

# COPYRIGHTING THE QUOTIDIAN: AN ANALYSIS OF COPYRIGHT LAW FOR POSTMODERN CHOREOGRAPHERS

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*“The mundane and spectacular all in one go.”*<sup>1</sup>

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<sup>1</sup> Yvonne Rainer, *Trisha Brown*, BOMB MAG., <http://bombmagazine.org/article/1720/trisha-brown> (last visited Oct. 10, 2017).

## INTRODUCTION

One sunny day at 80 Wooster Street in Greenwich Village, a man could be seen atop a seven-story building, grappling with a harness and standing precariously close to the edge.<sup>2</sup> Below, a handful of spectators peered up to watch.<sup>3</sup> The man, after a time, approached the edge of the building.<sup>4</sup> He then tipped rather unceremoniously over the edge, harness pulled taut, and began a walk down the side of the building.<sup>5</sup> This was the second of a series of minimalist postmodern dance works created by the famous choreographer Trisha Brown, a work that defied traditional definitions of dance with its simplistic movement and score.<sup>6</sup> The piece would later become known as *Man Walking Down the Side of a Building*.<sup>7</sup> This period in Brown's choreography—and this work in particular—poses an interesting challenge to the bounds and doctrines of copyright law.

Brown's identity as a postmodern choreographer stems from her interrogations of the bounds of her medium.<sup>8</sup> Her early pieces focused on deconstructing the formal aspects of the medium and challenging the audience to consider creativity and expression in seemingly mundane

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<sup>2</sup> *Man Walking Down the Side of a Building*, TRISHA BROWN DANCE CO., <http://www.trishabrowncompany.org/?page=view&nr=1187> (last visited Feb. 13, 2017); see also Marcia B. Siegel, *Dancing on the Outside*, 60 HUDSON REV., INC. 111, 114 (2007) (discussing the location on Wooster Street and the “mountain climber’s rappelling gear” used to lower the man down the side of the building).

<sup>3</sup> See Siegel, *supra* note 2 (showing a “small cluster of spectators gazing up”).

<sup>4</sup> See Siegel, *supra* note 2.

<sup>5</sup> See Siegel, *supra* note 2; see also Acatia Finbow, *Performance at Tate: Into the Space of Art*, TATE RES. PUBLICATION (June 2016), <http://www.tate.org.uk/research/publications/performance-at-tate/case-studies/trisha-brown>.

<sup>6</sup> See Sally Sommer, *Equipment Dances: Trisha Brown*, 16 DRAMA REV. 135, 137 (1972); Ivo Bonacorsi, *Man Walking Down the Side of a Building*, DOMUS (Oct. 18, 2016), [https://www.domusweb.it/en/art/2016/10/18/trisha\\_brown\\_man\\_walking\\_down\\_the\\_side\\_of\\_a\\_building.html](https://www.domusweb.it/en/art/2016/10/18/trisha_brown_man_walking_down_the_side_of_a_building.html); Kimberly King, “*Man Walking Down Building*,” YOUTUBE (Apr. 5, 2013), <https://www.youtube.com/watch?v=23V05I2gO1w>; Sanjoy Roy, *Step-by-Step Guide to Dance: Trisha Brown*, GUARDIAN (Oct. 13, 2010), <https://www.theguardian.com/stage/2010/oct/13/step-by-step-trisha-brown> (“Brown’s work can be divided into different phases, and what to expect from a Brown piece depends on which cycle it is from. In the beginning, she stripped dance to its essentials, ditching the traditional supports of story, music, emotion, technique, even setting. Consequently, her first ‘equipment pieces’ looked very un-dancey. They simply played with gravity or space, for example by using harnesses to enable the dancers to walk sideways along walls.”).

<sup>7</sup> See sources cited *supra* note 6.

<sup>8</sup> Ramsay Burt, *Against Expectations: Trisha Brown and the Avant-Garde*, 37 DANCE RES. J. 11, 11 (2005) (“Throughout the successive phases or cycles of her choreographic career, Brown has continually pushed the boundaries of her work as if never satisfied but always restlessly needing to move on.”).

motions.<sup>9</sup> Her motive was to discover and develop artistry in quotidian movement.<sup>10</sup> Much of her work has been registered with the Copyright Office, but her most experimental pieces are not on that list.<sup>11</sup> It is unclear why she chose not to register these works for copyright.

The interaction between copyright law and Brown's choreography functions as a case study for the tension between postmodern choreographers and copyright at large.<sup>12</sup> Its validation comes when others begin to copy postmodern expression; as such, it exists in a negative space within the otherwise copyrightable realm of choreography.<sup>13</sup> As a style, the laws of copyright may deter rather than encourage innovation.<sup>14</sup> This is the theory that will be explored in the following pages. Despite existing within a copyrightable genre, this Note proposes that postmodern dance does not benefit from copyright protection.

Part I begins with a primer on the laws of copyright. It provides an overview of the statute's history, as well as some background on particular doctrines developed through case law. Part II introduces the history of postmodern dance and the choreographer Trisha Brown, whose work will function as a case study herein. Part III analyzes Brown's work as it relates to the statutory language of copyright law and the doctrines of originality, functionality, idea/expression dichotomy, and fixation. The analysis uses Brown's work *Man Walking Down the*

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<sup>9</sup> Alastair Macaulay, *Pure Dance, Pure Finale*, N.Y. TIMES (Jan. 25, 2013), <http://www.nytimes.com/2013/01/27/arts/dance/trisha-browns-long-career-and-last-dances.html>.

The choreographer Trisha Brown has made dances worth arguing about for more than 50 years, and for at least 30 years her dances have been loved across the world. Many of today's best-known choreographers—including David Gordon, Mark Morris and Stephen Petronio—have cited her influence . . . . A pioneer of the pure-dance experimentalists of the 1960s and '70s, she challenged and changed the way we define dance performance.

*Id.*

<sup>10</sup> Brown was fascinated by “[t]he walker’s behaving as if he were on the ground while he was actually perpendicular to the wall[.]” Siegel, *supra* note 2.

<sup>11</sup> *Infra* note 105.

<sup>12</sup> Postmodern choreographer Yvonne Rainer famously wrote her “No Manifesto” in 1965 to reject many of the labels dance had collected. Yvonne Rainer, *No Manifesto* (1965), SCRIBD, <https://www.scribd.com/doc/85792156/Yvonne-Rainer-No-Manifesto> (last visited Nov. 16, 2017). Rainer was part of Judson Dance Theater, often considered the foundation of postmodern dance in America, which “openly questioned the use of sets, costumes, musical accompaniment, highly technical movement, and the proscenium stage[.]” Sharon Kahn, *No to No: Trisha Brown, Lucinda Childs, and the “No” Manifesto* (2009) (unpublished senior dance theses, Barnard University), <https://dance.barnard.edu/sites/default/files/inline/sharonakahn.pdf>; see also Jack Anderson, *How the Judson Theater Changed American Dance*, N.Y. TIMES (Jan. 31, 1982), <http://www.nytimes.com/1982/01/31/arts/how-the-judson-theater-changed-american-dance.html?pagewanted=all> (“Yvonne Rainer has said, ‘There was new ground to be broken and we were standing on it.’”).

<sup>13</sup> See discussion of negative spaces, *infra* notes 227–54.

<sup>14</sup> See *id.*

*Side of a Building*<sup>15</sup> as a single example to provide a real sense of postmodern dance to the reader. Part IV proposes that this particular type of postmodern dance encourages greater innovation without the legal protections of copyright and argues it is best suited as a negative space in the law.

## I. A PRIMER ON COPYRIGHT

In 1710, the British parliament passed the Statute of Anne, a law that regulated the printing press by making printing an author's right rather than a publisher's right.<sup>16</sup> The law was seen as an encouragement of learning and innovation and transferred the value of authorship from publishers to the creators themselves.<sup>17</sup> This language was used in 1787 to frame the United States' constitutional language for copyright,<sup>18</sup> which was originally called the Progress Clause, but is now known as the Intellectual Property Clause.<sup>19</sup> This was the grounding document for copyright law, giving Congress the power to promote innovation and reward authorship.<sup>20</sup>

One year later, in 1790, Congress passed the Copyright Act.<sup>21</sup> In its first iteration it protected only three types of writings: maps, charts, and books.<sup>22</sup> It was amended multiple times during the nineteenth century to add engravings, etchings, prints, musical compositions, dramatic

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<sup>15</sup> For an example of the work, see Walker Art Center, *Trisha Brown's Man Walking Down the Side of a Building*, YOUTUBE (June 9, 2009), <https://www.youtube.com/watch?v=MpGsEOR9db0>. This work has been performed many times since its debut on April 18, 1969. See Sommer, *supra* note 6.

<sup>16</sup> "The Statute of Anne . . . promised authors of new books a copyright of fourteen years from publication, with a possible second term of the same duration. A milestone, the statute was the first dedicated exclusively to copyright and the first to mention authors as beneficiaries by name." H. Tomás Gómez-Arostegui, *The Untold Story of the First Copyright Suit Under the Statute of Anne in 1710*, 25 BERKELEY TECH. L.J. 1247, 1248 (2010).

<sup>17</sup> *Id.* at 1248–49 (The Statute of Anne was "the first to express . . . a utilitarian rationale for copyright—*viz.*, that a limited monopoly would be given to encourage authorship.").

<sup>18</sup> Professor Christopher Buccafusco, Lecture on the History of U.S. Copyright (Jan. 23, 2017).

<sup>19</sup> The Constitution states, "The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to Their respective Writings and Discoveries[.]" U.S. CONST. art. I, § 8, cl. 8; see also Buccafusco, *supra* note 18.

<sup>20</sup> "[C]opyright law's production function 'encourages creative expression on a wide array of political, social, and aesthetic issues. The activity of creating and communicating such expression and the expression itself constitute vital components of a democratic civil society.'" JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 17 (4th ed. 2015) (quoting Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 347 (1996)).

<sup>21</sup> Copyright Act of 1790, 1 Stat. 124 (1790) amended by 17 U.S.C. § 26 (1909).

<sup>22</sup> *Id.*; see also Edward C. Walterscheid, *Understanding the Copyright Act of 1790: The Issue of Common Law Copyright in America and the Modern Interpretation of the Copyright Power*, 53 J. COPYRIGHT SOC'Y U.S.A. 313, 333 (2006).

compositions, photos, negatives, paintings, drawings, chromolithographs, statuaries, and models, so that by the time the twentieth century came there were many protections in place for artists and their work.<sup>23</sup> In 1909, Congress reworked the language of the statute, removing many of the formalities that were required for registration and extending the term of the protection.<sup>24</sup> It also redrafted the subject areas covered, creating broader subject areas to avoid the extensive list that had evolved over the last century as Congress tacked on new areas of artistic expression.<sup>25</sup> The new act covered “all the writings of an author.”<sup>26</sup>

The year 1976 saw another major shift in the scope of the Copyright Act.<sup>27</sup> Congress significantly extended the term of protection and redefined the subject areas once again.<sup>28</sup> Section 102(a) granted copyright to “original works of authorship.”<sup>29</sup> Congress did not provide a definition for this language, but it did suggest seven categories of copyrightable work: literary; musical; dramatic; pantomime and choreographic; pictorial, graphic, and sculptural; motion picture and audiovisual; and sound recordings.<sup>30</sup> Architectural works were also added to the list in 1990.<sup>31</sup>

At the heart of all these evolutions is the theory of incentives.<sup>32</sup> This theory is based on the idea that innovation is incentivized when the creator knows there will be a return in value.<sup>33</sup> When an author writes a book, she spends time writing it, invests money in paper, and loses out on opportunities to make money elsewhere. Time has opportunity costs. Because of this, she wants to be able to sell her book and recoup what it cost her to write it. Without any protections, someone could buy her book for a certain price, make many copies of it, and resell it at a lower cost. The next buyer could do the same thing, over and over, until the

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<sup>23</sup> Copyright Act, 1 Stat. 124 (1790); *see also* *A Brief Introduction and History*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/circs/circ1a.html> (last visited Oct. 31, 2017); COHEN ET AL., *supra* note 20, at 28.

<sup>24</sup> Copyright Act of 1909, 17 U.S.C. §§ 26(e)(9)–(10), (e)(23) (1909) (amended 1947); COHEN ET AL., *supra* note 20, at 651–62.

<sup>25</sup> 17 U.S.C. § 26(e)(5); *see also* COHEN ET AL., *supra* note 20, at 28.

<sup>26</sup> 7 U.S.C. § 26(e)(4); *see also* COHEN ET AL., *supra* note 20, at 28.

<sup>27</sup> Pub. L. No. 94-553, § 101, 90 Stat. 2541 (1976) (codified at 17 U.S.C. § 102 (2012)).

<sup>28</sup> *Copyright Law of the United States*, U.S. COPYRIGHT OFF. 133–35 (2016), <https://www.copyright.gov/title17/title17.pdf>.

<sup>29</sup> 17 U.S.C. § 102(a).

<sup>30</sup> *Id.*

<sup>31</sup> Copyright Amendments Act of 1990, H.R. REP. NO. 101-735 (1990).

<sup>32</sup> Shyamkrishna Balganes, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1577 (2009) (“Copyright, it is argued, exists to provide creators with an incentive to create and disseminate their works publicly.”).

<sup>33</sup> *Id.* (“By providing a creator with limited exclusionary control over creative expression at time  $T_2$ , the system is thought to encourage the production of such expression at time  $T_1$ . Since copyright deals with subject matter that is by nature a nonexcludable public good, the need for such exclusionary control is thought to be particularly pronounced.”).

cost of production would be the same as cost of sale—a massive depreciation of the author’s book. If that is the expected future for any and all books written by the author, why would she bother writing at all? There would be no incentive for her to innovate, and creativity would stagnate.

Enter copyright law. When an author has copyright on her work, she has relative control of the distribution of it.<sup>34</sup> She can sell it at how much people value her book, which incentivizes her to write for as long as people value it. This is not a pure monopoly; if she writes a bad book, then people will not value it and she will not recoup her time. For so long as she is writing good books, however, her copyright grants her exclusive rights over her one work in the market.

A variety of doctrines have developed since the Copyright Act was first established. Four doctrines are of importance for purposes of this Note: originality; fixation; idea/expression; and functionality. They will be explained here first and applied later to works of postmodern choreography.

Originality is rooted in the constitutional text providing copyright to an “original work[] of authorship.”<sup>35</sup> Subsequent case law has explored the boundaries of originality, and provided better guidance for the application of the doctrine. *Burrow-Giles Lithographic Co. v. Sarony* helped define a writing, which is a prerequisite for originality.<sup>36</sup> The Court found that a writing must be a visible expression of an author’s idea, and in order for the expression to be copyrightable that idea had to be original.<sup>37</sup> The great Justice Holmes contemplated originality to mean anything that is the “personal reaction of an individual upon nature,” a very low threshold but one contemplated to be so to prevent judges from being the final arbiters of the worth of innovation.<sup>38</sup> However, subsequent case law has ruled that, to overcome the originality threshold, a work must have a minimal degree of creativity.<sup>39</sup> This minimal degree can be found in a variety of ways, such as rendition of the work or the selection coordination, or arrangement of elements to

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<sup>34</sup> *Id.*

<sup>35</sup> 17 U.S.C. § 102(a) (2012) (providing that “[c]opyright protection subsists, in accordance with this title, in original works of authorship”).

<sup>36</sup> 111 U.S. 53 (1884).

<sup>37</sup> *Id.* at 58.

<sup>38</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249–50 (1903) (“Others are free to copy the original. They are not free to copy the copy. The copy is the personal reaction of an individual upon nature. Personality always contains something unique.” (citations omitted)).

<sup>39</sup> See *Feist Publ’ns, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340 (1991) (to be original, it needs to be independently created by the author and it needs to be minimally creative); *Burrow-Giles*, 111 U.S. 53 (establishing that a photograph of Oscar Wilde was original); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951) (establishing that “more than a ‘merely trivial’ variation” is necessary to obtain a copyright).

create the work.<sup>40</sup> To copyright a work, it must be original to the author.<sup>41</sup> At the very least, this means that the work was not copied from anyone else, but was rather the author's expression of his or her own idea.<sup>42</sup> The Court in *Feist Publications Inc.* broke originality down into two separate elements: one, that the work was not copied, and two, that the work must be minimally creative.<sup>43</sup> Originality is a very low bar, and as a threshold doctrine it is not difficult to achieve,<sup>44</sup> but those two elements must be identified to cross the threshold.<sup>45</sup>

The idea expression dichotomy further clarifies that even with an original work the copyright extends only to the parts of the work that are original expression of the idea.<sup>46</sup> It does not provide protection for the idea itself.<sup>47</sup> Allowing people to copyright ideas would quickly lead to monopolies that prevented the expansion of art, but granting copyright protection to only the literal expression of the artist's idea would make it far too easy to get around the legal protection.<sup>48</sup> Somewhere in that gray middle area, a line can be drawn between an artist's idea and her original expression of that idea. Admittedly, though, it is a very vague standard, and Judge Hand himself was disappointed

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<sup>40</sup> See *Feist*, 499 U.S. at 358 (providing that "the facts must be selected, coordinated, or arranged in such a way as to render the work as a whole original" (internal quotations omitted)).

<sup>41</sup> "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a) (2012); see also *Feist*, 499 U.S. at 345 ("To qualify for copyright protection, a work must be original to the author.").

<sup>42</sup> "In order to be copyrightable, a work must be original . . . Original, in this sense, means that the work was not copied from another source." Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229, 1231–32 (2016).

<sup>43</sup> See *Feist*, 499 U.S. at 345; see also Buccafusco, *supra* note 42, at 1275 ("[T]he Supreme Court in *Feist* clarified that in order to be copyrightable, a work has to be original. It further broke down originality into two separate concepts. The work could not be copied from another source, and it had to be at least minimally creative.").

<sup>44</sup> See *Feist*, 499 U.S. at 345; *Bleistein v. Dolnaldson Lithographing Co.*, 188 U.S. 239, 250 (1903); *Alfred Bell*, 191 F.2d at 102–03; see also COHEN ET AL., *supra* note 20, at 71 ("Because copyright law requires simply that a work not have been copied, a copyright owner cannot obtain relief against another author who independently generates expression that replicates the copyrighted work.").

<sup>45</sup> See *Feist*, 499 U.S. at 345.

<sup>46</sup> See *Baker v. Selden*, 101 U.S. 99 (1879); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

<sup>47</sup> *Baker*, 101 U.S. at 103.

<sup>48</sup> Buccafusco, *supra* note 42, at 1247.

[An author] cannot copyright what the novel is "about," but rather how he expresses what it is about . . . One possibility is that the author's copyrightable expression is limited to the specific, literal way in which he expressed some idea. But . . . "the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations . . ."

*Id.* (quoting *Nichols*, 45 F.2d at 121).

with the lack of clarity.<sup>49</sup>

The fixation doctrine is a slightly simpler doctrine.<sup>50</sup> The Copyright Act requires that, in order to copyright choreography, it must somehow be fixed in a tangible form.<sup>51</sup> Practically, fixation solves the evidentiary problems that would otherwise arise in contested copyright settings—an author would never be able to prove the work was hers if she did not fix it. Fixation also benefits society, because it provides access to the innovation. With the many opportunities of advanced technology available, fixation rarely becomes a problem.<sup>52</sup> Nearly everyone carries a camera with them in the form of their cell phone, and it is both cheap and simple to record a movie.<sup>53</sup> Questions only arise when art becomes

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<sup>49</sup> Of this nebulous dichotomy, Hand stated, “[n]obody has ever been able to fix that boundary, and nobody ever can.” *Nichols*, 45 F.2d at 121. He did attempt to explain the reasoning behind the dichotomy, stating:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his “ideas,” to which, apart from their expression, his property is never extended.

*Id.* Judges are often hesitant to make judgments about artistic merits; Justice Holmes stated, “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.” *Bleistein*, 188 U.S. at 251; see also Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 177 (1990). However, “assessments of artistic value influence copyright infringement determinations, specifically through the application of the idea-expression dichotomy.” *Id.* at 178.

<sup>50</sup> “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a) (2012).

<sup>51</sup> Copyright is granted to “original works of authorship *fixed* in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a) (emphasis added).

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

17 U.S.C. § 101.

<sup>52</sup> “This requirement is easily met when a work is embodied in a historical medium of mass expression like a printed book, photograph, or audio recording.” Evan Brown, *Fixed Perspectives: The Evolving Contours of the Fixation Requirement in Copyright Law*, 10 WASH. J.L. TECH. & ARTS 17, 17 (2014).

<sup>53</sup> “83% of all phones in use are cameraphones, so 4.4 Billion cameras are used in the world that are also connected to the network and are always carried, rather than the more premium stand-alone cameras that often sit in their cases back home.” Tomi T. Ahonen & Alan Moore,

intangible, or temporary. A painting is fixed, but is a garden?<sup>54</sup> A tattoo?<sup>55</sup> A well-plated beef bourguignon?<sup>56</sup> These are the gray areas of the fixation doctrine.

Finally, the functionality doctrine is rooted in Section 102(b) of the Copyright Act.<sup>57</sup> This doctrine is based on the Constitution's distinction between the useful arts covered by patent and the sciences covered by copyright.<sup>58</sup> Unlike copyright, patents are in place to protect processes, systems, methods of operations, or other useful arts. Copyright law does not want to protect functional innovations better served by patent law, and thus functional elements are excluded from copyright protection. The case of *Baker v. Selden* was the first to fully elucidate this distinction, separating the copyright of a book from the patent that would apply to the useful art described within the book.<sup>59</sup> To conflate them would be to frustrate the intention of the two doctrines and would defeat the goal of the Intellectual Property Clause of separating out original expressions from useful arts.

Each of these doctrines will be fleshed out later in this Note, particularly as they relate to the realm of postmodern choreography. First, however, is an overview of the evolution of dance from ballet to postmodern and an introduction to postmodern choreographer Trisha Brown. This background will serve as a knowledge base for Section III, when copyright doctrines will be applied to Brown's dance piece, *Man Walking Down the Side of a Building*.

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*The Annual Mobile Industry Numbers and Stats Blog - Yep, This Year We Will Hit the Mobile Moment*, COMMUNITIES DOMINATE BRANDS (Mar. 6, 2013), <http://communities-dominate.blogs.com/brands/2013/03/the-annual-mobile-industry-numbers-and-stats-blog-yep-this-year-we-will-hit-the-mobile-moment.html>.

<sup>54</sup> See, e.g., *Kelley v. Chi. Park Dist.*, 635 F.3d 290 (7th Cir. 2011); Michelle Chatelain, Note, *Copyright Protection of a Garden: Kelley v. Chicago Park District Holds That Gardens Are Not Artwork Subject to Intellectual Property Protection*, 14 TUL. J. TECH. & INTELL. PROP. 385 (2011); Lydia Pallas Loren, *Fixation as Notice in Copyright Law*, 96 B.U. L. REV. 939 (2016).

<sup>55</sup> See generally David M. Cummings, Note, *Creative Expression and the Human Canvas: An Examination of Tattoos as a Copyrightable Art Form*, 2013 U. ILL. L. REV. 279 (2013); Yolanda M. King, *The Challenges "Facing" Copyright Protection for Tattoos*, 92 OR. L. REV. 129 (2013).

<sup>56</sup> See, e.g., J. Austin Broussard, Note, *An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation*, 10 VAND. J. ENT. & TECH. L. 691 (2008); Michael Goldman, Comment, *Cooking and Copyright: When Chefs and Restaurateurs Should Receive Copyright Protection for Recipes and Aspects of Their Professional Repertoires*, 23 SETON HALL J. SPORTS & ENT. L. 153 (2013).

<sup>57</sup> "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (2012).

<sup>58</sup> Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]" U.S. CONST. art. I, § 8, cl. 8.

<sup>59</sup> *Baker v. Selden*, 101 U.S. 99, 102 (1879) ("[N]o one would contend that the copyright of the treatise would give the exclusive right to the art or manufacture described therein.").

## II. THE EVOLUTION OF DANCE FROM BALLET TO POSTMODERNISM

A. *A Brief History*

Ballet began in 1459 in Italy, where it was performed by servers at royal weddings.<sup>60</sup> It grew to prominence in the courts of late seventeenth and early eighteenth-century Paris under the reign of King Louis the XIV, who was well known for his performances in court.<sup>61</sup> Louis also founded the Académie Royale de Musique, which moved ballet from court to the stage.<sup>62</sup> Originally, ballet was staged alongside opera, but in the mid-eighteenth century French ballet master Jean Georges Noverre created the *ballet d'action*, a style of ballet that stood on its own as a dramatic narrative. He is now considered the precursor to narrative ballets.<sup>63</sup>

The turn of the nineteenth century heralded the French Revolution, when aristocrats were seriously discredited and ballet saw a steep decline in attendance.<sup>64</sup> Once a male-dominated art form, the Revolution opened the door for more women to become great ballerinas.<sup>65</sup> This period also saw the beginning of dancing *en pointe*, when ballerinas danced on the tips of their toes.<sup>66</sup> By the second half of the nineteenth century, ballet had become wildly popular in Russia, and Russian choreographers created such classics as *The Nutcracker*, *Sleeping Beauty*, and *Swan Lake*.<sup>67</sup> These pieces are considered the pinnacle of classical ballet, highlighting complicated footwork and sequences.<sup>68</sup>

The beginning of the twentieth century saw the arrival of ballet to the United States. George Balanchine, a ballet dancer from Ballet Russes, came to America to start his own ballet company, the New York City Ballet.<sup>69</sup> He introduced the United States to such beloved ballets as *The*

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<sup>60</sup> *History of Ballet*, SAS SCHOOL OF DANCE, <http://www.sasschoolofdance.com/history-ballet> (last visited Oct. 31, 2017) [hereinafter SAS SCHOOL OF DANCE]; see also *The Tutu's Tale: A Cultural History of Ballet's 'Angels'*, NPR (Dec. 13, 2010, 10:47 AM), <http://www.npr.org/2010/12/13/132023182/the-tutu-s-tale-a-cultural-history-of-ballet-s-angels>. See generally JENNIFER HOMANS, *APOLLO'S ANGELS: A HISTORY OF BALLET* (2010).

<sup>61</sup> SAS SCHOOL OF DANCE, *supra* note 60.

<sup>62</sup> See SAS SCHOOL OF DANCE, *supra* note 60.

<sup>63</sup> SAS SCHOOL OF DANCE, *supra* note 60.

<sup>64</sup> HOMANS, *supra* note 60 at 50.

<sup>65</sup> HOMANS, *supra* note 60 at 98–134.

<sup>66</sup> *Pointes, sur les*, AM. BALLET THEATRE, <http://www.abt.org/education/dictionary> (last visited Oct. 31, 2017) (“On the points. The raising of the body on the tips of the toes.”).

<sup>67</sup> SAS SCHOOL OF DANCE, *supra* note 60.

<sup>68</sup> *Classical ballet*, AM. BALLET THEATRE, <http://www.abt.org/education/dictionary> (last visited Oct. 31, 2017).

<sup>69</sup> *Our History*, N.Y.C. BALLET, <https://www.nycballet.com/Discover/Our-History.aspx> (last visited Oct. 31, 2017).

*Nutcracker* and began an incredible spread of ballet throughout the country.<sup>70</sup> This transition also sparked greater interest in contemplating new and different dance techniques.<sup>71</sup> So began America's exploration of modern dance.

Modern dance in the United States originated in such concepts of idealism and purity of movement,<sup>72</sup> with its roots tracing back to the early twentieth century and the dance explorations of Isadora Duncan. Duncan's work was informed by finding movement that felt natural to the mover.<sup>73</sup> Other dance artists include Ruth St. Denis and Ted Shawn, who strengthened the modern dance network in the United States and explored new and natural techniques in opposition to ballet (which was, at the time, a mostly European style).<sup>74</sup>

Iconic figures like Martha Graham, Doris Humphrey, and Charles Weidman broke new ground for dance.<sup>75</sup> These students rejected prior philosophies of their teachers in the hope that they could create a more personal interpretation of American life with their movement.<sup>76</sup> The political tension of World War I brought up questions about the meaning and purpose behind dance,<sup>77</sup> and the work that emerged embraced democracy, community, and the politics of movement.<sup>78</sup> It moved away from classic narratives of ballet to more abstract depictions<sup>79</sup> where minimalism was the aesthetic. Where once there were ballets like *The Nutcracker*<sup>80</sup> and *Romeo & Juliet*,<sup>81</sup> now there were

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<sup>70</sup> George Balanchine, N.Y.C. BALLET, <https://www.nycballet.com/Explore/Our-History/George-Balanchine.aspx> (last visited Oct. 31, 2017).

<sup>71</sup> MARGARET FUHRER, AMERICAN DANCE: THE COMPLETE ILLUSTRATED HISTORY 79 (2014) (describing two generations of modern dancers: the first contemplating the "outer self express[ing] the inner self;" and the second questioning how dance could "portray the American experience[.]").

<sup>72</sup> Modern dance "originated in idealism and rebellion guided by utopian notions of the freedom of the body and spirit, the quest for self-expression, and the vast potential of America." Charmaine Patricia Warren et al., *A Brief History of American Modern Dance*, DANCEMOTION USA 3 (2013), [http://www.dancemotionusa.org/media/30147/dmusa\\_americanmoderndance\\_english.pdf](http://www.dancemotionusa.org/media/30147/dmusa_americanmoderndance_english.pdf).

<sup>73</sup> Modern dance as "a natural form of movement[.]" *Id.*

<sup>74</sup> *The History of Modern Dance*, BALLET AUSTIN (comp. and ed. Pei-San Brown) [hereinafter BALLET AUSTIN], [https://www.academia.edu/14120304/THE\\_HISTORY\\_OF\\_MODERN\\_DANCE](https://www.academia.edu/14120304/THE_HISTORY_OF_MODERN_DANCE).

<sup>75</sup> Warren et al., *supra* note 72, at 3.

<sup>76</sup> This next wave of modern dancers "rejected the style and philosophy of their mentors, opting to create dance that was both a personal statement and an expression of American life, two recurring themes in modern dance." BALLET AUSTIN, *supra* note 74, at 3.

<sup>77</sup> JULIA L. FOULKES, MODERN BODIES: DANCE AND AMERICAN MODERNISM FROM MARTHA GRAHAM TO ALVIN AILEY 2 (2002).

<sup>78</sup> The new work "embodied the conflict and potential of creating a democratic whole out of distinct individuals." *Id.* at 3.

<sup>79</sup> FUHRER, *supra* note 71, at 79.

<sup>80</sup> *George Balanchine's The Nutcracker*, N.Y.C. BALLET, <https://www.nycballet.com/Ballets/N/George-Balanchines-The-Nutcracker.aspx> (premiered Feb. 2, 1954).

<sup>81</sup> *Romeo & Juliet* is choreographed by many different people but is almost always set to the music by Sergei Prokofiev. See generally *Romeo and Juliet – American Ballet Theatre*,

pieces called *Sixteen Dances for Soloist and Company of Three*,<sup>82</sup> or, even more simply, *Story*.<sup>83</sup> These works use simple movements in abstract settings to speak for the thoughts and emotions going on in each dancer's life.<sup>84</sup>

Modern dance gained momentum through the 1920s and 1930s, and by the time World War II came around it was a well-established form of dance.<sup>85</sup> The next generation of modern dancers did not need to focus on bringing legitimacy to their practice and could explore more fully the boundaries of dance without fear of being ignored or rejected.<sup>86</sup> This opened the doors for postmodernism, beginning the exploration of boundaries between the quotidian and the artistic and inspiring the famous Judson Dance Theater (JDT) of the 1960s.<sup>87</sup>

JDT was the movement that pushed modern dance into the postmodern realm.<sup>88</sup> It was "an artistic and social milieu" where dancers explored new boundaries and rejected typical conventions.<sup>89</sup> JDT began as a space for modern choreography students to perform their work.<sup>90</sup> It was meant as a one-time performance, but it quickly morphed into a focused exploration of dance that lasted over two years.<sup>91</sup> The group

METROPOLITAN OPERA, <http://www.metopera.org/season/2015-abt/romeo-and-juliet-american-ballet-theatre/> (last visited Oct. 31, 2017); *Romeo & Juliet*, N.Y.C. BALLET (last visited Oct. 31, 2017), <https://www.nycballet.com/Ballets/R/Romeo-Juliet.aspx>; *Romeo & Juliet*, BOLSHOI, <http://www.bolshoi.ru/en/performances/344> (last visited Oct. 31, 2017).

<sup>82</sup> *Sixteen Dances for Soloist & Company of Three*, MERCE CUNNINGHAM TRUST, [https://mercecunningham.org/index.cfm/choreography/dancedetail/params/work\\_ID/46](https://mercecunningham.org/index.cfm/choreography/dancedetail/params/work_ID/46) (premiered Jan. 17, 1951) ("This dance was the first in which Cunningham made use of chance operations. The choreography was concerned with the nine permanent emotions of Indian aesthetics."); see also Ensemble Musikfabrik, *John Cage - Sixteen Dances - Trailer*, YOUTUBE (last visited Oct. 31, 2017), <https://www.youtube.com/watch?v=34cZOF6qswU>.

<sup>83</sup> *Story*, MERCE CUNNINGHAM TRUST, [https://www.mercecunningham.org/index.cfm/choreography/dancedetail/params/work\\_ID/80](https://www.mercecunningham.org/index.cfm/choreography/dancedetail/params/work_ID/80) (premiered July 24, 1963).

<sup>84</sup> FOULKES, *supra* note 77, at 17.

<sup>85</sup> "The great battle for the position and respectability of modern dance had already been fought and won." BALLET AUSTIN, *supra* note 74, at 7.

<sup>86</sup> See, e.g., George Jackson, *Judson Church: Dance*, DANCE HERITAGE COALITION 1 (2012), [http://www.danceheritage.org/treasures/judsonchurch\\_essay\\_jackson.pdf](http://www.danceheritage.org/treasures/judsonchurch_essay_jackson.pdf).

<sup>87</sup> *Id.*

<sup>88</sup> See generally SALLY BANES, *DEMOCRACY'S BODY: JUDSON DANCE THEATER, 1962-1964* (3d ed. 1993).

<sup>89</sup> *Id.* at xiv, xvi.

<sup>90</sup> Robert Ellis Dunn is regarded as the creator of the famous Judson Dance Theater and "whose classes in improvisation and choreography were the laboratory in which postmodernist dance was born in the early 1960's." See Jennifer Dunning, *Robert Ellis Dunn, 67, a Pioneer in Postmodern Dance Movement*, N.Y. TIMES (July 15, 1996), <http://www.nytimes.com/1996/07/15/arts/robert-ellis-dunn-67-a-pioneer-in-postmodern-dance-movement.html>; see also Danielle Marilyn Bélec, *Robert Ellis Dunn: Personal Stories in Motion*, 30 DANCE RES. J. 18 (1998).

<sup>91</sup> See Jackson, *supra* note 86, at 1; see also Sally Banes, *The Birth of the Judson Dance Theatre: "A Concert of Dance" at Judson Church, July 6, 1962*, 5 DANCE CHRON. 167, 167 (1982) ("The Judson Dance Theatre became the focus of a new stage in American modern dance, the seedbed out of which post-modern dance developed over the next two decades.").

created a new forum of thought, increasing the pace of exploration and idea sharing in the blossoming world of postmodern dance.<sup>92</sup> Initially the question at the forefront was whether or not this was dance at all, and the dancers struggled to establish validity.<sup>93</sup> By the end of the Judson period, however, it was clear the movement was established as the postmodern period of dance.<sup>94</sup>

In basic terms, postmodern dance is a style of choreography that rejects storyline or arc and values movement for itself without ascribing any greater meaning.<sup>95</sup> It refutes the typical aesthetics associated with choreographic form and structure, and it seeks to find beauty in unrefined movement.<sup>96</sup> Choreographers play with quotidian styles of movement, pushing the boundary of what constitutes dance in a rebellion against the old ideas of form and style.<sup>97</sup> It is a genre of dance based in a curiosity about movement and a desire to play with boundaries.<sup>98</sup>

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<sup>92</sup> Sally Banes, a renowned dance scholar, has written extensively on the Judson Church phenomenon. In her book, *Democracy's Body: Judson Dance Theater, 1962-1964*, she closes the chapter on Robert Dunn's workshop at Judson with an apt description of Judson Church as "the burgeoning of a new, pluralistic generation of choreographers—one which [was] . . . actively installing in dance new values of democracy, humanism, decentralization, and freedom." BANES, *supra* note 88, at 33. Such values contributed to the fast pace of exploration and opened the doors to many more artists; at Judson, "[t]hese choreographers were not all dancers by training; their numbers included visual artists and musicians." *Id.* at xi. The synopsis of Banes's book captures the importance of the Judson Church movement: it was "the seedbed for postmodern dance and the *Id.* at back cover.

<sup>93</sup> Regarding her work, Trisha Brown explained, "[n]o one could buy my work in the art world, and the dance world said it wasn't dance—which it probably wasn't. I was caught in a crack doing serious work in a field that wasn't ready for it." SUSAN ROSENBERG, TRISHA BROWN: CHOREOGRAPHY AS VISUAL ART 67 (2017).

<sup>94</sup> Marcia B. Siegel et al., *What Has Become of Postmodern Dance? Answers and Other Questions*, 36 DRAMA REV. 48 (ed., Ann Daly 1992).

<sup>95</sup> "Postmodern dance often values movement for movement's sake rather than movement as a vehicle for storytelling." Nora Younkin, *What the Heck Is Postmodern Dance?*, HUFFINGTON POST (Oct. 7, 2015, 10:56 AM), [http://www.huffingtonpost.com/nora-younkin/what-the-heck-is-postmode\\_b\\_8253322.html](http://www.huffingtonpost.com/nora-younkin/what-the-heck-is-postmode_b_8253322.html); see also Lisa Torre, *Analytic Post-Modern Dance and Steve Paxton*, PASSPORT TO THE ARTS (Sept. 23, 2012), <http://macaulay.cuny.edu/eportfolios/uchizono12/2012/09/23/analytic-post-modern-dance-and-steve-paxton-2>.

<sup>96</sup> Postmodern dance was "letting movement stand for itself" without any pre-established structures. Susan Foster, *The Signifying Body: Reaction and Resistance in Postmodern Dance*, 37 THEATRE J. 44, 46 (1985).

<sup>97</sup> "Postmodern choreography [is] an experimental reflection upon the nature and limits of dance[.]" Sally Banes & Noël Carroll, *Cunningham, Balanchine, and Postmodern Dance*, 29 DANCE CHRON. 49, 50 (2006).

<sup>98</sup> Judson Dance Theater is a good example of the new ideas about dance that emerged in the 1960s:

Those involved were discriminating omnivores who tried and discarded diverse means in the endeavor to define themselves as dancers. They disliked the disguises of conventional dance. Their work surprised returning audiences because Judson dancers in the early days didn't have signature styles and seldom repeated themselves: it was a brave new world each time. Stripped of much theatrical artifice, even declining to don the role of performer, the Judson dancers tried to stand and

B. *Trisha Brown*

Postmodern choreographers have branched out in as many directions as there are ideas to be had, each with a different style and motivation. It would be impossible to try and categorize it all under one umbrella heading and make broad claims about copyright; instead, this Note will focus on the experimental works of Trisha Brown as a case study of the broader genre.<sup>99</sup> Her experimental works focused on minimalism of movement with a slant towards the quotidian; this focus can be found across postmodern genres and poses interesting challenges with copyright law. It is a rejection of the typical ideals of choreography, and as such forces the viewer to contemplate her own imperfect definition of dance.

Adhering to the notions of exploration and the dislike of boundaries in postmodern dance, there is no clean name or definition for Brown's work. Watching performances of her work<sup>100</sup> does not bring to mind the aesthetic of ballet, with identifiable moves and memorable works like *The Nutcracker*.<sup>101</sup> And yet, Trisha Brown is one of the foremost choreographers of the last half century, considered by many to be a pioneer of postmodern dance.<sup>102</sup> Her experimental equipment pieces (such as *Man Walking Down the Side of the Building*) are from her earlier years of exploration, when Brown was deeply committed to freeing her work from the bounds of form and style.<sup>103</sup> The fact that they are so very different from the traditional ideas of dance is exactly what Brown was hoping for; it highlights her motivation to expand notions of movement and art, and asks the viewer to find beauty in what might otherwise be considered the mundane.<sup>104</sup> This interrogation creates a fascinating dialogue with the more traditional concepts of copyrightable

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move naked of prescriptions —except that of being truthful to themselves.

Jackson, *supra* note 86, at 1.

<sup>99</sup> Trisha Brown was born in Washington and graduated from Mills College in 1958. *Trisha Brown/Dance*, TRISHA BROWN DANCE CO., <http://www.trishabrowncompany.org/index.php?section=36> (last visited Oct. 31, 2017). In 1961 she moved to New York City and joined the Judson Group Theater. *Id.* “[H]er movement investigations found the extraordinary in the everyday and challenged existing perceptions of performance.” *Id.*

<sup>100</sup> Barbican Center, *Trisha Brown's Walking on the Wall at the Barbican*, YOUTUBE (Mar. 16, 2011), <https://www.youtube.com/watch?v=TWkkAU1RSLU>; Hammer Museum, *Trisha Brown: Floor of the Forest*, YOUTUBE (Apr. 25, 2013), <https://www.youtube.com/watch?v=9dAvQstiVqA>; Walker Art Center, *supra* note 15.

<sup>101</sup> EuroArtsChannel, *Piotr Tchaikovsky: The Nutcracker - Ballet in Two Acts (HD 1080p)*, YOUTUBE (Nov. 29, 2014), <https://www.youtube.com/watch?v=xtLoaMfinbU>.

<sup>102</sup> Trisha Brown has been described as “[a] pioneer of the pure-dance experimentalists of the 1960s and '70s, [who] challenged and changed the way we define dance performance.” Alastair Macaulay, *Pure Dance, Pure Finale*, N.Y. TIMES (Jan. 25, 2013), <http://www.nytimes.com/2013/01/27/arts/dance/trisha-browns-long-career-and-last-dances.html>.

<sup>103</sup> See *Trisha Brown/Dance*, *supra* note 99.

<sup>104</sup> See Macaulay, *supra* note 102.

dance and is explored in the following Sections.

### III. BROWN MEETS COPYRIGHT

It is important to note at the outset of this Section that Trisha Brown has registered a copyright for several of her works.<sup>105</sup> However, *Man Walking Down the Side of a Building* was a part of her experimental phase and is not found within the list of works she has registered for copyright.<sup>106</sup> This may be because she chose not to register them, or it may be that they were rejected for registration—we cannot say for sure. Thus, the following exploration of her works and their interaction with rules of copyright is not based on any knowledge that Brown's experimental work was rejected by the Copyright Office of Registry; rather, it is an attempt to understand how this style of postmodern choreography interacts with the law. In doing so, this Note will establish the areas of copyright that may be at odds with the current postmodern dance climate.

#### A. *The History of Copyright and Dance*

The first legal protection afforded to choreographers was the dramatic works category of the 1856 Copyright Act.<sup>107</sup> Choreographers could obtain copyright, but only if the work was considered a dramatic composition.<sup>108</sup> The 1909 Act still proved inadequate; while it acknowledged dance, it specified that the dance had to tell a story or

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<sup>105</sup> A search of the Copyright Registry was conducted, and the following works came up: *Accumulation with Talking, Plus Watermotor* (1978); *Glacial Decoy* (1979); *Opal Loop* (1980); *Son of Gone Fishin'* (1981); *Set and Reset* (1983); *Lateral Pass* (1985); *Foray Foret* (1990); *For M.G. the Movie* (1991); *If you couldn't see me and M.O.* (1995); and *Trilogy* (2004). *Public Catalog*, COPYRIGHT.GOV, <https://www.copyright.gov/records> (type "Brown Trisha" in the search bar; search by name; then hit "begin search") (last visited Jan. 8, 2016). However, these are all works that Brown set on a stage, and all contain more traditional concepts of choreography. *Man Walking Down the Side of a Building*, as well as other of Brown's equipment pieces, are not registered for copyright with the Registry. *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See *Fuller v. Bemis*, 50 F. 926, 929 (S.D.N.Y. 1892); Anthea Kraut, "Stealing Steps" and *Signature Moves: Embodied Theories of Dance as Intellectual Property*, 62 *Theatre J.* 173, 175 (2010); Jennifer Dunning, *Hanya Holm is Dead at 99: Influential Choreographer*, N.Y. TIMES (Nov. 4, 1992), <http://www.nytimes.com/1992/11/04/theater/hanya-holm-is-dead-at-99-influential-choreographer.html?pagewanted=2&pagewanted=print#>.

<sup>108</sup> See, e.g., *Fuller*, 50 F. at 929 (The court held that Fuller's Serpentine Dance was not copyrightable because it was not a dramatic work, explaining, "[i]t is essential to such a composition that it should tell some story . . . It may be but the narrative or representation of a single transaction; but it must repeat or mimic some action, speech, emotion, passion, or character, real or imaginary.").

express a particular theme.<sup>109</sup> Any abstract works would fall outside the limits of copyright.<sup>110</sup> The Copyright Act did not expressly provide protection for choreographic works until 1976,<sup>111</sup> when Section 102 of the Copyright Act established the subject matter of copyright protection.<sup>112</sup> Section 102(a)(4)<sup>113</sup> allows for the copyright of choreographic works, but the provision is limited by Section 102(b)'s restrictions on basic ideas or creations that are patentable.<sup>114</sup> The statute does not provide any definition for choreographic work or dance; most of copyright law for choreography relies instead on doctrines established in case law. The legislative history made it clear that social dance and other such routines were excluded from copyright protection.<sup>115</sup>

### B. *Trisha Brown and Postmodern Challenges in Copyright*

Because the statutory language is slim, the following doctrines create the basis of copyright in choreography. Unfortunately, the doctrines are far from clear regarding Trisha Brown's work. Is Brown's work original?<sup>116</sup> Is it an expression, or just an idea?<sup>117</sup> Was fixation

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<sup>109</sup> Copyright Act of 1909, 17 U.S.C. §§ 26(e)(9)–(10), (e)(23) (1909) (amended 1947) (categorizing dance under the “dramatic or dramatico-musical compositions” heading); Nicholas Arcomano, *The Copyright Law and Dance*, N.Y. TIMES (Jan. 11, 1981), <http://www.nytimes.com/1981/01/11/arts/the-copyright-law-and-dance.html?pagewanted=all> (“According to the Copyright Office at that time, ballet had to ‘tell a story, develop a character or express a theme or emotion by means of specific dance movements and physical actions.’ How would this requirement relate to abstract ballets, such as Balanchine’s ‘Agon’ or to modern and experimental dances? It didn’t, in any satisfactory way.”).

<sup>110</sup> “Agnes de Mille put it succinctly in a comment submitted to the Copyright Office in 1959: ‘Choreography is neither drama nor storytelling. It is a separate art. It is an arrangement in time-space, using human bodies as a unit design. It may or may not be dramatic or tell a story.’” Arcomano, *supra* note 109.

<sup>111</sup> Pub. L. No. 94-553, 90 Stat. 2541.

<sup>112</sup> “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a) (2010).

<sup>113</sup> 17 U.S.C. § 102(a)(4) (2010).

<sup>114</sup> 17 U.S.C. § 102(b) (2010) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

<sup>115</sup> Legislative history explains, “[t]he three undefined categories—‘musical works,’ ‘dramatic works,’ and ‘pantomimes and choreographic works’—have fairly settled meanings. There is no need . . . to specify that ‘choreographic works’ do not include social dance steps and simple routines.” H.R. REP. NO. 94-1476, at 53–54 (1976).

<sup>116</sup> Originality is drawn from the Constitution, which states “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]” U.S. CONST. art. I, § 8, cl. 8. The Copyright Act provides protection only for “original works of authorship[.]” 17 U.S.C. § 102(a) (2010). *Feist Publications* clarifies the requirements for originality, stating, “[o]riginal, as the term is used in copyright, means only that the work was independently created by the author

sufficient?<sup>118</sup> None of these questions have clear answers, and the following Sections will address each question with the intent of better understanding postmodern choreography's interaction with copyright doctrines.<sup>119</sup>

### 1. Originality

The first step of analysis for Trisha Brown's choreography is to understand whether and to what extent her work may be considered original.<sup>120</sup> To do so, the work must be a minimally creative work of authorship. It is impossible to credit Brown with originality for walking; most people came up with and conquered that concept twelve to fifteen months into life.<sup>121</sup> Walking alone, in a quotidian manner, fulfills neither of the *Feist* elements, for the walking involved here is both functional<sup>122</sup> and copied from innumerable sources.<sup>123</sup> To establish originality, then, there must be other aspects of Brown's work that collectively create an original piece.<sup>124</sup> While walking down the wall of a building seems more original, the original aspect lies in the difficulty of the task, and effort alone is insufficient to make something original.<sup>125</sup>

Theories of authorship help determine the originality of Brown's work.<sup>126</sup> All works are created by an author, and all authors begin their

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(as opposed to copied from other works), and that it possesses at least some minimal degree of creativity." *Feist Publ'ns, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 345 (1991).

<sup>117</sup> "Fundamental to traditional copyright doctrine is the claim that copyright only protects an author's particular expression of an idea and never the idea itself." Richard H. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 PACE L. REV. 551, 551 (1990).

<sup>118</sup> In order for a work to be copyrighted, it must be "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a).

<sup>119</sup> *Infra* at Sections III.B.1–4.

<sup>120</sup> See *Feist*, 499 U.S. at 345.

<sup>121</sup> "Most babies take their first steps sometime between 9 and 12 months and are walking well by the time they're 14 or 15 months old." *Baby Milestone: Walking*, BABYCENTER, [http://www.babycenter.com/0\\_baby-milestone-walking\\_6507.bc](http://www.babycenter.com/0_baby-milestone-walking_6507.bc) (last visited Nov. 13, 2016).

<sup>122</sup> A lecture on the benefits of walking described the activity as "one of the most functional movements we do every day." EBFAFitness, *Walking Gait Assessment The Most Functional Movement Assessment? With Dr. Emily Splichal*, YOUTUBE (July 11, 2013), <https://www.youtube.com/watch?v=8kNo-cJcacU>.

<sup>123</sup> *Infra* note 138.

<sup>124</sup> For a work that consists of unoriginal parts, "the requisite originality and creativity must arise in the manner in which the author selects, coordinates, and arranges the relevant facts." Buccafusco, *supra* note 42, at 1245–46. Therefore, Brown must arrange or coordinate the walking in an original and creative way in order to meet the requirement for copyright.

<sup>125</sup> "Sweat of the brow" is not the touchstone of copyright." *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 451 (S.D.N.Y. 2005).

<sup>126</sup> "For purposes of copyright law, then, a person may be considered an author when she has the categorical intention that her creation is capable of producing mental effects in an audience." Buccafusco, *supra* note 42, at 1262.

creative process with uncopyrightable parts.<sup>127</sup> For Brown, the uncopyrightable element in her work is the walking and the building.<sup>128</sup> The authorial aspect is the compilation of uncopyrightable elements in a creative way (so long as that compilation is not copied from a different source).<sup>129</sup> Not every compilation will be deemed original; as seen in *Feist*, the particular arrangement of phone numbers in a book does not meet the standards for minimal creativity.<sup>130</sup> But for Brown's work, creativity is far more plausible to establish. There is nothing mundane about tilting the audience perspective and creating a spectacle where a person walks sideways down a building. The walking itself is a creative endeavor; it is not just that Brown wanted to lower a person from the top of the building, she wanted it to look as though they were walking effortlessly.<sup>131</sup> Brown was very purposeful in her creation of *Man Walking Down the Side of a Building*, with setting, pace, and motion all carefully chosen.<sup>132</sup> All of these factors indicate the manner in which she authored the work, directing her creative ideas into a particular artistic expression.<sup>133</sup> And while authorship may not always be the indicator of originality,<sup>134</sup> here they go hand in hand: Brown's creation of a work

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<sup>127</sup> "All works of authorship are created from uncopyrightable component parts or formal elements—colors, notes, words, shapes, chemicals, and other substances." Buccafusco, *supra* note 42, at 1274.

<sup>128</sup> Walking, as an action in isolation, is not creative enough to meet the standards established in *Feist*. See *Feist Publ'ns, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 345 (1991).

<sup>129</sup> "[A]s in *Feist*, the copyright attaches to the manner by which the creator selects, coordinates, and arranges to produce mental effects." Buccafusco, *supra* note 42, at 1274.

<sup>130</sup> In *Feist*, "the plaintiff's directory failed to meet [those] low standards. The Court described it as 'entirely typical,' 'garden variety,' and 'devoid of even the slightest trace of creativity.'" Buccafusco, *supra* note 42, at 1246.

<sup>131</sup> The first performance of *Man Walking Down the Side of a Building* was performed by Brown's husband. ROSENBERG, *supra* note 93, at 76. Rosenberg describes the performance as "a reasonably accurate reproduction of the act of walking. With back held straight, perpendicular to the building and parallel to the ground, he promenades, seemingly effortlessly, in an altered orientation to gravity's inexorable logic." ROSENBERG, *supra* note 93, at 76.

<sup>132</sup> Susan Rosenberg, author of the book *Trisha Brown: Choreography as Visual Art*, described Brown's equipment pieces as follows:

Everyday movement is revealed as a series of minute physical choices and cognitive-kinesthetic negotiations necessary to execute actions that are assumed to be "natural." Subjected to "equipment," movement's components become visible, much as Eadweard Muybridge's stop-action photography brought scrutiny to animal and human locomotion.

ROSENBERG, *supra* note 93, at 66.

<sup>133</sup> "[A]n author is a human being who intends to produce one or more mental effects in an audience by an external manifestation of behavior." Buccafusco, *supra* note 42, at 1260. For that manifestation to be creative, "it seem[s] to require some degree of cleverness or nonobviousness." Buccafusco, *supra* note 42, at 1275. Brown's intention to flip the perspective on walking to emphasize the choreographed nature of movement certainly indicates a level of cleverness inherent in her authorship, which in turn supports the originality of her work. See ROSENBERG, *supra* note 93, at 66 (Brown "brought visual scrutiny to the choreographed nature of quotidian movement forms.").

<sup>134</sup> "According to Section 102(a), 'copyright subsists in original works of authorship.' As

intended to create specific mental effects in her audience—it was a clear expression of her original idea.<sup>135</sup>

## 2. Idea/Expression Dichotomy

The idea/expression dichotomy has established that copyright will only protect expressions, not the ideas behind them.<sup>136</sup> The idea/expression dichotomy would never permit Brown to secure a copyright on walking.<sup>137</sup> It is one of the basic ideas of human function—not nearly close enough to be considered expression.<sup>138</sup> This is the extreme result of copyright being granted to an idea, rather than an expression.<sup>139</sup> But where along this abstraction between idea and expression would her work fall? Could she establish a copyright for a work that had a person walking down the side of any building, or would it have to be a particular person walking down a particular building at a particular place during a particular period of time? Or is walking, no matter how specifically, still too general to be considered an expression?

There are two concepts that attempt to navigate this ill-defined dichotomy.<sup>140</sup> One concept is merger: when an idea cannot be separated from its expression.<sup>141</sup> In such situations it is unacceptable to award copyright, because it would lead to an artist holding a monopoly over the idea.<sup>142</sup> However, if there are multiple ways to express the idea, merger doctrine will not apply and copyright may be granted.<sup>143</sup>

The second is the concept of *scènes à faire*, which occurs when an expression is so closely related to a certain motif that an author cannot

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Michael Madison has pointed out, this construction, with the modifier ‘original,’ implies that there could be nonoriginal works of authorship.” Buccafusco, *supra* note 42, at 1276.

<sup>135</sup> See ROSENBERG, *supra* note 93.

<sup>136</sup> “Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.” Tetris Holding, L.L.C. v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 400 (2012) (citing Mazer v. Stein, 347 U.S. 201, 217 (1954)).

<sup>137</sup> This would be a “most general statement” and would be copyrighting the idea rather than the expression. *Id.* at 400, 402.

<sup>138</sup> “The U.S. Census Bureau has estimated New York City’s population at 8,537,673, as of July 2016.” *Current and Projected Populations*, NYC PLANNING, <http://www1.nyc.gov/site/planning/data-maps/nyc-population/current-future-populations.page> (last visited Dec. 3, 2016). This means that each day, upwards of eight million people in New York City alone would be violating Brown’s copyright.

<sup>139</sup> Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (“The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended.”).

<sup>140</sup> See, e.g., Tetris Holding, 863 F. Supp. 2d at 403.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

help but use that expression.<sup>144</sup> These often occur in arenas such as historical fiction, where a certain list of characters and events cannot help but become a part of the expression.<sup>145</sup> Like merger, the *scènes à faire* doctrine does not allow for copyright, so as to prevent monopolies over ideas.<sup>146</sup> If William Shakespeare had been able to obtain copyright for the entire life history of *King Henry VIII*,<sup>147</sup> our historical fiction today would be seriously lacking in the sordid tale of his many wives and their grievous ends.<sup>148</sup>

Despite these clarifications, Brown's work seems unlikely to fall squarely in either of these doctrines, for one rather confounding reason—it is almost impossible to know the idea behind the expression.<sup>149</sup> With the written word, it is possible to get a sense of the idea; one can logically expand the plot of a fiction or the goal behind a biography when reading such a book to the idea where it began.<sup>150</sup> With movement though, the concept of an articulable idea is shrouded in mystery.<sup>151</sup> We know the general goal behind Brown's exploratory work,

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> WILLIAM SHAKESPEARE, *HENRY VIII* (Barbara A. Mowat & Paul Werstine eds., 2007).

<sup>148</sup> See, e.g., CAROLLY ERICKSON, *THE LAST WIFE OF HENRY VIII: A NOVEL* (2006); ANTONIA FRASER, *THE WIVES OF HENRY VIII* (1992); KAREN LINDSEY, *DIVORCED, BEHEADED, SURVIVED: A FEMINIST REINTERPRETATION OF THE WIVES OF HENRY VIII* (1995).

<sup>149</sup> See Aili Bresnahan, *The Philosophy of Dance*, STAN. ENCYCLOPEDIA PHIL. (2016) <https://plato.stanford.edu/archives/win2016/entries/dance> (emphasis added).

[M]any dance scholars eschew the idea that dance can be reduced to or compared to anything like a score or text. Mark Franko, for example, points out that 'contemporary thought on dance is frequently split between a concept of dance-as-writing and a concept of dance as *beyond the grasp of all language*, especially written language' . . . . Even when there is a score, this score is not always used as an essential recipe for the performances but can instead just serve as the inspiration for a performance that is completely different[.]

*Id.*

<sup>150</sup> In the case of *Harold Lloyd Corp. v. Witwer*, an author of a fictional story sued the author of a play for copying his idea. In the decision, the court pares both story and play down to a couple of paragraphs so as to demonstrate the similar ideas behind each. *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 2–4 (9th Cir. 1933). *Nichols* acknowledges the reverse of this problem, stating, "It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations." *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

<sup>151</sup>

"[S]ometimes the dance performer 'creates,' and not just performs and interprets, the dance. The dancer, for example, often supplies structural and stylistic elements of a dance during the course of rehearsing and performing the piece that were not specified or provided by the choreographer. If these contributions are significant then what the dancer provides might be better understood as 'creation' rather than 'interpretation.'"

Bresnahan, *supra* note 149.

and the postmodern concept of movement for movement's sake, but those are not necessarily the ideas that directly inspired each of these pieces.<sup>152</sup> Trisha Brown may not even know how to articulate the idea behind the expression; the expression is itself how she articulated the idea.<sup>153</sup> It is almost that Brown's work—and perhaps the work of other choreographers—transcends the dichotomy of idea and expression.<sup>154</sup>

Watching the varied performances of *Man Walking Down the Side of a Building* creates a clearer potential for describing the nature of expression within the work.<sup>155</sup> Each performer has a very different aesthetic in his or her walk—Petronio a skidding, jilting descent, Streb a stiff, lilted walk, and Terwilliger a grace that evades the hold of gravity.<sup>156</sup> Watching each of these performances raises the question of whether fixation is the key to establishing expression.<sup>157</sup> In the abstract, Brown has created a dance of walking, and the abstract is too generic to meet the criteria of expression.<sup>158</sup> In performance, the dancer adds her

<sup>152</sup> See Bresnahan, *supra* note 149.

<sup>153</sup> See *id.*

<sup>154</sup> Justice Kaplan noted that the difficulty “is not simply that it is not always clear where to draw the line; it is that the line itself is meaningless because the conceptual categories it purports to delineate are ill-suited to the subject matter.” *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 458 (S.D.N.Y. 2005).

<sup>155</sup> Whitney Museum of American Art, *Elizabeth Streb Discusses Trisha Brown's "Man Walking Down the Side of a Building"*, YOUTUBE (Dec. 13, 2010), <https://www.youtube.com/watch?v=9kxWm31jh3Q>; clearwindow, *Stephen Petronio performs "Man Walking Down the Side of a Building" at The Whitney Museum. Video*, YOUTUBE (Jan. 25, 2011) [hereinafter clearwindow], <https://www.youtube.com/watch?v=mqwciH2D8EY>; Walker Art Center, *supra* note 15.

<sup>156</sup> See sources cited *supra* note 155.

<sup>157</sup> See ANDREAS RAHMATIAN, *COPYRIGHT AND CREATIVITY: THE MAKING OF PROPERTY RIGHTS IN CREATIVE WORKS* 126–27 (2011).

The meaning of ‘expression’ . . . has often been bundled up with fixation, which does not assist attempts to give the idea-expression dichotomy a clearer definition. So when Farewell J says ‘that there is no copyright in an idea . . . the production which is the result of the communication of the idea to the author . . . is the copyright of the person who has clothed the idea in form, whether by means of a picture, a play, or a book . . .’, he clearly hints at the necessity of physical embodiment or fixation to crystallise the idea into expression.

*Id.*

<sup>158</sup> Walking as an action is far too generic to meet the specifications of expression that would qualify the movement for copyright. However, Brown's description of the work may add clarity to her intention behind the movement and the expression of the idea:

*Man Walking Down the Side of a Building* was exactly like the title—seven stories. A natural activity under the stress of an unnatural setting. Gravity reneged. Vast scale. Clear order. You start at the top, walk straight down, stop at the bottom. All those soupy questions that arise in the process of selecting abstract movement according to the modern dance tradition—what, when, where and how—are solved in collaboration between choreographer and place. If you eliminate all those eccentric possibilities that the choreographic imagination can conjure up and just have a person walk down an aisle, then you see movement as activity.

RAMSAY BURT, *JUDSON DANCE THEATRE: PERFORMATIVE TRACES 3* (2006).

own physicality and interpretation to the movement, producing an individualized walk far closer to the expression end of the dichotomy.<sup>159</sup> Perhaps it is impossible to tease apart the idea/expression dichotomy from fixation as regards choreography. But then the question follows—what type of fixation? Written in Labanotation, or recorded with video? It turns out that these two possibilities are dichotomous, and pose a whole new challenge for postmodern choreography.

### 3. Fixation

The difficult question with fixation of choreography is whether the notation or recording adequately represents the intangible art for which the artist is seeking copyright protection.<sup>160</sup> Some forms of dance are able to answer this question easier than others; the viewer of fixed classical ballet can, with relative clarity, understand what steps and movements are being fixed. Two relevés,<sup>161</sup> a pirouette,<sup>162</sup> an arabesque.<sup>163</sup> Watching a recording of ballet clearly identifies what is

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<sup>159</sup> “According to the idea/expression dichotomy, an author of a novel cannot copyright the novel’s ideas, only the particular way that he has expressed those ideas.” Buccafusco, *supra* note 42, at 1247. In this instance, with the dancer’s unique physicality and movement style on display, the particular expression tends towards expression rather than idea. However, it is often quite difficult in visual arts to determine where the line is drawn between idea and expression, and, “[a]s numerous judges and scholars have described, application of the idea/expression dichotomy has been woefully unsatisfactory.” Buccafusco, *supra* note 42, at 1248.

<sup>160</sup> See RAHMATIAN, *supra* note 157, at 42.

The third protection requirement, that the work must be recorded in some permanent form (fixation) to obtain protection, is a peculiarity of the copyright systems of the Common law countries and seems to take account of the need for a material reifier which represents the otherwise purely intangible notion of dematerialised (copyright) property and which acts as a social ‘crutch’ without actually being the property object itself.

*Id.*

<sup>161</sup> “Raised. A raising of the body on the points or demi-pointes, point or demi-pointe.” *Relevé*, AM. BALLET THEATRE, <http://www.abt.org/education/dictionary> (last visited Nov. 20, 2016).

<sup>162</sup> “Whirl or spin. A complete turn of the body on one foot, on point or demi-pointe.” *Pirouette*, AM. BALLET THEATRE, <http://www.abt.org/education/dictionary> (last visited Nov. 20, 2016).

<sup>163</sup> See *Arabesque*, AM. BALLET THEATRE, <http://www.abt.org/education/dictionary> (last visited Nov. 20, 2016).

One of the basic poses in ballet, arabesque takes its name from a form of Moorish ornament. In ballet it is a position of the body, in profile, supported on one leg, which can be straight or demi-plié, with the other leg extended behind and at right angles to it, and the arms held in various harmonious positions creating the longest possible line from the fingertips to the toes.

*Id.*

meant to be copyrighted.<sup>164</sup>

Problems arise when the viewer attempts to record Brown's work in a clear and recognizable way. It is difficult to recognize the choreographic aspects of Brown's work by watching a video recording of *Man Walking Down the Side of a Building*.<sup>165</sup> There is not an established dance vocabulary for the artistic concepts in Brown's piece, aside from the identification of the walking movement.<sup>166</sup> But Brown's work cannot be copyrightable simply as walking—walking is an idea, not an expression, and thus, is not entitled to copyright protection.<sup>167</sup> Furthermore, walking alone would not be copyrightable because it lacks originality.<sup>168</sup>

The form of fixation, then, is critical in highlighting the building's role in the piece.<sup>169</sup> Labanotation is a complex system meant to record all the details of movement so that later dancers or choreographers might read the notation and understand how to perform it.<sup>170</sup> As between video recording and Labanotation, the latter is more accurate

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<sup>164</sup> When an audience views a ballet performance, it is relatively easy for them to understand, visually, that the performance is a compilation of specific dance moves. See katp1891x2, *Fairies Variations - The Sleeping Beauty - Paris Opéra Ballet - 2013*, YOUTUBE (Dec. 21, 2013), <https://www.youtube.com/watch?v=Et31LySAxf0>; Royal Opera House, *Swan Lake - Entrée and Adage from the Black Swan pas de deux (The Royal Ballet)*, YOUTUBE (Jan. 13, 2015) <https://www.youtube.com/watch?v=p21n1xorjEs&list=RDVOIZyYbidAU&index=5>. The vocabulary of ballet allows someone in the Copyright Office, even if they have little experience with dance, to point to the order of moves in the choreography to determine what the choreographer is asking to protect under copyright law. See *American Ballet Theatre Online Ballet Dictionary*, AM. BALLET THEATRE, <http://www.abt.org/education/dictionary> (last visited Jan. 9, 2017) (containing an index of ballet terminology with definitions, pictures, and videos).

<sup>165</sup> Walker Art Center, *supra* note 15.

<sup>166</sup> While Labanotation does provide highly detailed explanations of the choreographer's movement, it would still look very sparse when describing Brown's work. There would be the start of the walking, the walking itself, and the stop—and that does not lend itself to appearing artistic or choreographed. If anything, it would appear no different than the functional walking that everyone does on a daily basis. See Weinhardt, *infra* note 170.

<sup>167</sup> *Supra* notes 137–39.

<sup>168</sup> *Supra* notes 121, 122, 138.

<sup>169</sup> “The fixed form of a choreographic work must be one which is ‘capable of performance as submitted,’ if recreated from fixed form.” Joi Michelle Lakes, *A Pas De Deux for Choreography and Copyright*, 80 N.Y.U. L. REV. 1829, 1853 (2005).

<sup>170</sup> Anne Weinhardt explains Labanotation as follows:

Labanotation involves a staff which is divided vertically by a center line to represent the two sides of the body. That staff is divided further into two to twelve vertical columns. The complex symbols in these columns of the staff represent the positions of all parts of the body at a given point in space and time. The center line represents the spine and the right and left lines correspond to the right and left sides of the body. The staff, which is read bottom to top, contains symbols which convey specific movements. The length of these symbols signifies the length of time allotted for that movement.

Anne K. Weinhardt, *Copyright Infringement of Choreography: The Legal Aspects of Fixation*, 13 J. CORP. L. 839, 847 (1988).

in communicating the details of the work.<sup>171</sup> Thus, using Labanotation would provide greater detail and, hopefully, greater clarity to the expression and originality of *Man Walking Down the Side of a Building*.<sup>172</sup>

There is, however, an immediate problem with Labanotation. In notating Brown's *Walking on the Wall*, all that goes down on the page is walking.<sup>173</sup> Brown might articulate that the walking was performed on the side of a building, done parallel to the ground, but the movement itself—the steps of the dance—is just walking.<sup>174</sup> Labanotation cannot evoke the effect of distorted reality created by the sight of a person walking sideways down a building.<sup>175</sup> It prevents Brown from articulating the value and artistic impact of her work.<sup>176</sup> Were the Copyright Office to look at the Labanotation of this piece, it is highly unlikely it would find it was copyrightable—that walking is copyrightable.<sup>177</sup> To copyright walking would bring us back to the problem of the idea/expression dichotomy, and Brown would be unable to obtain a copyright over the idea of walking.<sup>178</sup>

The alternative form of fixation for Brown is video recording.<sup>179</sup> Using a video, the Copyright Office could identify what her work looks like in order to determine if it meets the criteria for a choreographic

<sup>171</sup> *Id.* at 848–49.

<sup>172</sup> Lakes, *supra* note 169, at 1854.

The Copyright Office prefers forms of notation which may be more precise, but which for various reasons are not universally embraced by the choreographic community. Written notation systems, such as Labanotation and Benesh Notation, are considered most appropriate . . . because of their ability to capture the exact position and intended movement of the dancer in a manner even more precise than film.

*Id.*

<sup>173</sup> See Weinhardt, *supra* note 170, at 846.

<sup>174</sup> See *id.*

<sup>175</sup> KINETOGRAPHY LABAN, also known as LABANOTATION, CONTEMPORARY-DANCE.ORG, <http://www.contemporary-dance.org/labannotaion.html> (last visited Oct. 21, 2017) (“The pretention of an exact record of a dance, but mostly of what happens in the body that dances, does not belong to the practice of kinetography Laban. Such aim would not only fail to recognize the essential nature of dance (constant change), but mostly the complexity of its support of existence: human body: subjective, unique and almost indecipherable.”). See generally Christian Griesbeck, *Introduction to Labanotation*, GOETHE U. FRANKFURT (1996), <http://user.uni-frankfufde/~griesbec/LABANE.HTML>.

<sup>176</sup> See generally sources cited *supra* note 175.

<sup>177</sup> “Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing[,]” are not copyrightable. 37 C.F.R. § 202.1(b) (2014). Because Labanotation may not be able to express the effect of walking when performed on the side of a building, it may not be capable of articulating the “particular manner” in which Brown’s work is expressed. See *id.*

<sup>178</sup> See *id.*

<sup>179</sup> See U.S. COPYRIGHT OFFICE, COMPENDIUM II: COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 450.07(a) (1984).

work.<sup>180</sup> There are a handful of recordings of Brown's work,<sup>181</sup> and each one reveals a different perspective on *Man Walking Down the Side of a Building*.<sup>182</sup> Whether or not Brown would use any of these as her model of fixation is unknown, but using these recordings as examples highlights the problem of how and what to record. Some recordings show the contraption on the roof that lowers the dancer to a parallel along the building wall<sup>183</sup>; others do not.<sup>184</sup> One recording shows the audience's perspective, but also gets aerial shots.<sup>185</sup> None of them are just one take; they vary from angle to angle.<sup>186</sup> In the performances, each dancer brings a different style of walking to the table (or to the wall, in this case).<sup>187</sup> Each dancer may also have a different interpretation of the meaning and purpose of the work, which affects the performance.<sup>188</sup> All of this helps to articulate the question: which recording is the *right* recording? Which performance is actually *Man Walking Down the Side of a Building*?

The problem, and the beauty, of dance is that no two performances are ever exactly the same.<sup>189</sup> Each dancer has a different body with

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<sup>180</sup> "According to Compendium II, fixation using film is also acceptable." Lakes, *supra* note 169, at 1855.

<sup>181</sup> See Fondation Cartier pour l'art contemporain, *Man Walking Down the Side of a Building | Les Soirées Nomades - Septembre 2016*, YOUTUBE (Oct. 24, 2016), [https://www.youtube.com/watch?v=Fd4pUus\\_APw](https://www.youtube.com/watch?v=Fd4pUus_APw); Meany Center, *Rachael Lincoln Performs Trisha Brown's "Man Walking Down the Side of a Building"*, YOUTUBE (Feb. 17, 2016), <https://www.youtube.com/watch?v=TbpBHTPODB4>; UCLA, *Man Walking Down the Side of a Building*, UCLA, YOUTUBE (Apr. 5, 2013), <https://www.youtube.com/watch?v=1wUI7CL5jaY>; Walker Art Center, *supra* note 15; clearwindow, *supra* note 155; Whitney Museum of American Art, *supra* note 155.

<sup>182</sup> "People perceive things differently. We choose to select different aspects of a message to focus our attention based on what interests us, what is familiar to us, or what we consider important." Scott McLean, *Differences in Perception*, in BUS. COMM. FOR SUCCESS (2017), [http://catalog.flatworldknowledge.com/bookhub/reader/15?e=mclean-ch03\\_s03](http://catalog.flatworldknowledge.com/bookhub/reader/15?e=mclean-ch03_s03); see also Christof Koch, *Think Different: How Perception Reveals Brain Differences*, SCI. AM. (Jan. 1, 2011), <https://www.scientificamerican.com/article/think-different-jan-11>.

<sup>183</sup> See Whitney Museum of American Art, *supra* note 155; Fondation Cartier pour l'art contemporain, & UCLA, *supra* note 181.

<sup>184</sup> See Walker Art Center, *supra* note 15; Meany Center, *supra* note 181.

<sup>185</sup> See Fondation Cartier pour l'art contemporain, *supra* note 181.

<sup>186</sup> See sources cited *supra* note 181.

<sup>187</sup> For example, compare the walk of Rachael Lincoln to that of Elizabeth Streb and notice the difference in gait and tempo. See Whitney Museum of American Art, *supra* note 155; Meany Center, *supra* note 181.

<sup>188</sup> One dancer stated, "the effort of looking effortless, and the ease and the precision of the work, and that there is something really clear about what's happening in the body, I love that still, there's an efficiency to it." Meany Center, *supra* note 181. Another dancer explained, "it was really just the idea of changing gravity to ninety degrees and staying parallel to the ground and walking down." Whitney Museum of American Art, *supra* note 155.

<sup>189</sup> See DEBBIE WILSON, *THIRD SWAN FROM THE LEFT: THE STORIES, MUSINGS, AND RANDOM THOUGHTS OF A WANDERING ARTIST* 54–55 (2015).

I learned long ago that ten dancers can be put in a room, learning the same choreography straight from the horse's mouth (the choreographer) and they will still manage to come up with at least six different variations. It's not that they weren't

different perspectives and different abilities, so two dancers will never be able to look exactly alike.<sup>190</sup> This problem matters less in classical forms of dance, because the movements are still the same; no matter if they look slightly different, each performer did two pirouettes.<sup>191</sup> When the entirety of the piece is walking, however, the articulation of the movement of walking becomes more relevant to the viewer. Brown may, and likely did, appreciate the variety in style each dancer brought to her work; but for the Copyright Office, each version creates a new problem as to which expression of the work is the one to be registered for copyright protection.<sup>192</sup>

Brown's work exists on two dichotomous ends of a spectrum, and each end depends on the type of fixation utilized.<sup>193</sup> At one end of this dichotomy, a video recording of the work would be a particular expression. As seen in the various recordings, each performance could either be a separately copyrightable work, or the Copyright Office would need to see all performances in order to understand what is consistent throughout and identify *that* as the work.<sup>194</sup> On the other end, Labanotation fails to express enough to breach the gap between idea and original expression and prevents copyright altogether.<sup>195</sup> And so far,

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paying attention to the choreographer, they were simply doing what every dancer in the world does: transferring the movement into their bodies according to their abilities.

*Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Pirouette*, *supra* note 162.

<sup>192</sup> If, for example, Brown submitted Rachael Lincoln's performance of *Man Walking Down the Side of a Building*, the Copyright Office would be registering a copyright for a woman who walks down a building with a stiff, jolting gait. *See* Meany Center, *supra* note 181. On the other hand, if Brown submitted Stephen Petronio's performance of the piece, the Copyright Office would be looking at a very different movement style, one with much more skidding along the building at the start but with much smoother steps towards the end of the walk. *See* Clearwindow, *supra* note 155. When the entire piece is only walking, the difference in style is stark, forcing the Copyright Office to consider whether the two performances can be under a single copyright registration or if the difference in expression means they would each have to be registered as separate pieces.

<sup>193</sup> Postmodernism faces many challenges with copyright law. Megan Carpenter & Steven Hetcher, *Function over Form: Bringing the Fixation Requirement into the Modern Era*, 82 *FORDHAM L. REV.* 2221 (2014). Carpenter and Hetcher argue that Holmes's *Bleistein* principle, which warns "it is bad copyright policy for judges to determine the quality of art[.]" has reemerged in the doctrine of fixation. *Id.* at 2225. "[B]ecause copyright law protects only 'fixed' art, it fails to adequately incentivize an important form of contemporary art: art that is 'unfixed' according to the strictures of the Copyright Act." *Id.* at 2226. Brown is not the only postmodern artist who faces difficulties with fixation; her concepts "represent[] a dominant current in contemporary art[.]" *Id.* at 2235. For Carpenter and Hetcher, the inflexibility of courts regarding fixation of postmodern artwork "demonstrate[s] that U.S. copyright law is moving further and further from its core function by requiring that works not contain transitory elements to establish basic copyrightability." *Id.*

<sup>194</sup> *See, e.g.*, Meany Center, *supra* note 181.

<sup>195</sup> *See* Griesbeck, *supra* note 175.

these appear to be the only ways for a performer to fix her work.<sup>196</sup> For postmodern choreographers then, the exploration of the quotidian has confounded the doctrines of copyright and made fixation an interpretive lens rather than a means of recording a work.

#### 4. Functionality

Outside the conceptual haze of fixation, functionality within copyright of choreography is the concept that work must be artistic movement rather than movement with a functional objective.<sup>197</sup> Making breakfast, taking a shower, dialing a phone—all of these are functional aspects of everyday life and are not protected by copyright.<sup>198</sup> The Constitution's original intention was that the law protects work created by artists and innovators.<sup>199</sup> Protecting functional movement would undermine the support and encouragement of artistic innovation.<sup>200</sup>

Suppose a man decides he wants to “choreograph” an assembly line. He puts one person at each station throughout a factory, with each person executing a specific task. After organizing it all and ensuring that everyone understands, he walks through the factory with a camera and films the assembly line “performance.” Then, he goes to the Copyright Office, hands in his recording, and requests that his assembly line choreography be registered.<sup>201</sup> This clearly is not the type of creative or artistic work the Copyright Office intended to protect; the man has filmed entirely functional processes. But the example illustrates why the doctrine of functionality is so important; it ensures that works receiving

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<sup>196</sup> “At present, there are only a few notable—and imperfect—ways of ‘fixing’ choreography in a tangible form: film, notation, and computer technology.” Katie M. Benton, *Can Copyright Law Perform the Perfect Fouetté?: Keeping Law and Choreography on Balance to Achieve the Purposes of the Copyright Clause*, 36 PEPP. L. REV. 59, 88 (2008). Computer technology is an advanced version of notation, but it has not caught on with choreographers because it takes the human element out of the creative process. *Id.* at 90.

<sup>197</sup> “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b) (2010).

<sup>198</sup> *Id.*

<sup>199</sup> U.S. CONST. art. 1, § 8, cl. 8.

<sup>200</sup> “In *Feist Publications, Inc. v. Rural Telephone Service Co.* (1991), the Court stated that because the clause permits copyright protection only for creative works, facts cannot be copyrighted.” Thomas B. Nachbar, *Patent and Copyright Clause*, HERITAGE, <http://www.heritage.org/constitution#/articles/1/essays/46/patent-and-copyright-clause> (last visited Dec. 5, 2016); see also Chris Dodd, *Copyright: Empowering Innovation and Creativity*, HUFFINGTON POST, [http://www.huffingtonpost.com/chris-dodd/copyright-empowering-inno\\_b\\_3417472.html](http://www.huffingtonpost.com/chris-dodd/copyright-empowering-inno_b_3417472.html) (last visited Dec. 5, 2016) (“[C]opyright must empower creativity, innovation, and the dissemination of knowledge by ensuring that creators have a fair chance to be compensated for their creative efforts.”).

<sup>201</sup> A similar illustration can be found in Buccafusco's work. See Buccafusco, *supra* note 42.

copyright are artistic works rather than functional ones, thereby protecting the integrity of both art and copyright law.<sup>202</sup>

The doctrine of functionality comes with some hazards for postmodern choreographers like Trisha Brown.<sup>203</sup> In daily life, walking is a functional endeavor, and not an artistic one.<sup>204</sup> We do not walk from bed to bathroom in an attempt to be innovative or creative; its purpose is to get us from those warm sheets to the hot shower in order to wake us up for the day.<sup>205</sup> If anything, walking is the epitome of functionality—without it, we could not go about our daily lives with ease.<sup>206</sup>

This idea is complicated by Brown's *Man Walking Down the Side of a Building*.<sup>207</sup> As the title indicates, the piece consists entirely of walking,<sup>208</sup> a functional movement.<sup>209</sup> However, there are two different ways to look at the doctrine of functionality as it relates to Brown's piece: one is to ask whether walking is functional, and the other is to ask whether a dancer walking down the side of a building for a particular purpose is functional.<sup>210</sup> The distinction between these two perspectives relies on the concepts of intention and authorship, and the determination of functionality relies on whether or not these concepts are artistically motivated.<sup>211</sup>

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<sup>202</sup> See Dodd, *supra* note 200.

<sup>203</sup> Postmodern choreographers like Brown "presumed the need of all bodies to embrace and be liberated by the pedestrian," which inspired them to utilize pedestrian movement in their work. Susan Leigh Foster, *Walking and Other Choreographic Tactics: Danced Inventions of Theatricality and Performativity*, 31 *SUBSTANCE* 125, 128 (2002). But walking is a functional task performed daily by nearly everyone, and copyright law clearly excludes functional movement from copyright protection. See 17 U.S.C. § 102(b) (2010); Laura Donovan, *Here's How Much the Average American Walks Every Day*, *BUS. INSIDER* (July 12, 2015), <http://www.businessinsider.com/heres-how-much-the-average-american-walks-every-day-2015-7>.

<sup>204</sup> The typical American takes 5,900 steps each day. Donovan, *supra* note 203. People walk to get from point A to point B, and many people walk for exercise, but the average person walking by is not walking for artistic reasons. Karin Lehnardt, *51 Fun Facts About Walking*, *FACT RETRIEVER* (Dec. 28, 2016), <https://www.factretriever.com/walking-facts>.

<sup>205</sup> Walking is "[t]he number one method of human transport in the world," and gets us from point A to point B throughout our days. *City of Fort Collins Pedestrian Plan*, FORT COLLINS GOV'T, [http://www.fcgov.com/transportationplanning/pdf/pedplan\\_4.pdf](http://www.fcgov.com/transportationplanning/pdf/pedplan_4.pdf) (last visited Jan. 9, 2017).

<sup>206</sup> *Id.*

<sup>207</sup> Brown's work consists entirely of walking, which was just established to be functional movement. See Meany Center, *supra* note 181.

<sup>208</sup> Sources cited *supra* note 181.

<sup>209</sup> *Supra* notes 189–93.

<sup>210</sup> The former considers the movement generally and in isolation, the way a pirouette may be considered a dance move in isolation from any specific performance. *Pirouette*, *supra* note 162 (a pirouette is "ballet turn in place on one leg"). The latter considers the movement as it is utilized in Brown's particular performance, acknowledging that "[l]ots of folks walk all the time and don't call it art, but some of them do." Carrie Marie Schneider, *The Ten List: Walk as Art*, *GLASSTIRE* (Nov. 23, 2012), <http://glasstire.com/2012/11/23/the-ten-list-walk-as-art>.

<sup>211</sup> The copyright law does not protect functional works. 17 U.S.C. § 102(b) (2010). Authorship and intention are two facets that help determine whether or not a work was made

Intention is the goal or reason behind the doing or creating of something.<sup>212</sup> There is a mindset or mental state required in an intention, one that guides the creation and lends meaning to the finished result.<sup>213</sup> In the copyright setting, it is the type of mental state that shapes the particular intention and reveals whether the innovator intended artistry or functionality.<sup>214</sup> A choreographer must have an intention that defeats the idea of pure functionality in the work.<sup>215</sup> It does not matter what particular mental effect the author is hoping to give to her audience; it is enough that the author has the intention to create an artistically driven effect.<sup>216</sup> In other words, the work must induce a mental state in the audience in order to establish authorship and relay the artistic purpose that negates function.<sup>217</sup>

A layperson watching Brown's work may or may not grasp her particular artistic intention, depending on that layperson's knowledge of postmodern dance and theory. At the time Brown made *Man Walking Down the Side of a Building*, she was exploring how she could upend

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to be artistic or functional. See generally LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* (2007).

<sup>212</sup> Merriam-Webster defines intention as "a determination to act in a certain way." *Intention*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/intention> (last visited Oct. 21, 2017).

<sup>213</sup> "[C]opyright scholars emphasise the intention to produce a work of authorship . . . . Intention and causality . . . are essential ingredients in the process of authorial creation." ZEMER, *supra* note 211, at 83.

<sup>214</sup> See Buccafusco, *supra* note 42, at 1232; see also ZEMER, *supra* note 211, at 103 ("Thinking is a preliminary step and a core factor in the making process of copyright works . . . . Thought is a process of conceptualisation whereby man's world is symbolized or schematized. Copyrighted works reduce the abstract conceptualisation to the way an author associates his ideas with existing objects, identifies and 'tangibly' expresses his ideal reflection of the world.").

<sup>215</sup> See Buccafusco, *supra* note 42, at 1261–62.

The intentions that matter for copyright authorship are a person's categorial intentions. As the term suggests, categorial intentions are those about what kind of work the person has created . . . . For purposes of copyright law, then, a person may be considered an author when she has the categorial intention that her creation is capable of producing mental effects in an audience.

*Id.*

<sup>216</sup> Professor Buccafusco said that "we need not care *what* mental effect the putative author intends to create." *Id.* at 1262. To clarify this point, he lays out a helpful example:

Alice constructs a three-dimensional object intending that when people interact with it, by looking at it and touching it, they will experience certain feelings, thoughts, and sensations. Bill constructs a similar three-dimensional object intending that it will serve as a part of a house where, after it is installed, no one will see it or interact with it. Cass also constructs a similar object. He intends that it will be used to hold flowers, and he also intends that when people see it they will experience certain feelings, thoughts, and sensations. Alice and Cass have engaged in authorship, while Bill has not.

*Id.* at 1262–63.

<sup>217</sup> *Id.* at 1232.

notions of pedestrian movement.<sup>218</sup> Brown's work took a seemingly pedestrian, everyday movement and presented it in such a way as to upset her audience's perspective on pedestrian movement.<sup>219</sup> Walking becomes an entirely new concept when it is presented like artwork on the wall of a building, artwork that calls into question our conception of gravity and our ideas of what can be taken for granted.<sup>220</sup> These ideas highlight an intention in Brown's work wholly separate from functionality; her intention is to re-orient conceptions about walking that her audience might hold, affecting their mental states by imposing her artistic conceptions onto her audience.<sup>221</sup> Through this lens, therefore, Brown's work escapes the threat of functionality.

Practically the question remains as to whether the functionality doctrine is to be applied to the movement of walking or the act of having a dancer walk down the side of the building.<sup>222</sup> At this point, no court has ever ruled on whether a walk can be anything other than functional. We know that yoga sequences are not considered copyrightable per the functionality doctrine, as the purpose of the sequence is to encourage health and wellness rather than to promote or expand a creative idea.<sup>223</sup> Given the current case law, courts would likely be hesitant to award copyright protection to such functional movement.

#### IV. PROPOSAL

Having grappled with the doctrines of copyright, the question remains as to whether Brown's work is copyrightable.<sup>224</sup> While certainly innovative, postmodern choreographers' interests in the boundaries of the medium may push it outside the bounds of the law.<sup>225</sup> At a

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<sup>218</sup> During Brown's equipment period, she set herself the goal of answering certain questions: "How can you walk on the wall?" "How can you move while parallel to the ground?" "How can you seem to be doing free-fall?" Sommer, *supra* note 6, at 136. On a similar piece, titled *Walking on Walls*, Brown commented that she was "developing a skill for an occasion-appearing to be natural in a completely un-natural situation." Trisha Brown & Douglas Dunn, *Dialogue: On Dance*, 1 PERFORMING ARTS J. 76, 82 (1976).

<sup>219</sup> "Flying is a recurrent leitmotiv in the dance of Trisha Brown . . . but Brown's aerial feats are ever mindful of, and ever challenging to, the forces of nature." Philip Bither, *Trisha Brown: From Falling and Its Opposite, and All the In-Betweens*, WALKER ART CTR. (Mar. 20, 2013) <http://www.walkerart.org/magazine/2013/philip-bither-trisha-brown>.

<sup>220</sup> "Soon accustomed to the perilousness and the paraphernalia, the viewer comes to focus on the walking itself, altered radically by the new relationship to gravity." Foster, *supra* note 203, at 126 (discussing Brown's *Man Walking Down the Side of a Building*).

<sup>221</sup> Buccafusco, *supra* note 42, at 1232.

<sup>222</sup> *Supra* note 210.

<sup>223</sup> *Bikram's Yoga Coll. of India, L.P. v. Evolution Yoga, L.L.C.*, 803 F.3d 1032, 1044 (9th Cir. 2015).

<sup>224</sup> See discussion *supra* Part III.

<sup>225</sup> See Jack Anderson, *Postmodern Dance Favors Display in Lieu of Definition*, N.Y. TIMES (Nov. 1, 1981), <http://www.nytimes.com/1981/11/01/arts/post-modern-dance-favors-display->

minimum, the doctrinal and theoretical challenges may dissuade the Copyright Office from granting copyright. It may be futile to advocate for a change in the copyright law as any necessary changes would be unwieldy and unrealistic for lawmakers. Such changes would likely require an overhaul of the Copyright Act—an overhaul unlikely to garner favor when it directly impacts only a small group of postmodern choreographers.

This does not, however, mean that postmodern dance is destined for obsolescence. There is evidence to indicate the opposite is true: postmodern dance could be more innovative without copyright protection.<sup>226</sup> There are other areas of creative innovation that are not protectable under copyright law, yet are still thriving and innovating.<sup>227</sup> The purpose of copyright laws is to reward innovativeness and spur creativity.<sup>228</sup> In some cases, this can be achieved without receiving statutory protection under copyright laws.<sup>229</sup> Culinary arts, for example, is an innovative industry that is not afforded any legal protection from copyright.<sup>230</sup> Yet it is a thriving industry despite—or perhaps because of—the gap in protection.<sup>231</sup>

The culinary arts are not copyrightable because, at their core, they are simple procedures.<sup>232</sup> A recipe functions as guidelines for crafting a dish.<sup>233</sup> Chefs have tried on multiple occasions to secure copyright for their creative concoctions, but courts have ruled against extending legal protection to food.<sup>234</sup> Despite a lack of copyright protection, however,

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in-lieu-of-definition.html; see also *Postmodernism*, TATE, <http://www.tate.org.uk/art/art-terms/p/postmodernism> (last visited Feb. 13, 2017) (describing postmodernism as “[a]nti-authoritarian by nature, [it] refuse[s] to recognise the authority of any single style or definition of what art should be. It collapse[s] the distinction between high culture and mass or popular culture, between art and everyday life”).

<sup>226</sup> “In some cases copying ought to be welcomed, not stopped. Imitation can fuel innovation, serve as a form of advertising for originals, spur more competitive markets, and lead to better, more valuable new creations.” KAL RAUSTIALA & CHRISTOPHER JON SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* (2012).

<sup>227</sup> *Id.* at 14.

<sup>228</sup> See COHEN ET AL., *supra* note 20, at 111.

<sup>229</sup> Creativity can persist even in the face of widespread copying. See RAUSTIALA & SPRIGMAN, *supra* note 226, at 14–17.

<sup>230</sup> See *id.* at 9–10.

<sup>231</sup> “The American apparel industry has boomed over the past 50 years in the face of uncontrolled copying, and it has been vibrantly creative.” *Id.* at 21. The culinary arts are another area that has flourished without copyright. “In cuisine, almost no version of a given dish is indistinguishable from another . . . . Variation is inherent in this system.” *Id.* at 84.

<sup>232</sup> “The very point of a recipe is to tell the reader how to recreate the dish in question. *Id.* at 67.

<sup>233</sup> “Recipes are functional guides, not creative expressions.” *Id.* at 66.

<sup>234</sup> *Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473 (7th Cir. 1996) (copyright laws do not afford protection to recipes); Complaint, *Powerful Katinka, Inc. v. McFarland*, No. 07-6036, 2007 WL 2064059 (S.D.N.Y. 2007) (after leaving the Pearl Oyster Bar to start his own restaurant, the owner of the Pearl sued McFarland for copying her recipes and restaurant décor. The case was settled, but given *Publications International* it is unlikely that the owner could

the culinary arts continue to thrive, and their success rests in large part on the fact that exact copies of food are nearly impossible to create.<sup>235</sup> The process of replication is never perfect, so the likelihood of another chef copying precisely someone's new dish is slim.<sup>236</sup> There is, however, a large chance that a chef will cook a similar dish.<sup>237</sup> And yet, similar dishes are not threatening innovation in cuisine.

The reason for this stems from the idea that the recipe is not itself the product on sale—for the culinary arts, authenticity is paramount.<sup>238</sup> Chefs are charging for uniqueness and performance, not the ingredients that came together to create a dish.<sup>239</sup> Thus, even though Dunkin' Donuts sells cronuts, people will still flock to Dominique Ansel Bakery to get a taste of the authentic.<sup>240</sup> Not only is the authentic cronut likely to taste better than the Dunkin' Donuts version, but the atmosphere and décor will add to the experience of Mr. Ansel's cronut.<sup>241</sup> Chefs are relatively unaffected by the incentives of copyright law, for the copying of their recipes does not affect the authenticity and experience of their particular creations.<sup>242</sup>

Postmodern dance is like food—the copies are never perfect, and authenticity is just as important as the movement.<sup>243</sup> Reflecting back on the handful of filmed performances of *Man Walking Down the Side of a*

secure any legal protection for her recipes).

<sup>235</sup> Raustiala and Sprigman relate cooking to the analog technology of cassette tapes, highlighting how difficult it is to create an exact copy of food:

[E]ven in the finest restaurants the original version of a dish is subject to change . . . Food, in short, is more like an analog technology, in which copying is never perfect. Think of an LP copied to a cassette tape—analog copying technologies like these generate copies in which quality degrades in an obvious way. Copies of famous recipes are like cassettes—they can be good, but they are never perfect[.]

RAUSTIALA & SPRIGMAN, *supra* note 226, at 84.

<sup>236</sup> “[T]he norm against perfect copying . . . is, in a sense, enforced by the nature of cooking itself.” *Id.* at 84.

<sup>237</sup> “Because perfect copies are almost impossible in cuisine, their values are also not the same as that of the original.” *Id.* at 84.

<sup>238</sup> “Thomas Keller’s famed Oysters and Pearls, for example, is a great creation. The recipe itself can be reproduced. Yet the experience of eating it at Keller’s famous . . . restaurant, the French Laundry, cannot be . . . Finding the same dish in a local haunt, no matter how skillfully reproduced, is not a true substitute.” *Id.* at 85.

<sup>239</sup> “It may be possible to copy a recipe faithfully, but it is very rarely possible to copy the experience of consuming it.” *Id.* at 85.

<sup>240</sup> “The Cronut pastry is the unique creation by Chef Dominique Ansel that many have described to be a croissant-doughnut hybrid.” *Cronut 101*, DOMINIQUE ANSEL BAKERY, <http://dominiqueansel.com/cronut-101> (last visited Feb. 13, 2017); *see also* Bruce Horovitz, *Dunkin’: Croissant Donut Permanent*, USA TODAY (Feb. 11, 2015), <http://www.usatoday.com/story/money/2015/02/11/dunkin-donuts-fast-food-restaurants-croissant-donut-doughnuts/23227017>.

<sup>241</sup> “[T]he central item created by a chef—food—cannot be easily disentangled from the ‘packaging’ of the restaurant[.]” RAUSTIALA & SPRIGMAN, *supra* note 226, at 85.

<sup>242</sup> *Id.* at 86.

<sup>243</sup> *See supra* note 187.

*Building* available to the public, each performer and each location differs.<sup>244</sup> While the procedure of the dance may be simple, the embodiment of that procedure manifests as a slightly different work each time it is performed.<sup>245</sup> This is exemplified in postmodern dance: when there are fewer identifiable dance moves to point out, the appearance and experience of watching each version becomes more prevalent.<sup>246</sup> One cannot separate *Man Walking Down the Side of a Building* from the building—it loses nearly all its meaning.<sup>247</sup> *Giselle*,<sup>248</sup> on the other hand, would be identifiable whether it was performed at Lincoln Center, Central Park, or Liberty Island. The incentive for copyright thus remains for those choreographing classical works, but for postmodern dance the incentive is less necessary. Copying the movement might not threaten the innovator.

Copyright exists primarily to provide incentives to authors.<sup>249</sup> An author of a book, without copyright, has little reward for her innovation—anyone can copy her book without having to pay her a dime.<sup>250</sup> But in certain negative spaces of intellectual property, this incentive is not present.<sup>251</sup> In fields where copyright is not a threat, the incentive is unnecessary, and may quickly become a hindrance rather than a help.<sup>252</sup> Postmodern dance exists in such a negative space: an area of innovation that does not conform to the theories of copyright.<sup>253</sup> While choreography as a category is entitled to legal protection, the exceptions in the law that keep postmodern choreography from being protected are beneficial rather than harmful.<sup>254</sup> If postmodern choreographers required others to license their works, innovation could stall. In a field where the goal is to push boundaries, copying may be the best tool to spread the word. If choreographers had to pay to mimic these (sometimes outlandish) works, the innovation might never get off

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<sup>244</sup> See sources cited *supra* note 181.

<sup>245</sup> ANTHEA KRAUT, CHOREOGRAPHING COPYRIGHT: RACE, GENDER, AND INTELLECTUAL PROPERTY RIGHTS IN AMERICAN DANCE 12, 19 (2016).

<sup>246</sup> See sources cited *supra* note 155.

<sup>247</sup> See *supra* text accompanying notes 126–35.

<sup>248</sup> *Giselle: A Romantic Ballet in Two Acts*, AM. BALLET THEATRE, <http://www.abt.org/education/archive/ballets/giselle.html> (last visited Oct. 4, 2017).

<sup>249</sup> See COHEN ET AL., *supra* note 20, at 9 (“[I]nformational products have an ‘owner’ and that this owner has some ‘rights’ that would be violated by unauthorized copying of the product.”).

<sup>250</sup> Without copyright, someone could buy a \$100 book, copy it 100 times, and sell the book for \$50. Then someone buys the \$50 book, copies it 100 times and sells it for \$25. And so on and so on until you reach the cost of the production of books. This is massive depreciation and does not protect the author’s legal interest. Professor Christopher Buccafusco, Lecture on the Theories of Copyright (Jan. 18, 2017).

<sup>251</sup> “[T]he mere fact that a recipe is copied does not necessarily threaten the originator.” RAUSTIALA & SPRIGMAN, *supra* note 226, at 86.

<sup>252</sup> *Id.* at 86.

<sup>253</sup> See text accompanying notes 226–31.

<sup>254</sup> See text accompanying notes 226–31.

the ground. Imitation is often the precursor to greater innovation in postmodern dance, and it may be of great import that other choreographers freely copy from their peers to spread their pioneering ideas.

Innovation is divided into two categories: the innovation of the pioneers and the evolutions put forth by the “tweakers.”<sup>255</sup> The success of an individual or an art form is reliant upon pioneers being innovative and allowing that innovation to spread.<sup>256</sup> New ideas generally begin with one pioneer, and that strategy is often received with apprehension or distaste by other members of the community.<sup>257</sup> Then, after the strategy begins to percolate, others take the strategy and tweak it, thus proliferating the strategy and coaxing it into the mainstream.<sup>258</sup> For example, if that first pioneer of golf in America had obtained a copyright over the game, we’d likely still be playing the sport with wooden clubs and “featheries”—leather balls stuffed with feathers.<sup>259</sup>

Like golf, postmodern dance requires freedom to copy for innovation to flourish.<sup>260</sup> Postmodern dance is a style that explores the bounds and limits of its own medium, and as such its evolution follows the pattern of pioneers and tweakers in sports.<sup>261</sup> Few pioneering ideas are well received on their debut performance.<sup>262</sup> Trisha Brown’s work was likely met with resistance or hesitation after its first performance—if it was even noticed at all.<sup>263</sup> Now, however, she is revered in the dance community, and her ideas have been taken and tweaked by other choreographers.<sup>264</sup> Had choreographers been unable to pull freely from

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<sup>255</sup> RAUSTIALA & SPRIGMAN, *supra* note 226, at 128–30, 132.

<sup>256</sup> *Id.* at 131.

<sup>257</sup> “The initial reaction to Leach’s spread offense was, as with Walsh’s West Coast Offense, contempt. The second reaction, just as inevitably, was imitation.” *Id.* at 130.

<sup>258</sup> “Tweaking is present in all inventive fields, and in some—like music—is a very prominent part of the creative process.” *Id.* at 142.

<sup>259</sup> “1800s: Par for the course, golf makes its way to the United States. Players use 20 to 30 wooden clubs of various functions to hit featheries, hard leather balls stuffed with feathers.” Amanda Green, *A Brief History of the Golf Club*, POPULAR MECHANICS (May 16, 2013), <http://www.popularmechanics.com/adventure/sports/a8984/a-brief-history-of-the-golf-club-15478412>.

<sup>260</sup> “Nothing stops another coach or team from imitating a great innovation on the field. But at the same time, that prospect doesn’t stop great innovations from being introduced.” RAUSTIALA & SPRIGMAN, *supra* note 226, at 128. So too with postmodern dance; despite the ability of other choreographers to imitate, pioneers are not deterred from innovating.

<sup>261</sup> *Id.* at 132 (There are pioneers, who “come up with something radically different from anything that has been done before,” and then there are tweakers, “who improve ideas and products by refining or reconceptualizing what others have done.”).

<sup>262</sup> *See supra* note 257.

<sup>263</sup> “It may be true that neither critics nor audiences absorbed what happened in the sixties but I don’t think I’d be doing what I’m doing now if that hadn’t happened.” Brown & Dunn, *supra* note 218; *see also Trisha Brown/Dance, supra* note 99 (acknowledging that Brown’s work “challenged existing perceptions of what constitutes performance”).

<sup>264</sup> For example, Bandaloop is a dance company that performs on the sides of buildings. BANDALOOP, <http://bandaloop.org> (last visited Feb. 6, 2016); Stan Grossfeld, *Dancing in the*

her work, the chances of her ideas taking root in dance would be far slimmer, and tweekers such as Bandaloop may never have come into existence.<sup>265</sup> Just as with cuisine, the incentive to provide copyright does not exist in sports or in postmodern dance, for it would stifle the tweekers that disseminate and improve pioneering ideas from the Trisha Browns of the world.<sup>266</sup>

#### CONCLUSION: A POSITIVE ENDING FOR NEGATIVE SPACES

Aspects of postmodern choreography may not be protected under our present-day copyright regime; rather, postmodern works fall into what legal theorists have termed copyright's "negative space."<sup>267</sup> This is not necessarily a bad thing, as many industries within this space have flourished.<sup>268</sup> Copyright law is premised on the goal of incentivizing innovation, and rewarding authors who innovate with legal protections of their work.<sup>269</sup> But for certain industries, that incentive is unnecessary or even harmful to innovation.<sup>270</sup> Copying is not a threat to postmodern dance—the field might never evolve without the opportunity to copy.<sup>271</sup> And without that threat, there is no incentive for copyright protection for postmodern choreography.<sup>272</sup> Rather, the freedom to copy sustains and encourages innovation in postmodern choreography, allowing artists like Trisha Brown to leave behind a legacy of work to inspire the next generation of choreographers. Hers must be a gift that keeps on giving.

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*Air*, BOSTON GLOBE (June 8, 2016), <https://www.bostonglobe.com/2016/06/07/dancing-air/cjBY9B30PqUjxSYQBdCl9L/story.html>. One of the company members has performed Brown's *Man Walking Down the Side of a Building* on at least two different occasions. See Fondation Cartier pour l'art contemporain, *supra* note 181; see also Meany Center, *supra* note 181.

<sup>265</sup> See *supra* note 264.

<sup>266</sup> "Tweekers can be very important to the development of successful, effective innovations." RAUSTIALA & SPRIGMAN, *supra* note 226, at 133.

<sup>267</sup> See *supra* text accompanying notes 260–63.

<sup>268</sup> RAUSTIALA & SPRIGMAN, *supra* note 226, at 14.

<sup>269</sup> See *supra* note 35.

<sup>270</sup> See *supra* note 255.

<sup>271</sup> See *supra* notes 224–66.

<sup>272</sup> The incentive created in the Constitution does not apply here. See *supra* text accompanying notes 35–37.