

INTERNATIONAL JOURNAL OF LEGAL STUDIES AND SOCIAL SCIENCES [IJLSSS]

ISSN: 2584-1513 (Online)

Volume 2 | Issue 4 [2024] | Page 59 - 67

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COPYRIGHT IN MOTION: LEGAL CHALLENGES OF USER-GENERATED DANCE CONTENT ON SOCIAL MEDIA

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ABSTRACT

The article delves closely into the delicate relationship between copyright law and user-generated dance material on social media sites. Dance is an incredible art form that combines creativity, emotional expression, and physical movement to produce unique choreographic works. According to Indian Copyright Law, choreography is protected as a 'dramatic work' but only if it is recorded in a fixed format. However, since the advent of social media platforms such as TikTok, Instagram, and YouTube, dance has become a culture of one step forward; that is, a discrete dance move such as "The Floss" or "Renegade" goes viral but leaves the creators who first invented these moves frequently without credit. This study examines the legal problems that choreographers have in asserting ownership of their work in the digital age of social media where user-generated content thrives.

INTRODUCTION

‘Every dance tells a story’ even if it’s for a brief period. Dance is one of the most expressive forms, where the performer uses not only their body but also their mind and emotions. It is considered one of the best ways to express one’s emotions. The choreography of a song says a lot about the song. Various traditional dance forms for example, Kathak have well defined routines and arrangement of steps that structures the entire dance performance. However, there are certain dance steps like the infamous “Gangnam Style” by pop singer Psy, that can stand alone and does not follow any structure.²³

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²“Khurana and Khurana, ‘Copyright Protection for Choreographic Works’ (Mondaq, 29 June 2021) < <https://www.mondaq.com/india/copyright/799134/copyright-in-dance-and-dance-steps>> accessed 23 August 2024

³Chadha & Chadha Intellectual Property Law Firm, ‘Protect your moves - A mix of Intellectual Property and Dance’(Lexology, 9 February 2021)

In the case, *Academy of General Education, Manipal and Ors v. B. Malini Malliya*⁴, the apex court held that a new dance form if expressed in writing, can be considered a dramatic work under copyright law. Through this case, it can be understood that for a choreography to be protected under the copyright law, it's a necessity that the choreography should be documented in some way or the other. It can only be eligible for registration if it's in writing or any other medium like video recording. Choreographers or the creators of the dance routine are considered the original author of the work. Section 2(d) of The Copyright Act, 1957⁵ defines author. Under Indian law, dance moves and routines are covered by the term 'choreographic work.' Choreographic works are not separately protected under copyright and falls under the ambit of 'dramatic works.'⁶ Section 2(h) of The Copyright Act, 1957 defines dramatic works as "Dramatic work includes any piece for recitation, choreographic work, or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, but does not include a cinematograph film."⁷ There is a distinction between a dancer and a choreographer.⁸ A choreographer is someone who creates the steps or a sequence of steps known as routine, while a dancer is someone who performs the routine and communicates it to the public. Dancer is included in the definition of Performer under section 2(qq) of The Copyright Act, 1957.¹⁰ The ongoing debate is about what qualifies as choreography and is eligible for copyright protection. Some argue whether a single dance move can be considered a choreography and be eligible for copyright protection. Some people also contend that arrangement of steps is what is referred to as choreography. Therefore, to be eligible for copyright protection, it's important to show a full choreographed routine.¹¹ In my interpretation of the act, it is the routine that is protected instead of a standalone dance step.

However, this generation is more inclined towards a 'single step' culture. The convincing evidence of this is reels on social media. It's not the complete choreography or the complete routine that is making the creator famous but instead it's a single step that sticks with the people and they start sharing it on social media. For example, 'Floss,' a dance step that gained massive popularity through social media. Celebrities and people of all age groups were sharing their videos of

⁴*Academy of General Edu., Manipal and Ors. v B. Malini Malliya* [2009] (4) SCC 256

⁵ The Copyright Act 1957, s 2(d)

⁶Chadha & Chadha Intellectual Property Law Firm, 'Protect your moves - A mix of Intellectual Property and Dance'(Lexology, 9 February 2021)

⁷ The Copyright Act 1957, s 2(h)

⁸ Himanshu Sinha, 'Copyright in choreography'(iPleaders, 18 March 2021)<<https://blog.iplayers.in/copyright-in-choreography-2/>> accessed 22 August 2024

⁹Chadha & Chadha Intellectual Property Law Firm, 'Protect your moves - A mix of Intellectual Property and Dance'(Lexology, 9 February 2021)"

¹⁰ The Copyright Act 1957, s 2(qq)

¹¹ Himanshu Sinha, 'Copyright in choreography'(Ipleaders, 18 March 2021)<<https://blog.iplayers.in/copyright-in-choreography-2/>> accessed 22 August 2024

attempting to perform that dance move on social media. The issue that is raised is ‘what is the threshold of creativity in dance choreography with regard to copyright.’

SOCIAL MEDIA AND COPYRIGHT CHALLENGES¹²

In 2020, a routine known as renegade broke the internet.¹³ It was a short dance routine that consisted of various popular moves such as ‘the dab’ and many more. The trend originally started on TikTok, but soon was seen on every social media application. Many were recording their version of Renegade and sharing it with others. Videos showed teenagers performing this routine as a victory dance, in pep rallies etc. Furthermore, many celebrities such as Kourtney Kardashian and the famous K-pop Band ‘Stray Kids’ also became part of the trend of ‘Renegade.’ But the one person who was not able to take credit for this routine and capitalise on this popularity was the original creator of the dance routine, Jalaiah Harmon. After some time, when she finally received recognition, the moment was gone and the dance routine which was once viral started to slow down. The social media platforms provide young teenagers with the opportunity to become famous and get recognised, but this is at the cost of someone else’s hard work. Due to large dissemination, the original creator misses out on the credit and is not able to capitalise on the popularity. Their dance routine or steps achieve widespread popularity without their involvement or recognition.

When choreographers create viral dances, they might want to protect it through copyright. However, sometimes the social media application makes it difficult for the original creators to protect their original work. For example, TikTok uses the ‘Browse wrap’ agreement¹⁴ which means that user agrees to TikTok’s conditions just by browsing the app. Its terms and conditions state that if you upload a video on TikTok, its legally theirs however the condition is that the creator also allows the platform and its partners to use their video in many ways without taking explicit permission from them. TikTok can use videos outside the app, create edits and remixes, share videos with other platforms and make money off the video without paying the original

¹²Ali Johnson, ‘Copyrighting TikTok Dances: Choreography in the Internet Age’ (2021) 96(3) WLR<<https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=5188&context=wlr>> accessed 22 August 2024

¹³Maryclaire M. Farrington, ‘Viral for the Wrong Reasons: Credit or Copyright for Short Choreographic Works?’(The Wake Forest Law Review, 29 October)< <https://www.wakeforestlawreview.com/2021/10/viral-for-the-wrong-reasons-credit-or-copyright-for-short-choreographic-works/>> accessed 23 August 2024

¹⁴Ronika Tater, ‘The browsewrap agreements and their enforceability’(iPleaders, 10 February 2021)<<https://blog.iplayers.in/browsewrap-agreements-enforceability/>> accessed 24 August 2024

creator.¹⁵The social media gives birth to many influencers which creates tension between the influencer and the original creator. The original creator created the expression or choreography however the popularity and fame that was gained was due to the influencer. This creates a complex landscape that involves various challenges.

OWNERSHIP AND COPYRIGHT IN DANCE

Unlike written works, dance can be more complex to prove copyright especially short snippets of dance or a single-step routine. For choreography to be eligible for copyright protection, it should fall under dramatic works. For choreography to be considered as dramatic work, it should meet these prerequisites:

- The dance should be in fixed form i.e., it should be recorded or written(documented) in some way or the other. It will not be considered for copyright, if it's the dance is in the performer's memory or is only performed live without any documentation.
- The choreography should not be a part of film or should be created for the purpose of being used in the film. If it's created for the film, it will not fall under dramatic work and will not be considered for copyright separate from the movie.¹⁶If a choreography is primarily made for a dance scene in the movie, it is considered as a part of that movie. As mentioned earlier, in this case, dance will not be considered as scene separate from the movie and will not be eligible for copyright purposes. This is because the dance is not treated separately from the movie and becomes part of the movie's overall protection. However, if dance is not created for a movie and is made on its own for e.g. for a music video, then it can be treated as a separate art and is eligible for copyright protection. Dance, to receive copyright protection should be separate and fixed.¹⁷
- Furthermore, the doctrine of "scènes à faire"¹⁸ can be applied to dance. The doctrine of "scènes à faire" refers to elements that are common to a particular genre and therefore not eligible for copyright protection because without these elements expressing that genre

¹⁵Ali Johnson, 'Copyrighting TikTok Dances: Choreography in the Internet Age' (2021) 96(3) WLR<<https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=5188&context=wlr>> accessed 25 August 2024

¹⁶'COPYRIGHT FOR DANCE CHOREOGRAPHY' (Kenya Copyright Board, 23 May 2023)<<https://copyright.go.ke/media-center/blog/copyright-dance-choreography>> accessed 25 August 2024

¹⁷Ali Johnson, 'Copyrighting TikTok Dances: Choreography in the Internet Age' (2021) 96(3) WLR<<https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=5188&context=wlr>> accessed 25 August 2024

¹⁸Vaibhavi Pandey, 'The Relevance Of Doctrine Of Scène À Faire In Copyright Law'(Mondaq, 8 January 2015)<<https://www.mondaq.com/india/copyright/365210/the-relevance-of-doctrine-of-sc%C3%A8ne-%C3%A0-faire-in-copyright-law>> accessed 25 August 2024

would not be possible. In the context of dance, certain movements, steps, or sequences of steps may be considered scenes faire because they are essential for a particular style of dance. For example, use of jazz hands in jazz cannot be copyrighted as it is an essential element when performing jazz. Basic ballet positions being fundamental to style cannot be copyrighted and cannot be claimed as original creations. This doctrine is applied in analysing the copyrightability of dance sequences. A choreographer cannot claim ownership or authorship over generic or standard moves that are expected in certain genres of dance. To be eligible for copyright, it's important that there is a unique arrangement of steps and creative expression originating from the creator in the choreographed piece. Applying this doctrine helps prevent the monopolisation of common moves and encourages creative innovations for the choreographers.¹⁹

Section 14 of The Copyright Act, 1957²⁰ provides creator of a work with various exclusive rights. These exclusive rights are necessary in nature as they provide protection to the intellectual property of the creator. These rights ensure that the original creator can maintain his/her control over how their work is used, thereby protecting their financial as well as their creative interests. Section 14 is further classified into categories such as artistic works, dramatic works and cinematograph films, computer programs. Section 14(a)²¹ provides protection to creators of dramatic works by giving them the control over how their work is used and capitalised. There are two important actors in an expression of dance: choreographer (creator) and dancer(performer). Section 14 talks about rights of the creator whereas Section 38 of The Copyright Act, 1957²² discusses the exclusive rights of performer.²³

Section 14(a): Exclusive Rights for Creators of Dramatic Works²⁴

1. Right to Reproduce Work²⁵
2. Right to Issue Copies²⁶

¹⁹Ali Johnson, 'Copyrighting TikTok Dances: Choreography in the Internet Age' (2021) 96(3) WLR<<https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=5188&context=wlr>> accessed 25 August 2024

²⁰The Copyright Act 1957, s 14

²¹The Copyright Act 1957, s 14(a)

²²The Copyright Act 1957, s 38

²³Ali Johnson, 'Copyrighting TikTok Dances: Choreography in the Internet Age' (2021) 96(3) WLR<<https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=5188&context=wlr>> accessed 25 August 2024

²⁴The Copyright Act 1957, s 14(a)

²⁵The Copyright Act 1957, s 14(a)(i)

²⁶The Copyright Act 1957, s 14(a)(ii)

3. Right to Perform the Work in Public²⁷
4. Right to Communicate the work to the public²⁸
5. Right to Make Adaptations²⁹
6. Right to Translate³⁰

Performer's rights protect the live execution of the work whereas the creators' rights protect the intellectual property of the work itself. Section 38A of The Copyright Act, 1957³¹ gives performer the control over how their performance is used.

- Right to record the performance
- Right to issue copies
- Right to Communicate performance
- Right to sell or rent recordings.
- Right to broadcast

Furthermore, Section 38B of the Act³² protect the performer's identity and integrity of their performance. This section grants rights to the performer which are enforceable even if they have sold or assigned their rights to a third party. Performers can stop others from distorting or modifying their performance in such a way that it would harm their reputation. (Moral Rights).³³ The threshold for creativity in dance choreography in India is not explicitly defined, but the Indian courts generally look at whether the work in question shows a minimal degree of creativity and is not purely generic i.e, it is not mechanical or a common sequence of steps.³⁴ Dance forms like Bharatanatyam, Kathak cannot be copyrighted, however, a derivative expression is copyrightable. In the case of Anupama Mohan V. State of Kerala³⁵, the petitioner was a famous Kuchipudi dancer who filed a writ petition against the Government of Kerala, for infringement of copyright. She accused the state of Kerala of circulating her dance performance, over which she had copyright,

²⁷ The Copyright Act 1957, s 14(a)(iii)

²⁸ The Copyright Act 1957, s 14(a)(iii)

²⁹ The Copyright Act 1957, s 14(a)(vi)

³⁰ The Copyright Act 1957, s 14(a)(v)"

³¹ The Copyright Act 1957, s 38A

³² The Copyright Act 1957, s 38B

³³ The Copyright Act 1957, s 38B(b)

³⁴ Himanshu Sinha, 'Copyright in choreography' (iPleaders, 18 March 2021) <<https://blog.iplayers.in/copyright-in-choreography-2/>> accessed 27 August 2024

³⁵ *Anupama Mohan v State of Kerala* [2015] WP(C). No. 22790 of 2015

without her authorisation/permission. The court ruled in favour of the petitioner and allowed the petition.³⁶

CASE STUDY

One of the most famous cases in copyright law in choreography is the lawsuits against “Epic Games.” The lawsuits were filed by various performers claiming that the company had copied their dance moves and turned them into “emotes” (short dance animations) in its famous game ‘Fortnite.’ The performers claimed that Epic Games infringed on their copyright by using their original dance creations.³⁷ However, due to ruling of US Supreme court, they had to withdraw the lawsuits temporarily as these dances were not registered with the U.S. Copyright office. Three of the most famous dances in these cases were ‘The Carlton Dance’, ‘The Milky Rock’ and ‘The Floss.’

THE CARLTON DANCE³⁸

This dance involves swaying the hips and stepping side to side, swinging the arms, and some additional simple movements. This dance was rejected protection under copyright law as the dance was a simple routine and a simple dance routine cannot be registered as a choreographic work. Therefore, due to basic nature of routine, the application was rejected by the US Copyright office.

THE MILLY ROCK

The rapper 2 Milly, sued Epic Games for copyright infringement, alleging that they were using his dance without any proper authorisation. However, the application for copyright was denied by the copyright office.

³⁶Khurana and Khurana, ‘Copyright Protection For Choreographic Works’(Mondaq, 29 June 2021)<<https://www.mondaq.com/india/copyright/799134/copyright-in-dance-and-dance-steps>>accessed 28 August 2024

³⁷ Laura Jiang, ‘Stolen Dance Steps in Fortnite’s Fortune: Resisting Ineffective Choreography Copyright Protection in Hanagami v. Epic Games, Inc.’(2024) CLR< <https://www.culawreview.org/journal/stolen-dance-steps-in-fornites-fortune-resisting-ineffective-choreography-copyright-protection-in-hanagami-v-epic-games-inc>> accessed 28 August 2024

³⁸ Brian Crecente, “Fortnite’ Dance Lawsuits: The Carlton, the Floss, the Milly Rock, What Is Going On?’(Variety, 18 December 2018)<<https://variety.com/2018/gaming/news/fortnite-dance-lawsuit-1203092141/>> accessed 27 August 2024

THE FLOSS

Unlike other cases, The Floss was registered under choreographic works. However, the creator was able to register a long version of floss as Copyright Office noted that individual dance steps are not copyrightable on their own.³⁹

THE CURRENT SITUATION: COPYRIGHT IN SOCIAL MEDIA DANCE TRENDS

Currently, there has been no progress on the issue that whether individual steps used on social media are eligible for copyright protection. In India, there are not many cases where choreographer claimed for copyright protection. However, with social media trends becoming more popular and generating more revenue, the question of who owns the rights to these dances has become more complex. Moreover, the social media influencers face dilemma in registering for copyright. They need their dance to be widely shared to become popular, but they also want the credit for it which makes it an irony.⁴⁰ If their dance is copyrighted, it would discourage people from using it which would defeat the purpose of uploading the dance on social media. If these dances are allowed to be copyrighted, many will face difficulty in using the routine for their personal celebrations or a non-commercial purpose.⁴¹ The creators are not aware about their rights or do not have the financial resources to enforce their rights. Furthermore, in copyright infringement, the person affected by infringement has to file the lawsuit. In social media, it is difficult to judge who has committed infringement due to social media's vast reach and accessibility. The nature of user-generated content allows for rapid sharing, remixing, and reposting, making it difficult to track the original source.

CONCLUSION

One of the solutions to this issue can be Creative Commons Licensing. Creative commons are a system wherein the creators grant permission to others to use their work under certain conditions.

³⁹Brian Crecente, "Fortnite' Dance Lawsuits: The Carlton, the Floss, the Milly Rock, What Is Going On?'"(Variety, 18 December 2018)<<https://variety.com/2018/gaming/news/fortnite-dance-lawsuit-1203092141/>> accessed 27 August 2024

⁴⁰"Ali Johnson, 'Copyrighting TikTok Dances: Choreography in the Internet Age' (2021) 96(3) WLR<<https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=5188&context=wlr>> accessed 28 August 2024

⁴¹Chadha & Chadha Intellectual Property Law Firm, 'Protect your moves - A mix of Intellectual Property and Dance'(Lexology, 9 February 2021)

Instead of all rights being reserved with the creator, Creative commons offer some rights reserved to the user making it easier for others to reuse, distribute the work. Creative Commons is legal and is valid in India. There are several types of Creative Commons License, and each offers different permissions.⁴² For example, Wikipedia, a well-known platform that uses a Creative Commons Attribution-Share Alike (CC BY-SA) license. This license grants permission to Indian users to edit content on topics related to India. The content generated under this project can be shared, modified, and reused by anyone, if proper attribution is provided, and the new work is shared under the same license.

Currently, the legal system in India requires dance choreography to be documented for copyright protection. However, mostly viral dances are short and informal, therefore making it difficult to match the threshold for protection. The ‘single step’ culture of social media blurs the line between creative expression and common movements.

⁴²Ali Johnson, ‘Copyrighting TikTok Dances: Choreography in the Internet Age’ (2021) 96(3) WLR<<https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=5188&context=wlr>> accessed 28 August 2024”