WISE WORDS
The Firm's Opinion

Dance Moves and Copyright

Aishwarya Chaturvedi
Associate

Copyright law gives the author of literary, dramatic works, composer of musical work, artist of an artistic work, producer of a cinematographic film and/or sound recording the exclusive right over their original creations. Choreographic works are explicitly included under the definition of "dramatic work" under the Copyright Act, 1957. But a ubiquitous conundrum is -does a choreographic work extend to single dance moves or does it apply only to works that combine a sequence of movements into a larger routine?

The term "choreography" has not been defined in the Copyright Act, 1957; however, the Canadian Copyright Act defines the said term as the design or arrangement of a staged dance, figure skating and also the sequence of steps and movements in dance or figure skating. ***Agnes de Mille***, an American dancer and choreographer pertinently stated in a comment submitted to the Copyright Office in 1959 that 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, and it may or may not be dramatic or tell a story. This implies that a broad class of works could fall under the ambit of choreographic work, thereby including an individual dance move as well.

Several factors such as the presence of rhythmic movements from a dancer's body in a defined space, compositional arrangement into a coherent, integrated whole, musical or textual (notations) accompaniment, and dramatic content such as a story or theme have to be taken into consideration while considering whether a work is "choreography". The composition and arrangement of dance movements and patterns are copyrightable as choreographic works, provided they meet two criteria:

The dance must be your original work: it must originate with you and show some minimal level of creativity.

The dance must be fixed in a tangible object. This might include a film or video recording of the dance, or a precise written description in text or in a dance notation system. An idea for a dance is not entitled to copyright protection, nor is a dance that has been performed but not notated or recorded.

However, there cannot subsist copyright in certain types of choreography such as:

Social dances

Discrete dance movements and simple routines

Ordinary motor activities and physical skills

Steps not choreographed and/or performed by humans

The issue of copyright subsisting in dance moves was dealt with in the celebrated Indian case Academy of General Education, Manipal and Anr. v. B. Manini Mallya , the Hon'ble Supreme Court of India considered the fair use doctrine. Yakshagana Ballet had been developed by one Dr. Karanth and was performed in New Delhi in September 2001. Manini Mallya, in whose favour Dr. Karanth had executed his will, filed a suit for declaration, injunction and damages alleging violation of copyright in respect to the said dance works vested in her in accordance with the terms of the will. The basis of her claim was that Dr. Karanth had developed a new and distinctive dance, drama troop or theatrical system, which he hadnamed as `Yaksha Ranga' which in his description meant "creative extension of

traditional Yakshagana" and, thus, the Academy had infringed the copyright by performing the form without obtaining prior permission from her. She stated that seven verses or prasangas for staging Yaksharanga Ballet had been composed by Dr. Karanth apart from bringing in changes in the traditional form; thereof, on its relevant aspects, namely, Raga, Tala, Scenic arrangement, Costumes etc.

An argument was raised that literary work is different from dramatic work. The Hon'ble Supreme Court observed that the difference between the two rests on the fact that a literary work allows itself to be read while a dramatic work "forms the text upon which the performance of the play rests". The question related to copyright in respect of a form of dance ballet, which had been developed by the testator. The Hon'ble Court held that such rights (rights to seven verses of the ballet as well as its theatrical or dramatic form) went to the respondent by virtue of her being the residuary legatee. Considering the fact that the Hon'ble Karnataka High Court had granted an injunction in favour of Ms. Mallya, the Hon'ble Supreme Court noted that the High Court modified the order of the trial Court stating that if the Academy desired to stage any of the seven Yakshagana prasangas in the manner and form as conceived by Dr. Karanth, the same could be done only in accordance with the provisions of the Copyrights Act, 1957, owing to the copyright in seven prasangas being vested with Ms. Mallya. The Hon'ble Supreme Court also opined that the High Court should have clarified that the Academy could take the statutory benefit of the fair use provisions contained in clauses (a), (i) and (l) of sub-section (1) of Section 52 of the Act. Elucidating upon the aspect, and dismissing the appeal, the Hon'ble Court observed as follows:

"When a fair dealing is made, inter alia, of a literary or dramatic work for the purpose of private use including research and criticism or review, whether of that work or of any other work, the right in terms of the provisions of the said Act cannot be claimed. Thus, if some performance or dance is carried out within the purview of the said clause, the order of injunction shall not be applicable. Similarly, appellant being an

educational institution, if the dance is performed within the meaning of provisions of clause (i) of sub-section (1) of Section 52 of the Act strictly, the order of injunction shall not apply thereto also. Yet again, if such performance is conducted before a non-paying audience by the appellant, which is an institution if it comes within the purview of amateur club or society, the same would not constitute any violation of the said order of injunction."

Interestingly, in certain circumstances choreography and even distinct moves have been accorded protection. For instance, the moves and choreography in the hundred-year-old West Side Story is iconic to the relevant segment of people who are acquainted with the said work. Owing to its popularity, it is also a work that many try to steal or imitate. In one of the seasons of the popular show “Dancing With The Stars”, one of the professionals tried to recreate the choreography. However, they were not allowed to use any of the iconic moves as it was, and if they did so, it could have posed severe problems for the ABC network. Therefore, copyright in the particular dance routine was acknowledged and what resulted was a dance that reflected the style of the musical, but not the same routine.

Presently, there is grave ambiguity about copyright subsisting in an individual dance move and most jurisdictions decide the aforesaid question in negative, and there is no doubt that copyright subsists in the artist's video taken as a whole. The US Copyright Office issued a circular published in 2017 stating that "short dance routines consisting of only a few movements or steps" cannot be registered, "even if a routine is novel or distinctive." The said circular categorically specified that "social dance steps and simple routines" will not be protected by copyright "even if they contain a substantial amount of creative expression." However, the position of the US Copyright Office is dynamic and changes from time to time inasmuch as in the year 1952, Hanya Holm, an American dancer and choreographer had submitted a system of dance notation of her choreography for the musical "Kiss Me Kate" for registration as a dramatic work. It was accepted by the Copyright Office, although the dances did not tell a story. This was reported to be the first time dance notation was accepted.

Often single dance steps become immensely popular and come to be associated only with the performer and/or choreographer and/or cinematograph film. Further, with the advancement of technology, such works now reach a wider and diverse audience who upon consuming the performance, begin to correlate it with the performer and even replicate the popular steps.

So can a dance move can be protected under the trademark law?

Tebowing or Kaepernicking are two signature dance moves for celebratory touchdown poses which acquired trademark registration for various types of clothes and apparel. It is clear that even though the players developed the move, used the move and gained popularity for the same and the name developed

from there but only the name of the dance moves were registered. So, it is possible to trademark a dance move, but just the name of it and not the move itself.

Therefore, if an individual dance move within a performance/ song video displays substantial originality and becomes significantly popular amongst the public, then in that scenario if another entity commercially exploits such dance moves, with the intention to gain monetary benefit from such use then such exploitation without the permission/ authorization of the copyright owner ought not to be permitted in certain circumstances. However, as has been established above, copyright does not subsist in most single dance moves and while considering if copyright subsists in such move(s),it needs to be contemplated whether or not the part of the work copied represents a substantial part of the choreography and it needs to be emphasised that "substantial part" is not constituted only depending on the amount of work copied, but on its substantial significance or importance in relation to the work as a whole. Furthermore, another aspect that needs to be taken into consideration is whether creation or reproduction of a work involved substantial use of skill and labour.

The most fundamental and crucial question that needs to be ascertained is whether the dance move(s) is original. The answer to this question is subjective and would differ from work to work; however, the same deserves to at least be deliberated upon inasmuch as it might actually involve an author's copyright being exploited by another person without permission for monetary gain, under the garb of fair use. The essential criteria for copyright to subsist in a work is that the work must be original and in tangible form. For instance, if a single dance move which is repeated multiple times to form a "sequence of steps" becomes so recognizable that even when performed by an animated character, it can be immediately distinguished from all other dance moves and/or choreography, resulting in association of the same with an individual performer/ artist/ choreographer/ cinematograph film, it must have some degree of originality for it to be protected. In such a scenario, the rights of the performer and/or choreographer should not be compromised by allowing the user of such work(s) to gain monetary benefit by cashing upon the performer's/ choreographer's work and popularity. The rationale behind Copyright law across jurisdictions is to balance the interests and equities of the copyright owners and the public at large. Therefore, the law promotes dissemination of knowledge through as many modes as possible so that more people can consume it; however, the law does not justify unjust enrichment by an entity by way of exploiting the original works of a copyright owner without due permission/ authorization. Thus, even though it is acknowledged that the prevalent law is that there can be no copyright in most individual dance moves, the same is not a line in the sand.

Author

Aishwarya Chaturvedi

Aishwarya is currently working with Singh & Singh Law Firm as an associate and her practice areas include Copyright and Trademark litigation. She has authored the book "The Unheard Predicament: Social and Legal Perspective on Women and Child Rights in India." She also has a keen interest in women and child empowerment and runs an NGO by the name Nirman.