

# Who can profit from dance?: An exploration of copyright ownership

Waelde, C, Whatley, S & Pavis, M

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## Who can profit from dance? An exploration of copyright ownership

### Abstract

*Focusing on UK copyright law, this article explores ownership of the dance by reference to the work of disabled dance artists. Our attention is on this group because their position within the dance workforce has always been precarious and so perhaps have most to gain through greater recognition of authorship in their work. Through an examination of the law as it applies to two different projects featuring Caroline Bowditch, we suggest that, contrary to the views of some, the performers are either authors of the copyright in the arrangement of the dance on their bodies, or joint authors in the work of dance. This is important because the author is the first owner of copyright in a dance; income from exploitation generally flows to the owner. With the rise of social media there may be yet further opportunities for exploiting dance. Starting from a doctrinal legal perspective, and bringing together dance and law to explore the vexed questions of cultural value, audience literacy and commercial exploitation, we hope to bring attention to the labour of disabled dance artists and the different ways in which all dancers can assert the rights to their work. In taking this approach this contribution differs from recent scholarship on dance and law, most notably works by Anthea Kraut, *Choreographing Copyright: Race, Gender, and Intellectual Property Rights in American Dance* (Oxford University Press, 2015) and Caroline Picart, *Critical Race Theory and Copyright in American Dance: Whiteness as Status Property* (Springer 2013). These analyses examine dance and American copyright law through race and gender lenses. Reading across the contributions would suggest that the time is ripe for a truly interdisciplinary project in which experts from law, dance and, disability studies come together to deepen and extend our knowledge and understanding of this area.*

Commercialise to survive: this is one strong message being given by the Arts Council England to the creative sector in the UK. In a time of tightening purse strings, alternative modes of financial survival have to be developed which do not depend wholly on public funding. One of these may be through greater commercial exploitation of creative outputs. Dance is no exception to this policy focus. Commercial exploitation of dance would depend on the exclusive rights granted under the copyright framework. Fundamental to developing an exploitation strategy would be to identify the author and owner of the copyright in the dance. This is an area that has been underexplored in law: there is little case law or literature on dance and copyright, but there are certain assumptions within the dance community, though not often voiced, as to authorship and ownership.

Drawing on our work as part of the Arts and Humanities Research Council funded project, *InVisible Difference: Disability Dance and Law*,<sup>1</sup> and on our earlier published works,<sup>2</sup> this article explores the ownership of the dance with a specific focus on the practice of disabled dance artists. Their position within the dance workforce has always been precarious so perhaps have most to gain through greater recognition of authorship in their creations. With a focus on two different projects featuring choreographer and performer Caroline Bowditch, the article will question whether the law would recognise the dancers as either copyright authors of the copyright in the arrangement of the dance on their bodies, or joint copyright authors in the work of dance. This is important because the author is the first owner of copyright in a dance;<sup>3</sup> income from exploitation

generally flows to the owner so it could have implications for how dance and dancers are funded. With the rise of social media there may be yet further opportunities for commercialising dance, which could be a valuable additional stream of revenue as public funding is being gradually withdrawn from the arts. By bringing together dance and law perspectives to explore the vexed questions of cultural value, audience literacy and commercial exploitation, we thereby hope to bring attention to the labour of disabled dance artists and the different ways in which all dancers can assert the rights to their work.

### ***The case studies***

Our focus is on two dance projects that both feature Bowditch with whom we have been working closely during the currency of our *InVisible Difference* project. Each provides a case study to reflect on the extent to which disabled dancers are in a position to claim a particular right of ownership in the dance they create and/or perform. Bowditch is one of the dancers in our first case study, *Love Games* (2012) choreographed by Joan Clevillé for Scottish Dance Theatre. Our second case study, *Falling in Love with Frida* (2014), was created and performed by Bowditch accompanied by Welly O'Brien and Nicole Guarino.<sup>4</sup> In each case study, Bowditch fulfils different creative roles. Whilst in her interpretation of *Love Games* her input would be associated with that of a performer, she holds the position of choreographer in *Falling in Love with Frida*. However, as this analysis further explores the creative dynamics of each piece, it reveals a more nuanced distribution of roles between Bowditch and her collaborators. This discussion points to places where Bowditch's input blurs the lines of any rigid distinction between choreographing and performing. We contend that those nuanced patterns of collaboration may be in part attributable to the dancers' unique physicality. Further, we explore the degree to which the presence of disability in dance may shift traditional boundaries laid between choreographers and performers. Because many assume that the legal ownership of the work will be awarded to the artist who can be regarded as the lead choreographer in the creative process, the extent to which those boundaries have been shifted by the presence of different dancing bodies becomes a pertinent question for both dancers and lawyers.

### ***Love Games***

Clevillé choreographed *Love Games* in 2011. His piece stages a duet expressing on stage a male-female relationship exploring the dynamics of a male/female relationship that is playful and affectionate. Originally interpreted by two non-disabled performers, Naomi Murray and Jori Kerremans, *Love Games* conveys moments of gentle touching, embracing, and lyrical lifts and swoops are interspersed with more dynamic confrontations. The dancing is marked by an easy fluidity, a spirited youthfulness and athleticism as the dancers move through a sequence of intricate entanglements. Murray conforms to the image of the 'dancer's body'; she is long-limbed, long-haired and graceful. Her femininity is highlighted by the male partner, the stronger of the two, who supports Murray and lifts her with ease. The performance upholds many of the conventions of a typically hetero-normative duet.

In 2012, Bowditch moved into Murray's role and imposed a new frame upon *Love Games* where traditional gender roles are blurred. The female 'dancerly body' is refracted through the very different physicality of Bowditch dancing in her wheelchair. In many ways the recasting illustrates the translation of a role from one dancer to another but

within a mainstream theatre dance context it amplifies the politics of translation and adaptation. Bowditch's wheelchair opens up a different dialogue on the stage space. So often a powerful signifier of disability/immobility, her wheelchair is now enabling, signifying mobility, independence and the power to support. Bowditch manoeuvres her chair with a technical virtuosity equal to the technical feats of the non-disabled dancers, integrating the chair into her dancing in a way that chimes with Albright's description of Charlene Curtiss's dancing:

[Curtiss] claims the chair as an extension to her own body [and] revises the cultural significance of the chair, expanding its legibility as a signal of the handicapped into a sign of embodiment.<sup>5</sup>

Bowditch's chair acts as her partner, supporter and transporter. Although Bowditch's recasting may not be aimed at gender re-balance, her control of the chair diminishes the role of her male partner, making his role equal to her own. Murray's version concludes with the rest of the ensemble entering and interrupting the duo on stage and she moves away from her partner; Bowditch's ends with the duo alone on the stage. She turns first towards and then away from the audience and moves in a lilting pathway upstage as the man stands away, leaving the space to Bowditch. It has a wistful quality, but she seems neither forlorn nor abandoned.

An extract of Bowditch's recasting of *Love Games* is available online.<sup>6</sup> In the film, Bowditch has re-composed the two 'versions' of the duet to run on screen side-by-side. On the left, the 'original' version features Murray and Kerremans. The second video captures Bowditch's performance of Cleville's piece with the same male partner. Bowditch's screen composition emphasises the connections and differences between the two versions whilst also placing herself in an authorial position by inventing a new version that creatively juxtaposes the two duets.

### ***Falling in Love with Frida***

The second work is *Falling in Love with Frida (FILF)* choreographed by Bowditch and which premiered in May 2014.<sup>7</sup> Made for gallery spaces and designed to create an intimate relationship with a small audience, *FILF* developed out of a period of research into Mexican artist Frida Kahlo (1907-1954), known for her art, particularly her portraits, and not so much her disability. Bowditch's project is part homage, part re-imagining of Kahlo's relationship with her changed body post a devastating accident, and part reflection on how disability has intervened in the twists and turns that her own life has taken towards her career as dance/performance artist. A series of danced vignettes reveal different episodes in Bowditch's life intertwined with Kahlo's. Bowditch performs pleasure in telling stories about her own sexual experiences, frankly sharing the realities of what it means to have sex as a disabled woman. But it is less clear whether this is real or fiction, invented for the performance as a reflection on Kahlo's own emerging sexuality or contrived as Bowditch's imagined relationship with Kahlo. By finding a theatrical form for her 'love affair' with Kahlo, Bowditch is showing us something of Kahlo's hidden life, the life behind the paintings. The shifting gaze between Bowditch and Kahlo, between the visual artist able to 'hide' her disabled body from the viewer and performing artist who puts her body on show, between the artist of the past and the contemporary performer, inscribes the multiple layers operating within the work as well as the multiple gazes that the disabled performer is subject to. Bowditch is both narrator and central character, joined by the other performers who dance with her or dance out the layers of the narrative through their own collaboratively choreographed material.

Bowditch's desire to bring attention to Khalo's disabled body provides her with ideas about how to transmit her and her dancers' own somatic experience of physical impairment as source for creating a poetic performance work. Bowditch's 'curation' of the dancers' bodies seems to follow Mark Franko's observation that whilst the dancers' knowledge is inscribed in their bodies they are also led to take their own bodies as objects of transformable knowledge and language as material for different arrangements of corporeality. The choreographer is thus frequently the curator of the dancer's body, taking that body 'out of the carceral condition of discipline and into a culturally generative field of creative activity'.<sup>8</sup> And yet the work might be seen to de-centre disability; the physical disabilities of the dancers are neither accentuated nor hidden, the disability simply exists. What emerges is a poetics of disability that defamiliarises the body as it is normalised within performance practice. Bowditch's role as both choreographer and performer is not unfamiliar, neither is her dance making process that encourages the dancers to be contributors to the choreography. In these cases dancers are often credited for their contribution in various ways but when it comes to attributing the 'author' and 'owner' of the work in legal terms, it is the named choreographer who usually claims this right. But the ontological nature of the creation and performance of dance complicates what might be regarded as a straightforward legal authorship and ownership of copyright in dance.

### ***Copyright and the dance***

Copyright and dance entertain a difficult relationship because the two disciplines negotiate with the notion of fixation on different terms.<sup>9</sup> Whilst copyright entirely relies on fixation for its existence - it is when the dance is recorded that copyright in the piece arises<sup>10</sup> - dance tends to resist it. Within the discipline of dance, some view the fugitive nature of the dance as presenting particular problems for capture; others point to the technicalities of the art form occupying both space and time as being too challenging for fixation.<sup>11</sup> Yet the dance has also been referred to as fixed or 'set' in the 'memories and bodies of the dancers where the bodies are considered material objects.<sup>12</sup> For many, however, the idea of recording choreographic works remains an anathema: the dance is meant only to be ephemeral - to exist at the time of performance where fixation ossifies the work.<sup>13</sup> Thus, the capture, or recording, of the dance in some material form - such as in the film - brings us precisely to the tricky interface between the law of copyright and the dance.

Copyright is a right that gives to the owner the exclusive prerogative to authorise or prevent the reproduction of the dance in a variety of different ways - such as by reproducing a film containing a dance, and making a film of a dance available on the internet.<sup>14</sup> Just as the owner can prohibit these types of uses of a dance without permission, so can she permit others to copy or perform the dance in return for payment - such as in the form of royalties. In other words, copyright is the legal foundation on which (commercial) exploitation of the dance can take place. One of the underlying justifications for the law of copyright expects artists to be more willing to create if financial returns on the use of their work by third parties can be secured. Simply put, it is a mechanism designed to encourage creators to create, which functions on the assumption that monetary concerns contribute to driving individuals' creativity. Indeed, copyright is the legal mechanism through which the majority of our creative sectors operate, including the music, publishing and film industries. Unlike these industries however, the dance community has seemed hesitant about identifying and asserting rights. That is not because participants do not know about copyright: our research with

dancers and choreographers has shown that many are aware of its framework, but it seems rarely to be of concern in their artistic endeavour.<sup>15</sup> What is rather more important, particularly to those who work alone or in small groups, is the process of creation of the dance and all that brings with it.<sup>16</sup> The work of individuals and collectives tends to be funded through a variety of means including public funding.<sup>17</sup> Artists often hold a portfolio of jobs to support their creative work. In this picture, the exploitation of the dance based on copyright plays a very small part.<sup>18</sup> However, given the tightening of the public purse strings and the focus on commercial exploitation as one strategy for financial survival of the arts, this may (have to) change. Once the dance has been fixed, and copyright in the dance arises, questions over authorship and ownership of the dance need to be addressed.

### ***So who has authored, and who owns the dance?***

So who has authored, and who owns the dance?<sup>19</sup> To answer this question, the legal framework requires us to identify the nature of the work at stake first, and then, who made the right legal authorial contribution to that work in order to be regarded as its author by law. There seems to be a clear assumption in the dance community that the choreographer is the author of the dance and the owner of the copyright in it. This comes across in interviews with choreographer,<sup>20</sup> and in the literature both by<sup>21</sup> and about choreographers.<sup>22</sup> The Copyright, Designs and Patents Act 1988 (CDPA), which is the current act that regulates copyright in the UK, however says nothing about choreography or choreographic work but does provide that a dramatic work includes a work of dance<sup>23</sup> and the author is the person who creates that work.<sup>24</sup> UK case law on identification of a dramatic work is sparse. It seems that a dramatic work cannot be purely static and should have some movement, and a story or action,<sup>25</sup> and should be capable of being performed<sup>26</sup> but we know little beyond that. If we look at the case study examples above, is *Love Games* a work of dance and if so, is Clevillé as choreographer the author and owner of the copyright? Is Bowditch the author and owner as a dancer? Or are both authors and owners? Assuming that *FILF* is a work of dance, is it Bowditch as choreographer who is the author and owner in the copyright? Or is it O'Brien and Guarino as dancers? Or are they all authors and owners in law?

### ***What is the dance?***

While UK case law on identifying a dramatic work or work of dance for the purposes of copyright is scarce,<sup>27</sup> the position is currently complicated by the development of jurisprudence from the Court of Justice of the European Union (CoJ). Over recent years many copyright questions have been referred to the CoJ for interpretation, including ones concerning originality for the purposes of copyright law.<sup>28</sup> The notion of originality is central to copyright: a work must be original in the legal sense for copyright to subsist in a work. The CoJ has stressed that the European scheme of protection copyright protects works where the subject matter is original in the sense of being the author's intellectual creation.<sup>29</sup> What the work is called, in other words whether it is a work of dance being a subset of the category of dramatic works, is irrelevant.<sup>30</sup> The standard of originality for all types of work is the same: it is one of intellectual creation.<sup>31</sup> To reach this level the author should express her creative ability in an original manner by making free and creative choices,<sup>32</sup> and stamp her 'personal touch' on the work.<sup>33</sup> Where choices are dictated by technical considerations, rules or constraints, which leave no room for creative freedom, then these criteria are not met.<sup>34</sup>

In the light of these tests and looking to the reproductions on YouTube and on Vimeo, there seems to be little doubt that *Love Games* and *FILF* are both works of dance for the purposes of copyright law (where the word ‘work’ is used advisedly in the light of the CoJ case law which suggests that it may no longer be necessary to place a work into any particular category).

### ***What is the authorial input?***

The next question is as to what is the input that is necessary for the purposes of being classed as an author for copyright law, and what instead (or as well) might be considered in the nature of performance and therefore protectable by performers' rights. As with dance, there is only limited case law considering the authorial requirements in respect of dramatic works. In *Brighton v Jones*,<sup>35</sup> the Court considered whether a director and playwright were the joint authors of a play. One argument was made in respect of the contributions made during the course of rehearsals. The judge noted that one collaborator, Miss Jones, the defendant and the person claiming that she was the sole author of the copyright in the play, had produced the plot of the play in advance of rehearsals. In addition, and while Miss Brighton, the claimant and the person claiming that she was a joint author of the copyright in the play, had suggested ideas for the dialogue, the decision on whether these were taken up were for Miss Jones. These, the court found to be ‘contributions to the interpretation and theatrical presentation of the dramatic work’<sup>36</sup> rather than to composition of the work itself.<sup>37</sup> Thus this was not the right sort of authorial input for the law to recognise Miss Brighton as a joint author of the copyright. Miss Brighton would have had to have contribute to the ‘composition’ of the work. In *Coffey v Warner*<sup>38</sup> concerning a musical work, voice expression, pitch contour and syncopation were found to be elements in the ‘interpretation or performance characteristics by the performer’ which was not ‘the legitimate subject of copyright protection in the case of a musical work, rather than to composition, which is.’<sup>39</sup> So the performer contributing these elements to a work was not found to be a joint author for the purposes of copyright. However, a number of observations can be made around difference that arise with *Love Games* and *FILF*. *Brighton v Jones* was not concerned with the input into the work by the performers, but rather by those in charge of realising the performance. Further, it is acknowledged that where a dancer interprets the work of a choreographer, and there is no room for the dancer to make creative choices, then authorship of the dance resides with the choreographer, and performers’ rights are the appropriate mechanism to protect her interests. But there is a real (and legally observed) difference between that type of dance, and a dance to which the dancer brings her own input to the creation of the work. The more that the creation of the dance is an iterative, collaborative process between the choreographer and dancer, the more such input must be recognised as being of the right sort to be considered authorial for the purposes of copyright, whoever has made that input.

### ***What is Fixation?***

One final requirement for the subsistence of copyright in the dance that needs to be considered is the requirement of fixation, or recording, of the work. Although there is no requirement of fixation in the international framework for copyright to subsist,<sup>40</sup> the law in the UK does require that the work be fixed in some material form:<sup>41</sup> copyright only arises on fixation. What form fixation takes is left open and needs only to be ‘in writing or otherwise’.<sup>42</sup> Traditionally fixation has been thought of as being in writing, reflecting the historical text-based roots of copyright law. For dance, one of the more commonly

used notation systems such as Labanotation or Benesh might be deployed, both of which have relatively modern origins, having been invented in the mid-twentieth century. In common with many contemporary dance works, neither *Love Games* or *FILF* have been notated but other forms of dance fixation are equally relevant including film and video (YouTube and Vimeo), as well as computer generated recordings such as motion capture and holography.<sup>43</sup>

### ***Bowditch and Copyright***

So what of the recasting of *Love Games* and of *FILF*? Where does Bowditch stand in relationship to the authorship and ownership of these dances? Whatever may be thought of the fixation requirement, the parts of *Love Games* that are available on YouTube, and *FILF* on Vimeo have been fixed in a form that is sufficient to meet this prerequisite.

Copyright law often recognises layers of copyright in a single work. If the choreographer is to be considered the owner of the copyright in the dance, it might follow that the dancer could be considered an arranger of the choreography on her body, similar to the ways in which musicians might be considered as arrangers of an underlying musical score.<sup>44</sup> The dance may be 'placed on the body' by the choreographer, but there is room in interpretation and arrangement on and through the dancers' body for authorial intent sufficient for copyright. Bowditch's arrangement of *Love Games* on her body, interpreting Clevillé's choreographic intent, is visibly different from the dance performed by Murray. It seems unarguable that Bowditch's personal touch is stamped on her recasting of *Love Games*. It is only Bowditch who knows how her body operates. It is only Bowditch who could produce the dance in the form that she has. So in *Love Games* it could be argued that there are two authors of copyright: one in the composition of the dance, Clevillé, and one in the arrangement on her body, Bowditch.<sup>45</sup>

And what of *FILF*? On asking Bowditch and Kimberley Harvey (who was involved in early studio rehearsals but not the final production) 'who owned the dance?' the response by Bowditch was that the *ideas* were hers for which she would be credited as choreographer but it was the dancer's *dance* and they would be credited as collaborators. Overall however Bowditch thought that '*people want to be part of it, not own it*'. For Harvey, Bowditch owned the dance and it was her (Harvey's) professional intent to interpret Bowditch's ideas. Bowditch certainly has the ideas, but such is her choreographic method that not only at times does she direct the dancers to interpret those ideas, only asking that they say if they need input, but also, from time to time, she intervenes to set particular movement sequences. However, ideas are not protected by copyright,<sup>46</sup> so the question here is whether Bowditch's input is sufficient for authorial copyright.<sup>47</sup> Observing Bowditch working in rehearsals it was clear that Bowditch does provide significant input. While she gives the dancers space to interpret her ideas, and, in line with the points made above, only Guarino and O'Brien who have performed the dance with Bowditch really know how their bodies will interpret the dance, Bowditch also is actively engaged in setting the dance on the bodies of the dancers as the work develops. The creation of the dance involves active collaboration between the three of them. The process of creation of the dance, its interpretation and expression on the bodies of the dancers, have fused in to one in which individual contributions are indistinguishable, and which, once captured, is a work of dance protected by copyright. Bowditch, O'Brien and Guarino are effectively joint authors of the copyright in *FILF*.

The question arises as to whether the position would be different with non-disabled dancers and choreographers. Looking first at *Love Games*: although it might be argued that every performance requires at least some ‘translation’ from one body to the other every time the piece is interpreted by different dancers, whether there would be enough legal originality for the later one to be regarded as an ‘arranged’ version of a previous performance, is a moot point.<sup>48</sup> The answer is likely to turn, in large part, on the creative space that the choreographer gives to the dancer to interpret the work. If the dancer is to interpret it exactly as the choreographer demands, then, contrary to the position with a disabled dancer, a new copyright is unlikely to arise in the arrangement. Which leads to the somewhat ironic position that the disabled dancer may prefer to be treated no differently from any other dancer. That said, such a conclusion does not suggest that the law creates a distinct class of rights for disabled artists. Rather it stems from the manner in which copyright law operates and understands originality. This body of law looks objectively at what is presented by artists, and applies the law to determine whether there is the ‘right kind’ of originality in a work for the purposes of the subsistence of copyright. That, from a legal perspective, does not make disabled dance a distinct class; what it does is to make disabled dance original in the eyes of copyright law. That legal assessment would be no different from any other legal assessment of originality in any other type of work.

The position with *FILF* is different because of the different process of the creation of the dance as described above. Here, the way authorship and ownership of the work is allocated has little to do with the choreographer’s and performers’ disabilities. Shared ownership emerges through Bowditch’s choreographic method in *FILF* that actively encourages each dancer to be a contributing artist. Had none of the dancers involved in the piece been dancers with disabilities, the same apportionment of rights would have arisen. Here the disabled dancer is on equal terms with the non-disabled dancer.

### ***Commercialisation of the dance***

As noted above, the author of the copyright in the dance is usually the first owner unless, in the UK, she is an employee acting in the course of employment in which case the employer will be the first owner. This is not the situation in the case studies discussed above as the dancers are not employees, and we are claiming that the dancers, as authors, are the first owners of the copyright in the dances. Therefore, as owners of the copyright, Clevillé, Bowditch, O’Brien and Guarino could share in the returns from allowing others to reproduce the dances in return for royalties or other forms of payment. While some have doubted whether earning an income from such exploitation would be possible, it should be remembered that new revenue generating strategies made possible by social media are only in their infancy. One example is advertising revenue that is generated when YouTube videos are accessed and watched. For videos with advertisements associated with them, each time that a video is watched, a payment is triggered, a percentage of which goes to the owners of the copyright in the video. If an advertiser chose to be associated with a dance work in which one of the dancers owned the copyright, then she would be entitled to a share of the revenue – which makes it so important to identify the owner of the copyright. Many more opportunities are likely to emerge in the future.

Such a strategy would be in accordance with Arts Council England’s (ACE) exhortations to the creative sector to make themselves ‘resilient and innovative’<sup>49</sup> because of the probable decreases in public funding in the wake of austerity measures. One way to

achieve that, it concludes, is through ‘strengthening business models in the arts [and] helping arts organisations to diversify their income ...’.<sup>50</sup> Specifically in relation to dance the pages of the ACE website state that it will:

... support the development of entrepreneurial skills to ensure that companies, artists, and producers have a deeper sense of their markets and how to position themselves.<sup>51</sup>

The message from ACE is clear: artists (and art-forms) will only survive and thrive if they diversify and commercialise.

### ***Cultivating audiences***

The message from ACE implies that in order to have commercial success in the market, dance needs to cultivate a greater sensitivity to the market.<sup>52</sup> And in order to cultivate a greater sensitivity, there needs to be an audience for the dance. One strand of our research in the *InVisible Difference* project, was an assessment of how audiences respond to dance by disabled performers through three lines of enquiry.<sup>53</sup> The first was through an analysis of audience responses to YouTube videos of disability dance; the second was by way of a survey of literary criticism of disabled dance, and the third was through the dancers’ own experiences of audience reaction. What emerged through three distinct strands was a single and consistent story: there is a significant mismatch between the ways in which disabled dancers think about themselves, their work, and the place of disability in that work on the one hand, and their lived experiences in professional dance on the other. While they think deeply about movement content, intentions, concepts, presentation, etc., espousing notions of variation, transformation, and equalisation, audiences and critics are much less likely to engage with these critical aspects of their practice. Instead, our research exposed that viewers tend to focus on binary concepts of bodily difference and deviations from the ‘normal’ dancing body. The dancers might like to control or at least profoundly shape the ‘stare’ to which they are subject, highlighting the fluidity and multiplicity of identity, and the connectivity of people to their environment, technologies and others but doing so requires building relationships with audiences.

The analysis of YouTube and critic surveys, and interviews with artists, revealed that audiences lack a critical language to discuss the work. Responses to dance by differently-abled dancers, seems at least in part due to a deeply entrenched idea of disability being an individual physiological condition, and of bodies characterised by difference or variation being a transgression from the norm. Such overpowering and largely negative ideas too often appear to blind audiences to the deeper (although sometimes more obvious) narratives being conveyed, and to the quality of the movement and structural properties of the work. While critics *could* play an important role in tutoring audiences, many critical accounts tend to reinforce a dominant discourse associated with a normative dancing body, focusing only on the disability or avoiding any reference at all to the impaired dancing body. Underpinning this shortcoming is the absence of an audience appreciation of the ‘viewing strategies’ facilitative of understanding and so better appreciating disabled dance.<sup>54</sup> As a consequence, the disabled body continues to be marginalised and struggles for legitimacy in the professional dance sector.

So while on the one hand copyright could underpin a developing business model in which dancers could share, the current state of audience reception for their work would

mean that independent commercial survival – of the sort envisaged by ACE – would be exceptionally precarious. Indeed, it is likely that copyright revenues would fail to fulfil the financial support previously granted by public funding. That is because the two sources of incomes pursue entirely different objectives and therefore interact with the market in different ways. Whilst public funding operates in part as a springboard for artists who are located at the margins to obtain initial points of contact with their audience, intellectual property incomes can only be triggered once artists have successfully entered their market and established the mechanisms for generating income through copyright. In other words, public funds enable artists to *meet* their audience without conditions of commercial success, whereas copyright royalties require artists to have *found* their audience in order to generate any stream of revenues. Public funding and copyright revenues come into play at different times and serve different functions in an artist's professional practice. The former targets communication of artistic works to the public, the second monetises its commercialisation on a mass scale. For this reason, if new business models are to yield positive change for the dance sector both financial instruments should be geared towards relaying but not replacing each other.

## Conclusion

We noted in the introduction that the strong message emanating from ACE to the cultural sector is 'commercialise to survive'. Whether or not this is a message that is helpful for the way in which the dance community is organised, or aligns with the common working principles of dance artists, we have shown that copyright law would see dancers with disabilities as authors and owners of the copyright in their dances. Using the rights associated with ownership, the dancers could commercialise their work in the marketplace. However successful commercialisation depends on positive audience reaction to the work and a sophisticated critical engagement with the work. As yet, audiences find it challenging to judge the work on its merits.

While disabled dance artists participate in educating their audiences through publicity materials and the work itself, they cannot be expected to act alone. While the view that disability is a medical problem in need of a cure may be slackening its hold on the public psyche and thus challenging assumptions that disabled dance is primarily a therapeutic practice, there is still a long way to go before dancers with disabilities are treated on equal terms as those without disabilities. As disabled dancers and choreographers have told us: 'we don't want to be viewed as great disabled dancers; we want to be viewed as great dancers'.<sup>55</sup> If dancers are to achieve their aim of being viewed as great dancers, and to meet ACE's aspirations for dance to become commercially viable using copyright as the legal vehicle, then it follows that more attention should be given to audience literacy. More knowledgeable audiences would help to bridge this liminal gap and facilitate meaningful and informed discussions over what is good versus what is mediocre (disabled) dance, a development that differently-abled dancers crave and deserve. This, in turn, could help push production organisations (e.g., theatres and repertory dance companies) to make space for disabled dancers and productions of disabled dance, thus increasing audiences (and audience demand) for the dance.

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<sup>1</sup> AHRC grant number AH/J006491/1. See for the project's official website: [www.invisibledifference.org.uk](http://www.invisibledifference.org.uk); AHRC grant number AH/J006491/1.

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<sup>2</sup> Charlotte Waelde, Sarah Whatley and Mathilde Pavis, 'Let's Dance – But who owns it?', *European Intellectual Property Review*, Vol. 36 (2014):217-228.

<sup>3</sup> Unless, in the UK, the author is an employee and acting in the course of employment, in which case the first owner of copyright will be the employer. Copyright, Designs and Patents Act 1988 s 11(2).

<sup>4</sup> It must be noted that the British Sign Language interpreter in the rehearsals and performance, become in effect another performer through her close integration with the dancers within the theatrical setting.

<sup>5</sup> Ann Cooper Albright, *Choreographing Difference; The Body and Identity in Contemporary Dance*(Hanover: Wesleyan University Press, 1997) p. 83.

<sup>6</sup> *Love Games*, film, choreographed by Joan Clevillé. Dundee: Scottish Dance Theatre, 2012. The film is available at: <<http://www.youtube.com/watch?v=6YEtEyr6N4g>>(last accessed September 2015)

<sup>7</sup> *Falling in Love with Frida*, film, choreographed by Caroline Bowditch, Edinburgh, Dance4, 2014. A promotional video on Vimeo can be found at <https://vimeo.com/102615217> (last accessed September 2015).

<sup>8</sup> Mark Franko, 'Archaeological choreographic practices: Foucault and Forsythe' in *History of the Human Science*, Vol. 24, no 4, (2011): 100.

<sup>9</sup> This point of friction between dance and law is the main focus of a rather meagre body of legal literature dedicated to studying the art form that limits its interdisciplinary exploration to this particular primary issue without offering any deeper investigation beyond this point. See for example, Meredith Cook, 'Moving to a new beat: copyright protection for choreographic works' *UCLA Law Review*, Vol. 24, (1977): 1287; Martha Traylor, 'Choreography, Pantomime and the Copyright Revision Act of 1976' *16 New England Law Review*, Vol. 16 (1981): 237; Katie Lula, 'The pas de deux between dance and law, Tossing copyright law into the wings and bringing dance custom centerstage.' *Chicago Kent Journal of Intellectual Property*, Vol. 5, (2006): 182 ; Evie Whiting, 'Square Dance : Fitting the Square Peg of Fixation into the Round Hole of Choreographic Works', *Vanderbilt Law Review*, Vol. 65, (2012):1261; Edwina M Watkins, 'May I Have This Dance?' Establishing a Liability Standard for Infringement of Choreographic Works' *Journal of Intellectual Property Law*, Vol 10, (2003): 437.

<sup>10</sup> CDPA s 3(2),

<sup>11</sup> Cook, M 'Moving to a new beat: copyright protection for choreographic works' 1977 24 *UCLA L Rev* 1287.

<sup>12</sup> Traylor, M. 1981. 'Choreography, Pantomime and the Copyright Revision Act of 1976.' *New England Law Review* 16: 227, 237.

<sup>13</sup> See for instance, Paul Théberge, 'Technology Creative Practice and Copyright', in Simon Frith and Lee Marshall (eds) *Music and Copyright* (Edinburgh: Edinburgh University Press, 2004, 2nd ed) pp. 139-140.

<sup>14</sup> CDPA ss 16-21.

<sup>15</sup> Charlotte Waelde and Patrick Schlesinger, 'Music and Dance: Beyond Copyright Text?', Vol. 8, No 3 *SCRIPTed* (2011): 257 <<http://script-ed.org/?p=83>> (last accessed September 2015).

<sup>16</sup> Waelde and Schlesinger, 'Music and Dance: Beyond Copyright Text?' 257.

<sup>17</sup> *Ibid.*

<sup>18</sup> Things are different for the large concerns, such as the Scottish ballet. Here there is a very carefully worked out system of licensing of rights, most particularly for the large productions where scenery; costumes, lighting etc. are all an important part of the overall exploitation package. See generally, Waelde and Schlesinger, 'Music and Dance: Beyond Copyright Text?' 257.

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<sup>19</sup> Here it is important to emphasise that it is the *work* in which copyright resides once fixed that is under investigation, and not the performance of the work which would be protected by performers' rights. See, CDPA Part II.

<sup>20</sup> Waelde and Schlesinger, 'Music and Dance: Beyond Copyright Text?' 257.

<sup>21</sup> Agnes De Mille, *And Promenade Home*, (Boston, Toronto: Little, Brown and Company, 1956), pp.256. De Mille writes: "[T]he choreographer is glued immobile as a fly in a web and must watch his own pupils and assistants, suborned to steal his ideas and livelihood. Several dancers made paying careers out of doing just this". (at 256)

<sup>22</sup> See generally Graham McFee, *The Philosophical Aesthetics of Dance: Identity, Performance and Understanding* (Alton: Dance Books, 2011).

<sup>23</sup> CDPA s 3.

<sup>24</sup> CDPA s 9(1).

<sup>25</sup> *Creation Records v News Group* [1997] EMLR 444.

<sup>26</sup> *Norowzian v. Arks Limited*, [2000] F.S.R. 363 (C.A.).

<sup>27</sup> The one British case to have considered the question, *Massine v de Basil*, [1936-45] MacG CC 223 was decided under the 1911 Copyright Act.

<sup>28</sup> Mireille van Eechoud, 'Along the road to uniformity – diverse readings of the Court of Justice Judgments on copyright work', *JIPITEC*, Vol. 3, no 1 (2012) : para 60; Christian Handig 'The "sweat of the brow" is not enough! – more than a blueprint of the European copyright term "work"', *European Intellectual Property Review*, Vol 1 (2013) : 334-340; Andreas Rahmatian, 'Originality in UK copyright law: the old "skill and labour" doctrine under pressure', *International Review of Intellectual Property and Competition Law*, Vol. 3 (2013) :4-34; Eleonora Rosati, 'Towards an EU-wide copyright? (Judicial) pride and (legislative) prejudice', *Intellectual Property Quarterly*, Vol. 1 (2013):47-68

<sup>29</sup> Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening ( Infopaq)* paras 33 38. See also Case C -393/09 *Bezpenostní softwarová asociace* para 45. What is not protected is expression which is limited by its technical function. See, Case C- 406/10 *SAS Institute Inc. v World Programming Ltd* paras 38-40 ; Case C-145/10, *Painer v Standard VerlagsGmbH et al.* In the UK, see *SAS Institute Inc.v World Programming Ltd* [2013] EWHC 69 (Ch) para 27.

<sup>30</sup> Although it seems that a work would need to fall under the Berne Convention categories of a literary or artistic work. See, Berne Convention Article 2(1). See also, *SAS Institute Inc v World Programming Limited* [2013] EWHC 69 (Ch) para 27.

<sup>31</sup> *Case C-5/08 Infopaq International A/S v Danske Dagblades Forening*;, Case C393/09 *Bezpenostní softwarová asociace* paragraph 45; Joined Cases C403/08 and C-429/08 *Football Association Premier League and Others*. See on this, Eleonora Rosati, 'Originality in a work, or a work of originality: the effects of the *Infopaq* decision' *European Intellectual Property Review*, Vol. 33, no 12, (2011): 746. See also, Estelle Derclaye, 'Wonderful or Worrisome? The Impact of the ECJ Ruling in *Infopaq* on UK Copyright Law' *European Intellectual Property Review*, Vol. 32, No 5 (2010): 248.

<sup>32</sup> *Infopaq*, para 45; *Bezpenostní softwarová asociace*, para 50; *Painer*, para 89, *Football Dataco* para 38.

<sup>33</sup> *Painer*, para 92; *Football Dataco* para 38.

<sup>34</sup> *Bezpenostní softwarová asociace*, paras 48 and 49, *Football Association Premier League and Others*, para 98; *Football Dataco* para 39.

<sup>35</sup> [2004] EWHC 1157 (Ch).

<sup>36</sup> *Ibid* para 56.

<sup>37</sup> Citing *Fylde Microsystems Ltd v Key Radio Systems Ltd* [1998] FSR 449.

<sup>38</sup> *Coffey v Warner/Chappell Music Ltd* [2005] EWHC 449. See also *Tate v Thomas* [1921] 1 Ch. 503 where the individual who supplied ideas and some lines of a play 'Lads of the Village' was not an author of the copyright.

<sup>39</sup> *Coffey v Warner* para 6.

<sup>40</sup> Berne Convention Article 2.2 leaves fixation to members of the Union.

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<sup>41</sup> This is so the extent of the monopoly claimed may be known to others. *Tate v Fulbrook* 1908 1 KB 821 at 832.

<sup>42</sup> CDPA s 3(2).

<sup>43</sup> Each of which may have separate protection in their own right.

<sup>44</sup> See, *Redwood Music Ltd v Chappell & Co Ltd* [1982] R.P.C. 109; *Fisher v Brooker* [2009] UKHL 41.

<sup>45</sup> If on the other hand the two contributions are considered indistinguishable, the dance could be considered a work of joint authorship. See, *Fisher v Brooker* [2009] UKHL 41; *Brighton v Jones* [2004] EWHC 1157 (Ch) *Stuart v Barrett* [1994] EMLR 449; *Hadley v Kemp*, [1999] EMLR 589,

<sup>46</sup> *Designers Guild v Russell Williams* [2001] FSR 113 (HL).

<sup>47</sup> *Brighton v Jones* [2004] EWHC 1157 (Ch).

<sup>48</sup> See on this point see, M. Pavis, 'Is there any-body on stage: a legal (mis)understanding of performances', Platform : Journal of Theatre and Performing Arts, Vol:2 (2014) 12

<sup>49</sup> See Arts Council of England, *Arts Council Plan 2011-2015* (London: ACE, 2011). This Plan implements Arts Council of England, *Achieving Great Art for Everyone: A Strategic Framework for the Arts* (London: ACE, 2011).

<sup>50</sup> Ibid, at 7. And see Arts Council of England, *The Role of Diversity in Building Adaptive Resilience* (London: ACE, 2011).

<sup>51</sup> <<http://www.artscouncil.org.uk/what-we-do/supporting-artforms/dance/>> (accessed September 2015).

<sup>52</sup> The economic contribution of performers has long been questioned. As early as 1776, Adam Smith described performances as the epitome of unproductive labour. The theorist wrote: "players, buffoons, musicians, opera-singers, opera-dancers" whose work "perishes in the instant of its production". In Adam Smith, *The Wealth of the Nations*, (Hayes Barton Press, Vol 1, 1776, reprint 1961)p. 221.

<sup>53</sup> Shawn Harmon, Charlotte Waelde and Sarah Whatley, 'Disabled Dance: Barriers to Proper Inclusion within our Cultural Milieu', unpublished, manuscript on file with authors.

<sup>54</sup> On this point, see S. Whatley, 'Dance and Disability: The Dancer, the Viewer and the Presumption of Difference' *Research in Dance Education*, Vol. 8 (2007): 5-25.

<sup>55</sup> Comment made by Caroline Bowditch during interviews with Charlotte Waelde.