Next On Floor Exercise, Dominique Dawes©: The Difficulties In Copyrighting Athletic Routines

I. INTRODUCTION

"The true importance of the public domain and fair use are to provide the necessary grist for the creative mill to churn."[1]

For copyright purposes, "public domain" has been defined as "public ownership status of writings, documents, or publications that are not protected by copyrights."[2] Indeed, at present, athletic endeavors generally remain examples of authorship not within the scope of the Copyright Act.[3] However, routine-oriented athletics – namely, figure skating, gymnastics (floor exercise), synchronized swimming, rhythmic gymnastics, and the

1. Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 545 (1999).

2. BLACK'S LAW DICTIONARY 1229 (6th ed. 1990).

3. *See* Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 669 n.7 (7th Cir. 1986).

like – are characterized by essentially the same traits as traditional choreographic works, which are explicitly afforded protection under the Copyright Act.[4]

This comment proposes that such athletic routines may be deserving of copyright protection when performed in a non-competitive setting. By subsequently amending the fair use provision of the Copyright Act to include competition as one of the provision's exceptional purposes, such routines will be protected and may be used by other athletes in competitions without obtaining permission from the respective copyright holders. Under such an amendment, the public's substantial interest in competition may be preserved with little or no harm to the copyright holder.

Part II of this comment reviews the current judicial position on the copyrightability of athletic events. Part III examines the history leading up to the inclusion of choreographic works in the Copyright Revision Act of 1976 and justifies the protection of certain athletic routines under the "choreographic works" umbrella. Parts IV and V lay the foundation for the notion of copyright protection as a balancing of interests by exploring two somewhat intriguing practices - exotic dancing and bullfighting.

By way of this "balancing" rationale, Part VI introduces the public's interest in competition as the balancing test fodder for the routine-oriented athletics debate. Part VII considers the fair use doctrine as a solution for the confusing judicial treatment of routine-oriented athletics. Finally, Parts VIII and IX offer examples – both real and hypothetical – of some of the looming problems that may result from the granting of copyright protection to routine-oriented athletics.

II. ATHLETICS AS COPYRIGHTABLE SUBJECT MATTER: WHAT'S ALL THE *HOOPLA* ABOUT?

Few courts have directly addressed questions regarding the copyrightability of athletic routines. To the extent that they have, most have held that "a sports game itself (as opposed to a broadcast of a game) is not copyrightable."[5] In *Hoopla Sports and Entertainment, Inc. v. Nike,*

4. 17 U.S.C. § 102(a)(4) (1989). The Copyright Act affords the owner of a copyright the exclusive right to reproduce, distribute, publicly perform, publicly display, and create derivative works of the protected material. 17 U.S.C. § 106 (1989). Furthermore, where the protected material is a sound recording, the act grants a copyright holder the sole right to perform that work through a digital audio transmission. *Id.*

5. Hoopla Sports and Entm't., Inc. v. Nike, Inc., 947 F. Supp. 347, 354 (N.D. Ill. 1996) (citing National Basketball Ass'n v. Sports Team Analysis & Tracking Sys., Inc., 931 F. Supp. 1124, 1142-45 (S.D.N.Y. 1996)).

Inc.,[6] the United States District Court for the Northern District of Illinois denied protection for the Plaintiff's "U.S. Versus The World" high school boys' all-star basketball game idea.[7] The district court relied upon the language of the Copyright Act, which explicitly denies protection to mere ideas.[8] Defendant's "Hoop Summit,"[9] therefore, did not constitute an infringement of the plaintiff's basketball game, according to the court.[10]

Looking again to the text of the Copyright Act, §102(a) specifically defines copyrightable subject matter as including literary, musical, dramatic, pantomime, choreographic, pictorial, graphic, sculptural, motion picture, audio-visual, sound recording, and architectural works.[11] As the United States District Court for the Southern District of New York averred in *National Basketball Association v. Sports Team Analysis & Tracking Systems, Inc.*,[12] sports events are noticeably absent from this illustrative list of copyrightable works of authorship.[13] Adhering to the letter of the law, the court held that the Copyright Act was not intended to protect professional basketball games themselves.[14]

Finally, the preeminent authority on the subject, *Nimmer on Copyright*,[15] steadfastly rejects the notion that athletic events may be protected under the Copyright Act.[16] According to *Nimmer*, there are alternatives to statutory copyright, upon which hopes for the protection of athletic events may be pinned.[17] As such, courts have remained reluctant

6. 947 F. Supp. 347 (N.D. Ill. 1996).

7. *Id.* at 353-54.

8. *Id.* at 354. In defining copyrightable subject matter, the Copyright Act specifically states that "[i]n 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) (1989).

9. *Hoopla*, 947 F. Supp. at 351. On the network's telecast, CBS announcers described the "Nike Hall of Fame Hoop Summit" as "12 high school All-Americans [taking] on a team of international young stars representing 10 different countries from 5 continents." *Id.*

10. *Hoopla*, 947 F. Supp. at 354.

11. 17 U.S.C. § 102(a) (1989).

12. 939 F. Supp. 1071 (S.D.N.Y. 1996).

13. *Id.* at 1090.

14. *Id.* at 1093. *See also* National Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997), which held that professional basketball games were not copyrightable subject matter. *Id.* at 843-45.

15. MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.09[f] (1996) [hereinafter NIMMER].

16. *Nat'l Basketball Ass'n*, 939 F. Supp. at 1091 (citing NIMMER, *supra* note 15, at § 2.09[f]).

17. *Id.* at 1092 (quoting NIMMER, *supra* note 15, at § 2.09[f]). "[The] more reasonable . . . construction [is] that athletic events are subject to legal protection pursuant only to right of publicity, misappropriation, and other established legal doctrines outside the ambit of statutory copyright." NIMMER, *supra* note 15, at § 2.09[f].

to afford copyright protection to forms of athletic performance.

III. ATHLETIC ROUTINES AS CHOREOGRAPHY

Copyright protection originated as a mechanism to promote progress in the areas of science and the useful arts.[18] Prior to 1976, a choreographic work was only copyrightable as a dramatic work, whereby it had to tell a story or portray characters.[19] Abstract works of choreography were not protected.[20] In 1976, however, the Copyright Revision Act[21] was passed, including the addition of choreographic works, without qualification, as a copyrightable subject matter.[22]

The Copyright Act, as it currently exists, does not elaborate on what constitutes a choreographic work.[23] This remains a rather intriguing omission in light of the Act's prescribed definitions of architectural audiovisual, literary, pictorial, graphic, and sculptural works, motion pictures, and sound recordings.[24] In fact, an examination of the legislative history of the Copyright Revision Act of 1976[25] reflects that Congress believed choreography to be well settled in its definition.[26] Accordingly, in order to test the Act's applicability to certain athletic routines, one need only refer to the nearest dictionary.

Webster's dictionary defines choreography as "the art of symbolically representing dancing . . . the composition and arrangement of dances . . . or a composition created by this art."[27] Webster's then defines dance as "a series of rhythmic and patterned bodily movements usually performed to music."[28] It is evident from the coalescence of these definitions that choreography is not precluded from taking place on a mat, in water, or

18. U.S. CONST., art. I, § 8, cl. 8.

19. Horgan v. MacMillan, Inc., 789 F.2d 157, 160 (2d Cir. 1986).

20. *Id.*

21. 17 U.S.C. §§ 101-810, 1001-1010 (1989).

22. 17 U.S.C. § 102(a)(4) (1989).

23. *See* 17 U.S.C. § 101 (1989). This is the "Definitions" section of the Copyright Act.

24. *See id.*

25. 17 U.S.C. §§ 101-810, 1001-1010 (1989). This 1976 revision of the Copyright Act included the addition of "pantomimes and choreographic works" to the § 102(a) list of copyrightable subject matter. 17 U.S.C. § 102(a)(4) (1989).

26. William Tucker Griffith, *Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performance with Copyright Law*, 30 CONN. L. REV. 675, n.135 (1998) (citing H.R. Rep. No. 94-1476, at 53 (1976)). The House Judiciary Committee Report that Griffith cites expressed Congress' understanding of the fairly settled meaning of choreography merely by stating that choreography does "not include social dance steps and simple routines." H.R. Rep. No. 94-1476, at 53.

27. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 202 (10th ed., Merriam-Webster, Inc. 1998).

28. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 292 (10th ed., Merriam-Webster, Inc. 1998).

with skates on one's feet.[29] Similarly, it can hardly be contested that the typical figure skating routine qualifies as "a series of rhythmic and patterned bodily movements usually performed to music,"[30] as do most gymnastics floor exercises and synchronized swimming routines. As these athletic routines seem to be well within the confines of the generally accepted definition of dance, Congress would be hard-pressed to deny their inclusion under the generally accepted definition of choreography.

IV. A PRELUDE TO THE BALANCING OF INTERESTS: EXOTIC DANCING

In *Miller v. Civil City of South Bend*,[31] the United States Court of Appeals for the Seventh Circuit evaluated the nature of exotic dancing alongside traditional forms of dance, with regard to their protection as forms of expression under the First Amendment of the United States Constitution.[32] The court ruled that exotic dancing is equally deserving of such protection in spite of its being artistically and aesthetically inferior to classic ballet.[33] In addition, the *Miller* court pointed out the defendant's own acknowledgement that such nude dance routines would be protected under copyright law but for their exotic content.[34] It is therefore reasonable to conclude that the Seventh Circuit might find a non-competitive figure skating or ice dancing routine to fall well within the parameters of the Copyright Act's "choreographic works."[35]

V. THE BALANCING OF INTERESTS: *BULLFIGHTING*

As part of his lengthy concurrence in *Miller*, Judge Posner tackled the sports-versus-dance debate by way of a unique analogy—bullfighting.[36] In much the same way as commentator William Tucker Griffith described figure skating,[37] Judge Posner professed how bullfighting unites music,

29. Consider, for example, the choreography in the Broadway musical, *Starlight Express*. All of the show's dancing was performed on roller skates. *See* http://www.imagination.com/moonstruck/albm52.html (last visited Mar. 29, 2001).

30. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 292 (10th ed., Merriam-Webster, Inc. 1998).

31. 904 F.2d 1081 (7th Cir. 1990), *rev'd on other grounds*, 501 U.S. 560 (1991).

32. *Miller*, 904 F.2d at 1085.

33. *Id.* at 1087.

34. *Id.* at 1086. The court pointed out the defendant's statement that the exotic dance routines in question would "certainly be protected . . . if they were . . . choreographed as part of a graduate Ph.D. thesis." *Id.*

35. *See* 17 U.S.C. § 102(a)(4) (1989).

36. *Miller*, 904 F.2d at 1097.

37. Griffith, *supra* note 26, at 676-78 (describing figure skating as an artistic sport involving

pageantry, and costumes, in order to create the maximum emotional impact for its spectators.[38] In fact, the judge recognized that sports house creative and expressive elements in varying degrees.[39] Judge Posner ultimately pointed out, however, that the inevitable distinction between bullfighting and ballet is attributable to certain public policy interests associated with bullfighting.[40] Justifiably, Judge Posner opined that ballet embraces neither the torturing nor killing of animals, nor the significant risk of death to its partakers, as does bullfighting.[41] In that vein, in the absence of a strong public interest in competition, it may be said that little, if any, difference exists between traditional choreography and certain artistic, non-competitive athletic routines.

VI. THE PUBLIC INTEREST IN COMPETITION

Since 1939, when the New York Yankees decreed that Lou Gehrig's number "4" would never again be worn by a Yankee player, it has been a common practice among professional sports teams to retire from use a distinguished player's number.[42] In the case of professional football, however, the NFL has recently sought to discourage its teams from retiring uniform numbers, except in the most rare and special instances.[43] At any given time (especially during training camp before rosters are trimmed by player cuts), football rosters tend to have more players than the rosters of other sports' teams. Naturally, if a team bestows the honor of a retired number on too many players, there might soon be too few numbers available for active players. As much as a team may wish to protect the uniform number of one of its great players, until three-digit numbers are

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"the integration of music, costuming, and lighting.").

38. *Miller*, 904 F.2d at 1097. Judge Posner described the meshing of art and sport through "the march of the toreadors . . . [and] the dance-like steps with which the matador incites and parries the bull." *Id.*

39. *Id.* Judge Posner recognized that bullfighting "[is] more expressive . . . artistic [and] culturally richer than the most popular American sports." *Id.*

40. *Id.*

41. *Id.*

42. http://www.sportslegends.about.com/sports/sportslegends/library/blnumbers.html (last visited Mar. 9, 2001).

43. http://www.sportslegends.about.com/sports/sportslegends/library/blnumnfl.html (last visited Mar. 9, 2001). Using the city of Pittsburgh as an example, the Steelers football team has produced several legendary Hall of Fame players (e.g. "Mean" Joe Greene, Jack Lambert, Jack Ham, Franco Harris, Mike Webster, Mel Blount, Terry Bradshaw), yet none has had his number retired. *Id.* Conversely, the Pirates baseball team has retired the uniform numbers of eight players, including Willie Stargell (8), Roberto Clemente (21), Honus Wagner (33), Ralph Kiner (4), Billy Meyer (1), Bill Mazeroski (9), Pie Traynor (20) and Danny Murtaugh (40). *Id.* Even the Penguins hockey club has retired two numbers, namely, Michel Briere (21) and Mario Lemieux (66). *Id.*

considered, football retains a great interest in preserving available uniform numbers.

The same tension between the concerns of the individual and the interests of society exists in the realm of copyright. Few commentators have maintained that routine-oriented athletics are outright undeserving of copyright protection, but rather have reasoned that the interest in such protection is outweighed by society's interest in competition.[44] This does not merely include the viewing public, for athletes themselves are obviously motivated by their competitive urges.[45] Demonstrating this motivation, United States President Warren G. Harding once said:

> Competition in play teaches the love of the free spirit to excel by its own merit. A nation that has not forgotten how to play, a nation that fosters athletics, is a nation that is always holding up the high ideal of equal opportunity for all. Go back through history and find the nations that did not play and had no outdoor sports, and you will find the nations of oppressed peoples.[46]

As such, granting copyright protection to an athletic routine, so as to exclude others from its use, may come, as President Harding suggested, at a great societal cost.[47] Bearing in mind the Supreme Court's position that the primary concern of copyright law is the public welfare and not the reward to the copyright owner,[48] it is precisely this public interest in competition that must be balanced against the statutory protection of copyrighted works.

VII. THE FAIR USE DOCTRINE—A SOLUTION?

A. Balancing of Interests

Copyright law operates on the rather thin tightrope of providing adequate protection to encourage individuals to create, while safeguarding

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44. *See* Garon, *supra* note 1; Proloy K. Das, *Offensive Protection: The Potential Application of Intellectual Property Law to Scripted Sports Plays*, 75 IND. L.J. 1073, 1095 (2000).

45. Griffith, *supra* note 26, at 677 (citing John Izod, *Television Sport and the Sacrificial Hero*, 22 J. SPORT & SOC. ISSUES 173 (1996)).

46. Griffith, *supra* note 26, at 677 n.13 (citing ASHTON APPLEWHITE, AND I QUOTE 363 (1992)).

47. Das, *supra* note 44, at 1074.

48. *See* United States v. Paramount Pictures, Inc., 334 U.S. 123, 126-27 (1932). *See also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). In *Aiken*, the Supreme Court stated that "the limited scope of the copyright holder's statutory monopoly . . . reflects a balance of competing claims upon the public interest. Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts." *Id.*

against such overprotection as might stifle the very creation that the law seeks to promote.[49] As a result of this balancing of interests, the exclusive rights bestowed upon a copyright holder by Section 106 of the Copyright Act are not absolute. In fact, a limitation on such rights may be found in the very next section of the Act.[50]

This "fair use" provision[51] affords an individual the right to reasonably use an author's copyrighted work, even without that author's permission.[52] More specifically, the fair use doctrine purports that such reasonable uses include those intended as criticism, comment, news reporting, teaching, scholarship or research.[53] In light of the strong public interest in competition, as previously described, it seems that "competition" could be added to Section 107's express list of permitted reasonable uses of copyrighted works, without disturbing the objective of the fair use provision.

In *Rosemont Enterprises, Inc. v. Random House, Inc.*,[54] the United States Court of Appeals for the Second Circuit articulated that objective.[55] In ruling on a case involving a Howard Hughes biographer's use of copyrighted articles written about Mr. Hughes, the court stated that, when balancing between the public interest and the possible damage to the copyright owner, the former should prevail.[56]

Consistent with this notion, the public interest in competition manifests itself in the development of a routine-oriented athlete's art. Most athletes aim to develop their art by building upon the accomplishments of others. An athlete's need to better his or her rival's performance is especially inherent in routine-oriented undertakings such as figure skating and gymnastics, where competitors are judged and scored individually. Such one-upmanship would seem to be predicated upon an athlete's ability to first recreate elements of that routine performed by his

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49. *See* Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 33 (1996).

50. *See* 17 U.S.C. § 107 (1989). This provision is the first of six consecutive provisions whose headings begin, "Limitations on exclusive rights." 17 U.S.C. § 107-112 (1989).

51. 17 U.S.C. § 107 (1989).

52. BLACK'S LAW DICTIONARY 598 (6th ed. 1997). Fair use is defined as "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without the owner's consent, notwithstanding the monopoly granted to the owner." *Id.*

53. *Id.* Section 107 of the Act includes "multiple copies for classroom use" under the heading of "teaching." 17 U.S.C. § 107 (1989).

54. 366 F.2d 303 (2d Cir. 1966).

55. *Rosemont,* 366 F.2d at 309.

56. *Id.* The court characterized the fair use doctrine as "subordinat[ing] the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry." *Id.* at 307 (quoting Berlin v. E.C. Publ'ns, Inc., 329 F.2d 541, 544 (2d Cir. 1964)).

or her competitor. If, as described previously, such athletic routines were protected under the Copyright Act's "choreographic works" umbrella,[57] the purpose of developing an athlete's art in support of the greater public interest in competition would fall precisely within the spirit of Section 107's list of fair use exceptions. Accordingly, allowing a competitor the use of another's copyrighted routine in competition should outweigh such copyright holder's monopoly on that routine.

Some commentators have criticized the fair use doctrine for losing sight of an author's protected expression and making the exceptions the focus of infringement analysis.[58] Such criticisms are, to a large degree, well aimed. However, the subject matter of such criticisms goes to the very tenet conferred by the Copyright Office – to inspire creation and circulation of intellectual expression for the *public* welfare.[59]

B. The Statutory Language of Section 107

With choreographic works expressly protected under Section 102 of the Copyright Act,[60] it can hardly be denied that if the famed choreographer George Balanchine[61] had created an original work to be performed on ice by skated performers, such a work would be protected under the Act. Consider, for example, an ice-dancing team that chose to perform an excerpt from that work in competition. The athletes would be publicly performing copyrighted material without the author's consent, constituting an infringement of a right conferred to the author under the Copyright Act.[62] Nevertheless, if deemed "reasonable,"[63] the team's use of the copyrighted work may be defensible by way of the fair use doctrine. In fact, the language of Section 107 has traditionally been thought of as having been conceived largely based upon an author's implied consent to the reasonable use of his or her work.[64]

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57. 17 U.S.C. § 102(a)(4) (1989).

58. *See* Douglas Y'Barbo, *The Heart of the Matter: The Property Right Conferred by Copyright*, 49 MERCER L. REV. 643, 694-95 (1998).

59. U.S. COPYRIGHT OFFICE, REPORT OF THE REGISTER OF COPYRIGHT ON GENERAL REVISION OF THE COPYRIGHT LAW 1, 4-6 (Apr. 1961) (emphasis added). The report stated that although "the two purposes are closely related, the ultimate aspiration of copyright law is to foster creation and dissemination of intellectual works for the public welfare." *Id.*

60. 17 U.S.C. § 102(a)(4) (1989).

61. Russian-born choreographer, George Balanchine (1904-1983), is considered the "father of American ballet." http://kennedy-center.org/honors/history/honoree/balanchi.html (last visited Mar. 9, 2001).

62. *See* 17 U.S.C. § 106(4) (1989) (granting the copyright holder the exclusive right to publicly perform a his or her protected work).

63. *See* BLACK'S LAW DICTIONARY 598 (6th ed. 1990).

64. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549-50 (1985). *See*

It may be noted that, through the use of the words, "such as," the text of Section 107 of the Copyright Act does not limit the purposes of the use to which the fair use doctrine applies.[65] Prior to Congress's codification of the doctrine as part of the Copyright Revision Act of 1976, the House of Representatives recognized that the courts had not succeeded in establishing a clear definition of the fair use concept.[66] The Supreme Court reiterated this position in its opinion in *Campbell v. Acuff-Rose Music, Inc.*,[67] averring that any application of the fair use defense warrants a case-by-case consideration driven by the specific facts at hand in each instance.[68]

As such, in addition to the balancing of interests, there exists no textual justification for excluding competition from the protective arms of the fair use doctrine. Accordingly, in spite of progressive suggestions, such as on-site lawyers at sporting events who assess those athletic performances deserving of protection,[69] Section 107 of the Copyright Act provides the most rational playing field for affording copyright protection to athletic routines.

C. The Test

Section 107 of the Act outlines four factors for courts to consider when evaluating an alleged infringer's fair use defense:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[70]

By its very design, the fair use doctrine involves one's conceded use of another's copyrighted work.[71] For purposes of discussing the application of the four-factor fair use test, it is necessarily assumed that an athletic

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also Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366 (2d Cir. 1993), which stated that the fair use doctrine "tempers the protection of copyright by allowing . . . use [of] a limited amount of copyrighted material under some circumstances." *Id.* at 1373.

65. *See* 17 U.S.C. § 107 (1989).

66. H.R. Rep. No. 94-1476, at 65 (1989).

67. 510 U.S. 569 (1994).

68. *Campbell*, 510 U.S. at 577 (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984)). Together, these three Supreme Court decisions comprise the landmark "trilogy" that guides most fair use proceedings.

69. *See* Das, *supra* note 44, at 1095.

70. 17 U.S.C. § 107 (1989).

71. *See id.*

routine is copyrightable under the choreography principles previously described.

Regarding the first factor, commercialism attaches itself to athletic competition in countless fashions. Athletes often compete for prize money, professional monetary contracts, commercial endorsements, television appearances, and so forth. Beyond that, the networks that televise, the venues that host, and the advertisers that sponsor such athletic competitions all hold substantial financial interests in such events. Nonetheless, the direct "purpose and character"[72] of a secondary use of a copyrighted routine in competition is just that – competitive. The commercial atmosphere in which the competitive use takes place is indeed a relevant factor to be weighed in a fair use analysis.[73]

However, courts have widely accepted that placing an overemphasis on the mere existence of any commercial element to a secondary use denies the user of a Section 107 defense.[74] In *Campbell*, the Supreme Court again relied on the express language of the statute, stressing that Section 107(1) refers primarily to the broad purpose and character of the work and not merely to the notion of commercialism.[75] A secondary use of a copyrighted floor exercise routine may occur at a small, un-televised, local competition just as easily as it may at a network-televised, national championship event. Under *Campbell*, the latter-type use may arguably be deemed commercial in indirect purpose and character, as differentiated from the direct purpose and character of the bare bones competitive use of a copyrighted work.[76] Only when a secondary user commercially exploits the protected work for direct financial reward should the use categorically fail the "purpose and character" prong.[77]

The second factor of the fair use test examines "the nature of the copyrighted work."[78] In *Campbell*, Justice Souter described this factor as evaluating the degree to which a particular work is of a type that copyright law is intended to protect.[79] There, the Court easily judged Roy Orbison's

72. 17 U.S.C. § 107(1) (1989).

73. *Sony Corp.*, 464 U.S. at 449, n.32.

74. *See* Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1262 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987) (noting that such overemphasis would result in the fair use doctrine becoming "virtually obliterated").

75. *Campbell*, 510 U.S. at 584. Justice Souter's opinion stated that "Section 107(1) uses the term 'including' to begin the dependent clause referring to commercial use, [while] the main clause speaks of a broader investigation into 'purpose and character.'" *Id.*

76. *See* Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 921 (2d Cir. 1994).

77. *Id.* at 922.

78. 17 U.S.C. § 107(2) (1989).

79. *Campbell*, 510 U.S. at 586.

copyrighted song, "Oh, Pretty Woman," to indeed be of such a type.[80] As with musical works,[81] choreographic works are expressly granted protection by the Copyright Act.[82] The choreographic basis for the copyrightability of routine-oriented athletics undoubtedly makes it reasonable for such routines to fall within the category of "useful arts"[83] intended to be protected by the Act.

With regard to "the amount and substantiality of the portion used in relation to the copyrighted work as a whole,"[84] case-by-case analyses would illustrate in whose favor the fair use scale may tip. Still, there undoubtedly exists a multitude of scenarios in which the amount and substantiality of the secondary use constitutes only a modest portion of the original whole. Consider the George Balanchine example previously described.[85] Imagine that Mr. Balanchine choreographed an on-ice version of Tchaikovsky's *Swan Lake*. If figure skater Kristi Yamaguchi[86] performed an excerpt from Mr. Balanchine's work as a four-minute competitive program, the amount of the original protected work she used would obviously have been nominal. If, however, Ms. Yamaguchi performed the precise four-minute protected routine created by skater Katarina Witt[87] two years prior, the amount of the original she used would be great and considered accordingly when all four factors were balanced.

With regard to substantiality, the Supreme Court has described Section 107's third factor as being as much an issue of quality as of quantity.[88] In *Harper & Row, Publishers, Inc. v. Nation Enterprises* (hereinafter "*Nation*"),[89] the secondary user extracted only three hundred words from President Gerald Ford's copyrighted memoirs.[90] Still, the Court deemed those words to be the "heart" of the original work and denied the

80. *Id.* The Court described "Oh, Pretty Woman" as "creative expression for public dissemination . . . within the core of the copyright's protective purposes." *Id.*

81. *See* 17 U.S.C. § 102(2) (1989).

82. 17 U.S.C. § 102(4) (1989).

83. U.S. CONST. art. I, § 8, cl. 8.

84. 17 U.S.C. § 107(3) (1989).

85. *See supra* note 61 and accompanying text.

86. Kristi Yamaguchi is a former United States and World figure skating champion. http://www.davison.k12.mi.us/dms/projects/women/ayamaguc.html (last visited Mar. 9, 2001). In 1992, she became the first American woman, since Dorothy Hamill in 1976, to win the Olympic singles gold metal. *Id.*

87. Katarina Witt is a German-born figure skater, who dominated women's figure skating for most of the 1980's, winning world titles in 1984, 1985, 1987 and 1988. http://encarta.msn.com/find/Concise.asp?ti=04B31000 (last visited Mar. 9, 2001). In 1988, she became the first woman to win a second Olympic gold medal in fifty-six years. *Id.*

88. *Campbell*, 510 U.S. at 587.

89. 471 U.S. 539 (1985).

90. *Harper & Row*, 471 U.S. at 564-66.

defendant's fair use defense.[91] In the aforementioned *Swan Lake* example, the work would have to be such a "heart" in order to parallel *Nation*. A full-length "ballet on ice" may very well have a definitive climactic scene that may be performed separately in a four-minute skating routine.

Nonetheless, it is certainly plausible that four minutes of a full-length choreographic work may be duplicated without impinging the so-called "heart" of the work. As with the amount of the work, however, Ms. Yamaguchi's performance of Ms. Witt's protected routine would have earned greater substantiality scrutiny. This would be especially true if the routine contained a specific jump or combination unique to Ms. Witt's routine. In contrast to *Nation*, however, Ms. Yamaguchi would still have the public interest in competition on her side, as previously described.

Ultimately, it is Section 107's fourth factor, the effect of the use upon the potential market for, or value of, the copyrighted work,[92] which drives most fair use analyses.[93] In *Nation*, Justice O'Connor conveyed that the secondary use of the verbatim "heart" of the original work was determinative of the Court's denial of the fair use defense, insomuch as that use adversely affected the potential marketability of the work.[94] It is apparent, therefore, that without a demonstrated damaging effect on the market value of the protected work, the third prong of the fair use test – amount and substantiality – is accorded very little weight.[95]

To prove that a four-minute excerpt in a figure skating competition would harm the market potential of the hypothetical *Swan Lake* is a tall order. The more interesting case is one where an athlete performs the precise routine created by another athlete, as in the previously described Katarina Witt example.[96] The prospect of not only Kristi Yamaguchi, but an infinite number of other skaters who might choose to perform Ms. Witt's protected routine, fuels the market effect debate.

In *Campbell*, Justice Souter stressed that the fourth factor of the fair use test does not merely consider the extent of market harm caused by an alleged infringement.[97] In addition to an individual action's potential market harm, Justice Souter demonstrated great concern about the adverse effect on the market for the protected work that may be caused by

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91. *Id.*

92. 17 U.S.C. § 107(4) (1989).

93. *Harper & Row*, 471 U.S. at 566. According to Justice O'Connor, "this last factor is undoubtedly the single most important element of fair use." *Id.*

94. *Id.* at 568-69.

95. *See id.*

96. *See supra* notes 86-87 and accompanying text.

97. 510 U.S. at 590 (quoting NIMMER, *supra* note 15, at § 13.05[A][4]).

widespread conduct like that of the alleged infringer.[98] This debate, as with others, may be best settled by the public's interest in competition. One commentator professed that the use of law to regulate competitive sports conflicts with the very elements of sports to which the public is drawn in the first place.[99] If society's interest in competition indeed guides an athlete to mimic another's protected routine, then society's interest is precisely what should guide the legal treatment of such performances. As the public's interest motivates the selection of the works to be replicated, therein lies the value of a given work under the fourth factor of fair use analysis.

Much like an athlete's signature move, the value in a given protected routine may be found more in its attribution to the creator than in any monetary return.[100] Commentator William Tucker Griffith wrote that "Kurt Thomas, an American gymnast . . . revolutionized his sport by taking a fundamental move from the pommel horse and incorporating it into his floor exercise routine. His move, commonly referred to as the 'Thomas Flare,' is . . . used by a majority of male gymnasts who compete at the highest level."[101] Mr. Griffith points out that such moves are most often created as a means for an athlete to excel at his trade, and "not created as a means to earn more money."[102]

As long as a prior routine remains the athletic standard to be challenged, secondary use of that routine enhances, rather than hinders, the market for seeing that routine performed. The instant that the course of competitive athletics surpasses that standard, the market for that work will likely begin to dwindle. Preserving the benefit of that routine for its creator at a substantial expense to the public directly violates the intent of copyright.[103] This is precisely why competitive uses of copyrighted routines should be seen as passing the muster of the four-factor fair use test.

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98. *Id.*

99. Das, *supra* note 44, at 1076. Das wrote that "the concept of restricting the competitive elements of the playing field through the use of societal law offends the notions of fair play and competition that sports enthusiasts cherish." *Id.*

100. *See* Griffith, *supra* note 26, at 728.

101. *Id.*

102. *Id.*

103. *See Rosemont*, 366 F.2d at 303. The court stated that, "in balancing the equities . . . public interest should prevail over the possible damage to the copyright owner." *Id.* at 309.

VIII. A MAJOR CONCERN: THE IMPACT OF COPYRIGHT PROTECTION ON NETWORK SPORTS COVERAGE

In 1991, *Sports Illustrated* magazine gave a "thumbs down" to ESPN[104] for canceling its broadcast coverage of the synchronized swimming events at the World Swimming Championships "because it [didn't] want to pay rights fees for music."[105] In *Coleman v. ESPN, Inc.*,[106] ESPN was forced to defend its uses of musical works alleged by ASCAP[107] on behalf of its members to be infringements. The United States District Court for the Southern District of New York examined performances of copyrighted songs that were being played in arenas and stadiums that hosted sporting events.[108] Specifically, the court looked at those songs that could be heard faintly, yet identifiably, during ESPN's broadcast coverage.[109] ESPN averred that such performances were merely "ambient noise," no different from crowd noise.[110] ESPN further argued that the music was not controlled by ESPN and was, therefore, incidental to ESPN's programming.[111] The district court, however, viewed these performances in quite a different light.[112] The court stressed that ESPN's intent was not determinative of whether its actions amounted to infringements.[113]

In *Coleman*, the district court also examined alleged infringing performances of Stephen Sondheim's "Send In The Clowns,"

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104. ESPN originally stood for the "Entertainment and Sports Programming Network." *See* http://espn.go.com/sitetools/s/help/espn-faq.html (last visited Mar. 9, 2001). The "Frequently Asked Questions" page on the ESPN.com website states that ESPN "doesn't stand for anything. . .the full name was dropped in February 1985 when the company adopted a new corporate name – ESPN, Inc. – and a new logo." *Id.*

105. Steve Wulf, *Scorecard: Judgment Calls*, SPORTS ILLUSTRATED, Feb. 18, 1991, at 9.

106. 764 F. Supp. 290 (S.D.N.Y. 1991).

107. The American Society of Composers, Authors & Publishers. ASCAP is a performing rights society founded in 1914 having the non-exclusive right to license and collect royalties for non-dramatic public performances of the copyrighted musical compositions of its approximately 45,000 members. *Coleman*, 764 F. Supp. at 292. ASCAP also monitors performances appearing on radio, television and cable programming for unlicensed uses of compositions within the ASCAP repertory. *Id.*

108. *Coleman*, 764 F. Supp. at 293.

109. *Id.*

110. *Id.*

111. *Id.*

112. *See Coleman*, 764 F. Supp. at 294. The district court relied on a line of cases that included *Columbia Broad. Sys., Inc. v. ASCAP*, 620 F.2d 930, 939 (2d Cir. 1980), *cert. denied*, 450 U.S. 970, 67 L. Ed. 2d 621, 101 S. Ct. 1491 (1981) (suggesting that even spontaneous performances of copyrighted musical works require the proper license).

113. *Coleman*, 764 F. Supp. at 294. Judge Patterson stated that "whether ESPN broadcast certain compositions unintentionally because they constituted spontaneous crowd noise is immaterial." *Id.*

accompanying a figure skater's routine in *Skate International America*, and Prince's "U Got The Look," to which a cheerleading squad set its routine in the National High School Cheerleading Championships.[114] ESPN claimed that such musical accompaniment to athletic routines was not an "essential" element of ESPN's programming.[115] The network relied on the fact that television announcers often speak over the music when they comment on an athlete's performance.[116] Having not been asked to ultimately resolve this question, the court deemed the question to be one of fact that precluded plaintiff songwriters' motion for summary judgment.[117] The case would eventually be settled.

Now imagine that it is the athlete's hypothetically copyrighted performance itself, and not its accompanying music, that is the subject of an infringement claim. Section 502(a) of the Copyright Act of 1976 arms federal courts with the power to grant temporary and permanent injunctions to prevent or restrain acts of copyright infringement.[118] Under Section 502(a), therefore, an athlete could conceivably enlist a court to enjoin another athlete from performing his or her copyrighted routine. Generally, the standard for granting a temporary injunction is that a plaintiff need merely establish a prima facie case as to the validity of his or her copyright and its infringement.[119] Once this standard is met, an athlete could effectively suspend the athletic competition at hand indefinitely.

Alternatively, since the broadcast of such athletic competition qualifies as a "public performance,"[120] an athlete could allege that the broadcast is an infringement, and, accordingly, seek to enjoin the applicable network from broadcasting the performance altogether. Under Section 106(4) of the Copyright Act, an athlete would have exclusive control over the exploitation of the right to perform his or her copyrighted routine publicly.[121] In the absence of a countervailing exception, such as the fair use doctrine, a broadcasting network would need to first obtain permission

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114. *Id.* at 292.

115. *Id.* at 293.

116. *Coleman*, 764 F. Supp. at 293.

117. *Id.* at 295.

118. 17 U.S.C. § 502(a) (1989). Section 502 goes on to state that "any such injunction may be served anywhere in the United States on the person enjoined." 17 U.S.C. § 502(b) (1989).

119. *See, e.g.*, Houghton Mifflin Co. v. Stackpole Sons, Inc., 104 F.2d 306 (2d Cir. 1939), *cert. denied*, 308 U.S. 597 (1939).

120. 17 U.S.C. § 101 (1989). This "definitions" section of the Copyright Act of 1976 defines performing a work publicly as including the "transmi[ssion] or otherwise communcat[ion] of a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." *Id.*

121. 17 U.S.C. § 106(4) (1989).

from the copyright-holding athlete by way of a privately negotiated license. That network would hope that skaters, gymnasts, and the like, subscribe to a performing rights group designed to collectively license their routines in the way that ASCAP,[122] BMI[123] and SESAC,[124] for example, license the public performance of their members' copyrighted musical works. Otherwise, the network would have the impractical, if not impossible, task of obtaining permission from each and every individual copyright holder.

IX. THE WORK ITSELF AND CREATIVE CREDIT: HOUSES DIVIDED

A. When Less than an Entire Work is Performed

Consider situations in which an athlete claims that only a portion of his or her copyrighted routine is performed. Indeed, courts have held that merely playing any material part of a copyrighted composition constitutes a performance.[125] In *M. Witmark & Sons v. Pastime Amusement Co.*,[126] the United States District Court for the Eastern District of South Carolina examined an instance in which the chorus of Plaintiff's copyrighted song, "Kiss Me Again," was performed during the showing of a motion picture.[127] Just as Justice O'Connor focused on the "heart" of the copied work in her fair use analysis in *Nation*,[128] the *Witmark* court declared that the copied part need not be a large portion of the protected work for an infringement action to succeed, provided that it was a material part of the original that was copied.[129] According to the court, no precise definition of "material" could be cited.[130]

As applied to routine-oriented athletics, consider the complications

122. *See supra* note 107 and accompanying text.

123. Broadcast Music, Incorporated. BMI performs essentially the same function as ASCAP. *See supra* note 107 and accompanying text.

124. Society of European Stage Authors and Composers. SESAC, while a smaller player, performs essentially the same function as ASCAP and BMI. *See supra* note 107 and accompanying text.

125. M. Witmark & Sons v. Pastime Amusement Co., 298 F. 470 (E.D.S.C. 1924).

126. *Id.*

127. *Id.* at 472. Plaintiff was assigned the copyright to "Kiss Me Again" by, among others, one of the song's composers, Victor Herbert. *Id.* at 471. Coincidentally, Mr. Herbert was the founder of ASCAP. http://www.ascap.com/membership/whatis.html (last visited Mar. 9, 2001).

128. *See supra* text accompanying note 93.

129. *Witmark*, 298 F. at 476. "It is not necessary that the whole, or even a large portion, of the work will have been copied, and on the principle of *de minimus non curat lex* it is necessary that a material and substantial part of it will have been copied." *Id.*

130. *Id.*

that might result from one athlete's claim that another copied a mere *portion* of his or her hypothetically copyrighted routine. Once again, the copyright holder could seek to enjoin the other athlete from performing that portion of his or her work, suspending indefinitely the competition at hand.

B. Multiple Contributors

In the case of a copyrighted musical work, in situations where only an instrumental snippet of, for example, Elton John's[131] "Someone Saved My Life Tonight" is performed publicly, lyricist Bernie Taupin[132] is entitled to the very same compensation as Elton John.[133] Consider, therefore, the creative interest that an athlete's coach or trainer might claim in one or more of that athlete's routines. Consider, as well, a routine set to an original piece of music composed for that very routine and fixed in a tangible form, thus adding the music composer to the list of claimants to the copyright pie.[134] To that end, even the rejection of copyright protection

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131. Born Reginald Kenneth Dwight, Elton John is one of the world's most prolific and successful recording artists. *See* http://www.disney.go.com/DisneyRecords/Biographies/John_Bio.html (last visited Mar. 9, 2001). He is the only artist to have songs reach the "Top 30" on the *Billboard* magazine's Top 100 chart in 23 consecutive years. *Id.* John was recently inducted into the Rock 'n' Roll Hall of Fame. *Id.*

132. Bernie Taupin is one of the most respected and successful lyricists of the twentieth century, whose twenty-seven year collaboration with Elton John has resulted in sales in excess of one hundred million records, and has earned him induction into the Songwriters Hall of Fame. http://www.farmdogs.com/bernie.html (last visited Mar. 9, 2001).

133. Section 201(a) of the Copyright Act states, "The authors of a joint work are co-owners of the copyright in the work." 17 U.S.C. § 201(a) (1989). The Act defines a joint work as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of the unitary whole." 17 U.S.C. § 101 (1989). It can hardly be contested that a collaboration between a composer and a lyricist qualifies as, if not typifies, a joint work, as it is defined by the Act. Unless they otherwise agree, co-authors of a joint work are entitled to equal shares of the performance royalties associated with the work. Christian Broad. Network, Inc. v. Copyright Royalty Tribunal, 720 F.2d 1295, 1316 (D.C. Cir. 1983).

134. Assume that the music to which the routine is set was not composed as a "work for hire." Section 101 of the 1976 Act provides that a work for hire may be created under either of two sets of circumstances:

> (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

17 U.S.C. § 101 (1989).

Under the work for hire doctrine, when an employee acting within the scope of his or her employment creates a copyrightable work, his or her employer is deemed to be the "author" and copyright holder with regard to that work. Forward v. Thorogood, 985 F.2d 604, 606 (1st Cir. 1993).

for professional basketball games in *National Basketball Ass'n v. Sports Team Analysis & Tracking Systems, Inc.* was accompanied by an acknowledgement of the difficulty in ascertaining the identities of the copyright owners of such a collectively created work.[135] The court feared the inevitability of having to obtain consent from referees and coaches, as well as any other participants who infused creative energy into the NBA game.[136]

To add further to this credit complicity, consider the following scenario:

Figure skater Michelle Kwan,[137] along with both her trainer and composer, authors a skating routine. Much of the skating moves are unoriginal, in and of themselves. However, combined with the corresponding music, the resulting work comprises an original, copyrightable routine. Kwan performs the routine in various competitions. Subsequently, ESPN televises a competitive routine being performed by skater Tara Lipinsky.[138] Lipinsky's routine seems largely to be a copy of Kwan's, only without the music. Kwan's mother, who is familiar with all of her daughter's routines, sees this telecast and is certain that Lipinsky has copied Kwan's routine. Upon learning this, Kwan initiates an infringement action against both Lipinsky and ESPN.

On one hand, under *Witmark*, the skating alone should constitute a material and substantial portion of the copyrighted work.[139] However, in contrast to Elton John's and Bernie Taupin's respective musical and lyrical contributions[140] to the whole, each of which is readily identifiable without the other, Kwan's skating is acknowledged to be insufficiently original without the accompanying music. Still, Kwan's mother claims to be able to identify the work by the skating alone, without the music, much like one might identify "Someone Saved My Life Tonight" by the music alone without any lyrics. Should Kwan prevail in her claim against Lipinsky? Against ESPN? In terms of paralleling other types of works that are expressly protected under the Copyright Act, these are pleasantly puzzling questions. Nonetheless, as long as society maintains its love of and

135. *See Nat'l Basketball Ass'n*, 939 F. Supp. at 1091-92.

136. *Id.* at 1092.

137. Michelle Kwan is a World and Olympic figure skating champion. http://espn.go.com/skating/s/KwanBio.html (last visited Mar. 9, 2001). In 2000, Kwan became the first American woman since Peggy Fleming to win a third World figure skating title. *Id.*

138. Tara Lipinsky won the 1998 Olympic gold medal in women's figure skating in Nagano, Japan, making her the youngest Olympic women's figure skating champion in history (15 yrs., 7 mos.). http://www.infoplease.com/ipsa/A0758220.html (last visited Mar. 9, 2001).

139. *See Witmark*, 298 F. at 476.

140. *See supra* notes 131-33 and accompanying text.

passion for competition, the answer to each must remain a resounding "no."

X. CONCLUSION

The Michelle Kwan example shines a flicker of light on the otherwise murky questions that would accompany the granting of copyright protection to competitive athletic routines. Under the widely accepted purpose of the fair use doctrine, as previously described,[141] Tara Lipinsky's purpose of culling elements of Ms. Kwan's routine, as a means of developing her own art, tips the scale in favor of the public interest in competition. Conversely, when not being performed under a veil of competition, it can hardly be contested that figure skating, gymnastics, synchronized swimming, and other such routines, sport all of the characteristics of choreographic works, and therefore, deserve the same copyright protection as their choreographic counterparts. Because Congress, in recognizing the need to consider the interests of both the copyright holder and the public-at-large, specifically codified a balance-based fair use exception, there remain few justifications for depriving non-competitive versions of routine-oriented athletic works of copyright protection. Whereas the courts have remained reasonably silent with regard to the copyrightability of routine-oriented athletics, Congress need only amend Section 107's fair use provision to include "competition" as a viable purpose for the exception to make clear the standard under which courts may govern in the future.

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141. *Rosemont*, 366 F.2d at 303. The court stated that, "in balancing the equities. . .public interest should prevail over the possible damage to the copyright owner." *Id.* at 309.