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## IP Law Book Review, v. 8# 1

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# The IP Law Book Review

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# The IP Law Book Review

IP Law Center, Golden Gate University School of Law

**Vol. 8 No. 1 (November 2017) pp. 1-7**

**AUTHORS IN COURT: SCENES FROM THE THEATER OF COPYRIGHT**, by **Mark Rose**. Harvard University Press, 2016. 219 pp., Hardcover, \$29.95.

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Drama is the master metaphor by which Mark Rose characterizes the six historical moments examined in his important book, *AUTHORS IN COURT*. Each of these moments, he argues, is an “exemplary narrative[] . . . which can be read as an exploration of the drama of . . . the development of authorship and the law” (p. x). Casting history as drama implies narrative tension, conflict, reversal, and recognition; it is not quite clear whether Rose feels he has discovered an inherent plot or telos in copyright history, or whether he is acknowledging the craftsmanship of his own lively storytelling, or both. But we need not decide this ontological question to derive pleasure and profit from his careful study. Where there is drama, there must be *dramatis personae*, and Rose deploys his dramaturgy around vividly drawn authorial figures supported by a cast of lawyers, judges, expert witnesses, and accused infringers. His six-act drama raises the curtain on Daniel Defoe’s misunderstood satires and dream of authorial property; Alexander Pope’s resort to litigation to vindicate his privacy and his copyrights; Harriet Beecher Stowe’s bid to control the right to translate her nation-changing book; Napoleon Sarony’s ownership of the mental conceptions captured in his celebrity photographs; Anne Nichols’ attempt to monopolize plot, character, and setting in stage comedy; J.D. Salinger’s use of copyright to combat publicity and unwelcome biography; and Jeff Koons’ struggle to make readymade art and bankable banality proper subjects for the defense of fair use.

Yet what kind of drama has Rose unveiled for us? What sort of tale does copyright’s history unfold? Is this romantic comedy or the theater of the absurd? Are we watching a well-made play or listening to the dire chanting of a Greek chorus? Would Northrop Frye find archetypal tragedy in the growth of copyright’s scope, or wintry satire in the professionalization of authorship?<sup>1</sup> At the very least, Rose brilliantly stages a complex problem play in which copyright law first enthrones the idea of proprietary authorship and then, in hubris and avarice, topples the crowned king in a palace coup plotted by the work-for-hire doctrine. My one serious regret is that Rose did not add a seventh exemplary act

in which that seemingly oxymoronic Macbeth, the corporate author, was shown with hands dabbled in the blood of human authorship. The law-abetted split between creative labor and capitalist ownership in modern culture industries has been richly explored, for example, in Catherine L. Fisk's *WRITING FOR HIRE: UNIONS, HOLLYWOOD, AND MADISON AVENUE*,<sup>2</sup> but Rose stops short of this potentially absurdist drama and only hails it from afar. Yet several of his subplots take us to the brink of that anxious dénouement: the struggle of Pope and Stowe to reap the benefits of professional authorship while maintaining façades of gentility and domesticity, respectively; the posturing of Sarony as a photographic genius while his uncelebrated cameraman humbly operates the shutter; the idiot-savant entrepreneurship of Koons who builds an art empire on the simple proposition that the ordinary world might be a source of vast profit if the public could be taught to swoon before found objects bathed in a glamor of hand-numbered scarcity and Warholian celebuz.

The main plot of Rose's book asks the question, how did copyright law grow from merely prohibiting unauthorized literal copies of books to forbidding many nonliteral types of exploitation: abridgments, translations, adaptations, use of characters, even paraphrase? His chapter on Defoe shows copyright's construction of the author at an early stage. Defoe repeatedly called for a statute that would secure authors' works as their own indefeasible property, and his agitation contributed to the passage of the Statute of Anne (1710), "the world's first copyright act" (p. 8). In contrast to earlier licensing acts that sought to control seditious texts and other officially disapproved speech, the Statute had the express purpose of encouraging learning, making authors the initial owners of a limited right to print and reprint their works, "by virtue of [their] literary endeavor" (p. 10). Alexander Pope's 1741 lawsuit against the rascally printer Edmund Curll for publishing Pope's letters without permission established a fundamental point of copyright law that is still observed today: copyright protects the particular concatenation of words set down by the author, not the physical document or other tangible medium that embodies them. By detaching the intangible right of publication (owned by the author) from the physical letter (owned by the recipient), Lord Chancellor Hardwicke, who heard *Pope v. Curll*, helped advance the law from the old printer's claim of copy-right—the right to print from copy acquired from an author—towards the modern idea of an author's copyright, the right to control the intangible work, whatever medium it might inhabit (pp. 24-25). To conceive of authors' works as something separate from paper and ink was a step towards recognizing "the author's right of property in the text" (p. 33). The tangible-intangible split in *Pope v. Curll* was a metaphysical surge in the abstractive trajectory of intellectual property (p. 90).

Rose points out that in one respect Hardwicke's decision was essentially an act of literary criticism. In concluding that private, familiar letters could be protected by a statute that had been framed for the advancement of learning, Hardwicke was necessarily "turning critical opinion into legal judgment" (p. 23). Rose's subplot of judge-as-critic is a recurrent theme of his study, and his point could be

extended to other judicial performances. Supreme Court Justice Samuel Miller's ruling in *Burrow-Giles Lithographic v. Sarony* (1884) that a photograph was a "writing" and that a photographer was an "author" within the meaning of the U.S. Constitution's Copyright Clause was a bold interpretative act, comparable in some ways to a contemporary theorist's argument that popular culture should be granted equal dignity with canonical literature as a subject of criticism and pedagogy.<sup>3</sup> When Justice Oliver Wendell Holmes, Jr., concluded that an ordinary circus poster could qualify as a pictorial work under U.S. copyright law, he was creatively expanding the law to accommodate the detritus of popular culture,<sup>4</sup> even as he was endorsing, according to Barton Beebe, "an 'accumulationist' model of progress [that] defines aesthetic progress as simply the accumulation over time of more and more aesthetic things."<sup>5</sup>

Judicial determinations of fair use are often acts of aesthetic interpretation. Where one judge finds copyright infringement in the unauthorized use of a photograph to construct a sculpture of puppies, another might find fair use as a matter of artistic transformation or parodic purpose. Justice David Souter's landmark opinion in *Campbell v. Acuff-Rose Music* (1994), with its influential distinction between parody and satire, is as much a seminar in literary genres as a ruling on fair use.<sup>6</sup> The growth of transformative fair use as a powerful defense in the twenty years between *Salinger v. Random House* and *Blanch v. Koons*<sup>7</sup> shows the judicial mind opening to the lawful possibilities of postmodern collage, allusion, parody, and intertextuality. "Inevitably," Rose writes, "the determination of what is or is not 'transformative' is subject to critical discrimination" (p. 183).

Harriet Beecher Stowe tried to expand authors' rights by pushing copyright further along its metaphysical path. But her lawsuit against the publisher of an unauthorized German translation of her bestselling antislavery novel *UNCLE TOM'S CABIN* (1852) failed to add an exclusive translation right to copyright's bundle. In *Stowe v. Thomas*, Justice Robert Grier held that, prior to publication, an author's "dominion" over her thoughts, ideas, and sentiments was "perfect," but, once published, her conceptions were "given . . . to the world" as "common property," and she was left with only the "exclusive right to multiply the copies of that particular combination" of words.<sup>8</sup> Unauthorized translation, because it was a re-clothing of ideas, sentiments, and characters freely gifted to the world through the decision to publish, could not infringe the author's narrow right to protect "the precise words" of her book (p. 90). As Rose points out, the 1870 U.S. Copyright Act would later vindicate Stowe's position by codifying an author's translation right (p. 90), but in 1853 the law was not ready for such an expansive novelty. Infringement lay in literal copying, not nonliteral translation.

In a fascinating passage, Rose analyzes the strange literary-critical moment in Justice Grier's opinion when he played on "the idea of Stowe as a slave owner" suing to control her characters through legal monopoly while preaching an abolitionist politics of non-ownership in her novel (pp. 58-59). Rose suggests that Grier, a supporter of the 1850 Fugitive Slave Law, was flinging a "gratuitous

insult” at Stowe (p. 59), but I wonder if Grier’s edgy dictum went somewhat deeper. In his opinion, he remarked that Stowe’s characters “Uncle Tom and Topsy are . . . *publici juris* [and] may be used and abused by imitators, play-rights [sic] and poetasters.”<sup>9</sup> The quip hints that, if Stowe had wanted to maintain the perfect dominion over her characters that she now contends for as a litigant, she should have kept them confined to the plantation of her imagination and not manumitted them in the pages of a published volume. Uncle Tom and Topsy may now be lawfully exploited by anyone, subjected to all manner of nonliteral copying in the ruthless and degrading literary marketplace. This was more than the language of insult; it was the rhetoric of paternalism that many Southerners employed to justify the institution of slavery in the mid-1800s. The slaveholder’s relationship to the slave, this rhetoric declared, was that of a kind father to his vulnerable child, a form of protective kindness and solicitude that radical Northerners would cruelly destroy by freeing slaves to enter a world that would use and abuse them. Slaveholders “recoiled from the suggestion that their slaves would be better off as free men,” according to scholars of American slavery.<sup>10</sup> Justice Grier’s barb hinted that the scornful treatment to which Stowe’s thought-slaves were now exposed in the writer’s marketplace would be visited on actual freed slaves, should her abolitionist dream become law.

The playwright Anne Nichols also sought to control the nonliteral elements of a popular work, her smash-hit stage comedy “Abie’s Irish Rose” (1922). When Universal Pictures failed to obtain rights to adapt Nichols’ play for the screen, the company bought the rights to a different play and then altered it to resemble the central theme of “Abie’s Irish Rose”: ethnic conflict between an Irish family and a Jewish family, complicated by a romance between a son and a daughter from each. Nichols sued Universal over the resulting movie, *THE COHENS AND KELLYS* (1926), and hired an attorney, Moses L. Malevinsky, who also served as her expert witness in the case. Malevinsky had authored *THE SCIENCE OF PLAYWRITING*,<sup>11</sup> in which he claimed that any drama could be analytically reduced to its emotional components by an algebraic formula, and that this algebra could be employed to detect plagiarism: “A plus B plus C of the Algebraic Formula when paralleled in two plays proves infringement” (p. 99).

This write-by-numbers approach to literary composition had a certain vogue in the early decades of the twentieth century. Hudson Maxim, the U.S. inventor of smokeless gunpowder, argued in his book *THE SCIENCE OF POETRY AND THE PHILOSOPHY OF LANGUAGE* that the mysteries of poetic composition could be cleared up by a scientific approach to the subject. Maxim coined the words “potentry” and “tro-potentry” to characterize the power of great lines, and gave examples of his own scientifically created verse, even offering a methodological rewrite of Hamlet’s soliloquy to illustrate “continuous primary rhythm”: “How fear doth poise us on the brink of death, / Between contending purposes.”<sup>12</sup> An illustration in the volume showing Maxim taming a bucking Pegasus as if it were a wild bronco gives an idea of the confidence that lay behind his project.<sup>13</sup> The American poet Ezra Pound mocked Hudson’s theorizing as

pretentious and parochial, “designed, in short, for the store-post-office audience in Canastota and Pipe’s End.”<sup>14</sup> Yet this faith in a rational skeleton key to literature stretched back at least to Edgar Allan Poe’s “Philosophy of Composition” (1846) and can be found in sophisticated forms in Frye’s archetypal criticism and in the recurrent textual patterns discovered by literary structuralism. Malevinsky’s algebraic formula, which Rose describes as bearing “the marks of a quirky autodidact” (p. 99), operated at the ideal level of malleable abstraction for finding plagiaristic similarities in popular drama. He was the perfect lawyer and expert witness for Nichols, who was indignant over nonliteral parallels between her play and Universal’s movie. Universal had done something more economically threatening than simply borrowing words and speeches from her play: it had become a competitor for audience response to her story about blind love overcoming family prejudice, her comic rewriting of “Romeo and Juliet.”

Judge Learned Hand, of the U.S. Court of Appeals for the Second Circuit, rejected Nichols’ claims and Malevinsky’s algebraic analysis, holding that Universal had taken no more than general plot elements, comedic conventions, and stock characters. Famously, Hand set forth in his eloquent opinion what has come to be known as the “abstraction test”:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended.<sup>15</sup>

Rose suggests, persuasively, that Judge Hand may have formulated his abstraction test partly in response to the battle of experts in the lower court (pp. 106-09). Indeed, Hand’s application of the abstraction test turned Malevinsky’s algebra on its head, finding non-infringement in the common emotional elements that the expert had proudly identified as evidence of unlawful copying. Hand located copyright’s commons precisely where Malevinsky had found invaded property. An irony of the litigation is that Hand complained in his opinion about the use of expert witnesses in copyright cases (p. 107). He felt that they invaded the province of the fact-finder, substituting pedantic dissections and intricate charts for “the firmer, if more naïve, ground of [the court’s] considered impressions upon its own perusal.”<sup>16</sup> Yet his abstraction test, elaborated and refined, has been the basis of much expert testimony in copyright cases of recent decades, especially those involving software and other technical subject matter.

One of Rose’s storylines is the tension between expansion and contraction in copyright’s metaphysics, between authors’ rights and users’ privileges. Pope’s

lawsuit broke ground by splitting the intangible work from the tangible medium. Sarony's litigation showed that posed photographs could be the basis of authorial property. Yet, in contrast to these growth spurts, the translation right came slowly to U.S. copyright law, as Stowe learned; and general plotlines, common settings, and indistinctly marked characters remain as unprotected today as they were for Anne Nichols. Copyright expands until it overreaches and impinges on the common pool of materials necessary for others to engage in creativity. Then there is a halt and a readjustment.

Rose's final two chapters shift the focus from plaintiff authors to defendant copiers, and from the changing shape of authors' rights to the dynamic development of the fair use defense. Yet these chapters are also about authors, because the defendants in the Salinger and Koons cases engaged in quoting and copying precisely in order to create. Ian Hamilton quoted from and paraphrased Salinger's private letters with the intention of crafting a biography in which the reclusive author's voice could be heard as a rich melody distinct from Hamilton's own ground bass. Salinger's quoted letters lent individuality and authenticity to Hamilton's account. Koons copied from photographic kitsch and fashion ads in order to transpose the banal and the mundane to the key of postmodern irony. Rose's narrative account of the growth of transformative fair use through the Salinger and Koons cases brings human color and pathos to one of copyright law's most complex and unpredictable areas. Here, Hamilton and Koons, though accused of infringing authors' rights, become the authors in court. Rose shows that transformative fair use is more than just a change in the direction of a murky doctrine; rather, it recognizes the fundamentally creative dimension of copying: copying for a purpose beyond copying. Just as copyright's history shows an extension of authors' rights to nonliteral forms of their works, so the story of fair use is a gradual recognition of the social and aesthetic value of nonliteral copying.

Rose's six-act drama is a worthy successor to his groundbreaking *AUTHORS AND OWNERS*.<sup>17</sup> As in that book, he anchors copyright law in clear storytelling. Each chapter gives us more than just the facts and the law; it also shows authorship struggling to shape itself in relation to property and its discontents, eager to ensure that being an owner is not inconsistent with being an author. The chief characters sometimes strangely echo one another within their moment and across time. Stowe tries to make property-owning consistent with being a wife and mother; Pope plots and contrives to be a copyright-enforcing author without taking on the taint of ungentlemanly professionalism. Pope and Salinger—separated by two hundred and fifty years, and as different as two authors could be—converge in using copyright to enforce controversial claims to privacy. Napoleon Sarony is a diminutive dandy every bit as committed to flamboyant showmanship as his famous photographic subject, Oscar Wilde. Jeff Koons is in some ways a reincarnation of Wilde, demanding deference to his aesthetic whims and decrees, expecting to be richly rewarded for his aesthetic audacity, absolutely certain of the division between art and non-art yet constantly bringing the two into subversive contact. Rose's chapter on Koons, "Purloined Puppies," is easily the

best account ever written of the Koons litigations, largely because Koons emerges here as a complex artist and businessman, thoughtful and dedicated in his way, far from the cardboard charlatan and greedy clown that he is often depicted as being. Rose tells copyright law's stories with great skill and humanity. In addition to its value as a scholarly monograph, *AUTHORS IN COURT* would be an excellent supplementary text for courses on intellectual property, copyright, and piracy in law schools and graduate and undergraduate programs.

## ENDNOTES

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- <sup>1</sup> See generally Northrop Frye, *ANATOMY OF CRITICISM: FOUR ESSAYS* (Princeton Univ. Press, 1957).
- <sup>2</sup> Catherine L. Fisk, *WRITING FOR HIRE: UNIONS, HOLLYWOOD, AND MADISON AVENUE* (Harvard Univ. Press, 2016).
- <sup>3</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58-59 (1884).
- <sup>4</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903).
- <sup>5</sup> Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 *Colum. L. Rev.* 319, 331 (2017).
- <sup>6</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580-81 (1994).
- <sup>7</sup> *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).
- <sup>8</sup> *Stowe v. Thomas*, 23 F. Cas. 201, 206 (C.C.E.D. Pa. 1853).
- <sup>9</sup> *Id.* at 208.
- <sup>10</sup> Eugene D. Genovese & Elizabeth Fox-Genovese, *FATAL SELF-DECEPTION: SLAVEHOLDING PATERNALISM IN THE OLD SOUTH 3-4* (Cambridge Univ. Press, 2011).
- <sup>11</sup> Moses L. Malevinsky, *THE SCIENCE OF PLAYWRITING* (Brentano's, 1925).
- <sup>12</sup> Hudson Maxim, *THE SCIENCE OF POETRY AND THE PHILOSOPHY OF LANGUAGE* 199 (Funk and Wagnalls Co., 1910).
- <sup>13</sup> *Id.* at unnumbered page between pages 26 and 27.
- <sup>14</sup> Quoted in Omar Pound & Robert Spoo, eds., *EZRA POUND AND MARGARET CRAVENS: A TRAGIC FRIENDSHIP, 1910-1912*, at 58, (Duke Univ. Press, 1988).
- <sup>15</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).
- <sup>16</sup> *Id.* at 123.
- <sup>17</sup> Mark Rose, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (Harvard Univ. Press, 1993).

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# The IP Law Book Review

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**COPYRIGHT BEYOND LAW: REGULATING CREATIVITY IN THE GRAFFITI SUBCULTURE** by **Marta Iljadica**, Hart Publishing, 2016, 328 pp., Hardcover, \$94.00

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In my home city in 2014, a 20-year-old provocateur and his friend launched a guerrilla art project called Rainworks, sneaking around Seattle and surreptitiously creating works of art using sidewalks as canvasses.<sup>1</sup> These works were created with paint and super-hydrophobic coatings which rendered them invisible until rain darkened the pavement around the art work and caused a message suddenly to “appear.” The works “disappeared” again as the concrete dried, and the paint—and thus this reappearing-disappearing act—lasted for two to four months in each work. In a climate famous for its rainy weather, the opportunities to see these works abounded, and the desire for distraction, or a lift in spirits caused by finding hidden works, had intuitive appeal. Rainworks was designed to make people glad that it was raining: sort of an anodyne idea, the smiley-face emoji version of installation art. Consider the mission: “Rainworks are positive messages and art that appear when it rains. Their purpose: To turn rainy days into something to look forward to!” The everybody-wins ethos of Rainworks’ writings is exemplified physically in its paint, which is nontoxic and biodegradable, with solvent that evaporates. Rainworks clearly aims to avoid offending; its point is not to foment revolution at the bus stop. At the same time, and in spite of its do-gooderism, its legal status as art was a little iffy: before Rainworks started working with the City of Seattle and the Seattle Department of Transportation, the project was technically illegal, a form of cheery trespass.<sup>2</sup> Claiming ownership of these works might have been difficult under U.S. copyright law, the legal domain most central to regulating art, because of the requirement that works be “fixed in a tangible medium of expression,” and perhaps for public policy reasons. (I have argued elsewhere that fixation need not be a bar to copyrightability in conceptual works of art that change in certain predictable ways like these did, though it is not certain that the U.S. Copyright Office, or indeed courts, would agree.)<sup>3</sup>

Still, Rainworks is art that started life in liminality, traced in the margins of urban textuality. Through municipal blessing, it has gone mainstream, moved to the body of the text, shifted status from illicit street art to sanctioned public art. But it

began life, at least in theory, as a crime. This is the complex status of graffiti and other unauthorized forms of street art: it may display creativity, create community cohesion, and enable individual self-fashioning through artistic expression, yet it tends to have these benefits overshadowed, and undertheorized, because of its legal status as marginal or even criminal. Through the inevitable politics that shape policy and scholarship, graffiti and its creative subculture have been, if not invisible, nonetheless not fully seen.

Marta Iljadica's new book, *COPYRIGHT BEYOND LAW: REGULATING CREATIVITY IN THE GRAFFITI SUBCULTURE* provides a thorough investigation of graffiti's role in contemporary life, understood through issues of creativity, law, and urban space. In her investigation of graffiti's subculture, she identifies a "bounded commons" that governs the attitudes and norms of the artists within it. Relying on semistructured interviews and personal observation, she identifies rules that govern and safeguard graffiti's practice as an embodied form of art, always linked to its physical environment, and undergirded by sociological, aesthetic, and moral norms. The "graffiti rules" exist sometimes in parallel with copyright, and sometimes in supplementary or substitutive form, generally there to protect the work, the practice, and the community (p. 295). Iljadica's curiosity and diligent empirical research provide copyright scholars with a richly rewarding exploration of alternative frameworks for regulating creativity. Iljadica writes that the project began with her surprise upon discovering, through a friend's offhand comment, that tagging a church or car was not considered acceptable within the graffiti subculture; she realized there were a set of hidden rules she had never seen, and had not known she wasn't seeing (p. 63).

Perhaps as a way of prompting us to a similar flash of insight, Iljadica's book opens with an engaging epigraph. "A Note on Pictures" appeared unexpectedly, rather like a Rainworks writing, and then disappeared from view as I made my way into the book. Yet its message remained in the back of mind as I read, and it came to take on deeper significance as I thought about the aspirations of the book as a whole. The epigraph is there to warn readers not to expect pictures of graffiti in the book, and it telegraphs information, between the lines, about readerly expectations; the way in which permissions operate in publishing and may sometimes constrain authorship; the care Iljadica displays for graffiti creators' creations whether or not they are copyright protected; and the deeper message behind her method. This is not a book about the content and messages of the graffiti themselves (pp. 66-67); it seeks instead to describe the attitudes toward creation, ownership, and copying that are manifest in graffiti's subcultural system. To do that, it doesn't need pictures as much as it needs readers willing to open their minds and perhaps their eyes. Iljadica writes:

[R]ather than seeing here examples of graffiti creativity outside the cultural and spatial context in which they reside, I invite you to walk the city; to seek out graffiti writing (and street art, too). See the names repeating. See the forms of graffiti creativity takes (and those it doesn't) and the places in which it is found (and those in which it isn't). None of this is an accident.

Iljadica urges readers to explore the world around them, seeking visual clues in graffiti, looking for repetitions, forms, names, and omissions. She calls readers to observational attention and, by directing them to look for things in the negative (forms graffiti doesn't take; places graffiti doesn't appear), she invites readers to imagine, to fill gaps and draw inferences. Lastly, she instructs them to trust that what they are seeing is not there by accident, but by design, part of a hidden subcultural order that many do not understand and scarcely imagine to be a vibrant artistic ecosystem with high standards of originality and ethics, as well as clear rules about how and where graffiti writers create their art. In asking us to attend to our own vision, she is asking that we begin, in effect, by opening our eyes to what is around us, to what she will later describe, quoting Anne Barron, as a world hidden from view, unseen “except as an environment for economic activity” (p. 292). Copyright's dominant stories about artistic creation and its regulation are heavily skewed towards economic frameworks, and that bias has at times kept more accurate, and more pluralistic views out of sight. Of course, more empirically and phenomenologically accurate accounts require time, fieldwork, methodological rigor, and a commitment to the value of undertaking such resource-intensive work. Happily, Iljadica has volunteered. Her book takes readers on a listening and imagining tour as she guides us through her experience of that world, showing us how graffiti writers work, what matters to them, and what shapes their community governance. Her work provides an opportunity to undo a politics of invisibility that obscures graffiti writers, their process and their mores.

Iljadica's thoughtful approach to structuring the book displays loving craft, signaled on the surface by adopting her interviewees' term “panel,” but going much deeper. Iljadica artfully weaves themes through the book, moving between empirical, historical, quasi-sociological, and doctrinal discussion in a way that rewards a linear reading. At times, those of us who publish in law review articles chafe at the format: articles can seem organized inorganically, as though programmed by a word processor's automated outline function, and one suspects (with no claims about cause or correlation) that these same articles are likely to be read instrumentally (readers may read the one relevant section, Part IV on willful infringement for instance, to the exclusion of the rest). To be clear, those of us in that publishing ecosystem may all be guilty at times of both organizing and reading in instrumental, uninspired fashion. Lawyers, and law professors, are epistemologically inclined towards instrumentalism, a hard habit to break in a field where client-oriented service, persuasive advocacy, and time-keeping norms mark the profession in particular ways. Nonetheless, that professional backdrop

makes reading *COPYRIGHT BEYOND LAW*—a work beautifully conceptualized and immanently ordered, a book meant to be taken in holistically—a genuine joy to read. The book is organized in sections, or panels, a term Iljadica borrows from graffiti writers who use it to refer to the section of a train carriage on which to work (p. 4). Each panel is further subdivided into one to three chapters that painstakingly approach the subject of graffiti from various interdisciplinary perspectives. In what follows, I provide brief summaries and comments on each panel.

In her opening panel, “Context,” Iljadica historicizes graffiti, and situates it in the framework of copyright theory. Chapter 1 provides a helpful history of graffiti’s development, a working definition of graffiti (and its relationship to street art and public art), and observations about a particular location (London). She explains some of the characteristics of the graffiti subculture, providing vivid snapshots of why and how graffiti artists create. Iljadica captures the sense of exhilaration writers may feel upon tagging a train, or achieving otherwise difficult artistic feats, and she acknowledges the legally risky, if not downright illegal nature of her interviewees’ chosen art. Iljadica positions the practice as liminal but not negatively so. By contrast, much of the work in this area categorizes it as though its illegality were presumed, or a core characteristic of it; Iljadica refers to this as “normativity against graffiti writers” (p. 65).

In the second chapter, “Copyright, Creativity and Commons,” Iljadica summarizes the utilitarian view of copyright’s purpose, as well as existing critiques of it. Her assessment is both sweeping and concise, a valuable summary of the scholarly debate for those new to it. This section also makes a contribution in its own right for those in our field who have long felt stifled and perplexed by the dominance of the economic view and in search of a more heterogeneous view of copyright, one based on values and exogenous reasoning than on economic theories and endogenous assumptions. Iljadica points out that “[a] noted flaw of the law and economics approach in justifying copyright is precisely its inability to explain *why* encouraging creativity is a social benefit in the first place” (p. 35). Her assessment of the flaws of law-and-economics-style utilitarianism may help explain why qualitative empirical research is so important. By attuning researchers to what matters within a given creative community, we can ask and answer better questions. By uncovering what artists actually do, and think, and feel, and need, we can consider regulation of creativity from a range of perspectives and with more accurate information that tracks practices and attitudes in the world rather than hewing to an abstract, theoretical model of what a rational actor in a given situation does to maximize her interests.

Iljadica builds on important scholarship by Betsy Rosenblatt and Estelle Derclaye that suggests the importance of belonging and happiness respectively to human flourishing. Turning to other researchers (Julie Cohen, Jessica Silbey, Rebecca Tushnet) who have explored creativity and why creators create, Iljadica cites love, esteem, play, pleasure and other non-property-oriented benefits that have no

obvious place in a copyright world structured by commodity culture and market-driven thinking. More radically still, perhaps, Iljadica suggests we could recalibrate copyright protection in order to maximize happiness rather than an optimal balance of incentives and access (p. 39). In other words, Iljadica does not just critique the dominant market-centered philosophy underpinning copyright. She advocates for its wholesale reorientation around ethics and empirics instead of “the fallacious idea of progress” (p. 39). She turns to the idea of a “bounded commons” for graffiti writers to unite the importance of physical space with the “library of styles” they collectively govern, in an intellectual commons that exists outside copyright law (p. 49). The graffiti writing community has an incentive to participate in the norms of the commons because membership matters, and those outside the group will be treated differently. Their participation in graffiti writing, and compliance with graffiti rules becomes “a social practice of commoning” (p. 55, internal citation omitted).

The third chapter of this Panel shifts gears into a more colloquial tone as Iljadica tells the story of her research design and experience. She conducted 29 formal interviews and analyzed them following grounded theory practices. She supplemented these by conducting extensive supplementary research and with her own fieldwork, traveling through the city and other cities. 18 months into a qualitative empirical research project studying craft brewers in Seattle, I must say I found this section especially gripping and impressive: this kind of work is a labor of love, and it requires a certain amount of both faith, and courage. Like Iljadica, I eventually had to move from reading to practice, jumping into action at a certain point because there is no substitute for *doing* in this arena. Her discussing of taking sides was especially valuable; I found myself taking a side in interviews quite naturally, for some of the same reasons Iljadica tells us she did (p. 73). Still, I often wondered what an ideal calibration looked like. The empathy and engagement with a particular subculture can be a genuine and also helpful stance to strike even if it does not pretend to achieve “objectivity,” or perhaps precisely because it doesn’t. Iljadica’s work in this area is unique in its focus on illegal subcultural activity, and the methods section was interesting to read for the complexities that aspect introduced. Ultimately, I wondered about some issues that I did not see discussed at length, including the gender, age, and ethnicity of participants. Is graffiti writing macho or masculinist (as I would speculate) and what are the ways for girls and women to participate, if so? What are the class and other identity factors that make belonging to this community easier or harder? Iljadica notes her own positionality as an outsider (p. 68) under suspicion (p. 70) and that being a woman generally might contribute to that outsider status (p. 71). I wanted more discussion of these factors, and how they created both norms of inclusion and exclusion that might shape the graffiti subcultural commons.

The book’s middle sections (panels 2, 3, and 4) all juxtapose copyright rules with the graffiti rules Iljadica identifies in her empirical chapters. Her aim is to map departures, adherence, and various misalignments between the two regimes. Panel 2 is about “the relevance of form and placement to creativity,” but it is also an

exploration of graffiti's status in the eyes of copyright law and its subject matter requirements. Chapter 4 presents an ontological inquiry into what counts to make certain activity be considered art, or original, or indeed, a unit of work that can and should be measured as such under either the graffiti or copyright paradigms. The juxtaposition here helps denaturalize copyright law: there is nothing particularly necessary about the lines it draws, and at times, those lines will not map well onto a subculture or practice.

Additionally, Iljadica provides helpful background for this and other American readers, allowing them to follow a few of the doctrinal divergences between U.K. Copyright Law and EU Copyright Law (which divergences may take on additional significance given BREXIT). She is especially helpfully in discussing the paradox of graffiti: it might be doubly copyrightable in some instances (as literary work *and* as visual work under the Copyright, Design and Patents Act 1988 ("CDPA")); but it may be uncopyrightable --either on the grounds that it is a single word, name, or short phrase (pp. 95-96), or on public policy grounds based on the theory that if placed in such way that it creates civil or criminal liability, perhaps copyright ought not to place a stamp of approval on it through legal protection (pp. 102-103).

The third panel centers on copying. Chapters 6 and 7 analyze copyright's originality and authorship doctrines, as well as their counterparts in the graffiti rules. Iljadica catalogs ways in which authorial choices matter in both domains, and contrasts their standards for originality. Her treatment of authorship and joint authorship was brief but illuminating, and suggests the need for continuing work on how collaborative subcultural creativity governed by norms misaligns with formal law and may be chilled by regulation, thus suppressing socially beneficial expression. Iljadica demonstrates that this misalignment holds true with respect to reproduction, which copyright law paints in very broad brushstrokes but which subcultural communities like this one tend to treat in much more nuanced and variegated fashion. Graffiti writers think of some copying as derivative but some as necessary and helpful, and the qualitative nature of the copying and the works may matter (pp. 163, 182). Relatedly, the inability of the lay eye to discern differences in graffiti writings may cause further difficulty in grafting the law's concept of reproduction onto the graffiti rules (p. 163).

A minor point of confusion for me may lie in a terminological choice. Throughout the book, and in these middle sections, there occasionally appeared to be some slippage between "rules" and "norms" (p. 3, for instance, uses graffiti rules and norms interchangeably but elsewhere there appeared to be a difference between the two). Norms, as I understand them, are informal rules that derive from a community's practice and beliefs, backed by a sanction. To the extent no sanction exists, then behaviors could be caused by reasons other than compliance with norms, and statements of community values cast as norms could be merely precatory aspirations or statements of belief, with no teeth. The reasons graffiti writers choose to adopt original styles, or choose to write in certain places, could

of course be due to a norm against biting and other graffiti rules, but these reasons could also have to do with the desire for fame, the sense of thrill and risk, and the desire to make a mark in a hard-to-reach highly visible area, for the bragging rights and sense of achievement. If sanctions operate forcefully, other reasons may be present, but as long as the sanctions are meaningful ones, we would normally presume that they matter to community members, and contribute to shaping behavior. Because Iljadica notes that “graffiti writers recognize but do not always enforce, norms that demonstrate striking similarities and telling departures from copyright rules,” I wondered whether I understand norms in the same way she does (p. 4). Insisting on a distinction between them helps avoid behavioral reductivism, or a collapse between practices and the reasons behind them, as Iljadica undoubtedly knows. For this reader perhaps, the distinction could have been made slightly clearer, perhaps by defining those two central terms more finely. To the extent that behavior is prohibited by norms, or perhaps unavailable or unattractive for other reasons, it may become important to know. When Iljadica writes of compelled forbearance of IP rights, for instance (p. 61), the implication is that would-be plaintiffs *cannot* seek legal remedies for copying of their own illegal works. But would they if they could? In the area I study, there is a forbearance norm under many circumstances; that of course tells a different story. The point may be a minor one, but the norms/rules distinction helps sort the reasons for decisionmaking about creativity and law. Ultimately, Iljadica’s larger points concern the interplay between graffiti rules and copyright rules, and those stand regardless of this question of terminology and the intended distinction between norms and rules.

The fourth panel discusses creators’ reputational interests, and the means of protecting those available under graffiti subculture norms, and copyright (or trademark) law. This discussion is especially interesting for American readers, whose copyright system is well known for rejecting most forms of moral rights like those that, in other copyright regimes, protect reputation through rights of integrity and attribution. To the extent that UK copyright law aligns in some respects with what graffiti artists want, it does so in some instances through moral rights that the U.S. copyright law largely excludes from its system. I am not here advocating for moral rights in the U.S.; my point is both less prescriptive and less sure that moral rights help more than hinder. However, it should give us some hesitation in this country as empirical scholarship continues to show that authors and artists may not be getting what they need from U.S. copyright law, but might be able to get more of that if moral rights were available through law. Of course, Iljadica’s compelling study demonstrates that norms play an important role, and in some, or many cases, their availability may be better and cheaper than the strongest moral rights available at law (p. 291).

Iljadica also shows how evaluation of the work’s merit plays a role in graffiti’s subcultural governance norms. This kind of value-definition is typically outside the scope of copyright law, which at least nominally purports to strike a position of aesthetic non-discrimination. Interestingly, the graffiti rules here track the

intuitive position of many subcultural communities; aesthetic valuation is fine if it is controlled by and within the community, for the purposes of reputational advancement or other opportunities. Ijadica's work helps show that the point at which aesthetic valuation becomes a problem is when courts are in charge of it, and empowered to award or withhold property rights on its basis.

The book's final panel features a chapter of suggested reforms for copyright, and a stirring conclusion about the jurisprudential stakes of truly seeing graffiti for what it is, and can be, in the larger context of copyright's regulation of both creativity and public space. *COPYRIGHT BEYOND LAW* allows us to shine a light on copyright's internal structures and biases, and perhaps consider reforms Ijadica lays out. Yet she cautions against using the study instrumentally to improve copyright; her suggestion instead is to allow it to inform a more pluralistic, less hegemonic discourse about creativity, and its connections to community and space (p. 300).

How one reads graffiti is a function of contextual clues and environmental factors; artistic reception is socially constructed. Yet graffiti may correlate with factors in the lived world that scrambles its meanings for many who see it. What makes a varsity letter jacket "code" one way and a hoodie code another way, for those who see them on a young man walking down the street? What work do other factors (race, age, size of the wearer) do to inform the way these items are seen, and what are the architectural and social features of the landscape that embeds and encodes graffiti? What do these clues do to shape policy discourse around graffiti? One has only to consider Rainworks, discussed above, for an example of how policymakers might talk about graffiti, but for many complex reasons including class, race, and gender, usually don't. The discourse about graffiti, by many academics and policymakers alike, comes heavily freighted with assumptions about morality and aesthetic value.

A great deal of writing has explored graffiti as an urban phenomenon, though regrettably much of it links graffiti to crime or urban troubles, framing it as one among many indicators of decline. This version of discourse about graffiti, at least in the United States, reinscribes the discriminatory effects, and biases, of an often-unjust, broken culture of criminal justice and mass incarceration. Some scholarship does celebrate graffiti's capacity for community-building, beautification, and individual self-fashioning, even when this art is unlawful, though less of such work than one might hope. Yet none has offered an extended examination of graffiti as a subcultural activity that can contribute rich insights to IP scholarship, which, with its core interests in theorizing and calibrating the regulation of creative activity, ought to take notice.

For Ijadica, graffiti is not a symptom of the "broken windows" problem, signaling urban neglect and lumped in with activities such as public urination, intoxication in public, and other expressions of lawlessness (or sometimes simply poverty) that are taken to be urban failures of some kind. On the contrary, graffiti

reflects engagement with the territory, and functions as a means of identifying people's belonging to and within that place—note Iljadica's own sense that graffiti is a link to a person, making a city feel safer to her (p. 75). Iljadica's book demonstrates a commitment to taking graffiti seriously on its own terms, which includes understanding what sets it off from street art, and when (she mentions the “blurred line” between them often). Iljadica discusses a “wide... gulf” between graffiti and street art, and it may be that the distinction between the two forms of art tracks to some extent their different treatment; graffiti may be cast in negative terms, and street art might be cast more positively, more like art than merely signatures or territory-markings (to adopt some of the stereotypes about both). To see graffiti cast here as a form of art about reputation, visibility, and the lived landscape—as well as risk-taking and resistance—is a refreshing change.<sup>4</sup> Iljadica's work will help conceptualize graffiti in more positive terms, and her incisive interdisciplinary analysis will, I hope, advance a conversation among scholars of art, sociology, cultural geography, and law.

Notwithstanding this rehabilitative ethos, the book grapples with graffiti's often illegal status: it affects whom Iljadica could interview, and created some anxiety discussed in Chapter 3, about the modes and ethics of her interviews. This marginal status is one the practice of graffiti continues to experience, made all the more visible perhaps by the growing popularity of certain kinds of (sanctioned) street art and the overlaps between artistic communities who participate in both. The Wynwood neighborhood of Miami comes to mind: a remarkable collection of art, including street art, public art and graffiti, graces many walls and surfaces, spanning over twenty city blocks. Maps legitimize the collection as tourist destinations, and as a collection that coheres, too.<sup>5</sup> Yet within that community, even those artists who do both graffiti and street art, remain anonymous for fear of arrest—some have been to jail and prefer to stay out.<sup>6</sup>

Iljadica's study tees up many rich lines of future inquiry. Her sounding notes on the market-oriented assumptions of copyright and the commodification of art have, for me, lasting resonance. A question for future empirical and theoretical work on graffiti writers to take up is the effects of the commodification and mainstreaming of forms of street art. Will graffiti as kitsch, as brand, as meta-signature, coopt graffiti as self-expression and subculture? Will graffiti writers actually find more legitimacy in their work based on the increased legitimacy of these outdoor tableaux and the sense that the urban landscape is available for artistic engagement? Is the album of snapshots Iljadica has taken going to change, and if so how? She refers to the graffiti rules as dynamic, not static. IP scholarship has not done enough to study the conditions of norm-making, and how market pressures may force changes in norms that might push artists either further into norms, or out of norms and into formal law. She talks about how graffiti is an act of resistance that reclaims urban space from corporate ownership (p. 53), drawing on theories of space and the city by Georg Simmel, and Henri LeFebvre. For both of them, the scholarly understanding of space required accounting for individual, phenomenologically inflected experience while also grappling with social

relations structured by modernity, capitalism, and industrialization. Read at a broad level, both were concerned in various ways with the everyday struggle of the human against the social machinery of the system, shaped as it was by economic and political power. Ilijadica writes that “space is socially produced, [hence] the interpretation of laws, including copyright law, also actively *produce* space” (p. 295). In calling the attention of copyright scholars to its role “in producing public space,” she shows how graffiti highlights the sociopolitical dimensions of that role (p. 288). The individual, and the subculture, struggle to resist, and engage with, and reclaim, the world around them. Graffiti is at once an opening salvo, and a response, full of defiance, that creates space for a different artistic discourse, and a different lived experience in the city.

As street art and graffiti have gained status in the worlds of art and fashion, graffiti has taken on a commodity aspect. There have been numerous instances in which designers have used graffiti artists’ work without their permission, or following failed attempts to negotiate a license. The logic of the commodity is also the logic of the law, of property, and of the right to exclude. In litigation that has predictably followed these unauthorized uses, a rhetoric of commodification and ownership is visible, and this rhetoric is what wins IP lawsuits: it’s a necessary ingredient in most complaints.<sup>7</sup> If it is merely rhetorical, reflecting compliance with legal pleading requirements, there may be nothing more to say about it. But if these lawsuits, and their theories of harm, reflect more than rhetoric, might it be that copyright, and IP law, will work to produce a different kind of public space, perhaps a diminished intellectual commons? Trademark and copyright exert different pressures on rightsholders, and if graffiti writers turn to formal law, what will that look like for them, and for the creative communities around them? Graffiti may serve many purposes, from self-expression to community-building, to expressing resistance. It may also be a writer’s brand, or coopted by a large corporate brand seeking to look edgy or fresh. Its status, for law, for art, and in the market, merits future attention.

COPYRIGHT BEYOND LAW is a welcome contribution to several ongoing conversations in IP scholarship. Its discussion will add to existing legal scholarship on subcultural creativity, as well as the law-and-norms and negative space scholarship. In particular, the norms scholarship at times suffers from an anti-IP bias, or an insistence on viewing the world through a negative-space/low-IP lens. Here, Ilijadica is careful to emphasize that the existence of robust non-legal norms need not necessarily mean “no ‘rules,’ [through law] but rather, ‘better rules’; rules which make room for and reflect that which copyright, because it cannot, does not” (p. 295). She takes the counterintuitive tack that “the study of alternative copyright norms” among graffiti writers “provides support *for* the continued existence of copyright, albeit in an occasionally modified form, rather than for its wholesale abolition” (p. 285). In this nuanced approach to mapping copyright and graffiti rules, Ilijadica avoids the problem of all-or-nothing approaches to norms, and provides a model, consistent with intellectual or knowledge commons frameworks, of communities in which informal governance

and formal regulation can coexist, and perhaps should. The merits of this project are many, in its insights about graffiti writing and copyright law, and in the persuasive way Iljadica reframes both.

COPYRIGHT BEYOND LAW will provide helpful comparative perspective for those U.S. scholars of copyright and subcultural creativity who may find themselves with a myopically domestic focus: Iljadica's work provides much-needed comparative analysis with important implications for assessing the proper role and need for moral rights. Looking outside legal literatures, this work also contributes to the larger scholarly conversation on graffiti (and street art), with a welcome thumb on the scale that weighs the value of graffiti as a salutary sociocultural practice (instead of the normative framing of graffiti as evidence of urban decline and criminality). Finally, I think a substantial contribution of this book is to add normative heft to the collective and growing body of scholarship by other qualitative empirical researchers in IP: the excellence of this book, and its insights, call for more work of this kind. Iljadica notes copyright law's "shortcomings in recognizing the process-oriented nature of creativity and the space in which it occurs" (p. 288). It is only through qualitative study of the process itself, as it is lived by its participants, that we can map the community's practices, attitudes, and norms. Iljadica's epigraph could be doubly read: first, it is as an invitation to develop "graffiti sight" in walking through the city, a flaneur with graffiti on the brain. But it could be read at another level as impelling us, urgently, to travel through our territories, looking in a new way for different kinds of signs and omissions, imagining different kinds of evidence, and opening ourselves to a different kind of scholarly vision.

## ENDNOTES

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<sup>1</sup> Rainworks, <https://rain.works/story/>

<sup>2</sup> Matt Hickman, "Seattle's Hidden Street Art is Only Revealed After a Good Soaking Rain," (Mother Nature Network, Narrative Content Group, May 20, 2016), <https://www.mnn.com/lifestyle/arts-culture/blogs/seattles-hidden-street-art-only-revealed-after-good-soaking-rain>

<sup>3</sup> Copyright's Illogical Exclusion of Conceptual Art, 39 Colum. J. L. & Arts. 335 (2016). Iljadica refers to a debate over whether fixation improperly excludes certain forms of art on p. 135 n. 68.

<sup>4</sup> See, e.g. Celia Lerman, Protecting Artistic Vandalism: Graffiti and Copyright Law, 2 NYU J. Intell. Prop. & Ent. L. 295 (2013). Even pieces about the very idea of graffiti's rehabilitation as art in its own right seem to frame their arguments around this starting point. Marisa A. Gomez, The Writing on Our Walls: Finding Solutions Through Distinguishing Graffiti Art from Graffiti Vandalism, 26 U. Mich. J.L. Reform 633, 634 (1993) (internal citation omitted).

<sup>5</sup> An Online Guide to Wynwood Murals and Street Art, <http://www.wynwoodmap.com>

<sup>6</sup> Ahmed Fakhr, Meet Street Artists Remaking Miami's Wynwood Neighborhood, (Rolling Stone. August 3, 2017),

<http://www.rollingstone.com/culture/features/wynwood-walls-graffiti-artists-remake-miami-neighborhood-w495766>

<sup>7</sup> For examples of three recent controversies, see Lizzie Crocker, The Brooklyn Graffiti Artists Taking On McDonald's, (The Daily Beast, April 20, 2017), <https://www.thedailybeast.com/the-brooklyn-graffiti-artists-taking-on-mcdonalds> The Fashion Law, Graffiti Artists Are Increasingly Lawyering Up to Fight Fashion Copycats, (The Fashion Law, July 10, 2017),

<http://www.thefashionlaw.com/home/graffiti-artists-are-increasingly-lawyering-up-to-fight-fashion-copycats>

Anandashankar Mazumdar, 'Malarky' Is Latest Graffiti Artist to Sue Fashion Designer, (Bloomberg BNA, January 12, 2016), <https://www.bna.com/malarky-latest-graffiti-n57982066053/>

This last one's complaint excludes copyright because the artist, who goes by "Malarky," had not registered copyrights in his works. But the language uses noteworthy property rhetoric and reveals market-oriented thinking, given the claim that the artist is regularly approached with requests for licensing and affiliation: "Plaintiff regularly receives substantial financial offers requesting permission to use his name, art, and distinct style of design for collaboration to create, among other things, eye-catching, fashion forward apparel ... Plaintiff maintains strict control over the manner in which his name, identity and works of art are used. Plaintiff exercises careful consideration in selecting and approving products which he permits to license or use his name, identity, or persona. Plaintiff restricts such use and licensing to goods and services that are of acceptable high quality to Plaintiff and for which compensation is commensurate with the exploitation and value thereof." Mark Allsop aka Malarko Hernandez aka Malarky, an individual, Plaintiff, v. Ultracor, an entity of unknown origin, Michael F. Ball, an individual, Bandier Holdings, LLC, a New York Limited Liability Company, and Does 1 through 25, Inclusive, Defendants., 2016 WL 96149 (Cal.Super.)

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# The IP Law Book Review

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**CHOREOGRAPHING COPYRIGHT: RACE, GENDER, AND INTELLECTUAL PROPERTY RIGHTS IN AMERICAN DANCE** by **Anthea Kraut**

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Dance may be one of the world's oldest art forms, but it is a relatively recent entrant into the sphere of copyright law—and remains something of an afterthought amongst copyright lawyers and scholars alike. For copyright scholars, at least, that should change with the publication of Anthea Kraut's *CHOREOGRAPHING COPYRIGHT: RACE, GENDER, AND INTELLECTUAL PROPERTY RIGHTS IN AMERICAN DANCE*. Kraut performs a fascinating exploration of the evolution of choreographic copyright—sweeping, political, polemical—that should leave no one in doubt as to the normative significance of choreography as a subject matter of copyright law and policy. Nor should doubt remain as to the political significance of copyright within the realm of choreography. Choreographic copyright, Kraut persuades us, is a key site for the negotiation of subjecthood and the navigation of shifting power flows. Through carefully researched and beautifully narrated case studies that reveal the role of race and gender in the allocation of intellectual property rights, Kraut weaves a compelling historical and socio-cultural account of copyright's emergence and exploitation on the stages and in the studios of 19<sup>th</sup>-21<sup>st</sup> century America.

A scholar of dance, Kraut contributes to an increasingly interdisciplinary conversation around the legal structures of the intellectual property system, challenging the traditional formal account of copyright law with its facially neutral concepts of authorship, originality, ownership, and economic incentive. Bringing to bear lessons from dance, performance and cultural

studies, critical race scholarship, and critical legal studies, Kraut expertly deconstructs the edifice of copyright law to reveal the gendered and racialized assumptions of value and social hierarchy on which its foundations lie. Perfectly adept at explaining the law and its development through statute, regulation, and case law, Kraut confidently engages with the legal scholarship on the nature of copyright while also seamlessly drawing on a rich body of literature on dance history and philosophy, anthropology and ethnography. The contribution that this book makes to the field of dance and theatre studies has already received worthy recognition<sup>1</sup>—but it is the interdisciplinary light that it sheds on the legal theorizing of copyright in dance and beyond with which I am most impressed. In particular, Kraut’s book should be welcomed as an important contribution to legal scholarship in the blossoming areas of copyright and choreography; intellectual property, race and gender; and intellectual property’s negative spaces.

In the first regard, the book adds greatly to a surprisingly small body of academic scholarship grappling with copyright law’s treatment of choreographic works.<sup>2</sup> Coming from a legal perspective, such works typically focus on the significant doctrinal challenges involved in, for example, parsing protectable original expression from public domain “social dance steps and simple routines;” separating the choreographic “work” from the “system, method or mode of operation” that copyright ought not to protect; adequately fixing the choreographic work in a stable, material form that allows the work to be protected, registered and readily identifiable; and untangling the ownership claims of dance companies, choreographers, and performers. Each of these challenges presents fascinating practical and policy questions for legal scholars to examine, pressing not just at the subtle incoherencies of choreographic copyright but revealing the uncertainties inherent in copyright law at large. Kraut recognizes these doctrinal challenges as she tackles particular cases, but refuses to reduce them to interesting questions of law: rather, they play at the peripheries of a much larger challenge—revealing the inherently political nature of recognizing, defining, allocating, and circumscribing copyright in choreographic works.

In this political vein, Kraut’s book also represents a major contribution to the legal scholarship at the intersection of intellectual property, race, and gender. This vital area of critical concern has emerged, over the past decade or two, to occupy a central place in critical legal approaches to copyright, radically unsettling the long-held notion that its privileges apply equally across cultural, geographic, racial, gender, and economic divides to anyone who can objectively lay claim to the label of “original author.” Beginning

with the work of scholars such as K.J. Greene (who is thanked in this book) and Rosemary Coombe (whose work Kraut describes as instrumental to her thinking) (p. 35),<sup>3</sup> a community of critical scholars has shown that the law's labels are differentially bestowed upon certain creators and genres of creative expression depending on the identity of the author(s), the perceived value of the work within the dominant culture, and the social context from which the author speaks.<sup>4</sup> Of course, it should be no surprise that racial and gender inequalities permeate copyright law as they do any other area of our law and society, subordinating some voices for the valorization, amplification, and economic benefit of others. What Kraut demonstrates, through her examination of the ebbs and flows of copyright in choreography, however, is the extent to which the recognition or denial of copyright has always depended on the dancer or choreographer's "position in a raced, gendered and classed hierarchy, and on the historical conditions in which they made, and made claims on, their dances" (p. xiii). Nuanced in its telling but simple in its essence, Kraut's argument is that "choreographic copyright emerged out [and so retains] the same racialized logic of property that has persistently treated some bodies as fungible commodities and others as possessive individuals" (p. xviii). Through one choreographer's story after another, Kraut tells us how, "although race and gender rarely surfaced as explicit factors in dancers' pursuit of copyright protection or in the law's uneven bestowal of that protection, choreographic copyright has served to consolidate and to contest racial and gendered power" (p. xiii).

CHOREOGRAPHING COPYRIGHT should also be received as a welcome addition to the so-called "negative space" literature: the growing body of academic work that examines what happens in creative communities when intellectual property protection is absent, whether in law or in practice.<sup>5</sup> From the perspective of the legal scholar, the purpose of these forays into different and often marginalized communities of creative practice is often to unsettle assumptions about the incentive structures established through law, and to explore how these map onto (or fail to map onto) people's actual decision-making about what and how to create, or shared norms around when and how to copy (or not). Kraut's exposition reveals the extent to which the dance world—whether of late nineteenth century theatres, early twentieth century stages, or twenty-first century streets—offers a perfect example of how creativity thrives and norms of sharing develop in the general absence of formalized legal claims over—or recognition of—expressive works as such. Nonetheless, the denial of copyright to particular creative communities and particular actors within or at the margins of those communities remains subject to powerful critique as a mode of "invisibilization" (pp. ix-x).<sup>6</sup> At the same time, Kraut acknowledges and

warns of the way in which the vesting of copyright—particularly in the *embodied* choreographic expression of the dancer—threatens to exacerbate the kind of objectification and commodification to which gendered and racialized bodies have historically been subjected.

Thus, with the natural balance of the proverbial ballerina, Kraut tip toes along the narrow line that many legal commentators struggle to hold. Kraut succeeds, to my mind, where others have faltered: at once and convincingly condemning the denial of recognition that the refusal of intellectual property rights can represent, while sustaining a critical skepticism of the proprietary mode through which such recognition manifests and is operationalized in the marketplace. What emerges is a complex tale: a celebration of ownership in its connection with personhood, combined with a measured wariness of property in its connection with alienability and the conditions of capitalist exchange. The line she draws between the discourse of intellectual property rights and the empowerment of African American performers, for example, explicitly proceeds along the same path of principled pragmatism taken by critical race theorist Patricia Williams with respect to the discourse of rights in general (p. 131).<sup>7</sup> Rather than arguing for or against choreographic copyright or legal reform, Kraut contends only and importantly that “copyright and choreography productively illuminate one another and the workings of race and gender in American dance” (p. 5).

The book is divided into five chapters with an introduction and a coda. The Introduction, entitled “Dance Plus Copyright,” acquaints the reader with copyright’s tentative presence in the world of dance, and with the dance world’s tentative embrace of copyright. While acknowledging the problematic (sometimes even farcical) (p. 2)<sup>8</sup> nature of efforts to own physical movement in the digital age, Kraut points the reader firmly towards the racial dynamics of appropriation and ownership, insisting from the outset that it is insufficient to simply dismiss choreographic copyright as either folly or futile. Rather, the challenge is to recognize that “[q]uestions of who possesses the rights to which movement, of who is authorized to borrow from whom, and of who profits from the circulation of dance are all entangled in the legacies of racial injustice” (p. 2). The Introduction is worth reading in its own right for its concise but surprisingly comprehensive overview of relevant debates in copyright theory (from public domain and free culture critiques of copyright’s expansion to concerns about its “Euro-modernist” origins and Western Enlightenment underpinnings) (p. 7), as well as its survey of raced and gendered conceptions of property (from labour and personhood theories to “whiteness as property”) (p. 27),<sup>9</sup> and conceptions of materiality (commodification, embodiment and corporeality) in respect of both property and dance.

With this complex ground-work laid, Kraut embarks, in Chapters 1-5, to explore choreographic copyright case studies, drawing on a “combination of traditional performance sources and traditional legal sources,” to examine “how dance-makers with various degrees of privilege, working in the genres of modern dance, ballet, tap and jazz at various historical moments, engaged with the discourse and legal apparatus of intellectual property law” (p. 41). In telling these stories, Kraut mines them for illuminating lessons on “the ways dancers both participate in and resist the commodification of their embodied work, the stakes involved in that participation and resistance, and the effects of race and gender on both” (p. 41).

Chapter 1 relays the experience of a white, female modern dancer, Loïe Fuller, as she sought to claim ownership of her “stolen” “Serpentine Dance” (p. 64),<sup>10</sup> culminating in the 1892 case of *Fuller v. Bemiss*.<sup>11</sup> The case is cited quite frequently in the choreography context for the derisive manner in which Fuller’s claim was dismissed by the court as falling short of the requirements of “dramatic composition.” Indeed, Judge Lacombe concluded that the “mere mechanical movements” of Fuller conveyed “no other idea than that a comely woman is illustrating the poetry of motion in a singularly graceful fashion.” The idea was “pleasing” but “hardly...dramatic” (p. 73). Kraut observes the gendered implications of the decision, noting how gracefulness and visual pleasure are attached to the female dancing body as object, while denying her “interiority” and “status as an authorial subject entitled to ownership” (p. 74).<sup>12</sup> True to form, however, Kraut does not start or end her analysis there, but adds further layers of contradiction, introducing new tensions just as the more obvious conclusions were beginning to solidify. She notes, for example, that the “Serpentine Dance” was not the result of *de novo* origination but rather borrowed from Indian “nautch” dancing, introduced to the West through colonial cultural flows. When “white Western bodies” become the privileged interpreters and masters of Oriental dance, she contends, they lay claim to “Eastern ‘raw materials’ through their choreographic practice” (p. 63). With the disavowal of antecedents and the arrogation of proclaimed “creative genius” and “novelty,” Fuller is not presented simply as subordinated female subject, but also as privileged subject “claim[ing] the status of the white Romantic artist” (p. 65) and thereby seeking “to signal her distance from the chorus girls, skirt dancers, and Nautch dancers of the commercial stage” (p. 66). Kraut charts Fuller’s continued pursuit of intellectual property rights to “elevate her station,” navigating the “patriarchal organization of the mixed-race commercial stage” (pp. 80-81). Ultimately, Kraut concludes that Fuller’s turn to the legal apparatus “must be seen at one and the same time

as an act of gendered resistance against a patriarchal system and an assertion of racial privilege within a system of white dominance” (p. 90).

A similar narrative approach guides the reader through each subsequent chapter. The themes, tensions and interpretations that Kraut presents are constantly twisting and turning in on themselves, resisting the reader’s confident grasp, refusing to simplify the intersectionality of their subjects or the shifting, contextual nature of power. Chapter 2 delves into the relationship between race and property from the other side, exploring the efforts of Johnny Hudgins, an African American blackface comic pantomimist, to first defend himself against a breach of contract claim by denying his originality or individuality as a performer, and then to assert himself as an owner of copyright over his original act a few years later. Mining the contradiction, Kraut observes: “The irony of viewing Hudgins as a commodity that speaks and of viewing that speech as an affirmation of his personhood is that his speech...on some level reinforced the commodity status of his dancing body” (p. 125) In Chapter 3, Kraut examines how notions of property were both refuted and reinvented amongst African American dancers of the 1930s and 40s. Referencing the work of legal scholars such as Boatema Boateng and Yochai Benkler, (p. 157)<sup>13</sup> Kraut argues that a shared tradition of “stealing steps” amongst African American vernacular dancers, combined with codes and conventions that governed borrowing, reveals “the ways in which notions of intellectual property play out in and around practices that the law refuses to recognize” (p. 164).

1940s and ’50s Broadway is the focus of Chapter 4, which tracks the battle for choreographers’ copyright waged by white women such as Hannah Holm (who successfully registered the choreographic score for “Kiss Me Kate) and Agnes de Mille (the choreographer of “Oklahoma!”), whose advocacy later paved the way for the inclusion of choreography in the 1976 Copyright Act). Their “success” is not, however, the full story. In her telling of the tale, Kraut emphasizes that “granting the choreographer intellectual property rights necessitates suppressing the non-autonomous and non-original aspects of the creative process: its collaborations, its borrowings, and vitally, its dependence on the labour of racialized others” (p. 197). She then adds to the story Faith Dane’s 1962 common law copyright claim in the musical “Gypsy,” dismissed because her performance of “bumps, grinds, [and] pelvic contractions” could not rise to “the status of a property right.”<sup>14</sup> By juxtaposing these case studies, Kraut underscores how decisions about copyrightability (and so access to “the rights of possessive individualism”) (p. 216) are rife with distinctions between high and low art, intellectual and physical labour, moral virtue and morally suspect sexuality.

The final chapter provides a thorough account of the two major choreography copyright cases post-1976: one that upheld the infringement claim of the George Ballanchine estate;<sup>15</sup> and the other that denied the ownership and infringement claim of Martha Graham's estate.<sup>16</sup> Having emphasized the embodied nature of the choreographic work throughout the book, Kraut tugs on this string, asking, "what does the irrevocable loss of the choreographer's body [in death] mean for the figure of the author and for the afterlife of the choreographic work?" (p. 221). She beautifully captures the significance of copyright's romantic author trope, noting that after the literal deaths of two great American dance icons, "what was implicitly on trial in their copyright lawsuits...was nothing less than the choreographer-as-genius" (p. 228). Perhaps it ought not to surprise us, then, that it was the male genius who persisted as possessive individual post-mortem, "entitled to the historically white masculine privilege of propertied personhood" (p. 262).

If the racialized and gendered dynamics and power flows of choreographic copyright were beginning to seem clear, however, a final twist is presented in the Coda, which explores the controversy around African American pop star Beyoncé's evident copying, in her "Countdown" music video, of Belgian choreographer De Keersmaeker's acclaimed modern dance "Rosas danst Rosas." This offers the opportunity for Kraut to break from her U.S.-frame, panning out to transnational dimensions of cross-border cultural flows, and the implications of choreography's digital circulation. In a controversy involving parties at "opposing poles" in the contemporary dance landscape, it might have been tempting to present this twist as an optimistic turn: the empowered black female performing artist successfully appropriating white, avant-garde art, thereby "invert[ing] the historical pattern of acclaimed white artists taking from non-white dancers" (p. 268). The tale could have been one of racial and gender progress, revealing the power of art, in the internet age, to unsettle social hierarchies on the world stage. (pp. xvii-xviii) Resisting such a tidy final act, however, Kraut instead invites us to consider how the critical response to Beyoncé's appropriations reveals continuing anxieties around the appropriate flow of choreographic traffic (pp. 265-266). Beyoncé's reproduction ("re-embodiment") (p. 276) of the choreography within commercial "global pop culture" ("coded black") (p. 274), was "a tacit attenuation of white privilege," which could be reclaimed only by reasserting authorial control. Having accused Beyoncé of "stealing," De Keersmaeker's decision to run a "Rosas Remix Project" and invite the public to upload their own versions of the choreography does not read, to Kraut, as a concession to the post-proprietary circulation of digitized dance in a participatory online environment: paradoxically,

perhaps, it looks more like an alternative copyright claim: “an attempt to regulate choreography’s reproduction and to separate out the right kind of circulation from the wrong” (p. 280).

The picture Kraut paints, in the telling of these stories, is not ultimately one of progress, or even evolution, but one about the intractability of race and gender as hierarchizing constructions that continuously regulate the role of author and the privilege of proprietorship.

Most of the choreography copyright cases examined in Kraut’s book and outlined above have made appearances elsewhere in the existing literature on copyright in choreographic works. Perhaps most notably, interesting accounts of an overlapping array of cases, similarly focused on emphasizing the privileging of whiteness and the presumed masculinity of authorship are provided by Caroline Picart in her excellent book, *CRITICAL RACE THEORY AND COPYRIGHT IN AMERICAN DANCE*.<sup>17</sup> While I would have appreciated a more carefully articulated explanation of the commonalities and differences between Picart’s and Kraut’s account of this legal history,<sup>18</sup> I found both to be valuable and much needed contributions to the landscape of critical copyright theory. Indeed, I hope that Kraut’s book and Picart’s represent the start of a new wave of critical and interdisciplinary work in this field. I have argued elsewhere that the increasing number of controversies around choreographic “appropriation” in popular culture, such as those levelled against Beyoncé’s music videos, raises the specter of choreography as a new front in digital copyright wars.<sup>19</sup> Whether or not that proves to be true, there is no question that choreographic copyright offers up a fertile terrain within which to explore the contours of copyright law, challenging and rethinking how the law constructs and values the author, authorship, and the work. Far from competing over the same academic territory, there is plenty of room here for many more voices to enter the fray.

As for Kraut’s voice, it is possible that her prose will be a little off-putting to some, straying as it occasionally does from the richly poetic to the potentially opaque. Readers familiar with the terminology, theoretical constructs, jargon and style of writing in socio-cultural and gender studies will undoubtedly feel more at home than those used to the typical legal academic terrain. Certainly, the writing can be dense, and the book is not a quick and easy read. But the reader is rewarded for her persistence. After all, Kraut’s objective is not to simplify the role of copyright, race or gender in the stories she is telling, but to convince the reader of their complex interplay. She does so in a way that seems almost to revel in their context-specific contradictions. Embracing the complexities and exposing the

contradictions, Kraut offers a deeply nuanced account of a tangled “knot of recurrent issues: raced and gendered hierarchies in the theatrical marketplace; white women’s complication relationship to property rights; legacies of ownership of black bodies and appropriation of non-white labor; copyright as a discourse of domination and of resistance; the contradictions of self-ownership; and the tension between dance’s ephemerality and its reproducibility.” (p. xvii)

CHOREOGRAPHING COPYRIGHT is an illuminating book about copyright’s complicated engagement with choreographic expression in the United States, written “from a critical dance studies perspective that foregrounds race and gender” (p. xvii). It deserves a thoughtful reading by a wide audience within the IP academy, but will be of particular interest to anyone whose work brings a critical or interdisciplinary lens to bear on issues of copyrightability, authorship, ownership, equality, and the circulation of ideas within and across creative communities.

#### ENDNOTES

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<sup>1</sup> CHOREOGRAPHING COPYRIGHT won Outstanding Book from the Association for Theatre in Higher Education (2016) and the Biennial Sally Banes Publication Award from the American Society for Theatre Research (2016).

<sup>2</sup> See e.g., Gary Ordway, *Choreography and Copyright*, 15 ASCAP Copyright Law Symposium 172 (1967); Martha M. Traylor, *Choreography, Pantomime and the Copyright Revision Act of 1976*, 16 New Eng. L. Rev. 227 (1980-1981); Barbara Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. The Custom of the Dance Community*, 38 U. of Miami L. Rev. 287 (1984); Leslie Wallis, *The Different Art: Copyright and Choreography*, 33 UCLA L. Rev. 1442 (1985-1986); Anne Weinhardt, *Copyright Infringement of Choreography: The Legal Aspects of Fixation*, 13 J. Corp. L. 839 (1987-1988); Adaline Hilgard, *Can Choreography and the Copyright Waltz Together in the Wake of Horgan v Macmillan, Inc.?*, 27 U.C. Davis L. Rev. 757 (1994); Julie Van Camp, *Copyright of Choreographic Works*, ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 1994-1995 (Stephen F. Breimer, Robert Thoerne & John David Viera Eds., Clark Boardman Callaghan, 1994), 59-92; Matt Kovac, *Copyright and Choreography: The Negative Costs of the Current Framework for Licensing Choreography and a Proposal for an Alternative Licensing Model*, 36 Hastings Comm. & Ent. L.J. 137 (2013-2014); Christopher Buccafusco,

Authorship and the Boundaries of Copyright: Ideas, Expressions, and Functions in Yoga, Choreography, and Other Works, 39 Colum. J.L. & Arts 421 (2016); Jessica Goudreault, Copyrighting the Quotidian: An Analysis of Copyright Law for Postmodern Choreographers, *Cardozo Arts & Ent. L.J.* (forthcoming, 2017).

<sup>3</sup> Citing Rosemary Coombe, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* (Duke Univ. Press, 1998)). Kraut also acknowledges Jane Gaines, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* (UNC Press, 1991), for its treatment of copyright “as an ideological construction embedded in shifting cultural politics.”

<sup>4</sup> See e.g., Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. Rev. 547 (2006); K.J. Greene, *Copynorms, Black Cultural Production, and the Debate over African-American Reparations*, 25 *Cardozo Arts & Ent. L.J.* 1179 (2008); K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 *Hastings Comm. & Ent. L.J.* 339, 358-59 (1999); K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 *Am. U. J. Gender Soc. Pol’y & L.* 365 (2008); see also Boetema Boateng, *THE COPYRIGHT THING DOESN’T WORK HERE: ADINKRA AND KENTE CLOTH AND INTELLECTUAL PROPERTY IN GHANA* (UMN Press, 2011); Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 *Am. U. J. Gender Soc. Pol’y & L.* 551, 552, 559-64 (2006); Malla Pollak, *Towards a Feminist Theory of the Public Domain, or Rejecting the Gendered Scope of United States Copyrightable and Patentable Subject Matter*, 12 *Wm. & Mary J. Women & L.* 603 (2006); see generally Irene Calboli & Srividhya Ragavan (eds.), *DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS* (Cambridge Univ. Press, 2015); John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, *BYU L. Rev.* 1233 (2012).

<sup>5</sup> See, e.g., Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be Per Se Copyrightable?*, 24 *Cardozo Arts & Ent. L.J.* 1121 (2007); Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 *VA. L. Rev.* 1787 (2008); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 *VA. L. Rev.* 1687 (2006); Elizabeth Rosenblatt, *A Theory of IP’s Negative Space* 34 *Colum. J.L. & Arts* 317 (2011); Dave Fagundes, *Talk Derby to*

Me: Intellectual Property Norms Governing Roller Derby Pseudonyms, 90 Tex. L. Rev. 1093 (2012); Kate Darling, IP without IP? A Study of the Online Adult Entertainment Industry, 17 Stanford Technology Law 709 (2013); Kate Darling and Aaron Perzanovski (eds.), CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY (NYU Press, 2017).

<sup>6</sup> Remark on the “entrenched racialized logic that generally assigns authorship and ownership of discrete acts of creative expression to individual white artists while ‘invisibilizing’ the creative labor of individual and collective artists of color.”

<sup>7</sup> Citing Patricia J. Williams, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (Harvard Univ. Press, 1991).

<sup>8</sup> Describing the copyright infringement accusations made by Richard Silver against a number of performers of the popular 1970s line dance known as the Electric Slide). See also, *id.* at 1 (quoting tap dancer Eddie Rector as having remarked, “Shuck, if you could copyright a step...nobody could life a foot.”); cited in Marshall and Jean Stearns, JAZZ DANCE: THE STORY OF AMERICAN VERNACULAR DANCE (Perseus Books Group, 1968), 338.

<sup>9</sup> Citing Cheryl Harris’s ground-breaking Whiteness as Property 106 Harvard L. Review 1714 (1993).

<sup>10</sup> Quoting Fuller as having written, “They had stolen my dance.... [N]ow others were going to reap the benefit. I cannot describe my despair.”

<sup>11</sup> 50 F. 926 (S.D.N.Y. 1892).

<sup>12</sup> Citing Ann Cooper Albright, TRACES OF LIGHT: ABSENCE AND PRESENCE IN THE WORK OF LOÏE FULLER, 28 (Weslyan Univ. Press, 2007).

<sup>13</sup> Citing Boateng; Benkler, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (Yale Univ. Press, 2006)).

<sup>14</sup> *Dane v. M & H Company et al.* 136 U.S.P.Q. 426 (N.Y.Supp.Ct.1963), *per* Justice Aurelio; quoted in Kraut, at pp. 214-15.

<sup>15</sup> *Horgan v. Macmillan Inc.*, 789 F.2d 157, 160 (2d Cir. 1986).

<sup>16</sup> *Martha Graham School v. Martha Graham Center*, 153 F. Supp. 2d 512 (S.D.N.Y. 2001); *Martha Graham School v. Martha Graham Center*, 224 F. Supp. 2d 567 (S.D.N.Y. 2002); *Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.* 380 F.3d 624 (2d Cir. 2004).

<sup>17</sup> Caroline Joan S. Picart, *CRITICAL RACE THEORY AND COPYRIGHT IN AMERICAN DANCE: WHITENESS AS STATUS PROPERTY* (Palgrave Macmillan, 2013)

<sup>18</sup> Kraut acknowledges the overlap and identifies some specific differences in coverage and conclusions, but contends that the primary distinction is that “Picart’s dance research relies heavily on secondary sources, and there are some holes in her historical analysis.” Kraut, p. 38.

<sup>19</sup> Carys J. Craig, *Bodies in Motion: Contemplating Choreography and Copyright Law* (on file with the author).

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