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Dance Dance Copyright Revolution: Interactive Gaming's Upcoming Copyright Conundrum

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The next interactive gaming revolution will soon be ushered in by a wave of gesture detection control systems, where the player's body controls the action. Beginning this year, game developers and publishers will have the technology to develop a viable motion capture-based game, one with more potential applications than any gaming console or system released to date. Using a TV-mounted motion detection camera and a handheld controller, the PlayStation MotionController (rumored to be named the "Arc") will be capable of recognizing and tracking a user's face and voice as well as body motion. Similarly, Microsoft's Project Natal systemfor the Xbox 360 will use a TV-mounted motion detection camera that will track the movement of every part of the body, and capture, for the first time, a three-dimensional representation of the player on the screen completely sans gaming controllers. Now, as consumers await the release of a slew of motion capture games scheduled for retail this holiday season, publishers and developers alike need to brace themselves for the myriad of potential legal issues concerning the ownership and licensing of the movements replicated and featured in those games. Whether a dance routine or a martial arts demonstration, legal protection for the majority of athletic movements that will be incorporated into the forthcoming wave of motion detection-based games will likely fall under copyright law's definition of "choreography"–a form of artistic creation which secured copyright protection in 1976 when the Copyright Act (the"Act") was amended to include "pantomimes and choreographicworks" (17 U.S.C. 102(a)). Prior to that time, choreography could only be protected under copyright statutes to the extent embodied within another copyrighted work that was eligible for protection. Although the Act extended protection to "choreographic works", it failed to define the term and what types of movements qualified as same. Other copyrightable forms, including "architectural, audiovisual, literary, pictorial, graphic and sculptural works, motion pictures, and sound recordings" are defined in the Act, but "choreographic work" is the only copyrightable form whose meaning is left unclear. In fact, the House and Senate Reports surrounding the Act indicate that Congress' decision not to define "choreographic work" was deliberate, as legislators believed the meaning to be "fairly well settled". In fact, the only guidance provided by Congress with respect to the category of "choreographic works" was that it does not include "social dance steps and simple routines." In the absence of guidance from Congress or the copyright statutes on which activities qualify for protection under copyright law as "choreographic works", the U.S. Copyright

Office (the "Office") offered a more technical definition of "choreography" in its Compendium of Copyright Office Practices, stating that "[c]horeography is the composition and arrangement of dance movements and patterns usually intended to be accompanied by music." While instructive, this interpretation is not binding on the federal judiciary, and there is little case law defining the precise scope of "choreographic works". Moreover, even if the Office's interpretation of a "choreographic work" does not capture the essence of certain athletic movements, the fact remains that the Act's enumeration of copyrightable subject matter is not meant to be exhaustive, and is prefaced with the statement that "[w]orks of authorship include the following categories"; and since the Act defines the term "including" as "illustrative and not limitative," the fact that Congress did not specifically list all athletic movements that fall within the realm of copyrightable subject matter does not mean that they are not covered (just as, for example, the absence of programming code and computer programs from the Copyright Act has not prevented the courts from finding same to be well within the range of copyrightable subject matter). Further, a separate category of copyrightable subject matter known as "dramatic works" also provides some applicability to the extent the athletic movements portray a story or narrative through action, but the underlying movements, which themselves are devoid of story, would not likely find refuge here if separated from the corresponding story or narrative in the context of an interactive game. While some athletic movements remain close enough to the Office's definition of "choreographic works" or "dramatic works" that they should be afforded copyright protection (e.g., figure skating, rhythmic gymnastics, synchronized swimming, etc.), there has been, in recent years, a push for the copyrightability of other athletic movements under the guise of "choreographic works." For instance, Open Source Yoga Unity v. Choudhury, specifically addressed the question of the copyrightability of yoga moves (see 2005 WL 756558 (N.D. Cal. Apr. 1, 2005). While the court did not settle this question, it held that it is at least possible for individual yoga positions to be "arranged in a sufficiently creative manner" to merit copyright protection. In Ahn v. Midway Manufacturing Co., a district court held that dancers who performed martial arts routines for a software developer that later incorporated the routines into the "Mortal Kombat" video game did not become joint owners of the copyright in the game only because they assigned their rights to the copyrights pursuant to a work-for-hire contract (see 965 F. Supp. 1134 (N.D. Ill. 1997)). The court deemed the martial art performances to be "choreographic works" and stated that these "choreographic works were all original works of authorship [and] choreographic works fall within the subject matter of copyright." In fact, in Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, the Seventh Circuit held that "[baseball] [p]layers' performances possess the modest creativity required for copyrightability" (see 805 F.2d 663 (7th Cir. 1986)). Based on the foregoing decisions, there may not be a significant enough distinction between a kung fu sequence, a skateboarding demonstration set to music and a figure skating routine that would warrant extending copyright protection to one and not the others. Ultimately, though, determining which choreography or movements actually fulfill the statutory criteria, and which on the other hand are too commonplace to qualify as copyrightable subject matter, will require a case-by-case, fact-specific analysis. That being said, as the above discussion indicates, it is certain that to qualify for copyright protection, an athletic movement will have to evince a certain degree of complexity and original expression, and routine-oriented athletic performances are more likely to warrant coverage as they generally embody sufficient amounts of artistic expression and each move is specifically choreographed and designed for repetition. As one commentator described, a sport like football, even where each play is diagrammed and practiced to some extent, depends more upon the interaction and improvisation of the participants throughout the natural course of the game. A running back, for example, may go fifty yards for a touchdown, eluding opponents, breaking tackles and navigating through the defense on one play, but the next time that play is called, he may fumble the ball or be tackled for a loss of yards. A figure skating routine, on the other hand, has a repetitive nature to it; the skater will often perform the same routine countless numbers of times with minimal variations. Once the determination is made that the athletic movement likely falls within a class of protectable subject matter under the Act, the next step is licensing the rights for inclusion in the interactive game. The clearance process for music-based interactive games, for example, relies on a well-established framework with the licensing arms of the major labels, publishers, performing rights organizations and other collectives serving as long-standing clearing houses for securing rights from multiple artists and writers. However, there are no analogous industry clearing houses or collectives for licensing choreography rights and each applicable copyright, together with any corresponding moral, publicity or privacy rights, need to be licensed

from the individual owner. In fact, this may well be the first time that movements deemed "choreography" under the Act, whether in the form of modern dance or complex wrestling moves, will be exploited and licensed as individual works on a large scale–separate and apart from the play, the music video, the movie or even the person through which it entered the public consciousness. In other words, in order to develop an interactive title based on choreography on an operational level, each individual movement will need to be reperformed and recast by professionals and technicians who will recreate the movements in a green screen-reminiscent environment using motion sensors that will allow advanced computers to precisely track a new range of activity, in particular depth-based movement, which will then be digitized and incorporated into the video game. This process will ultimately allow for the comparison of the professional recreation against the end users' movement on a television screen and allow the game to rate and track performance, alter difficulty settings, offer training functionality, etc., all of which have become standard functionality in interactive titles. Having now extracted and recreated the choreography as a stand-alone artistic creation, the publishers and developers of motion detection games will need to begin the process of securing the rights to those popular movements crucial to a successful gaming title. This is where the legal confusion begins for licensing athletic movements and choreography. As an example, consider the implications of the inclusion of modern or popular dance into a motion capture video game. Dances have never been the subject of lucrative licensing outside the realm of dance companies and on-stage performances because dancers were often placed at a severe disadvantage for demonstrating ownership of copyrights. As a result, attribution and credit for a dance in the dance community is frequently not equated with ownership of the copyright given the lack of economic incentive in establishing and maintaining an accurate chain of title. In these muddy waters, who holds the necessary rights required to license the dance? The music label that owns the music video? The artist who performed the dance? The artist's choreographer who conceived of the dance? Is it jointly owned by contributing dancers and the artist? Was it created pursuant to a work for hire agreement or within the scope of employment without an agreement? Was the dance based on a pre-existing dance which could invalidate ownership? Was the dance created outside the United States thus leaving the creator with moral rights over the work that cannot be assigned? Was it previously performed and recorded on stage or in dance studio, so that the movie studio or music label is left without ownership outside of their movie or video? The foregoing dance hypothetical is just one example of the complications associated with one form of athletic movement destined to be incorporated into motion capture games. Once the worldwide popularity of a new line of these games takes hold and creators of all forms of movements claim copyright protection after realizing the new found economic value of their works, legal disputes over the nature of copyright and the bounds of statutory protection will force the courts to take a series of bold moves–ones that can be repeated. As always, we will keep an eye out for developments in this area of the law, particularly as the technological bounds of interactive gaming continue to expand with the introduction of gesture-based gaming.

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