This is a preview of a paper that will be published later this year in Dance Research Journal. The abstract is followed by some selected draft extracts from the full paper.

**Abstract:**

This paper brings together two very different perspectives, dance and law, to ask questions about authorship and ownership in dance made or performed by dancers with disabilities. The focus is on one short film project made by and featuring UK dancer and choreographer Caroline Bowditch, in which she is recast as the female dancer in a duet section from Joan Cleville’s choreography for Scottish Dance Theatre, *Love Games.* In *A Casting Exploration*, we see Bowditch juxtapose her own film with the same duet danced by a non-disabled dancer. The paper provides an analysis of what is going on in the dance and explores what medical law, human rights law and intellectual property law might say about Bowditch’s role. The aim is to show how the film project raises questions about the aesthetic properties of the double duet, the politics of sameness and difference, and who can claim ‘ownership’ of the dance.

**Introduction: Improving on Poor**

Numerous international legal and policy organisations and instruments declare that the right to participate in and to access culture and cultural works is a fundamental human right.[[1]](#endnote-1) While the correctness of this position seems perfectly unchallengeable, the reality is rather more lamentable. As we have discussed elsewhere, the position of impaired individuals and groups with respect to accessing cultural works can be rather tenuous, as a result not only of physiological impairments but also, importantly, of social and legal disabilities and limitations imposed on them and/or by technical solutions (Waelde, Harmon, Brown, forthcoming).[[2]](#endnote-2) With respect to providing more space and support for impaired *dance* artists, we have come some way in the UK and elsewhere; but advances have been in waves, as attention focuses on disability in connection with specific societal agendas or events (such as the Paralympic Games). Efforts and achievements to date have been:

* growing arguments from the disability arts movement for the legitimisation of disabled performers and greater transparency around the political imperatives within the performing arts community;
* an expanding body of literature that considers inter alia the different models of disability and their impact on performance (Mitchell and Synder 2006; Sandahl and Auslander 2005; Johnston 2012), and that engages critically with the experience and output of impaired dancers (Albright 1997; Benjamin 2002; Kuppers 2003, 2005, 2011; Whatley, 2007, 2010);
* increased use of this research by dance writers, artists, and commentators to bring disabled dance more firmly into view, to advocate for more opportunities for disabled dance artists, and to argue for disabled dance to be seen as a serious arts practice as opposed to ‘community dance’ or ‘therapeutic practice’; and
* greater attention to developing strategies to increase opportunities for disabled artists to access training for professional careers.[[3]](#endnote-3)

Despite the above, there remains little evidence that disabled dancers are any more present in ‘mainstream’ dance than before, and there are few disabled dancers in positions of leadership. There is, however, a small and committed group of disabled choreographers emerging in the UK who are beginning to find more consistent support for their work and from each other. Caroline Bowditch, Marc Brew and Claire Cunningham are all developing careers that have earned them commissions to choreograph for major dance companies. This is in addition to their work for the Unlimited Festival, a programme within the Cultural Olympiad celebrating arts, culture and sport by impaired people.[[4]](#endnote-4)

In this paper, we examine a short film made by and featuring UK dancer and choreographer Caroline Bowditch. In addition to drawing attention to her career and to expanding the number of disabled dance practitioners whose work is subject to critical analysis,[[5]](#endnote-5) we wish to anticipate and rehearse some of the questions that we will address in *InVisible Difference*, an AHRC[[6]](#endnote-6)-funded project which will explore a range of questions at the nexus of dance, disability, law, and ethics.[[7]](#endnote-7) The Bowditch film provides a lens through which we seek to expose our shared curiosities, and develop our common interest, in uncovering the experience of disabled dance artists and the conditions in which they work.

***An Exploration of ‘Recasting’***

In the film, the two ‘versions’ of the duet run on screen side-by-side. The ‘original’ version features Naomi Murray and her male partner Jori Kerremans. In the second version, Bowditch is cast in the female role with the (same) male partner. The juxtaposition of two duets provides an opportunity to contemplate (1) the shared aesthetic properties of the dance, (2) the politics of sameness and difference, (3) the processes of translation of a dance from the able bodied to the disabled, and (4) the questions that are asked when the viewer encounters a disabled dancer, and which Bowditch confronts herself, including, ‘Can a disabled dancer cover an able bodied dancer?’[[8]](#endnote-8) The result is a potent intervention; a useful provocation about how we look at disabled dance.

The duet in *Love Games* explores the dynamics of a male/female relationship that is playful and affectionate. In the Murray version, moments of gentle touching, embracing, and lyrical lifts and swoops are interspersed with more dynamic confrontations. The dancing is marked by an easy fluidity, a spirited youthfulness and athleticism as the dancers move through a sequence of intricate entanglements. Murray conforms to the image of the ‘dancer’s body’; she is long-limbed, long-haired and graceful, with a femininity that is highlighted by the male partner, who is the stronger of the two, and who supports her and lifts her with ease. It generally upholds many of the conventions of a typically hetero-normative duet. The recasting of Bowditch imposes a new frame, which blurs traditional gender roles. The female ‘dancerly body’ is refracted through the very different physicality of Bowditch, who dances in her wheelchair. In many ways the recasting is a clear example of how to ‘translate’ a role from one dancer to another but in so doing it exposes much more about the politics of translation and adaptation within mainstream theatre dance. The opening moment sees each woman lifted into an embrace by the man. What is striking is that Bowditch is just over three feet tall, so she resembles a child when held by her partner. But this image quickly dissolves as the duet continues and her confident physicality as a wheelchair dancer resists any reading of youth or innocence.

***What the Recasting Is and Isn’t***

It might be easy to read Bowditch’s performance as ‘brave’, ‘heroic’ or ‘courageous’; Bowditch dancing ‘about’ her bodily impairments to ‘overcome’ her disability and to dance a role otherwise always performed by a non-disabled performer. However, we would argue that Bowditch’s work has nothing to do with Darke’s claim about “heroic works that assert the potential normality of disabled people to fit in; overcoming their disabilities” (2003, 133). Nor do we believe that Bowditch is (in this project) setting out to align herself with the philosophy of Disability Art which, according to Darke, “is a challenge to, an undermining of, (as a minimum) traditional aesthetic and social values” (2003, 132). We also do not perceive any apparent indication that Bowditch has a desire to be assimilated into the ‘established tradition’ (Darke 2003, 138).

Bowditch’s performance, both live and on screen, explores what is acceptable in dance terms for the ‘main stage’, and she reveals something of her own identity as a dance artist. She stakes her claim to be there by exposing the problematic assumption that disability cannot be playful and purposeful, and that virtuosity is limited to particular dance practices and body types. Her performance might also be seen to contribute to a wider ‘disability theatre aesthetic’, which, according to Johnston, “challenges conventional representations of disability on stage, impacts the development process, and seeks to re-construct the social meanings of disability” (Johnston 2012, 173). Prefixing ‘identity’, ‘politics’, ‘art’, ‘culture’ with the label ‘disability’ might reinforce difference but that difference can be positive provided that it accepts (and celebrates) diversity of practice.

**Dance, Copyright and Authorship**

There is a clear assumption in the dance community that the choreographer is the author and first owner of copyright in the work; this comes through in interviews with choreographers (Waelde and Schlesinger 2011), and in the literature by and about choreographers from different viewpoints.[[9]](#endnote-9) The one UK case to have considered the question, *Massine v de Basil*,[[10]](#endnote-10) was decided under the 1911 Act, which included a reference to ‘choreographic work’.[[11]](#endnote-11) By contrast, the CDPA says nothing about choreography, though it does, as indicated, provide that a dramatic work includes dance. So is a choreographer an author under the CDPA? Or is a dancer an author? Or perhaps both are authors in law?

Choreography has been defined as the composition and arrangement of dance movements and patterns, whereas the dance itself (ie: the performance) has been defined as static and kinetic successions of bodily movement in certain rhythmic and spatial relationships.[[12]](#endnote-12) Choreography thus seems apt to be considered as a work and protected by copyright, but is that always the case? It is reported that Joan Clevillé stated that his intention with *Love Games* was to “translate the movement and the dramaturgy of the dance to a new body”, and so he focused on the emotional and physical intentions behind the movement rather than the form as originally conceived or expressed (2011)[[13]](#endnote-13). From the copyright perspective, this sounds rather like the unprotectable idea than the protectable expression. Is there then authorial input into the *performance* of the work by Bowditch such as to render it capable of being protected by copyright?

Here the cases concerning copyright in music can be useful by analogy. In music, copyright can subsist in an original musical composition,[[14]](#endnote-14) and a separate copyright can exist in an arrangement of the composition so long as the correct type of originality has been expended.[[15]](#endnote-15) While there remains a question over unprotectable choreographic ideas and protectable expression, the above-offered definition of choreography suggests that generally the tasks of composition and arrangement both fall to the choreographer. Why however can the dancer not be considered as an arranger of the composition? The dance may be ‘placed on the body’ by the choreographer,[[16]](#endnote-16) but is there not room for authorial intent by the dancer sufficient for copyright? We think, yes. This is particularly so if we look at Bowditch’s virtuoso interpretation of the dance; she interprets Clevillé’s choreographic intent, but the result is visibly different from that performed by Murray; Bowditch’s personal touch is stamped on her arrangement of *Love Games*.

At this point it is instructive to note that copyright law has nothing to say about disability in authorship.[[17]](#endnote-17) It treats all authors the same, looking only for authorial input sufficient to satisfy the legal tests. But in juxtaposing those legal tests with the very particular contribution made to *Love Games*, we believe that the claim that Bowditch is an author of the work is strengthened *precisely because* she is disabled: only Bowditch is capable of contributing the intellectual creation necessary to make this dance a success because only Bowditch knows precisely how her body can interpret and fix the choreographic intent.[[18]](#endnote-18) Copyright law is blind to Bowditch’s subjective intention only to ‘cover’ the role, and deaf to her claim not to assert ownership of the dance. At the very least we would suggest that there are two separate copyrights in this dance: one with the choreographer in the composition and one with Bowditch in the arrangement.

What would the consequences be of these arguments? Ownership of copyright flows from authorship. Copyright is a property right and so with ownership comes the rights (and responsibilities), powers (and obligations) that a right to property confers and, significantly, equality with other copyright (co)owners. Ownership thus confers a status that could be an important factor in the transition from exclusion and othering to inclusion and normalcy; from the marginalisation of dance made by disabled people to the embrace of the art form and recognition of the (disabled) dancer as a valued and valuable participant in and owner of our cultural heritage.

1. Article 27(1) Universal Declaration of Human Rights 1948 UNGA Resolution 217 (LXIII) (“UDHR”), Article 15(1)(a) International Covenant on Economic Social and Cultural Rights 1966 003 UNTS 3(“ICESCR”); see also UNESCO Universal Declaration on Cultural Diversity 2001 and UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003. [↑](#endnote-ref-1)
2. We emphasise that ‘disability’ is the socially constructed physical and social limitations imposed on the physiologically impaired. For more on the difference between impairment and disability, see Oliver (1996), and many more. [↑](#endnote-ref-2)
3. A number of studies have examined the route into the profession for disabled dancers, focusing on training opportunities and what is needed to support disabled dancers in HE (See for example, Whatley 2008). [↑](#endnote-ref-3)
4. See <http://www.london2012.com/about-us/cultural-olympiad/unlimited/> [accessed 17 December 2012]. [↑](#endnote-ref-4)
5. We wish to reach beyond the established companies and highlight those who have nonetheless played a key role in building the landscape for ‘inclusive’ or ‘integrated’ professional dance practice in the UK. In that regard, we draw attention to companies such as Amici Dance Theatre Company (<http://www.amicidance.org/>), Blue Eyed Soul Dance Company(<http://www.blueeyedsouldance.com/>), Candoco Dance Company (<http://www.candoco.co.uk/>), StopGAP Dance Company (<http://www.stopgap.uk.com/html-eng/home.html>), and more. [↑](#endnote-ref-5)
6. The Arts and Humanities Research Council; see <http://www.ahrc.ac.uk/Pages/Home.aspx> (accessed 26/1/13) [↑](#endnote-ref-6)
7. Beginning in January 2013, *InVisible Difference* is collaboratively partnering researchers in the domains of dance and dance studies and intellectual property, human rights and biolaw, bringing them together with disabled dance artists to investigate the working methods and experiences of dancers, and to expose how they and others within the dance-related creative and cultural industries think about issues of authorship and ownership of their work. A key premise of the project is that issues surrounding dance and disability are made more interesting and complex when other theoretical frameworks are brought to bear. [↑](#endnote-ref-7)
8. See the comment on youtube: <https://www.youtube.com/watch?v=6YEtEyr6N4g> [↑](#endnote-ref-8)
9. See for example McFee’s (2011) philosophical discussion about the nature of authorship in dance. [↑](#endnote-ref-9)
10. [1936–45] MacG CC 223 [↑](#endnote-ref-10)
11. Subsection 35(1) of the *Copyright Act 1911* stated that “dramatic work” includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character. Similarly, s. 45(1) of the *Copyright Act 1956* specifically referenced choreography. [↑](#endnote-ref-11)
12. Copyright Law Reporter (New York, CCH, 1991), at no. 625. Note that there are also performers rights in dance quite separate from copyright. These rights, which would belong to the dancer, will not be further explored here. [↑](#endnote-ref-12)
13. Clevillé, Joan. 2011. Love Games at the Pathways to the Profession Symposium [online] on 1 April 2011, [accessed 18 November 2012]: Available from: http://joancleville.blogspot.co.uk/2012/04/love-games-at-pathways-to-profession.html. [↑](#endnote-ref-13)
14. First recognised in *Bach v Longman,* 98 ER [1777] 1274. [↑](#endnote-ref-14)
15. *Austin v Columbia,* [1917-1923] MacG CC 398; *Robertson v Lewis,* [1976] RPC 169; *Redwood Music v Chappell & Co Ltd.,* [1982] RPC 109. although the case law which has considered copyright in arrangements tends to leave the line between composition and arrangement rather fuzzy *Godfrey v Lees,* [1995] EMLR 307; *Beckingham v Hodgens,* [2002] EMLR 45; *Hadley v Kemp,* [1999] EMLR 589; *Fisher v Brooker*, [2009] UKHL 41. See also R Arnold, “Reflections on “The Triumph of Music: Copyrights and Performers’ Rights in Music” (2010) *IPQ* 153; R Arnold, “Are Performers Authors? *Hadley v Kemp*,” (1999) *EIPR* 21(9), 464. [↑](#endnote-ref-15)
16. We are using this idea in a general sense; we acknowledge that a choreographer’s relationship with her dancers is very varied and the dance may emerge through diverse methods of sourcing, generating and shaping movement material. [↑](#endnote-ref-16)
17. For an exposition on the way in which copyright law treats the visually impaired, see C. Waelde, S. Harmon, A. Brown “Do You See What I See? Disability, Technology, Law and the Experience of Culture” (2013) *International Review of Intellectual Property and Competition Law* (ICC) Forthcoming. [↑](#endnote-ref-17)
18. Note that the argument is not that a non-disabled dancer cannot be an author: it is rather that Bowditch’s claim to authorship in this case is strong and made more compelling because it is Bowditch who ‘composes’ the double film, arguably existing as a new artefact in its own terms. [↑](#endnote-ref-18)