**CCDS Seminar series : The voice of disability**

***Shifting the boundaries of authorship - What can different bodies teach the law?***

**Introduction**

Authorship is a concept well known of the legal narrative. Since the seventeenthcentury copyright laws have used authorship as an instrument to foster creativity.[[1]](#footnote-1) The rationale behind the introduction of authors’ rights argues that artists would have no interest in creating if their works were left unprotected against unauthorised copying. As a result, the public good would suffer from a loss the in cultural goods available. In this context, authorship[[2]](#footnote-2) is designed to generate incentives for creators to produce artistic works by rewarding them with rights for the time, skills and effort they put into their creations. This reasoning assumes that artists are mainly concerned with economic efficiency.

More recently, policy-makers seem to have seen in legal authorship an alternative to public funding. In the United Kingdom, governmental support of the Arts is decreasing[[3]](#footnote-3) and being replaced by a policy which encourages the commercialisation of creative works. Artists are strongly recommended to seek financial independence by re-orienting their practice towards business models exploiting/maximising their authorial rights.[[4]](#footnote-4)

Unlike artists who have met their audience and found their market, the task of finding financial independence for practices outside the mainstream is not an easy one. For instance, practices involving disabled artists are particularly challenged when required to commercialise to survive.[[5]](#footnote-5) Disability dance[[6]](#footnote-6) is one of the movements suffering from lack of funding and whose practitioners cannot yet rely on a professional sector to secure incomes. In this context, even if the full commercial exploitation of their practice may be less fruitful than hoped by the government, the stream of revenues legal authorship might represent for these artists is not to be disregarded. When neither the market nor the government support the artists, copyright royalties can have a significant role to play.

This paper investigates the interaction between legal authorship and the works made disabled dance artists. Even though, the comments will be made in relation to choreographic works, they remain largely applicable and relevant to other forms of performative disciplines.

The aim of this paper is to answer the following questions. Can copyright authorship be used to foster creativity in the field of Disability Performances? What lessons could we learn from Disability Dance or performative practices involving non-normative bodies? Can encouraging the integration of disabled artists in the mainstream be one of the agendas of copyright? Can legal authorship be an instrument for the integration of disabled artists?

The first part unfolds more clearly the interaction and intersections between authorship, disability and performance. The comments are then applied to the work of dance performed by differently abled dance artists. The case study examines how the distribution of rights is made in the context of choreographic work performed by different bodies. It is argued that disabled dance performers highlight the performative process in such ways that their practice may shift the classic boundaries of legal authorship. The paper concludes that disability dance is thus the performative discipline policy-makers should draw upon to adequately reform performers’ rights.

1. **Authorship, Disability and Performance**

This section reviews the conditions and implications of being an author at law. To a certain extent, legal authorship is ‘blind’ to disability. The subsequent section explains how the real handicap in accessing authorial rights is the status of ‘performer’ rather than the disability of the artist.

1. **Legal authorship**

The following paragraphs explain the relevance of seeking legal authorship for artists after artistic recognition and financial stability. The low requirements to obtain such rights make of authorial rights an even more relevant instrument to rely on.

1. **What does it mean to be an author?**

Authorship grants artists rights over their work, such as the right to issue copies, to perform, and display the work in public.[[7]](#footnote-7) Such rights most commonly lead to the payment of royalties to the author of the work by re-users. The author is also allowed to claim damages in cases when the work is used without his/her permission.[[8]](#footnote-8) Thus the answer to what authorship brings the author is *money*. As above mentioned, the source of incomes copyright can potentially provide is not to be overlooked in this time of decreasing public funding in the Arts.

However, money is not the only benefit granted by authors’ rights. Copyright also awards *status*. The following section details the rather short list of requirements an artist has to fulfil to be granted the status of “author” of his/her work. Even if authorship is easily accessible, the status of author is not any less positive or rewarding. Among authors’ legal prerogatives stands the right to protect the integrity of his/her work, which indirectly enables the artist to protect his/her reputation.[[9]](#footnote-9) This specific feature of legal authorship is often described as the most relevant and valuable right one could grant.[[10]](#footnote-10) For these reasons, copyright should not be reduced to its economic aspect. Although the economic advantage of owning copyright may be dominant, authorship is also about obtaining a status within the community, about protection one’s artistic reputation and acknowledging one’s contribution to our culture. In this light, legal authorship does become a potential useful instrument to foster and support the integration of disabled dance artist in the dance community and encourage leadership.

1. **What does it take to be an author?**

After detailing the benefits of owning copyright, the next step is to review the conditions to satisfy to be recognised as an author. Because the legislator uses authorship as an instrument,[[11]](#footnote-11) the law has coined its own definition of the concept. As a result, who an author is for practitioners might differ from who an author is for copyright laws.

At law, authorship is ‘cheap’. This expression refers to the fact that the requirements to be awarded the copyright of a work are rather low compared to the common conception of authorship. For the author to receive legal authorship, the work has to satisfy the following criteria:

* The *work* has to fit in one of the categories of protected works.[[12]](#footnote-12) The list has recently been widened to encompass any work that is the product of the author’s intellectual mind.[[13]](#footnote-13) The expression “the product of the author’s intellectual mind” is vague enough to include a vast amount of creative works and has been designed to exclude from the scope of copyright works that are the result of mere technological or technical constraints.
* The *work* has to be fixed in a tangible manner.[[14]](#footnote-14) In most cases, this condition will be satisfied by the fact of producing the piece itself. For example, a painting, a book or a sculpture are fixed the very moment they are created as the creative work matches the tangible object. For performative works such like choreographic works, the situation is slightly different. The work is not embodied by itself and has to be performed to be disseminated and accessible by the audience. Recording performances can, however, solve this issue. The record will be recognised by the law as a fixed version of the choreographic work.
* Finally, the *work* has to be original but not in the common understanding of the word. The legal definition of originality has nothing to do with novelty or invention. A work is considered as original as long as it is not substantially copied from a previous protected work and that the author has put sufficient personal input into it.[[15]](#footnote-15)

It must be noted that at no point, the quality of the work is taken into consideration. There is no qualitative judgment involved in granting authorship to artists.

1. **Authorship and Disability**

These above described conditions will now be applied to the works made by disabled artists and performers in order to assess whether disability can be an obstacle to obtain legal authorship.

1. **Could a disabled *artist* be an author?**

Going back to the conditions laid out in the previous paragraph, it has to be underlined that authorship is granted on the basis of the characteristics of the work and the characteristics of the work only. The *work* has to be original, the *work* has to be fixed, the *work* has to fit in one of the categories of protectable works. At no point the law considers the characteristics of the author to grant authorship. Therefore, whether the author of the work is disabled or not is not relevant to copyright and plays no role in awarding authorship. Thus the answer is yes, a disabled artist can be an author legally speaking. Copyright is, somehow, ‘blind’ to disability.

The artistic community experience difficulty in judging of the quality of works created or performed by disabled artists.[[16]](#footnote-16) In the context of dance and disability dance, the presence of physical disability on stage challenges the traditional aesthetics, codes and qualitative standards, the dance community is used to. *Cannot there be good disability dance?* Experience proves the contrary but the difficulty in criticising good or bad work persists. The Invisible Difference project[[17]](#footnote-17) points out the lack of vocabulary and critical discourse to evaluate disability dance where the range of movements is entirely renewed and where critics feel bound to praise the disabled “brave” disabled dancer on stage “despite” his/her disability.[[18]](#footnote-18)

This controversy around the quality of the works made by disabled artists is ignored by copyright laws for the simple reason that quality as such is not a condition to satisfy to obtain copyright protection. Copyright laws do not see good or poor art, good or bad performance of a work. It only sees *fixed* or *not fixed*, *in* or *out* the categories of protectable work and *original* or *not original* – in its simplistic definition.

In this respect, it can be validly argued that copyright is a relevant instrument for disabled artist and performers to rely on in order to develop their practice, career and leadership since it overlooks what seems to be problematic for the field: their disability and renewed aesthetics.

1. **Could a disabled *performer* be an author?**

Although disability is not an obstacle to authorship, the nature of performers’ work, the performances, is one. When the artist, disabled or not, is a performer the law experiences some difficulty in acknowledging the creative his/her input, consequently, refuses him/her authorship. However, if at first glance the differently-abled performer cannot be an author legally speaking, the next section might, however, bring evidence to mitigate this statement. The second part of this paper discusses further this specific point when examining the situation of disabled dance artists in more details.

1. **Authorship and Performance**

According to the law, the performer is not an author. Among the class of artistic creators, performers like singers, musicians or actors seem to hold the rank of lesser artists compared to authors like composers, playwrights, choreographers.[[19]](#footnote-19) Intellectual Property laws have been described as reflecting our society’s conception of performers and the hierarchy among creators it has built over the centuries.[[20]](#footnote-20)

Historically performers have enjoyed a rather low social status. Since the second century before Christ,[[21]](#footnote-21) performances are regarded as less valuable contributions to the Arts than authorial works. Performers are regarded as puppets placed in the authors’ hands since the latter write the work they perform.[[22]](#footnote-22)

It has been argued that performers could not be protected in the same way as authors because performances are not tangible. Performances are ephemeral, and as such their legal protection was considered impossible in practice. Others have gone further and described performers as deprived of any economic value. Performers’ work, the performance, vanishes the very moment it is produced and is consequently valueless. That position was notably held by a figurehead of our liberal economic system: Adam Smith.[[23]](#footnote-23)

Despite this tortuous cultural path, performers have now found their rights internationally recognised.[[24]](#footnote-24) Performers’ rights are now endorsed by most international treaties and enforced under domestic laws of Intellectual Property.[[25]](#footnote-25) Social and technological changes lead policy-makers to reconsider the situation of performers and improve their legal protection. Indeed, western societies witnessed the development of the “star” system and manias around performers like singers and actors. Performers are no longer outcasts of the society or of the artistic community.[[26]](#footnote-26) This phenomenon occurred at the same time as sound and video recording technologies were improved so much so that performances became commercially exploitable – less ephemeral. Sound and video recording got performances to gain the economic value there were accused of lacking. These technologies also raised the issue of re-use of performances by others which was not practically possible before.

These two factors pleaded in favour of introducing some protection for performers but have not been as convincing as to bring performer’s rights to the level of authors’ rights. Performers’ rights are of a marginal value compared to authorial rights, both in practice and in the text.[[27]](#footnote-27) They are thought as lesser rights compared to that of authors. Cultural history left aside, the fear of producers and authors to see their shares of revenues diminished might be the reason behind policy-makers’ reluctance to reform performers’ rights.[[28]](#footnote-28) The entertaining and creative industries have been structured by a long standing tradition where authors are the recipients of copyright protections and are able to transfer such rights to producers or investors. Any legal reform that would attempt to rebalance the situation of performers will be working against a well-established economic organisation.

The paper argues next that disability performances or performative arts by disabled artists act as a magnifying glass on the creative inputs performers bring in the work they interpret. In this respect, they would be a much better figurehead for the defense of performers’ rights or the plea for performers’ authorship than Beyoncé or other alike pop stars gifted with economic leverage and media coverage. To support this position, this paper bases its argumentation on the observations collected during the observation of disability dance practitioners.

1. **Case Study: Disability Dance**

The practice of disability dance reveals that staging disabled performers challenges the traditional boundaries of authorship so much so that performers can be seen as authors. This section briefly describes the process of staging a different body before examining the distribution of rights it triggers.

1. **Staging disabled dancers**

There are two scenarios in which a disabled dancer can be involved: the performer can be performing a piece created tailored to his/her body or be asked to perform a piece not designed for his/her physicality.

1. **Performing a piece created for one’s body**

The author invites you to watch Caroline Bowditch[[29]](#footnote-29)’s performance of *The long and the Short of it[[30]](#footnote-30)* available at: <http://www.youtube.com/watch?v=POlr7W9mpD4>

When the work is designed for the physicality of the dancer, the performer’s disability does not impact the underlying work[[31]](#footnote-31). The artist is put in the same situation as a non-disabled dancer performing choreographic works created for ‘normative’ bodies. Here, the input of the disabled performer is similar to that of a non-disabled performer interpreting a mainstream work.

1. **Performing a piece not tailored to one’s body**

The author invites you to watch Caroline Bowditch’s recasting of *Love Games* Joan Clevillé,[[32]](#footnote-32) available at: <http://www.youtube.com/watch?v=6YEtEyr6N4g>

The situation is very different when a disabled dancer is performing a work not designed for his/her corporeality. In this case, the dancer has to adjust the work to perform it, he/she has to modify the work. Dance or the art of choreography is probably the performative art that relies the most on the body of its performers. A choreographic piece cannot be perceived by the audience without the intervention of performers. Therefore the work and the performers’ bodies have a unique connection. When the work does not suit the dancer’s body the work cannot be performed by the dancer in the way it has been conceived by its author, the choreographer. In this scenario, the conceived version of the work no longer matches its performed version. Caroline’s performance of *Love Games* is revealing of the difference between the conceived work and the performed work when the latter is embodied by bodies different than those envisioned by the choreographer.

1. **Performers or authors?**

When the choreographic work is designed for normative bodies but is not performed by them, the performed version of the work can be very different from its conceived version. The conceived version of the work, or work originally created by the choreographer, will also be designated by the expressions “original version” or “underlying work” for the purpose of this discussion. The difference between the two versions of the work is caused by the adjustments the impaired performer has to make so that he/she can execute the work within his/her own range of movements. The adjustments are made – or should be made – with expertise and virtuoso so that the aesthetics, theme and spirit of the work remain intact. From this perspective, the dancer’s input into the performed version of the work is creative. The dancer puts skills and efforts in adjusting the work to his/her body without damaging its aesthetics.

In this situation, one may legitimately ask what the nature of the performance is when considering the legal definition of “work” of authorship. Is it still a performance in the classic understanding of the word? Is it more than “just” a performance? Does the performed version of the work amounts to the creation of a new work whose author would be the performer? To what extent can it be argued that the performer has created a new work?

There are grounds to argue that the performer is creating a new work which should be recognized by copyright as independent from the choreographer’s underlying piece. Indeed, the performed version of the work is significantly different so much so that the affiliation of the performed version to the “original” underlying work can be hard to perceive . Moreover, the performed version of the work embodies a significant amount of the performer’s authorial inputs which is one of the key criteria for copyright to grant authorship to an artist. However and even though the disabled performer seems to be satisfying all the conditions required by copyright, one may question the fairness of attributing authorship on the basis of a visible difference caused by his/her disability.

1. **Performers’ authorial inputs**

As mentioned before, to receive authorship, artists must produce an ‘original’ piece, understood as a piece which is substantially different from previous works as well as show significant intellectual input into it.

1. **A visible difference**

The strongest argument in claiming that the performance qualifies as an independent work detached from the underlying work is the visible difference between the two. Indeed, the difference in the performers’ physicality can be such that the work has to be significantly adjusted to be performed. The moves of the conceived work will be modified in its performed version, sometimes the majority of the moves will be different. Having this in mind, one may then ask when the conceived work ceases to exist and when the performed work starts standing on its own.

In Bowditch’s performance of *Love Games*, a trained eye or an expert of Joan Clevillé’s work may still be able to trace the original version of the work in Caroline’s performance. However, a layperson would not see the connection between the two works, especially if the two works are not displayed next to each other as they are in the referred video. The greater the adjustments made by the performer are, the less visible the work of the choreographer becomes. What would be the stance of the law here? In this scenario, would copyright grant authorship to the performer, despite its traditional reluctance against performers?

Focusing on Caroline’s recasting, her performance is fixed and fitting in the categories of protectable works – as a choreographic piece. The only delicate point would be the originality requirement*. Is her performance original enough to be protected?* As mentioned in the previous section, to be original a work must not be a copy of a previous work. In this case, Bowditch’s performance must not be a copy or mere performance of Joan Clevillé’s work. Here, the audience knows the filiation between Bowditch’s performance and Joan Clevillé’s work is there but can the audience see it? Is the print of Joan Clevillé’s work visible in Bowditch’s performance? It is tempting to reply yes as the audience is told by Caroline and the video footage that her work is a recasting of Clevillé’s work. The similarities between the two performances are made obvious by the double screens. If Bowditch’s partner was not dancing with her and Joan Clevillé’s work was not mentioned, *would we able to see the underlying work in Caroline’s performed version of it?* It is unlikely. The choreographer’s work seems to disappear as Bowditch performs it because she interprets it with her own range of movements. Her performance and adjustments of the work can be compared to an arranger’s work over another composer’s scores[[33]](#footnote-33) but brought to a further level. From the legal perspective, if the underlying work cannot be perceived by the audience, the performed version of the work becomes a new and original work of which the performer should receive authorship. Whether Bowditch intends to create a new piece or to “only” perform a previous a work has no impact on attributing authorship.[[34]](#footnote-34)

Copyright is not even as strict as requiring the underlying work to be completely invisible in the subsequent work – here the performed version of the work – as derivative works are also a protectable type of work. A work will be considered derivative when in spite of the fact that it visibly relies on parts of a previous work, the whole piece remains original enough due to its author’s input.[[35]](#footnote-35)

1. **Significant authorial input**

The second point of the originality condition requires the work to be the fruit of the author’s personal creative input as well as not being a mere copy of a previous protected work. The dancer has to bring in the work conceived by the choreographer enough creative input to ‘deserve’ copyright protection and authorship.

In the present case, it seems that Bowditch satisfies that requirement. Her input in the work is obvious and embodied by the changes she has to make to perform the underlying work. Thus her performance can be at least considered a derivative work if not independent.

1. **A fair authorship?**

In this scenario, the source of the performer’s authorship can be seen as his/her disability. The difference of body is causing performers to modify the underlying work. The dancers’ disability appears to be the reason why disabled performers would be receiving authors’ rights as it is the reason why the underlying work is invisible in its performed version. Can authorship be granted because of disability? Can authorship be caused by disability?

An egalitarian approach would claim that specific physical traits should not lead to more favorable treatments – e.g. receiving authorship - if such treatment cannot be accessed by everyone. A non-disabled performer will never be in the position of having to change the work to perform it. As a result, he/she will never be in the situation of receiving authorship over his/her work simply because “deprived” of disability he/she does not have to accommodate the work. When the performer possesses a “normative body” the work is ready to be performed by him without modification having to be made.[[36]](#footnote-36) There is thus no opportunity for him/her to adjust the work to his/her physicality and obtain authorship in return.

This seems all the more problematic that the disabled dancer does not chose to modify the work during his/her performance, he/she *has* to. How fair is it to obtain authorship out of unintended modifications of a work due to the performers’ physical (dis)ability?Two arguments can be opposed as this apparent unfairness. First, non-impaired performer can enjoy the same opportunity in accessing authorship when performing a work designed for disabled dancers’ physicality. However, given the rather marginal amount of available works designed for disabled dancers, this hypothesis does not offer a strong counter argument. Second, it can be argued that when accommodating the work, the disabled performer employs skills and creativity so that the fluidity, theme and aesthetics of the work is not impacted. Bowditch’s recasting of Joan Clevillé’s work brings evidence of the skills and creativity the performer has to use to perform the work. In other words, a disabled dancer cannot *just* perform the work, he has to recreate part of it to preserve the work’s quality and aesthetics. As the work is re-created, the performer should legitimately be regarded as an author. Whether the same opportunity is available to non-impaired bodies should not restrain the law from awarding authors’ rights.

The second counter-argument may, however, be defeated by the fact that copyright is unable to make the difference between a performance by a disabled dancer who employs skills and creativity and a performance where the performer does not. Copyright is unable to see the difference, and would as a result grant authorship to both. The situation is caused by the fact that copyright laws ignore any notion of quality when attributing rights. As mentioned earlier in this paper, conditions to obtain authorship include fixation, a low requirement of originality and fitting in one of the categories of protectable work laid out by the law. None of these conditions require the work to be of good quality. Copyright will only examine the visible difference between the conceived and performed work and the degree of such difference.[[37]](#footnote-37) With or without creativity or skills, if the performance by the disabled dancer makes the performed version of the work visibly different so much so that the conceived or underlying work is barely visible, the performer would be entitled to receive authorship. Whether the performer has been skillful or not, whether the performer made the effort to adjust the work or not does not make any difference in the distribution of rights. The presence of disability is enough for the performer to be considered author of a choreographic piece and such authorship is unlikely to be accessible by non-disabled performers as easily*.*

Would it be fair? Should a performer be considered an author because disabled and on stage? If the answer to this question depends on one’s own subjectivity and opinion, the situation would certainly be favorable to differently able dance artists and may contribute to improving their integration and leadership in the mainstream.

1. **A case for all performers**

The case study observed the possibility for disabled dancers to access authorship and claims their legitimacy in receiving such rights. The paper goes further in arguing that such legitimacy is not limited to disabled dancers, and may be relevant to all performers. Such claim would solve most of the issues brought up earlier with regard to the fairness of granting authorship on the basis of one’s disability. However, arguing that all performers have creative input in the works they interpret might play against the using authors’ rights to support disabled dancer artists specifically.

1. **Observations applicable to all performers**

The case study revealed that disabled performers had to make adjustments to the choreographic work in order to perform it because of their disability. It was also observed that such adjustments and modifications were creatively made so much so that the performance of the disabled dancer amounted to create a new work of which he deserved to receive authorship.

This reasoning assumes that there are non-normative bodies as opposed to normative bodies. It is also presumed that a disabled dancer would have to adjust a work to his/her body whereas a non-impaired performer would not since the choreographic work would, by default, fit his/her normative or standardised physicality. Do normative bodies resist exist? Is there such thing as a human template onto which any artist work would fit without it to be modified by its performers?This is the premise the paper challenges drawing on the observations of disability dance.

First, it is claimed that the need for such adaptation to be made is not limited to disabled dancers interpreting pieces not designed for their bodies, but that it is a situation faced by all performers as there is no such thing as ‘normative bodies’ (i). Second, the paper argues that such belief in the normativity of performers’ bodies may be one of the reasons behind the reluctance of the law to reward performers with equivalent rights to authorship. Indeed, the belief in performers’ normative bodies is the starting point of conceiving the former as non-creative artists (ii).

1. Each performer as a different body and each performance is the result of a performer adjusting a conceived work to his/her body, abilities and set of mind. In this respect, each performance is the result of creative and skillful inputs of the performer. In this hypothesis, disability dance would only be a practice which magnifies performers’ creative input, involving performing bodies ‘more visibly’ different.
2. The reluctance of copyright laws to grant author’s rights to performers is evidence that the law does not recognize the contribution of performers as being as creative and valuable as that of authors. This is where the case study provides useful information as to why performers are not perceived as creative collaborators. Performers are seen as non-creative, or as not as creative as an author, because authors’ works are thought to be performable by all performers by default. Works are pictured as performable by all performers because performers are conceived as identical from one another so much so that the author is able to produce a piece for all performing bodies since all performing bodies are the same. Performers are thought to be identical human templates ready to be employed by the author like puppets in the puppeteers’ hands. Questioning the belief in the normativity of the performing body challenges the very reason why performers are not described as creative protagonists and why, as a consequence, they are not deserving of authors’ rights. Turning this reasoning around, admitting the absence of normative bodies would lead to envisage performers as authors. If performers are recognized as creative as authors, there is no argument left standing in their accession to legal authorship.
3. **The implications of recognising all performers as creative**

Claiming that disabled performers are being as creative as any other performers is a two-sided argument. On one hand it could plead in favor of upgrading the status of performers to that of authors without distinction between disabled and non-disabled performers. On the other hand, the argument could also be reversed against disabled performers. It could be argued that if disabled performers are not doing anything more than any other non-disabled performers when adjusting the work to their body, they should thus receive the same treatment which would equate to being granted performers’ rights and not authorship.

In the first hypothesis, disability dance serves the performers’ cause and the plea for a better legal protection whereas the second is going against the agenda of using copyright as a tool to foster disabled dance artists’ integration. Indeed, being seen as a performer rather than an author results in losing a significant amount of rights and economic prerogatives over the performance.

There is no clear answer whether the current context would be favorable to developing performers’ rights or if policy-makers would be inclined to reform. Therefore, it is hard to predict which the interpretation will be chosen over the other.

**Conclusion**

Our cultural belittlement of performers and the value of performances has influenced our legal framework and allocation of authorship. However, our conception of performers and their contribution to our society’s culture might be slowly changing. Although new technologies have enhanced the economic value of performances and boosted the need to enforce performers’ legal rights, this process was slowed down by the powerful lobbies of authors and producers.

In order to take a resolute step towards bringing performers’ rights up to the level of authors’ rights, policy-makers need evidence. Regulatory bodies need evidence that performances are ‘works’ in the copyright sense of the word, and deserving of such protection. They need to be convinced that performances have an existence as independent works and that their protection can be realistically achieved.

This paper asserts that disability dance is addressing that lack of evidence. Disability dance is the one case study that acts as a magnifying glass over the process of creation from the choreographer’s end as well as from the performers’ end. The practice renders visible the usually invisible touch of the performer in the performed version of a work. For that reason, disabled dancers would be a better figurehead for the reform or performers’ rights than many other popular pop stars or so-called “bankable” artists.

On a smaller scale, the paper believes that disabled dancers could benefit from copyright authorship to support the development of their work and practices as any other non-impaired artist would. However, it is unlikely that copyright can be reformed in order to specifically accommodate disabled artist as a privileged category of authors, given the current stance of the law. Copyright is designed to focus on the characteristics of the work only therefore its structure is fundamentally inadequate to target one class of authors over another.

1. ## The Statute of Ann of 1710 was the first statute to enforce authors’ rights in the United Kingdom. In Germany the first copyright law was introduced in Prussia in 1837. The division of the nation into various states however complicated the enforcement of the law in practice so much so that Germany is often described as a jurisdiction which did not enforce copyright laws for centuries compared to other countries such like England or France. It is interesting to note here that despite the lack of copyright regulation, Germany has seen an incredibly productive past of publications which would lead us to think that the correlation between authorship or copyright protection and incentive to produce and write is not that strong. See Frank Tadeusz, No Copyright Law: The Real Reason for Germany's Industrial Expansion?, Spiegel International Online edition, 18 August 2010, available at: <http://www.spiegel.de/international/zeitgeist/no-copyright-law-the-real-reason-for-germany-s-industrial-expansion-a-710976.html> (last visited: 01/11/2013)

   [↑](#footnote-ref-1)
2. Copyright laws designate by “authorship” the bundle of rights which allows an author to protect his/her work against unauthorised use as well as to trade such use against royalties. The legal conception of authorship is moulded on the pattern of property ownership. Authors’ rights or authorial rights are alternate expressions to refer to the same notion of copyright authorship, as opposed to other types of rights also regulated by Intellectual Property Laws such as performers’ rights. [↑](#footnote-ref-2)
3. In 2010-2011 the Art Council received £450 million in public grant. In 2011-2012 it was reduced by 14% to £388 million; in 2012-2013 by 7.5% to £359 million; in 2013-2014 by 3% to £348 million and in 2014-2015 it will be reduced to £343 million. See: <https://www.gov.uk/government/policies/supporting-vibrant-and-sustainable-arts-and-culture>. This is however no the only source of funding for the Arts Council. The national lottery gives significant amount of money via the Arts Council to support the Arts. Total funding including lottery funding in 2010-2011 was £601 million. In 2014-2015 it is expected to be £605 million. [↑](#footnote-ref-3)
4. The Arts Council Plan 2011-2015 can be found at: <http://www.artscouncil.org.uk/media/uploads/pdf/Arts_Council_Plan_2011-15.pdf>. The plan implements the Council’s strategic vision 2011 – 2021 ‘Achieving Great Art for Everyone’ available at <http://www.artscouncil.org.uk/what-we-do/our-vision-2011-21/> [↑](#footnote-ref-4)
5. Waelde, Charlotte ; Whatley, Sarah ; Pavis M, “Let’s Dance! But Who Owns It?” (2014) 36 European Intellectual Property Law Review 217 [↑](#footnote-ref-5)
6. Disability Dance is the case study the paper will be relying on to base its argumentation regarding the validity of awarding authorship to performers [↑](#footnote-ref-6)
7. Section 16 of the Copyright, Designs and Patent Act of 1988 (CDPA 1988). The German Copyright Act (*Urheberrechtsgesetz*) does not refer to a list of rights granted by the law to the author. Section 11 of the Act refers to the “use” or “utilisation” of the work as a privilege of its author without defining the notion of “use” or “utilisation”. A illustrative list of exploitation rights is however given by the Act under §15. under section §11. [↑](#footnote-ref-7)
8. The prerogatives of the authors go even further by allowing the author to sue an authorised user of his/her work if his/her work is subjected to derogatory treatment by the user. This prerogative is the author’s moral right to protect his/her work from derogatory treatment, see section 80 CDPA 1988. Section 97(1) of the German Copyright Act entitles the author of a work to sue for damages in case of breach of his/her rights. [↑](#footnote-ref-8)
9. As mentioned in the note 6, the author enjoys moral rights as well as economic right over his/her work. These rights aim at protecting the paternity and integrity of the work. The author is allowed to be identified as author or director and the right to protect the integrity of his/her work against derogatory treatment even when the use of the work has been authorised by him beforehand. See Chapter IV, sections 77 and 80 CDPA 1988. Sections 12 to 14 of the German Copyright Act empower German authors with similar moral rights. [↑](#footnote-ref-9)
10. De Quintana KL, “The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies over Pioneering Choreographers” (2004) 11 Villanova Sports & Entertainment Law Journal 139, 169 [↑](#footnote-ref-10)
11. See Introduction and comments in footnotes supra *note* 1 [↑](#footnote-ref-11)
12. The list of protectable works in the United Kingdom counts: original literary, dramatic, musical or artistic work, sound recordings, films, broadcasts and typographical arrangements of published editions. See section 1 CDPA 1988. The German Copyright Act also offers a list of protectable work under section 2(1) of the Act. However the section 2(2) following the list of protected works mentions that “personal intellectual creations alone shall constitute works within the meaning of this Law”. [↑](#footnote-ref-12)
13. See the Infopaq jurisprudence of the European Union Court of Justice: Case C-5/08 Infopaq, followed by Case c-393/09 BSA, joined cases C-403/09 and C-428/09 FALP, Case C-145/10 Painer, Case C-604/10 Football Dataco and Case C-406/10 SAS. See on this the comments made by Mr Justice Arnold held that: “In the light of a number of recent judgements [here above quoted], it may be arguable that it is not a fatal objection to a claim that copyright subsists in a particular work that the work is not one of the kinds of work listed in Section 1(1) of the Copyright Designs and Patents Act 1988 and defined elsewhere in that Act. Nevertheless, it remains clear that the putative copyright work must be a literary or artistic work within the meaning of Article 2(1) of the Berne Convention “in Eleanor Rosati, “Pushing the Boundaries of Copyright Protection? Card, Board and Football Games”, IPKAT Blog, Sunday 28 April 2013, available at: <http://ipkitten.blogspot.co.uk/2013/04/pushing-boundaries-of-copyright.html> (last visited: 06/06/13) [↑](#footnote-ref-13)
14. Section 3(2) CDPA 1988. German Law does require the work to be fixed (see section 2(1)1 of the German Copyright Act) it has to be perceptible but not has not have to be materially fixed. See Elizabeth Adeney, Critique and Comment, Authorship and fixation in copyright law: a comparative comment, 677 Melbourne University Law Review 35, 682, 2011 [↑](#footnote-ref-14)
15. Section 1(1)(a) [↑](#footnote-ref-15)
16. This debate is another central line of discussion of the Invisible difference project. See *infra* note 17. [↑](#footnote-ref-16)
17. The AHRC funded project “Invisible Difference: Dance, Disability and the Law” (Invisible Difference project) investigates the intersections between dance, disability and the law. For more information see: [www.invisibledifference.org.uk](http://www.invisibledifference.org.uk) <last accessed 05/06/2014> [↑](#footnote-ref-17)
18. See Charlotte Waelde and Sarah Whatley, Validation and Virtuosity: Perspective on Difference and Authorship/Control in Dance, (in press) 2014 at 8. Disability dance is not about the heroism of its dancers because impaired but yet performing. [↑](#footnote-ref-18)
19. Richard Arnold, Performers’ rights, Sweet and Maxwell, 2008 at 3-5 [↑](#footnote-ref-19)
20. *ibid* [↑](#footnote-ref-20)
21. Richard Arnold, Performers’ rights, Sweet and Maxwell, 2008 at 3-5 *supra* note 19 [↑](#footnote-ref-21)
22. The law endorses the classic conception of the art of performing where the performer is seen as a neutral medium through which the work is disseminated by the author to the audience. The legal narrative is representative of Diderot’s conception of performers’ work. Even though, this theorisation around performances has been challenged, renewed and replaced by models where performers are recognised to have a much more significant creative and transformative inputs into the performance. See Pavis M, “The Body on Stage” (*SCuLE blog*) <http://scule.org.uk/> <last accessed 15/05/2014>.

    See Diderot D, *The Paradox of Acting* (Kessinger Publishing 1883); Simmel G, *La Philosophie Du Comédien* (Circe 2001) ; Fischer-Lichte E, *The Transformative Power of Performance - A New Aesthetics* (Routeledge 2008). [↑](#footnote-ref-22)
23. See Adam Smith in The Wealth of the Nation 1776 where he describes performances as the epitome of unproductive labour: “players, buffoons, musicians, opera-singers, opera-dancers” whose work “perishes in the instant of its production”. Adam Smith, The Wealth of the Nation, Volume 1 (1776) Hayes Barton Press, ed. The Originals (1961) 221 [↑](#footnote-ref-23)
24. In 1996 the World Intellectual Property Organisation adopted two treaties enforceable in signatory country such as the United States, the United Kingdom and other European nations. The WIPO Treaties refers to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (also referred to as WPPT). In 2012, performers’ rights were further improved by the WIPO Beijing Treaty on Audio-visual Performance available at <http://www.wipo.int/treaties/en/text.jsp?file_id=295837> <accessed 15/05/2014>. [↑](#footnote-ref-24)
25. Several acts were passed from 1925 to 1958 in the United Kingdom to improve the situation of performers but the protection only reached a significant level with the implementation of the Rome Convention in 1961. The international community caught up with the European Union in 1996 when enacting the WIPO Performances and Phonograms Treaty. See Richard Arnold, Performers’ Rights, *supra* note 19 at 20-21 [↑](#footnote-ref-25)
26. See Richard Arnold, *supra* note 19 at 4 [↑](#footnote-ref-26)
27. Performers’ rights are still considered as lesser rights than authors so much so that they are labelled as “neighbouring rights” to authors’ rights. On that see Richard Arnold, *supra* note 19 at 13 [↑](#footnote-ref-27)
28. The argument according to which the introduction of another layer of rights over the work in favour of performers would lead authors and producers to receive fewer revenues as investors will have to split their investment is challenged by many authors who claim the market is flexible enough to accommodate both authors and performers’ rights. One of them is Richard Arnold, Performers’ rights *supra* note 19 at 8. [↑](#footnote-ref-28)
29. Caroline Bowditch is a choreographer and dance artist collaborating with the Invisible Difference project, see *supra* note 17 [↑](#footnote-ref-29)
30. The Long and the Short of it is a duet choreographer by the Scottish Dance Theatre’s Dance Agent for Change, Caroline Bowditch and Tom Pritchard. The performers for 2011 are Caroline Bowditch and Joan Clevillé, the music is composed by Rising Appalachia and the lighting design was arranged by Emma Jones. [↑](#footnote-ref-30)
31. The expression “underlying work” here refers to the work as conceived by the choreographer, see subsequent Section B. [↑](#footnote-ref-31)
32. Love Games was choreographed by Joan Clevillé and first performed in the Scottish Dance Theatre. Caroline presented her recasting in 2012 at the Pathways to the Profession Symposium in Dundee. [↑](#footnote-ref-32)
33. On the analogy between the impaired dancer accommodating a work not designed for his/her body with the work of musical arranger see C. Waelde and S. Whatley *supra* note 18 at 20 [↑](#footnote-ref-33)
34. This can be problematic as disabled performers might be in the position of being unable to *just or only* perform choreographic works given the rather small amount of work designed for disabled bodies and the vast diversity of disabled bodies and disabilities. *Does it mean disabled dancers can never be performers and are bound to be authors?* [↑](#footnote-ref-34)
35. The parts copied from a previous cannot be substantial and the author has to rearrange them so much so that the whole piece satisfies the originality requirement. [↑](#footnote-ref-35)
36. For an illustration of this classic conception of performance, see the work of Denis Diderot *supra* note 22 [↑](#footnote-ref-36)
37. The degree of visibility of the difference will be used as the cursor to draw the line between the mere copy of a work, a derivative work or truly original and independent work. [↑](#footnote-ref-37)