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An Exploration of the 2Milly's Litigation from a UK Copyright Law Perspective: A Multi-Factorial Approach? (June 2022)

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Nouf Ali S Algazlan

Abstract

The UK statutory provisions and case law in copyright law currently provide a relatively broad approach to dance under dramatic works. As a result, the Copyright, Designs and Patents Act ("CDPA") is unclear whether short dances, that consist of a few moves, can receive copyright protection.

The following paper argues that copyright protection in short dances should be governed by the proposed multi-factorial approach. To do this, this article first, from a doctrinal viewpoint, examines the law on dances under UK copyright law questioning whether short dances receive copyright protection. By examining key cases such as *Norowzian v Arks* and *Nova Productions* v *Mazooma Games*, this paper demonstrates that it remains uncertain whether short dances can be granted protection. Hence, from a normative lens, the article suggests how short dance should be dealt with under UK courts. By comparing the courts' approach to all authorial works and assessing the justifications of copyright law, the article finds that the tests drawn from *Exxon* and *Sawkins* are the most appropriate. Through 2Milly's case (Milly Rock dance), the paper will demonstrate precisely how the multi-factorial test would apply. The primary advantage of the solution is providing the content creators protection over their work and recognition.

Keywords: Copyright – Law – Short Dances - IP

I. Introduction

"...I just feel like I have to protect what's mine."[1]

Imagine you are a content creator. You create a short dance move that goes viral. Most people who come across that dance will therefore associate it with you. However, a big company uses your dance – the same moves and gives no credit. Should UK copyright law "protect"[2] your short dance?

The UK statutory provisions and case law in copyright law currently provide a relatively broad approach to dance under dramatic works. As a result, the Copyright, Designs and Patents Act ("CDPA") is unclear whether short dances, that consist of a few moves, can receive copyright protection. One major issue discussed controversially in this sense, is the imagination discussed above, which is the reality for several content creators[3] because of the video game Fortnite.

Launched in 2017, Fortnite remains the most famous game in 2022.[4] Although the game is free, players buy V-Bucks, a virtual currency in return for real money (e.g. 1000 v-bucks is £6.49)[5] which are then used to purchase items such as emotes (short dances).[6] What you have imagined is what happened to Terrance Ferguson ("2Milly") who created a dance and popularised it in his music video "Milly Rock".[7] The quote aforementioned was his words after

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[1] Cycle, '2Milly on pursing legal action against Fortnite' ,<https://twitter.com/bycycle/status/1064577301977931778> accessed 10th October 2021.

[2] Ibid.

[3] E.g., Alfonso Ribeiro with his dance 'The Carlton;' and Russell Horning with his dance 'The Floss'. See Kevin Webb, 'Fresh Prince' actor Alfonso Ribeiro and Instagram's Backpack Kid are the latest artists to sue the creators of 'Fortnite' for allegedly copying dance moves to make money' (The Insider, 18 Dec 2018) <https://www.businessinsider.com/fortnite-milly-rock-lawsuit-2018-12?r=US&IR=T> accessed 15th October 2021.

[4] Techacake, 'Is Fortnite dying? How many people play Fortnite in 2022?' (*Techacake*, Epic Games) https://techacake.com/is-fortnite-dying/#:~:text=With%20more%20than%2080.4%20million,battle%20royale%20game%20in%202022. Accessed January 23rd, 2022.

[5] Jordan Forward, 'Fortnite V-Bucks: how to get free Vbucks' (*PCGames*, March 29 2022) <https://www.pcgamesn.com/fortnite/fortnite-free-v-bucks-win-prices-buy#:~:text=Battle%20Passes%2C%20including%20the%20Fortnite,and%20500%3B%20legendaries%20cost%202000,%20https://www.pcgamesn.com/fortnite/fortnite-free-v-bucks-win-prices-buy#:~:text=Its%20answer%20is%20Fortnite%20V,give%20you%20a%20competitive%20advantage > Accessed 28th April 2022.

[6] Megan Flynn, 'Is Fortnite Stealing Black Dance Culture? The Creator of 'Milly Rock' Argues Yes in new lawsuit' (*The Washington Post*, 6 December 2018) <http://washingtonpost.com/nation/2018/12/06/is-fortnite-stealing-black-dance-culture-creator-milly-rock-argues-yes-new-lawsuit/> accessed 22nd October 2021.

[7] Another Great Idea, 'Milly Rock x 2 Milly' (*Youtube*, 31 August 2014) <https://www.youtube.com/watch?v=PMzDoFuVgRg> accessed 28TH November 2021.

Fortnite utilised his move[8] (without his consent)[9] naming it “Swipe It”. Although 2Milly started a lawsuit in the US, he withdrew his complaint.[10] This could be due to the US Copyright Office’s refusal to admit another short dance (Carlton Dance) for being a “simple dance routine”.[11]

Although 2Milly withdrew his litigation, this, nonetheless, raises an interesting legal question that has not fully been explored in the UK yet. Can short dances be copyrightable? It is worth noting that this paper is not concerned with whether Fortnite has infringed[12] 2Millys dance (as Fortnite is not claiming that these dances are independently created)[13] but whether 2Milly’s work is a dance in the first place that should be protected. By exploring 2Milly’s litigation from a UK copyright law perspective, it will be apparent that this is not straightforward for several reasons. Firstly, it is unclear whether the UK courts would consider 2Millys creation a work, or whether one or few dance moves are enough to qualify as a dramatic work. The threshold for this is very vague. Secondly, for 2Millys work to be protected, it should be original. Depending on the type of work, problems can also arise in identifying whether your work is original when it is very short.[14] Finally, the lack of clarity of UK copyright law on work allows a space for the fundamental principles and justifications to be ignored. Consequently, content creators have argued for stronger copyright protection.[15] The unlawful use of their creation impacts their ability to gain profit from their work, which then decreases their incentive to create, resulting

[8] Elijah Hack, 'Milly Rocking through Copyright Law: Why the Law Should Expand to Recognize Dance Moves as a Protected Category' (2020) 88 U Cin L Rev 637.

[9] Ibid.

[10] Case 2:18-cv-10110 *Terrence Ferguson* v *Epic Games* <https://cdn.arstechnica.net/wp-content/uploads/2018/12/2millylawsuit.pdf> accessed 10th January 2022.

[11] Jordan Crucchiola, ‘Alfonso Ribeiro Shimmies Away From Fortnite Lawsuit Over Carlton Dance’ (*The Washington Post*, 8th March 2019) <https://www.vulture.com/2019/03/alfonso-ribeiro-fortnite-lawsuit-carlton-dance.html> Accessed 10th January 2022.

[12] Nonetheless, there is an assumption that there is a clear infringement under UK courts (Fortnite can be played in Europe, there is a clear recognisable part of the work being taken (i.e., derivation), there’s clear reproduction, clear copying (S17 CDPA), and clear communication to the public via a screen (s20 CDPA)).

[13] Anthony Cuthbertson, ‘Fortnite dance lawsuit sparks Epic Games response: ‘No one can own a dance step’’ (*Independent*, 13th February 2019) https://www.independent.co.uk/tech/fortnite-dances-2-milly-lawsuit-epic-games-emotes-copyright-law-a8776996.html accessed 20th December 2022.

[14] E.g., *Exxon v Exxon Insurance* (1982) CH 119.

[15] MRF Senftleben, ‘Overprotection and Protection Overlaps in Intellectual Property Law - the Need for Horizontal Fair Use Defences’. In Kur A, Mizaras V, editors, The Structure of Intellectual Property Law: Can One Size Fit All?’ Cheltenham, UK: Edward Elgar. 2011. p. 136-181, N. Helberger and others, ‘Legal Aspects of User Created Content (2009)’ SSRN.

in fewer creative works.[16] In contrast, there is a developing consensus amongst the public that copyright law has "gone too far".[17]

This paper argues that copyright protection in short dances should be governed by the proposed multi-factorial approach. To do this, this article first, from a doctrinal viewpoint, examines the law on dances under UK copyright law questioning whether short dances receive copyright protection. By examining key cases such as *Norowzian v Arks*[18] and *Nova Productions* v *Mazooma Games*,[19] this paper demonstrates that it remains uncertain whether short dances can be granted protection. Hence, from a normative lens, the article suggests how 2Milly's case should be dealt with under UK courts. By comparing the courts' approach to all authorial works and assessing the justifications of copyright law, the article finds that the tests drawn from *Exxon*[20] and *Sawkins*[21] are the most appropriate. Through 2Milly's case, this paper will demonstrate precisely how the multi-factorial test would apply. The primary advantage of the solution is providing the content creators protection over their work and recognition.

Part II of the article will examine the factual problem with 2Milly's case. It will illustrate the dance moves, discuss the simplicity arguments that US courts proclaim, and explain why this cannot be the case under UK courts. After that, the paper assesses copyright justifications, copyright subsistence, and the possible issues that arise in 2Milly's case. Part III of the paper will argue for a multi-factorial approach as a solution to short dances by adopting policy considerations and the court approaches to other authorial works in the UK. Part IV will examine the arguments for and against the multi-factorial approach. It is also important to note that other Intellectual Property Rights (e.g., trade mark)[22] may be relevant when assessing 2Milly's case, however, these issues are beyond the scope of this article.

II. Copyright Implications of Dance Works in the U.K.

[16] Charlotte Waelde and others, *Contemporary Intellectual Property: Law and Policy* (3rd edn, Oxford University Press 2014) 240.
[17] Irene Segal Ayers, 'The Future of Global Copyright Protection: Has Copyright Law Gone Too Far' (2000) 62 U Pitt L Rev 49, 49.

[18] (No 2) (2000) FSR 363 ("Norowzian").
[19] (2006) RPC 379 (Ch), (2007) RPC 589 (CA) ("Mazooma").
[20] *Exxon* (n 14).
[21] *Sawkins* v *Hyperion* (2005) RPC 32 ("Sawkins").
[22] LegalGamer, ''Fortnite' Creator Facing Potential Lawsuit Over 'Stolen' Dance Moves' (LegalGamer, 20th November 2018) https://legalgamer.weebly.com/blog/fortnite-creator-facing-potential-lawsuit-over-stolen-dance-moves accessed 20th December 2021.

To argue that a multi-factorial approach is an appropriate solution to the issues of short dances, it is important to lay out the factual and legal background. The following part examines how 2Milly's case is an example of the issues surrounding the unreliability of protecting dances as a copyrightable category. It also criticises the inconsistent judgements of authorial works and originality.

A. The Factual Background

In 2014, 2Milly popularised "Milly Rock"[23] as illustrated below:

Figure 1: 2Milly performing the Milly Rock[24]

The pictorial representation of the dance is as follows:

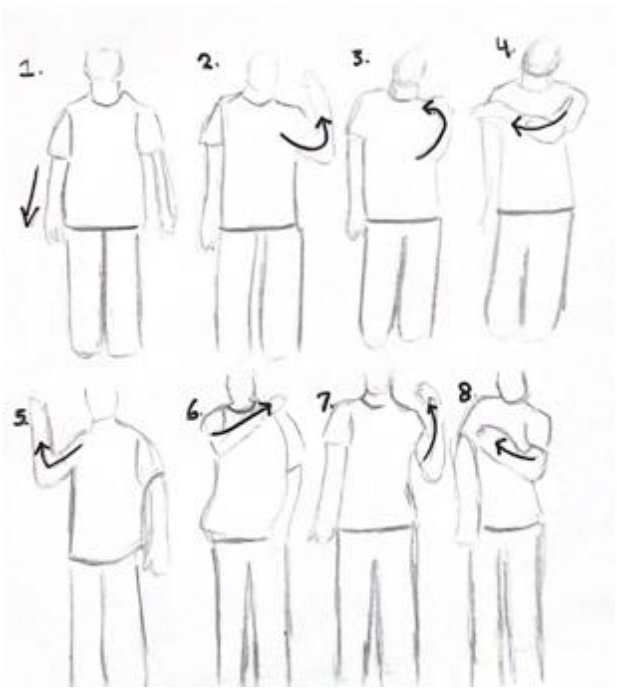

Figure 2: Drawing of Milly Rock steps[25]

[23] For further information, see Introduction; 2Milly (n 7).
[24] Ibid.
[25] The author focusses on the swiping motion of the dance (arms movement) in the pictorial representation as that is the prominent part of the dance. It is worth noting there are foot movements too.

The Milly Rock involves approximately four steps. (1) The performer's hand rises whilst the other hand is down. (2) This is then swung across the body while the knee is lifted. (3) It is then performed on the opposite side of the body. (4) This is repeated a few times. Fortnite has then created this:

Figure 3: Fortnite Emote 'Swipe It'[26]

Though watching the dance in video format will demonstrate the similarities more clearly, they are also very similar in snapshots. The following section aims to explore whether the Milly Rock is a protectable dance. Although the answer is unclear from a UK copyright law perspective, the US courts refused protection to short dances for simplicity reasons.[27] U.S. literature reason this by comparing the short dance with a short word (which does not gain protection under Copyright Law).[28]

Nevertheless, the simplicity requirement in the US seems to be not evident in UK copyright law. Some UK copyright cases show that works that are simple and do not require much work get protection. *University London Press*[29] held that literary works cover work "expressed in print or in writing, irrespective of the question of whether the quality or style is high."[30] Thus, it is unlikely that UK courts will follow the US approach.

B. The Legal Background

[26] Nick Statt, 'Epic Games is getting sued for turning rapper 2 Milly's dance into a Fortnite emote' (*The Verge*, 5th December 2018) <https://www.theverge.com/2018/12/5/18128115/epic-games-fortnite-sued-lawsuit-rapper-2-milly-dance-move-emote> accessed 1st December 2021.
[27] Crucchiola (n 11).
[28] Chandler Martin, 'Whose Dance Is It Anyway?: Carving out Protection for Short Dances in the Fast-Paced Digital Era' (2020) 98 NC L Rev 1001, 1016.
[29] *University of London Press* v *University Tutorial Press* (1916) 2 Ch 601 ("University").
[30] Ibid.

Accordingly, there are two possible issues in 2Millys case. First is the vulnerability of copyright works that include identifiable and noticeable inspirations from content creators that end up being unprotectable works. Second is the unclear threshold for dance works. To deal with the first issue, the underlying principles of copyright law need to be assessed. The next part will give an overview of the relevant justifications,[31] their significance,[32] and how they should be played out in 2Milly's case.

1. Justifications of Copyright Law: *Should* Milly Rock be protectable?

Copyright law has been regularly understood to not protect "social" dances[33] because of the 'Public Benefit Rational' (i.e., the work should benefit the public to gain protection).[34] Additionally, there may be significant issues to protecting a social dance. If 2Milly's dance has protection, would that make kids performing it subject to damages? The prevalent challenge in the performance reasoning and the public benefit rationale supports the conclusion that social dance should not be protected. However, this is not the purpose of copyright law. In today's age, these "social" or "simple" dance moves can be subject to wide popularity through social networks. For instance, TikTok allows creators to instantly share their dance moves which gain them quick fame.[35] In fact, the creativity and expressiveness of dance moves come from their simpleness and replicability "not in *spite* of it".[36] Milly Rock is one example of a dance that obtained quick fame because of its simplicity and uncomplicated performance, not because of its "sophistication".[37] The fame of these dances comes from the creator who has iconised the dance and the response of the public. Thus, if the copyright law objective is social benefit, creativity that evokes reaction and joy, like the MillyRock, should gain protection.[38]

Moreover, several theories of Intellectual Property apply to short dance. For example, copyright law mainly gives protection to incentivise[39] people to create new works and

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[31] Due to limited space in paper, for criticisms or validity of such justifications, see: Lionel Bently and Others, *Intellectual Property Law* (5th edn) (OUP 2018) 5; For a summary of incentive theory, see Tom G Palmer, 'Are Patents and Copyrights Morally Justified - the Philosophy of Property Rights and Ideal Objects' (1990) 13 Harv J L & Pub Pol'y 817.

[32] Susy Frankel, 'Protecting Killer Crocs and Fantasy Football - The Ethics of Copyright Law' (1998) 28 Victoria U Wellington L Rev 191, 191.

[33] Hack (n 8) 647-8.
[34] Ibid.
[35] Ali Johnson, 'Copyrighting TikTok Dances: Choregraphy in the Internet Age' (2021) 96 Wash. L. Rev. 1225.
[36] Hack (n 8) 648.
[37] Ibid.
[38] Ibid.
[39] Ian Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth (2011) p43, 44, 51 and 92; Tanya Aplin and Jennifer Davis, *Intellectual Property Law: Text, Cases and Materials* (3rd edn, Oxford University Press 2017) 13-15.

contribute to society.[40] The 'Incentive Theory' is concerned with the notion of what is advantageous for the public[41] and the idea that an author needs to have an incentive to produce works. The incentive theory also assumes that the construction of works is a significant and precious activity. Accordingly, if copyright law did not exist, then the formation of these activities would not be as optimal because works may be expensive to make, and once they are in the public, they can simply be copied (e.g., while some dance can be time consuming and require effort to produce, once it is available to the public, they can easily and without cost be re-produced).[42] Thus, by granting short dances protection, authors, in theory, would be incentivised to spend their effort to create new dances. However, it could be argued, considering the simplicity of these dances, it is questionable whether authors need an incentive as the creation does not take much time. Despite that this may be correct, this is generally not important.[43] Hence, short dances, if they are original, should be given protection.

Another predominant theory of copyright law is the 'Natural Right' theory. Natural rights theorists believe that allowing copyright protection is morally correct.[44] It is fair to acknowledge copyright in creations because such creations emerge from the mind of the creator. Dance is viewed as the product of a dancer's mind, of their labour and creativity. Hence, this is viewed as their possession and duplicating it without permission is like robbery. Some natural theorists believe that works should gain protection if the creators' personality is evident.[45] Others tend to focus on Locke's idea on labour[46] (which has turned out to be crucial when assessing whether there is copyright in a work).[47] Although Milly Rock is a simple dance, it still requires some sort of labour. Fortnite reproduced the entirety of Milly Rock, not only a part. Thus, 2Millys creation needs to be acknowledged as it derived from his labour and creativity.

Additionally, the supporters of the 'Reward Theory' believe that allowing copyright protection is fair as it rewards the creator for their labour in the creation of the work that will be in the

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[40] Martin (n 28) 1008.

[41] Bently (n 31) 42.

[42] Bently (n 31) 42; Wendy Jane Gordon, 'An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory' (1989) 41 Stanford L Rev 1343, 1444. For criticisms, see Diane Leenheer Zimmerman 'Copyright as Incentives: Did We Just Imagine That?' (2011) 12 TIL 29, 36-37.

[43] For instance, photographs can gain protection though they are taken instantly.

[44] Bently (n 31) 40.

[45] Ibid, See Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77 Geo L J 287, 289. For criticisms of this theory see Bently (n 42) 40.

[46] Bently (n 31) 40-41. See J Locke *Two Treatises of Civil Government* (Hafner Press, New York, 1947).

[47] Frankel (n 32) 195.

public.[48] That the creator, because they are exceeding the expectations of society, should get some sort of protection. Fortnite uses Milly Rock to gain "social legitimacy and relevance" by connecting their game with a famous dance.[49] As a result, such dances are a major factor in the success of the game.[50] Moreover, the use of these dances makes the public associate the dance with Fortnite, not 2Milly (especially with changing the name of the dance). 2Milly does not get any reward or recognition. Finally, the concept of 'unjust enrichment' further advances the argument that short dances should gain protection. Ultimately, if Fortnite can utilise a dance that it did not create, that invokes the integrity and character of another person to promote its work without their consent; it unjustly takes advantage of someone else's work. For these reasons, 2Milly's dance should be protected. The next part will analyse copyright subsistence and the issues that may arise.

2. **UK Copyright Law Subsistence**

For an authorial work to gain copyright protection, it should be a work[51] that is original and fixed.[52] These requirements raise several issues for short dances. Here, these issues will be addressed. It will be argued that it is necessary to have a more focused approach to short dances under dramatic works.

i. Idea/Expression

A fundamental rule in copyright law is the idea/expression dichotomy.[53] Copyright law does not protect *ideas* but the *expression* of such ideas.[54] Whilst Spence argues that the CDPA does not provide clarification of this concept,[55] TRIPS Article 9(2) makes a clear distinction. Moreover, Lord Hoffman in *Designer* reiterated that it "all depends on what you mean by

[48] Bently (n 31) 40-42.
[49] Hack (n 8) 649.
[50] Ibid.
[51] J Pila, 'Copyright and its Categories of Original Works' (2010) 30 OJLS, 229-254; Jason Haynes, 'Subject matter of Copyright Protection in the UK: A Road MAP TO effectuating Statutory Reform' (2013) 39 Commw L Bull 319, 319.
[52] See S1(1), S3(2), and S3(3) CDPA for subsistence (Fixation). For artistic works, see Creation Records v News Group Newspapers (1997) EMLR 444 and *Metix (UK) Ltd* v G*.H. Maughan (Plastics) Ltd* (1997) FDR 718.
[53] For justifications of the dichotomy, see MD. Rezaul Karim, 'The Idea/Expression Dichotomy and Its Impact on the Blurring Copyright-Patent Paradigm' (2014) SSRN 8-9.
[54] *Donoghue* v *Newspapers* (1938) Ch 106 p.109-110. For more regarding the controversy of the concept, see: Steven Ang, 'The Idea-Expression Dichotomy and Merger Doctrine in the Copyright Laws of the U.S. and the U.K.' (1994) 2 Int'l JL & Info Tech 111.
[55] T Endicott and M Spence, 'Vagueness in the Scope of Copyright' (2005) 121 LQR, 657.

ideas."[56] Ideas are not protected because they are either not linked with the kind of work, or not original, or too "commonplace" to be the main part of the work.[57]

In dances, single basic movements could be an *idea.* However, the arrangement and combination of these basic movements into a dance routine may be an authorial contribution that can get protection.[58] The justification behind the idea-expression concept is that it recognises the limitation of the copyright monopoly.[59] Nevertheless, the way by which bodily motions can pursue dance is not restricted – there are many attainable combinations of dance. Only total monopolies on simple moves or poses would hence prevent the formulation of other dances. Although the courts can think that 2Milly's dance is an idea – due to its simplicity and length, there is a strong argument that the Milly Rock is an expression as it involves more than *one* step. 2Milly's expression is evident in his choices of picking the moves and arranging them. This, nonetheless, remains controversial. The next section will examine whether Milly Rock is a *work.*

ii. Works

The first issue in Milly Rock is whether it is a 'work' under the CDPA. Section 1 demonstrates what is considered a work, including authorial works (e.g., dramatic works) and entrepreneurial works (e.g., films). In contrast to a long dance or ballet which will usually fall under dramatic work, the following part will assess whether individual component steps that make up a full dance are capable of being protected. It will also assess whether Milly Rock, which lasts for a few seconds, can get protection. Although dramatic works do not provide answers to these questions, other authorial works gives hint of an answer. For this reason, there will be an examination and comparison of only authorial works.

a. Dramatic Works

S1 CDPA explains that a dramatic work "includes a dance or mime." Yet, what constitutes as a "dance" is unclear. Despite that S178 CDPA deals with definitions and gives a detailed explanation as to what "writing" or "computer-generated" means, there is no definition for dance. Nonetheless, some common characteristics of dance can be tracked through caselaw. For instance, it could be asserted that for a dance to be protectable, it needs to involve some

[56] *Designer Guild* v *Russell Williams* (2000) 1WLR 2416; [2001] FSR 11 at 67 pp. 2422-3.

[57] Viola Elam, 'Sporting Events as Dramatic Works in the UK Copyright System' (2015) 13 ESLJ [1], [11].

[58] Ibid 12.

[59] *Donoghue* (n 54).

movement. In *Creation Records*,[60] Lloyd J decided that an assemblage of things for the objective of a photoshoot was "inherently static", and contained "no movement, story or action"[61] to be viewed as a dramatic work.

An important case that deals with dramatic works is *Norowzian.*[62] Here, the claimant made a film using 'jump-cutting,' which involves the dancer perform moves that could not be carried on in real life. It was decided that the dance cannot be a dramatic work as it is not a "work of action, with or without music, which is capable of being performed before an audience".[63] The obligation of being performed has been illustrated in a limited manner in *Green v Broadcasting*[64] where Lord Bridge demonstrated that a "dramatic format" of a TV show that includes consistent features (i.e. catchphrases and clapometer) could not be separated from the irregular things demonstrated in a sole performance.[65] Hence, it did not receive copyright. Both cases suggest that a dramatic work should have enough unity to be capable of being performed and the dance should not be uncertain. In 2Milly's case, it is arguably, capable of being performed (as many artists and fans performed the short dance).[66] However, there remain uncertainties relating to the *scope* of the performance – what is the threshold? How short can a performance (or dance) be for it to be a dramatic work? Does this mean that any work which is "capable of being performed"[67] is a dramatic work? These questions remain unanswered.

Nevertheless, the above decisions have been illustrated in *Mazooma*[68] where the courts held that the original work was not a dramatic work due to the lack of repetition between plays. The decision in *Mazooma*[69] illustrates the importance of reproducibility by UK courts. Furthermore, in *Banner*[70] Snowden J stated that as a minimum, there should be "clearly identified features" which together differentiate the shows and that these aspects, together in a clear framework, can be repeatedly applied "as to enable the show to be reproduced in a recognisable form."[71] These authorities indicate that dance may be the subject of dramatic works insofar as they involve movement, capable of being reproduced and have some degree of certainty.

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[60] *Creation Records* (n 52).
[61] Ibid 7.
[62] *Norowzian* (n 18).
[63] Ibid.
[64] (1989) RPC 700.
[65] Ibid.
[66] E.g., Rihanna: MyHoodBk, 'Rihanna Hits the Milly rock on SNL' (Youtube, 23 October 2015) < https://www.youtube.com/watch?v=--UGSVNVgq8> accessed 20th February 2022.
[67] *Norowzian* (n 18).
[68] *Mazooma* (n 19).
[69] Ibid.
[70] *Banner Universal v Endemol Shine* (2017) EWHHC 2600 (Ch).
[71] Ibid 44.

b. Other Authorial Works

The explanation of a 'Dramatic work' is less broad than 'Literary' and 'Musical' work (i.e., works that are "written, spoken or sung" or works that are "intended to be sung, spoken or performed with the music").[72] Arguably, *Exxon* sets out the minimum contribution before a work can be considered a 'Literary' work. The work should provide "Information, instruction, or pleasure" to be a literary work.[73] This seems to be an easy precondition for literary work to meet despite that it may lack aesthetic aspects.[74]

If the courts approach the issues of short dance like short words, short dance will likely not be protected. However, this is wrong. A word and a dance move are qualitatively different. The degree of information that is contained within a particular dance move or selection of movement is not the same as in words. Whilst words may mean one thing or perhaps several things, body language can reveal more information through eye contact, touch, space, etc. Therefore, it is easier to differentiate (and thus make more creative) a short dance than a short word (especially with the restriction of the letters in the alphabet). In contrast, poses or gestures, that are unoriginal (e.g., a normal handshake) should be denied protection as they are in the same territory as *Exxon*[75] (poses/gestures are *one* move and *Exxon*[76] is *one* word).

One can view Milly Rock and claim that it is an unprotectable simple dance. However, a deeper look at the dance reveals its complexity. The Milly Rock involves at least *two* steps which include arm, foot, and overall bodily movement. The combination of these moves suggests that Milly Rock may be protectable. In literary works, a combination of words may be protectable insofar as they are *original* (*Meltwater*,[77] *Infopaq*[78]). It would be odd to allow protection for a combination of words but not a combination of moves. Moreover, if the Milly Rock was to be described in words, it would take a considerable amount of effort to create. Translating the dance into a set of instructions would reveal a huge amount of information when looking at the dance. To argue that copyright law should not protect that amount of information, will not only go against the justifications of copyright law, but would also disregard

[72] S3(1) CDPA.
[73] *Exxon* (n 14).
[74] *University* (n 29) at 608; *Ladbroke (Football) Ltd v William Hill (Football) Ltd* (1964) 1 WLR 273 at 291 and 295; *Sawkins* (n 21) 3281, at 3288 (Mummery LJ) (31). Haynes (n 51) 322.

[75] *Exxon* (n 14).
[76] Ibid.
[77] *Meltwater* v *NLA* (2012) RPC 1.
[78] Case C-5/08 *Infopaq International AS v Danske Dagblades Forening* (2009) ECDR 16.

the fact that there is a clear difference between the information contained in a literary work and information contained in a short dance where the movement is complicated.

'Musical' works[79] are like dramatic works in the sense that there is no definition for the word 'music' per se.[80] Nonetheless, the courts have viewed music to be a mixture of sounds that is for listening.[81] Mummery L.J. commented that music is not equal to a simple noise. It should have an impact on the listener's emotions and intellect.[82] In *Lawson v Dundas*,[83] the courts granted protection to 4-notes. This contradicts the decision in *Exxon*[84] as arguably both works have the same level of creativity (a letter makes up a word and a note indicate a sound). Consequently, this makes 2Milly's case more unclear. If the courts follow *Exxon,*[85] then Milly Rock has a higher chance of not passing the threshold for dramatic works. If the courts follow *Lawson,*[86] Milly Rock may be protectable.

Lastly, S4(1) CDPA states the different 'Artistic' works that may get protected "irrespective of artistic quality".[87] As explained, *Creation*[88] suggests protection may be given to the flowing or moving features of Milly Rock. However, if Milly Rock were to be translated into an artistic work (e.g., screenshots were taken of the dance), Milly Rock will be protectable. Nonetheless, if a creator argues for copyright protection in those specific poses in the screenshots, issues arise. Whilst the screenshot may be a form of *expression*, the pose in the picture will be seen as an underlying *idea*. Unlike a short dance where you can combine different moves, the human body can pose or move only in a limited way.[89] Therefore, whilst poses and single moves are less likely to be protected, short dances have a higher chance.

Overall, it is uncertain whether Milly Rock can get protection under dramatic works. Although Milly Rock is capable of being performed, whether it is *enough* remains ambiguous. The threshold for short dance is not evident within the current framework. Thus, the courts may be reluctant in affording protection to Milly Rock which should not be the case.[90] Other authorial

[79] S3(1) CDPA.
[80] Luke T.McDonagh, 'Rearranging the roles of the performer and the composer in the music industry – the potential significance of Fisher v Brooker' IPQ 2012(1) 64, 67.
[81] *Sawkins* (n 21) 56.
[82] *Sawkins* (n 21) 53.
[83] *Lawson* v *Dundas* (1985).
[84] *Exxon* (n 14).
[85] Ibid.
[86] *Lawson* (n 83).
[87] The minimum contribution in Artistic works is low (*British Northrop* v *Texteam Blackburn* (1974) RPC 57). For fixation requirement see *Creation Records* (n 52).
[88] *Creation* (n 52).
[89] 'Here's a poser: Can You Protect a Pose?' (RickSanderLaw, 9th March 2018) https://www.ricksanderslaw.com/heres-a-poser-can-you-protect-a-pose accessed 20th April 2022.
[90] See justifications above.

works give contradictory decisions which further makes the case of 2Milly unclear. As it is unpredictable whether a short dance may be a 'work', a more focused approach to dance per dramatic work is necessary. Before suggesting a solution, there is another obstacle for 2Milly to overcome – the *originality* requirement.

iii. Originality

For an authorial work to be copyrightable, it must be *original*.[91] Though the CDPA does not define originality, the approaches taken to determine originality come from case law (e.g., *University*[92] was one of the first cases to deal with originality requirement).

The originality requirement has generally been considered as "synonymous" with "originating" from the author.[93] Peterson J expressed that the CDPA does not expect the expression to "be in an original or novel form."[94] It seems from Peterson J's comments that the view of "originality" is wide - it is not essential for a work to be "unprecedented."[95] In fact, it is argued that the originality criteria is a not a high threshold to meet[96] (e.g., in *Walter v Lane,*[97] news reports were "original" works as such work required effort, skill, and time).

Understanding the threshold of originality is not straightforward due to the contrasting decisions. *Cramp v Smythson*[98] (which concerns information that was in the claimant's diary) suggested that, as the material was factual, there is no question of variation in what is written, and no room for judgement. Thus, the material is commonplace gaining no protection. Contrastingly, *Football League v Littlewoods*[99] which involved football fixtures (information on which team played, what time, etc. that was based on a set of rules) was enough to get copyright protection due to "skill, labour, time judgment and ingenuity"[100] in the work. It seems that the level of creativity in *Cramp* was an important factor, but in *Littlewoods*, the court were less concerned about creativity and more about the *effort* that went into the creation.

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[91] S1(1)(a) CDPA.
[92] *University* (n 29).
[93] Bently (n 31) 93-4, Eleonora Rosati, 'Originality in a Work, or a Work of Originality: The Effects of the Infopaq Decision' (2010) 58 J Copyright Soc'y USA 803.

[94] *University* (n 29) 608-609.
[95] H. Laddie, P. Prescott and M. Vitoria, *The Modern Law of Copyright and Designs* (5th ed.) at 3.43.
[96] Haynes (n 51) 325.

[97] (1900) AC 539.
[98] (1944) AC 329 (HL).
[99] (1959) Ch 637.
[100] Ibid 651.

The UK's approach to originality is evident in the House of Lord's judgment in *Ladbroke v William Hill*.[101] Here, there was a united judgment that coupons were protected by copyright and there was an emphasis on the amount of work by the claimants (and the substantial copying by the defendants). The court identified that copyright could exist if there was the expenditure of skill, labour, and effort (or judgement) of the correct type in its creation. However, it should be noted that not everything that involves skill, judgement, and labour has resulted in a copyrightable work.[102] Indeed, problems in originality occur when works are very short. Dances that are long have a greater chance of being original as the creator does not need to show the originality of each dance step, however, originality needs to be evident in their selection of dance moves as a whole.[103] On the other hand, content creators of a few dance moves have a lower chance of originality as they need to demonstrate that they came up with these particular moves. This is also the same as other authorial works – it is far easier to demonstrate that 1,000 pages are original than a word. Therefore, as 2Milly's dance consists of a few moves, it can be difficult to prove that it is original.

The EU's approach to originality stems from *Infopaq.*[104] Here, it was decided that 11 words are enough to be protected as original literary works insofar as its "the author's own intellectual creation".[105] When it comes to dance works, in particular, the Austrian Court in *Racino* suggested that dances show "thoughts and feelings" in "an individual way" that can be a "personal intellectual creation".[106] *Racino* suggests that dance moves cannot be "original" because of "limited scope of creativity," however there should be an examination on the movements as a whole.[107]

The point where the courts pass the threshold of originality within short dances remains unclear. However, it seems that requiring a work to be a creator's 'intellectual creation' may make the length of a dance less relevant when examining originality. The CJEU decision which allowed copyright protection for 11-words seem to approve this.[108] In contrast, the UK courts seem to emphasize labour, skill, and judgment.[109] Whether the Milly Rock has enough skill, labour and judgement or not remains unclear. A final requirement to copyright subsistence is fixation.

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[101] (1964) 1 WLR 273 (*Ladbroke*).
[102] E.g., *Exxon* (n 14).
[103] Martin (n 28) 1010.

[104] *Infopaq* (n 78).
[105] Ibid 37.
[106] Case 4 OB 216/07D in *Re The Joey Racino Show* (Austrian Supreme Court 2008) (Excerpt).
[107] Ibid 19.
[108] *Infopaq* (n 78).
[109] *Ladbroke* (n 101).

iv. Fixation

The work also needs to be fixed – that it should be "recorded, in writing or otherwise".[110] There seem to be no substantial issues concerning fixation as the dance has been recorded in a music video.

Due to the contrasting decisions in both 'work' and 'originality', whether or not short dances are capable of protection remains unclear. The lack of definition of 'dance', the vague requirements within dramatic works, and the inconsistent decisions of other authorial works and originality requirements further support this. Consequently, there is a likelihood that short dances are unable of protection. This alludes that dances which should merit copyright protection (i.e., might have involved a lot of labour for instance) might not be protected because they involved a few steps. This can be unfair, especially when other big companies profit from it. For these reasons, a new solution to short dances is pivotal - further expanded in Part III of the paper.

III. A Solution for Short Dances: Adopting the best out of UK Authorial Works

Considering the reasons for protecting short dances, the current laws on authorial works, and the examination of originality, this part will provide a possible solution to the issues raised in 2Milly's litigation, namely, a clearer test for dramatic works demonstrating a clear consensus on the scope of protection for the short dance.

1. Adding A Multi-Factorial Test

To incentivise creators to come up with new dances and contribute to society, this paper argues a multi-factorial solution is needed to ensure that creative works (short dances) like the Milly Rock get copyright protection.

a. Draft of the Multi-Factorial Test

To maintain certainty, the suggested model makes use of the current principles from dramatic work. However, it adds to the principles to ensure that issues of the length of dance are dealt with appropriately. Thus, the model would blend in with the principles of dramatic works. It should be noted that many factors can be taken into consideration as the courts see fit (e.g., unfair profiting and the popularity of the dance). Nevertheless, some prominent considerations in the test include:

[110] S3(2) CDPA.

1. Dramatic works “include a dance or mime”[111] irrespective of dramatic quantity or quality.
2. There should be a degree of creativity, the capability of being performed, a degree of repetition/reproducibility, or identified moves.[112]
3. There should be an impact on the viewers’ emotions, intellect, enough to provide instructions, information, or pleasure.

Additionally, as there is no statutory definition of ‘dance’, ordinary usage subsists:

- The essence of dance is combining moves for performing.
- Dance is not the same as a mere move.
- The movement of dance is intended to impact the watcher’s emotions and intellect.

The above hints as to what should be considered by the courts when determining whether a short dance qualifies for copyright protection. It is worth noting that the above test does not all need to be fulfilled, however, by examining these factors, the courts should aim to paint a picture that determines whether a dance qualifies for protection.

2. Similarities and Differences of Authorial Works

To come up with the above multi-factorial test, the author included tests drawn from different authorial works. Though there are many different approaches, along with the current rules on dramatic works, the rules drawn from *Exxon* and *Sawkins* - having an “impact”[113] and providing “information, instruction or pleasure”[114] are the most appropriate for the issues of short dance, as dances usually aim to express ideas (information) or emotion.[115] The proposed approach also involves distinctions and improvements. The next part of the paper will explore which tests have been applied and why it was somewhat changed.

A. The Similarities and Differences of the *Dramatic* Approach

First, Number 1 of the test includes the most prominent similarity taken from the statute: that dramatic works “includes a work of dance or mime”.[116] Although it remains unclear whether the current courts look at the duration/complexity of the dance before giving copyright protection, it is suggested that those factors should be disregarded. This is the main difference from the already established law on dramatic works. Number 1 explicitly states that is –

[111] S3(1) CDPA.
[112] *Mazooma* (n 19) and *Norowzian* (n 18).
[113] *Sawkins* (n 21).
[114] *Exxon* (n 14).
[115] Judith R. Mackrell, "dance". (*Encyclopaedia Britannica*, 19 Nov. 2020) <https://www.britannica.com/art/dance> accessed 27 April 2022.
[116] S3(1) CDPA.

'irrespective of dramatic quantity or quality'. What is more relevant than the numerical boundaries or complexity of the dance is the creativity[117] conferred in the dance itself. Dance might be short but worthy of protection due to the creativity conferred in the dance. Likewise, dance might be long but consists of one simple move that lacks creativity.

Second, Number 2 includes inspiration taken from case law on dramatic works. For example, the performance element from *Norowzian*[118] and the element of repetition from *Mazooma*.[119] The reason for this is because the dance should not change every time it is performed but should have a degree of repetition. If a dance lacks repetition, it will be uncertain as to what the protected dance is. Lastly, inspired by *Banner*,[120] Number 2 of the test explains that, as a minimum, there should be "clearly identified"[121] moves. This is important as it will distinguish the dance from other similar dances.

B. The Similarities and Differences of the *Artistic* Approach

Number 1 of the test demonstrates similarities with the law on Artistic works. Particularly, the inspiration of "irrespective of dramatic quantity or quality," which is inspired by the statute that states that Artistic work means "a graphic work … irrespective of artistic quality".[122] The multi-factorial test asserts for dance moves to be treated like artistic works (i.e., having a low requirement) by adding that dances should not be decided solely on their dramatic qualities (e.g., whether they are simple) or dramatic quantities (e.g., whether they are two or three moves). The main difference between artistic works is that the proposed test requests some degree of creativity as demonstrated in Number 2 of the test. This is because not every move should count as dramatic work. There should be some sort of creative effort by the creator even if it is minimal to avoid issues of poses being protected or dances that include one step.

C. The Similarities and Differences of the *Literary* Approach

The main similarity is evident in Number 3 of the test, namely that, a dance should provide some sort of instructions, information, or pleasure.[123] Arguably, this element is important when conferring copyright protection as judges should base their decisions on whether the dance conveys some sort of contribution, especially because the quantity/quality is disregarded. For instance, if the dance demonstrates information, this will usually mean it involved some skill

[117] The creative element is evident in Number 2 of the test.
[118] *Norowzian* (n 18).
[119] *Mazooma* (n 19).
[120] *Banner* (n 70).
[121] Ibid 44.
[122] S4(1)(a) CDPA.
[123] Taken from *Exxon* (n 14).

and labour. As elaborated earlier, the natural theory aims to protect such work, that involves skill and labour, which is often viewed as an *expression*, and not an *idea*.[124]

Nevertheless, the courts should be reminded that there are different standards for creativity in literary and dramatic works. Thus, whilst two words are less likely to gain protection, two moves might, as the works are qualitatively different. An arrangement of letters is simply not the same as choreographing movement (even where that movement is restricted regarding the number of steps involved). One move of a body language can communicate one's posture, facial expressions, and hand gestures which is enough to communicate or understand their body language.[125] This is different from one/two word(s) which does not offer the same amount of information. Thus, even if a dance is simple and contains a few moves, the subtlest of movements can convey a great deal of information and therefore deserves copyright protection.

D. The Similarities and Differences of the *Musical* Approach

Both dramatic and musical works have no statutory definitions. Inspired by *Sawkins* which states that in the absence of a statutory definition, ordinary use helps to define,[126] the same could be the case for dramatic works. [127] If "music is not the same as mere noise",[128] then dance is not the same as a mere move. Arguably, the movement of dance is also like music in the sense that both intend to produce some sort of impact on emotions and intellect. In fact, a study revolved around the Swedish Twin Registry demonstrated that people who have a lot of experience in dancing have an increased ability to communicate their emotions than others.[129] Thus, it is appropriate to include such factor when deciding when to confer protection (as implemented in Number 3). Adding this requirement will deal with the threshold issue evident in short dances. If the courts decide that the dance has an impact of some sort, even if the dance is short in length, it should be protected.

3. Putting the Multi-Factorial Test into Practice

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[124] Bently (31) 40.
[125] Cambridge Dictionary, 'Body Language' <https://dictionary.cambridge.org/dictionary/english/body-language> accessed 12th April 2022.
[126] *Sawkins* (n 21) 53.
[127] See above for the definition of dance (under the proposed test).
[128] *Sawkins* (n 21) 53.
[129] Horwitz and Others, 'Can Dance and Music Make the Transition to a Sustainable Society More Feasible?' (*National Library of Medicine*, 10 January 2022) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8772942/#B34-behavsci-12-00011> accessed 25th March 2022. Also, see Horwitz and Others, 'Engagement in dance is associated with emotional competence in interplay with others' (*National Library of Medicine*, 31 July 2015) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4521297/> accessed 25TH March 2022.

The primary example of how the multi-factorial test would apply is with 2Milly's case. The multi-factorial test is also appropriate for any case that deals with dance or mime. The next part will illustrate how the courts should decide 2Milly's case considering the multi-factorial test.

i. Work

On the application of the multi-factorial test, Number 1 suggests two parts: first, dramatic works are either a dance or mime, second, this is regardless of its quantity or quality. Milly Rock constitutes the first part. It is a 'dance' per the definition as it involves a combination of steps that are for performing.[130] It is not *one* move but involves *several* steps that are repeated. Additionally, Milly Rock has an impact on the viewer's emotions and intellect. This is supported by the fame of the dance that was a result of the public's reaction to the dance – Milly Rock gave them joy.[131] The second part does not cause notable concerns as it disregards the quality or quantity of the dance.

Number 2 of the multifactorial test considers whether the Milly Rock has a degree of creativity, reproducibility or identified moves and whether it is capable of being performed. Although Milly Rock is very short, it meets this demand. The two steps demonstrate a degree of creativity that stems from 2Milly's choices of moves, his position within the dance, the pace of the dance, and how it is generally performed. There are also clear identifying moves (i.e., the swiping motion across the body). If the Milly Rock is unable to gain protection, despite its creativity, and reproducibility, this will highly discourage the creation of new dances.

Number 3 of the test is for further clarification and would usually be immediately satisfied if Number 2 is. As elaborated above, Milly Rock influences the viewer's emotions. Thus, under the multi-factorial test, there is a strong argument that Milly Rock is a dramatic work. This could be contrasted to the widely accepted dance routines that do not have copyright protection such as the Waltz Box Step. When applying these criteria to the box step dance, it would not be given protection as it is a well-established dance routine. As a result, this would fail number 2 of the test which requires creativity.

ii. Originality

Before applying the UK and EU's approaches to originality within 2Milly's case, it is important to note the common characteristics of the approaches. First, both associate 'originality' with the connection between the author and the work.[132] For a work to be original, the creator must

[130] See Youtube (n 7).
[131] Hack (n 8) 648.
[132] Bently (n 31) 93.

have used their required intellectual qualities (in the UK, “labour, skill, or effort”;[133] in the EU, “intellectual creation”).[134] Second, originality depends on the way the work is *expressed* – in the way the creator selected the moves, their combination, their order, and its execution (as copyright law cannot protect ideas).[135] Finally, as Bently argues, when deliberating the previous case law, regardless of which test has been applied, the issue of whether the work is original naturally relies upon the specific “cultural, social, and political context” in which the decision has been made.[136] Thus, what constitutes as being *original* can change over time. For example, when photography was first invented, it was viewed as being unoriginal and non-creative. However, it is now one form of artistic work.[137] The same could be for short dances. Due to video games and social media, short dances received a dramatic shift that impacted our culture and strengthened many trends.[138]

Arguably, under the UK’s approach, 2Milly’s work is original. When creating Milly Rock*,* 2Milly has freely selected and picked from many accessible moves. He chose to move his arm, rotate his hands, and moves his leg a certain way. These choices mirror the preparation and thought that went into selecting those steps and movements. 2Milly’s preference in combining the moves shows his expression in the dance. In *Ladbroke,*[139] it was established that it is not appropriate to cut up the work and consider each part separately to determine originality (and therefore ignore the fact that there might be originality in the combination itself). Likewise, it would not be fair to separate the two-step dance into separate moves which are not sufficient for originality, then conclude the same goes for the whole dance. Therefore, per the UK’s approach, 2Milly’s dance is original. This is different to individual steps e.g., only swiping the arm[140] which demonstrates nothing more than an idea (that should not gain copyright protection).

Moreover, if *Lawson*[141] was original, then Milly Rock should be too. Arguably, dance is more nuanced than the arrangement of notes, and requires more labour. Although Haga’s findings

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[133] *Ladbroke* (n 101)
[134] *Infopaq (*n 78).
[135] *University* (n 29) 608.
[136] Bently (n 31) 94.
[137] Ibid.

[138] Trevor Boffone, 'Digital dance cultures: from online obscurity to mainstream recognition' (*OUPBlog*, 21st March 2022) <https://blog.oup.com/2022/03/digital-dance-cultures-from-online-obscurity-to-mainstream-recognition/> accessed 12th April 2022.
[139] *Ladbroke* (n 101).
[140] See Kara Krakower, ‘Finding the Barre: Fitting the Untried Territory of Choreography Claims into Existing Copyright Law’ IPMEJ (2018 671, 726.
[141] *Lawson* (n 83).

indicate that there may be a consistency in the method people view music and movement,[142] there is a clear difference. Singing or making music requires vocalising or producing sounds whilst dance uses the *whole* body. Therefore, Milly Rock should be considered an original work.

The argument that Milly Rock is original is further supported by the EU's approach to originality. *Infopaq* held that "words … in isolation, are not … an intellectual creation … It is only through the choice, sequence, and combination of those words that the author may express his creativity"[143] which forms intellectual creation. Likewise, moves that are in isolation are not an 'intellectual creation'. However, 2Milly's choices of the moves and combination are. Moreover, the EU approach is far more open textured to copyright subsistence than the UK and allows for a degree of flexibility in the boundaries of what will classify as a copyrighted work. *Levola,*[144] which attempted for copyright protection for the taste of a product, suggests that subject matter should be identifiable, with sufficient precisions and objectivity to gain copyright protection.[145] The EU courts seem to indicate that insofar one can see the expression of the author in the work, it would be *original*. Thus, when examining cases such as the Milly Rock*,* the EU's approach to originality is preferred as it helps shift the focus on whether the work is an original contribution.[146] As illustrated above, Milly Rock meets this. It includes identifiable features (e.g., swiping motion) that fans associate with 2Milly.

It should be noted that the authorship of Milly Rock may be at issue (as 2Milly stated he was inspired by someone else).[147] Nevertheless, this does not question the issue of originality. As argued, a short combination of dance, in principle, should be capable of being a copyright work. Hence, it is irrelevant whether another person has created the dance and 2Milly brought it to prominence.

Overall, considering the multi-factorial test and recent EU caselaw, MillyRock is an original work. The next part draws on the advantages and disadvantages of the multi-factorial test.

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[142] Egil Haga, Correspondences between Music and Body Movement, Faculty of Humanities (University of Oslo, 2008) (A Ph.D. thesis) <https://core.ac.uk/download/pdf/30892018.pdf> accessed 1st April 2022.
[143] *Infopaq* (n 78) 45.
[144] Case C-310/17 *Levola Hengelo BV* v *Smilde Foods BV* (2019) ECDR 2.
[145] Ibid 40.
[146] This is different from the rigid structured approach of UK courts which first asks whether it is a work, then whether it is original.
[147] GlobalGrindTV, '2 Milly Shows How To Do the Milly Rock Dance' (12 May 2015, YOUTUBE), https://www.youtube.com/watch?v=uY3uh_pIQ0g [https://perma.cc/29SN-4WW8 accessed 20th April 2022.

iv.Possible Benefits and Criticisms of the Multi-Factorial Test

This paper aims to produce a suggested solution that involves the advantages of the tests from other authorial works and blends it with dramatic works. As the CDPA does not usually update, a case-law solution is preferred.

The main advantage of this multi-factorial solution is that it is compatible with the existing UK laws. The multi-factorial test is a combination of already-established principles within authorial works and the CDPA (e.g., *Exxon*, *Sawkins*) with some additions to ensure that the court approach the questions of short dance in the right way. Secondly, the multi-factorial test is flexible as it is up to the courts to choose which factor is important depending on each case. Accordingly, the multi-factorial test will work on, most, if not all, cases on dances. Finally, the justifications of copyright law support the argument that short dances may be eligible for copyright protection. If a famous dance gets protection, this will incentivise other creators to come up with similar dances.

Nonetheless, a criticism to the multi-factorial approach is that it is unnecessary. The case law, *Mazooma*,[148] and *Norowizan*[149] are flexible enough for short dances. However, this is not true. Both cases simply indicate what dramatic works include, with *Norowzian* giving a helpful definition. However, Nourse LJ in *Norowzian* does not give a detailed account when it comes to the length of the dances or their scope. Thus, the proposed multi-factorial account is needed to provide a more structured approach for the courts to follow. It identifies clearly what short dances need to have to gain copyright protection (the scope of protection).

Another criticism may be that the multi-factorial Test will create legal uncertainty as it is not a strict test, but a flexible one, especially since it is up to the judge to decide which factors they want to focus on (or judges can even have different opinions on similar short dances). However, this criticism is exaggerated. To ensure certainty, the multi-factorial test includes principles that are well-established under dramatic works. It also requires a “degree of” creativity. Although there is a degree of flexibility in the test, it also has a degree of certainty.

v. Conclusion

This paper has investigated how the 2Milly litigation could be dealt with in the UK by using the existing thresholds and framework. It has identified the contentious issues relating to short

[148] *Mazooma* (n 19).
[149] *Norowzian* (n 18).

dance – whether it is capable of being a *work* that is *original*. By examining these concepts, the paper has illustrated that more clarity is needed, and argued for a multi-factorial test inspired by *Exxon* and *Sawkins*. As 2Milly asserts, one needs to protect what is his (creative work).[150] The creators who invest their time and passion in creating short dances are usually pushed aside, whilst big companies profit from copying their creations. If Copyright law aims to incentivise and reward original works, then such objectives are likely to not be satisfied by the present law for short dances. Therefore, the multi-factorial test is needed to ensure that works like Milly Rock get protection.

[150] 2Milly (n 1).

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