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FROM COPYRIGHT TO PERFORMER'S RIGHTS: *AD LIBITUM* DANCE PERFORMANCES IN INDIA

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ABSTRACT

It is an understatement to claim that dance performances have been exuberantly prevalent within society. In spite of such prevalence, discussions interlinking intellectual property rights (IPR) – specifically copyright law and performers' rights – with these performances have often been meagre and neglected. Ordinarily, dance performances should be accorded protection as both, a 'dramatic work' under copyright law and a 'performance' for the purposes of performers' rights. However, often dance performances – specifically ad libitum performances – are denied IPR protection on the grounds of unreliability and unpredictability. Hence, the main thrust of this research paper is to rectify the inadequate normative status quo by throwing light on the developing fields of IPR and ad libitum dance performances through an analysis of judicial and legislative developments. For this reason, the paper draws inspiration from foreign jurisprudence and their treatment of ad libitum works such as formats for television programs. In doing so, the paper shapes the discussion within the

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contours of Indian IPR laws, while attempting to apply the learnings of foreign jurisprudence to develop an argument favouring IPR protection for ad libitum performances within India.

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I. INTRODUCTION

It would be pointless to begin this paper without noting that ordinarily dance performances fall within the ambit of "dramatic works" and dancers fall within the ambit of "performers" under the Indian Copyright Act, 1957 [*hereinafter* "**Copyright Act**"].[1] For the purposes of this paper, it is important to be mindful of the broad components of dance performances: (i) choreographed dance sequence, (ii) the (human or non-human) performers, and (iii) the choreographer facilitating the performance. In that respect, Indian jurisprudence lacks comprehensive discourse on delineating the scope of "dramatic works" and "performers" under copyright law. Since jurisprudence has predominantly focused on the role of intellectual property rights [*hereinafter* "**IPR**"] in choreographed dance forms, there is a lacuna in understanding the interrelationship between IPR and *ad libitum* dance performances.

For clarity, it is imperative to note that *ad libitum* performances refer to performances that are not choreographed in their entirety or that use improvised dance steps within their choreography. The growing list and variations of *ad libitum* dance forms in today's age necessitate a clearer understanding of their relationship with IPR laws. One such development in the field of *ad libitum* dance includes performances given by animals. Animal dance performances are typically considered to be extempore performances due to the inability and absent cognitive skills of animal

[1] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

performers to deal with sequential information,[2] leading to variations within the choreography. Yet, this premise runs counter to recent scientific studies centred on dance performances rendered by a cockatoo named Snowball.[3] The studies have relevantly concluded that Snowball is capable of not only understanding but also responding to music.[4] While performances by animals[5] – dance or otherwise – are not a novelty in today's society,[6] nevertheless, only in recent times have they become the subject matter for scientific studies.[7]

Accordingly, the increased awareness and evolution within the field of *ad libitum* works, including animal dance performances, raises resultant questions of IPR protection for such works. As the discussion will analyse the broader question of attributing IPR protection to *ad libitum* works, the paper will seek assistance from niche forms of *ad libitum* works, *i.e.*, animal dance performances, to contextualize the discourse.

Pertinently, copyright and performers' rights are two distinct rights provided to individuals/performers under IPR laws. Correspondingly, copyright is awarded to the author of a work, and performers' right to the performer of the performance. Considering the distinct categorization of

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[2] Stockholm University, *"Memory for stimulus sequences distinguishes humans from other animals"*, SCIENCE DAILY (June 20, 2017), www.sciencedaily.com/releases/2017/06/170620200012.html.

[3] Aniruddh D. Patel et al., *Studying Synchronization to a Musical Beat in Nonhuman Animals*, 1169 ANNALS N.Y. ACAD. SCI. 459, 459–60 (2009) ("**Patel**").

[4] *See id.* at 460; Joanne R Jao Keehn et al., *Spontaneity and Diversity of Movement to Music Are Not Uniquely Human*, 29 CURRENT BIOLOGY R621, R621-22 (2019).

[5] For the purpose of this paper, the construction of term "animals" will include birds.

[6] *See* Jeremy Phillips, *A Pet Subject for Copyright?,* THE IPKAT (January 5, 2006) http://ipkitten.blogspot.com/2006/01/pet-subject-for-copyright.html.

[7] See Patel*, supra* note 3.

both the rights, the paper is structured into two parts to understand the theoretical discussions and concerns associated with awarding the aforesaid rights to respective authors and performers of *ad libitum* dance performances.

To that extent, Part III of the paper discusses the scope of protecting *ad libitum* dance performances as 'dramatic works' under the Copyright Act.[8] Accordingly, Part III considers whether the "author" of such *ad libitum* performances, *i.e.*, the creator/choreographer of the performance, can protect their work through copyright law.

Part IV of the paper generally examines the nature of performers that are entitled to performers' rights over their performance. In particular, Part IV discusses if choreographers of *ad libitum* dance performances (such as animal dance performances) can claim performers' rights for the same. The need for a comprehensive discourse on the performers' rights of choreographers in their *ad libitum* performance arises due to the lack of copyright protection awarded to the choreographer for such dance performances (as will be discussed in Part III). Ordinarily, human actors such as dancers are considered "performers" of their performance – whether *ad libitum* or choreographed – for the purposes of performers'

[8] Copyright Act awards copyright protection for several categories of work, namely – literary work, dramatic work, artistic work, musical work, sound recording and cinematographic films. The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. III § 13(1) (India). Considering that "choreographic works" are explicitly considered to be "dramatic work," any analysis regarding animal dance performance must consider whether the same falls within the definitional ambits of "dramatic work" for claiming copyright protection. *Id.* at ch. I § 2(h).

rights.[9] In contrast, courts have zealously refrained from awarding IPR to non-human actors or performers.[10] The seminal judgement on the subject of rights for non-human actors can be traced to the "*Monkey Selfie*" *case* that debated questions of authorial rights over a photograph taken by a monkey.[11] Therein, the court declined to consider the monkey as the author of the photograph on the ground that IP rights (including performers' rights) are only conferred upon human actors.[12] Since the law on IPR protection for non-human actors is settled, Part IV will limit its discussion to human actors, with a specific focus on choreographers. Though, for ease of convenience, this paper will often illustrate its arguments by using the context of animal dance performances, that by their very nature are considered to be *ad libitum* works.

II. HYPOTHESES

Before dwelling further, it is important to note the arguments against IPR protection for *ad libitum* dance performances. Briefly, the case against copyright protection for *ad libitum* performances focuses on the scope of "dramatic works" and the case against performers' rights for such performances focuses on the nature of performer(s).

First, the scope of "dramatic works" is based on – (i) the statutory definition of dramatic work and (ii) the threshold of performability – as will

[9] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. I §§ 2(q) – (qq) (India).
[10] *See* Naruto v. Slater, 888 F.3d 418, 426 (9th Cir. 2018).
[11] *Id.*
[12] *Id.*

be explained in Part III of this paper.[13] Since choreographic (dance) performances are expressly included within the definition of dramatic work within the Copyright Act,[14] the focus of the paper will be on understanding the second factor regarding the test of performability and its impact on *ad libitum* dance performances. *Second*, the scope of a "performer" hinges on the nature and extent of contribution of the individual claiming to be a performer towards the performance. Arguably, choreographers are denied performers' rights in *ad libitum* dance performances because the quantum of contributions by the choreographer is understood to be incidental to the performance.[15]

In response, this paper hypothesizes that the understanding of IPR law, specifically under the Copyright Act, permits the grant of copyright and performers' rights to choreographers for their *ad libitum* dance performances.

III. COPYRIGHT PROTECTION FOR *AD LIBITUM* DANCE PERFORMANCE

The Copyright Act[16] and its provisions thereunder have been modelled to incorporate India's obligations under international treaties,

[13] *See* Green v. Broad. Corp. New Zealand (1989) 3 NZLR 18 (NZCA) at 19*;* Ukulele Orchestra Great Britain v. Clausen [2015] EWHC (IPEC) 1772 [94–106] (UK).
[14] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. 1 § 2(h) (India).
[15] *See* Heythrop Zoological Garden Ltd. v. Captive Animals Prot. Soc'y, (2016) EWHC (Ch) 1370 ("***Heythrop Zoological***"); *infra* Part IV of this paper.
[16] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

specifically the Berne Convention.[17] The said treaties, however, fail to define or elaborate upon the scope of dramatic work, though they do include the same under the category of "protected works."[18] For this reason, Section 2(h) of the Copyright Act defines dramatic works in an illustrative and inclusive manner for the purpose of copyright law.[19] Though, of all categories of works that are entitled to copyright protection, "dramatic works" have varying definitions under several national legislations and international conventions. This inevitably results in conflicting interpretations regarding the elements that constitute a dramatic work.

To analyse copyright protection for *ad libitum* dance performance as dramatic work, this Part is further divided as follows: Section A introduces the prerequisite criteria needed for claiming copyright protection in India; Section B explores the scope of protecting *ad libitum* dramatic work under foreign and Indian jurisprudences; and Section C applies the conclusions of Section B while discussing IP protection for *ad libitum* dance performances as dramatic work in India.

A. REQUIREMENTS FOR COPYRIGHT PROTECTION IN INDIA

Section 13 of the Copyright Act protects original and fixed work of authorship.[20] This presupposes three crucial conditions that need to be fulfilled for claiming copyright protection. Namely, the work claiming

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[17] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 222 ("**Berne Convention**").
[18] *Id.* at art. 2 ¶ 1.
[19] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. 1 § 2(h) (India).
[20] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. III § 13 (India).

copyright protection must fall within the ambit of – (i) standard of originality, (ii) threshold of fixation, and (iii) statutory scope of 'work' as defined under the Copyright Act.

First, the standard of originality in India has long been established in *Eastern Book Company v. DB Modak*.[21] As per the case, for a work to be considered original it must originate from the author. Hence, the test of originality is construed liberally and requires the work to encompass the skill and judgment of the author while containing minimal levels of creativity.[22] Considering the lenient threshold of originality within India, it can be argued that an *ad libitum* dance routine will invariably contain the requisite amount of skill and intellectual creativity of the choreographer needed to satisfy the test of originality.

Second, the standard of fixation requires the work claiming copyright protection to be fixed in a tangible medium such as in writing or otherwise.[23] Globally, the requirement of fixation is applied uniformly across all categories of work.[24] The necessity for such application arises due to the idea-expression dichotomy that precludes copyright protection for ideas, themes, or abstract concepts.[25] The standard for fixation ensures that the work does not remain a mere idea but is manifested through tangible

[21] Eastern Book Company v. DB Modak (2008) 1 SCC 1.
[22] *Id.*
[23] *Id.*
[24] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) ("**TRIPS Agreement**").
[25] *Id.* § 1 art. 9(2).

expression. Significantly, Section 2(h) of the Copyright Act (applicable to the present instance of dance performances) explicitly imposes the requirement of fixation for dramatic works.[26] Though, the Copyright Act precludes dramatic works from being fixed in a cinematograph film.[27]

Third, any work seeking to benefit from copyright protection must fall within the definitional ambit of "works" protected under law.[28] This is attributable to the statutory nature of copyright law that guarantees copyright protection solely within the statutory contours of the Copyright Act.[29] Section 13(1) of the Copyright Act *only* protects original works in the form of – literary work, dramatic work, artistic work, or musical work.[30] Accordingly, it is necessary to determine whether *ad libitum* dance performances fall within the category of work (and subsequently within the category of "dramatic works" as predetermined by Copyright Act).

Throughout this paper, theoretical discussions presuppose the satisfaction of the test of originality and fixation. This is primarily because the foregoing factors have settled positions of law with low thresholds that may be met by most works. Accordingly, deliberations will focus on analysing whether *ad libitum* dance performances – owing to their

[26] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. 1 § 2(h) (India).
[27] *Id.* ch. I § 2(h).
[28] *Id.* ch. I § 2(y).
[29] The Chancellor, Masters & Scholars of the University v. Rameshwari Photocopy Services, 233 (2016) DLT 279, ¶ 9.
[30] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. III § 13(1) (India).

extempore nature – can fall within the scope of "dramatic works" under law.

B. UNDERSTANDING THE SCOPE OF DRAMATIC WORKS

International law and treaties have been wanting and ambiguous in determining the definitional scope for dramatic works.[31] For this reason, the scope has remained dependent upon national treatment of the same. To that end, this Section analyses the treatment of *ad libitum* works as dramatic works under foreign and Indian jurisprudence. Overall, the national treatment of dramatic work can be divided into two blocks: the approach taken by the USA, and the approach taken by common law countries.

1) Position in the USA

Copyright law in the USA protects dance performances in the nature of "dramatic works."[32] Per the definition of the category, the subject matter of dance is currently protected under § 102(a)(4) of Title 17 of the U.S. Code, which covers "pantomimes and choreographic works," though it previously qualified as a "dramatic work" prior to 1978.[33] However, such protection is inferred to be qualified and limited by two conditions.

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[31] The two major treaties regarding copyright law are the Berne Convention and the TRIPS Agreement. While the Berne Convention mentions "dramatic works" without defining the term, the TRIPS Agreement does not even venture to mention the term. Berne Convention, *supra* note 17 art 2 ¶ 1. *See generally* TRIPS Agreement *supra*, note 24.

[32] 17 U.S.C. § 102(a)(3).

[33] *Id.* § 102(a)(h); U.S. COPYRIGHT OFFICE, Copyright Registration of Choreography and Pantomime, CIRCULAR NO. 52, 1–2 (2017).

The *first* limitation subjects the choreographic works to the "complexity test" as formulated in the case of the "*Carlton dance*".[34] The specific dance – conceptualized and popularized by actor Alfonso Ribeiro – had previously been denied copyright protection on the ground that it was "too simple" to be awarded copyright.[35] Surprisingly though, the complexity test also finds certain favour in the definitional understanding of choreographic works supported by the US Copyright Office, the House of Representatives and the judiciary. As noted in *Horgan v. Macmillian,*[36] still photographs of a ballet performance can constitute copyright infringement. In deciding so, the Court acknowledged the distinctive nature of dance choreographies and noted that a single photograph has the ability to "*capture a gesture, the composition of dancers' bodies or the placement of dancers on the stage*."[37] While reaching its conclusion, the Court cited multiple US authorities that equate choreographies with 'dance movements and patterns' entailing bodily movement in rhythmic and spatial relations.[38] Accordingly, choreographic works should consist of a 'flow of movements' that *may* convey a story but must necessarily not be commonplace, social, simple or routine movements.[39] Needless to mention, this limitation effectively entails

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[34] Mathilde Pavis, *Dance Dance Dance: Another Episode in the Fortnite Saga,* THE IPKAT (February 27, 2019) http://ipkitten.blogspot.com/2019/02/dance-dance-dance-another-episode-in.html.
[35] *Id.*; Elizabeth A Harris, *Carlton Dance Not Eligible for Copyright, Government Says,* N.Y. TIMES (Feb. 15, 2019) https://www.nytimes.com/2019/02/15/arts/dance/carlton-dance.html.
[36] *See* Horgan v. Macmillan, Inc., 789 F.2d 157, 163 (2d Cir. 1986).
[37] *Id.* at 163.
[38] *Id.* at 161-162.
[39] U.S. COPYRIGHT OFFICE, *supra* note 39 at 3; ANTHEA KRAUT, CHOREOGRAPHING COPYRIGHT, 209 fn. 183 (OUP, 2016).

a stricter qualitative assessment – arguably echoing the US IP clause that obligates the government to develop and strictly facilitate IPR within its territory for the promotion of science and useful arts.[40]

The *second* limitation can be traced to the US Copyright Office itself which has been proactive in eliminating certain dance performances from copyright protection, namely, dance routines that are performed by non-human actors.[41] Therefore, protectable dance choreographies must necessarily be authored and performed by humans.

Preliminarily, by its very nature *ad libitum* performances are improvised and/or contain unscheduled variations. Hence, *ad libitum* dance performances may not satisfy the complexity test laid down under the US jurisprudence. However, considering the need for human performers, choreographers of certain *ad libitum* routines involving non-human actors such as animal dance performances, will necessarily be denied copyright protection for their work.

2) <u>Position in common law countries</u>

This sub-Section focuses on the approach undertaken by common law countries of the UK, New Zealand, and Canada. Even though each jurisdiction employs differing statutory language for copyright law, they

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[40] *See* U.S. CONST. art I, § 8, cl. 8.

[41] U.S. COPYRIGHT OFFICE, *supra* note 39 at 4; Alissia Clarke, *Everybody Dance Now! Actually Don't . . . That Choreography May Be Copyrighted*, TRADEMARK & COPYRIGHT BLOG (September 10, 2018) https://www.trademarkandcopyrightlawblog.com/2018/09/everybody-dance-now-actually-dont-that-choreography-may-be-copyrighted/.

have relied heavily on the others' decisions to articulate a "common approach" towards defining the scope of "dramatic works."

The first substantial decision on dramatic works that shaped the common approach was given in the case of *Green v. Broadcasting Corporation of New Zealand* [*hereinafter* "***Green***"].[42] As per this decision, dramatic works were defined to encompass – (i) sufficient unity and (ii) sufficient certainty – such that they were capable of being performed.[43] For our ease of reference, this definitional interpretation is to be understood as the "test of performability." Accordingly, television formats have been denied copyright protection as dramatic work since they failed to satisfy the test of performability on account of *ad libitum* elements within their format, such as varying dialogues.[44] The test has been further entrenched by the UK courts through *Norowzian v. Arks* [*hereinafter* "***Norowzian***"].[45] As per the courts, dramatic works require a certain performative nature.[46] Therefore, they were defined as "*work[s] of action, with or without words or music, which [are] capable of being performed before an audience*."[47] The *Norowzian* standard has been debated (though ultimately supported) by the UK courts in *Nova Productions v. Mazooma Games*.[48] Therein, the courts followed *Green* and elaborated upon the elements necessary for a dramatic work to be capable of performance

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[42] *Green* (1989) 3 NZLR 18.
[43] *Id.* ¶ 6.
[44] *Id.* ¶ 3.
[45] Norowzian v. Arks Ltd. (No.2) [2000] ECDR 205.
[46] *Id.* at 208.
[47] *Id.* at 209.
[48] Nova Productions Ltd. v. Mazooma Games Ltd. [2006] EWHC 24 ¶ 114.

– chiefly, (i) the element of certainty that requires the work to follow its predetermined plan, and (ii) the element of unity that requires the components constituting the work to be unitary in nature.[49] This strict interpretation of the test of performability has been predominantly followed by the courts to deny *ad libitum* works of all kinds, such as screen displays of video games and television show formats, copyright protection as dramatic works.[50]

It is relevant to note that the initial rationale behind the test of performability was to balance the economic rights of authors with the meritorious rights of other persons by tailoring monopolies.[51] Considering that *ad libitum* works enable variations within a work, the test of performability prevents authors from exercising *excessive* monopolistic rights over the subject matter of their work (and variations thereof) while promoting access and innovation for other persons.

Nonetheless, such strict interpretation of dramatic work disregards the basic skill, judgement, and intellectual creativity invested in creating *ad libitum* or improvised performances. This lacuna was initially discussed in the dissenting judgment of Judge Gallen in *Green.*[52] If one were to place reliance on the test of performability in the context of experimental works of plays that consisted of detailed plotline and characters, but impromptu dialogues, the test of performability would not only decline protection for

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[49] *Id.* ¶ 112–13.
[50] *Id.*
[51] Green v. Broad. Corp. New Zealand, C.A. 40/84, C.A. 95/87, *aff'd* [1989] 3 NZLR 18.
[52] *Green* (1989) 3 NZLR 18 (Gallen, J. dissenting).

such plays but also neglect the substantial intellectual labour, effort, and skill put in the play by the author.[53] The balance sought to be achieved between authorial rights and rights of innovation of other persons would be greatly skewered in favour of the latter. Therefore, Judge Gallen developed the 'test of structural certainty' that granted protection to experimental or improvisational plays as "dramatic work", if the combination of materials seeking protection, *i.e.*, the plotline and character sketch, formed a detailed and recognizable structure despite the *ad libitum* elements, *i.e.*, variations in the dialogues.[54]

It is germane to note that the test of structural certainty has been informally applied by the Exchequer Court of Canada in *Kantel v. Grant*.[55] This case concerned a claim for copyright protection as dramatic work for a radio format that dedicated a section of its programme towards a quotidian and varying reading of children's mail for the purposes of advertising.[56] The courts granted this claim on the ground that the show format involved a "fixed sequence" overarching framework that remained unaffected by the said variations on the show,[57] a clear departure from the test of performability. Recently though, the test of structural certainty has found formal reaffirmation in the case of *Banner v. Endemol* [*hereinafter*

[53] *Id.*
[54] *Id.* ¶ 18.
[55] Kantel v. Grant [1933] Ex. CR 84.
[56] *Id.* ¶ 2–3.
[57] *Id.* ¶ 11.

"***Banner***"].[58] In *Banner*, though the Court ultimately rejected the claim for copyright protection of a television format as a dramatic work, they read down the threshold for the test of performability.[59] Per the Court, the definition of dramatic work did not presuppose an exact replication of the said work but instead required the work to have a detailed and specific 'structure' that is capable of repetition.[60]

The judgement in *Banner* represents a different approach that the courts have started looking towards for protecting fixed, original extempore works that contain substantial intellectual labour and skill. This alternate standard for determining dramatic work has also been reflected in the civil law system through the decision of the Italian Supreme Court in *RTI Reti Television v. Ruvido*.[61] As concluded in the case, dramatic works are required to have logical thematic connections between elements that resulted in a 'structure' capable of repetition - akin to the test of structural certainty.[62]

Therefore, though the test of performability rejects copyright protection for *ad libitum* dance routines, protection for the same can be argued on basis of the test of structural certainty.

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[58] Banner Universal Motion Pictures Ltd. v. Endemol Shine Group Ltd. [2017] EWHC 2600 ¶ 35–39, 46.
[59] *Id.* ¶ 27–32.
[60] *Id.* ¶ 44.
[61] Cass., 27 luglio 2017, n. 18633/17, RTI Reti Televisive Italiane Spa v Ruvido Produzioni Srl, (It.).
[62] Eleonora Rosati, *Italian Supreme Court Confirms Eligibility of TV Formats for Copyright Protection*, 12 J. INTELL. PROP. L. & PRAC. 968, 969 (2017).

3) Position in India

The Indian jurisprudence has had sparse explanations and case laws delineating the contours of dramatic works under the Copyright Act.[63] In turn, the said Act has given an illustrative statutory definition of dramatic works that includes, but is not limited to, choreographic or similar works that are either "fixed in writing or otherwise."[64] The seminal case to discuss dramatic work under the Act is *Academy of General Education v. B. Malini Mallya* [*hereinafter* "***General Education***"].[65] *General Education* established that copyright in the performance of dance would come within the purview of dramatic work.[66] Though the judgement primarily focused upon distinguishing the definition of literary works from that of dramatic works, the complete absence of limitations imposed by the Court in encompassing dance performance within the scope of "dramatic work" suggests an unqualified and absolute inclusion.[67]

It is prudent to also discuss a subsequent decision of the Delhi High Court in *Institute for Inner Studies v. Charlotte Anderson* [*hereinafter* "***Charlotte Anderson***"].[68] Therein, copyright protection was claimed for yoga asanas

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[63] Divij Joshi, *IP Protection for the Manganiyar's Seduction? Throwing Some Light on Copyright in Stage Directions,* SPICYIP (September 18, 2017) https://spicyip.com/2017/09/ip-protection-for-stage-directions-throwing-some-light-on-the-stage-of-the-manganiyar-seduction.html; Shreya Aren, *The Drama in the Definition of 'Dramatic Works',* SPICYIP (August 26, 2010) https://spicyip.com/2010/08/guest-post-drama-in-definition-of.html.
[64] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. 1 § 2(h) (India).
[65] Acad. of Gen. Educ. v. B. Malini Mallya, AIR 2009 SC 1982.
[66] *Id.* ¶ 14.
[67] *Id.*
[68] Inst. for Inner Studies v. Charlotte Anderson, MIPR 2014 (1) 129.

as dramatic work.[69] While adjudging this claim, the High Court imported the traditional test of performability conceived in *Green* and *Norowzian*.[70] Even though, the High Court agreed that the definition of dramatic works under the Copyright Act was inclusive and "*therefore may include works of the nature prescribed under provisions of the [Copyright] Act*", the common law test of performability was applied to limit this scope.[71] To that point, copyright protection for a dramatic work was made contingent upon: (i) complete certainty of the work to be performed in the manner as conceived initially by the author, and (ii) sufficient unity between the elements comprising the work.[72] Upon applying the test, copyright protections for yoga asanas were denied since they contained *ad libitum* elements and were unable to satisfy the requirements of certainty and unity.[73]

C. *AD LIBITUM* DANCE PERFORMANCES AS DRAMATIC WORKS WITHIN INDIA

Considering that Copyright Act is an antediluvian tool of the colonial ages, it lacked necessary contemporary foresight at the time of its conception. To that effect, the Indian courts have often relied upon the approaches taken by the foreign courts. Section B of the paper has highlighted the two different approaches that foreign jurisprudences have taken while defining the scope of dramatic work. The Section further juxtapositions the said approaches with that of Indian courts. Accordingly,

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[69] *Id.* ¶ 61.
[70] *Id.* ¶ 113-114. *See* discussion *supra* Part III.B.2
[71] *Id.* ¶ 110-114.
[72] *Id.* ¶ 113; *See* KEVIN M. GARNETT ET AL., COPINGER AND SKONE JAMES ON COPYRIGHT (14th ed., 1999).
[73] Inst. for Inner Studies v. Charlotte Anderson, MIPR 2014 (1) 129 ¶ 119.

the objective behind Section C is to explore the feasibility of granting protection for *ad libitum* dance performances as dramatic work under Indian law. Since the foreign approaches can be divided into two blocks, this Section will sequentially consider the applicability of each approach within India.

First, the approach taken by the USA courts is considerably inapplicable due to the differing legal context underlying USA and Indian jurisprudence. Primarily, the restrictive definition by the USA courts necessitates qualitative assessment which is arguably in furtherance of its IP clause.[74] This rationale is further supported by their understanding of dramatic works that require such works to "*convey a story, theme or narrative through a series of dramatic situations*" – thereby imposing a certain artistic or qualitative standard upon the work.[75] In contrast, India lacks similar constitutional provisions that necessitate a meritorious assessment of works. To that end, copyright assessments by courts under Copyright Act have traditionally remained quality agnostic.[76] Not to mention, limiting protectable dance choreographies to human performers seems to have no logical rationale and is myopic of changing developments. Therefore, applying the standard laid down by US courts within the Indian legal sphere will lead to disjunctive results.

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[74] *See* discussion *supra* Part III.B.1 of this paper.

[75] Aristocrat Leisure Indus. v. Pac. Gaming, [2000] FCA 1273, ¶ 62; Seltzer v. Sunbrock, [1938] 22 F. Supp. 621, 629; PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT 106 (3rd ed., 2008).

[76] *See* The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. 1 § 2(c) (India); University of London Press Ltd. V. University Tutorial Press [1916] 2 Ch 601.

Second, the approach taken by the courts of other common law countries has been followed by the Indian courts to a certain extent – as evidenced by the judgment in *Charlotte Anderson*.[77] The test of performability as conceptualized and applied in India requires certainty of performance in accordance with predetermined choreography.[78] For this reason, *ad libitum* works such as *ad libitum* dance performances, yoga asanas or animal dance performances, are/can be denied copyright protection as a dramatic work.[79]

There remains a judicial trend among Indian courts to rely on foreign jurisprudence for interpreting copyright issues. This can result in blind inclusion of principles without due adherence to the Indian statutes. The test of performability applied in *Charlotte Anderson* is suggested to amount to additional judicial restrictions on the definition of dramatic work in absence of supporting statutory language.[80] The statutory wordings of the Copyright Act for the definitional clause of dramatic works impose a sole requirement of fixation.[81] Moreover, the clause gives an illustrative definition that expressly includes *fixed* 'choreographic works and works of similar nature within the definition of dramatic works' – without any reservations.[82] This is unlike the definitional clauses in other common law countries that define dramatic work in a broad, unrestrictive manner. For illustration, the UK Copyright Act, 1988 defines dramatic works

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[77] *See* Inst. for Inner Studies v. Charlotte Anderson, MIPR 2014 (1) 129.
[78] *See* discussion *supra* Part III.B.3 of this paper.
[79] *Id.*
[80] *See* Inst. for Inner Studies v. Charlotte Anderson, MIPR 2014 (1) 129.
[81] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. 1 § 2(h) (India).
[82] *Id.*

expansively, including works of dance or mime, without imposing any qualifiers for the same.[83]

The excessively broad and flexible nature of statutory language (as in other common law countries) may demand judicial intervention for delineating the scope of dramatic works – contrary to the Indian statute that specifically and explicitly mentions the necessary scope and qualifiers for dramatic works in the statutory clause itself,[84] absolving any need to limit it further through case laws. For this reason, the intervention in *Charlotte Anderson* and consequent application of the common law standard is debatably skewered and not in consonance with the express statutory intention behind Copyright Act. If *ad libitum* dance performances are to be governed by the statutory language and legislative intent, then they should be considered dramatic works so long as they satisfy the requirement of fixation.

Just the same, irrespective of the merits or follies of adopting foreign principles and legislating through judicial intervention, the Indian courts have been inclined towards applying the test of performability over the test of structural certainty. Such inclinations too are misguided, especially in the light of the test of performability being eclipsed by the test of structural certainty through *Banner*.[85] Not only is the test of structural certainty the most recent interpretational standard, but it is also more

[83] Copyright, Patents and Designs Act 1988, c. 48 § 3(1) (UK).
[84] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. 1 § 2(h) (India).
[85] Banner Universal Motion Pictures Ltd. v. Endemol Shine Group Ltd. [2017] EWHC 2600.

aligned with the fundamentals of copyright principles. Through the test of structural certainty, *fixed ad libitum* works are protected as dramatic works if they have a sufficiently detailed structure such as a comprehensive sequence or format of performance, and varying elements that do not affect the consistent framework.[86] For a practical understanding of this test, the components of animal dance performances (that are de facto *ad libitum* in nature) must be assessed against the aforesaid test. Such performances generally comprise components such as – dance movements, sequence of actions, lightning, costumes, and attached audio and visual graphics – among others. As long as the structure formed through the cohesion of these elements remains certain and capable of repetition, the varying nature of dance movements should not preclude copyright protection.

The underlying reasoning behind protecting these *ad libitum* works is that their structure would remain specific and original to its individual author, such that individual variations within it will be immaterial.[87] Notably, the test of structural certainty does not assess all variations against the same yardstick. Instead, it distinguishes between immaterial variations that may not be sufficiently original to attract copyright protection by itself and substantial variations that *may* lead to independent copyright protection in the form of derivative works.[88] Through such distinction, the test of structural certainty, unlike the test of performability, strikes an accurate

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[86] *Id.*; *see also* discussion *supra* Part III.B.2 of this paper.
[87] Interlego AG v. Tyco Industries, [1988] UKPC 3 (UKPC) (appeal taken from H.K.).
[88] Derivative works are derived from the underlying work such that substantial variations to the underlying work can result in an original derivative work that can be protected under copyright law without it infringing upon the copyright of the underlying work.

balance between the monopolistic rights of the creator with the right of the public to innovate. In essence, the test denies excessive monopolistic rights over a subject matter by protecting minor variations of a work within the work itself while also allowing protection for substantial variations in the form of derivative works. It concurrently rewards creators' skills and efforts in creating *ad libitum* works – compatible with the objective of copyright law. Applying the test of structural certainty thus seems to be more harmonious with the purpose of copyright law.

On that account, the approach of the Indian courts per *Charlotte Anderson* is dated for two primary reasons: (i) it incorrectly intervenes to modify the statutory language of dramatic work, and (ii) it ignores the test of structural certainty in favour of the test of performability. In absence of *Charlotte Anderson*, the opinion of the court in *General Education* and the statutory language of the Copyright Act becomes relevant. Implementing it, along with the test of structural certainty ensures that, *fixed* and *original ad libitum* works, such as animal dance performances, having sufficiently detailed structure and certain non-material varying movements *can* and should be awarded copyright protection in India.

It is prudent to note that copyright protection for such performances faces practical hindrances due to the standard of fixation. Since the Copyright Act expressly precludes fixation of dramatic works in cinematograph films,[89] authors of dramatic works have limited methods of satisfying the said standard. Practically, it may not be feasible to fix *ad libitum*

[89] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. I § 2(h) (India).

works in devices other than a cinematograph film/video recording since these works do not necessarily follow a predetermined path. Hence, such hindrances highlight the importance for choreographers of *ad libitum* dance performances to receive copyright protection through alternate channels. For the same, the paper dwells on the scope of the performer's rights under Part IV.

IV. PERFORMERS' RIGHTS FOR CHOREOGRAPHERS OF *AD LIBITUM* DANCE PERFORMANCE

Though performers'/performing rights and copyright law can be claimed by an individual over the same work, the administration of the former remains independent and distinct from the latter. Even though the rights *may* overlap, they will not conflict on account of the differing context under which they are claimed: copyright is claimed by the "author" of a work and performers' rights by the "performer" of a work.[90] Within the Indian context, performers' rights were initially introduced through the Copyright (Amendment) Act, 1994 in order to protect the efforts and livelihood of performers in the age of advancing technological developments,[91] and thereafter substantiated vide the Copyright (Amendment) Act, 2012.[92]

As a result, the definitional ambit of "performers" and "performances" have been defined in Copyright Act. Section 2(q) of the

[90] *Id.* ch. VIII § 38–38A; Sushila v. Hungama, CS No. 426/18 ¶ 9.4 (2018) (India).
[91] The Copyright (Amendment) Act, 1994, No. 38, Acts of Parliament, 1994 (India).
[92] The Copyright (Amendment) Act, 2012, No. 27, Acts of Parliament, 2012 (India).

Act defines "performance" broadly to include "any visual or acoustic presentation made by one or more performers".[93] This expansive understanding includes innumerable forms of performances without any limitations – and through inference, *ad libitum* dance performances – within its definition.[94] For this reason, the paper will not be concerned with understanding the definitional clause of "performance." Instead, the crux will be to ascertain the definitional scope of a "performer" to determine if choreographers can claim to be performers of *ad libitum* dance performances.

The need for performers' rights of choreographers arises due to the unpredictable copyright protection accorded to *ad libitum* performances. Generally, the subject matter of both the aforesaid rights differs such that the authored dramatic work forms the basis of copyright law while the individual performances of the performer(s) within the dramatic work form the basis for performers' rights. Interestingly though, due to the role of a choreographer as the author and executor of a dance performance, the subject matters of copyright and performers' rights for the choreographer will inevitably relate to the same dance routine choreographed/authored by them. Further, it is pertinent to note that, as per the Copyright Act, the rights provided under copyright law, and the performers' rights are substantially similar such that both, the copyright holder and performer, have recourses against unauthorized usage of their respective work or

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[93] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch.1 § 2(q) (India).
[94] *See* DAVID BAINBRIDGE, INTELLECTUAL PROPERTY, (10th ed., 2018); *Heythrop Zoological*, *supra* note 15.

performance.[95] Few illustrations of the overlapping rights include the exclusive rights to: (i) reproduce the performance/work; (ii) communicate the performance/work to the public; (iii) issue copies of the work/performance to the public; or (iv) make sound or visual recordings of the work/performance, among others.[96] Considering that *ad libitum* dance performances are presently unprotected as dramatic work in several copyright jurisprudences (including India),[97] performers' rights can provide an alternate solution for choreographers to protect their investment in such performances. However, any arguments for the inclusion of choreographers as performers in India rest on the definitional interpretation of "performer" under the Copyright Act.

Though the Copyright Act fails to unambiguously define a "performer", it provides an illustrative and inclusive list of individuals that are considered performers for the purpose of the Copyright Act including dancers, musicians or individuals making a performance.[98] Further, a brief analysis of foreign jurisprudence elucidates a "performer" to mean "any person giving a performance."[99] Hence, the determinative point is to understand what constitutes "*giving/making*" of performance for a choreographer.

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[95] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. III § 14, ch. VIII 38–38A (India).
[96] *Id.*
[97] *See* discussion *supra* Part III. B & III.C of this paper.
[98] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. I § 2(qq) (India).
[99] Shweta S. Deshpande, *Copyright Protection of Performers Rights*, 28 DESIDOC J. LIBRR. & INFOR. TECH. 66, 66 (2008); *Copyright Act 1968* pt IX div 1 s 189 (Austl.); Copyright, Designs and Patents Act 1988, c. 48 pt II § 180 (UK).

Largely, in an *ad libitum* dance performance, the choreographer can contribute their efforts in two ways – (i) the choreographer can perform with the performers before an audience, or (ii) the choreographer can guide the performers through the performance while off stage.

Accordingly, Section A of this Part addresses the circumstance of joint performance and Section B addresses the off-stage presence of the choreographer to determine whether the nature of contributions in both situations is sufficient for awarding performers' rights to the choreographer.

A. NATURE OF CONTRIBUTION BY CHOREOGRAPHERS IN JOINT PERFORMANCE

The instance of joint on-stage performance involves the choreographer engaging in the performance before an audience, alongside the other performers. The recent evolution of performers' rights within the IPR field has resulted in a paucity of legal literature on the same. On that account, the seminal case dealing with performers' rights and contributions of a choreographer during a joint performance is that of *Heythrop Zoological v. CAPS* [*hereinafter* "***Heythrop Zoological***"] which deals with the contribution of animal trainers in a joint performance with animal performers.[100] Per *Heythrop Zoological,* for animal acts executed alongside animal trainers, the trainer can be granted performers' rights in the animal act if their quantum of contribution satisfies a two-fold test – (i) their

[100] *Heythrop Zoological*, *supra* note 15 ¶ 38.

intervention was essential for the performance, and (ii) their intervention made the performance worth watching.[101]

Heythrop Zoological further provides examples of indicative acts that satisfy the two-fold test, such as (i) performances given by animal trainers while introducing animal performers to the audience, and (ii) performances in which the animal trainer instructs the animal throughout the act while on the stage.[102] In addition, the two-fold test for joint performance is arguably supported by the Indian jurisprudence due to the inclusion of "snake charmers" as performers under the Copyright Act.[103] The underlying rationale for the inclusion can be ascribed to snake charmers being an *essential* element for guiding the snake(s) and executing the performance before an audience.

Since animal dance performances fall within the ambit of *ad libitum* works due to the unpredictability and volatility of animal performers, the aforesaid two-fold test can thus be extrapolated to other *ad libitum* dance performances where contributions made by the choreographer fulfil the conditions laid down in *Heythrop Zoological*, to award such choreographers performers' rights in the said *ad libitum* performances.

B. NATURE OF CONTRIBUTION BY CHOREOGRAPHERS FOR OFF-STAGE PERFORMANCE

[101] *Id.* ¶ 38 – 40.
[102] *Id.* ¶ 37–38.
[103] The Copyright Act, 1957, No. 14, Acts of Parliament, 1957, ch. I § 2(gg) (India).

Generally, choreographers can be considered a performer if they perform alongside the performers or are essential for guiding the performers while on the stage – as noted in Section A herein.[104] The pertinent question that then arises is whether choreographers can be deemed to be a performer if they guide their performers while remaining off stage. Hence, the key point is to understand the significance of stage presence in awarding performers' rights.

In the context of animal dance performances, *Heythrop Zoological* agreed with the opinion of Richard Arnold, suggesting that a "*performance by animals should nevertheless be regarded as a performance given by the individual, namely the trainer, notwithstanding that the animals are not individuals. Though this is to stretch the concept of an interpretative performance nearly to breaking point, it is justifiable on grounds of policy.*"[105]

Following this logic, contributions of the choreographers towards the execution and completion of an *ad libitum* performance should not be denied merely on the grounds that such contributions occurred off-stage for the simple reason that such contributions – whether on stage or off stage – are reflected in the executed performance.

The lack of importance attached to on-stage contributions to establish performers' rights is further highlighted through the French

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[104] *See* discussion *supra* Part IV.A of this paper.
[105] *Heythrop Zoological*, *supra* note 15, ¶ 34 (citing RICHARD ARNOLD, PERFORMERS' RIGHTS ¶ 2.33 (4th ed., 2008)).

legislation that qualifies puppet masters as performers.[106] This approach finds corroboration in provisions of certain international treaties. The WIPO Performances and Phonograms Treaty qualifies "interpreters" as performers.[107] Such a qualification is supported by the Rome Convention in the French and Spanish texts, which provides performers' rights for interpreters (*artistes interprètes*) and executants (*artistes exécutants*).[108] The understanding as per the Rome Convention has been discussed in the WIPO Committee of Governmental Experts on Dramatic, Choreographic and Musical Works.[109] The Report by the Committee supports the conclusion that interpreters and executants are 'performers' and should be awarded performers' rights.[110] Interpreters and executants are explained to include conductors and directors – whose role involves "*interpretation of works and the giving of instructions to other artists who directly produce performances*."[111]

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[106] Code de la Propriété Intellectuelle [IPC] art. L212- 1(Fr.); *see also* Mathilde Goizane Alice Pavis, The Author-Performer Divide in Intellectual Property Law: A Comparative Analysis of the American, Australian, British and French Legal Frameworks vol I, 163–66 (March 2016) (Ph.D. dissertation, University of Exeter) https://ore.exeter.ac.uk /repository/bitstream/handle/10871/23692/PavisM.pdf.

[107] WIPO, Performances and Phonograms Treaty, art. 2 (a), Dec. 20, 1996, 2186 U.N.T.S. 203; Antony Taubman, *Nobility of Interpretation: Equity, Retrospectivity, and Collectivity in Implementing New Norms for Performers' Rights*, 12 U. GA. J. INTELL. PROP. L. 351, 383 (2005).

[108] WIPO, Convention Internationale Sur La Protection Des Artistes Interprètes ou Exécutants, des Producteurs de Phonogrammes et des Organismes de Radiodiffusion, art. 2(1)(a), Oct. 26, 1961, 496 U.N.T.S. 43; WIPO, Convención Internacional Sobre la Pbotección de los Abtistas Intébpbetes O Ejecutantes, Los Pboductobes De Fonogramas y Los Obganismos de Badiodifusión, art. 2 ¶ 1(a), Oct. 26, 1961, 496 U.N.T.S. 43; ARNOLD, *supra* note 105 ¶ 2.31. All texts and translations of the convention are said to be equally authentic and credible and uniform in applicability.

[109] UNESCO, Comm. of Gov. Experts on Dramatic, Choreographic and Musical Works, Paris, U.N. Doc. WIPO/CGE/DCM/3 (March 6, 1987).

[110] *Id.* ¶ 62.

[111] *Id.*

In addition, the WIPO guide to the Rome Convention explains "interpreters" to include conductors of instrumental and vocal groups.[112] The inclusion of orchestra conductors as performers is also endorsed by the Australian Copyright law,[113] the Italian Copyright Statute,[114] and the Spanish Author's Right Act[115] which further extends performer's rights for stage directors. The foregoing illustrations attribute performers' rights to human actors who are necessary for the performance even when not visible to audience. Despite their lack of stage presence, these human actors are assigned performers' rights in the performance for executing or contributing to it while off-stage – akin to the test established in *Heythrop Zoological* for qualifying as a "performer."[116]

This classification of interpreters – especially orchestra conductors – as performers is also significant for understanding the impact of stage presence in assigning performers' rights. Orchestra conductors primarily guide performers through the performance with instructions and gestures, while not necessarily being on the stage.[117] Not to mention, several jurisprudences have inclined towards providing performer's rights to artists

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[112] *Id.* ¶ 62, 134.
[113] Copyright Act, 1968 (pt. IX), Div. 1 § 191B (Austl.).
[114] Law for Protection of Copyright and Neighbouring Rights, Law No. 633 of April 22, 1941, Article 82 (Italy) ("**Copyright Protection Law**").
[115] Royal legislative Decree 1/1996 dated 12th April, enacting the Consolidated Text of the Intellectual Property Act, Regularising, Removing Ambiguities and Harmonising the Current Legal Provisions on the Subject, Article 105 (Spain).
[116] *See generally Heythrop Zoological*, *supra* note 15.
[117] THE CAMBRIDGE COMPANION TO CONDUCTING 1-4 (José Antonio Bowen ed., Cambridge Univ. Press 7th edition 2003).

'playing a significant artistic part, even if in supporting role'.[118] For instance, the German Copyright Law is generally understood to extend performers' rights for stage or musical directors, lightning directors or make-up artists[119] – individuals predominantly contributing to a show while off-stage. Hence it is suggested that stage presence *need* not be a mandatory requirement for qualifying as a performer. Instead, the qualifier for determining a choreographer as a performer should be the two-fold test formulated in *Heythrop Zoological* – regardless of stage presence.[120]

The role and nature of contributions by a choreographer while guiding performers through a dance performance, though off-stage, is analogous to that of orchestra conductors. In both events, the mentioned individuals form the basis and impetus for the execution of the performance. It is further posited that the role of choreographers in successfully executing *ad libitum* performances is significantly more essential due to the volatility and improvisations in the performances. Therefore, ideally, choreographers should be awarded performers' rights if they can satisfy the two-fold test of *Heythrop Zoological*. The discourse on the importance (or lack thereof) of stage presence in determining a 'performer' precludes arguments against awarding performers' rights to choreographers

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[118] Copyright Protection Law, *supra* note 114.

[119] PASCAL KAMINA, FILM COPYRIGHT IN THE EUROPEAN UNION 351 (Cambridge University Press 2004).

[120] For clarity, the test requires that (i) the intervention by the performer was essential to performance and (ii) the intervention made the performance worth watching. *See Heythrop Zoological*, *supra* note 15.

executing *ad libitum* performance while off-stage – whether in a joint performance or otherwise.

V. CONCLUSION

While *ad libitum* dance performances are an evolving occurrence, traditional understanding of IPR law has so far been discouraging in affording protection to such works. From the perspective of the choreographer, the said individual expends immense effort, skills, and creativity in authoring the dance routine and ensuring its performance.

For that reason, this research paper has aimed to discuss the relevant status quo of IPR protection in light of developing judicial standards. In doing so, the paper has explored the varied arguments put forth in favour and opposition of such protection – whether through copyright or performer's rights – to draw the most efficient conclusion. At the outset, the paper had set forward two hypotheses which have been proven true throughout the paper. A detailed discussion of the interpretational standards for IPR law followed under foreign jurisprudence and international treaties result in the proposition that the choreographers choreographing the *ad libitum* dance performances can theoretically be accorded copyright (despite practical hindrances) as well as performers' rights for such performances within India. This conclusion is not only the inevitable result of the applicable law but also most aligned with the purpose of IPR law in increasing accessibility while incentivizing innovations.