**IS IT A WALK OR IS IT A *WALK*: FASHION MODELS AND THREATS POSED BY GENERATIVE AI**

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## Table of Contents



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## Introduction

Generative artificial intelligence (AI) has taken nearly every industry by storm, and the global fashion industry has not been spared.[2] The technology is already having an impact on one of the more human aspects of the industry—modeling. For instance, Maison Valentino announced a new collection that was presented entirely with AI-generated models.[3] Potentially more troubling is the experience of Shereen Wu, a young Taiwanese American model who recently walked for Michael Costello and had her face replaced with "the face of a White woman she didn't recognize."[4] Wu walked in Costello's show at the Art Hearts Fashion Show in October

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 Thank you so much to Mary Kate Brennan for introducing me to the world of fashion law, and for encouraging me to publish this article. I am also so incredibly grateful for the constructive feedback and guidance offered by Julie E. Cohen.

[2] Imran Amed et al., *The State of Fashion 2024: Finding pockets of growth as uncertainty reigns*, MCKINSEY & COMPANY (Nov. 29, 2023), https://perma.cc/RD97-958A ("Generative AI's creative crossroads. After generative AI's (gen AI) breakout year in 2023, more use cases are emerging across the industry. Capturing value will require fashion players to look beyond automation and explore gen AI's potential to enhance the work of human creatives.").

[3] *Maison Valentino's new Essentials line was shot entirely by AI tech*, HERO (Jan. 11, 2023), https://perma.cc/S4WE-4DZ2.

[4] Riddhi Setty, *AI Threatens to Push Human Fashion Models Out of the Picture*, BLOOMBERG LAW NEWS (Jan. 9, 2024), https://perma.cc/A7FH-4AFA.

2023.[5] In the days following the show, according to Wu, the designer posted a video of the show to his Instagram account; yet instead of the video showing Wu, her face had been replaced, presumably through the use of a generative AI editing tool.[6] In a statement following the post, a representative stated that "neither [Costello] nor [their] team was responsible for such alteration," but did not explain how the altered photos were ultimately posted to the designer's Instagram.[7] Unfortunately, Wu's experience is not likely to be unique. For a field composed largely of women,[8] and with women of color continuing to be underrepresented,[9] Wu's experience serves as a warning for what may be to come—especially considering the existing constraints and concerns with modeling contracts.[10]

Valentino's collection, Wu's experience, and AI's potential to "eliminate the associated [employment and labor] challenges and expenses" associated with human models,[11] raises questions of how models, especially models of color,[12] might be able to protect themselves in

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[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Compare Fashion Model Demographics and Statistics in the US*, ZIPPIA (2021), https://perma.cc/BRE5-FRZB (reporting that women make up 77.7% of the fashion model workforce) *with* U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK (April 2023), https://perma.cc/7BBM-Z8K5 (reporting that women's labor force participation, nationally, was only 56.1%).
[9] *See* Vanessa Padula, *Whitewashed Runways: Employment Discrimination in the Fashion Modeling Industry*, 17 BERKELEY J. AFR. AM. L. & POL'Y 117, 122 (2016) ("In Fall of 2013, the statistics [of New York Fashion Week] were: 79.8% [W]hite, 8.08% [B]lack, 8.1% Asian, 3.19% Latina. This racial disparity has a negative economic effect on models of color who must constantly compete for the small number of spots available to them."); *see also* Valeriya Safronova, *Has New York Fashion Week Finally Gotten the Memo on Diversity?*, THE NEW YORK TIMES (Sept. 21, 2017), https://perma.cc/84A3-UT9U (reporting that in Fall of 2017 36.9 %of models in New York Fashion Week shows were "nonwhite").
[10] First, modeling contracts are written in a manner that is highly favored toward modeling agencies' benefits, often leading to financially disastrous consequences for the models. *See, e.g.*, Lisa Lockwood, *The Model Conundrum: Waiting to Be Paid*, WOMEN'S WEAR DAILY (Sept. 11, 2019 at 12:01 AM), https://perma.cc/DT6N-ZRJN (discussing how models are often forced to wait for payment, are "paid in trade (clothing exchanged for modeling) instead of money," or not even paid at all, and are often charged "fees and expenses" that they claim they were not made aware of); *see also* S3477-A, 2023-2024 Reg. Sess., Sponsor Memo (N.Y. 2023) ("Unlike talent agencies, modeling agencies consider themselves to be management companies . . . thereby allowing them to escape licensing and regulation. This leaves models unprotected outside the terms of their individual contracts, which tend to be exploitative and one-sided in favor of the management company . . ."). The nature of these contracts, and their effects on models—especially young women, young men, and children—has led to efforts by advocacy groups, such as the Model Alliance, to advocate for improved transparency and accountability from modeling agencies, and better working conditions for models, including the above referenced Fashion Workers Act. MODEL ALLIANCE, https://perma.cc/7W77-7LDD. Further, models, especially those new to the industry, are in no position to negotiate with the agency. *See* Louis Tertocha, *Fashion Modeling: From Contract Clauses to the Rigors of the Runway*, 17 ENT. & SPORTS LAW 1, at *19 (1999) ("As with other neophytes to the entertainment business, a fledgling unsigned model does not possess leverage for negotiations; any contract is often on a 'take it or leave it' basis."); *see also* Padula, *supra* note 8, at 120 ("Many models will sign fixed-term, exclusive contracts to be represented by their new agency. These agreements classify the model as an independent contract of the agency and permits the agency to collect a commission on every job the model books during the contract's term. Therefore, these contracts are highly valuable to the agency. Aware that many young models are anxious to be signed, agencies are often accused of taking advantage of models' weak bargaining power.").
[11] Anthony V. Lupo et al., *The Generative AI Revolution: Key Legal Considerations for the Fashion & Retail Industry*, ARENTFOX SCHIFF (Aug. 16, 2023), https://perma.cc/5CV3-UJQ9.
[12] *Cf.* Claire Savage, *AI-generated models could bring more diversity to the fashion industry—or leave it with less*, Associated Press (Apr. 14, 2024, 10:43 PM), https://perma.cc/LA3F-ZMF3 ("But critics raise concerns that digital

this shifting industry. These questions are front in center when considering a hypothetical runway show, occurring in a completely virtual space (e.g., the "Metaverse"). To develop the virtual representations of models, a company will need to rely on existing material to create a virtual model and their walk. To accomplish this virtual recreation, the developing company may need to either reference, or reproduce, a human model's walk or the company may "train" the AI model using footage and imagery from a human model's walk.[13] This Essay seeks to explore this hypothetical under the theory that if copyright law can be wielded by models, particularly their walks, then fashion companies may be more reticent to train their generative AI technologies using video of models, as such training would then infringe a model's intellectual property.[14]

Part I begins with a brief landscape analysis of the Copyright Act and what additional information can be gleaned from existing regulatory and guidance documents. Building upon this, Part II examines two Ninth Circuit cases in which the court disposed of plaintiffs' attempts to rely on the Copyright Act's enumerated "choreography" category. In Part III, this Essay applies the statute and lessons learned from the Ninth Circuit to theorize how a model might argue that their walk fits within the umbrella of the Copyright Act. Finally, Part IV offers a few thoughts in conclusion, including how models may be able to leverage state right of publicity laws given the seemingly closed federal pathways.

## I. Overview of the Copyright Act and its related regulations

The federal Copyright Act provides that "original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated . . . directly" may be afforded protection.[15] The statute enumerates eight categories of "works of authorship" that may be afforded protection, including pantomimes and choreographic works.[16] Reading the statute as a whole, it requires that, to be copyrightable, the work must (1) be an original work[17] that (2) is fixed in a medium of expression,[18] and (3) falls

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models may push human models . . . out of a job . . . [a]nd companies could claim credit for fulfilling diversity commitments without employing actual humans.").

[13] *See* Center for Teaching Innovation, *Generative Artificial Intelligence*, CORNELL UNIV., https://perma.cc/B4WT-LL5P ("Generative artificial intelligence is a subset of AI that utilizes machine learning models to create new, original content, such as images, text, or music, based on patterns and structures learned from existing data.").

[14] This Essay explores this hypothetical under the assumption that the purported model has not previously assigned their intellectual property rights to their modeling agency or the fashion brands for whom they walk. The author recognizes that this may, in reality, not reflect the general norm within the modeling industry, considering the highly contractual nature of a model's relationship with their agency or fashion brand. *See supra* note 9.

[15] 17 U.S.C. § 102(a).

[16] 17 U.S.C. § 102(a)(4).

[17] The statute does not define "original," but *Nimmer on Copyright* provides that originality, in the copyright sense, "means only that the work owes its origin to the author, i.e., is independently created rather than copied from other works." 1 NIMMER ON COPYRIGHT, § 2.01 [A][1]. Further, if another varies upon an existing work, the work is distinguishable—therefore, protectable—if the new work "is the product of the author's independent efforts and is more than merely trivial." *Id.* at [B][1].

[18] The statute defines that a work is "fixed" when its embodiment in a medium is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. 17 U.S.C. § 101. For works that are performance in nature, such as choreography or pantomime, the work must still be fixed in a way that "reveals the movements in sufficient detail to permit the work to be performed in a consistent and uniform manner." *See* U.S. COPYRIGHT OFFICE, CIRCULAR 52: COPYRIGHT REGISTRATION OF CHOREOGRAPHY AND PANTOMIME 2 (2022), https://perma.cc/PW9U-TBQ3 [hereinafter CIRCULAR 52]. Thus, a work could be "fixed" for

within one of the enumerated categories. Whether a work can fit within one of the enumerated categories is an operative question for whether a plaintiff may succeed in arguing protection applies to their work.[19]

*a. What constitutes a choreographic work[20]*

The statute leaves "choreography" undefined but the U.S. Copyright Office defines "choreography" as the "composition and arrangement of a related series of dance movements and patterns organized into a coherent whole."[21] Common elements of a choreographic work may include rhythmic movements of dancers' bodies in a defined sequence; a story, theme, or abstract composition conveyed through movement; a presentation before an audience; or a performance by skilled individuals.[22]

*b. What does not constitute a choreographic work.*

The Copyright Office guidance provides that "ordinary motor activities," including functional physical movements, feats of physical skill or dexterity, are not eligible for registration as choreography because "these movements do not represent the type of authorship that Congress intended to protect as choreography."[23] However, the *Compendium III* provides that "uncopyrightable movements may be used as the building blocks for a pantomime, in much the same way that notes or short musical phrases provide the basic material for a composer."[24]

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purposes of statutory protection if there are textual descriptions, photographs, or drawings of the work, or video recordings of the performance." *Id.*

[19] Although the statute provides that protectable works of authorship "include the following categories," this element may not be a strictly necessary requirement. According to a guide that accompanied the Copyright Act of 1976, the United States Copyright Office commented that "[t]hese categories are illustrative and are not meant to be limitative. See U.S. COPYRIGHT OFFICE, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976 16 (Sept. 1977), https://perma.cc/C6UK-2K64 [hereinafter COPYRIGHT GUIDE]. Further, the House Report for the 1976 Act provided that the phrase "works of authorship" is "purposefully left undefined" and the intent was to provide a flexible definition that would neither" freeze the scope of copyrightable subject matter . . . nor allow unlimited expansion into areas completely outside the present congressional intent." H.R. REP. NO. 94-1476 at 51. (1976) (94th Congress 2d Session).

[20] For the purposes of this Essay, discussions of "pantomime" are excluded. Between the common meaning of "pantomime," especially the imagery it evokes, and the complete absence of any case law exploring when and how works of pantomime may be protected, discussion of the topic here is of little value. To accentuate how "pantomime" seems inapposite to the issue of modeling, the U.S. Copyright Office provides that a pantomime "is the art of imitating, presenting, or acting out situations, characters, or events through the use of physical gestures and bodily movements." *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §806.1 (3d ed. 2014) [hereinafter COMPENDIUM III].

[21] CIRCULAR 52, *supra* note 17 at 1.

[22] *Id.; see also* COMPENDIUM III, *supra* note 19 at 805.2(D) ("Choreographic works often tell a story, develop characters or themes, and convey dramatic concepts or ideas through a sequence of bodily movements presented in an integrated, compositional whole.")

[23] CIRCULAR 52, *supra* note 17 at 3. Additionally, in the *Compendium II*, the Copyright Office provides that protectable choreographic works include some form compositional arrangement, which includes a "related series of dance movements and patterns organized into a coherent whole." U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §450.03(a) (2d ed. 1984) [hereinafter COMPENDIUM II]. And such movements "must be more than mere exercises, such as 'jumping jacks' or walking steps." *Id.*

[24] COMPENDIUM III, *supra* note 19 at § 806.4(D).

Thus, even if the components may not be themselves protectable, if the "work as a whole contains a sufficient amount of original authorship," then it may be protectable.[25]

## II. Ninth Circuit Approaches to Interpreting "Choreography"

Since inclusion of choreographic works in the 1976 amendments to the Copyright Act, the case law has been slow to develop a judicial understanding of what would be a protectable choreographic work.[26] Nonetheless, the few instances when courts have disposed of copyright infringement claims related to choreographic works may illuminate how they would address a copyright claim related to a model's walk. Two cases from the Ninth Circuit, with their opposing conclusions regarding claimed choreographic work, may be especially illustrative. First, in *Bikram's Yoga College of India, L.P. v. Evolation Yoga, LLC*, the Ninth Circuit held that the plaintiff had no valid copyright claim, ruling that the claim choreographic work in question—a series of yoga poses and breathing exercises—was merely a sequence of movements that only served a functional purpose.[27] This can be compared to a more recent Ninth Circuit case, *Hanagami v. Epic Games, Inc.*, in which the court held that a series of individual dance poses can be protectable under the Copyright Act.[28]

### *a. Yoga as an unprotectable series of static poses and movements.*

In *Bikram*, the Ninth Circuit upheld a lower court decision that rejected the plaintiff's copyright infringement claims, holding that, *inter alia*, the sequence of yoga poses is not a copyrightable choreographic work because the sequence was an idea, process, or system.[29] The plaintiff, Bikram Choudhury, developed a sequence of twenty-six yoga poses and two breathing exercises, which he arranged in a particular order.[30] After publishing a book with this sequence, Choudhury created a yoga teacher training course, which the two defendants attended and completed.[31] Choudhury filed suit against the defendants—two former students who later opened their own yoga studio offering "hot yoga"—alleging that they infringed on his copyrighted work "through substantial use of [his sequence] in and as part of [their] offering of yoga classes."[32] The district court granted defendants' motion for summary judgment ruling that Choudhury's sequence was not protectable under the Copyright Act.[33]

In reviewing the district court's dismissal on grounds that the sequence is not a protectable choreographic work, the Ninth Circuit relied on the *Compendium of Copyright Office*

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[25] *Id.* at § 806.4(D).
[26] *See* Hanagami v. Epic Games, Inc., 85 F.4th 931, 935 (9th Cir. 2023) ("In 1976 Congress for the first time extended explicit copyright protection to 'choreographic works,' bringing dance in line with other performing arts. Nonetheless, the field of choreography copyright has remained a largely undefined area of law.").
[27] Bikram's Yoga College of India, L.P. v. Evolation Yoga, LLC, 803 F.3d 1032, 1044 (9th Cir. 2015).
[28] *Hanagami*, 85 F.4th at 942 ("The district court's approach of reducing choreography to 'poses' is fundamentally at odds with the way we analyze copyright claims for other art forms, like musical compositions.").
[29] *Bikram*, 803 F.3d at 1044.
[30] *Id.* at 1035
[31] *Id.* at 1036.
[32] *Id*.
[33] *Id.* at 1032.

*Practices* to determine what is included within the statutory meaning of "choreography."[34] The Ninth Circuit noted that they did not need to decide whether to adopt the Copyright Office's definition because all choreographic works are subject to the requirements and limitations of Section 102,[35] and specifically that the "idea/expression dichotomy" is operative for new and evolving forms of authorship.[36] By this, the court relied on the text of Section 102(b), which provides that "every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication."[37] Although Choudhury's sequence may involve "static and kinetic successions of bodily movement in certain rhythmic and spatial relationships," the Court argued that "[s]o too would a method to churn butter or drill for oil."[38] In other words, non-copyrightable physical movements do not become copyrightable simply because they are described as "part and parcel of a process."[39]

There are two key lessons from *Bikram* that are insightful for attempts to leverage copyright law for non-traditional works of authorship. First, *Bikram* shows that courts—at least the Ninth Circuit—take cues from the Copyright Office's guidance, specifically the *Compendium*. Although the court did not explicitly adopt the definition of "choreography" provided in the *Compendium*, it is apparent that the court's approach to Choudhury's argument was informed by this definition. Second, *Bikram* underscores the difficulty that plaintiffs face in attempting to argue their work is a choreographic work, especially when the argued work is beyond what is commonly thought of as choreography. While the court did not refer to the Copyright Office's description of common elements for choreographic work, [40] if these elements are absent courts seem reticent to accept a plaintiff's argument for protection of a work that is seemingly beyond the accepted meaning of "choreography."

*b. Choreography as a series of movements and patterns organized into a coherent whole.*

Contrary to the outcome in *Bikram*, in *Hanagami v. Epic Games, Inc.* the Ninth Circuit reversed a lower court's ruling and instead held that the plaintiff's work was—at least at the motion to dismiss stage—plausibly within the protections of copyright law.[41] The plaintiff there was a "Los Angeles-based choreographer with a star-studded resume"[42] and in 2017 published a video of a five-minute dance performed to a song, containing about 480 "counts," or steps, of choreography.[43] In 2020, Epic Games, the creator and developer of the *Fortnite* video game released a new "emote" called "It's Complicated."[44] The "emote" was an animation for *Fortnite* players' characters and consists of sixteen steps of choreography, four of which were the subject

[34] *Id.* at 1043. As highlighted above, the *Compendium* describes "dance" as "static and kinetic successions of bodily movement in certain rhythmic and spatial relationships," and must be more than "mere exercises." *See* COMPENDIUM II, *supra* note 22.
[35] *Bikram*, 803 F.3d at 1043.
[36] *Id.* at 1043-44.
[37] *Id.* at 1037. Thus, as applied to Choudhury's claim, while his original book was properly protected (i.e., the "idea"), that protection cannot exclude others from using his book (i.e., the "expression").
[38] *Id.* at 1044.
[39] *Id*.
[40] *See supra* Part II.a.
[41] Hanagami v. Epic Games, Inc., 85 F.4th 931, 936 (9th Cir. 2023).
[42] *Id.*
[43] *Id.*
[44] *Id.* at 936-37.

of the infringement claim.[45] In granting Epic Games's motion to dismiss, the trial court found that Hanagami's choreography was merely composed of a "number of individual poses" that were not protectable "when viewed in isolation."[46] Thus, the district court essentially held that because Epic did not copy Hanagami's choreography in its entirety, and only a few of the discrete steps, there was no infringement. The Ninth Circuit held otherwise and reversed the lower court's decision.[47]

Citing to their earlier reasoning in *Bikram*, the Ninth Circuit explicitly adopted the *Compendium*'s definitions of "choreography" and "dance."[48] Additionally, the Ninth Circuit highlighted that the *Compendium* provides that the Copyright Office will not register "short dance routines consisting of only a few movements or steps with linear or spatial variations, even if the routine is novel or distinctive."[49] In the eyes of the Copyright Office these individual dance elements are the "building blocks of choreographic expression" and thus not protectable.[50] To evaluate choreography infringement claims, a court must evaluate whether the plaintiff has shown that they (1) own a valid copyright in his choreography, and (2) that the defendant copied protected aspects of the plaintiff's work.[51] The first element was easily satisfied since there was no challenge, on appeal, to Hanagami's ownership of a valid copyright.[52] The bigger issue was whether Hanagami successfully showed that Epic Games unlawfully appropriated his work.[53]

In determining whether the defendant unlawfully appropriated the plaintiff's work, the Ninth Circuit considers whether the defendant's work was "substantially similar" to the plaintiff's work.[54] The substantial similarity analysis is a two-part test: an extrinsic analysis of the objective similarities, and an intrinsic analysis of the similarities in expression.[55] The Ninth Circuit took issue with the district court's approach to the extrinsic analysis for the substantial similarity determination.[56] The appellate court noted that they analyze choreographic works, and whether a defendant has infringed the work of another, via the "selection and arrangement" approach,[57] which evaluates the "particular way in which the artistic elements [even if they are

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[45] *Id.* at 937.
[46] *Id.*
[47] *Id.* at 932.
[48] *Id.* at 940.
[49] *Id.* at 940.
[50] *Id.*
[51] *Id.* at 941.
[52] *Id.*
[53] *Id.* ("To demonstrate the [copying] prong . . . Hanagami must plausibly allege both (1) copying and (2) unlawful appropriation. . . . Here, it is undisputed that Hanagami plausibly alleged the "copying" component of his claim.").
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] The "selection and arrangement" approach has largely been used for textual works, especially those that are compilations of pre-existing works. *See* Matthew B. Goldman, *Fragmented Music Copyright Protection: A Better Arrangement*, 40 CARDOZO ARTS & ENT. L.J. 729, 744 (2023) ("The 'selection and arrangement' doctrine is traditionally used for compilations and derivative works under 17 U.S.C. § 103, but has been applied to creative works where the alleged infringement is based on a combination of unprotectable elements within the larger work."). Nonetheless, the Ninth Circuit has used this framework for other non-textual artistic works. *See, e.g.*, Satava v. Lowry, 323 F.3d 805, 811-12 (9th Cir. 2003) (refusing to recognize a copyright infringement claim against a glass artist because the original artist's work was merely a "combination of unprotectable elements" that "[fell] short" of the sufficiently original standard that proffers protection). This extension of the selection and arrangement

individually unprotectable] form a coherent pattern, synthesis, or design."[58] Under this approach, an author cannot claim protection to an "individual, stand-alone dance movement, such as a plie," but they can claim protection to the author's "original selection, coordination, and arrangement."[59]

In turning to review of the district court's analysis, which also employed the selection and arrangement framework, the Ninth Circuit held that the trial court erred in only focusing on the specific dance moves.[60] Instead, the trial court should have also considered other "expressive elements" that were in the choreography, such as "body position, body shape, body actions, transitions, use of space, timing, pauses, energy, canon, motif, contrast, and repetition."[61] In underscoring this totality approach, the Ninth Circuit argued that reducing choreography to mere poses would be "akin to reducing music to just 'notes.'"[62] "The element of 'poses,' on its own, is simply not dynamic enough to capture the full range of creative expression of a choreographic work."[63] Thus, Hanagami plausibly alleged that Epic Games infringed upon Hanagami's choreographic work, including the "footwork, movement of the limbs, movement of the hands and fingers, and head and shoulder movement."[64] The Court went further to also highlight that just because the alleged infringement was of only a few steps of Hanagami's larger routine, Hanagami is not barred from raising an infringement claim.[65]

*Hanagami* emphasizes what was learned from *Bikram*. First, *Hanagami* is the first example of the Ninth Circuit making an unequivocal adoption of the Copyright Office's *Compendium*, including its definitions and exclusions. Thus, whether a plaintiff can orient their claim within the *Compendium*'s framework will likely determine how willing the court is to consider the plaintiff's claim. Second, unlike in *Bikram*, where the court did not give any weight to the movements-as-part-of-a-process argument and denied the plaintiff's copyright claims, the *Hanagami* court emphasized that individual poses can be protectable if they are sufficiently "choreographic." The key difference between these approaches seems to be, again, how close the alleged work is to a colloquial understanding of "choreography" and "dance." In *Bikram*, the plaintiff was attempting to make a novel argument that the yoga poses *could* be choreography,

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framework for other works of art has, however, not been without controversy. *See* Edwin F. McPherson, *Crushing Creativity: The* Blurred Lines *Case and Its Aftermath*, 92 S. CAL. L. REV. 67, 68 (2018) ("All music shares inspiration from prior musical works, especially within a particular musical genre. . . . By eliminating any meaningful standard for drawing the line between permissible *inspiration* and unlawful *copying*, the [Ninth Circuit's affirmance of a jury verdict] is certain not only to impede the creative process and stifle future creativity, it ultimately does a disservice to past songwriters as well and adversely affects the entire music industry.").

[58] *Hanagami*, 85 F.4th at 942 (citing Skidmore v. Zeppelin, 952 F.3d 1051, 1074 (9th Cir. 2020)).

[59] *Id.*

[60] *Id.* at 943.

[61] *Id.*

[62] *Id.* at 944.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 946 ("It is true that Congress indicated that simple routines do not warrant copyright protection. . . . But here, Hanagami plausibly alleged that the Steps are more than 'a few movements . . . with minor linear or spatial variations.' Short does not always equate to simple.").

whereas in *Hanagami*, the plaintiff was showing that the dance movements were clearly choreography.[66]

Although not discussed by the Ninth Circuit, *Hanagami* also raises a question of what impact, if any, does the type of defendant have on the court's disposition toward the plaintiff's claim, or at least to the defendant's potential fair use defense. In *Bikram*, the plaintiff—a yoga instructor—brought an infringement claim against a fellow yoga instructor. Said differently, Choudhury was challenging the defendants' use of the yoga sequence, within their yoga classes. Whereas in *Hanagami*, the plaintiff—a choreographer—brought an infringement claim against a video game development company. In other words, Hanagami was challenging the defendants' use of the choreography, not within a dance routine, but within a video game—a completely different context and use. Although neither *Bikram* nor *Hanagami* answer this question, this could be a key determining factor when considering the thrust of this Essay—whether a model can claim infringement for a company's use of their "work" in an AI-developed show or campaign.

## III. Applying Copyright Protections for choreographic works to a model's walk: Naomi Campbell as a case study.

With the landscape of copyright law now laid out, we can return to the question of whether a model may be able to seek protection for their runway walk. Given the current state of the law, it is unlikely that a model would be successful in protecting their runway walk as a "work" of authorship, largely because of the difficulty they will have in showing that the walk is within the meaning of "choreography." To walk through this analysis, we will consider a model that is well known within and beyond the fashion industry: Naomi Campbell. Campbell's signature walk has been the focus of countless YouTube compilations,[67] fashion reporting,[68] pop music,[69] and even her own featured MasterClass.[70] If there is any model who can successfully claim that her walk should be a protectable work, it is Campbell.

First, Campbell will need to show that her walk is an original work. This could prove difficult considering that a walk is one of the most, if not *the* most, common physical movements. However, considering originality is one of the easier threshold questions, this may not prove to the be fatal flaw for Campbell's argument. It is feasible that Campbell could show that her walk is original and is more than a mere physical movement. She could point to the strategic choice in stride, the intentional looking at a point on the horizon, and even the

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[66] The plaintiff's identity is likely a contributing, if not stated, factor. Choudhury was a yoga instructor and Hanagami was a known choreography. Both had their respective celebrity appeal, but Hanagami was clearly known as a choreographer and his "works" were well within what is understood that a choreographer creates.
[67] *See, e.g.*, Fashion Runway, *Naomi Campbell | Best Runway Walk*, YOUTUBE (Apr. 2, 2020), https://perma.cc/7KHS-9DQU.
[68] *See, e.g.*, Danielle Pergament, *Naomi Campbell Shares the Secret to Her Stride*, ALLURE (Oct. 1, 2014), https://perma.cc/U69U-DXKK ("Walking on a runway is like a performance, and walking down the street is not. It's completely different.").
[69] *See, e.g.*, BEYONCE, *Get Me Bodied (Extended Mix)* (Sony BMG Music 2006) ("Do the Naomi Campbell walk").
[70] *See* Naomi Campbell, *Catwalk: Finding Your Stride*, MASTERCLASS, https://perma.cc/V2MR-3FGY (describing her approach to a fashion show as "step[ping] out of yourself and becom[ing] a character).

flourished toe kick she adds as she turns at the top of the runway.[71] Campbell could also point to the numerous writings of how her walk differs significantly than most others, especially in the modeling industry.[72] Further, Campbell would not need to show complete novelty with her work, only that her work "is independently created rather than copied from other works."[73]

Second, Campbell will need to show that her walk is fixed in a tangible medium. For choreography and other performed works, an author can fix their work by creating textual descriptions of the work, taking photographs or drawings of the work, or recording the performance. [74] Campbell could create a written description, similar to the above, that is sufficiently detailed to the point that someone could recreate her walk by reading the description.[75] She could also provide a video recording, like in *Hanagami*, to prove fixation.

Third, Campbell will need to show that her walk is within the auspices of the Copyright Act. This element will prove most difficult for Campbell to satisfy. Although the statute's enumerated categories are not exhaustive of protectable works,[76] a plaintiff is more likely to succeed in achieving protection if they can show that the work is within one of the enumerated categories. Thus, a plaintiff like Campbell should make all attempts to argue that their work fits within the meaning of "choreography;" but this argument is shaky at best, especially considering the Ninth Circuit's treatment of non-traditional arguments.[77] Given the Copyright Office's description of what constitutes,[78] and what does not constitute,[79] a choreographic work, Campbell will need to demonstrate that her walk is (a) not an ordinary motor activity or commonplace movement and (b) her walk includes several of the common elements to a choreographed work.

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[71] However, the Ninth Circuit's *Satava* decision may prove a challenge here. Satava v. Lowry, 323 F.3d 805, 811 (9th Cir. 2003). There, in disposing of the plaintiff's argument for copyright protection over his glass jellyfish sculpture, the Ninth Circuit specifically focused on the artist's use of various elements that would be non-protectable on their own, such as the use of clear glass, bright colors, and a "stereotyped jellyfish form." *Id.* The court wrote, "[t]hese elements are so commonplace in glass-in-glass sculpture and so typical of jellyfish physiology that to recognize copyright protection in their combination effectively would give Satava a monopoly on lifelike [ ] sculptures of single jellyfish with vertical tentacles." *Id.* at 812. Discussing further, the artist's use of "ideas, first expressed by nature," the court argued that an "artist may [ ] protect the original expression [they] contribute[ ] to these ideas." *Id.* at 813. Here, Campbell may struggle to articulate how her "flourishes" "contribute" to the natural forms and functions of walking and moving. In other words, Campbell would need to demonstrate that her walk is a sufficiently original expression that builds upon those "ideas, first expressed by nature."

[72] *See, e.g.*, Jocelyn Silver, *Why Naomi Campbell's Walk is Legendary*, W MAGAZINE (May 22, 2019), https://perma.cc/A2ZB-D9CM ("Naomi's walk is quite clearly the best in the business, a combination of swagger and grace that no other model has truly replicated (not even by those to whom she has given lessons, like Gigi Hadid). Her hips and shoulders sway while her back stays ramrod straight.").

[73] NIMMER ON COPYRIGHT, *supra* note 16 at § 2.01 [A][1].

[74] CIRCULAR 52, *supra* note 17.

[75] *See, e.g.*, NAOMI CAMPBELL TEACHES MODELING FUNDAMENTALS, MASTERCLASS 33 (breaking down Campbell's runway walk into ten discrete components).

[76] COPYRIGHT GUIDE, *supra* note 18.

[77] *See, e.g.*, Bikram v. Evolation Yoga, 803 F.3d. 1032 (9th Cir. 2015).

[78] Common elements of a choreographed work may include rhythmic movements of dancers' bodies in a defined sequence; a story, theme, or abstract composition conveyed through movement; a presentation before an audience; and a performance by skilled individuals. CIRCULAR 52, *supra* note 17.

[79] Choreographed works consisting only of "ordinary motor activities" or "commonplace movements or gestures," may lack a sufficient amount of authorship to qualify for copyright protection. *Id.*

*a. Campbell's walk as a non-ordinary motor activity and non-commonplace movement.*

In Campbell's own words, her runway walk is significantly different than walking down the street.[80] Campbell has discussed how she "learned" to walk for the runway, which is a different skill from a commonplace "walk," by taking lessons from her mother, a dancer.[81] Campbell's mother complemented this by telling Campbell that she needed to "find her style, her identity, her trademark."[82] Although this description, at least facially, seems to be strong evidence that Campbell's walk is more than a commonplace movement, the description may still face skeptical ears, especially considering Choudhury's failed attempt to classify his yoga sequence as a choreographed routine and court's hesitancy to afford copyright protection to "routinized physical movements."[83]

*b. Campbell's walk as having elements of a choreographed work.*

Campbell can emphasize that her walk consists of three elements that the Copyright Office has included within the understanding of a choreographed work. First, Campbell can argue that her walk is intended to tell a story or portray a character. In discussing her experience walking for Alexander McQueen or John Galliano, Campbell states that, "[these] shows were not just a show, they were an event . . . it was a transformation of the whole environment around you . . . and [ ] there you felt like you got into character."[84, 85] Second, Campbell can argue that her "work" clearly takes place before an audience. It almost goes without saying, but Campbell's signature walk is intended for an audience given that she always walks on a runway, in front of live audiences. Third, Campbell can argue that her performance is by a skilled individual by easily pointing to her own MasterClass[86] and her past experiences coaching and mentoring young models.[87]

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[80] Campbell, *supra* note 69 ("You should walk like a horse with long strides . . . not too fast. When you walk too quickly, what's the difference to walking down the street?").
[81] Marissa G. Muller, *Naomi Campbell Shares the Secret to Her Walk: Coaching From Her Mom*, W Magazine (Dec. 28, 2018), https://perma.cc/DLC9-FJPL ("She taught me how to walk. It wasn't that I didn't know how to walk. She just taught me how to have a bit more swag and how to listen to the rhythm of the music and how to walk when there wouldn't be music.").
[82] Naomi, *My Relationship With My Mother*, YouTube (Dec. 28, 2018), https://perma.cc/2H9K-9CPX (expanding further to say that "modeling is about walking so you need to find whatever makes you different from anyone else").
[83] *Bikram*, 803 F.3d at 1044 ("Our day-to-day lives consist of many routinized physical movements, from brushing one's teeth to pushing a lawnmower to shaking a Polaroid picture, and that could be (and, in two of the preceding examples, have been) characterized as forms of dance. Without a proper understanding of the idea/expression dichotomy, one might obtain monopoly rights over these functional physical sequences by describing them in a tangible medium of expression and labeling them choreographic works.")
[84] Campbell, *supra* note 69; *see also* Silver, *supra* note 71 ("It's never been about showing myself . . . it's been about finding a character within myself to each designer that I worked for in relation to the outfit that I was in.").
[85] A potential counterargument to this, however, would that the choreographed works are typically meant to be repeated and performed similarly in front of multiple audiences. Thus, if Campbell "steps into" a new character with each show, her work may not be consistent enough to be protected. Said differently, Campbell may not be able to copyright her one signature walk, if that walk is arguably a different character/approach for every different show in which she appears.
[86] Campbell, *supra* note 69; *see also MasterClass Announces Naomi Campbell to Teach How to Take on Modeling and Life with Confidence*, PRNewswire (Dec. 6, 2022 at 9:00 AM), https://perma.cc/8FE9-3RL5.
[87] Kendall Fisher, *Naomi Campbell Taught Gigi Hadid and Bella Hadid How to Walk the Runway in a Hotel Hallway*, E News (Apr. 6, 2016 at 3:22 PM), https://perma.cc/V5ZR-QVCF.

Given that Campbell can demonstrate that her walk is intended to tell story, that it takes place before and audience, and her work is performed by a skilled individual, Campbell may be able to survive a court's selection-and-arrangement analysis, as employed in *Hanagami*.[88] As in *Hanagami*, Campbell could argue that her work is more than mere steps in a linear movement. Instead, Campbell's walk is about telling a story through her movement; about using timing and body shape to bring energy to the runway; and about arranging her movements into a composition that expresses a theme. In other words, the totality of Campbell's walk is like a choreographed performance, not merely a sequence of ordinary movements.

## IV. Conclusion

New technologies often outpace developments in the law, and the ubiquitous use of AI is no different. The current landscape of copyright law seems ill-equipped to confront the changes that AI will engender within every industry, including fashion. As noted already, brands and fashion houses are employing AI to produce new collections and industry leaders see AI as a tool to reduce operating costs. And we have also seen how some brands have wielded AI to erase the contributions of models. Although models may be able to turn to existing law for protection, they will face significant hurdles in convincing courts to protect their work. The statute and courts' application of the Copyright Act are not yet in a place where non-traditional arguments—such as protecting a model's walk—are likely to see much success.[89] But models may not be left completely without a path toward protection.

State common law and statutory rights of publicity recognize that an individual's identity and likeness have commercial value, and an individual has the right to control the commercial use of their identity and likeness.[90] Individuals, especially those that have achieved a high degree of public fame, have previously relied on these rights when suing defendant corporations for the unauthorized use of their likeness.[91] Fashion brands have also been subject to these types of suits, particularly when companies have relied on celebrity "look-alikes" in their marketing campaigns.[92] Although the right of publicity seems like a promising option for models to protect

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[88] There the Ninth Circuit looked to more than just the individual poses and specific dance moves and instead considered the totality of the expressive elements. Hanagami v. Epic Games, Inc., 85 F.4th 931, 943 (9th Cir. 2023).

[89] However, international legal scholars have already start to explore whether a model can be considered a "performer" under British intellectual property law. *See* Mathilde Pavis, *Runway models, runway performers? Unravelling the* Ashby *jurisprudence under UK law*, J. 13 INTELL. PROP. L. & PRAC. 867 (2018). Given the global nature of the fashion industry, if there is an uptake of this theory in the United Kingdom, or another foreign jurisdiction, it may be only a matter of time before U.S. courts consider the issue under domestic law.

[90] *See, e.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995) ("One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate . . ."); 6A CAL. JUR. 3d *Assault and Other Willful Torts* § 162, Westlaw (database updated Apr. 2024) ("California common law recognizes the right of a person whose identity has commercial value, most often a celebrity, to control the commercial use of that identity. . . ."); N.Y. CIV. RIGHTS § 51 (West, Westlaw current through L.2024, chs. 1 to 49, 52, 61 to 112) ("Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent . . . may maintain an equitable action . . . against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof . . .").

[91] *See, e.g.*, White v. Samsung Electronics Am., Inc., 971 F.2d 1395 (9th Cir. 1992) (reversing lower court's rejection of plaintiff's common law right of publicity claim against defendant for defendant's use of a robot lookalike).

[92] *See* Kardashian et al v. The Gap Inc et al, No. 2:11-CV-06568 (C.D. Cal. filed Aug. 10, 2011) (claiming defendant "incorporated and used qualities, attributes, and traits associated" with plaintiff's likeness in challenged

their likeness, especially when compared with the dim prospects of success under federal law, it is unclear how these suits would fare when the basis of the claim is a virtual model created by generative AI. In a typical right of publicity case, the defendant has used a model or representation that so closely resembles the plaintiff's image or likeness (think celebrity lookalikes) that the plaintiff can plausibly allege that the defendant clearly sought to evoke the plaintiff's persona and commercially benefit from this evocation. This is different conduct than what we could expect would happen in a generative AI case. There, the defendant would use the plaintiff's image or likeness, as part of a larger dataset, to "teach" the AI, and the AI would produce a virtual production that is essentially an amalgamation of the learning material. In other words, the generative AI would produce a video or image that likely does not evoke the plaintiff's persona, since the plaintiff's persona was one of potentially thousands used to create the representation.[93] However, if the generative AI is used to create a digital replica or "avatar" of the plaintiff, and the digital representation closely resembles the plaintiff's persona, we would have returned back to the realm of a traditional right of publicity claim.[94]

If a fashion icon like Naomi Campbell will struggle to convince a court of protecting her walk under the Copyright Act, younger models new to the industry have a near zero chance. Nonetheless, the prospects of a loss should not dissuade a potential plaintiff from attempting to leverage the Copyright Act to their advantage. There are strong arguments to be made that a model's walk is more than a mere physical movement and it can be compared to a choreographed work. Further, the existing hesitancy for courts to acknowledge and appreciate AI may also prove to be a tool for plaintiffs. Like in *Hanagami*, where the plaintiff has thus far succeeded against a technology company, so might a model succeed against a brand and its affiliated technology. It is only a matter of time before courts answer the question: will they strike these challenges down, or will they strike a pose?

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advertisements); *see also* Grande-Butera et al v. Forever 21, Inc et al, No. 2:19-CV-07600 (C.D. Cal. filed Sept. 9, 2019) (claiming that defendant "did not simply use a model with a similar look and hairstyle; they used [ ] a model who looks strikingly similar to [plaintiff]. . .").

[93] This is the type of scenario hypothesized throughout the Essay. If a model's walk can be protected by federal copyright law, then the model can control the use of that walk, including when footage or photos of the walk are used as teaching material for the generative AI. This theory is comparable to other pending lawsuits alleging copyright infringement for use of written works in generative AI. *See* The New York Times Co. v. Microsoft Corp. et al, No. 1:23-cv-11195 (S.D.N.Y. filed Feb. 26, 2024); *see also* Tremblay et al v. OpenAI, Inc. et al, No. 23-cv-03223-AMO, 2024 WL 557720, at *3 (N.D. Cal. Feb. 12, 2024) (dismissing plaintiff's claim for vicarious copyright infringement).

[94] *See* Jon M. Garon, *The Revolution will be Digitized: Generative AI, Synthetic Media, and the Medium of Disruption*, 20 OHIO ST. TECH. L.J. 139, 214 (2023) ("To the extent that these derivative avatars rely too heavily on the source material and they are used for commercial exploitation, then they will invade the rights of publicity for the owners of those avatars and create legal liability as a consequence."); *see also* Alexandra Curren, *Digital Replicas: Harm Caused by Actors' Digital Twins and Hope Provided by the Right of Publicity*, 102 TEX. L. REV. 155, 183 (2023) (arguing for the extension of right of publicity claims to "unauthorized digital replicas").