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STUDIES 26–28

28. Copyright in Choreographic Works

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FOREWORD

This committee print is the ninth of a series of such prints of studies on Copyright Law Revision published by the Committee on the Judiciary Subcommittee on Patents, Trademarks, and Copyrights. The studies have been prepared under the supervision of the Copyright Office of the Library of Congress with a view to considering a general revision of the copyright law (title 17, United States Code).

Provisions of the present copyright law are essentially the same as those of the statute enacted in 1909, though that statute was codified in 1947 and has been amended in a number of relatively minor respects. In the half century since 1909 far-reaching changes have occurred in the techniques and methods of reproducing and disseminating the various categories of literary, musical, dramatic, artistic, and other works that are subject to copyright; new uses of these productions and new methods for their dissemination have grown up; and industries that produce or utilize such works have undergone great changes. For some time there has been widespread sentiment that the present copyright law should be reexamined comprehensively with a view to its general revision in the light of present-day conditions.

Beginning in 1955, the Copyright Office of the Library of Congress, pursuant to appropriations by Congress for that purpose, has been conducting a program of studies of the copyright law and practices. The subcommittee believes that these studies will be a valuable contribution to the literature on copyright law and practice, that they will be useful in considering problems involved in proposals to revise the copyright law, and that their publication and distribution will serve the public interest.

The present committee print contains the following three studies prepared by members of the Copyright Office staff: No. 26, "The Unauthorized Duplication of Sound Recordings," by Barbara A. Ringer, Assistant Chief of the Examining Division; No. 27, "Copyright in Architectural Works," by William S. Strauss, Attorney-Adviser; and No. 28, "Copyright in Choreographic Works," by Borge Varmer, Attorney-Adviser.

The Copyright Office invited the members of an advisory panel and others to whom it circulated these studies to submit their views on the issues. The views, which are appended to the studies, are those of individuals affiliated with groups or industries whose private interests may be affected by copyright laws, as well as some independent scholars of copyright problems.

It should be clearly understood that in publishing these studies the subcommittee does not signify its acceptance or approval of any statements therein. The views expressed in the studies are entirely those of the authors.

JOSEPH C. O'MAHONEY,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, U.S. Senate.

COPYRIGHT OFFICE NOTE

The studies presented herein are part of a series of studies prepared for the Copyright Office of the Library of Congress under a program for the comprehensive reexamination of the copyright law (title 17 of of the United States Code) with a view to its general revision.

The Copyright Office has supervised the preparation of the studies in directing their general subject matter and scope, and has sought to assure their objectivity and general accuracy. However, any views expressed in the studies are those of the authors.

Each of the studies herein was first submitted in draft form to an advisory panel of specialists appointed by the Librarian of Congress, for their review and comment. The panel members, who are broadly representative of the various industry and scholarly groups concerned with copyright, were also asked to submit their views on the issues presented in the studies. Thereafter each study, as then revised in the light of the panel's comments, was made available to other interested persons who were invited to submit their views on the issues. The views submitted by the panel and others are appended to the studies. These are, of course, the views of the writers alone, some of whom are affiliated with groups or industries whose private interests may be affected, while others are independent scholars of copyright problems.

ABE A. GOLDMAN,
Chief of Research,
Copyright Office.

ARTHUR FISHER
Register of Copyrights,
Library of Congress.

L. QUINCY MUMFORD
Librarian of Congress.

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STUDY NO. 28

COPYRIGHT IN CHOREOGRAPHIC WORKS

BY BORGE VARMER

October 1959

CONTENTS

COPYRIGHT IN CHOREOGRAPHIC WORKS

I. Introduction

The dance is one of the oldest forms of human expression. Originally, perhaps, the bodily movements of a dance were a spontaneous expression of the dancer's emotions for his own satisfaction. Group dances following an established pattern, as in a ritual dance or a community folk dance, became a means of expressing the feelings of the group of dancers. Ultimately, the dance was developed into an art form, a work of choreography for theatrical presentation, by which bodily movements to be performed by dancers are devised to convey thought or feeling to an audience.[1]

A dance created for theatrical performance may be comparable to a drama to be spoken and acted, or a musical composition to be performed, as an art form by which thought or feeling is conveyed to an audience.[2]

Herein lies an essential distinction between those relatively simple dances, such as the steps of a ballroom or other social dance, devised primarily for the enjoyment of the dancers themselves, and those more intricate dances, such as ballets, devised for execution by skilled performers for the enjoyment of an audience. "Choreographic work" is commonly understood as referring to the latter.

The word "choreography" is derived from the Greek words "choreia," meaning dance, and "graphikos," meaning to write. Webster's New International Dictionary (Merriam, 2d edition, 1939) gives the following three definitions of "choreography": (*a*) the "art of representing dancing by signs, as music is represented by notes"; (*b*) "dancing, especially for [the] stage"; and (*c*) "the art of arranging dances, especially ballets." The technical term "choreographic works," as used in the context of copyright, may refer both to the dance itself as the conception of its author to be performed for an audience, and to the graphic representation of the dance in the form of symbols or other writing from which it may be comprehended and performed.

Despite the antiquity of the dance as a form of theatrical art, it was not until recently that standard forms of notation for dance movements—for example, the Laban system of notation, first published in 1928—were devised and generally utilized by the practitioners of the art.[3] Another means of recording the movements of a dance in graphic form is the motion picture, also a relatively recent device. Prior to these developments, the knowledge of the dance

[1] See CURT SACHS, WORLD HISTORY OF THE DANCE, Chapters 6 and 7 (1937).

[2] A dance may be an integral part of a drama otherwise presented through speech and action, or may be an independent production. A dance, like a drama, may be the core of a spectacle involving also the use of scenery, costumes, sound effects, etc. Choreography is commonly devised to be performed with music; the dance may be intended to express a theme suggested by the music, or the music may be intended to heighten the dramatic import of the dance.

[3] See Ann Hutchinson, *The Preservation of the Dance Score Through Notation*, in SORELL, THE DANCE HAS MANY FACES, 49-53 (1951).

creations of a choreographer was largely a matter of memory, and the preservation of a particular dance depended upon one person teaching it to another by word of mouth and demonstration. It was possible, of course, to write a textual description or make a series of pictures of the dance movements, but this was rarely done; it was laborious to do so, and it was doubtful that the text or pictures would be sufficiently precise for the performance of the dance as its author had intended.

Moreover, in the absence of a record of the dance movements in some fixed form, it would often be extremely difficult, if not impossible, to determine whether a choreographer's creation was being reproduced in a dance performed by others.

These practical obstacles to securing copyright protection for choreographic works have been overcome to a large extent by the development of standard systems of dance notation [4] and the motion picture.[5]

At the same time, the use of choreography as a medium of public entertainment—on the stage, in motion pictures, and in television—has expanded greatly in recent years. The question of copyright protection for choreographic works has therefore become a matter of increasing importance.

II. The Present Law

A. COMMON LAW PROTECTION

No case has been found in which literary property rights under the common law have been accorded to a choreographic work.[6] Nevertheless, if a choreographic work constitutes an original work of authorship, there would seem to be no reason why the common law protection accorded to unpublished works of authorship generally would not extend to an unpublished choreographic work in the same circumstances.[7] What constitutes a work of authorship in the realm of choreography will be discussed below.

B. COPYRIGHT PROTECTION UNDER THE STATUTE

1. *Copyrightability for choreographic works.*—The copyright law (title 17 of the United States Code) does not specifically mention choreographic works among the categories of copyrightable works enumerated therein. However, "dramatic compositions" are among the enumerated classes into which copyrightable works are divided for the purpose of registration (sec. 5(d)), and choreographic works have been treated as a species of dramatic compositions.

[4] The Laban system, as a notable example, looks far from simple to the layman; but it can be read, and the dance can be performed therefrom, by those who learn the skill; and it is now accepted as a standard form of notation by specialists in the field of choreography. See Ann Hutchinson, *op. cit.* note 3, *supra*, at 51-61.

[5] Some choreographers have mentioned cost as a practical obstacle to the use of motion pictures as a mere device for recording a dance (as distinguished from a theatrical motion picture made for exhibition). See Ann Hutchinson, *op. cit.* note 3, *supra*, at 57-58; AGNES DE MILLE, AND PROMENADE HOME, 258 (1956).

[6] Such rights in a dance were asserted by the plaintiff in Savage v. Hoffman, 159 Fed. 584 (C.C.S.D.N.Y. 1908), but the court did not decide that question; it held that even if such rights existed they did not belong to the plaintiff. Perhaps the absence of cases may be attributed to the fact that until recently choreographic works have rarely been recorded in a tangible form.

[7] One writer at least seems to have no doubt that common law literary property rights extend to unpublished choreographic works which have been recorded in some tangible form: Mirrell, *Legal Protection for Choreography*, 27 N.Y. U.L. REV. 792, 794-800.

As to the protection afforded by the common law to unpublished works generally, see Strauss, *Protection of Unpublished Works* [Study No. 29 to appear in a later committee print in the present series].

The courts have recognized that silent action in a theatrical performance may constitute a drama. In *Daly* v. *Palmer*,[8] decided in 1868, it was held that written directions for movements and gestures conveying an original story sequence constituted a dramatic composition. In *Kalem Co.* v. *Harper Bros.*,[9] holding that the action in a silent motion picture was a dramatization of the story in the novel "Ben Hur," Justice Holmes said:

> Drama may be achieved by action as well as by speech. Action can tell a story, display all the most vivid relations between men, and depict every kind of human emotion, without the aid of a word. It would be impossible to deny the title of drama to pantomime as played by masters of the art.

Not all productions to be performed on the stage or screen, however, are dramatic. A series of unconnected scenic effects in the nature of tableaux,[10] a stage production consisting of a performer singing a series of songs in various costumes interspersed with motion pictures showing the performer changing costumes,[11] and the narrative description of a fictitious sporting contest (a roller skating "derby," the description apparently being designed to illustrate the rules of the contest)[12] have been held not dramatic and denied the public performance rights accorded to dramatic compositions.[13]

The case most directly in point on the question of what constitutes a dramatic dance is *Fuller* v. *Bemis*,[14] decided in 1892. The plaintiff in that case had filed a copyright claim in a written description of the movements of a dance to be performed on the stage. She sued the defendant for copyright infringement in giving an unauthorized public performance of the dance, which she contended was a "dramatic composition." The court, denying relief on the ground that the dance was not a dramatic composition, stated:

> An examination of the description of complainant's dance, as filed for copyright, shows that the end sought for and accomplished was solely the devising of a series of graceful movements, combined with an attractive arrangement of drapery, lights, and shadows, *telling no story, portraying no character, depicting no emotion.* [Emphasis added.]

And the court continued:

> Surely, those [movements] described and practiced here convey and were devised to convey, to the spectator, no other idea than that a comely woman is illustrating the poetry of motion in a singularly graceful fashion. Such an idea may be pleasing, but it can hardly be called dramatic.

It seems clear that an original dance which tells a story is a form of dramatic composition and is therefore copyrightable as such. The quotation above from *Fuller* v. *Bemis* and from Justice Holmes in the *Kalem* decision indicate that a dance which portrays a character or depicts an emotion may also qualify as a dramatic composition.[15]

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[8] 6 Fed. Cas. 1132 (No. 3,552)(C.C.S.D.N.Y. 1868). This case involved the "railroad scene" that became well known, in which the hero was tied to a railroad track by the villain and was rescued from the onrushing train at the last moment by the heroine.

[9] 222 U.S. 55 (1911).

[10] Martinetti v. Maguire, 16 Fed. Cas. 920 (No. 9173) (C.C.Cal. 1867).

[11] Barnes v. Miner, 122 Fed. 480 (C.C.S.D.N.Y. 1903).

[12] Seltzer v. Sunbrock, 22 F. Supp. 621 (S.D.Cal. 1938).

[13] As further examples, it seems safe to assume that the usual stage performance of a magician, a juggler, or an acrobat would not be considered dramatic.

[14] 50 Fed. 926 (C.C.S.D.N.Y. 1892).

[15] Fuller v. Bemis, as well as the cases cited *supra* in notes 10 and 11, has been criticized on the supposition that it considered the telling of a story an essential element of a dramatic work: Mirrell, *op. cit.* note 7 *supra*, at 807-809. Mirrell suggests, at 805, that drama is "a stimulator of emotions and thought. The use of the story medium is only one of the means by which a dramatic composition may accomplish this." And he continues: "The dance can achieve this conveyance of ideas and stimulation of emotional responses. Dance creates an emotional response to its beauty of pattern and rhythm even when the ideas are not obvious."

The Copyright Office Regulations [16] provide for the registration of copyright claims in dramatic works of choreography, and distinguish between such works and nondramatic dances. Thus, section 202.7 of the Regulations, pertaining to "Dramatic and dramatico-musical composition (Class D)," says:

> Choreographic works of a dramatic character, whether the story or theme be expressed by music and action combined or by actions alone, are subject to registration in Class D. However, descriptions of dance steps and other physical gestures, including ballroom and social dances or choreographic works which do not tell a story, develop a character or emotion, or otherwise convey a dramatic concept or idea, are not subject to registration in Class D.

In the same vein, Circular No. 51 issued by the Copyright Office to provide general information regarding the registration of copyright claims in choreographic works, contains the following:

> A choreographic work is a ballet or similar theatrical work which tells a story develops a character, or expresses a theme or emotion by means of specific dance movements and physical actions.
> The dance must convey a dramatic concept or idea. * * *
> * * * it is not possible to secure copyright protection for a mere dance step or variation as such, apart from a developed choreographic work in which it appears. Ballroom, social, and folk dance steps are not considered copyrightable material.

2. *Fixation of choreography.*—In order for a choreographic work to be copyrighted under the statute, either a copy of the work in unpublished form must be deposited for registration in the Copyright Office,[17] or copies must be published with the required notice of copyright.[18] In either case the work must be represented in some fixed form of "copy" from which the dance movements can be perceived and performed.

Thus, Copyright Office Circular No. 51 says:

> To qualify for registration in Class D, [i.e., as a dramatic or dramatico-musical composition], a choreographic work must meet two basic requirements:
> (*a*) The dance must convey a dramatic concept or idea, and must be complete enough for performance without further development.
> (*b*) The particular movements and physical actions of which the dance consists must be fixed in some sort of legible written form, such as detailed verbal descriptions, dance notation, pictorial or graphic diagrams, or a combination of these.

Some choreographic works have been deposited for registration in the Copyright Office in the form of a textual description or in the Laban system of notation; and in one case, at least, a motion picture was deposited as the fixed form of a choreographic work.[19]

Copyright Office Circular No. 51 goes on to point out that registration may also be made in Class A of "text matter concerning choreography or describing a choreographic work, when published with appropriate statutory notice"; and that "motion pictures which depict ballets and other dance forms may be registered under Class L or M."

Regarding the possibilities just mentioned of securing copyright registration for text matter or for motion pictures in relation to choreography, the following distinctions should be noted.

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[16] 37 C.F.R. chap. II, as amended; 24 Fed. Reg. 4955 (1959).
[17] 17 U.S.C. § 12.
[18] 17 U.S.C. § 10. After publication two copies are to be deposited for registration: 17 U.S.C. § 13. "Publication" denotes the distribution of copies to the public (see 17 U.S.C. § 26). Choreographic works are designed to be performed rather than "read"; and since public performance is not publication (see Ferris v. Frohman, 223 U.S. 424 (1912)), choreographic works will usually be unpublished.
[19] A number of motion pictures deposited for registration as such have contained dance sequences, but these have presumably been intended for exhibition as motion pictures.

A book or article about choreography—for example, a history of the dance or a critical appraisal of a particular dance or style of dancing—may be copyrighted as a literary work, but it would not constitute a dramatic work of choreography. Even a textual description of a dance would not seem to constitute a dramatic work of choreography if the description is so general and lacking in detail that the dance could not be performed therefrom. On the other hand, as indicated in the foregoing quotation from Circular No. 51, a full textual description of the movements of a dramatic dance, sufficiently detailed to serve as directions for its performance, may well constitute the fixed written form of a work of choreography.

A motion picture of a dance shows the dance fully in a fixed "written" form from which it could be reproduced in a performance on the stage or for another motion picture. Motion pictures may, in fact, be used as the medium of recording the dance movements in a fixed form, and an original dramatic dance so fixed would appear to qualify for copyright protection as a work of choreography.[20]

3. *Rights in copyrighted choreographic works.*—Copyrighted works of choreography, being a species of dramatic works, would appear to have protection under the statute similar to that provided for dramatic works.

The statute gives the copyright owner of all classes of copyrighted works the exclusive right "to print, reprint, publish, copy, and vend" the work.[21]

Of the greatest practical importance for works of choreography is the right accorded specially to dramatic works, "to perform or represent [the dramatic work] publicly."[22] It should be observed that this right in dramatic works extends to all public performances, in contrast with the corresponding right of public performance "for profit" in the case of nondramatic musical works [23] and public delivery "for profit" in the case of nondramatic literary works.[24]

It may also be noted that herein lies a vital difference between a choreographic work in the form of a complete record from which the dance movements could be performed, and a textual description of a dance in such general terms that the dance could not be performed therefrom. Copyright in the latter will protect it against public "delivery" for profit, but this refers only to the public reading or recitation of the text.

Also important for works of choreography is the right "to make or procure the making of any transcription or record [of a dramatic work] by or from which * * * it may * * * be exhibited, performed, represented, produced, or reproduced";[25] and this is supplemented by the right "to exhibit, perform, re-present, produce, or reproduce it."[26]

[20] The copyright in a motion picture as such has been held to protect an original story sequence depicted therein against reproduction in another motion picture or in a performance for television. See Universal Pictures Co. v. Harold Lloyd Corp., 162 F. 2d 354 (9th Cir. 1947); Loew's Inc. v. Columbia Broadcasting System, 239 F. 2d 532 (9th Cir. 1956), *aff'd* by an evenly divided court (the division apparently being on another point) in 356 U.S. 43 (1958). By analogy, it can be argued that the copyright in a motion picture containing an original dramatic dance would afford similar protection to the dance.

[21] 17 U.S.C. § 1(a).

[22] 17 U.S.C. § 1(d).

[23] 17 U.S.C. § 1(e).

[24] 17 U.S.C. § 1(c).

[25] 17 U.S.C. § 1(d). This would apply, for example, to the making of a motion picture of a dramatic work.

[26] 17 U.S.C. § 1(d). This supplemental provision, if taken literally, would seem to confer a general right to exhibit, perform, etc. the work itself, which would appear to be repetitious of the rights specified in other provisions and in some respects inconsistent therewith. Presumably it was intended to refer to the use of a "transcription or record" for exhibition, performance, etc.

Other rights accorded by the statute to dramatic works, perhaps of lesser practical importance for choreography, are the right "to convert [a drama] into a novel or other nondramatic work," [27] and the right "to vend any manuscript or record" of an unpublished dramatic work.[28]

III. International Conventions and Foreign Laws

A. INTERNATIONAL CONVENTIONS

Article 2(1) of the Berne Copyright Conventions (1908 and subsequent revisions) includes, in its specification of works to be protected by copyright, "choreographic works and entertainments in dumb show, the acting form of which is fixed in writing or otherwise." The Berne Conventions make no other mention of choreographic works specifically; the rights of authors which may be applicable to choreographic works are specified with reference to dramatic works [29] or to all protected works generally.[30]

Article 3 of the Washington Copyright Convention of 1946 mentions, among the categories of works to be protected, "choreographic works and pantomimes the stage directions of which are fixed in writing or other form." No other mention is made of choreographic works; the rights of authors are provided for in general terms for all protected works (art. 2).

The Universal Copyright Convention mentions "dramatic * * * works" among those to be protected (art. 1); it makes no express mention of choreographic works.

The Buenos Aires Copyright Convention of 1910 names "choreographic * * * compositions" among the categories of protected works (art. 2). The rights of copyright owners are provided for in general terms for all protected works (art. 4).

The United States is not a party to the Berne or Washington Convention. It does adhere to the Universal and Buenos Aires Conventions.

B. FOREIGN LAWS

The copyright statutes of many foreign countries mention "choreographic works" (together with pantomimes) explicitly, usually as a separate category of protected works.[31] In the United Kingdom [32] and the British Commonwealth countries,[33] "dramatic work" is defined as including a "choreographic work or entertainment in dumb show." In a few countries that are parties to the Berne or Washington Conventions,[34] no specific mention is made of choreo-

[27] 17 U.S.C. § 1(b). This would seem to have no practical application to a dance unless it told an original story that could be narrated in nondramatic form.

[28] 17 U.S.C. § 1(d). This was apparently designed to give the copyright owner of an unpublished dramatic work control over the manuscripts or other copies from which the work could be performed. This provision seems to be repetitious of § 1(a).

[29] See Article 11 of the 1948 Brussels Revision, providing for the rights of "public presentation" of dramatic works and "public distribution" of such presentation.

[30] See Article 8, 11 *bis*, 12, 14, of the 1948 Brussels Revision.

[31] *E.g.*, Argentia, Austria, Belgium, Columbia, Finland, France, Germany, Italy, Mexico, The Netherlands, Norway, Portugal. Denmark and Sweden use the term "ballets." Austria defines "choreographic and pantomimic works" as "theatrical works expressed by gestures or other motions of the body." The copyright laws of these and other countries mentioned below are set forth in COPYRIGHT LAWS AND TREATIES OF THE WORLD (published by UNESCO and the Bureau of National Affairs, 1956 with annual supplements).

[32] U.K. Copyright Act, 1956, § 48(1).

[33] *E.g.*, Canadian Copyright Act, REV. STAT. 1952, ch. 55, § 2(g); Indian Copyright Act, 1957, § 2(h).

[34] *E.g.*, Iceland, Japan, Spain (parties to the Berne Convention); Brazil (party to the Washington Convention).

graphic works; perhaps such works are deemed to be protected in those countries (as the Conventions require) as a species of dramatic works.

In many countries (as in the Berne and Washington Conventions) the reference to choreographic works is qualified by the requirement, variously phrased, that "the acting form" (or "the scenic arrangement") must be "fixed in writing or otherwise." [35] Other countries omit this requirement.[36]

In general, the foreign laws protecting choreographic works do not refer specifically to those works in enumerating the rights of copyright owners. Presumably the rights accorded to "dramatic works" are deemed to be applicable to choreographic works.

IV. Bills to Revise the U.S. Law

In the series of bills introduced in Congress between 1924 and 1940 for general revision of the copyright law, choreographic works were expressly mentioned among the enumerated categories of copyrightable works. All of these bills (being particularly designed with a view to U.S. adherence to the Berne Convention) contained the requirement, with variations in language, that choreographic works be fixed in some form from which they could be acted.

Thus, the Dallinger bill,[37] listed:

> Choreographic works and pantomimes, the acting form of which is fixed in writing or otherwise.

The Perkins,[38] Vestal,[39] and Duffy [40] bills and the Sirovich bill of 1936 [41] used the following formula:

> Choreographic works and pantomimes, the scenic arrangement or acting form of which is fixed in writing or otherwise.

The earlier Sirovich bill of 1932,[42] as first introduced listed (in conjunction with dramatic compositions) "written directions for choreographic works and pantomimes"; but this was omitted from the bill as reported out by the House committee, without explanation. The most recent general revision bill, the Thomas (Shotwell) bill,[43] included among protected works:

> Choreographic works and pantomimes, the scenic arrangement *and* acting form of which is fixed in writing.[44]

None of these bills referred specifically to choreographic works in providing for the rights of copyright owners. The rights provided for dramatic works (substantially the same as under the present law) would presumably have applied to choreographic works.

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[35] *E.g.*, in the British Commonwealth countries, Belgium, France, Germany, Italy, Mexico, The Netherlands, Portugal. The United Kingdom Copyright Act, 1956, § 48(1), requires that choreographic works must be "reduced to writing in the form in which the work . . . is to be presented."

[36] *E.g.*, Austria and the Scandinavian countries. The proposed new copyright law for Germany, as drafted by the Federal Ministry of Justice, would delete that requirement in the present German law. The Report accompanying the draft says (as translated): "Fixation is undoubtedly of great practical importance for the protection of works of this type [choreographic works and pantomimes], inasmuch as it would be difficult to prove infringement in the absence thereof. However, especially in regard to these works, it would not be fair to make protection dependent upon fixation."

[37] H.R. 9137, 68th Cong., 1st Sess. § 15(o) (1924).

[38] H.R. 11258, 68th Cong., 2d Sess. § 9(p) (1925).

[39] H.R. 12549, 71st Cong., 3d Sess. § 35(p) (1931).

[40] S. 3047, 74th Cong., 1st Sess. § 4(c) (1935).

[41] H.R. 11420, 74th Cong., 2d Sess. § 5(m) (1936).

[42] H.R. 10976, 72d Cong., 1st Sess. § 3(d) (1932).

[43] S. 3043, 76th Cong., 3d Sess. 15(n) (1940).

[44] Note the emphasized word "and" where earlier bills had used "or".

Choreographic works were not discussed in the hearings on the several bills.

V. Analysis of Basic Issues

Original dances that constitute "dramatic compositions," when fixed in some permanent record from which the dance can be performed, are deemed eligible for protection under the present copyright statute. That dances of this character are appropriate subjects of copyright protection does not seem to be questioned. The questions for consideration are whether the concept of "dramatic compositions" is sufficiently broad to encompass the kinds of choreographic works that should be given copyright protection; whether fixation of a choreographic work, in a form adequate to enable performance of the dance therefrom, is a necessary condition of copyright protection; and whether the protection given to "dramatic" works (i.e., the rights of the copyright owner of such works) is appropriate for choreographic works.

A. COPYRIGHTABLE WORKS OF CHOREOGRAPHY

The first inquiry is what kinds of dances should be given copyright protection, and whether these are embraced within the scope of "dramatic compositions." As a fundamental premise, copyright presupposes an original intellectual creation of authorship.

Mention has been made of the distinction between social dances intended to be executed for the personal enjoyment of the participants, and theatrical or dramatic dances intended to be presented by skilled performers for an audience. The former would generally be too simple to qualify as creative works of authorship; they could hardly be considered "dramatic" in any sense; and the most important right with which copyright in choreography would be concerned—the right of public performance—would have no application. Regarding this last point, social dances are intended to be *executed by* the public, not to be *performed for* the public as audience. It would be far removed from the basic concepts of copyright to give to a person who devises a new series of steps for a social dance the exclusive right to execute those steps in dancing. Social dances (though they may sometimes be included in the popular conception of the term "choreography") should therefore be excluded from copyright protection as regards their performance;[45] such protection should be confined to theatrical or dramatic dances.[46]

Nor would every series of dance movements intended for theatrical performance be a proper subject of copyright protection. The bodily movements to be executed by a performer may be so simple or so stereotyped as to have no substantial element of creative authorship. The ordinary "dance routines" performed in variety shows, where any supposed originality would be negligible, may be cited as examples of theatrical dances for which copyright protection would not be warranted.[47]

[45] A narrative or graphic description of a social dance, as in a book designed to teach the dance, might be copyrighted; but the copyright, while affording protection against the reproduction of the description in its narrative or graphic form, would not extend to the execution of the dance.

[46] The Austrian copyright statute designates the choreographic works protected as "Theatrical works expressed by gestures or other motions of the body (choreographic and pantomimic works)." Act of April 9, 1936, § 2, par. 2.

[47] The observation made in note 45 *supra* would also apply to a narrative or graphic description of dances of this character.

It may not be feasible to define precisely those dances that are proper subject matter for copyright protection. But this is not unique to choreographic works; the same is true of other categories of copyrightable works, including the general category of "dramatic" works. Perhaps this much can be said in broad terms: that to qualify for copyright protection (as regards performance), a choreographic work should constitute an original creation of dance movements to be performed for an audience, conveying some story, theme, or emotional concept.

Choreographic works of this character are typified by ballets.[48] But many "modern" dances, as distinguished from traditional ballets, are no doubt creative works of authorship; and although no "story" may be readily evident in a dance of the "modern" variety, the dance movements are expected to convey some thematic or emotional concept to the audience.[49]

This leads to the question whether the category of "dramatic compositions" in the copyright statute is of sufficient scope to embrace the choreographic works that should be afforded copyright protection. One writer, at least, has expressed the fear that "dramatic compositions" may be thought to include only those choreographic works that tell a story."[50] There is little authority on this point, but there is reason to believe that "dramatic compositions" might include choreographic works that depict a theme or emotion other than a "story" in the literal sense of a sequence of events.

In *Fuller* v. *Bemis*[51] the court held that a dance described by it as "a series of graceful movements, combined with an attractive arrangement of drapery, lights and shadows," conveying "no other idea than that a comely woman is illustrating the poetry of motion in a singularly graceful fashion" was not dramatic. In the course of its opinion the court said: "It is essential to [a dramatic] composition that it should tell some story." But this is followed immediately by the explanation: "The plot may be simple. It may be but the narrative or representation of a single transaction; but it must repeat or mimic some action, speech, emotion, passion, or character, real or imaginary." Thus, the court seems to have used "story" in a broad sense. Later the court characterized the dance in that case as "telling no story, portraying no character, depicting no emotion," thereby intimating that a dance which did any of these things might be considered dramatic.[52]

In *Kalem Co.* v. *Harper Bros.*,[53] Justice Holmes said that action alone, as in pantomime, may be dramatic since it "can tell a story, display all the most vivid relations between men, and depict every kind of human emotion."

The Copyright Office Regulations[54] and its Circular No. 51[55] indicate that copyright registration may be made for a choreographic

[48] The term "ballets" is used to designate the choreographic works protected in the copyright statutes of Denmark (Law No. 149 of April 26, 1933, § 2) and Sweden (Law No. 381 of May 30, 1919, § 1).

[49] Such dances may be comparable, in this respect, to an "abstract" or "non-representational" painting or sculpture, or to music which is inherently abstract. *Cf.* Balanchine, *Marginal Notes on the Dance*, in SORELL, THE DANCE HAS MANY FACES, 38-39 (1951).

[50] Mirrell, *op. cit.* note 7 *supra*, at 804-809. See also WEIL, COPYRIGHT LAW 76-82 (1917) and BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 82-85 (1944), indicating that a story is an essential element of a dramatic composition.

[51] See note 14 *supra*.

[52] Mirrell, *op. cit.* note 7 *supra*, at 808-809, suggests that the court's denial of protection was influenced by the "immoral content" of the particular dance involved, according to the standard of the time (1892).

[53] See note 9 *supra*.

[54] See note 16 *supra*.

[55] See p. 96 *supra*.

work, as a "dramatic composition," if it "tells a story, develops a character, or expresses a theme or emotion."

This brings us to the question of what the copyright statute should provide to delimit appropriately the choreographic works that should be given protection thereunder. Several approaches to this question may be suggested.

One approach is that which has evolved under the present law: that the protection of "dramatic compositions" suffices to protect choreographic works within appropriate limits. This approach has the advantage of placing choreographic works in an established framework as to other provisions of the statute, particularly in regard to the right of the copyright owner.[56] It also serves to give some definition to copyrightable choreography, at least by excluding social dances and simple noncreative "dance routines" which would not be "dramatic." This approach, however, does not resolve any doubt that may exist as to whether a choreographic work that does not "tell a story" would be afforded protection as to its performance.

A second approach is that used in many foreign laws and in most of the prior revision bills: naming "choreographic works" in the statute as a separate category of copyrightable works. It might be argued (perhaps sentimentally) that choreography is a sufficiently important and distinct form of art to merit specific mention; and that the term "choreographic works" would be fairly well understood as meaning only theatrical dances [57] of creative authorship. This approach might be thought to avoid any question as to whether a choreographic work must "tell a story" in order to be protected as to its performance; but it also seems possible that unless the term "choreographic works" were further defined, it might be construed so broadly as to include rather simple dance movements having no dramatic quality and a minimum of creativity. It is worth recalling that in the foreign laws naming "choreographic works" as a separate category, the provisions specifying the rights of authors generally refer to "dramatic works" but not to "choreographic works"; apparently the former is deemed to include the latter.

Another approach, combining the first two, is exemplified by the copyright statutes of the United Kingdom and British Commonwealth countries: [58] naming "choreographic works" as being included in the general category of "dramatic works." This would give express recognition to "choreographic works" while also defining that term to the extent of requiring that such works be dramatic in character, and placing such works in an established framework as to the rights accorded.

B. FIXATION OF CHOREOGRAPHY

The provision in the Federal Constitution empowering Congress to enact copyright legislation refers to the "writings" of authors.[59] It is doubtful, at best, whether the Federal statute could extend

[56] This assumes that the rights accorded to "dramatic" works are appropriate for choreographic works. This will be discussed below at p. 103.

[57] The limitation to theatrical dances may be inherent in the term "choreographic works." Such limitation also seems to be implied in the provision in many foreign laws for the fixation of the "acting form" or "scenic arrangement."

[58] See notes 32 and 33, *supra*.

[59] Art. I, Section 8, clause 8. "Writings" may have a dual meaning: as relating to the character of an author's creations, and as relating to the physical form in which such creations appear. It is pertinent here in the second sense.

copyright protection to a work presented only in a performance and not recorded in some tangible form of "writing."[60]

Moreover, in the absence of some tangible record of the dance movements, it would be extremely difficult to determine the question of infringement as between the dances presented in two different performances. Perhaps for this reason, most countries (including some that give copyright protection to unrecorded "oral" works such as speeches) require that choreographic works, to obtain copyright protection, must be fixed in some tangible record.

Fixation of a choreographic work is now possible in several ways: by a detailed textual description of the dance movements (which may be laborious and perhaps not entirely reliable), by dance notation (such as the Laban system), or by making a motion picture of a performance of the dance.

Another aspect of fixation is its adequacy to reveal the movements of the dance in sufficient detail to permit the dance to be performed therefrom. Thus, many foreign laws and most of the prior revision bills (following the Berne Conventions) have required that the fixation show the choreographic work in "acting form." Even without such a specification, this degree of completeness would seem to be essential for works that are to be performed. Our present law contains no such specification for dramatic works but it is understood that a "dramatic composition" must be in a form capable of performance.[61]

Fixation in a tangible form may be particularly inconvenient or costly for choreography, and there may be grounds for sympathy with a plea that the creator of a dance as presented in a performance, without a tangible fixation, should be protected against reproduction of the performance by others.[62] But the Constitution seems to preclude protection in this situation under the copyright statute. Whether such protection might be granted on some other legal basis is beyond the scope of this study. Perhaps the most that can be done under the copyright statute is to recognize all possible forms of fixation (including a motion picture) as a "writing" of the choreography.

C. RIGHTS IN CHOREOGRAPHIC WORKS

As noted earlier, in the foreign laws naming "choreographic works" as a category of copyrightable works, the rights accorded to them are not separately specified but are apparently the rights specified for dramatic works generally. This is true also of the prior revision bills. The rights to be accorded to choreographic works seem clearly to be the same as those accorded to dramatic compositions generally. In summary, these rights under the present statute (sec. 1) are: to make and distribute copies of the work (i.e., of the "writing" in which the work is fixed); to transform the work into another version; to perform the work publicly; and to make and use transcriptions or records of the work from which it can be reproduced or performed.

Parallel rights are accorded also to nondramatic literary and musical works, but they apply differently according to the differences

[60] See Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503 (1945).

[61] A narration of the story for a play, for example, being inadequate for performance, might be protected as a nondramatic literary work, but the protection would relate to its "public delivery," i.e., a public reading or recitation of the narration, as distinguished from the "public performance" of a play.

[62] A need for such protection is indicated by AGNES DE MILLE, AND PROMENADE HOME, chap. XV (1956).

in the inherent nature of the several kinds of works and in the varying modes of their utilization. Thus, as regards the right of transformation into another version, the present statute refers to the "translation" of a literary work, the "dramatization" of a nondramatic work, the "conversion" of a dramatic work into a "novel or other nondramatic work," and the "arrangement" or "adaptation" of a musical work (sec. 1(b)). Nondramatic literary works are protected against their "delivery" in public "for profit" (sec. 1(c)), dramatic works against their "performance" or "representation" in public (sec. 1(d)), and nondramatic musical works against their "performance" in public "for profit" (sec. 1(e)).[63] The "transcription or record" of a nondramatic literary or musical work[64] may be made in the form of a sound recording; in the case of a dramatic work it may also take the form of a sound recording in part (in regard to the literary and musical content of the work) but the "transcription or record" of the action requires visual recording as in a motion picture.

Insofar as the rights differ for these several kinds of works, choreographic works seem clearly to fit into the pattern of dramatic works. Of prime importance is the fact that the "for profit" limitation on the right of public performance in nondramatic musical works, and on the right of public delivery in nondramatic literary works, is not imposed on the right of public performance in dramatic works. The reasons underlying this—that public performance is virtually the only source of revenue for the author of a dramatic work, and that those attending any public performance of a dramatic work may be less likely to pay to attend another performance[65]—would seem to be applicable to choreographic works.

VI. Summary of Issues

The foregoing analysis would appear to sustain the following propositions: that choreographic works, insofar as they represent original creations of authorship by which a story, theme, or emotional concept is conveyed to an audience, are proper subjects of copyright protection in regard to their performance; that to secure such protection, they must be fixed in some tangible form in sufficient detail to be capable of performance therefrom; and that the rights to be accorded to the copyright owners of such works are the same as those accorded to dramatic works generally.

If these propositions are accepted, the issues to be considered in the treatment of choreographic works in a revision of the copyright statute may be narrowed down to the following questions as to the appropriate designation of such works in the statute.

1. Should "choreographic works" be named specifically in the statute among the categories of copyrightable works?
2. If so, should they be named as a species of dramatic compositions or as a separate category?
3. If "choreographic works" are named in the statute, should that term be further defined? If so, how defined?

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[63] The performance right for musical works is subject to a special exemption of performances by means of coin-operated machines in a place to which no admission fee is charged. 17 U.S.C. § 1(e).

[64] The recording right for musical works is subject to a compulsory license as to recordings of the work for reproduction on mechanical instruments such as phonographs. 17 U.S.C. § 1(e). For a full discussion of this provision see Henn, *The Compulsory License Provisions of the U.S. Copyright Law* [Study No. 5 in the present series of committee prints].

[65] See Varmer, *Limitations on Performing Rights* [Study No. 15 in the present series of committee prints].

COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT OFFICE ON COPYRIGHT IN CHOREOGRAPHIC WORKS

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COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT OFFICE ON COPYRIGHT IN CHOREOGRAPHIC WORKS

Walter J. Derenberg

OCTOBER 19, 1959.

I have just received and read with much interest the study by Borge Varmer on "Copyright in Choreographic Works." In my opinion, the proposal which was found in most of the earlier revision bills and, more particularly, in the Thomas bill of 1940, would be entirely satisfactory. In other words, it would be my recommendation that the proposed copyright revision bill should include, among the protected works, the following provision:

"Choreographic works and pantomimes, the scenic arrangement and acting form of which is fixed in writing."

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WALTER J. DERENBERG.

John Schulman

OCTOBER 23, 1959.

I have only a brief comment on the study made by Borge Varmer concerning "Copyright in Choreographic Works."

To the extent that a choreographic work is reduced to tangible form, it should receive protection under a copyright statute as a writing of an author. Obviously, the fact that the description of a dance may be set down in symbols recognized by choreographers, rather than in conventional language, does not make it any less a writing than a song written in musical notation or a photograph. Since they are in fact writings of authors, choreographic works should be protected whether they are "dramatic" or not.

The primary problem is not whether these works should be protected, but the extent of protection which should be accorded, i.e., what exclusive rights should be granted them by the statute. These works should unquestionably be protected against reproduction in copies from which they can be read or visually perceived. On this score I think there can be little controversy. However, many serious questions arise if the proposal be that choreographic works should be protected against "performance."

Before this facet can be considered, it seems to me that information should be obtained from choreographers, dance directors and others, concerning the feasibility of providing any such protection. The answer does not depend on legal theory as much as it does upon the techniques and the practical problems involved.

I have only a layman's meager understanding of dancing techniques. Accordingly, I can perceive the possibility of granting exclusive rights to perform a ballet which tells a story in movement instead of words. The principle would be the same as that applicable to any other dramatic work. But the question is whether dance figures and patterns are so well defined that anything less than a dramatic presentation could be deemed to be an *infringement* of a prior *original* choreographic work.

It is in these elements of originality and infringement that I visualize the problems. For example, during a visit to India I had the occasion to see dancing which was so ritualistic and stylized that there could be no doubt that the various dancers and groups followed set and identical patterns. However, these patterns, I am told, were traditional and accordingly no choreographer could claim originality for them. The question would then arise concerning the amount of variations which would provide originality.

In recent years, various patterns of dancing have appeared upon the living stage and in motion pictures. Some of them seem, to uninitiated persons like myself, to be very much the same. The essential question is whether these

dances represent only styles or trends, or whether the individual dances are sufficiently identifiable entities to justify a claim to originality, and to make possible a determination of infringement.

The question of identification, I should judge, would present even more difficulty in patterns of ballroom dancing.

The nub of the question is whether a choreographic work or actual performance constitutes an identifiable entity sufficiently defined and delinated to determine its originality on the one hand and its infringement on the other. These are matters on which we should obtain information and education from persons skilled in the art.

Of course, if an exclusive right in the performance of a choreographic work were to be provided, it should be limited, as is music and literature, to public performance for profit. This, however, is only one of the lesser aspects of the problem.

May I suggest, therefore, that the study made by Borge Varmer be supplemented by thorough investigation of the nonlegal aspects of the subject.

JOHN SCHULMAN.

Agnes George DeMille

NOVEMBER 10, 1959.

* * * * * * *

The findings you sent me are of great importance, but I think Mr. Varmer together with all the learned legal experts he quotes make a basic mistake in point of view. If any attempt is made to define choreography in terms of, or classify it with, dramatic literature, the project of copyright [for] dance composition is doomed to failure through inexactness.

Choreography is neither drama nor storytelling. It is a separate art. It is an arrangement in time-space, using human bodies as its unit of design. It may or may not be dramatic or tell a story. In the same way that some music tells a story, or fits a "program," some dances tell stories—but the greater part of music does not, and the greater part of dancing does not. Originality consists in the arrangements of steps and gestures in patterns; the story may or may not be unique. I think the confusion with story and drama has come because an outline or synopsis of plot has been easy to write down and file; up to very recently an exact definition of steps has been impossible.

I think further there is no profit in trying to define art or creative choreography as opposed to ballroom or folk steps in respect to their difficulty, simplicity or familiarity. The exact problems pertain to music. There is in both fields an enormous body of inherited material, some simple and most familiar; in music a melody or composition can be copyrighted if [a certain number of] bars of music are unique and can be proven to be so. In this way arrangements or transcriptions of folk material can be copyrighted as original with the composer. In the same manner, all inherited folk steps, classic ballet technique, basic tap devices, are public domain. But their combination, good or bad, can be deemed to be original. It is not the province of the law to judge whether a dance, even the most trite and commercial, has creative original value. No one could think the majority of tunes of tin-pan alley creative achievements. Such as they are, however, they can be protected. The protection is based on a time measurement—not more than eight bars can be duplicated without infringing authorship rights. An equivalent measurement could be worked out for choreography. I see no reason why the inventor of special ballroom steps or patterns cannot avail himself of these rights if he so chooses.

Eventually all good creations, in whole or in part, go into public domain. But that does not mean that the choreographer alone of all creators should not reap while he lives the rewards of his talents and efforts.

The only two possible means of making a tangible graph are the Labanotation and films. Films record performance and will make clear style and dynamics. They are, of course, extremely perishable.

The making of films is at present blocked by various union requirements; but, with the formation of the Choreographers' Society, we have confidence that these difficulties can be compromised and resolved. In any case, they should have no bearing on the formulating of a law. Give us some chance to protect our basic rights and we will settle all other difficulties ourselves.

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AGNES GEORGE DEMILLE.

Agnes George DeMille

NOVEMBER 23, 1959.

In answer to your letter, let me make it clear that what the choreographers want is not protection against the performance of their dances, but performance for pay. If new dance steps are invented for social or ballroom dancing, naturally people have every right to copy these and perform them for their own amusement, just as people can whistle tunes without any tax, but if an exhibition piece of ballroom steps is devised and this combination is copied and performed for money, I think some infringement of rights has taken place. What I am trying to say is that I think the copyright must be based on the principle and not on the quality or type of performance. The moment money is received for dancing, the author of the dance steps should receive a royalty. This principle, I believe, applies to all the arts.

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AGNES GEORGE DEMILLE.

John Martin

NOVEMBER 30, 1959.

Basically the matter of copyright in choreographic works seems to me a reasonably simple one, in no way justifying the periodic agitations that it has caused over the past few years.

The source of the trouble lies in the inertias of "literary" thinking, which finds it difficult to conceive of any creative work that is unverbalizable. Most of the confusion disappears as soon as we separate the dance in our thinking from any inevitable connotations of "drama." The choreographic field cannot by any possible manipulation be forced into the category of dramatic works, any more than the field of music can be.

Actually its analogy with music is a far truer one. In music we have not only operas, which tell dramatic stories, and songs, which publish specific states of emotional activity that can fairly be considered as dramatic, but also completely formal abstractions—melodic, harmonic, contrapuntal—symphonies, concerti, divertimenti, suites, quartets, quintets, fugues, sonatas, etudes, etc. Parallel categories exist among dance compositions, from story ballets and dramatic solos to pure abstractions in all dimensions, with or without music. The analogy holds in all levels of "quality," classic or popular.

Since the dance employs a distinctive medium, that of bodily movement, it demands also a category of its own in the field of copyright, if only because no other category's techniques of recording are applicable to its requirements.

Clearly there must be some definitive recording of any specific work in which rights are to be established. Words are as inadequate for the purpose of choreographic recording as they would be for the recording of a Bach fugue. A filmed recording of a dance composition is no more acceptable than a phonographic recording of a musical composition would be. For one thing, it is a recording, not of the composition itself, but of a specific performance of it, which is inevitably an interpretation (sometimes even an adaptation because of the limitation of the individual performers) and consequently may depart radically from the choreographer's (as of the musical composer's) intent. For another thing, it lacks visible definition, especially in the case of an ensemble composition, in which groups of figures move in complex design, always in three dimensional space, and accordingly in front of each other much of the time.

It is inconceivable for a director to have to reproduce a choreographic ensemble composition from a film recording of it as it would be for an orchestral conductor to have to reproduce a symphony by listening, alone with his instrumentalists, to a phonographic recording, each picking out his own instrument and memorizing what he hears as he goes along. Such a procedure is manifestly absured.

At present there is a fairly well established system of dance notation, comparable to the established system of musical notation, called Labanotation, employed by representative artists in this country and in certain European countries. There is another system, the Benesh, of recent invention, used chiefly by the Royal Ballet of London and in some outlying areas of the British Commonwealth under the active promotion of Government agencies. There are also several old systems, not very wieldy nowadays but still quite legible. No major difficulty exists, therefore, in this respect. A choreographer who declines to employ some one of these systems would be in much the same position, as

far as copyright goes, as a musician who declined to use musical notation, or a poet who refused to learn to read and write.

I see no reason why any piece of choreographic invention, notated in any recognized system (that is, any system that is more than the personal "shorthand" of the individual inventor) should not be copyrightable in the specific category of a choreographic work, irrespective of its subject matter, its style, its branch of the art—ballot, modern, tap, soft shoe, musical comedy, acrobatic, "adagio", etc.

I do not see how it can be consistently copyrighted in any other category since it fits into no other.

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JOHN MARTIN.

Frank C. Barber

NOVEMBER 1959.

The following comments on the draft study on "Copyright in Choreographic Works," are entirely personal and do not reflect the opinion of our legal department or any member of the staff of Music Publishers Holding Corp. They are based on my years of experience in the dance field; 15 years with MPHC in matters of copyright procedure; 5 years in undertaking this assignment, selecting, developing, and publishing Labanotation scores and instruction books. MPHC is the first commercial publishing company taking an active interest in developing a catalog of Labanotation materials, broad in scope and far reaching into various fields of dance.

I shall first comment on the three propositions outlined on page 104 of the draft.

* * * * * * *

Proposition 1

I believe the term "choreographic works" should be specifically named in the statute but not as a separate category of copyrightable works, as per my exhibit A.

Proposition 2

I believe choreographic works can be named as a species of dramatic works; provided that—provisions are made for broad consideration of the contents of such works, in order that they may become acceptable under (5d).

Proposition 3

I believe that a broad definition is necessary containing the following thoughts in some form (from p. 96 of the draft—Circular No. 51—with additions).

(*a*) The choreographic work must convey a dramatic concept or idea, and/or, stimulate emotional response to its patterns and rhythm, even though the ideas are not obvious, and must be complete enough for performance without further development.

(*b*) The particular movements and physical actions of which the choreographic work consists must be fixed in some sort of legible written form, such as detailed verbal descriptions, dance notation, pictorial or graphic diagrams, or a combination of these.

Furthermore, re:

Proposition 3

By eliminating the word "dance" from (*a*) and (*b*) of Circular No. 51, there will be no question of acceptance of applications for registration, and/or protection of performance rights, of ballroom, social dance, folk dance, or just dance steps, which certainly will not qualify as "choreographic works," and which are primarily created, developed, and performed by the public at large.

I would not like to see any legislation passed by which choreographers, in order to obtain protection under (5d), would be obliged to limit their creative imaginations and artistic talents to the development of dramatizations of story material. We would be denied many fine compositions in which no amount of word description could adequately determine to what extent, if any, a work would cause "stimulation of emotional responses" when being performed. I am thinking of certain deposits of Labanotation scores which do not contain a descriptive plot or story in words, but result in truly dramatic compositions when performed. A representative example is "Symphony in C" by George Balanchine.

EXHIBIT A

The following is quoted from the text of United States Code, Title 17—"Copyrights," as it stands at the present time. I have inserted additional words [emphasized] which I believe, if accepted, will be beneficial to all concerned.

"Section 1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS

"Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

"(a) To print, reprint, publish, copy, and vend the copyrighted work;

* * * * * * *

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work *or, if it be a choreographic work* and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription of record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever; and

"(e) To perform the copyrighted work publicly for profit if it be a musical composition, and*/or a choreographic work;* for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: * * *"

* * * * * * *

FRANK C. BARBER

Lincoln Kirstein

DECEMBER 4, 1959.

I have read with interest Mr. Borge Varmer's draft on "Copyright in Choreographic Works," which seems to be a well-reasoned and rational attempt to tackle a very complex subject. However, I have a variety of basic objections which are not very constructive, and which are the results of 25 years of experience in this highly specialized field.

As I understand it, the law of copyright is intended to protect the authors of choreographic works. To my knowledge, there are not half a dozen choreographers in the world actually capable of reproducing works which they have not themselves designed. It is true that some systems of notation have been advanced but the knowledge taken to read them and put them to practical use is another inhibition against plagarism or theft direct.

Since choreography does not have a generally legible language, since even ballet masters forget their own works within a few years, and since the actual available or useful repertory is dead of its own exhaustion every decade, I see no practical advantage in attempts at protection. In Europe, the Society of Authors accepts brief "descriptions" of ballets as evidence of ownership and as base of claim for royalties; having composed some of these "descriptions," I know how feckless these are, except as simple registry of *titles* of works.

There are not two choreographers to a generation whose works are of a quality to be stolen from. Nothing can prevent dancers or observers from taking parts of these works and recombining them into new works. The nearest comparison is the conscious or unconscious reuse of new symphonic musical works. If Stravinsky could collect on his burglars, he would be a rich man indeed.

Also, a ballet, or choreographic composition is very often altered from season to season, sometimes radically, and although the name remains the same, the choreographer will utilize changes in the cast, new dancers to their advantage. Hence, it can hardly be established in a court of law what is the real original piece, since its inventor is not sure. To notate a ballet is so expensive (20 minutes costs about $1,200) that when it is done, it is not against theft, but only to enable its author to recall it for himself. If he can't recall it, it's unlikely anyone else can in its integrity. Besides, it's not worth it.

Increasingly, ballets fail to tell stories. They are about the dance itself, just as symphonic music is about sound. Some critics attach programs of the "March of Fate" or the "Triumph of Love" to a piece but this is merely a point of departure to their prose-poems and has little to do with the ballet, itself.

I am speaking in general about the serious classic dance in a repertory theater. Agnes De Mille makes her complaints against commercial exploitation of work she did in the speculative, noninstitutional Broadway theater, which is a separate problem. However, it does not pertain to the dance, but to her rights as a director of dancing, similar to a director of stage action, for which she could have obtained royalties, had she thought of it at the time, or had her reputation, before "Oklahoma" was first produced warranted her commanding such a contract, which it did not. At the present, any commercial choreographer, like De Mille, is guaranteed a weekly percentage of the gross of a show, if they can convince the producer they are worth it; this has nothing to do with the protection of the actual steps, which are not useful to anybody else, except out of context. It is true that certain choreographers are inventive and do originate certain combinations, but so do musicians invent sound and rhythms, but they cannot reserve them for their unique use, except in the context of a given use, as in a symphony.

I would say, as to your summary (p. 104):

1. Choreographic works are not, essentially or realistically, copyrightable, except by devices, such as those employed by the Société des Auteurs, which are meretricious and would not stand in a court of law.
2. Ballets need not be "dramatic"; if "abstract," or pure formalism, or if they are partly dramatic and partly abstract, what do you call them?
3. This is the 64-cent question; definition, along these lines is a parlor-game, like another; less interesting than chess and less useful.

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LINCOLN KIRSTEIN.

Hanya Holm

JANUARY 2, 1960.

I received your letter of November 12, 1959, and have given it careful consideration. However, I find it very difficult to discuss the problem in a letter. I would rather have a talk with the person in charge, e.g., Mr. Varmer or a representative of his. Nevertheless, I am sending you now the answer to "Summary of Issues" on page 104.

I accept the propositions as outlined in the aforementioned summary.

In answer to the questions:

1. I agree that "choreographic works" be named specifically in the statute among the categories of copyrightable works.
2. I feel that they should be named as a separate category rather than as a species of dramatic compositions.
3. At the moment I cannot suggest a better name than "choreographic works." This category would allow a variety of definements; such as:

Dramatic concert pieces.
Lyric-dramatic concert pieces.
Satirical concert pieces.
Dance in operas, in musical comedies, in revues.

I realize that the issue is of greatest importance and I hope that a protective law can be worked out.

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HANYA HOLM.

Anatole Chujoy

JANUARY 18, 1960.

The following are my comments on Borge Varmer's study, "Copyright in Choreographic Works."

The study of Mr. Borge Varmer on "Copyright in Choreographic Works" is of admirable completeness and his "Summary of the Issues" leaves little to be added. There are only one or two points on which I should like to comment.

Mr. Varmer is on dangerous ground when he says in the "Analysis of Basic Issues" (p. 100) that "the ordinary 'dance routines' performed in variety shows * * * may be cited as examples of theatrical dances for which copyright protection would not be warranted."

What is an "ordinary dance routine"? "Dance routine" is an accepted term for a "word description" of a dance. That some or most dances described in this manner do not belong to the category of great art, or art at all, does not make the term "dance routine" an invalid manner of description of dance works. Michael Fokine's "The Dying Swan" has been described by its late choreographer in words, i.e., written out as a "dance routine"; would the work be therefore unacceptable or unwarranted for copyright? The fact that Mr. Varmer uses the term "dance routine" in an inexact manner testifies to the term's ambiguity. Therefore I should suggest that its use as a limiting condition be dropped.

As to the general artistic quality of "dance routines," it will be found upon examination that many choreographic works recorded in dance notation, word description, or through the medium of motion pictures, are not worthy of consideration as works of art or craftsmanship. This, however, does not mean that their copyright protection is unwarranted. I do not think that the Government should take it upon itself to limit copyright privileges only to "worthy," or "good," or "talented" dance compositions, as it does not limit them in other forms of the arts or crafts. Who will say what is worthy, good, or ordinary?

The problem of storytelling or dramatic qualifications of a dance work submitted for copyright is a serious one, albeit antiquated. A quarter of a century ago a ballet without a story was an exception, today it is quite often the prevailing fare, e.g., most ballets in the repertoire of the New York City Ballet. These works, loosely called abstract ballets (can a ballet danced by men and women be called abstract?) are plotless or storyless. They are not "conveying some story, theme, or emotional concept" but are in most cases conveying or reflecting the structure of the music and only less often the mood of the music, or perhaps more properly, the mood which the music suggests to the choreographer, and which may not at all be the same mood that motivated the composer in writing the musical composition to which the ballet was staged or which the composer had intended to project to the audience.

Therefore, in my opinion, "structure of the music" and "mood of the music" should be included among the qualifications of a copyrightable choreographic work.

In response to the questions in the "Summary of Issues," the following is my opinion:

1. "Choreographic works" should be specifically named in the statute among the categories of copyrightable works.
2. They should be named as a separate category.
3. The term "choreographic works" should be defined as done by Mr. Varmer in the "Summary" with the addition of the words "structure of the music and mood of the music," to read: " * * * that choreographic works, insofar as they represent original creations of authorship by which a story, theme, structure or mood of the music, or emotional concept is conveyed to the audience, are proper subjects of copyright protection in regard to their performance; * * * "

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ANATOLE CHUJOY.

Lucile B. Nathanson

FEBRUARY 10, 1960.

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I am strongly in favor of copyrighting of choreographic works because the neglect of the protection of choreographers has harmed them financially and has prevented them from taking their proper place in the theatre hierarchy. I further believe that the recording of the choreographic works is a necessity—either through notation or film. The thorny problem from which all other points devolve is the definition of a choreographic work. I feel inadequate to tackle the problem in a way that will be legally feasible but will attempt it nevertheless. There is a major element to be taken into consideration of a definition, that is the development in all contemporary art forms of the abstract and nonobjective approach to art creations which do not necessarily *convey* an idea or feeling but may deal with elements of "pure" form or of "pure" design.

In dance, the choreography of Alwin Nikolais for the Steve Allen Show on television or most of George Balanchine's ballets which do not tell a story and often seem not concerned with a "mood" but are examples of the engineering movement in an original manner, are examples of abstract forms.

These next remarks relate to specific sections of the material in "Copyright in Choreographic Works."

1. On page 102, paragraph 3, line 13—Who is to be the judge of whether a work has a minimum of creativity?
2. In answer to the questions on page 104—

Should choregraphic works be named specifically?—an emphatic yes.
Should they be a separate category?—yes.

The only way to protect choreographers and encourage the reproduction of their works is by such protection. Though both drama and dance are performed on a stage they are two distinct arts—dance takes in all the complex apparatus of the stage, combines music, decor, costuming, scenery, lighting, etc., with the choreographer's score which is developed in three dimensions of space, time and dynamics. Thomas Munro in "The Arts and Their Interrelation" (Liberal Art Press, New York, 1951) on page 500 discusses the differences between dramatic composition and dance composition.

Definition of choreographic works—they are designed to be danced by the human body through a story, theme, mood, quality, emotional concept, or through the abstract manipulation of the form of dance—in time, space, and dynamics.

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LUCILE B. NATHANSON.

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