Choreography and Copyright

A Complex Pas De Deux

By Michelle L. Knight

Choreography has trod a difficult road to copyright protection. Historically, choreographic works have been passed along through the memories of dancers and choreographers. In part because of this intangibility, neither federal copyright law nor common law traditionally protected choreographic works.

Early federal copyright laws did not explicitly protect choreographic works. Choreographers attempting protection were forced to fit their work into a designated protectable category — "dramatic compositions" — first protected under the Copyright Act Amendment of 1856.[1] Fitting into this category imposed two difficult requirements. First, like dramatic compositions, courts required the choreographic work to tell a story.[2] Second, courts used the constitutional requirement to "promote the Progress of Science and the useful Arts"[3] as an opportunity to review artistic merit, disallowing protection to immoral works.[4]

The Copyright Act of 1909[5] did little to change these requirements. "Dances" were excluded from the dramatic compositions category.[6] Nonetheless, some early registrations happened after a revision to regulations in 1948 added "pantomimes" and "ballets" as works that could be registered as dramatic or dramatico-musical productions under § 5(d).[7] Hanya Holm registered the choreography for the Cole Porter musical "Kiss Me, Kate" in 1952.[8] Ruth Page registered the written instructions for performing her "Beethoven Sonata" as a "published book" in 1953.[9] George Balanchine succeeded in registering his "Symphony in C" sometime before 1961.[10]

Despite these successes, most choreographers eschewed registration and thus potentially protected their works by common law. Namely, rights of authors existed before passage of the first Copyright Act, and subsequent acts reserved those rights to authors who did not publish their work.[11] In theory, most choreographic works could retain such protection because a public performance alone was not considered publication.[12] In practice, however, common-law protection was effectively denied to choreographic works based on court precedents that imposed similar requirements to those of federal registration. For example, some courts required that the work must not be immoral.[13] Further, while not universal, some courts required a work to be in tangible form to claim common-law copyright,[14] presenting an almost insurmountable restriction for protection of choreographic works.

For these reasons, neither statutory nor common-law copyright protected most choreographic works. The dance community developed its own protective custom resulting from its evolution as a close-knit group of artists based primarily in New York.[15] With some exceptions, artists spent their careers in regional dance troupes attempting to break into the New York market and once completing a career there, retired to the regional troupes while maintaining New York connections.[16]

Dance community custom traditionally encompassed protections based on the choreographer's interests in the rights of attribution and integrity, also referred to as moral rights. Choreographic credit was given even if the work underwent many changes and revisions.[17] Further, companies regularly sought permission from the choreographer to perform a work, regardless of its ownership.[18] Permission generally resulted in a contract for performance rights that provided integrity rights for the choreographer, such as teaching and guiding a troupe through the first performance,[19] maintaining creative control to revise the work while under contract,[20] and the right of withdrawal of the work if the troupe no longer proved capable of a competent performance or if the troupe ended its involvement with an individual, such as the artistic director or the choreographer's protégé.[21]

Although this custom would appear to protect choreographic works, its utility was limited generally to choreographers working within the New York community.[22] For those outside the community, contract terms have been generally less favorable than those described above.[23] The relatively few choreographers working outside the community were treated

At a Glance

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as independent contractors with the implication that choreographic copyright was conveyed to the hiring party.[24] Even within the community, contractual protections have been granted only to guest choreographers with a certain level of bargaining power.[25] Further, because many dance troupes developed as so-called "one-choreographer companies," their choreographers often work without contracts.[26] While receiving customary rights as a matter of course, disputes could place choreographers at a disadvantage.[27]

These limitations in custom resulted in minimal problems for choreographers seeking to protect their work through the early years of dance. Over time, however, larger and more decentralized audiences and larger numbers of choreographers working outside the traditional community (e.g., in film and television)[28] amplified the holes in the protection of choreographic works.

Perhaps based in part on these changes, the Copyright Act of 1976 added for the first time explicit protection for choreographic works.[29] However, the act omitted a definition for such works. The legislative history indicates that the term "choreographic works" has a "fairly settled meaning [and does] not include social dance steps and simple routines."[30] This lack of definition encouraged early commentators to argue that the scope of choreographic works could extend to, for example, routine-oriented sports[31] and circus and marching band performances.[32] Subsequent guidance has narrowed what was thought may be a choreographic work, requiring a human performance[33] and omitting non-expressive movements such as "exercise routines, aerobic dances, yoga positions, and the like" and "athletic activities or competitive maneuvers including football plays, slam dunking maneuvers, and skateboarding or snowboarding."[34]

Initially, the act was not widely adopted by choreographers (e.g., in fiscal year 1980, only 63 of nearly 465,000 registered works were choreographic pieces or pantomimes). While the likely result of many factors, one factor doubtless was the requirement that the work be "fixed in any tangible medium of expression."[35] Historically, and even recently, some companies relied on the memory of a regisseur — a dancer serving as a living library of choreography.[36] Since at least the 15th century, choreographers attempted to reduce dance movements to a tangible form.[37] It was not until 1928 that the first widely used notation system, Labanotation, was introduced.[38] Later, Benesh notation was introduced solely for ballet.[39] While accurate,[40] these systems have been, and largely remain, too expensive and time consuming for most dance companies.[41] Videotaping was historically disfavored at least in part due to its limitations such as an inability to differentiate the choreographic work from the performance, including performance errors.[42] However, improvements in technology, including computers, allow choreographers to create and demonstrate their work in new ways.[43]

While not initially considered a factor in the decision of whether to register a choreographic work because a work

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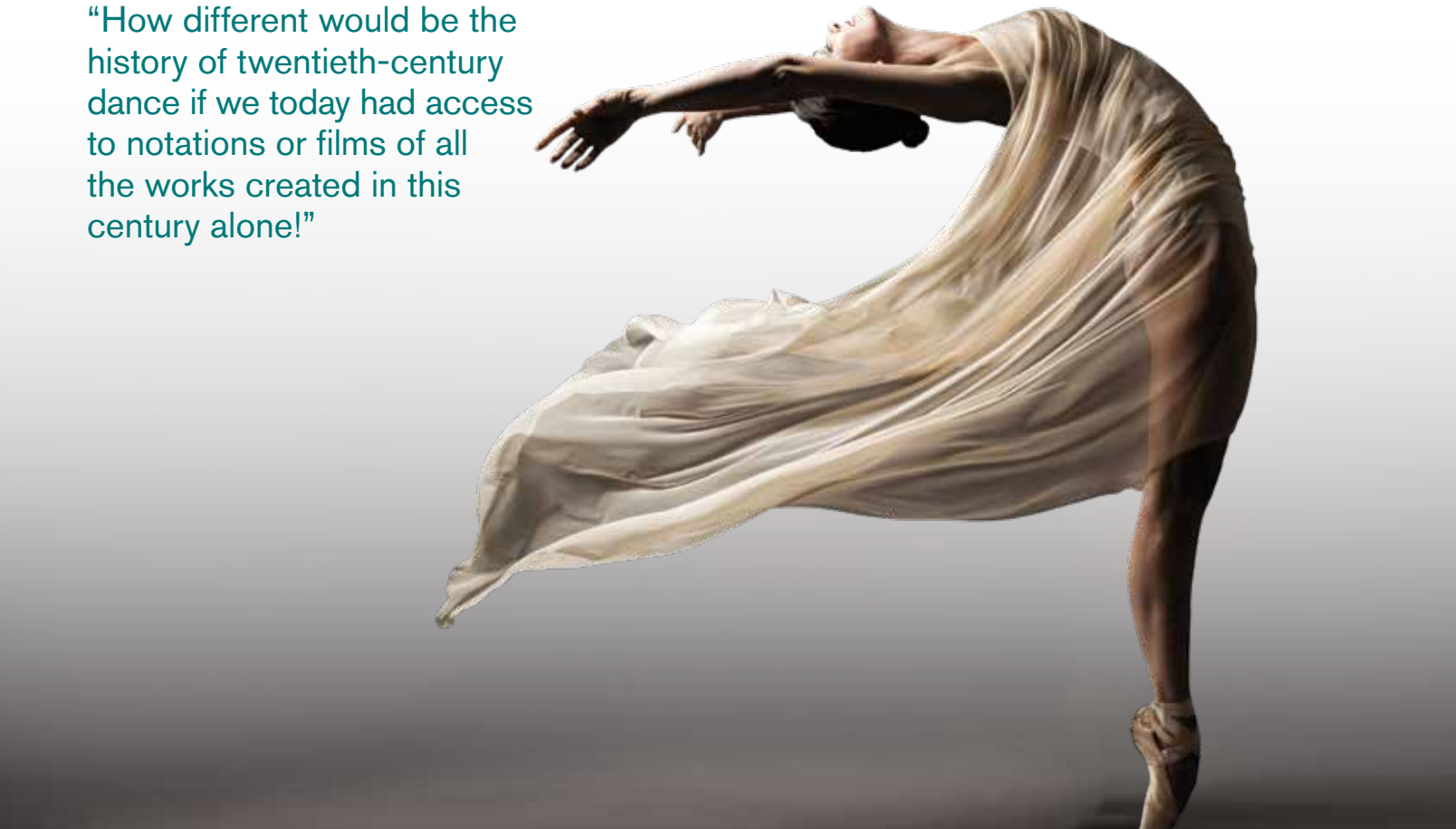

not filmed or annotated would remain eligible for at least common-law protection,[44] the major expansion of the act eliminating the distinction between published and unpublished works for the purposes of preemption of other laws under § 301 has become more significant for at least two reasons. First, the ubiquitous nature of camera technology means that fewer works remain unfixed.[45] While the act fails to expressly protect the choreographer's moral rights — these rights under § 106A are limited to works of visual art[46] — registration would allow choreographers to exploit the exclusive rights granted under the act to protect some moral rights within a licensing agreement for performance of the work.[47] Second, proof of infringement under common-law copyright would be all but impossible if a choreographic work were not reduced to tangible form.[48] Custom may protect some rights to unfixed works, but registration would likely be required to allege infringement.[49]

Dance history is filled with stories of choreographic works lost because they were not performed for years and were forgotten.[50] While federal copyright protection for choreographic works is an imperfect tool to protect the artist's interests, the incentives of the act — together with the limitations and common-law copyright — should encourage choreographers to fix and register their works, conferring benefits on the public. As one author familiar with the dance world wrote, "How different would be the history of twentieth-century dance if we today had access to notations or films of all the works created in this century alone!"[51] ■

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ENDNOTES

1. Copyright Act Amendment of August 18, 1856, ch 169, 11 Stat 138.
2. *Fuller v Bemis*, 50 F 926 (SD NY, 1892).
3. US Const, art I, § 8, cl 8.
4. *Martinetti v Maguire*, 1 Abb US 536; 16 F. Cas. 920, 922 (D Cal, 1867).
5. Copyright Act of July 1, 1909, PL 60-349, 35 Stat 1075.
6. Mirrell, *Legal Protection for Choreography*, 27 NYU Law Rev 792, 803, n 51 (1952).
7. *Id.* at 803, n 49. See also Ordway, *Choreography and Copyright*, 15 ASCAP Copyright L Symposium 172, 177 (1967).
8. *Legal Protection for Choreography*, at 810, 811, n 86.
9. Van Camp, "Copyright of Choreographic Works," in *Entertainment, Publishing and the Arts Handbook (1994–95 Edition)*, Breimer et al, eds (New York: Clark, Boardman & Callaghan, 1994), p 79.
10. *Id.*
11. Copyright Act of 1909, § 2.
12. *Ferris v Frohman*, 223 US 424; 32 S Ct 263; 56 L Ed 492 (1912) (dramatic compositions), *RCA Mfg Co v Whiteman*, 28 F Supp 787, 792 (SD NY, 1939) (musical compositions), and 17 USC 101.
13. *Dane v M & H Co*, unpublished opinion of the Supreme Court, New York County, New York, issued January 25, 1963.
14. *Id.*
15. Cramer, *Copyright Protection for Choreography: Can it Ever be 'En Pointe'?, Computerized Choreography or Amendment: Practical Problems of the 1976 U.S. Copyright Act and Choreography*, 1 Syracuse J Legis. & Pol'y 145, 156 (1995).
16. Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. the Custom of the Dance Community*, 38 U Miami L Rev 287 (1984), available at <https://repository.law.miami.edu/umlr/vol38/iss2/5/> [https://perma.cc/32BR-UGEP] (website accessed July 30, 2021).
17. *Id.* at pp 292–293.
18. *Id.* at pp 293–294.
19. *Id.* at p 295.
20. *Id.* at p 295, n 106.
21. *Id.* at pp 295 and 310, n 107.
22. *Id.* at p 290, n 13.
23. Woods, *Copyright and Contracts: Counseling the Choreographer*, 31 Oklahoma L Rev 969, 972 (1978).
24. *Community for Creative Non-Violence v Reid*, 490 US 730; 109 S Ct 2166; 104 L Ed 2d 811 (1989).
25. Taubman, *Choreography Under Copyright Revision: The Square Peg in the Round Hole Unpegged*, 10 Perf Arts Rev 219, 254 (1980).
26. Mansnerus, *"Who Owns the Dance? Joffrey, Choreographer Battle over Copyrights of Ballets,"* Houston Chronicle (May 17, 1990).
27. *Id.*
28. *Copyright and Contracts: Counseling the Choreographer*, 31 Oklahoma L Rev at 969, n 5.
29. 17 USC 101 *et seq.*
30. HR 94-1476, 94th Cong, 2d Sess 53, 54 (1976).
31. Griffith, Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performance with Copyright Law, 30 Conn L Rev 675 (1998).
32. Traylor, *Choreography, Pantomime and the Copyright Revision Act of 1976*, 16 N Eng L Rev 227, 229 (1981).
33. *Compendium of U.S. Copyright Office Practices (Third Edition)*, United States Copyright Office (2021), Chapter 805.4(C), available at <https://www.copyright.gov/comp3/> [https://perma.cc/H74D-JZRB] (website accessed July 30, 2021).
34. *Id.* at Chapter 805.5(B)(3).
35. 17 USC 102(a).
36. Roth, *Common Law Protection of Choreographic Works*, 5 Perf Arts Rev 75, 78, n. 11 (1975).
37. *Choreography and Copyright*, p 173.
38. Cook, *Moving to a New Beat: Copyright Protection for Choreographic Works*, 24 UCLA L Rev 1287, 1295 (1977).
39. Benesh, *Introduction to Benesh Movement-notation: Dance* (Trenton: Dance Horizons, 1969).
40. *In Search of Adequate Protection for Choreographic Works*, at p 302, n 67.
41. *Id.* at n 66.
42. Cramer, *Copyright Protection for Choreography: Can It Ever Be 'En Pointe'? Computerized Choreography or Amendment: Practical Problems of the 1976 U.S. Copyright Act and Choreography*, 1 Syracuse J of Legis & Pol'y, 145, 149–150 (1995).
43. Wood, *Two Left Feet: Government's Tango with Copyright and Choreography*, 6 Intellectual Prop J 291, 306 (1991).
44. HR 94-1476, 94th Cong, 2d Sess 52, 131 (1976).
45. "Copyright of Choreographic Works," at 83, n 72.
46. 17 USC 101.
47. Adler, *The Hand of Balanchine Still Evident as Louisville Ballet Stages His Work*, The Courier Journal (October 1, 1989).
48. *Two Left Feet*, at p 307 and *Choreography and Copyright*, at p 183.
49. *Fourth Estate Public Benefit Corp v Wallstreet.com, LLC, et al*, 139 S Ct 881, 892; 203 L Ed 2d 147 (2019).
50. *Legal Protection for Choreography*, at p 793, n 6.