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IS CHOREOGRAPHY COPYRIGHTABLE?: A STUDY OF THE AMERICAN AND ENGLISH LEGAL INTERPRETATIONS OF "DRAMA"

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INTRODUCTION

Dance, as well as music, may be reduced to writing. Movement may be recorded in Labanotation, which is a system of symbols by which the motion of each and every part of the human body, in its relationship to time and space, may be set down on paper. In 1952, Hanya Holm's labanotated choreographic score for the musical play, *Kiss Me, Kate,* was accepted by the United States Copyright Office for registration with a claim of copyright. Choreographic works may also be recorded by notation, symbols and diagrams different from the Laban system, drawings or pictures, or by language or words.[1]

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1. U.S. Const. art. I, §8, cl.8 provides:
   The Congress shall have Power . . .
   . . .
   To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

See *The Meaning of "Writings" in the Copyright Clause of the Constitution,* General Revision of the Copyright Law, Study No. 3 (1956).

The performance of choreography may also be recorded on motion picture film. This paper will not concentrate on the problems of performances of choreography recorded by motion pictures for the purpose of copyright. See 17 U.S.C. §5(*l*) (1947); 17 U.S.C. §5(m) (1947); 17 U.S.C. §1 (1947).

Basically the problems are: what protection does the United States Copyright Law afford copyrighted motion pictures? In general, the motion picture is protected against the unauthorized performance or copying of the film itself, and, in a motion picture photoplay, the unauthorized reproduction of the sequence of action, either in another motion picture or in a performance for television. See Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956), *affirmed by an equally divided court,* 356 U.S. 43 (1958); Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947); Patterson v. Century Prod., 93 F.2d 489 (2d Cir. 1937), *cert. denied,* 303 U.S. 655 (1938); Vitaphone Corp. v. Hutchinson Amuse-

Choreographic works should be distinguished from social or ballroom dances. Social dances are performed primarily for the pleasure and amusement of the dancers themselves; a fox-trot is an example of a social dance. Choreographic works usually refer to theatrical works; choreographic works are dance compositions for the stage, created and performed primarily for the enjoyment and appreciation of an audience. Ballets and modern dance compositions, either as independent theatrical works or as integral parts of musical plays,

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ment Co., 28 F.Supp. 526 (D.Mass. 1939); Metro-Goldwyn-Mayer Distrib. Corp. v. Bijou Theatre Co., 3 F.Supp. 66 (D.Mass. 1933); Pathé Exchange v. International Alliance, 3 F.Supp. 63 (S.D.N.Y. 1932); Tiffany v. Dewing, 50 F.2d 911 (D.Md. 1931).

Is the work recorded on the motion picture film protected against unauthorized public or live performances? In general, the work is protected against its unauthorized reproduction in any of the various modes in which it may be adopted or imitated; copyrighted two-dimensional pictures are protected against unauthorized three-dimensional reproduction. See Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947); Fleischer Studios Inc. v. Ralph A. Freundlich, Inc., 73 F.2d 276 (2d Cir. 1934), *cert denied,* 294 U.S. 717 (1935); Nutt v. National Institute For The Improvement of Memory, 31 F.2d 236 (2d Cir. 1929); King Features Syndicate v. Fleischer, 299 Fed. 533 (2d Cir. 1924); Hill v. Whalen & Martell, Inc., 220 Fed. 359 (S.D.N.Y. 1914); see also Eisenschiml v. Fawcett Publications, 246 F.2d 598 (7th Cir. 1957), *cert. denied,* 355 U.S. 907 (1957).

Are there other rights in the filmed choreography that may be legally protected? In general, there is a common law property right in a creative contribution of the performance in the recorded work, as distinct from the rights of the author in his work. See Ettore v. Philco Television Broadcasting Co., 229 F.2d 481 (3d Cir. 1956), *cert. denied,* 351 U.S. 926 (1956); Capitol Records, Inc. v. Mercury Records Corp., 109 F.Supp. 330 (S.D.N.Y. 1952), *aff'd,* 221 F.2d 657 (2d Cir. 1955); Republic Pictures Corp. v. Rogers, 213 F.2d 662 (9th Cir. 1954); Autry v. Republic Pictures Prod., 213 F.2d 667 (9th Cir. 1954); R.C.A. Mfg. Co. v. Whiteman, 28 F.Supp. 787 (S.D.N.Y. 1939), *reversed on other grounds,* 114 F.2d 86 (2d Cir. 1940), *cert. denied,* 311 U.S. 712 (1940); Waring v. Dunlea, 26 F.Supp. 338 (E.D.N.C. 1939); Gieseking v. Urania Records, Inc., 155 N.Y.S.2d 171 (Sup.Ct. 1956); Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 101 N.Y.S. 2d 483 (Sup. Ct. 1950), *aff'd,* 107 N.Y.S. 2d 795 (App. Div. 1951); Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937).

A motion picture photoplay is a dramatic work within the meaning of the United States Copyright Law and is protected by the Copyright Act as a dramatic composition. That the Copyright Law lists dramatic compositions and motion picture photoplays separately does not imply that registered motion picture photoplays are not protected by copyright as dramatic compositions. See 17 U.S.C. § 5 (1947); 17 U.S.C. § 1 (1947); 37 C.F.R. § 202.15(a) (1960); Universal Pictures Co. v. Harold Lloyd Corp., 162 F. 2d 354 (9th Cir. 1947); Metro-Goldwyn-Mayer Distrib. Corp. v. Bijou Theatre Co., 59 F.2d 70 (1st Cir. 1932). See also Tiffany Prod. v. Dewing, 50 F.2d 911 (D.Md. 1931); Vitaphone Corp. v. Hutchinson Amusement Co., 28 F.Supp. 526 (D.Mass. 1939); Metro-Goldwyn-Mayer Distrib. Corp. v. Bijou Theatre Co., 3 F.Supp. 66 (D.Mass. 1933)); Pathé Exchange v. International Alliance, 3 F.Supp. 63 (S.D.N.Y. 1932).

are examples of choreographic works. Although choreography and choreographic work may seem identical in referring to stage dances that may be recorded, choreographic work generally refers to a theatrical composition or the dances themselves, while choreography generally refers to the arrangement of the dances or to the dancing and its representation.

THE UNITED STATES COPYRIGHT LAW

No provision in the United States Copyright Law[2] specifically refers to choreography. Is choreography, or are choreographic works, the proper subject of copyright? The Copyright Law classifies dramatic and dramatico-musical compositions as the subject-matter of copyright,[3] and choreographic scores recorded in words and in Labanotation have been registered with the United States Copyright Office as dramatic or dramatico-musical compositions with a claim of copyright.[4] Are choreographic works dramatic or dramatico-musical

2. Act of 1947, July 30, 61 Stat. 652, as amended, 17 U.S.C. § 1 (1947).

3. 17 U.S.C. § 4 (1947); 17 U.S.C. § 5 (1947);

> § 4. All writings of author included.
> The works for which copyright may be secured under this title shall include all the writings of an author.
>
> § 5. Classification of works for registration.
> The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:
>
> . . . .
>
> (d) Dramatic or dramatico-musical compositions.
>
> . . . .
>
> The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title, nor shall any error in classification invalidate or impair the copyright protection secured under this title.

4. See 37 C.F.R. § 202.7 (as amended to October 17, 1960):
> 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 [Dramatic or dramatico-musical compositions]. 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.

See also Mirell, *Legal Protection for Choreography*, 27 N.Y.U. L. REV. 792 (1952); Varmer, *Copyright in Choreography Works*, General Revision of the Copyright Law, Study No. 28 (1959).

compositions[5] within the meaning of the Copyright Law? The United States Copyright Law does not define dramatic composition.[6]

No American judicial decision has held that choreography is copyrightable or that a choreographic work is a copyrightable dramatic composition.[7] The most important American case concerning a choreographic work registered with a claim of copyright was *Fuller v. Bemis*.[8] Loie Fuller had composed a series of abstract stage dances that displayed only the beauty of motion. The movements of the dances were described by written words, and this record of the work was registered with the United States Copyright Office as a dramatic composition with a claim of copyright. The stage dances represented the blossoming of a flower, waves at the seashore, and the flutterings of a butterfly.[9] The choreographic work was perhaps the earliest example of the American artistic form now called modern dance.[10] Loie Fuller allegedly performed the theatrical composition with great success and pecuniary profit, caused by the originality and beauty of the dances. Minnie Bemis presented very similar dances on the stage, and Miss Fuller sought a preliminary injunction against her, arguing that the choreographic work was a dramatic composition

5. Dramatico-musical compositions differ from dramatic compositions in that, besides the necessary elements for a dramatic composition, there is present musical and/or vocal accompaniment. April Prod., Inc. v. Strand Enterprises, Inc., 79 F.Supp. 515 (S.D.N.Y. 1948).

6. *But see* 17 U.S.C. § 1 (1947):

> § 1. Exclusive rights as to copyright works.
> Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
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> . . .
>
> (b) . . . to convert it into a novel or other nondramatic work if it be a drama; . . .
>
> . . .
>
> (d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; . . .

7. Dramatic compositions have been the proper subject of copyright since 1856, at least. Act of 1856, August 18, c.169, 11 Stat. 138; Act of 1870, July 8, c.230, 16 Stat. 198; Act of 1909, March 4, c.320, 35 Stat. 1075, as amended. As to the copyright of dramatic compositions before 1856, see Daly v. Palmer, 6 Fed. Cas. 1132 (No. 3552) (C.C.S.D.N.Y. 1868).

8. 50 Fed. 926 (C.C.S.D.N.Y. 1892).

9. *Id.* at 926-27.

10. The work was created about 1890. Later theatrical productions and choreographic works of Loie Fuller influenced Isadore Duncan, who was a member of Miss Fuller's dance company in 1902, and Ruth St. Denis. See De Morinni, *Loie Fuller: The Fairy of Light,* in Magriel (ed.), CHRONICLES OF THE AMERICAN DANCE (New York, Henry Holt & Co., 1948), 203-20.

within the meaning of the Copyright Law. The motion for the injunction was denied; Judge Lacombe held that the stage dances, displaying only the beauty of motion but telling no story, were not a copyrightable dramatic composition.

The opinion of the court defined dramatic composition very narrowly; it said that a copyrightable dramatic composition must tell a story:

> Whatever may be the language of the opinion in *Daly* v. *Palmer,* 6 Blatchf. 264, the decision is not authority for the proposition that complainant's performance is a dramatic composition, within the meaning of the copyright act. It is essential to such a composition that it should tell some story.[11]

Story implies a work having a plot. The court's construction of plot was comparatively broad:

> 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. And when it does, it is the ideas thus expressed which become subject of copyright.[12]

The choreographic work in this case displayed only the beauty of motion; it told no story:

> 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. The merely mechanical movements by which effects are produced on the stage are not subjects of copyright where they convey no ideas whose arrangement makes up a dramatic composition. Surely, those 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. Motion for preliminary injunction denied.[13]

The opinion stated that the choreographic work told no story, portrayed no character and depicted no emotion. Previously, in its

11. Fuller v. Bemis, 50 Fed. 926, 928-29 (C.C.S.D.N.Y. 1892).

12. *Id.* at 929.

13. *Id.* The opinion of the court has been reproduced in full.

interpretation of plot, the court had said that a story must repeat or imitate an emotion or character, or other dramatic element. Did the court then mean to say, in its description of the choreographic work, that the portrayal of a character or the depiction of an emotion is the element of a copyrightable dramatic composition, separate and distinct from the telling of a story? Would the choreographic work have been copyrightable had it only depicted a character or portrayed an emotion? The opinion did not say that a choreographic work which only portrayed a character or depicted an emotion would be a copyrightable dramatic composition. By negative implication in the interpretation of this opinion that conclusion could be reached, but Judge Lacombe did not reach it. He stated that a copyrightable dramatic composition must tell a story; Miss Fuller's choreographic work did not tell a story; therefore, her abstract stage dances were not a dramatic composition within the meaning of the United States Copyright Law.

Are choreographic works copyrightable dramatic compositions? *Fuller v. Bemis* is the American case closest on this question of law; no answer is reached in the decision. The opinion is negative; a certain type of choreographic work is not copyrightable as a dramatic composition. Whether all other types of choreographic works are copyrightable is still a question unanswered. No American case has held that a ballet or modern dance composition is copyrightable.

It is noteworthy that the case of *Daly v. Palmer*[14] was rejected as authority for Loie Fuller's position.[15] *Daly v. Palmer* was concerned with a written play that had been copyrighted as a dramatic composition. One of the scenes of the play consisted of written directions for its representation on stage by the actions of the characters, without the use of spoken language. An almost identical scene was used in another play. Judge Blatchford held that there was an infringement of the copyright.

The first inquiry in the case was: what is meant by a copyrightable dramatic composition? A composition was found to be "a written or literary work, invented and set in order."[16] Judge Blatchford then defined dramatic composition: "A dramatic composition is such a work in which the narrative is not related, but is represented by dialogue and action."[17]

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14. 6 Fed. Cas. 1132 (No. 3552) (C.C.S.D.N.Y. 1868).

15. See arguments by complainant's attorney, Fuller v. Bemis, 50 Fed. 926 (C.C.S.D.N.Y. 1892).

16. Daly v. Palmer, 6 Fed.Cas. 1132, 1135 (No. 3552) (C.C.S.D.N.Y. 1868).

17. *Ibid.*

In other words, the actions, as described in writing, are set in order and form a narrative. A copyrightable dramatic composition, as defined in the opinion, consists of narrative; it tells a story. In an elaboration of this definition, however, it may seem as if the court impliedly presented a broader interpretation of what might be a copyrightable dramatic composition:

> A pantomime is a species of theatrical entertainment, in which the whole action is represented by gesticulation, without the use of words. A written work, consisting wholly of directions, set in order for conveying the ideas of the author on a stage or public place, by means of characters who represent the narrative wholly by action, is as much a dramatic composition designed or suited for public presentation, as if language or dialogue were used in it to convey some of the ideas. The "railroad scene," in the plaintiff's play, is undoubtedly a dramatic composition. Those parts of it represented by motion or gesture, without language, are quite as much a dramatic composition, as those parts of it which are represented by voice. This is true, also, of the "railroad scene" in "After Dark" [the infringing play]. Indeed, on an analysis of the two scenes in the two plays, it is manifest that the most interesting and attractive dramatic effect in each is produced by what is done by movement and gesture, entirely irrespective of anything that is spoken. The important dramatic effect, in both plays, is produced by the movements and gestures which are prescribed, and set in order, so as to be read, and which are contained within parentheses.[18]

It would seem that the court impliedly defined dramatic composition as a written theatrical work, which, by conveying the ideas of its author, produces drama or a dramatic effect. Such a definition could be incorporated in a definition of dramatic composition as a work telling a story. Indeed it is, and such an implied definition must be seen within the context of the definition expressed in the opinion. The drama or dramatic effects, achieved in the case in question, resulted from the actions set in order and presented as a narrative. The written theatrical work did not just convey ideas producing drama, but represented a narrative by movements set in an order. The dramatic composition was a scene from a play, and the action, in itself and by itself, told a story. Therefore, *Daly v. Palmer* is not legal authority where the actions in a theatrical work do not unfold a narrative, but portray only the beauty of motion.

18. Daly v. Palmer, *supra* note 16, at 1136.

Daly v. Palmer does, however, stand for the principle that the absence of dialogue is not fatal to a copyright on a dramatic composition and that the theatrical work may be expressed entirely in movements or actions.[19] This point of law was approved in the case of *Kalem Company v. Harper Brothers,*[20] in which the United States Supreme Court held that an exhibition of silent motion pictures, depicting the principal scenes of the novel, *Ben Hur*, was a dramatization of the book and an infringement of the author's copyright; the appellant contributed to the infringement. Justice Holmes wrote:

> [D]rama 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. *Daly v. Palmer,* 6 Blatchf. 256, 264.[21]

Thus a pantomime of a literary work would be a dramatization.

The case of *Daly v. Webster,* [22] as well as the case of *Brady v. Daly,*[23] was concerned with the same scene in the same play as in *Daly v. Palmer.*[24] *Daly v. Webster,* following *Daly v. Palmer,* held that the combination of dramatic events expressed solely in actions was a copyrightable dramatic composition.[25] In a per curiam opinion, the court said:

> There must be a series of events, dramatically represented, in a certain sequence or order. In other words, there must be a "composition," i.e. a work invented and set in order,—a work of various parts and characters, which, when put upon the stage, is developed by a series of circumstances.[26]

The concept of a sequence of events unfolding a narrative is central in determining whether choreography may be copyrightable under the present law.

A copyrightable dramatic composition expressed solely in movement or actions must have a thread of consecutively related events

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19. See also Seltzer v. Sunbrock, 22 F.Supp. 621 (S.D.Cal. 1938).

20. 222 U.S. 55 (1911).

21. *Id.* at 61.

22. 56 Fed. 483 (2d Cir. 1892), *appeal dismssed,* Webster v. Daly, 163 U.S. 155 (1896).

23. 83 Fed. 1007 (2d Cir. 1897), *aff'd,* 175 U.S. 148 (1899).

24. 6 Fed.Cas. 1132 (No. 3552) (C.C.S.D.N.Y. 1868).

25. The holding of Daly v. Webster was followed in Brady v. Daly, 83 Fed. 1007 (2d Cir. 1897), *aff'd,* 175 U.S. 148 (1899).

26. Daly v. Webster, 56 Fed. 483, 487 (2d Cir. 1892).

in a sequence or order, constituting a story.[27] Stage business, or the mere postures, motions, movements or gestures of theatrical performers cannot be copyrighted,[28] unless they are so combined with events as to form a scene possessing a literary quality, or narrative.[29] Not everything intended for the stage may be the subject matter of copyright as a dramatic composition.[30] In *Martinetti v. Maguire,*[31] the court found that a theatrical composition, the success of which was due mainly to a series of ballets and tableaux, was a mere spectacle, or exhibition, or arrangement of scenic effects, and not a dramatic composition within the meaning of the United States Copyright Law.[32] In *Green v. Luby,*[33] the court found that a theatrical sketch, consisting of a series of recitations and songs with scenery, costumes and stage lighting, but with very little dialogue and action, was a dramatico-musical composition within the meaning of the Copyright Law;[34] the court doubted, however, that the work was sufficient to be a dramatic composition because of the lack of dialogue and action. The distinction is irreconcilable with the present law,[35] and today the sketch would probably be found uncopyrightable as a dramatico-musical composition.

The American law on the definition of copyrightable dramatic composition has been summed up recently in the opinion of *Seltzer v.*

27. *Id.* at 486, 487; Seltzer v. Sunbrock, 22 F.Supp. 621 (S.D.Cal. 1938); Universal Pictures Co. v. Harold Lloyd Corp. 162 F.2d 354 (9th Cir. 1947).

28. Chappel & Co. v. Fields, 210 Fed. 864, (2d Cir. 1914); Bloom & Hamlin v. Nixon, 125 Fed. 977 (C.C.E.D.Pa. 1903), *followed* in Green v. Minzensheimer, 177 Fed. 286 (C.C.S.D.N.Y. 1909); Harold Lloyd Corporation v. Witwer, 65 F.2d 1 (9th Cir. 1933); Seltzer v. Sunbrock, 22 F.Supp. 621 (S.D. Cal. 1938).

29. Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947); Chappel & Co. v. Fields, 210 Fed. 864 (2d Cir. 1914).

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

31. 16 Fed.Cas. 920 (No. 9173) C.C.Cal. 1867).

32. The Black Crook was one of the most elaborate and one of the most successful of all 19th-century musicals in America. Its success was due chiefly to its choreographic score, as well as to its exhibition of attractive chorus girls. See contemporary newspaper reviews in Freedley, *The Black Crook and the White Fawn,* Magriel (ed.), CHRONICLES OF THE AMERICAN DANCE, 65-79. Since the court considered the exhibition indecent, it also found that even if it were admitted that the work was a dramatic composition, it would still not be entitled to the benefits of copyright. See also Barnes v. Miner, 122 Fed. 480 (C.C.S.D.N.Y. 1903).

33. 177 Fed. 287 (C.C.S.D.N.Y. 1909).

34. See also Henderson v. Tompkins, 60 Fed. 758 (C.C.D.Mass. 1894).

35. April Prod. Inc. v. Strand Enterprises Inc., 79 F.Supp. 515 (S.D.N.Y. 1948).

Sunbrock.[36] In that case, the court held that a description, in the form of a drama, of an imaginary roller-skating race, having no fixed story or plot and no distinct characters, was not a copyrightable dramatic composition; it was fround to be merely a description of a system for conducting roller skating races.[37] The opinion stated:

> The courts, in determining what constitutes a dramatic composition, have emphatically stated that there must be a story—a thread of consecutively related events—either narrated or presented by dialogue or action or both. [citing *Daly v. Palmer*]. Attempts have been made to extend the protection afforded dramas under the act to other forms of composition spectacular in nature and theatrical in presentation, but lacking the story element. . . .
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> [R]epeated efforts have been made to secure an enlargement of the scope of copyright law so as to provide protection for various new forms of originality. . . . But none of these revisions, [of the Copyright Law] including the very significant one of 1909—to which detailed reference is made infra—have added anything to the act to change the original definition of a "drama" as enunciated by the courts. . . . There has been no statutory abandonment of any of the fundamentals previously held indispensable to a genuine dramatic composition.
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> The courts likewise have clung to first principles and have refused to extend the definition of a "drama" to include other forms of composition having no bona fide plot or story. [citing and quoting extensively from *Fuller v. Bemis*].[38]

Many ballets and many modern dance compositions, which are capable of being recorded, are not the proper subject matter of copyright as dramatic or dramatico-musical compositions because they do not tell a story. Abstract ballets, one of America's greatest artistic contributions to world culture, are denied copyright and its protection in America because they fulfill a true end of choreography in portraying the beauty of motion only.

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36. 22 F.Supp. 621 (S.D.Cal. 1938).

37. The rulings of the court were adopted in an identical case, Seltzer v. Corem, 107 F.2d 75 (7th Cir. 1939).

38. Seltzer v. Sunbrock, 22 F.Supp. 621, 628-29 (S.D. Cal. 1938). This opinion was adopted more recently in Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 365 (9th Cir. 1947).

THE ENGLISH COPYRIGHT ACTS

Although the case of *Daly v. Palmer*[39] was expressly rejected as authority for Loie Fuller's position in *Fuller v. Bemis,*[40] no mention was made in Judge Lacombe's opinion of *Lee v. Simpson*[41] or of *Russel v. Smith.*[42] These English cases were argued by Miss Fuller's attorney[43] in support of the proposition that the abstract stage dances were a dramatic composition within the meaning of the United States Copyright Law.

Lee v. Simpson[44] held that an introduction to a pantomime—that is, the written part of the entertainment—was a dramatic piece or entertainment within the protection of the English Copyright Act of 1833.[45] Whether the decision extended copyright to pantomimes, as such, is unclear. It is noteworthy that the opinion of *Gallini v. Laborie,*[46] as subsequently modified,[47] was cited in the arguments of counsel in *Lee v. Simpson* concerning the construction of the penal provisions of the English Copyright Act. In *Gallini v. Laborie,* the court held that no action could be maintained for breach of contract for a ballet performance, as it appeared that no license had been granted for the theatre in which the performance was to be held, as required by criminal statute. Lord Kenyon, C. J., in the opinion, referred to ballet as a species of stage entertainment comparable to plays, under the statute.

Russel v. Smith[48] held that a descriptive song was dramatic and was therefore a dramatic piece or musical composition within the meaning of the English Copyright Acts of 1842[49] and 1833. In his opinion, Lord Denman, C. J., defined dramatic piece broadly:

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39. 6 Fed.Cas. 1132 (No. 3552) (C.C.S.D.N.Y. 1868).

40. 50 Fed. 926 (C.C.S.D.N.Y. 1892).

41. 3 C.B. 871, 136 Eng.Rep. 349 (1847).

42. 12 Q.B. 217, 116 Eng.Rep. 849 (1848).

43. Fuller v. Bemis, 50 Fed. 926 (C.C.S.D.N.Y. 1892).

44. 3 C.B. 871, 136 Eng.Rep. 349 (1847).

45. Copyright Act, 1833, 3&4 Will.4, c.15. Section 1 of the Act extended copyright protection to "the Author of any Tragedy, Comedy, Play, Opera, Farce, or any other Dramatic Piece of Entertainment." As to copyright in dramatic works before 1833, see Murray v. Elliston, 5 B.&Ald. 657, 106 Eng.Rep. 1331 (K.B. 1822).

46. 5 T.R. 242, 101 Eng.Rep. 136 (K.B. 1793).

47. The King v. Handy, 6 T.R. 286, 101 Eng.Rep. 556 (K.B. 1795) excluded tumbling, and probably fencing, from the provisions of the statute of 10 Geo.2.

48. 12 Q.B. 217, 116 Eng.Rep. 849 (1848).

49. Copyright Act, 1842, 5&6 Vict., c.45. This Act, among other things, extended the provisions of the Copyright Act of 1833 to musical compositions. Section 2 provided the interpretation of the terms in the Act:

> If the interpretation clause of stat. 5 & 6 Vict. c. 45 [the English Copyright Act of 1842], be referred to, the second section declares that "dramatic piece," within that Act includes "tragedy, comedy, play, opera, farce, or" any "other scenic, musical, or dramatic entertainment." These words comprehend any piece which could be called dramatic in its widest sense; any piece which, on being presented by any performer to an audience, would produce the emotions which are the purpose of the regular drama, and which constitute the entertainment of the audience.[50]

Under this definition, a dramatic piece need not tell a story.[51] A dramatic piece would be a theatrical work, which, when performed before an audience, produces a certain emotional response in that audience, known as drama. What is that certain emotional response known as drama? The song in question was said to have evoked terror, pity and sympathy by presenting danger, despair and joy.[52] It should be noted that later in the opinion, Lord Denman distinguished stage play from dramatic piece,[53] although the first term appeared in a criminal statute and the second in the Copyright Act of 1842.

It is submitted that the definition in *Russel v. Smith* is more enlightened than the definition of dramatic composition in *Fuller v. Bemis*.[54] A theatrical work does not have to tell a story to be a dramatic composition. A theatrical work which produces a dramatic effect by conveying the ideas of its author is a dramatic composition. Drama necessarily implies an audience; drama is, in effect, the creation of a certain emotional response or of certain emotional responses in a person reading a written composition or seeing that composition performed on a stage. Nevertheless, this emotional response, without more, is unsatisfactory for a legal definition. Must the work produce those certain emotions in the whole audience, or in any one person or group of persons in the audience? Is the drama created by the composition or by the audience? There is ambiguity, and a more objective standard is needed. The English legal definition is, however, closer to actuality than the American. While a dramatic composition

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> And be it enacted, That in the Construction of this Act . . . that the Words "Dramatic Piece" shall be construed to mean and include every Tragedy, Comedy, Play, Opera, Farce, or other scenic, musical or dramatic Entertainment; . . .

50. 12 Q.B. 217, 235-36, 116 Eng.Rep. 849, 857 (1848).

51. See also Clark v. Bishop, 25 L.T.R.(n.s.) 908 (Ex. 1872).

52. 12 Q.B. 217, 116 Eng.Rep. 849 (1848).

53. *Ibid.*

54. 50 Fed. 926 (C.C.S.D.N.Y. 1892).

may have a story, a story is not essential for drama in a theatrical composition; indeed, the story itself may be secondary in making the composition dramatic.

Would the broad English definition of dramatic piece have included Loie Fuller's abstract stage dances? The definition probably would have excluded them from copyright under the English acts. A series of dances portraying only the beauty of motion—such as the fluttering of a butterfly or the blossoming of a flower—may produce delight or wonder in an audience, but may not create the certain emotional response so necessary for drama. That is to say, Loie Fuller's stage dances may have been graceful or elegant, and not dramatic, even in the widest sense of that term. *Russel v. Smith* was not good authority for Miss Fuller's case, and the broad definition of dramatic piece expressed in its opinion would not make many modern choreographic works copyrightable.

Russel v. Smith was subsequently distinguished in the judicial opinion of *Fuller v. Blackpool Winter Gardens and Pavilion Company,*[55] which held that a song was not a dramatic piece within the meaning of the English Copyright Act of 1833; it was found to be a musical comopsition protected by the Act of 1842. Lord Esher, M. R., in distinguishing *Russel v. Smith,* found that it was insufficient to call the song dramatic; it had to be seen whether the song was a dramatic piece within the meaning of the Copyright Act. Whether a song was within the provisions of the Copyright Act had to be determined by whether or not it had the characteristics of a dramatic piece; the characteristics of a dramatic piece must be determined in each case, as a question of fact, by the nature of the composition itself. Thus the basic question was: what was the character of the composition when it was first written and published?[56]

The decision in *Tate v. Fullbrook*[57] had, perhaps, the greatest significance in determining the question of the copyrightablibilty of choreography in England. In *Tate v. Fullbrook,* the court found that the subject matter of dramatic copyright, under the Act of 1833, had to be something which was capable of being printed and published. Thus scenic effects in a theatrical work, taken by themselves and apart from the words or incidents, were not found the subject of copyright.[58] What was meant by a "composition which . . . is capable of being printed and published"[59] is unclear; the scenic effects in ques-

55. [1895] 2 Q.B. 429 (C.A.).

56. *Id.* at 434.

57. (1908) 1 K.B. 821 (C.A.).

58. *Id.* at 832.

59. *Id.* at 821, 827.

tion were the stage business, gestures of the performers, and their make-up. The concurring opinion of Farwell, L. J., indicated that the written words to be spoken by the performers were not the only things protected;[60] it is clear, however, that the opinion would not cover only a written description of the movements of the performers, taken apart from the verbal composition of the piece. What is probably required, under the rule of law, is the tangible expression of the work to be represented on the stage. In other words, in a theatrical work to be expressed solely in movement, the notation of the movement, rather than a mere written description of its performance, is the proper subject of copyright. *Karno v. Pathe' Fire's,* London[61] on the authority of *Tate v. Fullbrook* held that a sketch mainly in pantomime, having no connected story or plot capable of being reduced into writing and no written dialogue, was not a "dramatic piece or entertainment" within the meaning of the Act of 1833; the pantomimical sketch had been registered with a claim of copyright.

Bishop v. Viviana & Co.,[62] also on the authority of *Tate v. Full-Brook,* held that a stage dance was not the proper subject of dramatic copyright in England. William Bishop had created a theatrical sketch, consisting mainly of an original dance, which imitated the movements of a mechanical doll or figure. The sketch was elaborated to include a scene with some dialogue, but its basic point was the dance, performed by a dancer suspended by a rod and hook. The defendant put on a performance of a very similar stage dance and Mr. Bishop sought an injunction and damages, claiming a breach of dramatic copyright. The defense was that the sketch was not the proper subject of copyright. The court upheld this position. Mr. Justice Channel, in giving judgment said the case was so exactly similar to *Tate v. Fullbrook* that if there was any distinction to be made it was one that must be made by the Court of Appeal, and not by him. He must therefore assume that the plaintiff had no statutory monopoly in the nature of a copyright in this dance. If his whole sketch had been copied it might have been different, but the case he had men-

60. *Id.* at 832:
> Nor do I say that scenic effects may not be protected as part and parcel of the drama: scenes do of course form parts of drama, and it is the dramatic piece as a whole that is protected by the Act.

61. 99 L.T.R.(n.s.) 114 (K.B. 1908), *aff'd, without dealing with this point,* 100 L.T.R. (n.s.) 260 (C.A. 1909). The Court of Appeals, in affirming the judgment of the case, even assumed implicitly that the sketch was a copyrightable dramatic piece.

62. London Times, January 15, 1909, p.3.

tioned was a clear authority that he could not have a copyright in a dance as a dance.[63]

Although this opinion seems similar to the one in *Fuller v. Bemis*,[64] it went even farther in principle by holding that a choreographic work, as a choreographic work, was not the subject of dramatic copyright. *Bishop v. Viviana & Co.* was decided in 1909; a revision of the English copyright acts in 1911 made choreographic works the proper subject of copyright.

The English Copyright Act of 1911[65] repealed the Acts of 1833[66] and 1842,[67] and defined dramatic works, a subject-matter of copyright:[68]

> 35. Interpretation.—(I) In this Act, unless the context otherwise requires, . . .
>
> "Dramatic work" includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement of acting form or the combination of incidents represented give the work an original character;[69]

Two cases involving choreographic works and English copyright have been reported since 1911. In *Holland v. Vivian Van Damn Productions, Ltd.*,[70] the court, in determining copyright infringement, held that a public performance of a ballet based on a copyrighted short story was a dramatization of the story. The scenic arrangement or acting form of the choreographic work had not been fixed in writing or otherwise.

Massine v. de Basil[71] was concerned with the ownership of the copyright of the choreography of ballets under a contract of employment. The court found that the work done by a choreographer in devising the notation of the dancing was by itself the subject matter of copyright. It was common ground, however, that a ballet may be

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63. *Supra* note 62. A second cause of action based on unfair competition was rejected also.

64. 50 Fed. 926 (C.C.S.D.N.Y. 1892).

65. Copyright Act, 1911, 1&2 Geo.5, c.46.

66. Copyright Act, 1833, 3&4 Will.4, c.15.

67. Copyright Act, 1842, 5&6 Vict., c.45.

68. Copyright Act, 1911, 1&2 Geo.5, c. 46 §1.

69. Copyright Act, 1911, 1&2 Geo.5, c.46 §35(1). Section 2(g) of the Canadian Copyright Act, Rev. Stat. 1952, c.55, is identical.

70. MacG. Cop.Cas.(1936-45) 69 (1936).

71. MacG. Cop.Cas.(1936-45) 223 (C.A. 1938).

the subject of copyright as a composite work, the elements of which are the music, the story or libretto, the choreography or notation of the dancing, and the scenery and costumes.[72] As the director of the ballet company had obtained the right to use all of the other elements of the ballet and had paid the choreographer to supply the choreography, which, as only one part of a composite work, could not have been performed by itself without the other elements of the ballet, and as the choreography was necessary for the completeness of the ballet, the court held that the copyright to the choreography vested in equity in the director and that he should be the owner of it.

Massine v. de Basil is important for the judicial findings that not only is choreography the proper subject of copyright, but also a ballet, as a composite work. The case shows the essential distinction between choreography and choreographic work. Recorded choreography is the notation of the dancing; the stage dance itself is the choreographic work. For purposes of copyright, the choreography or notation of the dancing must be distinguished from a mere written description of the theatrical work.[73] Nevertheless, the case seems to stand for the proposition that not only is recorded choreography copyrightable as a choreographic work in England, but that the musical score, the costumes, and the scenery used with the choreography may also be copyrightable as the choreographic work. Implications that may have arisen from *Massine v. de Basil,* concerning the term, choreographic work, were unchanged by a revision of the English Copyright Act of 1956.

The English Copyright Act of 1956[74] repealed the Act of 1911,[75] and also defined dramatic works, a subject matter of copyright:[76]

> 48. Interpretation.—(I) In this Act, except in so far as the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:—
>
> . . .
>
> "dramatic work" includes a choreographic work or entertainment in dumb show if reduced to writing in the form in which the work or entertainment is to be presented, but

72. See the decision of the lower court reported at 81 SOL. J. 670 (Ch. 1937), *upheld,* 82 SOL. J. 173 (C.A. 1938).

73. Tate v. Fullbrook, [1908] 1 K.B. 821 (C.A.); Bishop v. Viviana & Co., London Times, January 15, 1909, p.3.

74. Copyright Act, 1956, 4&5 Eliz.2, c.74.

75. Copyright Act, 1911, 1&2 Geo.5, c.46.

76. Copyright Act, 1956, 4&5 Eliz.2, c.74, pt.i, §2.

does not include a cinematograph film, as distinct from a scenario or script for a cinematograph film;

. . .

"writing" includes any form of notation, whether by hand or by printing, typewriting or any similar process.[77]

CONCLUSIONS

Should the United States Copyright Law be revised to have a provision similar to §48(1) of the English Copyright Act of 1956, defining dramatic compositions to include choreographic works? It may be said that such a provision would extend copyright to all choreographic works as dramatic compositions. It could be maintained, however, that under the American copyright law, if dramatic compositions were interpreted to include choreographic works, choreographic works would be only a species or form of dramatic compositions. Because dramatic compositions are defined under the judicial law as theatrical works telling a story, would a choreographic work illustrating only the beauty of motion and telling no story be a copyrightable dramatic composition? That is, if a choreographic work was only a species of dramatic composition, would a work not within the judicial definition of dramatic composition be legally protected as a dramatic composition? In order to avoid any doubt on this point and to insure copyright within the American law, dramatic compositions should not be interpreted in the statute as to include only choreographic works.

Should the United States Copyright Law be revised to have a provision similar to §35(1) of the English Copyright Act of 1911, defining dramatic compositions to include any choreographic work? Such a provision would probably be interpreted to provide copyright for all choreographic works, whether or not they tell a story. Nevertheless, the nature of a dramatic composition should be determined before choreographic works is included in a statute as that artistic form.

In relation to problems in copyright, a dramatic composition is a work with two basic elements: dramatic form and dramatic content.[78] A composition in dramatic form is a written work intended

77. Copyright Act, 1956, 4&5 Eliz.2, c.74, pt.iv, §48(1).

78. See Drone, *Law of Property in Intellectual Productions,* 586-96 (1879); Macgillivray, *Law of Copyright in the United Kingdom,* 123-26 (1902); Weil, *American Copyright Law,* 75-82, 210-12 (1917).

to be reproduced on the stage. In order to determine dramatic form, the nature of the work as it was originally written must be determined. If the work, as it was written, is capable of being reproduced on the stage, and, indeed, must be performed to be adequately and truly represented, it has dramatic form. A composition with dramatic content is a work with the essential elements of drama in the most comprehensive sense of the term. Drama, in this sense, is the creation of a certain emotional response or of certain emotional responses in any part of an audience seeing the composition, either in its original written form or as it is reproduced by performers. An element of drama usually is the depiction of action or a course of events.

Dramatic action is usually in the form of a story, but a definition of dramatic composition as only a theatrical work telling a story would be superficial. Such a definition emphasizes a particular literary form, not especially dramatic, at the expense of the elements of drama. On the other hand, a definition requiring a work only to produce drama in an audience would concentrate too heavily on dramatic content; a novel may have dramatic content. A dramatic composition has dramatic form as well as dramatic content.[79]

Should both elements of a dramatic composition be used to determine copyrightability? Instead of an absolute rule of law—such as, the work must tell a story—determining whether a work is a copyrightable dramatic composition, a test could be devised making the determination a question of fact, based on the nature of the work. The questions would be: 1. Is the work capable of being reproduced on the stage in the form in which it was written and, 2. Is the work, in itself, dramatic, or does it produce drama? This test, however, would be unsatisfactory for determining copyright in choreographic works; it is too narrow.

Not all theatrical works worthy of copyright are dramatic compositions. Twentieth-century American choreographic works, such as the abstract ballets and modern dance compositions, may lack dramatic content in their portrayal of grace or beauty. Although the depiction of action may be an element of drama, mere action on a stage, in itself, is not drama. A portrait of beauty may be expressed by actions, but they may not amount to dramatic action. Many choreographic works are not dramatic.[80]

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79. *Ibid.*

80. The United States Copyright Office requires that the recorded choreography convey a dramatic concept or idea, in order that the choreographic work qualify for registration as a dramatic composition. See 37 C.F.R. § 202.7 (as amended to October 17, 1960); *Choreographic Works,* United States Copyright Office Circular No. 51, 1959.

Choreographic works should be named specifically in the United States Copyright Law as a separate category of subject matter entitled to copyright. Dramatic compositions should not be interpreted in the statute to include any choreographic work; choreographic works are theatrical works separate and distinct from dramatic compositions.[81] Implicit wtihin the meaning of choreographic works would be *choreography; choreographic works* includes choreography, while *choreography,* standing alone in a statute, could refer to ballroom dances.

This judicial test, using the basic elements of dramatic compositions is insufficient for copyright in nondramatic theatrical works. Assuming the desirableness for copyright in such works as dramatic compositions, what test should be used? Since copyright is sought for the dramatic expression and not for the dramatic ideas or the drama itself,[82] dramatic form could determine whether a theatrical work is copyrightable. The question could be: Is the work capable of being represented on the stage in the form in which it was written?[83] This question alone, however, could include a symphony or piano concerto within the meaning of dramatic composition. Thus, copyright in theatrical works as dramatic compositions should be determined in each and every case as a question of fact by the nature of the written work itself. This judicial test, as a substitute for an express definition of dramatic composition, would seem more just than a single rule of law purporting to cover all cases.

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81. The two nations beside the United States most renowned for their dance works recognize the distinction between dramatic works and choreographic works in their copyright codes. See France: Copyright Statute, March 11, 1957, Law No. 57-296 (Fr.), on Literary and Artistic Property. Title I provides:

> ARTICLE 3. The following shall in particular be considered intellectual works within the meaning of this law: . . . dramatic or dramatico-musical works; choreographic works, and pantomimes, the acting form of which is fixed in writing or otherwise;

See also the Basic Copyright Law of the Soviet Union, Law, May 16, 1928, §4 (U.S.S.R.). Translations of the French and Soviet Russian Copyright Laws appear in *Copyright Laws and Treaties of the World,* UNESCO (1956), with annual supplements.

82. See Baker v. Selden, 101 U.S. 841 (1879); Holmes v. Hurst, 174 U.S. 82 (2d Cir. 1899); Kalem Co. v. Harper Bros., 222 U.S. 55 (2d Cir. 1911).

83. See Weil, *American Copyright Law,* 82 (1917).