The Balanchine Trust: Dancing through the Steps of Two-Part Licensing

Cheryl Swack
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CHERYL SWACK*

I. INTRODUCTION

A. George Balanchine

George Balanchine,1 "one of the century's certifiable ge-

* Member of the Florida Bar; J.D., University of Miami School of Law; B. A., Sarah Lawrence College. This article is dedicated to the memory of my mother, Allegra Swack.

1. Born in 1904 in St. Petersburg, Russia of Georgian parents, Georgi Meltonovich Balanchivadze entered the Imperial Theater School at the Maryinsky Theatre in 1914. See Robert Tracy & Sharon Delong, Balanchine's Ballerinas: Conversations With the Muses 14 (Linden Press 1983) [hereinafter Tracy & Delong]. His dance training took place during the war years of the Russian Revolution. See id. While at school, Balanchine began experimenting with his own choreography. See id. Upon graduation in 1921, he joined the State Theatre of Opera and Ballet and then followed in the footsteps of his composer father by entering the Petrograd Conservatory of Music. See id. In 1922, Balanchine was able to form a small company of dancers, called the Soviet State Dancers. See id. Soviet authorities, wanting to expose the West to Soviet art, granted the company permission to tour Europe. See Tracy & Delong, supra, at 14-15. Balanchine and his company never returned to the Soviet Union. See id. at 11. When performing in France, Balanchine and his dancers met Serge Diaghilev, director of the experimental Ballets Russes, who hired him as the resident choreographer and dancer. See id. at 15. While at the Ballets Russes, Balanchine found his artistic voice with his first two masterpieces: Apollon Musagète with music by Igor Stravinsky and Prodigal Son with music by Serge Prokofiev. See id. After Diaghilev's death in 1929, the Ballets Russes folded. See id. at 17. Balanchine then choreographed for the Paris Opéra Ballet, the Royal Danish Ballet in Copenhagen, Denmark, and for the Cochran Revue in London, England. See id. Eventually, Balanchine met Lincoln Kirstein, a well-to-do Bostonian, who brought him to New York, both to popularize ballet in America and to found a ballet company. See Tracy & Delong, supra, at 17.

Arriving in the United States in 1933, Balanchine and Kirstein worked tirelessly to form a lasting ballet company consisting of American dancers. See id. at 58. In pursuit of their goal, Balanchine and Kirstein founded four different companies between 1933 and 1948. See id. at 58-63. During this time, Balanchine also choreographed for the Broadway stage, the cinema and the circus. See id. Finally, in 1948, Balanchine began to realize his choreographic potential with the formation of the New York City Ballet. See Tracy & Delong, supra, at 63. In 1934, Balanchine co-founded with Lincoln Kirstein the School of American Ballet, the most prestigious ballet conservatory in the United States, and choreographed a neoclassical, plotless and abstract repertoire of masterpieces for the New York City Ballet. See id. By the time of his death in 1983, Balanchine had achieved worldwide acclaim for his work; not only had he changed the public's perception of how quickly and precisely a dancer should move, but he also changed the way audiences would thereafter perceive the way a dancer should look. See id. at 11.
choreographed what is considered to be the most compelling and complex ballet repertoires of all time. His ballets, numbering over 400 and created throughout his sixty-year career, utilize "speed, crystalline technique and musicality," to bestow emotional responses on the audience ranging from astonishment to the sublime. Today, audiences all over the world demand Balanchine's priceless neoclassical legacy because his mostly abstract and plotless ballets, when properly performed, captivate both sophisticated ballet audiences and those with little exposure to dance, with the dancers' visual musicality.

Balanchine's ideal danseuse possessed a small head, long neck and limbs, and highly arched feet. See id. at 10-11. Balanchine was at his most inventive when choreographing for women—after all, the muse of dance, Terpsichore, is very much female; consequently, Balanchine's ballerinas became international ballet stars. See id. at 10. Dancers such as Maria Tallchief, Gelsey Kirkland, Patricia McBride, Suzanne Farrell, Allegro Kent, and Darcy Kistler were hand-picked and trained by Balanchine. See Tracy & Delong, supra, at 10; see also Bernard Taper, Balanchine: A Biography 296 (Univ. Of Cal. Press, 2d ed., 1996) [hereinafter Biography]. When choosing his dancers, Balanchine looked at each woman's individual expressive qualities, noting that "[s]ometimes you see a body and you say it's not beautiful. But then she moves, and the mechanics of her moving produce an impression of beauty . . . . So what you look for in a dancer is what she can give you.", supra, Tracy & Delong at 10. Balanchine's ballets, now administered by the Balanchine Trust, are a testament to his choreographic ingenuity. See id. at 11.


3. See Sarah Kaufman, Balanchine Trust Step Savers Organization Upholds Integrity of His Ballets, WASH. POST, Apr. 9, 1995, at G8 [hereinafter Kaufman]. Besides revolutionizing choreography by "[changing] classic ballet from a statuesque series of poses to a stream of movement as nearly ineluctable as the flow of electrons." Bernard Taper, Choreographing the Future, BALLETT REVIEW, Fall 1995, at 28 [hereinafter Taper 1]. Edward Villella, artistic director of The Miami City Ballet, and former New York City Ballet principal dancer, recounts that Balanchine used to teach his company that dancing is not merely the steps; rather, "it's what links the steps that really is the dance." Id. See Dunning, supra note 2, at C16 (quoting Bart Cook, principal dancer with New York City Ballet, describing Balanchine's musical direction for ballet Stravinsky Violin Concerto, "[i]f you do the [steps] on the [natural musical] impulses . . . it looks fine. But if you do it the way Balanchine wanted, [before or between the impulses,] it's like a sigh or a cry — heart wrenching"); Nicolaj Hubbe - Most Savage Talent Since Nureyev (National Public Radio, Mar. 7, 1995) (quoting dance critic Jean Battey Lewis, "With their speed, musical demands, and intricate partnering, these works are some of the most difficult and beautiful ballets ever made.").

4. See Mindy Aloff, Reliquaries, THE NEW REPUBLIC, Feb. 12, 1996, at 31, 32 [hereinafter Aloff] (critiquing reliquary dedicated to Balanchine in light of his will, providing that New York Ballet would not survive his death). According to Immanuel Kant, there could be something known as "universal judgment of taste."
B. Balanchine Trust

After Balanchine's death in 1983, a unique trust, named the Balanchine Trust, was created to license the domestic and foreign performance rights in Balanchine's works to ballet companies around the world. The Balanchine Trust was created to implement three principle objectives: first, to simplify and encourage licensing ballets choreographed by George Balanchine; second, to disseminate his works worldwide; and third, to guarantee that performance quality would be both authentic and satisfactory. This article discusses the Balanchine Trust, the 1976 Copyright Act's grant of protection for choreography, and the dual licensing of both dance and music, which enables the show to endure.

Before his heart attack in March 1978, Balanchine entertained little thought of preserving his ballets after his death. When asked his opinion on maintaining his ballets for future ballet companies and audiences, Balanchine merely emphasized, "[n]ow is when [the works are] beautiful." For Balanchine, New York City Ballet

Louise Harmon, Law, Art, and the Killing Jar, 79 Iowa L. Rev. 367, 401 n.110 (1994) (discussing Modernism's emphasis on "purity, exclusivity, and the severance of art from any political, social, or cultural influences"). In Kant's view, judgments of taste could be neither cognitive nor logical, but "esthetic — which means that it is one whose determining ground cannot be other than subjective." Immanuel Kant, The Critique of Judgment, reprinted in AESTHETICS: A CRITICAL ANTHOLOGY 643 (George Dickie & Richard J. Sclafani eds., St. Martin's 1977). A person's reaction to a ballet performance would be based on "pure disinterested delight" when simultaneously watching the choreography and listening to the accompanying music. See id. at 644. Kant thought these subjective aesthetic responses could be universally held. See id. If a person perceives an object, or an event existing in time, as beautiful, "completely free in respect of the liking which he accords to the object [or event]," he could think that his decision "rest[s] on what he may also presuppose in every other person; and therefore he must believe that he has reason for demanding a similar delight from everyone." Id. at 648.

5. See Marilyn Hunt, The Balanchine and Ashton Inheritance Part I: The Balanchine Trust, The DANCING TIMES, Apr. 1993, at 668. Choreographer Anthony Tudor's works are now administered by a trust. See id. Anthony Russell-Roberts, executive director of England's Royal Ballet and heir to choreographer Sir Frederick Ashton's dances, has considered creating a trust similar to the Balanchine Trust to license the performance rights in his inheritance. See id.


7. See Kaufman, supra note 3, at G8. Balanchine often said, "[m]y ballets are like butterflies. They live for a season." Id. (discussing future of Balanchine productions since he is no longer alive to oversee their proper direction).

8. Taper 2, supra note 6, at 29 (indicating that Taper is Balanchine's official biographer). Balanchine was never preoccupied with memorializing himself through his ballets after his death. See Aloff, supra note 4, at 32 (stating that when Taper asked about preserving ballets, Balanchine answered, "[f]or whom? For people to see that I don't even know what they're like, that aren't even born yet?"
“NYCB”) served as his choreographic laboratory and showcase, not as a memorial to his genius.9 He did not want his ballets to memorialize him after his death.10 Furthermore, Balanchine feared that after fifty years of performances, his ballets would suffer from unauthorized changes, and persons capable of explaining the ballets would no longer be alive.11 To Balanchine, preserving his ballets meant that future dancers and audiences “will remember [only] the steps and forget the idea” underlying each dance.12

After recovering from his heart attack, Balanchine consulted a lawyer, recommended by NYCB’s counsel, to plan for the disposition of his personal assets upon his death. When asked by the lawyer to describe his assets, he indicated that his ballets “[were] not worth anything.”13

American copyright law had never protected abstract ballets as choreographic works.14 Abstract ballets, the bulk of Balanchine’s creative output, were therefore intangible property with no legal status and could not be bequeathed. Balanchine’s lawyer knew, however, that Congress had recently extended copyright protection to choreographic works, making it possible for the first time to successfully bequeath a choreographic legacy. In other words, Balanchine’s ballets could now “be considered assets that a will should take into account.”15

And are my ballets going to be danced by dancers I don’t know, that I haven’t trained? Those won’t really be my ballets.

9. See Aloff, supra note 4, at 32.
10. See id.
11. See Taper 2, supra note 6, at 30.
12. See Aloff, supra note 4, at 32. When choreographing, Balanchine never explained what he meant by “the idea,” but somehow it would always be there, “intrinsic to the work – a kind of visual fragrance sometimes, a particular insight into the music, a defined palette of movement (as when he thought of Apollo as ‘white on white’), a particular mode of attack, accentuated often by the entrances and exits, and a subtext of mysterious but somehow inevitable portents, emotions and references.” Taper 1, supra note 3, at 31.
13. Taper 2, supra note 6, at 30 (showing that Theodore M. Sysol, Esq. prepared Balanchine’s will, which he signed on May 25, 1978); see also Glackin, supra note 2, at EN8.
14. See Taper 2, supra note 6, at 30 (discussing fact that Balanchine’s lawyer informed him of Congress’ passage, for first time, of copyright law protecting dance works).
15. Taper 2, supra note 6, at 30. Balanchine named Horgan the executor of his estate. See id. Horgen’s first task was to pay any estate tax owed to the Internal Revenue Service (“I.R.S.”). See id. Because Horgen deposited videotapes of all Balanchine’s ballets in NYCB’s active repertoire with the Copyright Office during the last two years of his life, monetary values had to be assigned to the devised ballets as property of the estate. See id. However, “there [had] been no recorded case in which a choreographer’s right to control his work, and thus, its value, [had] been protected by the law of copyright.” Id. Hiring the law firm of Pros-
Balanchine passed away on April 30, 1983. His will, acknowledging "that dance has always been created and handed down through personal contact," specifically bequeathed the domestic, foreign and media rights in 113 ballets to fourteen individual legatees, rather than NYCB, whose repertoire consisted almost entirely of Balanchine’s ballets.16 Three legatees of Balanchine’s estate, Barbara Horgan, Balanchine’s personal assistant and the executor of his will, Karin von Aroldingen, intimate friend and NYCB ballerina, and former wife and NYCB ballerina Tanaquil Le Clerc, received seventy percent of the rights in Balanchine’s ballets.17

kauer, Rose, Goetz & Mendelsohn (“Proskauer, Rose”) to keep the tax bill as low as possible, the estate argued that “historically, choreographers’ fees have always been low . . . and that without Balanchine on hand to refresh and renew his works, these ballets were bound to depreciate and fall out of favor “as evidenced by the decline in both the quality and demand of Ashton’s repertoire for England’s Royal Ballet following his death. Therefore, . . . it would be unreasonable for the I.R.S. to reckon on more than five years of posthumous income for the Balanchine ballets.” 18

By itemizing the royalties earned on eighty-nine ballets three years before Balanchine’s death, Proskauer, Rose averaged his annual income at $87,067.60 (Apollo earned $972.12; Serenade, $4,410.84; The Four Temperaments, $1,813.32; Tarantella, $13.33; Robert Schumann’s “Davidsbündlertänzer,” $286.67; Allegro Brillante, $11,480.11; and The Nutcracker, $8,173.34). By adding up each ballet’s royalties, Proskauer, Rose determined the value of Balanchine’s ballets to be $190,691.37. See Taper 2, supra note 6, at 30. In April 1986, Horgan, Proskauer, Rose, and the I.R.S. concurred that twelve dances could survive longer than five years, and the I.R.S. assigned these ballets a fifteen-year life expectancy. See id. This trebled the value of Balanchine’s ballets to $550,000. See id. The taxable estate then equaled $1,192,086, with a federal tax bill of $300,562, and a New York state tax bill of $69,787.80. See id. Unlike the Ashton ballets, Balanchine’s dances have not disappeared, but have garnered immense popularity throughout the world. See id. For this reason, the I.R.S. valuation could have been ten times higher. See id. at 52-53; see also Hunt, supra note 5, at 668 (discussing operation of Balanchine trust).

16. See Hunt, supra note 5, at 668; see also Taper 2, supra note 6, at 30; Aloff, supra note 4, at 32 (citing two of Balanchine’s reasons for bequeathing his ballets to individual friends instead of NYCB: first, he wanted to provide for their welfare; and second, he did not think NYCB could survive his death because he used NYCB as forum to create ballet and not his memorial); Glackin, supra note 2, at EN8 (noting that of 113 ballets mentioned in will, seventy-five had been currently available, six could be restaged with some research, and thirteen would be newly choreographed in last five years of Balanchine’s life).

17. See id. Horgan and von Aroldingen share foreign royalty rights in ninety-two ballets and media royalty rights for photographs, written words and video in eighty-eight ballets, “plus all rights to those ballets not specified in [the will]”. Id. Le Clerc received the American royalty rights to eighty-five ballets. Additionally, Horgan received all the rights to Brahms-Schoenberg Quartet, music by Johannes Brahms, orchestrated by Arnold Schönberg; and von Aroldingen received all rights to Serenade, music by Pyotr Tchaikovsky, Liebeslieder Walzer, music by Johannes Brahms, Stravinsky Violin Concerto, music by Igor Stravinsky, Variations pour une Porte et un Soupir, music by Pierre Henry, Vienna Waltzes, music by Johann Strauss the Younger, Franz Lehár, Richard Strauss, and Kamermusik No. 2, music by Paul Hindemith. See Taper 2, supra note 6, at 31. The ballets included in the distribution of rights among the three principal legatees are Apollo, music by Igor Stravin-
Balanchine bequeathed the remainder of the ballets to eleven other NYCB colleagues.18

After settling Balanchine’s estate, Horgan and von Aroldingen predicted that “the rights [would become] further dispersed as they might be left to a multitude of heirs of heirs.”19 They approached the lawyer for Balanchine’s estate, Paul Epstein, for advice on consolidating the domestic, foreign and media rights which Balanchine had bequeathed to numerous individuals. On Epstein’s advice, Horgan and von Aroldingen created an irrevocable trust, entitled The Balanchine Trust L.P. (“Balanchine Trust”), and offered membership to all the legatees of Balanchine’s will to avoid the administrative chaos of licensing the complicated performance rights.20 The critical feature of an irrevocable trust is that once a person places one’s rights within the trust, the action cannot be revoked.21


18. See Taper 2, supra note 6, at 31. Balanchine devised full rights in specified ballets to: Diana Adams (A Midsummer’s Night Dream, music by Felix Mendelssohn); Suzanne Farrell (Meditation, music by Pyotr Tchaikovsky, Don Quixote, music by Nicolas Nabakov, and Tzigane, music by Maurice Ravel); Patricia McBride (Tarantella, music by Louis Gottschalk, arranged by Hershy Kay, Pavane, music by Maurice Ravel, and Etude for Piano, music by Alexander Scriabin); Merrill Ashley (Ballo della Regina, music by Giuseppe Verdi); Kay Mazzo (Duò Concertant, music by Igor Stravinsky); Jerome Robbins (Firebird and Pulcinella, music by Igor Stravinsky); Mrs. André Eglevsky (Sylvia Pas de Deux, music by Léo Delibes, Minkus Pas de Trois, music by Ludwig Minkus, and Glinka Pas de Trois, music by Mikhail Glinka); Betty Cage (Symphony in C, music by Pyotr Tchaikovsky); and Rosemary Dunleavy (Le Tombeau de Couperin, music by Maurice Ravel); Lincoln Kirstein (Concerto Barocco, music by Johann Sebastian Bach, and Orpheus, music by Christophe Willibald Gluck) and Edward Bigelow (The Four Temperaments, music by Paul Hindemith, and Ivesiana, music by Charles Ives) share their rights with von Aroldingen and Horgan. See id; see also Flatow, supra note 17, at 58 (discussing division of rights in Balanchine’s ballets).

19. Hunt, supra note 5, at 668 (discussing concerns that induced decision to have Balanchine’s legacy governed by trust).

20. See Taper 2, supra note 6, at 33 (noting that purpose of Balanchine Trust had been “to create a context in which order could prevail”). Balanchine left about sixty-five percent of his ballets in a very complicated arrangement. See Hunt, supra note 5, at 668 (relating that “American rights, foreign rights, and media rights often were owned by a different person or even jointly by two persons”). In addition, trusts receive some tax advantages under United States law. See id.

21. See Hunt, supra note 5, at 668.
Thus, any legatees who joined the Balanchine Trust could not revoke their membership.22

A valid trust must have: first, the intent to form a fiduciary duty; second, property or res; third, one or more beneficiaries; and fourth, a trustee. Since the Balanchine Trust was established as a centralized non-profit entity, Horgan has performed her fiduciary duty as trustee "to facilitate the licensing of the ballets, to foster their dissemination throughout the world, and to make sure that performances would be 'authentic' and of satisfactory quality."23 The corpus of the Balanchine Trust consists of the rights attached to the ballets.24 The legatees, for their lifetimes, receive "the receipts, royalties, [and] payments, for those ballets,"25 while the trustee administers the Balanchine Trust along with a board of trustees.26

As a participant in the Balanchine Trust, complete control over a particular dance remains with the specified legatee.27 Thus, when a ballet company requests performance rights to dance a certain Balanchine ballet, the legatee alone decides whether to permit that company to perform the ballet and also decides who will stage the work.28 Upon death, the legatee forfeits control of the dance, although the legatee's heirs continue to receive all royalties flowing from the ballet.29 If an heir chooses not to join the Balanchine Trust, the heir may still elect to have the trust administer the ballet's performance rights, and further, may bequeath rights in the ballet to the Balanchine Trust.30 Because the law states that a trust may only "support beneficiaries for a limited time and then cease to exist," Horgan and von Aroldingen also founded The George

22. See id. (explaining that, while it is not necessary to join trust, even if beneficiaries choose not to join, they might choose to have trust execute their rights in estate, as well, and may also choose to bequeath their rights to trust). Only Patricia McBride and Rosemary Dunleavey, along with Horgan and von Aroldingen, joined the Balanchine Trust. See Taper 2, supra note 6, at 33-34.
23. Taper 2, supra note 6, at 33.
24. See Hunt, supra note 5, at 668. One hundred thirteen ballets were distributed among fourteen legatees.
25. See id.
26. See id. The trustees are Karin von Aroldingen, Kay Mazzo Bellas, Paul H. Epstein, Susan Hendl and Barbara Horgan.
27. See id.
28. See id. The trustee consults the heir of the particular ballet to get his or her consent. If the heir consents, but is unable to stage the ballet, the trustee consults with the heir over who will do the staging. See id.
29. See Hunt, supra note 5, at 668.
30. See id. Several legatees, including Tanaquil Le Clercq, who are not members of the Balanchine Trust, permit Horgan, the trust administrator, to represent them. See Taper 2, supra note 6, at 34.
Balanchine Foundation to receive the rights to the ballets upon the Balanchine Trust's termination. Additionally, the Balanchine Trust registered Balanchine's name, and the terms "Balanchine Technique" and "Balanchine Style," with the U.S. Patent and Trademark Office.

II. THE HISTORY OF COPYRIGHT PROTECTION FOR CHOREOGRAPHY

Creation of the Balanchine Trust became possible through passage of the Copyright Act of 1976, which for the first time included choreography in its enumerated list of protected art forms. Historically, both Congress and the courts denied copyright protection to choreography. In the nineteenth century, courts interpreted the first cases involving choreography and copyright under common law copyright and refused to enlarge the scope of copyright law to encompass abstract choreography. Although musical compositions and dramatic works received statutory copyright protection, the Copyright Act of 1909 did not enumerate choreography as an

31. See Flatow, supra note 14, at 59 (noting that, in future, Horgan sees The George Balanchine Foundation "underwriting apprenticeships at NYCB, sponsoring students at the [School of American Ballet], and supporting talented choreographers"); see also Laura Bleiberg, Master Works, DAYTON DAILY NEWS, July, 23, 1995, at 3C (indicating that George Balanchine Foundation has released, on Nonesuch Records, five-video series called The Balanchine Library, giving "viewers a look at some of the finest of Balanchine's works done by some of his greatest dancers"; the foundation has also released teaching videos explaining Balanchine technique and style.); Jean Battey Lewis, Preserving Images of Balanchine's Best: Tape Series Is Priceless Treasure for Fans, WASH. TIMES, Aug. 13, 1995 (The George Balanchine Foundation releases videotape series); Hunt, supra note 5, at 669 (stating that copyrights on Balanchine's ballets will expire in 2033, fifty years after his death).

32. See Flatow, supra note 14, at 59. Barbara Horgan, executrix of Balanchine's will, stated: "If someone who took one class at SAB [School of American Ballet] opens a ballet school and claims to teach Balanchine style or technique, or Balanchine's name is used on merchandise without authorization, we would want to stop it . . . [T]hese registrations make it possible for us to [go to court] quickly while limiting the costs." Id.


34. Abstract dances are not choreographed to tell a story. See Savage v. Hoffman, 159 F. Supp. 584, 585-86 (S.D.N.Y. 1908) (withholding protection to abstract choreography); Fuller v. Bemis, 50 F. Supp. 926, 929 (S.D.N.Y. 1892) (denying choreographer Manelouise Fuller, early pioneer of modern dance, copyright protection because her dance did not tell story); Martinetti v. Macguire, 16 F. Cas. 920, 923 (C.C.D. Cal. 1867) (No. 9,173) (refusing to extend copyright protection to choreographer because work as undeserving).

an art form that could be copyrighted. In 1947, the Copyright Office extended protection to choreographic works if the dances could be classified as either “dramatic or dramatically-musical compositions.”

Before 1948, Congress did not extend copyright law to abstract choreography for three reasons. First, Congress’ constitutional power granted copyright protection only to those art forms it deemed “useful” to society. Under the 1909 Act, courts interpreted the term “useful” to mean morally proper, and courts almost always found dance immoral. Consequently, “neither Congress nor the courts found abstract choreography worthy of copyright protection.” Second, before the 1976 Act took effect on January 1, 1978, choreography could receive copyright protection as a dramatic or dramatically-musical composition only if it “told a story, was abstract and for the purpose of entertainment.”


37. Patricia Solan Gennerich, One Moment in Time: The Second Circuit Ponders Choreographic Photography as a Copyright Infringement Horgan v. MacMillan, Inc., 53 BROOK. L. REV. 379 n.4 (1987) (discussing implications which Horgan v. MacMillan will have on future determinations of choreographic copyright protection) (citing Barbara 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, 288 (1984)) (quoting Copyright Act of 1947, ch. 391 § 5(d), 61 Stat. 552, 564 (revised 1976)) [hereinafter Singer]. In 1948, the Copyright Office began to recognize the registration of choreography that fit the description of “dramatic works.” Singer, at 299 n.47. Many choreographers, including George Balanchine, were able to register or reregister their rejected works. See id. The success of such choreographers’ efforts led to the Copyright Act of 1976. See id.

38. See U.S. CONST. art. I, § 8, cl. 8 (enumerating powers of Congress). Under the United States Constitution, Congress has the power “[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings and Discoveries.” Id.

39. See Hilgard, supra note 2, at 762 (stating that because society viewed dance as immoral, lawmakers consistently denied choreography copyright protection; thus, choreography had not reached “the elevated artistic status of other fine arts . . . deemed worthy of copyright protection”); Martinetti, 16 F. Cas. at 923 (declaring choreography of women lying around on stage to be immoral and indecent because it promoted neither science nor useful arts); Barnes v. Miner, 122 F. Supp. 480, 490 (S.D.N.Y. 1903) (denying copyright protection to choreography displaying women changing clothes on stage); Dane v. M&H Co., 136 U.S.P.Q. 426, 429 (N.Y. Sup. Ct. 1963) (denying copyright protection for military-striptease dance choreographed as audition piece for stage version of Gypsy because it neither promoted useful arts nor contained literary, dramatic or musical elements, but suggesting that copyright protection might be granted if moral quotient of the work could be raised).

40. Hilgard, supra note 2, at 761; cf. DORIS HUMPHREY, THE ART OF MAKING DANCES 15 (1959) (stating that choreographer Doris Humphrey, pioneer of modern dance, called abstract dance “an emanation of the soul and the emotions also”).
part of a dramatic work, or conveyed the proper moral tone."\textsuperscript{41} Third, Congress had difficulty extending copyright protection to abstract choreography because it perceived all attendant performance rights to be ambiguous. Any dangerous risks derived from "unauthorized copying in textual form of a description of such [choreographic] work" would scarcely be noticed.\textsuperscript{42} Thus, experimental abstract choreography, which did not tell a story or advance a moral or dramatic scenario, was statutorily barred from copyright protection.\textsuperscript{43}

Under the 1909 Act, abstract choreographic works could only be copyrighted in the form of either a "book" or a "motion picture."\textsuperscript{44} To qualify for copyright, a book had to be a "textual description of the . . . choreographic work," while the motion picture could "[depict] a non-dramatic . . . choreographic work."\textsuperscript{45} Chore-

\textsuperscript{41} Gennerich, supra note 30, at 379; see 1909 Copyright Act, 35 Stat. 1075 (protecting choreography only if it told story, was part of dramatic work, or imparted correct moral attitude); Singer, supra note 30, at 288 n.7 (noting that under 1947 Copyright Act choreography had not been granted copyright protection: "Those few dances actually registered under that act were relegated to the category of 'dramatic or dramatico-musical composition [sic]'" (quoting Act of July 30, 1947, ch. 391 § 5(d), 61 Stat. 652, 654 (revised 1976))); Leon I. Mirell, Legal Protection for Choreography, 27 N.Y.U. L. REV. 792, 803 (1952) (discussing how the 1948 Copyright Office Regulations included ballet as work eligible for copyright protection because it met dramatico-musical composition requirement); Copyright Office, Circular No. 41, CHOREOGRAPHIC WORKS 1 (1977) (explaining that prior to Congress' enactment of 1976 Act, Copyright Office defined "choreographic work" as "a ballet or similar theatrical work that tells a story, develops a character, or expresses a theme or emotion by means of specific dance movements and physical actions").

\textsuperscript{42} See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.07(D) (1995) (explaining that, if formalities were followed, pantomimes and ballets which would have lost their copyright potential once published would be eligible for copyright protection as book or motion picture under The 1909 Act).

\textsuperscript{43} See id.

\textsuperscript{44} Id. (discussing ways to circumvent limitations on copyrighting choreography); see also Julie Van Camp, Copyright of Choreographic Works, in 1994-95 ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK at 59 (expressing attorney Joseph Taubman's comment that he had "been advised that on occasion the Copyright Office, under the [1909 Act], did, in fact, accept a film . . . as a copyright of a work of choreography. Conceivably this could cover abstract dance as well." (quoting Joseph Taubman, Choreography Under Copyright Revision: The Square Peg in the Round Hole Unpegged, 10 PERF. ARTS REV. 219, 233 (1980))).

\textsuperscript{45} NIMMER, supra note 35, at 2-72 n.33. A motion picture of a non-dramatic work could be registered "as a motion picture other than a photoplay under § 5(m) of the 1909 Act . . . . Whereas motion picture photoplays (i.e., motion pictures which are dramatic in content) were equated to 'dramatic works' for the purpose of conferring a performance right under § 1(d) of the 1909 Act, a motion picture other than a photoplay was entitled to a performance right only if it could be regarded as a 'nondramatic literary work' under § 1(c) of the 1909 Act. It was by no means clear that a motion picture could be regarded as a 'literary work'." Id. at n.33.
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Congress recognized choreography as "a separate, viable form of art," by extending full copyright protection to both abstract and thematic choreographic works. 53

Despite this grant of protection, Congress gave little information about what exactly constituted a choreographic work that would qualify for copyright protection. Both the House of Representatives and the Senate declined to define choreography, reasoning that choreography had a "fairly settled meaning." 54 The House of Representatives provided some guidance, however, by pointing out that the 1976 Act broadly recognized choreography and that choreography would be "broadened further by the explicit recognition of all forms of choreography." 55 Legislative reports further mentioned that "'choreographic works' do not include social dance steps and simple routines." 56

In response, the Copyright Office formulated the following definition of choreography: "Choreography is the composition and arrangement of dance movements and patterns usually intended to be accompanied by music . . . . To be protected by copyright, . . . choreography need not tell a story or be presented before an audience." 57 Choreography may also "represent[] a related series of

dance, as an original creation of a choreographer's authorship, should not be protected as fully as a traditional ballet presenting a story or theme").

53. See Singer, supra note 30, at 289 (discussing ramifications of Copyright Revision Act of 1976). Commentators give three reasons for extending copyright to choreography. First, the growth of modern dance and its recognition as an American art form. See Hilgard, supra note 2, at 763-64. Second, the emergence of new technologies permitting easier recoradation of choreographic works. See Martha M. Traylor, Choreography, Pantomime and The Copyright Revision Act of 1976, 16 New Eng. L. Rev. 227, 229-30 (1980) (discussing problems involving copyright of choreography and ways to adequately protect it) [hereinafter Traylor]. Third, choreography had been an important in both the entertainment and artistic communities, yet choreographers' financial rewards remained far behind their artistic accomplishments. See Melanie Cook, Comment, Moving to a New Beat: Copyright Protection for Choreographic Works, 24 UCLA. L. Rev. 1287, 1287 (1977) [hereinafter Cook].


56. House Report, supra note 44, at 54 (discussing different categories of choreography); see also Singer, supra note 30, at 297-98 (indicating that drafters of 1976 Act barred social dance steps and simple routines as too basic to justify copyright protection). Consequently, the 1976 Act tried to insert a minimum standard of difficulty necessary to sustain copyrightability of the choreographic work. See id. at 298.

57. Dramatic Works: Scripts, Pantomimes, & Choreography, In Answer to Your Query (Copyright Office, Washington, D.C., Sept. 1996) [hereinafter Query]; see
dance movements and patterns organized into a coherent whole."58 Furthermore, choreographers are permitted to incorporate "social dance steps and simple routines . . . in an otherwise registrable choreographic work. Social dance steps, folk dance steps alike, and individual ballet steps[,] may be utilized as the choreographer's basic material in much the same way that words are the writer's basic material."59 In *Horgan v. MacMillan, Inc.*,60 the only choreographic

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58. COMPENDIUM II § 450.05(a). Contact improvisation, developed in the 1960's by Steve Paxton and other members of the deconstructionist Judson Church movement of modern dance, relies solely on improvisation among the dancers to create a piece in front of an audience. No steps, patterns, spatial relationships or timing are worked out prior to performance. Also, choreographer Merce Cunningham creates his dances by choreographing rigorous movement sequences. Before each performance, he throws the I Ching, or uses some other chance procedure like tossing dice, to determine the order of sequences to be danced by his company that evening. Watching contact improvisation and Cunningham's chance methods is exciting because the choreography is always unpredictable. See id. at 400-21. The COMPENDIUM II notes that "[r]egistration cannot be made for improvisation to be provided by the dancer unless such improvisation is fixed." COMPENDIUM II, supra note 46, at § 450.09.

59. Id. § 450.06(a) (outlining acceptable choreographic content).

60. 789 F.2d 157 (2d Cir. 1986). In *Horgan*, appellant Barbara Horgan, executrix of George Balanchine's estate, appealed the district court's denial of an injunction to prevent publication of a book called *The Nutcracker: A Story & a Ballet*, published by defendant MacMillan, claiming the book infringed upon Balanchine's copyrighted choreography of *The Nutcracker*. See id. at 158. Balanchine registered a video of a dress rehearsal with the Copyright Office in December 1981. See id. MacMillan's children's book, photographed by NYCB's official photographers, contained pictures of Balanchine's version of *The Nutcracker* as performed by NYCB. See id. This ballet, which is performed by NYCB every year at Christmas, is a classic and a commercial success. See id.

Appellant questioned defendant's right to create a derivative work from Balanchine's copyrighted ballet without the proper permission and licenses from his estate. See id. at 159. Defendant claimed it did not need permission from Balanchine's estate to publish pictures of NYCB dancing *The Nutcracker*, since Balanchine authorized the photographers to take pictures of the company. See id. The district court held that the book did not infringe Balanchine's copyright since choreography is the flow of steps in a ballet, and the flow of movement cannot be captured in still photography. See id. at 160; see also *Horgan v. MacMillan, Inc.*, 621 F. Supp. 1169, 1170 (S.D.N.Y. 1985). On appeal, the court of appeals found that the district court used the wrong standard for its decision; instead of asking "whether the original could be recreated from the allegedly infringing copy," the district court should have asked "whether the [photographs are] 'substantially similar' to the [copyrighted ballet]." *Horgan*, 789 F.2d at 162. The correct test would then be "whether the observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.'" Id. (citing *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960)) (holding that preliminary injunction prohibiting defendant from infringing on cloth designs should be granted). The Second Circuit then noted that an ordinary observer seeing the book could "perceive even more from
infringement case litigated under the 1976 Act, the court defined choreography as "the flow of steps in a ballet."61 It remains to be seen, however, how future courts will define choreography.

In order to receive copyright protection, choreographic works must fulfill two requirements: first, the work must be an original work of authorship; and second, it must be fixed in a tangible medium of expression.62 To be "original," the choreographer "must [independently] create the work with [his] own skill, labor, or judgment63 and exhibit a "modicum of creativity."64 However, "[q]uality, aesthetic merit, ingenuity, and uniqueness are not considered in determining the copyrightability of a work."65

Because courts have not yet addressed the question of originality in choreography, musical compositions may provide direction.66 When a court examines the level of originality in music, it analyzes the way the composer has arranged musical building blocks: rhythm, harmony, and melody.67 If the composer has added his own recognizable imprint into the composition,68 the musical work

[these] photograph[s]" than just the "freezing of a choreographic moment . . . ." Horgan, 789 F.2d at 158 (reiterating district court's definition of choreography).

61. Horgan, 789 F.2d at 158 (reeating district court's definition of choreography).

62. See 17 U.S.C. § 102(a)(1994) (stating that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device").

63. Hilgard, supra note 2, at 765 (discussing rights and stipulations under Copyright Act of 1976); see also BellSouth Adver. & Publ'g Corp. v. Donnelly Info. Publ'g, Inc., 999 F.2d 1436, 1441 (11th Cir. 1993) (holding that compiling one telephone directory from another was not sufficiently creative to demand copyright protection); Atari Games Corp. v. Oman, 979 F.2d 242, 243 (D.C. Cir. 1992) (holding that district court's rejection of copyright protection to video game was unreasonable because of low requisite level of creativity); Mason v. Montgomery Data, Inc., 967 F.2d 135, 141 (5th Cir. 1992) (holding that maps, prepared using government topographical maps were sufficiently creative to warrant copyright protection); Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 355-57 (1991) (holding that Constitution established originality as requirement for copyrightability); cf. Russ VerSteeg, Defining "Author" for Purposes of Copyright, 45 AM. U. L. REV. 1323, 1344 (1996) (stating that [1976] Act does not require 'creativity,' it requires 'originality').


65. COMPENDIUM II, supra note 46, at § 202 (outlining criteria for original work of authorship).

66. See Singer, supra note 30, at 300.

67. See id.

68. See James D.A. Boyle, The Search for an Author: Shakespeare and the Framers, 37 AM. U. L. REV. 625, 629 (1988) (stating that author's interpretation governs artistic work because it is author's mind that created art). In the romantic view of art and authorship, "[t]he author is presumed to have an almost transcendental insight - something which cuts beneath the mundane world of everyday appear-
will most likely be copyrightable, regardless of the familiarity of the harmonic and rhythmic patterns. Accordingly, in choreography, when the building blocks of rhythm, space and movement are originally composed by the choreographer, the work should be copyrightable, even if it utilizes familiar steps. Thus, the art forms specifically enumerated in section 102(a) are considered works of authorship under the 1976 Act, and an author is the creator of the work’s intangible expression.

Under the second requirement, choreography is considered a “writing” under the Constitution only if it is “fixed in [a] tangible medium of expression.” Regardless of the number of times a dance has been publicly performed, section 101 explains that “a [choreographic] work is ‘created’ when it is fixed in a copy . . . for the first time.” Furthermore, the expression embedded in a dance must be fixed in a tangible medium of expression that is “sufficiently permanent or stable to permit it to be perceived, repro-

ance. This transcendental insight or genius plays a very important role in establishing the author as the ruler of the text.”

69. See Singer, supra note 30, at 300.

70. See id. (discussing “original” requirement that dances must fulfill to receive statutory protection).

71. 17 U.S.C. § 102(a) (enumerating subject matter qualifying for copyright protection). The art forms enumerated under section 102(a) of the 1976 Act are: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures, and other audiovisual works; (7) sound recordings; and (8) architectural works. See id.

72. See VerSteeg, supra note 52, at 1332 (defining author as “someone who contributes something that is copyrightable on its own”); see also Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (further defining author as “he to whom anything owes its origin”).

73. Nimmer, supra note 35, at § 2.03 (discussing eligibility requirements for copyright protection of rights of authorship); see also Goldstein v. California, 412 U.S. 546, 561 (1973) (holding that “writings” include “physical rendering of the fruits of creative intellectual or aesthetic labor”); cf. Leslie Erin Wallis, Comment, The Different Art: Choreography and Copyright, 33 UCLA. L. Rev. 1442, 1467 (1986) (explaining that “[a] choreographic work is not that which is notated or filmed; rather, it is the physical manifestation of the choreographer’s ideas expressed through physical gestures and movements of dancers.”). The fixation requirement in the 1976 Act, however, is in harmony with the governing act of the Berne Convention, to which the United States is a member. See Berne Convention of the Int’l Union for the Protection of Literary & Artistic Works, Sept. 9, 1886, 331 U.N.T.S. 217, Paris Revision, July 24, 1971, amended, Sept. 28, 1979, at art. 2(2) reprinted in J.A.L. STERLING, World Copyright Law 814 (1996)) (listing choreographic work as subject matter in art. 2(1), whereas art. 2b(i) details exclusive rights under Berne Convention).
duced, or otherwise communicated for a period of more than transitory duration. 74

Two methods are currently used to fix choreography in a stable form: written notation and audiovisual recordation. 75 First, Labanotation, which is primarily used in the United States, is a written dance notation system based on a vertical staff marked with symbols representing movements. 76 Second, film, and especially video, re-

74. 17 U.S.C. § 101 (1998); see VerSteeg, supra note 52, at 1339 (stating that author for copyright purposes is communicator because he must fix work in tangible medium of expression). As a precursor to communicating, however, many authors, either consciously or subconsciously, conceive an auditory or visual mental image of his original expression. See id. at 1346. This expression does not have to be fixed for the creator to be the author. See id. ("Fixation is a requirement of copyrightability but it is not a statutory requirement of authorship."); see also Community for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) ("As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression . . . ."); Problems of Creators of Works of Fine and Applied Arts, Including Choreographers, 1985 A.B.A. SEC. PATENT, TRADEMARK & COPYRIGHT LAW REP. 140 (stating performance of choreographic work is not copyrightable because it is not fixed in tangible medium).

75. See Query, supra note 57 ("[F]or choreography, the work may be embodied in a film or video recording or be precisely described on any phonorecord or in written text or in any dance notation system such as Labanotation, Sutton Movement Shorthand, or Benesh Notation."); see also Traylor, supra note 53, at 228-29 ("The word 'choreography' is derived from the Greek 'choreia,' meaning 'dance,' and 'graphos,' meaning 'to record.' Thus, the traditional meaning of the word combines the concept of dance with the concept of recordation so that the artistic aspects can be preserved and recreated from the recordation to allow later enjoyment of the artistic form."). See id. Traditionally, in the dance community, dances are passed down from dancer to dancer, in quite the same way folk tales had been passed down before printing and literacy became prevalent. See id. at 238-39. This is mental recordation: once dancers are taught choreography, they retain it in their memories. See id. at 239. Dancers' memories serve as the data bank for the dance community. See id. Thus, a choreographic work should be considered "fixed" when it is set into the memories of the dancers because at this instant, the choreography is sufficiently permanent and stable to permit it to be communicated to others through the dancers. See id.

76. See Traylor, supra note 53, at 231. The two forms of dance notation available are Labanotation and Benesh Notation, which is primarily used in England. See id. Labanotation had been created by Rudolf von Laban. Von Laban took twenty-five years to develop his system of dance notation, publishing it in his native Germany in 1928 under the title Kinetographie Laban, using written symbols to describe movements and steps. See id. In 1930, Labanotation had been translated into English and by 1940, Anne Hutchinson Guest, Helen Priest Rogers, Eve Gentry and Janey Price brought the system to New York, organizing The Dance Notation Bureau ("DNB"). See id. Notating dance is a highly complex skill, acquired after rigorous training. See id. A skilled Labanotator must know how to notate dance and transform the 200-300 page notated score back into a dance performance. See Traylor, supra note 53, at 231. Even though relatively few people are qualified Labanotators, DNB holds over 460 dance scores by more than 160 choreographers. See id. DNB has also developed LabanWriter, a computer program designed to notate dance. See id. Notating a score can be both time consuming and expensive; however, a Labanotation score provides a record of the choreography, serving the same function as a musical score for music; contains the details of
main the popular choice among choreographers because recordation in the audiovisual format is easier to obtain and less expensive than a Labanotation score. Although the high cost of permanent recordation stops many choreographers from registering their work, it is also clear that neither format fully captures the subtle movements and multi-dimensionality of dance.

Under the 1976 Act, after an author registers his work he has the exclusive right, subject to fair use, to do the following: reproduce the work in copies; prepare derivative works based on the steps, floor patterns and information on the choreographer's original motivations and nuances; details the unique relationship between the choreography and the music; and permits the dancers to study the choreographer's style. See Traylor, supra note 53, at 232; see also Anne Hutchinson, Labanotation: The System of Analysing and Recording Movement (1954). Benesh Notation, created by Rudolf Benesh, is taught at the Institute of Chorology in London, England. See id. The Institute of Choreology holds over 350 notated scores by choreographers such as Sir Frederick Ashton, Kenneth MacMillan, and David Bintley. Benesh Notation is taught to a small group of students, including a select few from the Royal Ballet School. See Rudolf Benesh et al., An Introduction to Benesh Dance Notation (1955); see also Explanatory Materials supplied by The Dance Notation Bureau.

77. See Gennerich, supra note 30, at 381 n.11 (asserting drawbacks to filming dance in that viewer may not be able to see all dancers' individual steps because camera may not "capture the dynamics and interplay of the dancers, especially when several dancers are engaged in syncopated movements"). Balanchine also expressed apprehension about film as an adequate recordation device:

While some people advocate the use of film to record ballet, I have found them useful only in indicating the style of the finished product and in suggesting the general overall visual picture and staging. A film cannot reproduce a dance step by step, since the lens shoots from but one angle and there is a general confusion of blurred impressions which even constant reshooting can never eliminate.

Hutchinson, supra note 61, at ii (quoting Balanchine). Audiovisual formats are useful in providing a record of performance, serving the same function as an audio recording does for music; giving an overall impression of the choreographic work; permitting persons to see the dance and hear the music at the same time; and allowing the dancers to study the style of particular performers. See Explanatory Materials supplied by the Dance Notation Bureau, supra note 61; see also Wallis, supra note 73, at 1462 (stating film and videotape are inadequate for fixation purposes).

78. See Gennerich, supra note 30, at 381 (stating that, in order to fix his work, choreographer must spend additional funds, because dances are created primarily for live performance). Even though video equipment may not be excessively expensive, cost may be prohibitive for less successful choreographers. See id. Section 102(a) also allows for fixation of the work to occur "in any tangible medium of expression, now or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a) (1990). Choreography software allows the choreographer to recreate human movement on the computer screen, along with accurate spacing and timing. See Hilgard, supra note 2, at 766. Again, the software is not yet affordable for most choreographers. See id. The Copyright Office will probably accept computer graphics as a form of fixation if, under § 101, it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (1998).
the copyrighted work; distribute copies by sale, lease or other transfer; perform the work publicly; and display the work publicly.\textsuperscript{79} Although all five rights apply to choreographic works, choreographers attach the most value to performance and derivative rights.\textsuperscript{80}

Nevertheless, the 1976 Act can protect all five rights inherent in choreographic works. First, when a choreographer exercises his right to reproduce his work, he can restage the work using either the copyrighted notated score or the copyrighted film or video. He also retains the right to stop any unauthorized performances of the work staged by a performer "in whose memory the choreography is fixed."\textsuperscript{81} Second, a derivative work is "a work based upon one or more preexisting works, such as a . . . musical arrangement[,] . . . sound recording[,] . . . or any other form in which a work may be recast, transformed, or adapted."\textsuperscript{82} Further, "[t]he copyright in a . . . derivative work extends only to the material contributed by the author of such work . . . and does not imply any exclusive right in the preexisting material."\textsuperscript{83}

A derivative work will be separately copyrightable if it is "based in whole, or a substantial part, upon a preexisting work . . . [and] it satisfies the requirements of originality."\textsuperscript{84} To satisfy the originality requirement, the material transforming the preexisting work must be more than a minimal contribution. Thus, the standard used to ascertain a work's \textit{quantum} of originality is whether the author has

\begin{footnotesize}
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\item See 17 U.S.C. § 106; \textit{see also} 17 U.S.C. § 410(c) (1976) (stating registration certificate, received by author after depositing one copy of his choreographic work with Copyright Office, is \textit{prima facie} evidence of copyright's validity). The American Bar Association's Section on Patent, Trademark and Copyright Law asked the Register of Copyrights and the Copyright Office to reduce the requirement of depositing two copies of a choreographic work in an audiovisual format to one required copy, along with a written description of the nature and content of the choreographic work. \textit{See Problems of Creators of Works of Fine and Applied Arts, Including Choreographers}, 1981 A.B.A. SEC. PATENT, TRADEMARK & COPYRIGHT LAW REP. 111. This is to help choreographers reduce the high cost of producing their videos. \textit{See id; see also Circular 96, REGISTER OF COPYRIGHTS, SECTIONS 202.19, 202.20, 202.21, at 5 (1996) (stating that for choreography recorded on film or video, deposit requirement is one copy).}
\item \textit{See Singer, supra} note 30, at 305; \textit{see also} NIMMER, \textit{supra} note 35, at § 2.07 [D], 2-72 ("The primary . . . right sought in a choreographic work . . . is the exclusive right to perform the work.").
\item Traylor, \textit{supra} note 53, at 250.
\item 17 U.S.C. § 103(b) (1976).
\item NIMMER, \textit{supra} note 35, at § 3.01, 3-2; \textit{see} COMPRENDIUM II, \textit{supra} note 46, at § 204.04 ("T]he new material may be subject to copyright protection only to the extent that it can be separated from the preexisting work.").
\end{enumerate}
\end{footnotesize}
created a "'distinguishable variation' that is more than 'merely trivial.'"

Choreographic works may be considered derivative in two ways. First, many choreographic works are derived from traditional classical ballets in the public domain. When a choreographer creates his own version of a preexisting ballet, he receives copyright protection only for his added original expression if it is substantially based on the preexisting work and is more than a trivial variation.

Second, a dance may be derivative when it is specially choreographed to a specific musical score or sound recording. Because the dance is a visualization of the choreographer's auditory response to the music, the choreography would be both a distinguishable variation of, and substantially based on, the preexisting music.

Third, under the right to distribute copies, the author "would have the right to control the first public distribution of an authorized copy . . . of his work, whether by sale, gift, loan, . . . or lease arrangement." This enables a choreographer to control the video publication and distribution of his work against all others, such as performers who may remember his dances.

Fourth, "[t]o 'perform' . . . means to . . . dance . . . either directly or by means of any device or process." A dance is a public performance if it is danced "at a place open to the public or at any place where a substantial number of persons . . . is gathered." Under this economic right, a choreographer or a licensing agency, like the Balanchine Trust, can license the performance rights in choreographic works to other dance companies for royalty fees.

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85. Nimmer, supra note 35, at § 3.03, 3-12; L. Batlin & Sons, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir. 1976), cert. denied, 429 U.S. 857 (1976) ("[T]here must be at least some substantial variation [from the underlying work], not merely a trivial variation.").

86. See Compendium II, supra note 46, at § 450.08 ("When the only preexisting material is a few public domain steps, . . . a waltz, or ballet positions, the work is not considered derivative."). Choreographer Marius Petipa and his assistant, Lev Ivanov, choreographed many of the traditional full length ballets for the Maryinsky Theatre in St. Petersburg, Russia in the late nineteenth century. These works, like Swan Lake, Sleeping Beauty, and The Nutcracker, with music by Pyotr Tchaikovsky, are in the public domain. Each time a choreographer restages one of these classics, his personal stamp will be noticeable in the performances, because, for one of many reasons, he may have to change parts of the choreography to fit the particular talents of his dancers. Balanchine, as well as others, also choreographed versions of Don Quixote, Swan Lake, Coppélia and The Nutcracker. See Traylor, supra note 53, at 246-47.


Finally, to publicly display a choreographic work "means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process," if the work is displayed "at a place open to the public or at any place where a substantial number of persons . . . is gathered."89 Because the word "copy," as defined in section 101, "includes the material objects . . . in which the work is fixed," original choreographic works broadcast or transmitted through cable or television, as well as reproductions, are protected under the right of public display.90

Before 1978, only unpublished works received copyright protection under state common law.91 However, section 301(a) of the 1976 Act preempted all state copyright laws "regardless of whether or not [the work] ha[d] been published."92 Nevertheless, "publication" continued to be defined in the 1976 Act as "the distribution of copies . . . of a work to the public," but not as a "public perform-

89. Id.; Appendix 4, supra note 72, at § 106 (Section 101 also clarifies that public performances and displays consist both of live performances and those that "transmit or otherwise communicate a performance or display of the work . . . by means of any device or process." Under this section, "to 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they were sent." This definition encompasses radio and television broadcasting, cable television and newly-emerging forms of technology).


91. See Joan Infarinato, Note, Copyright Protection for Short-Lived Works of Art, 51 Fordham L. Rev. 90, 114 (1982) (asserting common law copyright has been called "an author's proprietary interest in his literary or artistic creations before they have been made generally available to the public"). It enables the author to exercise control over the first publication of his work or to prevent publication entirely. See id.; see also Estate of Hemingway v. Random House, Inc., 244 N.E.2d 250, 254 (N.Y. 1968). Under common or state law copyright, if the work remained unpublished, the author had perpetual copyright protection for his work. See Infarinato, supra, at 114. Common or state law copyright would cease upon publication of the work, when the author would be eligible for federal copyright protection. See id.

92. Beryl R. Jones, Copyright and State Liability, 76 Iowa L. Rev. 701, 728 (1991); Nimmer, supra note 35, at § 2.02 (asserting that Federal law will supersede state law if two conditions are met: first, rights given by state must be equivalent to federal rights granted under § 106; and second, "such rights must inhere in works which 'come within the subject matter of copyright as specified by § 106'"); Appendix 4, supra note 72, at § 301 (Section 301(a) states, all "legal or equitable rights that are equivalent to any of exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of the copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this [the Federal Copyright Statute] title"); 28 U.S.C. § 1338 (1998) (stating that all actions concerning rights under Federal copyright law are within the exclusive jurisdiction of federal court); E. Fulton Brylawski, Publication: Its Role in Copyright Matters, Both Past and Present, 31 J. Copyright Soc'y 507, 524 (1984) (defining "publication" in 1976 Act as "broad enough to include most forms of commercialization or the making of a work public except by exhibition and performance of the work").
ance or display of a work." Thus, choreography that is not recorded or notated would be an unpublished work. Despite this definition, section 104 states that unpublished works "are subject to [federal copyright] protection." The 1976 Act then spared state copyright law, in section 301(b), to protect those works not fixed in a tangible medium of expression, like choreography which has not been notated or recorded on film or video. Consequently, choreography which is only publicly performed, and therefore, not published, would remain protected by state copyright law until the choreographer either notated or recorded the work.

In addition, the 1976 Act codified the fair use doctrine in section 107, allowing lawful infringement of the author's copyright "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research." Fair use applies to choreography because "well-known variations and divertissements" from "established and traditional artistic works are frequently used as teaching vehicles." Using choreography in this way mirrors the classroom use of literary texts. Under section 108, if a dance is to be available to the public for research purposes, "it is not an infringement of [the authors'] copyright for a library or archives . . . to reproduce no more than one copy" of the videotaped, filmed or notated work. Next, section 110 also applies to choreography because it allows "performance or display of a [variation of a full choro-

94. See Conrad Jordan, Note, Copyrights and the National Stolen Property Act: Is the Copyright Infringer a Thief?, 52 Fordham L. Rev. 1242, 1248 n.41 (1984); see also Infarinato, supra note 91, at 114; Appendix 4, supra note 72, at § 301. The states are able to grant statutory or common law copyright to works which are not fixed in a tangible medium of expression because the constitutional mandate — that works must be fixed to be "writings" — is not applicable to the states. See Nimmer, supra note 35, at § 2.02, 2-21.
95. See Infarinato, supra note 91, at 114 (asserting amount of protection offered by state copyright law may be minimal, because each state's laws would provide unfixed works with varying amounts of protection).
96. Courts look to the following four factors when considering whether the use in question is a fair use:
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion taken used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.
97. Traylor, supra note 53, at 251 (stating that, because variations are only small portion of ballet, fair use could fall under section 107(3), which considers amount and substantiality of fragment taught).
graphic work] by instructors or pupils in the course of face-to-face teaching activities of a non-profit educational institution." 99 Last, copyright notice may be "placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device." 100 Accordingly, "printed notice of this intent should be on prominent display before, during, and after the performance [of the copyrighted choreographic work], and should be on programs" handed out to the audience. 101 Used in this way, copyright notice for choreographic works would be analogous to its use in literary and artistic works.

III. BALANCING ARTISTIC OBJECTIVES WITH PERFORMANCE RIGHTS

How does the Balanchine Trust license the performance rights inherent in Balanchine's works to ballet companies, in light of its stated objectives: to facilitate the licensing process; to disseminate the works throughout the world; and to guarantee authentic and satisfactory performances of the ballets? 102

During his lifetime, Balanchine generously allowed other ballet companies to perform his work. He usually never charged fees to Americans, asking only incidental expenses and royalties from foreign ballet companies. 103 The Balanchine Trust continues this tradition by charging reasonable, affordable licensing fees for the privilege of performing the ballets. 104 These fees are sometimes adjusted downward to accommodate the budgets of smaller companies. 105 For the Balanchine Trust, making money from royalty fees plays only a secondary role to disseminating the works throughout the world. 106

As Licensor, the Balanchine Trust ("Licensor") actively seeks to license the performance rights to its ballets. 107 When a ballet

99. Id. § 110.
100. Id. § 401(a).
101. Traylor, supra note 58, at 253.
102. See Taper 2, supra note 6, at 33.
103. See Flatow, supra note 14, at 59-60 (stating that before Balanchine's death, sixty ballet companies worldwide had performed his work); Wilma Salisbury, Balanchine Foundation Keeps His Legacy Alive in Videos, CLEV. PLAINE DEALER, Aug. 11, 1996, at 4-J (discussing legacy of Balanchine Foundation).
104. See Taper 1, supra note 3, at 26.
105. See Salisbury, supra note 84, at 4-J (Horgan said, "[w]e ask them [the companies] to pay what they can afford. We have tried to keep it accessible. We have a moral obligation").
106. See Taper 1, supra note 3, at 26.
107. See Aloff, supra note 4, at 574. NYCB leases its Balanchine repertoire through a unique arrangement with the Balanchine Trust, but this agreement stands "only as long as Peter Martins — in whom the members of the Trust have
company ("Licensee") requests a particular ballet, the Licensor arranges a meeting between the Licensee and the legatee of the requested ballet to discuss "consent, terms, who should be recommended to do the staging, and any other special conditions." The Licensor, when granting requests for specific ballets, takes into account "the [Licensee's] size and character and any direct connections it may have with the Balanchine heritage." The Licensor readily grants performance rights if the Licensee is capable of performing the requested work. If the Licensee is not able to adequately and satisfactorily perform the requested ballet, however, the Licensor will suggest a less challenging ballet to showcase the Licensee's dancers. In both cases, after the Licensor grants the performance rights, casting is left to the Licensee. But if the Licensor declines to grant a request, it reflects the fact that the ballet probably will not be adequately and satisfactorily performed throughout the two-year duration of the license.

The Licensor's License and Service Agreement ("Licensing Agreement") first grants the Licensee a non-exclusive right to perform the ballet in stage and concert venues. The rights granted the Licensee pertain only to the choreography, not to the other elements of the work like music, lighting, scenery and costumes, confidence — remains the director of the company." Id. NYCB has a blanket license to perform all of the ballets represented by the Balanchine Trust, and similar agreements have been made with those legatees not represented by the Balanchine Trust. See Flatow, supra note 14, at 60. When another company, foreign or American, is scheduled to perform a Balanchine work in New York City, NYCB has the right to limit or stop the performance. See id. The Balanchine Trust also gave NYCB the right to use Balanchine's name for fundraising purposes. See id. Horgan has explained that the Balanchine Trust gave NYCB certain rights to Balanchine's name protected by the trust. Horgan noted:

For instance, the company has a fund for refurbishing ballets. Technically, under the law, the New York City Ballet would need an agreement with Balanchine's heirs to advertise this fund, because the money is being raised on his name. But it's entirely appropriate that the New York City Ballet raise money on Balanchine's name.

Id. 108. Taper 1, supra note 3, at 27.
109. Hunt, supra note 5, at 669.
110. See Taper 1, supra note 3, at 27.
111. See id. In this situation, a Balanchine expert may visit the Licensee, watch the dancers, and then make a suggestion as to appropriate ballets. Barbara Horgan, the trust's director, has said, "[a] ballet is not like a picture, you can't hang it on the wall. It is really there to be performed and to be seen by an audience. All that you can do is have it prepared in the best way you know how." Id.
112. See Flatow, supra note 14, at 60.
113. See id. (asserting licensee needs to have strong structure to maintain rehearsals and standard of ballet).
114. See id.
which must be separately licensed.\textsuperscript{115} Next, the Licensor may only perform the work in requested locations for a specific term of years.\textsuperscript{116} The Licensor generally grants an initial two-year license commencing on the date of the first performance, after which the Licensor will review the Licensee.\textsuperscript{117} Taking certain variables into consideration – "Is there a new director? How many dancers have left" – the Licensor may then extend the license if the Licensee is deemed satisfactory.\textsuperscript{118} Licensing fees and royalties are negotiable depending on the ballet company’s size and budget, with fees generally ranging from $1,000 to $10,000 for a single ballet for a two-year period.\textsuperscript{119} In addition, the Licensor does not charge another licensing fee to a Licensee wishing "to continue performing a ballet after its license has expired, but it may well require the [Licensor] to engage one of the [Licensor’s] authorized stagers to check how well the ballet is being performed and supervise what refurbishing may be needed."\textsuperscript{120}

The Licensing Agreement next stipulates that the Licensor will provide Balanchine Technique\textsuperscript{®} and Balanchine Style\textsuperscript{®} services by supplying a restager, who intimately knows the choreography in the requested ballet.\textsuperscript{121} The Licensee must prepare the work under the restager’s guidance. The restager, as an agent for the Licensor, sets the ballet on the Licensee’s dancers, then supervises and inspects rehearsals and performances to ensure that public performances are consistent with the Licensor’s standards of excellence. The Licensor also has "the right to send someone to look at the ballet after it’s been performed for a while, and if it is not being done correctly – if the style is wrong, or the steps have been changed – [the license can be revoked]. And if an artistic director leaves or is replaced, [the Licensor has] the right to decide whether the company may continue to perform the ballet."\textsuperscript{122}

\textsuperscript{115} See id.
\textsuperscript{116} See Flatow, supra note 14, at 60.
\textsuperscript{117} See id.
\textsuperscript{118} See Hunt, supra note 5, at 668.
\textsuperscript{119} See Taper 1, supra note 3, at 26 (stating some well-known choreographers charge around $100,000 to license ballet); see also Flatow, supra note 14, at 60.
\textsuperscript{120} Taper 1, supra note 3, at 26-27.
\textsuperscript{121} See Flatow, supra note 14, at 60 ("The contract stipulates that we send a ballet master or ballet mistress of our choice to stage the work."). The Balanchine Trust relies on twelve restagers, all of whom danced for Balanchine. See Taper 1, supra note 3, at 30-31. These include ballet luminaries such as Suzanne Farrell, Karin von Aroldingen, John Clifford, and Patricia Neary, plus gifted soloists like Elyse Borne, also former ballet mistress at The Miami City Ballet. See id.
\textsuperscript{122} Flatow, supra note 14, at 60.
The Licensing Agreement includes several other terms. First, the Licensor has the right to inspect the ballet every two years to make sure that it is being adequately and satisfactorily performed. If the ballet is not being correctly performed and no agreement can be reached between parties concerning additional rehearsals with the restager, the Licensing Agreement will be terminated. If an agreement is reached, the restager will help to cast the ballet. Second, the Licensing Agreement only gives the Licensee the right to publicly perform the ballet. Videos may be made solely for rehearsal purposes. The Licensor also allows photographs to be taken and used strictly for publicity purposes. Third, the rights acquisition fee is to be paid to Licensor within thirty days of the first performance, and is payable directly to the Licensor or to an authorized agent. No rights society has been authorized to act as a collection agent for the Licensor. Fourth, a notice shall appear in that section of the program where all other performance credits for the ballet are placed.\textsuperscript{123} Fifth, if: (a) the Licensor reasonably decides that there has been a significant change in the Licensee’s artistic direction; (b) the Licensee has reorganized or merged into another organization; (c) the Licensee performs the work outside its territory; or (d) the Licensee has violated any other terms of the Licensing Agreement, the Licensor may terminate the contract. If this happens, all forthcoming performances will be cancelled. Sixth, the Licensor will terminate the Licensing Agreement if changes are made to the choreography, or modified or abbreviated versions of ballet are performed, unless the Licensee obtains the Licensor’s written consent. Seventh, entering into this Licensing Agreement abrogates any previous rights Licensee may have had in the ballet. Eighth, because no adequate remedy exists at law for violation of the Licensing Agreement, the Licensor will be entitled to equitable relief. If the Licensor prevails in an ensuing proceeding, the Licensee shall be responsible for reasonable attorney’s fees and litigation costs. Ninth, all required correspondence between both parties shall be in writing. And tenth, under the Licensing Agreement, (a) the Licensee may not assign his rights under the Licensing Agreement; no relationship of agency, partnership or joint venture are created between the parties; and, (b) neither party may bind the other. Additionally, the Licensing Agreement is gov-

\textsuperscript{123} The notice is as follows: "The performance of [Name of Ballet], a Balanchine® Ballet, is presented by arrangement with The George Balanchine Trust and has been produced in accordance with the Balanchine Style® and Balanchine Technique® Service standards established and provided by the Trust.” Taper 1, supra note 3, at 27.
erned by New York law, and the Licensee agrees that any proceeding will be brought in the federal or state courts in New York.124

IV. NECESSARY STEPS TO OBTAIN THE RIGHT TO PERFORM A BALANCHINE BALLET

If the Balanchine Trust only licenses the right to perform the choreography, how does a ballet company obtain the right to perform the accompanying music?

Performance rights societies, like the American Society of Composers and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"), license performance rights to hundreds of theatrical, concert and recital promoters and presenters. Generally, these licenses only grant performance rights in the non-dramatic use of the music, which is simply "a performance of a musical composition that is not woven into or does not carry forward a definite plot and its accompanying action."125 Non-dramatic performance licenses,

124. See Singer, supra note 30, at 293 n.24 (stating Dance Notation Bureau ("DNB") is also licensing agent, where dance companies wanting to reconstruct dance from notated score of particular choreographer can license work). Either the choreographer or his estate holds the copyright to the notated scores. See Wendy Forster, Dance Notation Bureau Turns Fifty, DANCE MAGAZINE, May 1990. Licensees must consent to the following terms set forth in DNB's licensing agreement. First, if DNB provides the restager, it will provide the Labanotation score, the music score and a rehearsal quality tape of the music. Any accompanist hired by the licensee is at its own expense. If the licensee provides its own restager, its fees, payable to DNB, include, a rehearsal quality audio tape, a Labanotation score and DNB membership. Second, choreographic fees are set by the choreographers or their estates. The choreographic fee permits the licensee to perform the dance for one year from the date of the first performance. If the license is granted for a longer term, the parties stipulate to have the performance recoached. Third, the restager rehearses the licensee under a pre-arranged schedule. In addition, if the choreographer requires he be engaged for stylistic coaching, the licensee must engage his services. Fourth, the licensee is responsible for providing a régisseur to maintain the accuracy of the choreography. Fifth, the licensee will not change, rearrange, modify, or simplify the work without written permission form the choreographer, his estate, or DNB. If written permission is not granted, and the licensee proceeds to alter the original choreography, DNB will terminate the licensing agreement. Sixth, the licensee needs permission to video or notate the dance for its own use. Seventh, the licensee cannot teach the work to another dance company without DNB's permission. Eighth, if the licensee performs the dance for over one year, it must pay for recoaching. Ninth, the licensee pays for and provides music, sets and costumes for the performances according to the details furnished by DNB. It is the licensee's responsibility to license the separate performance rights to the music, sets, costumes and lighting. Tenth, a DNB credit must be placed in all of licensee's publicity and programs. And eleventh, the licensee's rights may not be assigned, and all disputes are to be tried in New York courts.

125. AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 978 (2d ed. 1996). A "singer in a nightclub [singing] a song outside of any dramatic context," is illustrative of a non-dramatic use of a song. See Bernard Korman & I. Fred Koenigsberg,
however, are not authorized to obtain the right to perform musical compositions accompanying choreographic works, because the performance rights societies consider choreography to be a dramatic work. In other words, composers and music publishers only allow performance rights societies to license non-dramatic performances of the music, and therefore, the societies usually do not license musical compositions accompanying concert dance.

The distinction between dramatic and non-dramatic rights is significant, because both the law and the music industry deal differently with these rights. Because dramatic performances occur less frequently than non-dramatic performances, the value of each performance is appreciably greater. The licensor of the dramatic rights must then be able to determine how much the ballet producer will pay for the dramatic use of a specific musical composition. Additionally, the issue of artistic control is pertinent to dramatic performance licenses, because the composer and choreographer’s reputation may be injured by “a shoddy production which . . . degrade[s] the work.”

Performing Rights in Music and Performing Rights Societies, 33 J. COPYRIGHT SOC’Y 332, 335 (1986). The use of the music remains non-dramatic “even if the song is part of a larger dramatic work, [like an opera or musical comedy]; id; see also Nimmer, supra note 35, at § 10.10, 10-96 (ASCAP’s former attorney general, Herman Finkelstein, defined non-dramatic performance as “rendition of a song . . . without dialogue, scenery or costumes”).

126. See Kohn, supra note 125, at 980 (The ASCAP Agreement § d(1) states: “This grant does not extend to or include the right to license the public performance . . . of any rendition or performance of (a) any opera, operetta, musical comedy, play or like production . . . in a manner which recreates the performance of such composition with substantially such distinctive scenery or costume as was used in the presentation of such [production]”); cf. M. William Krasilovsky & Sidney Shepel, This Business of Music 212 (7th ed. 1995) (discussing that, although standard performance license issued by Society of European State Authors and Composers (“SESAC”) does not license grand rights, which include “the right to perform in whole or in part dramatico-musical and dramatic works in a dramatic setting,” it separately licenses grand rights).

127. Kohn, supra note 125, at 877, 976; ASCAP, QUESTIONS AND ANSWERS ABOUT THE ASCAP LICENSES FOR CLASSICAL MUSIC PRESENTERS OF CONCERTS AND RECITALS at 6 [hereinafter Q&A] (ASCAP only licenses “non-dramatic public performances of copyrighted music . . . at . . . concerts and recitals”); cf. Stanley Rothenberg, COPYRIGHT AND PUBLIC PERFORMANCE OF MUSIC 54 (1987) (performing rights acquired by BMI can be both dramatic and non-dramatic); Kohn, supra note 125, at 981 (BMI Agreement, in section 5(a), states: “the rights granted to us shall not include the right to perform or license the performance of more than . . . five minutes from a ballet if such performance is accompanied by the dramatic action, costumes or scenery of the . . . ballet”).

128. See Korman, supra note 125, at 335.

129. See id.

130. Id.
Choreographic works are classified as dramatic performances, as are plays, musical comedies and operas. Generally, when music is performed as part of a ballet, its use is considered dramatic, regardless of whether the work is performed in its entirety or as one or more selections presented in a public performance. ASCAP’s television license provides the music industry with a good, workable definition of dramatic performance rights: “a dramatic performance shall mean the performance of a musical composition . . . in which there is a definite plot depicted by action and where the musical composition is woven into and carries forward the plot and its accompanying action.” The license further provides that “distinctive scenery or costumes as was used in a presentation of such . . . production” serves to “recreate the performance of such composition.” Under this definition, a performance of a musical composition will be considered dramatic if it tells a story. This standard may be tested by deleting the music from the ballet. If the “continuity or story line” of the performance is not restricted or vague after the music has been deleted, then it is non-dramatic. If the “continuity or story line” has been “impeded or obstructed,” then the performance is dramatic. In a Balanchine ballet, the dance has been exactingly created to provide a visual understanding of the accompanying musical composition. The plot, then, is the visual unfolding of the music such that the music is woven into and carries forward the ballet. Thus, the music tells the story and if it is deleted from the ballet the continuity of dance will be obstructed. To avoid this result, choreographic works should be classified as dramatic performances and protected accordingly.

Rights to dramatic performances are often referred to as “grand rights,” which are distinguishable from dramatic rights. “A grand right is the exclusive right to license the reproduction, adaptation, performance or other use of a dramatico-musical work . . . It is a right in all the contributions of the musical play as a single work . . . The subject of the grand right is a collective work comprised of words, music, choreography, the [plot or libretto], setting, scenery, scenery, scenery,

131. See Q&A, supra note 127, at 7 (“[T]he performance of music as part of a . . . ballet presented in its entirety would be dramatic, as would one or more musical selections . . . accompanied by dance.”).


133. See Nimmer, supra note 35, at § 10.10[E], 10-98.

134. See id.
costumes, and other visual representations." 135 On the other hand, a dramatic right centers around the narrating of a story or the portrayal of human struggles. Consequently, a dramatic right is a "performance of a musical composition that is woven into and carries forward a definite plot and its accompanying action." 136

The difference between grand rights and dramatic rights is that a grand right "is the performance of a grand opera, grand musical play, or other dramatico-musical work," whereas, a dramatic right is a "dramatic performance of an individual song . . . that is woven into and carries forward a definite plot and its accompanying action." 137 Ballet, defined as an "elaborate dramatic dance set to music, often[, but not necessarily,]choreographed to render a narrative story," is classified as a dramatico-musical work, which is "a theatrical work in which the music is integral to the story told by the book in the sense that the music is used to carry the action of the story forward." 138 Thus, music that accompanies a choreographic work will be licensed as a grand right because, as a dramatico-musical work, the music is integral in that it carries forward the abstract or thematic action of the ballet.

The law expressly states that "copyrighted musical works cannot be performed publicly without obtaining the permission of the

135. Kohn, supra note 125, at 978 (emphasis added); see Gershwin v. Whole Thing Co., 208 U.S.P.Q. (BNA) 557 (C.D. Cal. 1980) (Although court held that no grand right had been violated, it devised two basic tests to determine whether it is necessary to license grand rights. Grand rights are required if: first, "a song is used to tell a story;" and second, a song is performed with dialogue, scenery, or costumes). But see The Robert Stigwood Group, Ltd. v. Sperber, 457 F.2d 50 (2d Cir. 1972) (holding that twenty-three musical compositions from rock opera, Jesus Christ Superstar, performed in original sequence, but without costumes, scenery and dialogue, constituted dramatic performance of work).

136. Kohn, supra note 125, at 978.

137. Id.

138. Id. at 974. Copyright protection in a dramatico-musical work may be claimed first, in each separate contribution, like the musical composition and the choreography, or second, as a single work with the composer and choreographer each owning an undivided interest in one half of the dramatico-musical work. See id. at 975. Copyright may be claimed in a single work only where a choreographer specially commissions music from a composer, but not when the choreographer creates a dance to a musical composition in the public domain. See also Anne Marie Hill, Note, The "Work For Hire" Definition in the Copyright Act of 1976: Conflict Over Specially Ordered or Commissioned Works, 74 Cornell L. Rev. 559, 582-83 (1989) (citing House Comm. on the Judiciary, 89th Cong., 1st Sess., Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill 92 (Comm. Print 1965)) (stating that even though music or choreography may be specially commissioned, 1965 Revision Bill conceded that musical compositions and choreography not "works for hire").
copyright owner."¹³⁹ The copyright owner may be the music publisher, to whom the composer assigns his grand rights, or it may be the composer or his estate reserving the grand rights.¹⁴⁰ Permission to perform a grand work must be sought directly from the copyright owner.¹⁴¹ Because grand rights are licensed less frequently than non-dramatic rights, producers are able to individually negotiate the licenses with the copyright owner or his representative. The copyright owner should remember, however, that "his right to license reproductions and performances of the musical [production] is limited to the dramatico-musical [production] itself and does not extend to the individual songs themselves."¹⁴² Thus, if a ballet is made up of several dances, all using music written by the same composer, the copyright owner may only license the grand rights in the entire arrangement, including the choreography, but he cannot license the non-dramatic performance rights in the individual compositions. Thus, to have musical accompaniment for the ballet, the Licensee must license the grand performance rights in the music from the copyright owner of the musical composition.¹⁴³

In conclusion, a ballet company seeking to perform a Balanchine ballet must take two steps: first, it must license the performance right in the choreography from the Balanchine Trust; and second, it must also license the grand performance rights to the accompanying musical composition from the copyright owner.

¹³⁹. ASCAP, THE ASCAP LICENSE: IT WORKS FOR YOU.
¹⁴⁰. See Joseph Taubman, Music, 6 Perf. Arts Rev. 374, 376-77 (1975) (showing example of grand rights).
¹⁴¹. See Irving Berlin Music Corp. v. The United States, 487 F.2d 540, 543 (Ct.Cl. 1973) ("[G]rand performing rights licenses are not within the purview of ASCAP's authority but are separately negotiated and issued by Berlin Music to music users.").
¹⁴². KOHN, supra note 125, at 1018.
¹⁴³. The Balanchine Trust provides the Licensee with full information on who to contact when licensing the grand rights in the music.