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70 Years of Dance: Copyrighting Choreography Since 1952

BY ANNIE PLANKER / ON SEPTEMBER 27, 2022



Photo from Pixabay on Pexels

Choreography has long been a subject of controversy in the world of copyright. Despite its significance in the artistic community and the rise of social media in our everyday lives, choreography has not received the same property protections as other artforms, such as music, painting or sculpture. This is partly due to the transient nature of choreography; copyright law requires “fixed expressions” of works.¹ It is also due to a legal hesitation to limit “social” arts.² Lawmakers have little desire to prohibit large masses from participating in cultural activities.

The right to copyright in the United States was born with the ratification of the U.S. Constitution in Article 1, §8, Clause 8.³ The purpose was not to preserve endless rights for creators, but rather to “promote the Arts and Sciences”⁴ by securing limited times in which those creators would be granted “financial and legal support” for their cultural contributions.⁵

Neither the first Copyright Act of 1790, nor the Act of 1909, provided distinct copyright protection for chorographical works.⁶ Rather, the Act of 1909 allowed copyright for “dramatic works” of dance, or works that “[told] a story, develop[ed] a character, or express[ed] a theme or emotion by means of specific dance movements and physical actions.”⁷ Therefore, the first choreography copyright was not for an expected work of

ballet, jazz or classical dance, but rather for the Broadway musical, *Kiss Me Kate*.⁸ In 1952, well-known choreographer Hanya Holm was the first individual to ever successfully register a copyright claim for a work of choreography.⁹ Holm's copyright protected her interest in the dance movement of the first-ever Tony Award Winner for Best Musical.¹⁰ Because Holm's work told a story *through* dance, and was in and of itself a drama, the work qualified for protection.¹¹ But Holm had another leg-up on most choreographers; under the Copyright Act of 1909, if a work was already copyrighted, it was easier for corresponding works to be protected.¹² A simple affixing of a copyright notice was enough to allow Holm to register the work under *Kiss Me Kate*'s name.¹³

It wasn't until 1976 that copyright finally expanded to include stand-alone "choreographic works."¹⁴ However, this addition has caused much confusion in the artistic community. The United States copyright office defines choreography as "the composition and arrangement of a related series of dance movements and patterns organized into a coherent whole."¹⁵ But it also opines that protectable choreography cannot be "commonplace movements or gestures" or compilations of "social dances."¹⁶ Further, Congress has never given a proper definition for what makes a choreographic work protectable. Rather, at the ratification of the Act it proposed the meaning of choreography to be "fairly settled."¹⁷ However, since 1976, artists, lawyers, and judges have debated the copyrightability of many choreographic or movement-based works. This uncertainty has formed the basis for many famous copyright cases and shaped the way these artists share their work with the world.

The first legal decision to settle some of this uncertainty came about in 1986 with the second circuit decision in *Horgan v. Macmillan, Inc.*¹⁸ Esteemed choreographer George Balanchine sought "to enjoin the publication of a book entitled 'The Nutcracker: A Story & a Ballet'" which featured photographs of Balanchine's choreography from the New York City Ballet's production of *The Nutcracker*.¹⁹ While the district court found that photographs could not constitute an infringement of a copyrighted, choreographical work, the appellate court disagreed, rejecting the idea that choreography was the flow of steps, unreproducible in still photographs.²⁰ This decision helped to form an understanding of choreography which now expands past traditional notions of fixation and across mediums.

In the last twenty years, these mediums have only grown. The internet and social dance apps like TikTok have created even more concerns about how choreographers can effectively protect their dance work.²¹ After TikTok influencer Addison Rae performed several viral TikTok dances on "The Tonight Show with Jimmy Fallon," creators of the dances spoke out.²² Some creators, like Keara Wilson who created the #savagechallenge, have been able to copyright their viral dances, ensuring they receive proper compensation for their contributions.²³ JaQuel Knight, the go-to choreographer for Beyoncé, is pioneering his own company to represent diverse choreographers across the country.²⁴ But even with legal representation and superstar-worthy resources, copyrighting viral dances has its own set of limitations and confusions. In 2020, choreographer Kyle Hanagami sued Epic Games for a *Fortnite* 'emote' (animated movement) which he claimed constituted copyright infringement of his dance to singer Charlie Puth's "How High."²⁵ Hanagami lost the suit; the district court found that his series of steps were "identical to the emote but unprotectable" in their expression.²⁶

Despite the complications over the last seventy years, choreographical copyright has continued to adapt in a world of technological and creative advancement. With the proper acknowledgment and education, there is hope that choreographers and dancers will be able to continue to protect their work while expanding their audience reach far past what could have been dreamed only one lifetime ago.

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2. United States Copyright Office, Copyright Registration of Choreography and Pantomime (last visited Sept. 8, 2022) <https://www.copyright.gov/circs/circ52.pdf> [<https://perma.cc/MEJ2-GVGN>].
3. U.S. Const. art. I, § 8, cl. 8.
4. Id.
5. Marygrace Patterson, Choreography: How Graham v Graham Shocked Artists into Legal Awareness, 7 Colum. Undergraduate L. Rev. 47, 50 (2012).
6. Brian Vargas, What Copyright Protections do Choreographers Have Over Their Work?, Dance Mag. (Jan. 25, 2021), <https://www.dancemagazine.com/choreography-copyright/> [<https://perma.cc/7GJL-5KWC>].
7. Id.
8. Judith Nearman, Dance Pioneer Hanya Holm was First to Register Choreography (Feb. 2015), https://www.copyright.gov/history/lore/pdfs/201502%20Lore_February2015.pdf [<https://perma.cc/W5XC-YD2C>].
9. Id.
10. Kiss Me, Kate, Tony Awards, <https://www.tonyawards.com/shows/kiss-me-kate/> [<https://perma.cc/2LEU-9BEU>].
11. Nearman, supra note 8.
12. Patterson, supra note 2.
13. Id.
14. Sye, supra note 1.
15. Supra note 2.
16. Id.
17. Edwina M. Watkins, May I Have This Dance: Establishing Liability Standard for Infringement of Choreographic Works, 10 J. INTELL. PROP. L. 437, 440 (2003).
18. Sye, supra note 1.
19. Horgan v. Macmillan, Inc., 789 F.2d 157, 157 (2d. Cir. 1986).
20. Id. at 158.
21. Paige Skinner, The TikToker who Created the Viral “Savage” Dance is Copyrighting the Moves, BuzzFeed.News (Jul. 30, 2021, 7:39 PM),

<https://www.buzzfeednews.com/article/paigeskinner/savage-dance-copyrighted>
[<https://perma.cc/5WVK-N2CA>].

22. *Sye*, supra note 1.

23. See Skinner, supra note 21; Jazz Tangcay, *Beyonce and Megan Thee Stallion Choreographer JaQuel Knight Launches Company to Copyright Dance Moves*, *Variety* (Apr. 22, 2021, 9:05 AM),
<https://variety.com/2021/artisans/news/beyonce-choreographer-jaquel-knight-copyright-dance-moves-1234957578/> [<https://perma.cc/4HC3-RQG7>].

24. *Id.*

25. *Hanagami v. Epic Games Inc.*, LOEB and LOEB (Aug. 24, 2022),
<https://www.loeb.com/en/insights/publications/2022/09/hanagami-v-epic-games-inc> [<https://perma.cc/97VZ-RB56>].

26. *Id.*