The Protection of Choreographies Under Copyright Law: A Comparative Analysis

Andrea Borroni and Giovanna Carugno*

Abstract

The legal literature on intellectual property has rarely focused on choreographies. Choreographic works are different from other works protected under copyright law, because they consist in a limited number of standardised building blocks (musical notes, dance steps and movements) which are then each time arranged in an original, creative, and reproducible combination. The questions for lawyers are whether the combination of these elements is deemed worthy of protection by the legal domain in its entirety, or whether the musical part and the movement sequence can only find protection as separate components of the choreographic work; in either case, the question arises as to what are the thresholds for protection, and what remedies are available. In this paper, the author examines the legal issues related to choreographies through a comparative approach, considering concrete cases related to this matter as well as national legislation and international IP treaties.

I. Introduction

1. Research Question and Methodology

This article aims at providing an interdisciplinary contribution to the legal investigation of choreographic works, trying to offer a new comparative perspective. The protection of choreographies under copyright law will be analyzed through a diachronic and synchronic approach and the dialogue between legislation, legal case law, and legal scholarship will constitute a key-point to reveal the changing perspective in the protection of these works.

It will be underlined how the formants interact in order to frame the operational rules in the world of dancing, tackling the issues raised by choreographers and performers. In this respect, the literature relating to the history of dance and choreographic expression cannot be neglected.

Particular attention will be given to the United States' legal system, since it

* Andrea Borroni is Assistant Professor of Private Comparative Law, University of Campania 'Luigi Vanvitelli', 'Jean Monnet' Department of Political Sciences. Giovanna Carugno holds a PhD in Comparative Law and Processes of Integration from the University of Campania 'Luigi Vanvitelli', 'Jean Monnet' Department of Political Sciences. While this article is the product of common critical analysis and considerations, Giovanna Carugno authored paragraphs I.1.; I.2; II.1; II.2; II.3; II,4 whereas Andrea Borroni III.1; III.2; III.3; IV; V.

was the first one to adopt legal rules on choreographies; since then and until now, its example has served as an inspiring model for other States, even those belonging to the civil law family.

The comparison between the provisions and legal solutions offered by scholars and judges in different countries will be studied in light of the harmonizing role played by the international Treaties in the field of intellectual property, with a particular focus on the 1886 Berne Convention for the Protection of Literary and Artistic (the 'Berne Convention'). In conclusion, as it often happens in the legal domain, it will be highlighted that the traditional divide between common and civil law countries has becomes nuanced.

2. Brief Historical Notes

The legal literature has only recently focused on choreography. Until the middle of the 20th century, choreographies played a marginal role amongst the creative works considered worthy of copyright protection in *both* the *civil law and common law* traditions.[1]

This lack of protection, in terms of providing a legal status for choreographies and consequently, recognising exclusive rights to the choreographer, was due to many reasons.

Primarily, before the technological revolution, it was difficult to fix the choreography in a tangible support,[2] but later it became possible to record a dance

[1] Since the interest of the legislator was mainly focused on the protection of musical works, from the early 19th century, choreographers started to set limits to the use of their creations by concluding agreements with publishers, theatrical managers, dancers, and other artists (first among the others, the composers who wrote the musical scores for the choreography). This practice was especially developed in the Italian system, where historical sources show that the most common contract in the dance world was the *locatio operis*. As underlined by the scholars, this kind of agreement was primarily used to govern the relationship between the choreographer and the other protagonists of the theatrical arena. G. Azzaroni, *Del teatro e dintorni: una storia della legislazione e delle strutture teatrali in Italia nell'Ottocento* (Roma: Bulzoni, 1981), 90.

[2] Cf L.I. Mirrel, 'Legal Protection for Choreography' 27 *New York University Review,* 792 (1952). As correctly noted, another factor which *hindered* the legal protection of choreography was represented by the *specific nature* of this creative work; in fact, 'unlike literature or music, dances are intangible work of art that lives primarily through performance rather than through recording' (L.B. Cramer, 'Copyright Protection for Choreography: Can It Ever Be 'En Pointe?' Computerized Choreography or Amendment: Practical Problems of the 1976 U.S. Copyright Act and Choreography' 1 *Syracuse Journal of International Law and Commerce*, 145 (1955). The American anthropologist J.W. Keliinohomoku, 'An anthropologist looks at ballet as a form of ethnic dance', in A. Dils and A. Cooper eds, *Moving History/Dancing Cultures: A Dance History Reader* (Middletown: Wesleyan University Press, 2001), 38, emphasises this difference between dance and other forms of art, by identifying the performance movement as *the heart* of a dance work. He defined dance as 'a transient mode of expression performed in a given form and style by the human body moving in space. Dance occurs through purposefully selected and controlled rhythmic movements'. From this difference derives the difficulty in materially fixing the choreographic work: 'fixation in tangible form (…) presents a problem in the protection of choreography because movement is not susceptible of fixation as are other art forms (…) A choreographer's finished product is ephemeral, lasting only the length of the dancer performance. Music has similar

performance which is easier than writing.[3]

Since the Renaissance, notation was the most used method to give tangible form to a choreography, with the primary aim to keep it preserved and transferred to the performers.[4] Through the notational method, the dancing masters wrote symbols to indicate the position of the feet and the sequence of step. Until then, the 'recording' of choreographies heavily relied on the memory of the dancers;[5] this

> caused the loss of many great choreographic works when either the author died, or his memory failed without the works having been passed on to another by word of mouth and by demonstration.[6]

The practice of writing dances has continued to increase over the centuries[7] due to the growth of the dance community. This facilitated the recognition of authorship in relation to choreographic work, in the presence of a fixed score of the movement patterns.[8]

problems, but recording dance is much more difficult than recording music because dancers move in space as well as time'. M. Cook, 'Moving to a New Beat: Copyright Protection for Choreographic Works' 24 *UCLA Law Review*, 1294, 1287-1312 (1977).

[3] In effect, 'it is doubtful whether copyright protection would be afforded to a work which was not recorded in some tangible form but was merely performed' (J.E. Fitzgerald, 'Copyright and Choreography' 5 *CORD News*, 26, 25-42 (1973). Modern technologies give the possibility to incorporate a dance work in a material support, by recording it in a video, as a more flexible, less expensive and faster solution compared to the use of the notation system. For more details, see para 4 of this paper.

[4] For an introduction to the history of the dance notation system, see A.G. Hutchinson, *Dance Notation. The Process of Recording Movement on Paper* (London: Dance Books, 1984); Id, *Labanotation. The System of Analyzing and Recording Movement* (New York: Routledge, 1991).

[5] There were many notation systems developed from the mid-15th century, that differently combined letters, representative figures and symbols of the pathways. The first evidence of dance notation comes from Spain and consists in a manuscript which recorded a typical popular dance called 'low' or 'bass' dance, for the particular position of the feet, which were not to be lifted from the floor. In the opinion of M. Bourgat, *Technique de la Danse* (Paris: Presses Universitaires de France, 1986), 18, '*(é)crire la danse, c'est définir dans le temps et dans l'espace, par des lettres, des chiffres, et des signes appropriés, une succession d'attitudes du corps permettant la succession d'un thème dansant*'. Over the centuries, each choreographer has used his own method to write steps and body movements. Such a fragmentary approach has led to the development of many different ways and styles to notate dance, each of which was not fully shared among the choreographers or accepted by the entire dance community. This contributed to making dance as a form of art, 'unstable, depending on generations of dancers whose uncertain memories are associated with their own styles and body habits', F.E. Sparshott, *A Measured Pace, Toward a Philosophical Understanding of the Arts of Dance* (Toronto: University of Toronto Press, 1995), 199.

[6] G.D. Ordway, 'Choreography and Copyright' 15 *Copyright Law Symposium*, 174, 172-189 (1965).

[7] The milestones of dance notation were the handbooks written by R.-A. Feuillet, *Chorégraphie; ou, l'art de décrire la danse* (Paris: M. Brunet, 1700), A. Saint-Léon, *La Sténochorégraphie* (Paris: A. Saint-Léon, 1852), F.A. Zorn, *Grammatik der tanzkunst* (Leipzig: J.J. Weber,1887) and M. Morris, *Notation of movement* (London: Kegan Paul, Trench, Trubner & Co, 1928).

[8] F. Yeoh, 'The Value of Documenting Dance', available at https://tinyurl.com/sszrf5fe (last visited 30 June 2021), points out that the reason for recorded dance goes beyond the need to obtain a fixed product as empirical evidence to prove authorship. In fact, 'the value of documenting of

II. Building a Legal Framework

1. The United States Experience

In 1952, the US copyright office admitted for the first time the registration of a choreography, *Kiss me Kate* by Hania Holm, written in the well-known Labanotation.[9]

This case opened the doors to the recognition of the copyrightability of a dance not only in the American legal system, but also in other countries around the globe.[10]

Thus, choreographic works, along with pantomimes, were explicitly included as one of the categories of copyrightable subject-matter in the United States.

This was in response to the needs perceived by legal scholars and choreographers to give protection to those creations of the mind. Before then, choreographies were not deemed worthy of protection *per se*, but could rather be included in the larger set of dramatic compositions protected since the Act to Amend the Several Acts Respecting Copyrights, 3 February 1831 (the '1831 Copyright Act') and defined as including

> all manner of compositions in which the story is represented by dialogue or action instead of narrative, and a scene or composition in which the author's ideas are conveyed by action alone, is within the term.[11]

Though, all dances could not be included, but only those that met the standard laid out in the case *Fuller* v *Bemis*, ie those dances that told a story, portrayed a character or depicted an emotion.[12]

dance works in its various manifestations is evident not only for the purposes of copyright, but for preservation and scholarship. Developments in recording process that will make the art form of dance more accessible will only enhance its status'.

[9] Labanotation is a system of notation invented by the Austro-Hungarian choreographer Rudolf Laban (1879-1958) that permits to record not only the position of the feet, but also every human gesture and motion. This system is described as follow: 'Labanotation involves a staff that is divided vertically by a center line to represent the two sides of the body. The staff is divided further into two to twelve vertical columns. The complex symbols in these columns of the staff represent the positions of all parts of the body at a given point in space and time. The center line represents the spine and the right and left lines correspond to the right and left sides of the body. The staff, which is read bottom to top, contains symbols which convey specific movements. The length of these symbols signifies the length of time allotted for that movement'. A.K. Weinhardt, 'Copyright Infringement of Choreography: The Legal Aspects of Fixation' 13 *Journal of Corporation Law*, 839, 836-891 (1988).

[10] As L. Wilder, 'U.S. Government Grants First Dance Copyright' 19 *Dance Observer*, 69 (1952) underlined, thanks to Holm's claim, 'the battle of choreographers for legal recognition and protection passed into history. From now on, dance works are to be considered artistic property and must be protected as such'.

[11] *Daly* v *Palmer*, 6 Fed. Cas. 1132, 286 (1868).

[12] *Fuller* v *Bemis*, 50 Fed. 926 (1892). In that judgment, the court held that '(a)n examination of the description of complainant's dance, as filed for copyright, shows that the end sought for and accomplished was solely the devising of a series of graceful movements, combined with an attractive

In Fuller, the plaintiff's famous serpentine dance[13] failed the test and was ineligible for copyright protection for its non-figurative character.

In fact, before Public Law no 94-553, 90 Stat. 2541, 19 October 1976 (the '1976 Copyright Act'), choreographies were conceived as dramatic compositions, a large category of works protected under Section 5 of Public Law 60-349, 35 Stat. 1075, (the '1909 Copyright Act').

The dramatic component was presented only in a dance that

> tells a story, develops a character, or expresses a theme or emotion by means of specific dance movements and physical action.[14]

This component should have been recognised by the administrative authority and, lastly, by the courts. However,

> although the copyright office will allow registration of certain choreographic works, this does not guarantee that the courts will enforce protection against unauthorized use of such works.[15]

In other words, the dramatic character of the dance was ascertained on a case-by-case ground; this clearly represented a glitch in the copyright law system and limited the effective defense of the rights of the choreographers. Therefore, the creation should have passed a preliminary 'copyrightability test', based on the presence (or absence) of the dramatization elements.

Following the enactment of the 1976 Copyright Act, however, the situation changed, and choreographies could be protected *suo jure*. Various scholars had,

arrangement of drapery, lights, and shadows, telling no story, portraying no character, depicting no emotion, adding that (s)urely, those (movements) described and practiced here convey and were devised to convey, to the spectator, no other idea than that a comely woman is illustrating the poetry of motion in a singularly graceful fashion. Such ail idea may be pleasing, but it can hardly be called dramatic'. On the topic, see also *Copyright Law Revision: Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-Sixth Congress, Second Session Pursuant to S. Res. 240, studies 26-28* (Washington: US Government Printing Office, 1960-1961).

[13] 'In that dance, Fuller, wrapped in veils, moved as if under hypnosis (…) and became a flower, a butterfly, or a flame, thanks to the use of sticks that extended the movements of her arms and of colored and illuminated silk fabric'. F. Rosso, *Cinema e Danza. Storia di Un Passo a Due* (Torino: UTET, 2008), 11. Kraut underlined the relevance of the Fuller case '(a)s an early attempt by a white woman to use the legal system to secure ownership of a choreographic work (…). Viewed from this perspective, the lawsuit offers a case study of a white, female, early modern dancer's endeavors to harness the racial privileges of whiteness and establish herself as a property-holding subject. Accordingly, this essay approaches the circulation of the Serpentine Dance and Fuller's lawsuit against Bemis as the story of a gendered struggle to attain proprietary rights in whiteness'. A. Kraut, 'White Womanhood, Property Rights, and the Campaign for Choreographic Copyright: Loïe Fuller's Serpentine Dance' 43 *Dance Research Journal*, 4, 3-26 (1975).

[14] Copyright Office, Circular 41: Choreographic Works 1 (April 1977); accord, 37 C.F.R. 202.7 (1976).

[15] G.D. Ordway, n 6 above, 178.

after all, been arguing in favour of such an approach. In 1959, for instance, Martin had observed that '(t)he choreographic field cannot by any possible manipulation be forced into the category of dramatic works'.[16]

In the same way, Chujoy emphasised that considering choreographies as a type of dramatic composition was anachronistic and added that

> (t)he problem of storytelling or dramatic qualifications of a dance work submitted for copyright is a serious one, albeit antiquated. A quarter of a century ago a ballet without a story was an exception, today it is quite often the prevailing fare eg, most ballets in the repertoire of the New York City Ballet.[17]

In order to extend the scope of copyright on choreographies to those dances that cannot be reduced in a dramatic form – as the case of the so-called 'abstract dance, in which, aside from their esthetic appeal, no story or specific theme is readily apparent'[18] – choreographies and dramatic works are named separately in para 102(a) of the 1976 Copyright Act:

> (w)orks of authorship include the following categories: (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 audio-visual works; (7) sound recordings; and (8) architectural works.

The necessity to reform copyright legislation was pointed out also by the President Franklin Delano Roosevelt, who remarked that the drafters of the 1909 Copyright Act

> are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection; they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public; they

[16] *Copyright Law Revision* n 12 above, 111.

[17] ibid 115.

[18] M.B. Nimmer, *Nimmer on Copyright* (New York: Bender, 2002), 2. According G.D. Ordway, n 6 above, 181, 'even though some choreography may qualify as dramatic composition, it is equally obvious from the foregoing that not all dance is embraced within that concept. The traditional ballets which are commonly noted for conveying a storyline would obviously qualify. It is in the area of the 'modern and abstract' dances, where the dramatic content is questionable, that the real problem lies'. Before the entry into force of the 1976 Copyright Act, '(t)o secure and retain statutory copyright, one must register his work in one of the registration classes set out in §5 of the Act. But since choreographic works are not mentioned in §5, to establish eligibility for statutory copyright, a choreographer must convince the Copyright Office (and possibly the courts) that his dance composition fits in one of the classes that is mentioned. This often results in attempting to register choreographic works in Class D – dramatic or dramatico-musical compositions'. J.I. Roth, 'Common Law Protection for Choreographic Works' 5 *Performing Arts Review*, 75, (1974).

> are difficult for the courts to interpret and impossible for the Copyright Office to administer with satisfaction to the public. Attempts to improve them by amendment have been frequent, no less than twelve acts for the purpose having been passed since the Revised Statutes. To perfect them by further amendment seems impractical. A complete revision of them is essential.[19]

It is important to point out that, despite the inclusion of choreographies amongst the protected works of authorship within the US system, the 1976 Copyright Act does not clarify the characteristics of a choreography, or of a pantomime, as to how it differs from a dramatic work. The House Report points to the fact that it was a deliberate choice, for choreography and pantomime to 'have fairly settled meanings'.[20]

This lack of a definition allows the courts to consider worthy of protection a great number of diverse types and styles of dance. Indeed,

> if Congress were to stipulate a narrow, precise definition in the legislation, according to today's understanding of dance, it would restrict future choreographers from copyright protection for developments in dance that cannot be foreseen today.[21]

Such an approach is therefore commendable, for it allows for an evolution of the concept of choreography, giving the chance to

> (d)ance critics, theorists, philosophers, and historians (to play) a continuing role in this dialogue as we broaden and improve our understanding of 'dance'. Imposing a narrow codification in the Copyright Law would curtail this process unnecessarily.[22]

A definition is, instead, contained in the Copyright Office Practices, Compendium II (1984), where a choreography is defined as

> the composition and arrangement of dance movements and patterns, and is usually intended to be accompanied by music. Dance is static and kinetic successions of bodily movement in certain rhythmic and spatial relationships. Choreographic works need not to tell a story in order to be protected by copyright.[23]

[19] A. Latman et al, Copyright for the Eighties: Cases and Materials (*Charlottesville*: The *Michie* Company, 1985), 7.

[20] H.R. Rep. no 1476, 94th Cong., 2d Sess. (1976), 53.

[21] ibid.

[22] ibid.

[23] Copyright Law Reporter, 1991, no 625.

2. The US Influence on the Categorization of Choreographies as Dramatic Works

The protection of choreographic works in common law countries took inspiration from the US model, that classified this kind of creations as dramatic works.

In the United Kingdom, choreographies are mentioned by Section 35(1) of the Copyright Act 1909, under which

> (d)ramatic work includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character.

A similar provision is contained in section 3(1) of the Copyright Act 1988 (R.S.C., 1985, c. C-42), which mentioned choreographies in the list of dramatic works as well.

The same approach is taken in Canada, where choreographies have been considered a type of dramatic work since the Copyright Act, 1921. Although, it was only in 1988 that choreographies were given a statutory definition as a result of the Copyright Act 1988.

And that is still the case in India, where choreographies are not autonomously protected, but rather as dramatic works, pursuant to Section 2(h) of the Act to amend and consolidate the law relating to copyright, 4 June 1957 (the 'Indian Copyright Act 1957'), under which dramatic work

> includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise but does not include a cinematograph film.[24]

Therefore, since the Indian Copyright Act 1957 does not explicitly deal with choreographies, in order for them to be protected, they must meet the same requirements as all other dramatic works. Namely, they must be original and fixed in a tangible medium of expression, so as not to be fleeting.[25]

However, to be eligible for protection, a choreography must feature 'dramatic

[24] See also Academy of General Education, *Manipal* v *B. Malini Malia*, AIR 2009 SC 1982, where the Supreme Court confirmed that '(k)eeping in view the statutory provisions, there cannot be any doubt whatsoever that copyright in respect of performance of dance would (...) come within the purview of the definition of dramatic work'.

[25] U. Srivastava, 'So You Think You Can (Copyright) Dance? An Analysis of the Copyrightability of Choreographic Works in India' 12 *Journal of Intellectual Property Law and Practice*, 43 (2017). The very same approach is also adopted in South Africa, where Section 1 of Act no 98/1978, clarifies that dramatic work 'includes a choreographic work or entertainment in dumb show, if reduced to the material form in which the work or entertainment is to be presented'.

action', a requirement frequently criticised; Vaver, for instance, wrote that

> (o)nly a farfetched interpretation of the old Act could produce the result it claimed. Choreography, included as a species of "dramatic work", may take some colour from its genus, but obviously extends to other things than Othello on point.
>
> Two other major genera in the Indian Copyright Act 1957, literary and artistic works, also non-exhaustively list a number of miscellaneous species in their definitions, but do not require them to have all the characteristics of the genus.[26]

Considering choreographies as literary works could be a useful way to overcome the limitations deriving from the idea of dramatization. Under Section 2 of the Copyright Act 1988, literary works are 'other than a dramatic and musical work, which is written, spoken or sung'; the article then states that dances are included into the category of dramatic works. In this case, choreography can meet the requirements of a literary work only if it is conceived as a narrative product, 'as a book or article (…) – for example, a history of the dance or a critical appraisal of a particular dance or style of dancing', unlike the case where a choreography is written down in a descriptive way, with the aim of fixing it in a tangible form and enabling dancers to perform it.[27]

3. The Civil Law Classification of Choreographic Works

In the civil law family, choreographic works possess an independent status from dramatic compositions. Under French law, a clear-cut distinction is drawn between choreographies and dramatic works. In particular, Art 3 *Loi no 57-298 du 11 mars 1957 sur la propriété littéraire et artistique* (the '1957 Copyright Act'), states that

> *(s)ont considérés notamment comme des œuvres de l'esprit au sens de la présente loi: (...) les œuvres dramatiques ou dramatico-musicales; les œuvres chorégraphiques, les numéros et tours de cirques et les pantomimes dont la mise en œuvres est fixée par écrit ou autrement.*

[26] D. Vaver, 'The Canadian Copyright Amendments of 1988' 4 *Intellectual Property Journal*, 144-145, 121-155 (1989). Cf A.G. DeMille, who writes that '(c)horeography is neither drama nor storytelling. It is a separate art. It is an arrangement in time-space, using human bodies as its unit of design. It may or may not be dramatic or tell a story. In the same way that some music tells a story, or fits a 'program', some dances tell stories-but the greater part of music does not, and the greater part of dancing does not' (*Copyright Law Revision: Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-Sixth Congress, Second Session Pursuant to S. Res. 240, Studies 26-28* (Washington: US Government Printing Office, 1960-1961)).

[27] *Copyright Law Revision* n 12 above, 97.

In addition, Section 112-2 of the 1992 *Code de la propriété intellectuelle* clarifies that

> *(s)ont considérés notamment comme des œuvres de l'esprit au sens du présent Code: (…) 3° Les œuvres dramatiques ou dramatico-musicales; 4° Les œuvres chorégraphiques, les numéros et tours de cirques, les pantomimes, dont la mise en œuvres est fixée par écrit ou autrement*.[28]

In the Italian law, under Art 2 para 3 of legge 22 April 1941 no 633, *Protezione del diritto d'autore e di altri diritti connessi al suo esercizio* ('Law no 633/1941') both choreographies and pantomimes constitute a separate and autonomous category of works, which need to be fixed in a tangible support to be eligible for protection.[29]

Instead, in Germany, the legislator provides protection to the works of the art of dance within the category of pantomimes ('*pantomimische Werke einschließlich der Werke der Tanzkunst*')[30] and the choreographies are not explicitly mentioned.

In Austria, choreographies fall only within domain of literary works. This is self-evident by reading Art 2 para 2 of the Austrian Copyright Act, under which choreographies (and pantomimes) are theatrical works, 'expressed by gestures or other movements of the body' and described in a written form.[31]

Choreography is incorporated, for copyright purposes, in a literary work, when it is described by means of words and/or symbols. Registering choreography as a theatrical work – a sub-category of the literary ones – is the way offered not only by the Austrian Copyright Act, but also by other legal provisions in force in some extra-European countries[32] to protect this kind of creation. The same

[28] These works are performed by the artist through movement, gestures, and steps; in light of this, they were described by the scholars as '*œuvres gestuellesm*'. C. Caron, *Droit d'auteur et droits voisins* (Paris: Lexis Nexis, 2006), 138.

[29] On the difference between pantomime and choreography see M. Fabiani, *Diritto d'Autore e Diritti degli Artisti Interpreti o Esecutori* (Milano: Giuffrè, 2004), 64, who underlines that both, however, have in common the element of movement of the body; the imitation and the expression of eyes and arms are, according to the literature, the distinctive elements of pantomime when confronted to the choreography. See also M. Pasi, *Danza e Balletto* (Milano: Jaca Book, 1993), 107, quoting an excerpt of 'Dissertazione programmatica' from the ballet *Don Juan* by Gasparo Angiolini (1761), and V. Buonsignori, *Precetti sull'arte mimica applicabili alla coreografia ed alla drammatica divisi in quattro lezioni teoriche* (Siena: Tipografia dell'Ancora di G. Landi e N. Alessandri, 1854).

[30] See Art 2, para 1, no 3, of the 1965 Copyright Act (*Urheberrechtsgesetz Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz*), enacted on 9 September 1965, and lastly modified on 4 April 2016).

[31] Federal Law on Copyright in Works of Literature and Arts and on Related Rights (*Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte*), in the last version published in the Federal Gazette I, no 99/2015.

[32] For instance, in South Korea, where the Supreme Court assessed the possibility to consider choreographies as independent works (Decision E 639, 10 April 2004), but in its judgement opted for a literal application of the law. In fact, Art 4 para 1 of Law no 3916 of 31 December 1986 stated that these creations are protected under the category of theatrical works, along with pantomimes,

attempt was made in common-law countries, but without a positive outcome. In fact, in few cases literary property rights were recognized as applicable to a choreographic work, especially in the past, when dances were incorporated through notational systems by using written instructions and verbal illustration of the movements assigned to the dancers.[33]

Choreographies can be registered as non-dramatic literary work, but this does not ensure protection against the risk of an i*nfringement* on the rights of the author regarding the dramatic representation of his own creations.

Like other literary works, choreography would be protected in its description, as a non-dramatic expression, but not for any potential (dramatic) performance of it.[34]

4. The Berne Convention and the Requirement of Fixation

Looking at international instruments, on the other hand, choreographies are not mentioned amongst the creations of the mind deemed worthy of protection in the original version of the Berne Convention, the first treaty dealing with copyright protection. Art 3 of the Berne Convention defines the expression 'literary and artistic works' as including

> books, pamphlets, and all other writings; dramatic or dramatico-musical works, musical compositions with or without words; works of drawing, painting, sculpture and engraving; lithographs, illustrations, geographical charts; plans, sketches, and plastic works relative to geography, topography, architecture, or science in general.

The choice not to include choreographies in the set of copyrightable works was because it would be difficult to define the characteristic of this specific creation of the mind, which combines music and movements, and to distinguish it from others, such as pantomimes.

In particular, Germany was against the inclusion, whereas Italy was in favour

dramas and other (unlisted) operas. G. Choi, 'A Study on Copyright Protection of Choreographic Works' 64 *Law Journal*, 204, 203-234 (2019).

[33] This was possible first because choreography, as mentioned above, was not deemed worthy of inclusion as an autonomous work (neither dramatic nor literary) in the US until the 1976 Copyright Act's revision. Moreover, the category of literary works is too broad to contain many different creative expressions, including choreographies. As correctly underlined by a commentator reassessing the role of Art 17 of the US Copyright Act, para 101, 'literary work is one expressed in words, numbers, or other verbal and numeric symbols or indicia, regardless of the nature of the material objects (…) in which they are embodied' and of their artistic merit or aesthetic value. D.E. Bouchoux, *Intellectual Property: The Law of Trademarks, Copyrights, Patents, and Trade Secrets* (Boston: Cengage Learning, 2000), 199.

[34] See in particular, the case of the choreography titled *Beethoven Sonata*, recorded by the choreographer Ruth Page as a book in 1953 and not as a dramatic work. A. Chujoy, 'New Try to Copyright Choreography' 22 *Dance News*, 4 (1953).

of protecting choreographies as an autonomous category of artistic work.[35]

In 1908, therefore, the Berne Convention was amended *(Berlin revision), and as a result, choreographies were included in the list of* literary and artistic works protected under copyright law, as long as they are fixed in a tangible support. In fact, Art 2, para 1, states that:

> the expression 'literary and artistic works' shall include any production in the literary, scientific or artistic domain, whatever may be the mode or form of its reproduction such as (…) dramatic or dramatico-musical works, choreographic works and entertainments in dumb show, the acting form of which is fixed in writing or otherwise.

The expression 'or otherwise' was inserted as a compromise between the German and the Italian positions to ensure that copyright protection was afforded to the largest extent possible.[36]

It is a common prerequisite for both the common and civil law systems that choreographies be fixed in a tangible support for them to be protected under the copyright law.[37]

As is commonly known after all, dance involves a sequence of many different movements which, to the layman, may not be immediately distinguishable. This can create difficulties when it comes to the determination of whether there was an infringement.[38]

[35] D. Howland, 'The International Movement to Protect Literary and Artistic Property', in Id et al eds, *Art and Sovereignty in Global Politics* (New York: Palgrave Macmillan, 2017), 69. Italy was in favour because it had a long tradition of choreographers who had been creating on commission many choreographies, since the end of the eighteenth century, and requesting that their authorship be recognized on the *libretto* with a specific phrasing. The first-time choreographies were autonomously mentioned among the creations of the mind worthy of protection was the Regio decreto legge 7 November 1925 no 1950 which at Art 1 specifically includes choreographies in the list of the artistic works protected by this decree.

[36] See 'Études générales – La convention de Berne révisée du 13 novembre 1908' *Droit d'Auteur*, 78 (1909).

[37] As far as the United States are concerned, two specific legal documents deal with this issue. See, the US Copyright Act 1976 requires choreographic works to be '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' (title 17(b), Copyright Act). And, the US Copyright Office, Circular no 51b: 'The particular movements and physical actions of which the dance consists must be fixed in some sort of legible written form, such as detailed verbal description, dance notation pictorial or graphic diagrams, or a combination of these (…) Even a textual description of a dance would not seem to constitute (…) a work of choreography if the description is so general and lacking in detail that the dance could not be performed', cf B. Häger, *The Dancer's World: Problems of Today and Tomorrow* (New York: International Dance Council and UNESCO, 1978), 96-97.

[38] On the issue of copyright infringement in relation to choreographies in the US, the leading case is *Horgan* v *MacMillan Inc.* In that case, Macmillan Inc. had published a book titled *The Nutcracker*, containing photographs of George Balanchine's copyrighted choreography of the famous ballet. Balanchine's estate had then sued the publisher for copyright infringement. The US District Court for the Southern District of New York, however, concluded no infringement had

For this reason, the requirement of fixation was first established by the Berne Convention, since it is evident that the tangible support represents the most immediate way to prove authorship and copyright protection starts from the moment of fixation which, conventionally, is deemed to coincide with the moment of creation.[39]

It is clear that when the dance steps are fixed in writing, through symbols or words, it does not automatically entail that the choreography is a literary work. The classification of the work depends on the choice made by the choreographer, whether an alternative is provided by national law to register it as a literary work or as a choreography *ex se*.

In any case, the act of fixating a choreography in tangible support has a practical use because it makes it possible to ascertain if infringement occurs and gives certainty to the act of creating the choreography.[40]

Scholars have long written on the requirement of fixation. Most of the scholars, on that issue, affirm that fixing constitutes a condition for the existence of the choreographic work.[41] In particular, there is also who deems mandatory for the author to fix all aspects of choreography, beside the plot, traces, and the screenplay including also the specification of all constitutive elements, such as dance movements, plastic, and figurative figures, colors of the costumes, scenarios, etc.[42]

Other scholars underlined the practical difficulties related to the fixing

occurred, 'because (t)he still photographs in the Nutcracker book, numerous though they are, catch dancers in various attitudes at specific instants of time; they do not, nor do they intend to, take or use the underlying choreography. The staged performance could not be recreated from them' (*Horgan* v *MacMillan, Inc*., 621 F. Supp. 1169 (1985).

The Second Circuit Court of Appeals overruled the judgment, finding in favour of the plaintiff, for, they held, 'the standard for determining copyright infringement is not whether the original could be recreated from the allegedly infringing copy, but whether the latter is 'substantially similar' to the former, confirming that the proper test consists in determining whether the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same, and adding that (e)ven a small amount of the original, if it is qualitatively significant, may be sufficient to be an infringement, although the full original could not be recreated from the excerpt' (*Horgan* v *MacMillan, Inc*., 789 F.2d 157, 2d. Cir. (1986)). On the case, see J. Hilgard, 'Can choreography and copyright waltz together in the wake of Horgan v Macmillan, Inc.?' 19 *UC Davis Law Review*, 757-789 (1994); P.S. Gennerich, 'One Moment in Time: The Second Circuit Ponders Choreographic Photography as a Copyright Infringement Horgan v Macmillan, Inc.' 53 *Book Law Review*, 379-407 (1987).

[39] 'Regardless of the number of times a dance has been publicly performed, a choreographic work is created when it is fixed in a copy for the first time'. K. Abitabile and J. Picerno, 'Dance and the Choreographer's Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works' 27 *Campbell Law Review*, 44, 39-62 (2004).

[40] It is noteworthy that '(f)ixation in express detail is also beneficial in proving that an infringer 'copied' from the original work as opposed to creating the work itself. The unlikely similarity of specific movements and details cuts against the possibility that two choreographers independently created the movements' (M. Cook, n 2 above, 1296).

[41] S. Ercolani, *Il Diritto d'Autore e i Diritti Connessi: la Legge n. 633/1941 dopo l'Attuazione della Direttiva n. 2001/29/CE* (Torino: Giappichelli, 2004), 105.

[42] P. Greco, I Diritti sui Beni Immateriali: Ditta, Marchi, Opere dell'Ingegno, Invenzioni Industriali (Torino: Giappichelli, 1948), 170.

procedure in works that, for their own nature, live through performance, as product of a 'dynamic art', like dance.[43] It was highlighted that a choreography 'vanishes promptly upon performance' and remains 'impermanent'.[44]

Thus,

> (f)or working choreographers more interested in copyright protection for economic control than for preservation of the art form, written notation is an unattractive option.[45]

One way to fix the work without missing the performative features of the dance is the recourse to audio-visual devices, *in lieu* of writings.

Consequently, some specialists reminded that fixation could take the form of photographic, cinematographic, and television recording of the work. In doing so, the criticalities related to the transposition of what is performed in writings are reduced and the fixation, as far as it is possible, more authentic.

In this regard, it is undeniable that technological instruments facilitate the making and circulation of unauthorized copies of the choreographic work. As it was written,

> performance theory, which describes the development of individual agency through physical "embodiment" in the cultural worlds (…) has important lessons for crafting limits on property rights in experience, especially in cyberspace, where embodiment is the primary mode of experience and play;

in this area, 'dancing online' becomes 'a commodity, to the tune of literally billions of dollars'.[46]

For this reason, the battle of choreographers to protect their works is not over and copyright law should be ready to reshape and tune its solutions in relation to the digital advancement.

[43] The divide between 'dynamic' and 'permanent' has been clearly highlighted in the literature. If the former is 'is unstable or ephemeral, and that may invite unpredictable change though the influence of natural or human forces', the latter is an art 'that has and is meant to have weak, unclear boundaries – art that blurs text and context'. R. Brauneis, 'How Much Should Being Accommodate Becoming? Copyright in Dynamic and Permeable Art' 43 *Columbia Journal of Law and the Art*, 381 (2019).

[44] J. Taubman, 'Choreography Under Copyright Revision: The Square Peg in The Round Hole Unpegged' 10 *Performing Arts Review*, 241, 219-256 (1980). According to Anthea Kraut, '(t)he irony for dance is that copyright, with its requirement that works be 'fixed in a tangible medium of expression', has represented the temporal solidity – the past and the future – which is supposedly lacks; choreographic copyright is not an 'apparatus of capture". A. Kraut, *Choreographing copyright: race, gender, and intellectual property in American dance* (Oxford: Oxford University Press, 2016), 232.

[45] J.M. Lakes, 'A pas de deux for Choreography and Copyright' 80 *New York University Law Review*, 1854, 1829-1861 (2005).

[46] A. Chander and M. Sunder, 'Dancing on the Grave of Copyright?' 18 *Duke Law & Technology Review*, 149, 143-161 (2019).

Therefore, nowadays, the requirement of fixation appears outdated and should be totally re-thought.[47]

III. The Originality of a Choreographic Work

1. Premise

For a choreography to be eligible for protection, the requirement of originality must be met.

This element is present both in common law and civil law systems.

For a work to be deemed original a two-pronged test is applied: (i) the novelty and (ii) a minimum level of creativity.

In the US, according to the leading precedent,

> original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.
>
> To be sure, the requisite level of creativity is extremely low; even a slight

[47] The criticism towards the requirement of fixation increased under the influence of some lawsuits that revealed the dangers of incorporating a sequence of movements through audio-visual recordings. In a leading case, some artists (namely, the singer and hip-hop performer Terrance Ferguson, with the actors Alfonso Ribeiro and Russell Horning) sued the company Epic Games, to the district court of the Central District of California, in December 2018. The plaintiffs alleged that the movements performed by a digital character in the videogame named Fortnite (distributed by the respondent), were based on their choreographies and, so, it ended up being copied and used without any kind of permission. As '(t)he suits seek to block Epic Games from using the dance moves, awards of money earned off the moves purchased in Fortnite, punitive damages and attorney's fees' to restore the moral and economic damages suffered by the plaintiffs. Z. Crane, 'Fortnite Is "Dropping" Into Legal Land: A Proposal to Amend the Copyright Act to Address Artists' and Game Developers' Concerns Over Dance Moves as Purchasable Emotes in Video Games', 6, available at https://tinyurl.com/6zn93nwz (last visited 30 June 2021). See the text of the judgments: *Ferguson* v *Epic Games*, No. 2:18-cv-10110 (C.D. Cal. 2018), *Ribeiro* v *Epic Games, Inc.*, No. 2:18-cv-10412 (C.D. Cal. 2018), and *Redd* v *Epic Games, Inc.*, (C.D. Cal. Dec. 17, 2018). Cf also E. Hack, 'Milly Rocking through Copyright Law: Why the Law Should Expand to Recognize Dance Moves as a Protected Category', 88 *University of Cincinnati Law Review*, 651, 637-651 (2019), who argued that the decision of the court to exclude the copyrightability of hip-hop dance movements invented by Terrance Ferguson, interpreting them as simple routines *per se* not worthy of protection, 'encourages the intellectual theft' and disincentives the creative activities of choreographers and dancers. To solve this crucial issue, taking into consideration the technological and artistic evolution, the scholar suggests amending the 1976 Copyright Act, enlarging the scope of the notion of choreographies up to the inclusion of hip-hop sequences. The same conclusion is drawn also by A. Chander and M. Sunder, 'The Romance of the Public Domain' 92(5) *California Law Review*, 1331 (2004).

Even if, as it was stated, 'if too much material is protected, choreographers will lack incentives to create new pieces as a result of a shrinking public domain, and there will consequently be fewer jobs for dancers'. K.M. Benton, 'Can Copyright Law Perform the Perfect Fouetté? Keeping Law and Choreography on Balance to Achieve the Purposes of the Copyright Clause' 36 *Pepperdine Law Review*, 114, 59-128 (2008).

> amount will suffice. Most of the works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be.[48]

Similar requirements are also applicable in Italy.[49]

The same holds true for France as well where the courts have phrased the requirement as '*l'empreinte de la personnalité de l'auteur*'[50] o '*l'empreinte du talent créateur personnel*',[51] and for Germany as well where it is defined as *individualität*.

As stated in recital 17 of the preamble to Directive 93/98 'an intellectual creation is an author's own if it reflects the author's personality'.[52] The European Court of Justice in the Case C-*145/10 Eva-Maria Painer* v *Standard VerlagsGmbH and others* stated that a creation is original also when its author is 'able to express his creative abilities in the production of the work by making free and creative choices'.[53]

[48] Feist Publ'ns, *Inc.* v *Rural Tel. Serv. Co.*, 499 US 340 (1991).

[49] See, among others, V.M. De Sanctis, *I Soggetti del Diritto d'Autore* (Milano: Giuffrè, 2005), 172, who clearly states that, to meet this standard, the choreographer needs to add something recognizably *per se,* by expressing his creative ability in an original manner and transferring his personal footprint to the work. It is required, in other words, to point out a personal contribution to the work in order to have the direct paternity without any mediation of preexisting work. On the topic see also the following judgments: Corte d'Appello di Milano 8 July 1988 and, previously, Tribunale di Roma 12 May 1951, *Il Foro Italiano*, I, 1425 (1951) expressing the necessity to recognise in the work of creation feelings of the author. Cf also P. Zatti and G. Alpa, *La Nuova Giurisprudenza Civile Commentata*, 795 (1989).

[50] Cour d'appel de Paris 21 November 1994, in *Revue Internationale du Droit d'Auteur*, 381 and 243, (1995).

[51] Cour de cassation 13 November1973, *Dalloz*, 533, (1974). See also A. Lucas and H-J. Lucas, *Traité de la Propriété Littéraire et Artistique* (Paris: Litec, 2001), 72-87.

[52] Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, [1993] OJ L290, Recital, 17.

[53] Case C-*145/10 Eva-Maria Painer* v *Standard VerlagsGmbH and others*, Judgment of the Court of 1 December 2011, para 88, available at www.eurlex.europa.eu. See also Case C-5/08 *Infopaq International A/S* v *Danske Dagblades Forening*, Judgment of 16 July 2009, [para 33 et seq and, in particular, paras 37-38, available at www.eurlex.europa.eu: 'In those circumstances, copyright within the meaning of Art 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation. As regards the parts of a work, it should be borne in mind that there is nothing in Directive 2001/29 or any other relevant directive indicating that those parts are to be treated any differently from the work as a whole. It follows that they are protected by copyright since, as such, they share the originality of the whole work'. See also, the Opinion of Advocate General Trstenjak delivered on 12 February 2009 Case C-5/08 *Infopaq International A/S* v *Danske Dagblades Forening*, para 58 stating that '(t)he interpretation of 'reproduction in part' must not however be an absurd or excessively technical one according to which any form of reproduction of a work would be included no matter how minimal or insignificant a fragment of the work it is. I believe it is necessary, in interpreting that concept, to strike a balance between a technically inspired interpretation and the fact that the reproduction in part must also have a content, a distinctive character and – as part of a given work – a certain intellectual value, for which reason it is necessary to give it copyright protection. I consider that, to determine whether in a given case there is reproduction in part, it is appropriate to take two aspects into account. First, it is necessary to establish whether the

2. The Minimum Creativity Requirement: Threshold for Creativity?

Choreography relies on movements and steps which can be considered raw building blocks for the choreographer. According to a scholar,

> (a) choreographer of classical ballet has a specific movement vocabulary to work with. Like notes of music, however, these same steps can be put together in an infinite number of combinations. The prescribed steps can also be modified, as in contemporary ballet and modern dance, or repeated in different directions or done by a variety of dancers. In other words, the same step will look different in a dance depending on what step comes before and after it; the direction or tempo in which it is executed; whether it is performed while turning or leaping; what the rest of the body is doing at the same time; and how many dancers are doing it simultaneously. In short, what makes choreography interesting – instead of repetitive and boring – is the combination of the steps.[54]

However, these elements (steps and movements) cannot *per se* be copyrightable because they are standardized and so fall into the so-called 'public domain'.[55] These basic elements are used by the choreographer in the same way words are used by writers and notes by musicians.

As Traylor explains

> (it) is very different from an author writing words on paper. A choreographer works with a group of dancers who are trained in the discipline, and with a skeleton music source. The intellectual act of creation

reproduction in part is actually identical to a part of the original of the work (element of identification). In the case of reproduction in part of a newspaper article, that means specifically that it is necessary to determine whether the same words are found in the reproduction as in the newspaper article and whether those words are in the same order. Second, it must be established whether one can, on the basis of the reproduction in part, recognise the content of the work or determine with certainty that it is an exact reproduction in part of a given work (element of recognition)'.

[54] See M. Kerner, *Barefoot to Balanchine: How to Watch Dance* (New York: Doubleday, 1991), 132-133. See also Case C-5/08, *Infopaq International*, n 53 above, at paras 45-46: 'Regarding the elements of such works covered by the protection, it should be observed that they consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence, and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation. Words as such do not, therefore, constitute elements covered by the protection'.

[55] For an example of what is copyrightable see the following example reported by Schulman: 'during a visit to India I had the occasion to see dancing which was so ritualistic and stylized that there could be no doubt that the various dancers and groups followed set and identical patterns. However, these patterns, I am told, were traditional and accordingly no choreographer could claim originality for them' (*Copyright Law Revision: Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-Sixth Congress, Second Session Pursuant to S. Res. 240, Studies 26-28* (Washington: US Government Printing Office, 1960-1961), 109).

> occurs when movements are conceived by the choreographer and directed into the trained bodied and intellects of the dancers. Only the thoughts and artistic concepts of the choreographer are manifested (…). The dancers' role is to follow the directions of the choreographer.[56]

As an example, Carrière remarks that

> ballet classical movements such as *arabesque*, *assemblé*, *cabriole*, *entrechat*, glissade, *jeté*, *pirouette* or *sissonne* are not by themselves copyrightable.[57]

Furthermore, the choreographic work is deemed original regardless of its aesthetic value.[58]

Similarly, traditional dances are based on the repetition of standardised movements.

As clearly pointed out

> (s)ocial dance steps and simple routines are not copyrightable under the general standards of copyrightability. Thus, for example, the basic waltz step, the hustle step, and the second position of classical ballet are not copyrightable. However, this is not a restriction against the incorporation of social dance steps and simple routines, as such, in an otherwise registrable choreographic work. Social dance steps, folk dance steps, and individual ballet steps alike may be utilised as the choreographer's basic material in much the same way that words are the writer's basic material.[59]

An analogous approach is embraced by the Italian courts, with a particular emphasis on the originality of a choreography to be eligible for protection.[60]

[56] M.M. Traylor, 'Choreography, Pantomime and the Copyright Revision Act of 1976' 16 *New England Law Review*, 234, 227-255 (1980).

[57] L. Carrière, 'Choreography and Copyright. Some Comments on Choreographic Works as Newly Defined in the Canadian Copyright Act', 14, available at https://tinyurl.com/5ae52nz9 (last visited 30 June 2021).

The same author adds that 'they do not represent the right kind of creativity. In other cases, features are not protectable because they are not original or are insufficiently creative'. Leistner maintains that in Member States where a higher test applied, Art 6 of Directive 93/98 and of Directive 2006/116 lowered the level of originally required to comply with the directive. Then, he traces the comparison between the criterion of 'sweat of the brow', which derives from common law and the parameters of *originalité* and *Schöpfungshöhe*, which are familiar to civil law systems. M. Leistner, 'Copyright Law in the EC: Status Quo, Recent Case Law and Policy Perspectives' 46 *Common Market Law Review,* 847-884 (2009).

[58] H.R. Rep no 941476, at 51 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5664.

[59] The Compendium of Copyright Office Practices, Compendium II, para 450.

[60] A choreography that uses the steps of another dance, which constitutes a consolidated genre, as is the case for salsa, can only be copyrighted when it is original and, therefore, noticeably distinct from the genre whose steps it uses (Tribunale di Roma 18 March 2004, *Annali italiani del diritto d'autore, della cultura e dello spettacolo*, 493 (2005)).

In the old times, the issue related to the copyrightability of a choreography rarely arose since dances consisted in the replication of simple steps and figures, in order to make them easier to memorize and to adapt to the different music tunes.

In the 18th and 19th centuries, there appeared the so-called dance tune books and dance figures books. The former were collections of standardized steps (able to be used with different musical representations) whereas the latter contained original and new ones pictured dance figures available for different musical works (without any connection with the music).

To be eligible for protection, a combination of steps must include a *quid pluris* and a *quid novi*, resulting in a homogenous creative combination. For a practical example see the US Copyright Office Statement of Policy issued on June 18, 2012, where it is stated that

> a claim in a choreographic work must contain at least a minimum amount of original choreographic authorship. Choreographic authorship is considered, for copyright purposes, to be the composition and arrangement of a related series of dance movements and patterns organised into an integrated, coherent, and expressive whole.[61]

According to the Copyright Office the standardised steps fall within the

[61] See 77 Fed Reg 37605, 37607 (June 22, 2012): 'a mere compilation of physical movements does not rise to the level of choreographic authorship unless it contains sufficient attributes of a work of choreography. And although a choreographic work (…) may incorporate simple routines (…) exercise routines as elements of the overall work, the mere selection and arrangement of physical movements does not in itself support a claim of choreographic authorship'. It was correctly underlined that 'the work must be an 'original work of authorship' – the choreographer cannot simply copy a dance or performance and then seek copyright protection for it. The basis for originality lies in the physical setup, composition, and execution of the choreography. The choreographer must use his own creativity and imagination to use the basic dance steps, while simultaneously formulating his own unique creation. This new creation is what will be eligible to gain copyright protection' (K. Abitabile and J. Picerno, n 39 above, 7). Then again, 'it would seem possible, at least, that combinations of steps could be original, just as could combinations of words, for which there is strong support from decisions involving literary works. Whether or not the elements are original, the combination could be 'new and novel'. Combinations of dance steps also would seem analogous to a distinctive melody in music, for which there is considerable precedent for meeting the requirement of 'originality'. However, many combinations clearly belong to the public (eg, a series of turns à la seconde followed by multiple pirouettes, common in so many male solo variations in ballet), and some skeptics wonder whether any combinations could meet the statutory requirement of originality (namely, that only 'original works of authorship' are eligible for copyright)'. J. Van Camp, 'Copyright of Choreographic Works', in J.D. Viera and S. Breimer eds, *Entertainment, Publishing and the Arts Handbook 1994-95* (New York: Clark Boardman Company, 1994), 59-92. This concept can be extended to all genres of choreography, including those of cheerleaders, wrestlers, artistic gymnasts and skaters. See, among others, H.M. Abromson, 'The Copyrightability of Sports Celebration Moves: Dance Fever or Just Plain Sick' 14 *Marquette Sports Law Review*, 571-601 (2003), and L.J. Weber, 'Something in the Way She Moves: The Case for Applying Copyright Protection to Sports Moves' 23 *Columbia-VLA Journal of Law and the Arts*, 317-361 (1999).

domain of 'commonplace movements or gestures',[62] and so they are not eligible for copyright protection. For sake of precision, in this class, sports routines[63] (such as yoga sequences),[64] acrobatic exercises, and classical ballets movements are mentioned as well.

Even a mere rearrangement of these existing elements can be copyrightable as long as it consists in a new combination never seen before.[65] When it comes to music and dance, authors can rely on a wide set of material, which they can rearrange in ever changing ways to come up with an original result.

To sum up, choreographers take individual movements and steps which are not copyrightable in and of themselves[66] and come up with a choreography, which is copyrightable as a whole.

This is particularly important in light of the observation that choreographers

[62] See U.S. Copyright Office, *Copyright Registration of Choreography and Pantomime,* circular n. 52, 2017, available at https://www.copyright.gov/circs/ (last visited 30 June 2021).

[63] On the similarities between choreographies and standardized sequences of the athletes, see *ex multis* T. Griffith 'Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performance with Copyright Law' 30 *Connecticut Law Review*, 689, 675-695 (1998): '(r)outine-oriented athletic performance (…) is most similar to (…) choreographic works. (…) Both tend to exhibit a planned and prepared routine, the result of which entertains the audience, displays the performer's athletic abilities, and gives the performer herself (or himself) a great deal of self-gratification. Additionally, both rely greatly upon creativity and artistic expression'.

[64] An important judgment that applied the principle expressed by the Copyright Office to the yoga was delivered by the US *Court* of Appeals for the *Ninth Circuit* in 2015 (*Bikram's Yoga College of India, L.P.* v *Evolation Yoga, LLC*, 803 F.3d 1032 (9th Cir. 2015)). The judges clarified that the sequences *(asana)* of the Bikran yoga could not be copyrightable as choreographies, because they were repetitive movements based on standardized blocks, which had not an artistic value: they lacked a creative coordination proposed by the choreographer as something new from what was previously performed. In the opinion of the court, 'because the sequence was primarily influenced by functional concerns about physical and mental well-being, it is entirely disqualified from copyright protection. Any aspects of the sequence that were motivated by aesthetic concerns are, thus, bound up with the sequence's function and are unprotected'. C. Buccafusco, 'Authorship and the Boundaries of Copyright: Ideas, Expressions, and Functions in Yoga, Choreography, and Other Works' 39 *Columbia Journal of Law & the Arts*, 425, 421-435 (2016). Another scholar observed: 'While choreographed dance is an expressive art, the Bikram Yoga series is a functional system. As has been discussed at length, the Bikram Yoga series is essentially a functional work, 'discovered' and 'researched' by Bikram, intended to be used to derive certain physical and mental benefits in the body, as Bikram himself has admitted. Bikram has never claimed that there is nothing artistic or expressive about the series. Choreographed dance, on the other hand, is primarily an expressive, artistic work. Although a dancer may benefit in certain ways from choreographed dancing-by improving his health and fitness level, increasing his flexibility, or deriving pleasure from the experience-this is certainly not the intended purpose of choreographed dance. Rather, a copyrightable, choreographed dance is intended to express the original, creative talent of the choreographer and is valued primarily for this reason'. K. Machan, 'Bending Over Backwards for Copyright Protection: Bikram Yoga and the Quest for Federal Copyright Protection of an Asana Sequence' 12 *UCLA Entertainment Law Review*, 57, 29-61 (2004).

[65] *Stanley* v *Columbia Broadcasting System* 35 Cal. 2d 653, 664, 221 P. 2d 73, 79 (1950).

[66] Therefore, choreography is not different from the other creative works, 'created from uncopyrightable component parts or formal elements – colors, notes, words, shapes, chemicals, and other substances'. C. Buccafusco, 'A Theory of Copyright Authorship' 102 *Virginia Law Review*, 1274, 1229-1295 (2016).

are often influenced by a dance school or by specific techniques as a result of their training.

Therefore, requiring choreographers to be novel, rather than original, could result in a lack of protection in the event that an author was deemed to be too faithful to the conventions of his dance style. Even the use of standardised steps belonging to a specific dance style could turn out to be eligible for copyright protection as long as the combination of these standardised steps are original.

In this, dance is similar to music where it is possible for composers to arrange existing chords and tunes to create innovative melodies. In other words,

> (b)allet and modern dance vocabularies contain basic movements which can be used by anyone and incorporated into an original choreographic work, but it is the unique combination of dance steps that determine originality.[67]

For these reasons, it is important for the courts to be extremely careful when determining whether a choreography is original or not.

3. The Domain of Originality

It is important to point out that the determination of originality must be carried out in relation to the choreographic work rather than its performance, considering the differences between the way one performer interprets the dance as opposed to another.

As clearly stated by Carrière,

> (the performance of (the) steps may greatly vary from one dancer to another according to their own interpretation. Therefore, the steps may be quite similar but their rendering by a dancer be so different that the copying choreography may be perceived as different from the copied one. It is submitted however that under the Copyright Act, it is not the performance of a work that is protected but rather the work itself.[68]

After all, the performance of a choreography influences the creative process of a choreographer because it is by seeing his creation actually performed by dancers that the author can realise if the execution of abstract idea has been successful and consistent with what he had exactly in mind.[69]

It is relevant to take into consideration that the concept of originality is flexible, and it can be applied more or less strictly. However, there is a distinct lack of case law on this specific issue.

[67] N. Arcomano, 'The Copyright Law and Dance' *The New York Times* available at http://www.nytimes.com.

[68] L. Carrière, n 57 above, 14.

[69] L.E. Wallis, 'The Different Art: Choreography and Copyright' 33 *UCLA Law Review*, 1459, 1442-1471 (1986).

It is up to choreographers and lawyers to fill this void.[70]

If one applies the stricter test, one only looks at the movements of the dancers, whereas if one applies the more extensive one, all the elements of the choreography must be evaluated which means movements, steps, the relationships with the settings and the spaces, costumes. In the latter case,

> (t)he choreographer distributes predefined elements such as steps, jumps, spins and transitions uniformly, using the entire space. The elements are stylishly and harmoniously connected with each other under consideration of different tempos.[71]

The choice of one approach over the other bespeaks different attitudes towards choreographic works which can be considered either a coherent whole or the combination of different elements, in particular movements and music.

IV. Choreography: Unique Whole or Combination of Separate Creative Blocks?

Although various legislations consider choreographies copyrightable, none of them define their nature and characteristics. Etymologically, choreography is Greek in origin and means, literally, the art of writing ballets (*χορεία* = dance and *γραφή* = writing).[72]

Consequently, a choreography is a composition created to be danced and, as such, it consists of steps and movements. However, traditionally dance was never an autonomous art form but rather one that evolved in parallel to music, from which it was originally indistinguishable being part of the *mousiké* practiced by ancient Greeks and consisting in harmonious arrangement of words, melody, and dance.

The question for the lawyer is if the combination of dance movements and music is deemed worthy of protection by the legal domain in its entirety, or whether the musical part and the step sequences can only find protection as

[70] J. Haye, 'So You Think You Can Steal My Dance? Copyright Protection in Choreography', available at https://tinyurl.com/a32kwem9 (last visited 30 June 2021).

[71] M. Kerner, n 54 above, 132-133. It is necessary to add that 'the choice of performing space might be original and an integral part of the work. If a choreographic work involves the design of movement, the choice of location for that movement seems to be part of the design. For example, the use of ramps running across the audience or the steps leading to a public monument could be considered an original element in the design of the work. However, mere use of the performing space itself probably would be excluded from protection as a 'procedure', although the pattern of movement combined with the design for the space could be protected as original' (J. Van Camp, n 61 above, 59-92). Finally, also 'the choice of a particular musical accompaniment for a certain combination of steps might be considered an original element of a choreographic design'. See, on the use of the space, among others, D.S. Palmer, *Light, Scenography and the Choreographic Space* (Leeds: University of Leeds, 2015).

[72] F. Pompei, *Le Parole del Teatro: Glossario* (Roma: Aracne, 2008), 27.

separate components of the choreographic work. As far as the nature of choreographic is concerned, its performance consists in the assemblage of different elements where music and (or, *rectius*) dance are the essential elements.[73] If, however, one considers the creative act of a choreography, the situation changes, and two different hypotheses emerge.

On the one hand, the choreographic work can be seen as a combination of dance steps and body movements, resulting from the single creative act on the part of the choreographer who is using an already existing tune, whose license must be obtained to be allowed to play it.

In this case, the two components, ie music and choreography, are different and each one enjoys copyright protection autonomously.

As a result, if a producer wants to use a choreography in a movie or a musical, he will have to obtain the permission of and pay royalties to the creator of the melodies, the author of the lyrics, and the choreographer.[74]

On the other hand, the choreography may also be the result of a dual and integrated creative act on the part of the choreographer and the composer of the music who cooperate to create a composite artistic creation.

In this case, a choreography is the product of a collaborative act of creation, which is subject of rights belonging to choreographer and the composer.

This coexistence takes different shapes in the US where a choreographic work is considered a *unicum* made up of elements which cannot be separated without distorting the nature of the whole work,[75] as opposed to Italy where it is considered a composite work and the different creative contributions can be separated even if the performance is indivisible.

In the American legal system, in fact, such a choreography can enjoy protection as a joint work, which is

> the one prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent party of a unitary work.[76]

The authors become owners as equals, which means that each of them exercises independently the right to use and commercially exploit the work, remaining 'subject only to the obligation to account to the other joint owner for any profits that are made'.[77]

[73] P. Cuoco and M. Gallina, 'In principio era il testo (autori e diritto d'autore)', in M. Gallina ed, *Organizzare teatro. Produzione, Distribuzione, Gestione* (Milano: Franco Angeli, 2014), 193.

[74] J. Van Camp, n 61 above, 59.

[75] P. Greco, 'Collaborazione creativa e comunione di diritto di autore' *Il Diritto d'Autore*, 12, 1-50 (1952).

[76] US Copyright Act, title 17, para 101.

[77] *Thomas* v *Larson* 147 F. 3d 195 (2d Circ. 1998) and, in analogy, *Community for Creative Non-Violence* v *Reid* 846 F.2d 1485, 1498 (D.C.Cir. 1988). A consequence of the joint authorship is the fact that the duration of economic rights is extended after the death of the last remaining author.

Joint works are different from the so-called collective works, constituted by separate and autonomous copyrightable works put together in a whole,[78] and from the above-mentioned category of composite works, which also includes for the Italian lawmaker the choreography created by a music composer and a choreographer, involved in a single intellectual process developed within the same timeframe.

In this latter hypothesis, in the absence of particular agreements between the two authors governing the rights on the composite work – for instance, by sharing them through specific percentages of ownership – (Art 33 of Law no 633/1941), – only the choreographer is entitled to enjoy the exploitation rights, because the legal principle to be followed in this case is the one of 'the most important contribution'.

In this sense, Art 37 of Law no 633/1941 specifies that in a choreographic work, where the music has not a major function or value, the dance prevails, so, the choreographer is the primary author and the music composer has only the right to receive a remuneration for his creative effort.

Another problem is how to legally classify the contribution given by the dancers in the choreographic works. Dancers, as performers, add 'interpretative elements' to the choreography and this was seen by some commentators as a circumstance that can lead to the recognition of a form of joint authorship between dancers and the choreographer.[79]

However, in the opinion of this author, it is necessary to distinguish the case in which the dancer can enjoy rights as a co-choreographer, because he concretely contributes in the intellectual creation, by adding something new to the work, and not only in the practical performance of the dance – from the one where the dancer is *stricto sensu* a performer,[80] in which case, like a musician or an actor, his performances are protected under the so-called related or neighboring rights, as lastly established by the 1996 *WIPO* Performances and *Phonograms Treaty* (WPPT).

In particular, the dancer is entitled to moral rights (Art 5 of WPPT) – such as the rights to be recognized as the performer of the dances and 'to object to

[78] By virtue of title 17, para 102, letter c) of the US Copyright Act, the author of one of these works has only 'the privilege of reproducing and distributing the contribution as part of that particular *collective work,* any revision of that *collective work,* and any later *collective work* in the same series'.

[79] It was observed that the recognition of such a joint authorship 'would be inconsistent with apparent understanding in the dance community, as well as with practices of choreographers in registering their copyrights' (J. Van Camp, n 61 above, 59). But it is also true that 'dance is the dancer'. For this reason, 'the relation of dancer to choreographer is not just that of executant or performer to auteur – which, however creative, however inspired the performer, is still a subservient relation. Though a performer in this sense, too, the dancer is also more than a performer'. S. Sontag, 'Dancer and the Dance' 9 *London Review of Books*, 9-10 (1987).

[80] In fact, in this case, the choreography has already been created by the choreographer as a complete work, with its meanings and its unique characteristics. Cf V.M. De Sanctis and M. Fabiani, *I Contratti di Diritto d'Autore* (Milano: Giuffrè, 2007), 77.

any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation' – and economic rights (Arts 6, 7 and 8 of WPPT), such as the right to authorize the broadcasting, communication to the public and the fixation of his unfixed performance,

> the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form', the distribution and the commercial rental 'of the original and copies of their performances fixed in phonograms.

V. Final Remarks

Since the middle of the 20th century, choreographies have been protected by law both by statute and case law, in many countries, as a specific artistic manifestation, with the recognition of moral and economic rights in favour of the choreographer, as long as the work has been fixed in a tangible medium and is original. Both the common and the civil law recognize the copyright of the choreographer, which can be a joint copyright with the author of the music in the event of a composite work.

From a systemic perspective, furthermore, it is possible to draw a parallel between choreography and the other arts, especially literature and music. Hence, each one of these arts is based on its own peculiar vocabulary and expressive grammar, which constitute the building blocks (steps, words, musical notes) that are combined by the artists to come up with their creative work. So far, these building blocks have not been considered copyrightable *per se*, because, on the one hand, they are usually not original, and, on the other hand, they are too small to reveal an author's personal touch, while the combination of these elements is copyrightable, provided that the standard requirements are met. This final outcome is, even if through different legal paths and formulas, widely embraced in the legal systems belonging to the Western legal tradition.

Choreography gradually emerged as an autonomous legal construct in the US, where its independent recognition was the consequence of the suggestions of the scholars and rulings of the courts, but similar patterns have also been followed in civil law countries. Therefore, the divide between the two legal families of the Western Legal Tradition is not so evident in the solutions adopted, so much so, that, when dealing with the concepts of dramatization, fixation and originality, the traditional grouping of legal systems may not be particularly accurate or useful.

On the one hand, in Italy and France, where choreographies have a long tradition, parliament failed to regulate the subject since the praxis has been, *de facto*, governing since time immemorial all cases, courts provided some degree of certainty while legislation only came in recent times. On the other hand, in the common law countries and in the Germanic area, choreographies were

confined to the dramatic and theatrical arena, for they were not classified by copyright laws as independent works.

In conclusion, the common law Countries and the solutions of Central Europe, after having enacted a legal framework, relied on the courts to outline the rules on choreographies; whereas, in France and Italy, parliament only intervened after judges had reached a mature and stable regulation on the matter.