

COPYRIGHT IN PANTOMIME[♦]

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Abstract

Why does the Copyright Act specifically provide for the protection of “pantomimes”? This Article shows that the Copyright Act of 1976 amended the subject matter of copyright to include pantomimes simply in order to conform it to the Berne Convention for the Protection of Literary and Artistic Works. It further shows that the Berlin Act of 1909 amended the Berne Convention to provide for copyright protection of “les pantomimes” and “entertainments in dumb show” in order to ensure copyright protection of silent motion pictures. Unfortunately, the original purpose of providing copyright protection to “pantomimes” was forgotten. This Article argues that copyright protection of pantomimes is redundant on copyright protection of “motion pictures” and “dramatic works,” and reflects the carelessness of the drafters of the 1976 Act.

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INTRODUCTION

Copyright scholars and practitioners have long wondered why the Copyright Act of 1976 specifically provides for copyright protection of “pantomimes.”¹ The answer is rather surprising.

In a nutshell, the Copyright Act of 1976 amended the subject matter of copyright to include “pantomimes” simply in order to conform United States copyright law with the Berne Convention for the Protection of Literary and Artistic Works. And the Berlin Act of 1908 amended the Berne Convention to include “les pantomimes” as a category of “literary and artistic works” in order to provide copyright protection to silent motion pictures. In other words, copyright protection of “pantomimes” is redundant on copyright protection of “motion pictures” and “dramatic works.”

This observation is important for at least three reasons. First, it reminds us that seemingly simple questions can have unexpected answers. Second, it highlights the carelessness of the drafters of the 1976 Act, who failed to investigate the meaning and purpose of an unfamiliar term. And third, it underscores the need for yet another revision of the Copyright Act.

I. THE BERNE CONVENTION

Our philological investigation begins with the Berne Convention for the Protection of Literary and Artistic Works, an international copyright agreement that was initially formed on September 9, 1886, by Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, Tunisia, and the United Kingdom.² The Berne Convention gave the

¹ See, e.g., R. Anthony Reese, *Copyrightable Subject Matter in the “Next Great Copyright Act”*, 29 BERKELEY TECH. L.J. 1489, 1526 (2014) (“Consider, for example, the protected category of ‘pantomimes and choreographic works.’ The statute contains no definition, and the legislative history provides only that ‘choreographic works’ do not include social dance steps and simple routines.’ That leaves substantial ambiguity about what the statute does protect as a choreographic work, and provides no guidance as to pantomimes.” (footnote omitted)).

² Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. Treaty

authors of “literary and artistic works” certain exclusive rights to use those works, and explained:

The expression “literary and artistic works” shall include 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; in fact, every production whatsoever in the literary, scientific, or artistic domain which can be published by any mode of impression or reproduction.³

The Berne Convention also permitted signatories to provide copyright protection to photographic and choreographic works to the extent permitted by their domestic laws, characterizing photographs as “artistic works” and choreographic works as “dramatico-musical works.”⁴ Italy supported the protection of choreographic works, but Germany opposed on the ground that the music was already protected and the nature of a choreographic work was poorly defined. As M. Reichardt commented, “Do you wish to protect upon this ground every pantomime, every choreographic scene, represented in the circus, at fairs, in booths, even in the open street?”⁵

A. *The Berlin Act of 1908*

On November 13, 1908, fifteen countries signed the Berlin Act, which amended the Berne Convention.⁶ Article 2 of the Berlin Act provided, *inter alia*, that “literary and artistic works” shall include “choreographic works and entertainments in dumb show, the acting form of which is fixed in writing or otherwise.”⁷ The official French version of the corresponding clause provided for the protection of “les œuvres chorégraphiques et les pantomimes, dont la mise en scène est fixée par écrit ou autrement.”⁸

Notably, while the original version of the Berne Convention did not explicitly provide that choreographic works, entertainments in dumb show, or pantomimes were “literary and artistic works,” they

Doc. No. 99-27, 828 U.N.T.S. 221 [hereinafter “Berne Convention”].

³ Berne Convention, *supra* note 2, art. 4.

⁴ Berne Convention, *supra* note 2, Final Protocol Nos. 1–2.

⁵ WILLIAM BRIGGS, *THE LAW OF INTERNATIONAL COPYRIGHT* 381 (photo. reprint 2009) (1906).

⁶ Berne Convention, *supra* note 2, revised at Berlin Nov. 13, 1908. The signatories of the Berlin Act were Germany, Belgium, Denmark, Spain, France, Italy, Japan, Liberia, Luxembourg, Monaco, Norway, Sweden, Switzerland, Tunisia, and the United Kingdom.

⁷ *Id.* art. 2.

⁸ Convention de Berne pour la protection des oeuvres littéraires et artistiques du 13 novembre 1908, Art. 2.

presumably fell within the scope of its catch-all provision: “every production whatsoever in the literary, scientific, or artistic domain which can be published by any mode of impression or reproduction.”⁹

Section 14 of the Berlin Act also gave authors the exclusive right to create “cinematograph productions” or motion pictures based on their “literary or artistic works,” and provided that motion pictures could themselves be “literary or artistic works”:

Authors of literary, scientific or artistic works shall have the exclusive right of authorizing the reproduction and public representation of their works by cinematography. Cinematograph productions shall be protected as literary or artistic works, if, by the arrangement of the acting form or the combinations of the incidents represented, the author has given the work a personal and original character. Without prejudice to the rights of the author of the original work the reproduction by cinematography of a literary, scientific or artistic work shall be protected as an original work. The above provisions apply to reproduction or production effected by any other process analogous to cinematography.¹⁰

But why did the signatories of the Berlin Act decide to amend the subject matter of copyright to include “choreographic works,” “entertainments in dumb show” and “pantomimes”? What kinds of works did they intend to protect? And how did those works relate to motion pictures, if at all?

1. Choreographic Works

What is a “choreographic work”? The word “choreography” combines the Greek word “khoreia,” which means “dance,” and the Latin root “-graphia,” which means “writing.”¹¹ It was first used in the late eighteenth century to mean the written notation of dance but eventually came to mean the practice of designing dance sequences, whether written or not.¹²

The signatories of the Berne Convention and the Berlin Act seem to have used the term “choreographic work” to mean “dance sequence.” In 1899, the International Office, which administered the Berne Convention, defined a “choreographic work” as a work that

⁹ See Berne Convention, *supra* note 2, art. 4.

¹⁰ Berne Convention, *supra* note 2, revised at Berlin Nov. 13, 1908, art. 14.

¹¹ *Choreography Definition*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/choreography (last visited Dec. 28, 2015); *Choreography Definition*, GOOGLE DICTIONARY, https://www.google.com/search?q=google+dictionary&oq=google+dictionary&aqs=chrome..69i57j0l5.1353j0j7&sourceid=chrome&es_sm=93&ie=UTF-8#safe=off&q=choreography+definition (last visited Dec. 28, 2015).

¹² See OXFORD DICTIONARIES, *supra* note 11; GOOGLE DICTIONARY, *supra* note 11.

“represents . . . a processional dance, sometimes also a dancing group, the object being to reproduce on the stage a determinate subject, often an allegory or a symbolic grouping.”¹³ And a 1906 treatise on international copyright defined “choreographic works” under the Berne Convention as “[d]escriptive representations on the stage, in which the story is expressed by the postures and movements of the ballet.”¹⁴

2. Pantomimes and Entertainments in Dumb Show

What is a “pantomime” or “entertainment in dumb show”? The word “pantomime” is derived from the Greek word “pantomimos,” which means “an actor in a pantomime.”¹⁵ There are three kinds of pantomime: ancient, English, and modern.

Ancient pantomime was a popular form of theater in ancient Greece and classical Rome. It typically consisted of a dance based on a mythological theme, performed by a single dancer, accompanied by one or more singers and an orchestra. The dancer typically wore a long silk tunic, a short mantle, and a mask with a closed mouth, elaborate hair, and large eyeholes.¹⁶ In early eighteenth century France, there was an effort to revive ancient pantomime as a form of ballet.

English pantomime or “panto” is a form of theater that originated in England in the late seventeenth century. Although it was named after ancient pantomime, the two are otherwise unrelated. English pantomime developed out of mummering, masque, dumbshow, and commedia dell’arte.

Mummering is a form of seasonal folk theater that originated in England, probably in the Middle Ages, and continues to be performed today. It consists of “mummers,” or performers in disguise, who act out allegorical plays in rhymed verse, typically concerning an allegorical battle between good and evil. Masque was a related form of courtly theater that originated in England in the sixteenth century and was popular until the early seventeenth century. It typically consisted of music, dancing, singing, and acting on an allegorical theme.

¹³ LE DROIT D’AUTEUR 14 (1899).

¹⁴ See BRIGGS, *supra* note 5, at 373 n.1.

¹⁵ See *Pantomime Definition*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/pantomime (last visited Apr. 10, 2016).

¹⁶ See Alessandra Zanobi (Durham), *Ancient Pantomime and Its Reception*, ARCHIVE OF PERFORMANCES OF GREEK & ROMAN DRAMA, <http://www.apgrd.ox.ac.uk/learning/short-guides/ancient-pantomime-and-its-reception> (last visited Dec. 28, 2015); William J. Slater, *Pantomimes*, DIDASKALIA (May 1994), <http://www.didaskalia.net/issues/vol1no2/wslater.html>.



A Party of Mummers

“Dumb show” was a form of theater that originated in England in the sixteenth century. It consisted of silent gestures intended to convey meaning, often accompanied by music.¹⁷ Dumb show was a common element of English Renaissance Theater, but it became unfashionable by the mid-seventeenth century and disappeared by the early eighteenth century.

Commedia dell’arte was a form of theater that originated in Italy in the sixteenth century. It consisted of masked actors representing stock characters, who improvised their role based on conventional plots, often accompanied by music. In the mid-seventeenth century, *commedia dell’arte* characters began to appear in English plays, including Harlequin the rogue.

¹⁷ *Dumb Show Definition*, OXFORD DICTIONARIES, [HTTP://WWW.OXFORDDICTIONARIES.COM/US/DEFINITION/AMERICAN_ENGLISH/DUMBSHOW?Q=DUMB+SHOW](http://www.oxforddictionaries.com/us/definition/american_english/dumbshow?Q=DUMB+SHOW); *Dumb Show Definition*, GOOGLE DICTIONARY, [HTTPS://WWW.GOOGLE.COM/SEARCH?Q=GOOGLE+DICTIONARY&OQ=GOOGLE+DICTIONARY&AQ=CHROME..69I57J0L5.1353J0J7&SOURCEID=CHROME&ES_SM=93&IE=UTF-8#SAFE=OFF&Q=DUMB+SHOW+DEFINITION](https://www.google.com/search?q=google+dictionary&oq=google+dictionary&aqs=chrome..69i57j0l5.1353j0j7&sourceid=chrome&es_sm=93&ie=UTF-8#safe=off&q=dumb+show+definition) (last visited Dec. 28, 2015).



Claude Gillot, *Four Commedia dell'Arte Figures* (c. 1710)

Originally, English pantomime consisted of acting and dance, without spoken dialogue, accompanied by music. The earliest English pantomimes told stories based on classical literature, which was then followed by a comic scene. In 1717, John Rich of Lincoln's Inn introduced the *commedia dell'arte* character Harlequin, an acrobatic comic servant conventionally dressed in a checkered costume. The harlequinade soon became a defining element of English pantomime. It typically told the story of the eloping lovers Harlequin and Columbine being pursued by Columbine's father Pantaloon and his comic servants Clown and Pierrot, and it was performed as an interlude between two stories based on classical literature.



Commedia dell'Arte Harlequin



John Rich as Harlequin

In the early nineteenth century, English pantomime began to tell stories based on fairy tales, nursery rhymes, and English literature. The harlequinade gradually became the most important part of the performance, especially after actor Joseph Grimaldi increased the importance of the Clown.¹⁸ In the mid-nineteenth century, English pantomime began to incorporate spoken dialogue and depend on written scripts, although it remained primarily visual. Late nineteenth century English pantomime focused on spectacular scenic effects, including rapid scene changes, trap doors, and water effects enabled by large tanks underneath the stage. Gradually, pantomime began to deemphasize the harlequinade, and by the early 20th century it disappeared. Today, pantomime is typically performed at Christmas for family audiences and consists of comic acting, song, and dance. Modern pantomime stories are usually modified versions of familiar children's stories, often incorporating some mild sexual innuendo.

¹⁸ See also Andrew McConnell Stott, *The Memoirs of Joseph Grimaldi*, PUB. DOMAIN REVIEW, <http://publicdomainreview.org/2011/11/14/the-memoirs-of-joseph-grimaldi/> (last visited Dec. 28, 2015).



Joseph Grimaldi as Clown (c. 1810)



The Payne Brothers as Harlequin & Clown (c. 1875)

Modern pantomime or “mime” is a form of theater that originated in France in the early nineteenth century. It typically consists of one or more actors in whiteface who tell a story through movement and gesture, without any spoken dialogue. Mime was created by Étienne Decroux in the 1920s, developed by Jacques Lecoq in the 1950s, and popularized by Marcel Marceau in the 1960s. It is still performed today, primarily by buskers.

But these definitions of the terms “pantomime” and “dumb show” present a puzzling question. Why would the signatories of the Berlin Act amend the subject of copyright to include a defunct form of theater like dumb show or a nascent form of theater like mime?

By the early twentieth century, the words “pantomime” and “dumb show” were both used primarily to mean “significant gesture without speech.”¹⁹ In addition, French-English dictionaries typically translated the French word “pantomime” as “dumb show” or “pantomime.”²⁰ The

¹⁹ See *Dumb Show Definition*, *supra* note 17; *Pantomime Definition*, *supra* note 15.

²⁰ See, e.g., ALEXANDER SPIERS, A NEW FRENCH-ENGLISH GENERAL DICTIONARY (1908) (translating the French word “pantomime” as “dumb show”); PAUL EDOUARD PASSY & GEORGE HEMPL, INT’L FRENCH-ENGLISH & ENGLISH-FRENCH DICTIONARY (1904) (translating the French word “pantomime” as “dumbshow” or “pantomime”; translating the English word “dumb-show” as “pantomime” or “jeu muet” (“silent play”); and translating the French word “pantomime” as “pantomime”); JAMES BOÏELLE & JAMES BERTRAND DE VINCHELÉS PAYEN-PAYNE, HEATH’S FRENCH AND ENGLISH DICTIONARY (1903) (translating the French word “pantomime” as “dumb-show” or “pantomime”; translating the English word “dumb-show” as “pantomime”; and translating the English word “pantomime” as “pantomime”).

fact that the English version of the Berlin Act translated the French word “pantomimes” as “entertainments in dumb show” implies that the signatories of the Berlin Act used the terms “pantomime” and “dumb show” in this colloquial sense. Specifically, the House of Commons Law of Copyright Committee observed:

With regard to par. 1 of this Article it is to be noticed that it is in substantially similar terms to Art. 4 of the Berne Convention, except that it introduces choreographic works and pantomimes, the acting form of which is fixed in writing or otherwise, and architecture. But it must be pointed out that the word “écrits” in the French version of the Convention should possibly be translated by the word “documents” instead of by the word “writings,” the word “pantomimes” by the words “entertainments in dumb show” instead of by the word “pantomimes,” and the word “dessin” by the word “drawing” and not by the word “design.”²¹

Presumably, the Committee recommended translating the word “pantomimes” by the words “entertainments in dumb show” in order to avoid confusion with English pantomime. In any case, Parliament adopted the suggestion.

3. The Fixation of Choreographic Works, Pantomimes, and Entertainments in Dumb Show

Notably, Section 4 of the Berlin Act provided that the subject matter of copyright includes choreographic works, entertainments in dumb show, and pantomimes, “the acting form of which is fixed in writing or otherwise.”²² This presents an obvious question: what were the available means of fixing these categories of works in 1908? The most obvious way of fixing choreographic works, pantomimes, and entertainments in dumb show in writing would be to use a method of written notation to record the movements that comprise the work.

The fixation requirement was introduced at the insistence of the German delegation and modified at the insistence of the Italian delegation.²³ The German delegation proposed that the Convention

²¹ REPORT OF THE COMMITTEE ON THE LAW OF COPYRIGHT, 1909–10, HC 272, at 8–9 (UK).

²² Berne Convention *supra* note 2, revised at Berlin Nov. 13, 1908; *see also* Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 24 (1988) (“The conferees required that choreographic works and pantomimes be fixed in a tangible medium because they felt that the proof of an infringement would otherwise be impossible. Fixation, however, was not and still is not considered a copyright formality under the Convention, and thus does not violate the Convention’s general prohibition of formalities.”).

²³ UNION INTERNATIONALE POUR LA PROTECTION DES OEUVRES LITTÉRAIRES ET ARTISTIQUES, ACTES DE LA CONFÉRENCE RÉUNIE À BERLIN DU 14 OCTOBRE AU 14 NOVEMBRE 1908, AVEC LES ACTES DE RATIFICATION, 50–51 (1910) (proposals developed by the German Government with the assistance of the International Bureau).

should grant copyright protection to choreographic works and pantomimes only if they were fixed in writing:

Choreographic works are currently admitted to the protection of the Convention only on condition of being understood implicitly by domestic law among the dramatic musical works. Those from countries whose legislation meets this requirement are required to protect them. As for architectural works, it seems possible to take a step forward and to apply the Convention to them without a special clause. However, in international relations, it is difficult to aim at the protection of an event as fleeting as a choreographic action, a ballet or pantomime. So it seems appropriate to claim for these works a form that is more palpable, the form of a writing, and ask therefore that a text which fixes the dramatic rendition, the development of the action, and the script ensures to them the character of a true literary production. Thanks to this guarantee to which protection is subordinated, the reservation contained in the second paragraph of the current provision would lose its usefulness and could be deleted.²⁴

The Italian delegation modified the proposal by suggesting that the Convention should grant copyright protection to choreographic works and pantomimes fixed in writing or any other medium:

Choreographic works and pantomimes were only mentioned in the Final Protocol No. 2 in a somewhat restrictive form. "In regards to Article 9, it is agreed that those EU countries whose legislation includes implicitly, among dramatic musical works, choreographic works, explicitly award such works the benefit of the provisions of the Convention." The German Government proposed to amend the Protocol on this point. "It is agreed that the provisions of this Convention apply also to choreographic and mimed works whose dramatic action is fixed in writing." The proposal was consistent with the Italian proposal in a basic sense in that both tended to give protection to choreographic and mimed works. They differed ostensibly as to the place assigned to the provision. It was obvious that when one agreed, one simplified by including the works in the enumeration. The German proposal, to avoid serious difficulties of proof, added a clarification by asking that the action be fixed in writing. The Italian delegation agreed through the addition of the words "or otherwise," because sometimes the action is determined by a drawing or any other process which would not constitute a writing.²⁵

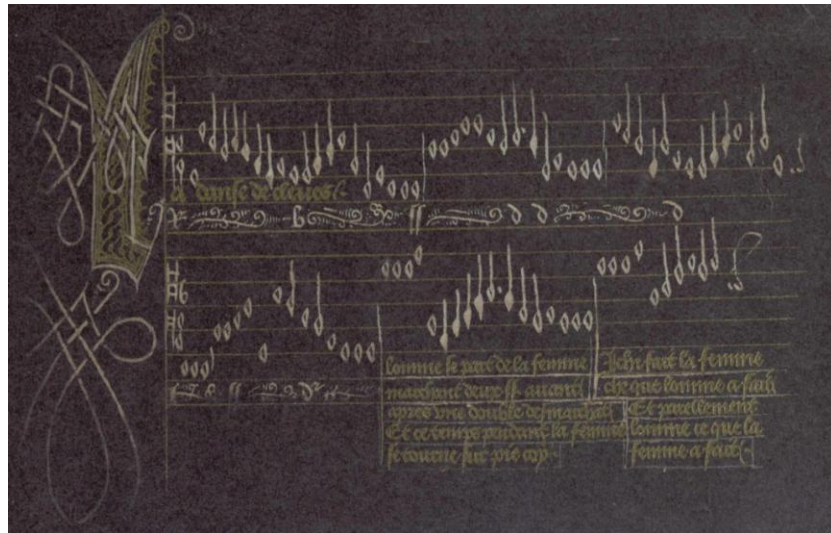
4. Movement Notation

Today, the written notation of the movements in a dance is

²⁴ *Id.*

²⁵ *Id.* at 231 (Report to the Conference on behalf of its Commission by L. Renault).

typically called “dance notation,” or more generally, “movement notation.”²⁶ Choreographers have created at least eighty-seven different movement notation systems.²⁷ The earliest systems of movement notation emerged in fifteenth-century Europe and were used to record the five steps of the Basse Dances, which were popular court dances in the fifteenth and early sixteenth centuries.²⁸ Each step was assigned a letter or symbol, which was typically written on the score under the corresponding musical note.²⁹



Les Basses danses de Marguerite d'Autriche (c. 1490)

By the beginning of the seventeenth century, systems of movement notation began to incorporate “track drawings” that traced the dancers’ paths across the floor.³⁰ In the 1680s, French choreographer Pierre Beauchamp created a notation system for Baroque dance that incorporated track drawings.³¹ Beauchamp’s notation system was first

²⁶ Brenda Farnell, *Movement Notation Systems*, 13 J. ANTHROPOLOGICAL STUDY HUMAN MOVEMENT 145 (2005).

²⁷ *Id.*

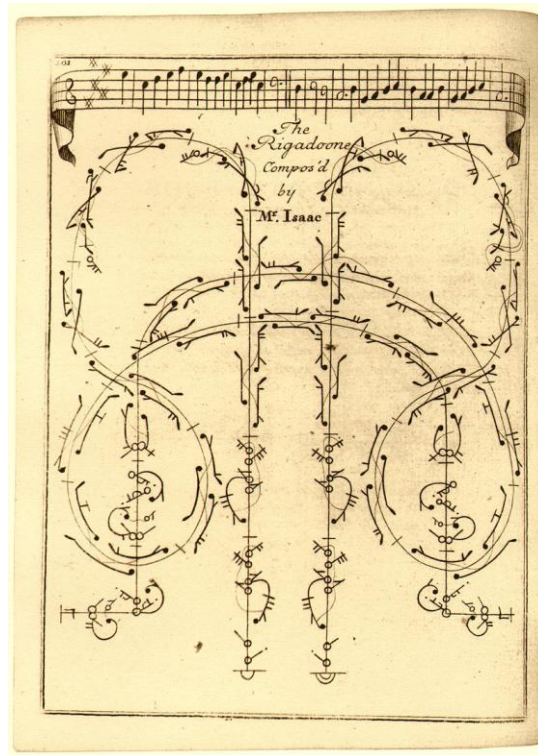
²⁸ ANN HUTCHINSON GUEST, CHOREO-GRAPHICS: A COMPARISON OF DANCE NOTATION SYSTEMS FROM THE FIFTEENTH CENTURY TO THE PRESENT 1 (Routledge 1998) (1989) (citing THE DANCE BOOK OF MARGARET OF AUSTRIA (c. 1450) (manuscript using letters), Cervera Manuscript (c. 1450) (manuscript using symbols), and L’ART ET INSTRUCTION DE BIEN DANCER (1488) (printed book using letters)). See also Farnell, *supra* note 26.

²⁹ GUEST, *supra* note 28, at 1 (citing Tanzbüchlein der Margarete von Österreich [The Dance Book of Margaret of Austria] (c. 1450) (manuscript using letters); Cervera Manuscript (c. 1450) (manuscript using symbols); and TOULOUZE, L’ART ET INSTRUCTION DE BIEN DANCER (1488)).

³⁰ GUEST, *supra* note 28, at 12 (citing F. Caroso, Nobilita di Dame (1600)).

³¹ Guest argues that Beauchamp’s system was probably based on Andre Lorin’s movement notation system. *Id.* at 13 (citing Andre Lorin, Livre de la contredance du Roy (1688)).

published in 1700 by Raoul-Auger Feuillet and eventually became known as Beauchamp-Feuillet notation.³² Beauchamp-Feuillet notation uses symbols to indicate the path of the dancers, the positions of their feet, the direction of their steps, when they should walk, jump, or turn, and certain movements of their arms and legs.³³ However, the Beauchamp-Feuillet notation assumed familiarity with Baroque dance and omitted certain critical information, making it difficult to read today.³⁴



Beauchamp-Feuillet Notation (c. 1710)

While Beauchamp-Feuillet notation was very popular in the early eighteenth century, it was abandoned in the late eighteenth century because it could only record the movements specific to Baroque dance, which was no longer fashionable.³⁵ In the late eighteenth century,

(manuscript)).

³² Farnell, *supra* note 26; see also R. A. FEUILLET, CHOREOGRAPHIE OU L'ART DE DECRIRE LA DANSE (photo. reprint 2010) (1701). Notably, a translation of Feuillet's book by John Essex was the first book to be registered by the author rather than the publisher under the Statute of Anne in 1710.

³³ GUEST, *supra* note 28, at 14–21.

³⁴ *Id.*

³⁵ GUEST, *supra* note 28, at 21–22.

Landrin published a similar movement notation system that could record some additional movements, but it was soon abandoned for the same reason.³⁶

The nineteenth century saw a proliferation of movement notation systems based on an assortment of different approaches. For example, in 1806, Gilbert Austin created a notation system for the gestures, body positions, and vocalizations used in public speaking.³⁷ In 1831, E.A. Theleur published a movement notation system that used abstract symbols to record ballet.³⁸ In 1852, Arthur Saint-Leon published a movement notation system for ballet that used stylized stick figures, which he called “stenochoregraphie.”³⁹ In 1887, Friedrich Albert Zorn published a movement notation system for ballet that used stick figures, which was translated into English in 1905.⁴⁰ And in 1892, Vladimir Stepanov created a notation system for ballet, which Alexander Gorsky and Nikolai Grigorevich Sergeyev used to record and reproduce many of Marius Petipa’s productions for the Imperial Russian Ballet.⁴¹ However, none of these movement notation systems were widely used, primarily because they could only record a limited set of movements.

³⁶ GUEST, *supra* note 28, at 21–22 (citing M. Landrin, RECUEIL DES CONTREDANSES (c. 1770)).

³⁷ Farnell, *supra* note 26 (citing Gilbert Austin, CHIRONOMIA, OR A TREATISE ON RHETORICAL DELIVERY (1806)).

³⁸ GUEST, *supra* note 28, at 102–05 (citing E.A. THELEUR, LETTERS ON DANCING (1831)).

³⁹ GUEST, *supra* note 28, at 28–30 (citing ARTHUR MICHEL SAINT-LEON, LA STENOCHOREGRAPHIE (1852)).

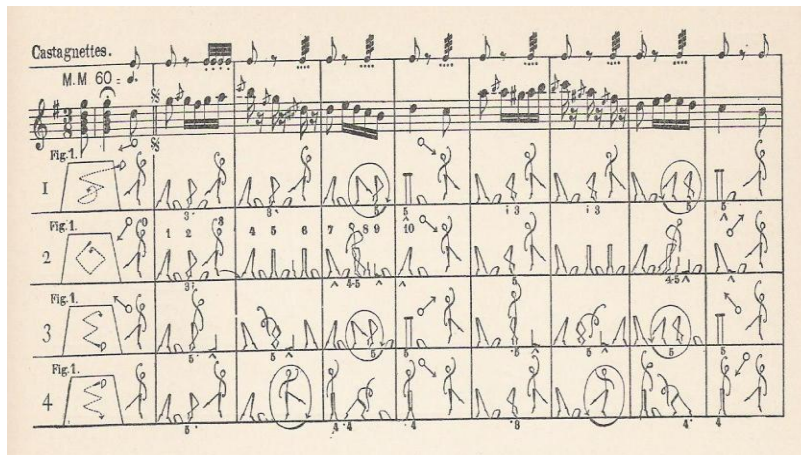
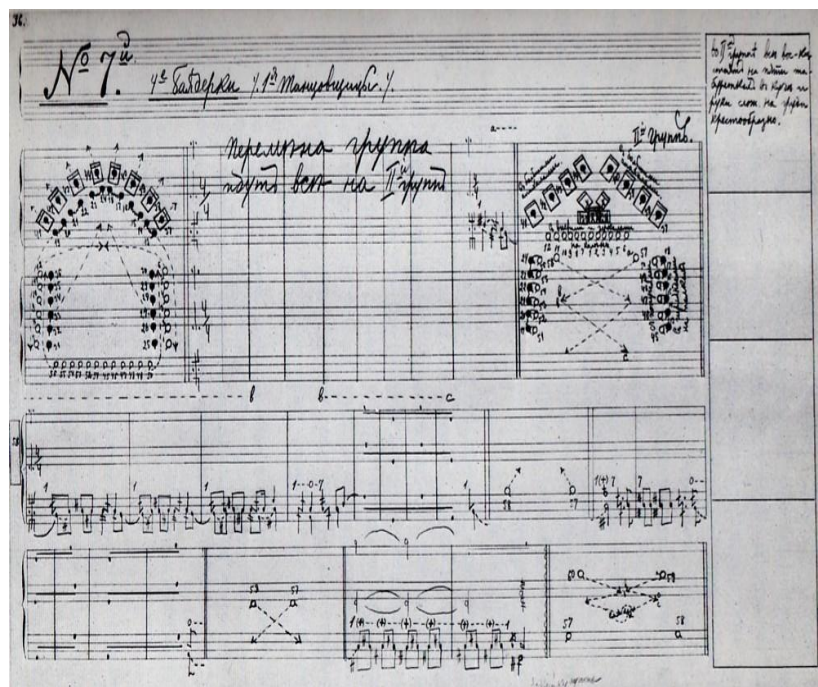
⁴⁰ GUEST, *supra* note 28, at 31–34 (citing FRIEDRICH ALBERT ZORN, GRAMMATIK DER TANZKUNST (1887), *translated in* FRIEDRICH ALBERT ZORN, GRAMMAR OF THE ART OF DANCING (1905)).

⁴¹ Farnell, *supra* note 32 (citing VLADIMIR IVANOVICH STEPANOV, ALPHABET DES MOUVEMENTS DU CORPS HUMAIN: ESSAI D’ENREGISTREMENT DES MOUVEMENTS DU CORPS HUMAIN AU MOYEN DES SIGNES MUSICAUX (1892)).

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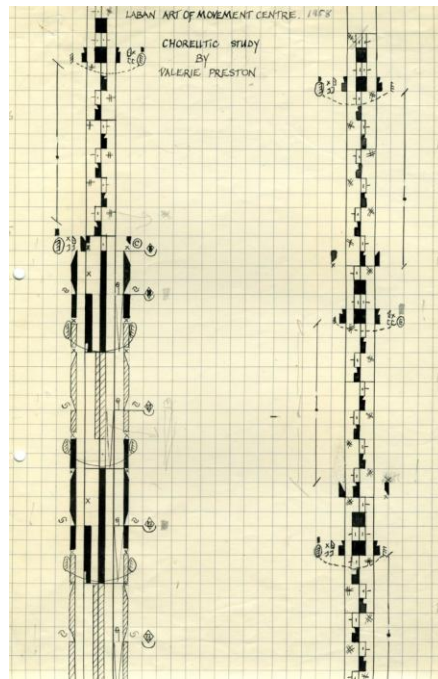
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Friedrich Albert Zorn, *La Cachucha* (1887)Stepanov Notation, *Petipa/Minkus La Bayadère* (c. 1900)

Movement notation systems capable of at least theoretically recording all movements did not exist prior to the 1920s. In 1928, both Rudolf von Laban and Margaret Morris published movement notation systems that used abstract symbols to record any type of human

movement.⁴² Laban's system eventually became known as Labanotation, and today it is the most widely used system of movement notation. In 1955, Eugene Loring and D.J. Canna published a movement notation system that uses abstract figures to record modern dance, but it was not widely used.⁴³ In 1956, Joan and Rudolph Benesh published a movement notation system that used stick figures to record ballet and modern dance, which later became known as Benesh Choreology and is still used today.⁴⁴ And in 1958, Noa Eshkol and Abraham Wachmann published a movement notation system that uses a quasi-mathematical system to record movement, which became known as Eshkol-Wachman movement notation.⁴⁵



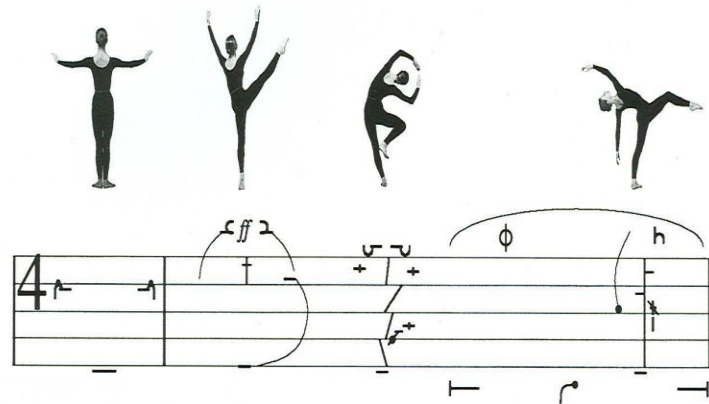
Labanotation:
Valerie Preston, *Choreutic Study* (1958)

⁴² RUDOLF VON LABAN, *SCHRIFTTANZ* (1928); MARGARET MORRIS, *THE NOTATION OF MOVEMENT* (K. Paul, Trench, Trubner & Company, Ltd. 1928).

⁴³ D.J. CANNA & EUGENE LORING, *KINESEOGRAPHY; THE LORING SYSTEM OF DANCE NOTATION* (1955).

⁴⁴ JOAN BENESH & RUDOLPH BENESH, *AN INTRODUCTION TO BENESH DANCE NOTATION* (A. and C. Black. 1956).

⁴⁵ NOA ESHKOL & ABRAHAM WACHMANN, *MOVEMENT NOTATION* (1958).



Benesh Choreology

5. Delsartism

In the mid-nineteenth century, the French acting teacher François Alexandre Nicolas Chéri Delsarte developed an acting style, which became known as the Delsarte System of Expression or Delsartism, based on his observations of human behavior. Delsarte held that movement reflects a “semiotics,” or system of signs, that conveys information to observers, and argues that specific movements express particular ideas.⁴⁶ Delsarte eventually became the most important acting teacher in nineteenth-century Europe. In 1871, Steele MacKaye, one of Delsarte’s students, introduced Delsartism to America.⁴⁷ And in 1885, Genevieve Stebbins, one of MacKaye’s students, published the first book explaining Delsartism.⁴⁸ Notably, while Delsartism explains how movements express ideas, it does not provide a system of movement notation.

Delsartism was extremely influential, especially in America. By the late nineteenth century, many Americans were teaching and practicing Delsartism, which in its American form consisted primarily of formalized poses.⁴⁹ For example, in 1882, Virginia teacher and author Mary Tucker Magill published a physical education textbook based on pantomime that was plainly influenced by Delsartism, including drawings of different poses.⁵⁰

⁴⁶ Stacy C. Marsella et al., *An Exploration of Delsarte’s Structural Acting System* (2006), http://people.ict.usc.edu/~marsella/publications/Delsarte_CameraReady.pdf.

⁴⁷ CARRIE J. PRESTON, MODERNISM’S MYTHIC POSE: GENDER, GENRE, SOLO PERFORMANCE 68 (2011).

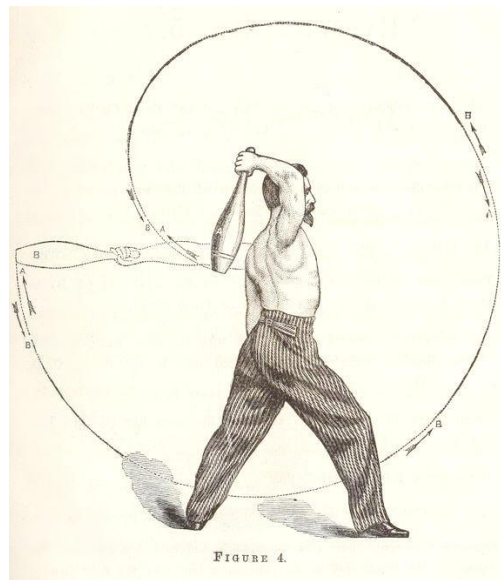
⁴⁸ GENEVIEVE STEBBINS & FRANÇOIS DELSARTE, *THE DELSARTE SYSTEM OF EXPRESSION* (2d ed. 1887).

⁴⁹ PRESTON, *supra* note 47, at 66.

⁵⁰ MARY TUCKER MAGILL, *PANTOMIMES: OR, WORDLESS POEMS, FOR ELOCUTION AND*

Delsartism inspired modern dance via Isadora Duncan and others and was studied by the creators of subsequent movement notation systems, including Rudolf Laban.⁵¹ In addition, Delsartism was extremely influential on silent film directors and actors, who needed to convey ideas without speaking.⁵² Delsarte's charts and illustrations of gestures and expressions were widely used by pantomime and dumb show actors in the nineteenth century and later by silent film actors in the twentieth century.

However, neither Delsarte nor his followers created a movement notation system capable of recording dumb show or pantomime. While Delsartian charts and illustrations were used to practice and interpret different poses and expressions, they were incapable of recording entire performances.



Delsartean Exercise (c. 1890)

6. The Fixation in Writing of Choreographic Works, Pantomimes, and Entertainments in Dumb Show

In other words, when the Berlin Act was ratified in 1908, existing movement notation systems could record ballets and certain

CALISTHENIC CLASSES (Boston, J. S. Cushing & Co., Printers 1882).

⁵¹ PRESTON, *supra* note 47, at 73.

⁵² Carrie J. Preston, *Posing Modernism: Delsartism in Modern Dance and Silent Film*, 61 THEATRE J. 213 (2009).

social dances but could not record many kinds of choreographic works. And no movement notation system was capable of recording pantomimes or entertainments in dumb show, however defined. As one of the members of the House of Commons Law of Copyright Committee observed:

It is proposed that the expression “literary and artistic works” shall include pantomimes, or, as the Committee suggest they should be called, “entertainments in dumb show.” Such entertainments must necessarily comprise facial expression, contortional entertainments, and gymnastic displays.

The inclusion of such performances in copyright legislation seems to me to be stretching the idea of such protection to the point of absurdity.

The paragraph provides that the “acting form” of such pantomimes, &c., is to be “fixed in writing or otherwise.” What the meaning of the last two words may be in this connection I do not know; but the word “fixed” would seem to imply that in some way the form of the representation is to be immutable, a provision which is surely inapplicable to entertainments of this description.⁵³

A century later, the situation has improved for choreographic works but not for pantomimes or entertainments in dumb show. Labanotation, Benesh Choreology, and Eshkol-Wachman movement notation are all at least theoretically capable of recording all human movements. It follows that they are also at least theoretically capable of recording all choreographic works. But none of these systems of movement notation are capable of recording important elements of pantomimes or entertainments in dumb show, including facial expressions.

So, in 1908, it was possible to fix a choreographic work in writing using one of the several existing movement notation systems. But it was not possible to fix an entertainment in dumb show or pantomime using any of the existing movement notation systems, because none were capable of recording the relevant gestures and expressions. The only way to fix an entertainment in dumb show or pantomime was in a photoplay or motion picture.

7. Motion Pictures

The Berlin Act granted copyright protection to “cinematograph productions” or motion pictures. But how did the signatories of the

⁵³ REPORT OF THE COMMITTEE ON THE LAW OF COPYRIGHT, *supra* note 21, at 32 (note appended to the signature of Mr. E. Trevor Ll. Williams).

Berlin Act conceptualize motion pictures and what did they intend to protect?

In the late 19th century, many different inventors tried to create motion pictures. In 1878, Eadweard Muybridge and Etienne-Jules Marey independently invented methods of creating serial photographic images of moving objects, Muybridge using a series of cameras, and Marey using a rotating photographic plate, which could be used to create rudimentary motion pictures.⁵⁴

But Muybridge and Marey's inventions intrigued Thomas Alva Edison. On October 17, 1888, Edison filed a caveat with the Patents Office, describing a device he called the "kinetoscope," which would record and reproduce motion pictures.⁵⁵ In June 1889, Edison asked his assistant, William Kennedy Laurie Dickson, to focus on creating a working motion picture camera.⁵⁶ And on August 24, 1891, Edison filed a patent for an invention he called a "kinetographic camera."⁵⁷ Edison and Dickson also created a peep-show viewer, which they named the Kinetoscope and released commercially in 1894. The original Kinetograph weighed more than a thousand pounds and required a battery, so Edison and Dickson primarily used it to film vaudeville acts in a studio.⁵⁸

In 1895, Auguste and Louis Lumière invented the cinématographe, which functioned as a camera, printer, and projector.⁵⁹ The cinématographe was hand-cranked and only weighed about twenty pounds, thereby enabling the Lumières to film outdoors and record documentary images of everyday life that they called "actualities." The Lumière cinématographe dominated early European cinema.⁶⁰

In the summer of 1895, Edison purchased several patents relating to motion picture projectors, and on April 23, 1896, he introduced his Vitascope projector at Koster and Bial's Music Hall in New York City.⁶¹ Later that year, the American Mutoscope and

⁵⁴ See David A. Cook, *History of the Motion Picture*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/art/history-of-the-motion-picture> (last visited Apr. 12, 2016). See also *Inventing Entertainment: The Early Motion Pictures and Sound Recordings of the Edison Companies*, LIBR. OF CONG., <https://www.loc.gov/collections/edison-company-motion-pictures-and-sound-recordings/articles-and-essays/history-of-edison-motion-pictures/origins-of-motion-pictures/> (last visited Apr. 12, 2016).

⁵⁵ See *Inventing Entertainment: The Early Motion Pictures and Sound Recordings of the Edison Companies*, *supra* note 54.

⁵⁶ Cook, *supra* note 54.

⁵⁷ Kinetographic Camera, U.S. Patent No. 589,168 (filed Aug. 24, 1891), <https://www.google.com/patents/US589168>.

⁵⁸ Cook, *supra* note 54.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

Biograph Company introduced the Mutoscope peep-show device and the American Biograph camera and projector. And in 1897, an assortment of competing companies began selling motion picture projectors and films to traveling exhibitors.⁶²

Initially, motion pictures were essentially animated photographs, consisting of a single shot of a vaudeville performance or a documentary scene. But around 1900, motion pictures began to tell simple stories and to incorporate editing. The French director Georges Méliès was among the first to experiment with trick photography and multi-scene films. And in the early 1900s, American director Edwin S. Porter began to experiment with camera angles and continuity editing.⁶³

In 1908, the standard length of a motion picture was “one reel” of a thousand feet, or about ten minutes of film.⁶⁴ Apart from a few isolated experiments, motion pictures were monochrome and silent, with dialogue and narration provided by intertitles.⁶⁵ Motion pictures were typically accompanied by an orchestra or organist and featured actors performing in pantomime or dumb show, often using expressions and gestures inspired by Delsartism.⁶⁶ As motion picture narratives gradually became more complex, a market for stories developed and resulted in the creation of the photoplay, or written scenario for a motion picture, which is the precursor to the modern screenplay.⁶⁷

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Cook, *supra* note 54.

⁶⁵ *Id.*

⁶⁶ Carrie J. Preston, *Posing Modernism: Delsartism in Modern Dance and Silent Film*, 61 THEATRE J. 213 (2009).

⁶⁷ See generally Luke McKernan, *Unequal Pleasures: Electric Theatres (1908) Ltd. and the Early Film Exhibition Business in London*, EMERGENCE OF FILM INDUSTRY IN BRITAIN CONF., UNIV. OF READING BUS. SCH. (June 29–30, 2006), http://lukemckernan.com/wp-content/uploads/unequal_pleasures.pdf.



Godfrey Tearle & Mary Malone, *Love at first sight* (c. 1912)
Demonstrating silent film acting techniques

8. Motion Pictures as Pantomime or Dumb Show

Read in a historical context, the language and structure of the Berlin Act show that its signatories amended the subject matter of copyright to include pantomimes or entertainments in dumb show in order to provide for copyright protection of silent motion pictures. The Berlin Act provides for copyright protection of entertainments in dumb show and pantomimes, “the acting form of which is fixed in writing or otherwise.”⁶⁸ But in 1908, the only way to fix an entertainment in dumb show or pantomime “in writing or otherwise” was a photoplay or motion picture.

Notably, the Berlin Act did not amend the subject matter of copyright to include motion pictures, even though it explicitly extended copyright protection to include “cinematograph productions.”⁶⁹ That is because the signatories of the Berlin Act considered cinematography a recording medium rather than a category of copyrightable works. The

⁶⁸ Berne Convention *supra* note 2, revised at Berlin Nov. 13, 1908.

⁶⁹ *Id.*

Berne Convention did not amend the subject matter of copyright to include motion pictures as a category of “literary and artistic works” until 1948 when the Brussels Act amended the subject matter of copyright to include “cinematographic works and works produced by a process analogous to cinematography.”⁷⁰

The delegates to the Berlin Conference explicitly linked copyright protection of pantomimes to motion pictures:

Cinematographic works have, in recent years, undergone an extraordinary development, although one can rightly argue that there is less need to enact new rules for them than to apply general principles to them. The French government has thought it appropriate to adopt specific provisions to stop unwelcome uncertainties. This is why it has asked for the issues concerning them to be included in the program of the Berlin Conference.

Through the cinema, one can capture a literary work. Such is the case when the cinematographer scenically realizes an idea borrowed from a novel, a dramatic work. This idea is within the terms of Article 10 of the 1886 Convention, Article 12 of our project. There may well be, through cinema, indirect appropriation that is only the reproduction of a literary work, in the same form or in another form, with non-essential additions or changes.

To make it clear how the questions are presented in practice and how they are likely to be considered, we believe the essential part of the five judgments on 7 July by the civil court of the Seine (1st room) must be reproduced on the occasion of lawsuits by various authors, who complained that their works had been reproduced without permission, by way of film adaptation:

Whereas, the law of 19-24 July 1793 must not be interpreted in a narrow and restricted sense, that its provisions are only expository. The legislature, in fact, did not intend to protect only actual issues that occur by printing or engraving, but all publishing manners, of whatever kind, of the work which is the private property of its author.

Whereas, the film strip or the film, on which are reproduced, with a series of photographs the various vicissitudes, a dramatic work, or a *féerie*,⁷¹ a pantomime or

⁷⁰ Berne Convention *supra* note 2, Brussels Act, Art. 2, 1948.

⁷¹ “*Féerie*” was a form of theater popular in late nineteenth and early twentieth century France

an opera, and that is, by itself, apart from the adaptation to any mechanism, legible and understandable for all, should be considered as an issue falling within the scope of the law of 19-24 July 1793.

Whereas, on the other hand, if the film projection is, in the absence of dialogue, certainly powerless to reproduce in all its subtleties and nuances, analysis of characters, the psychological study which would have delivered the author of a dramatic work, it can, however, in some cases, while only reproducing purely material mimed scenes, constitute a representation in terms of the law of the 13-19 of January 1791, if it recreates before the viewer's eyes, with the development of successive scenes, the work of the author. It is particularly true for feeries, pantomime and opera, with staging, that lend themselves particularly to film projection.

Whereas, without a doubt, an author cannot claim an exclusive right of ownership to an idea taken by itself, given it belongs in reality to the common stock of human thought, but that could not be the case when the subject's composition, the arrangement and combination of episodes, the author presents the public with an idea in a concrete form and gives it life. That creation, to which a playwright may claim a right of private property, consists of, apart from the material form that he gives to this design, in the sequence of situations and scenes, that is, in the composition of the plan, including a starting point, an action and a denouement that any infringement of the monopoly of exploitation in any form that is hidden, constitutes counterfeiting.

These questions asked, the Court found that in the series that were before it, there was counterfeiting, and the court relied on considerations of fact, which differ for each trial.

For Gounod's *Faust*, for example, the court finds "that the tableaux represented by the cinematographic works reproduce exactly all tableaux of the work of applicants, with the sets and costumes and accompanying music and singing excerpted from the opera, and are, so to speak, almost slavish copies. These projections, however

that resembled English pantomime. It strongly influenced early motion pictures, especially the films of Georges Méliès. See Katherine Singer Kovács, *Georges Méliès and the "Féerie"*, 16 CINEMA J. 1 (1976).

imperfect and fast the form in which they are reproduced, are not less an adaptation of the opera of the applicants and are, therefore, a violation of the laws referred to above, those that protect authors against its reproduction and against the representation of their works.”⁷²

The court establishes for each case, the analogies and finds that the differences are not significant enough to constitute an original work.

It is not different for the cinematographic works, with or without phonographic materials, than the rules permitted by the Berne Convention for adaptations. The addition of a word in Article 12 would have been enough in a pinch, but it seemed preferable to create an article regarding cinemas and sufficient unto itself. It will be more convenient for those interested who have not necessarily entered the depths of our material.⁷³

In other words, the delegates to the Berlin convention saw motion pictures as a method of fixing pantomimes. But pantomimes did not fit neatly into the existing categories of dramatic or dramatico-musical works, because they did not include dialogue or music. Accordingly, the delegates to the Berlin Convention amended the subject matter of copyright to include pantomimes, in order to ensure the protection of dramatic works fixed in silent motion pictures.

Unsurprisingly, the report of the United States delegate to the Berlin conference also linked choreographic works, pantomimes, and cinematograph productions:

By the terms of the Berlin convention the subject-matter of copyright is extended to include the following, not expressly or completely covered by the Berne convention: Works of architecture, choreographic works and pantomimes, when these are fixed in writing or otherwise; and cinematograph productions or productions obtained by any analogous process, when the authors shall have given to them a personal and original character, also reproductions of literary, scientific, or artistic works by means of the cinematograph.⁷⁴

⁷² See Berne Convention, *supra* note 2.

⁷³ *Union Internationale Pour La Protection Des Oeuvres Litteraires et Artistiques, Actes de la Conference Reunie a Berlin du 14 Octobre au 14 Novembre 1908, Avec Les Actes de Ratification, Report to the Conference on behalf of its Commission by L. Renault* 264-65 (1910).

⁷⁴ Report of the Delegate of the United States to the International Conference for the Revision of the Berne Copyright Convention, Held at Berlin, Germany, Oct. 14–Nov. 14, 1908, Copyright Office Bulletin No. 13 (1908), at 15.

The Berlin Convention's understanding of the relationship between motion pictures and pantomime or dumb show was quite conventional. In 1908, motion picture acting consisted entirely of pantomime or dumb show, conveying ideas and emotions through gesture and expression. Commentators made the relationship between motion pictures and pantomime or dumb show explicit. For example, Vachel Lindsay, the most notable early American film critic, observed:

Another way of showing the distinction is to review the types of gesture. The Action Photoplay deals with generalized pantomime: the gesture of the conventional policeman in contrast with the mannerism of the stereotyped preacher. The Intimate Film gives us more elusive personal gestures: the difference between the table manners of two preachers in the same restaurant, or two policemen. A mark of the Fairy Play is the gesture of incantation, the sweep of the arm whereby Mab would transform a prince into a hawk. The other Splendor Films deal with the total gestures of crowds: the pantomime of a torch-waving mass of men, the drill of an army on the march, or the bending of the heads of a congregation receiving the benediction.⁷⁵

In 1911, British newspapers often described motion picture acting as "dumb show." For example, one newspaper explained: "[w]hen stories in action were added to the repertoire of the cinematograph, potted drama as it were—humorous sketches, Macbeth portrayed in movement, Sweeney Todd in dumb show, The Luck of Roaring Camp in silence, side-splitting comedy without words—the triumph of the picture show was complete."⁷⁶

Another newspaper observed:

This year the cinematograph has invaded Stratford-on-Avon, and the enterprising firm trading under the title of La Lumiere has cinematographed Shakespeare. Talk about potted plays! They are nothing compared to the cinematographed drama. Mr. Benson's famous company has been photographed. In the glare of innumerable electric lights, they played Shakespeare under conditions which rendered it possible to represent the play in dumb show as a series of pictures to be reproduced thereafter by the aid of the friendly film before a myriad audiences in the Old World and the New. It is a daring experiment. Each play from start to finish must be condensed into a cinematograph turn not exceeding twenty minutes in length. The arrangement in the original, by which the play is divided into

⁷⁵ VACHEL LINDSAY, *THE ART OF THE MOVING PICTURE* 31 (The Project Gutenberg eBook 2004) (1915).

⁷⁶ *The Picture Show—For Good or Evil?*, AGE, Sept. 16, 1911, at 19.

scenes and acts, is ignored. Ten or twelve leading episodes are selected which, being strung together in rapid sequence, suggest to the spectators something of the plot and development of the play.⁷⁷

American newspapers made the same connection. In 1910, *The New York Times* observed that in motion pictures, “There are thrillers galore, with pistol shots, piano accompaniment, and all the effect to make the dumb show more real . . . The great difference is that it is hard to play well to a picture machine. One must express so much more by pantomime.”⁷⁸ In 1911, it complained that in motion pictures, “[t]he lack of spoken language and the consequent need for dumb show must be supplied by incessant happening.”⁷⁹ And in 1915, it eulogized the great silent film comedian John Bunny as master of modern pantomime:

The English pantomime, even in Thackeray’s day, had fallen from its once high place. The lovely Columbine remained and the sprightly Harlequin and the grotesque Pantaloon. But there were songs and dialogue, the entertainment was simply a sort of vaudeville, not genuine pantomime at all. It was not until the huge, clicking camera made lasting the gestures of the actors that the art of pantomime came back to its own . . . The motion picture is the renaissance of pantomime.⁸⁰

A 1912 encyclopedia that referred to motion picture acting as “The Art of Acting in Dumb,” explained:

Stage actors depend on subtlety of voice in character work, but the cinema player is dependent solely on his powers of pantomime.

Many clever and ingenious plots are evolved for cinematograph purposes, but the predominant emotions and expressions of the players are practically the same in each. The unfolding of a modern, or old world drama story inevitably includes the portrayal of love, anger, sorrow, joy, etc., and all by means of facial expression and pantomime. The photographs accompanying this article were specially posed for by Mr. Godfrey Tearle, the well-known actor, and Miss Mary Malone (Mrs. Godfrey Tearle).⁸¹

⁷⁷ *The Cinematograph and the Theatre*, WEEKLY SUN, Mar. 4, 1911, at 10.

⁷⁸ *Moving Pictures Sound Melodrama’s Knell*, N.Y. TIMES, Mar. 20, 1910, at SM7.

⁷⁹ Edwin H. Blashfield, “Movies” *Bridge Ages from Cave Man to Us*, N.Y. TIMES, Mar. 4, 1917, at SM8.

⁸⁰ Joyce Kilmer, *Pantomime Revived by John Bunny: Art of Silent Comedy, After a Lapse of Centuries, Appears in Moving Pictures of Famous Actor Who Died Last Week*, N.Y. TIMES, May 2, 1915, at SM15.

⁸¹ EVERY WOMAN’S ENCYCLOPEDIA, CINEMATOGRAPH ACTING: A NEW PROFESSION FOR MEN AND WOMEN (1912).

Hugo Munsterberg's 1916 reflections on the art of the photoplay and the motion picture explicitly described motion picture acting as the highest form of modern pantomime or dumb show:

Surely the theater has no lack of means to draw this involuntary attention to any important point. To begin with, the actor who speaks holds our attention more strongly than the actors who at that time are silent. Yet the contents of the words may direct our interest to anybody else on the stage. We watch him whom the words accuse, or betray or delight. But the mere interest springing from words cannot in the least explain that constantly shifting action of our involuntary attention during a theater performance. The movements of the actors are essential. The pantomime without words can take the place of the drama and still appeal to us with overwhelming power. The actor who comes to the foreground of the stage is at once in the foreground of our consciousness. He who lifts his arm while the others stand quiet has gained our attention. Above all, every gesture, every play of the features, brings order and rhythm into the manifoldness of the impressions and organizes them for our mind. Again, the quick action, the unusual action, the repeated action, the unexpected action, the action with strong outer effect, will force itself on our mind and unbalance the mental equilibrium. . . .

But each further step leads us to remarkable differences between the stage play and the film play. In every respect the film play is further away from the physical reality than the drama and in every respect this greater distance from the physical world brings it nearer to the mental world. The stage shows us living men. It is not the real Romeo and not the real Juliet; and yet the actor and the actress have the ringing voices of true people, breathe like them, have living colors like them, and fill physical space like them. What is left in the photoplay? The voice has been stilled: the photoplay is a dumb show. Yet we must not forget that this alone is a step away from reality which has often been taken in the midst of the dramatic world. Whoever knows the history of the theater is aware of the tremendous rôle which the pantomime has played in the development of mankind. From the old half-religious pantomimic and suggestive dances out of which the beginnings of the real drama grew to the fully religious pantomimes of medieval ages and, further on, to many silent mimic elements in modern performances, we find a continuity of conventions which make the pantomime almost the real background of all dramatic development. We know how popular the pantomimes were among the Greeks, and how they stood in the foreground in the imperial period of Rome. Old Rome cherished the mimic clowns, but still more the tragic pantomimics. "Their very nod speaks, their hands talk and their fingers have a voice." After the fall

of the Roman empire the church used the pantomime for the portrayal of sacred history, and later centuries enjoyed very unsacred histories in the pantomimes of their ballets. Even complex artistic tragedies without words have triumphed on our present-day stage. "L'Enfant Prodigue" which came from Paris, "Sumurun" which came from Berlin, "Petrushka" which came from Petrograd, conquered the American stage; and surely the loss of speech, while it increased the remoteness from reality, by no means destroyed the continuous consciousness of the bodily existence of the actors.

Moreover the student of a modern pantomime cannot overlook a characteristic difference between the speechless performance on the stage and that of the actors of a photoplay. The expression of the inner states, the whole system of gestures, is decidedly different: and here we might say that the photoplay stands nearer to life than the pantomime. Of course, the photoplayer must somewhat exaggerate the natural expression. The whole rhythm and intensity of his gestures must be more marked than it would be with actors who accompany their movements by spoken words and who express the meaning of their thoughts and feelings by the content of what they say. Nevertheless the photoplayer uses the regular channels of mental discharge. He acts simply as a very emotional person might act. But the actor who plays in a pantomime cannot be satisfied with that. He is expected to add something which is entirely unnatural, namely a kind of artificial demonstration of his emotions. He must not only behave like an angry man, but he must behave like a man who is consciously interested in his anger and wants to demonstrate it to others. He exhibits his emotions for the spectators. He really acts theatrically for the benefit of the bystanders. If he did not try to do so, his means of conveying a rich story and a real conflict of human passions would be too meager. The photoplayer, with the rapid changes of scenes, has other possibilities of conveying his intentions. He must not yield to the temptation to play a pantomime on the screen, or he will seriously injure the artistic quality of the reel.⁸²

In addition, photoplays were explicitly designed to tell stories through action rather than dialogue:

A photoplay is a story told largely in pantomime by players, whose words are suggested by their actions, assisted by certain descriptive words thrown on the screen, and the whole produced by a moving-picture machine.

⁸² HUGO MÜNSTERBERG, *THE PHOTOPLAY: A PSYCHOLOGICAL STUDY* (The Project Gutenberg eBook 2005) (1916).

Therefore, learn to think of a photoplay as being a story prepared for pantomimic development before the camera; a story told in *action*, with inserted descriptive matter where the thought might be obscure without its help; a story told in one or more reels, each reel containing from twenty-five to fifty scenes.

In selecting your theme, ask yourself if either dialogue or description may not be really required to bring out the theme satisfactorily. If such is the case, abandon the theme. The comparatively few inserts permitted cannot be relied upon to give much aid—the chief reliance *must* be pantomime.⁸³

B. *The Copyright Law of the United Kingdom*

This reading of the Berlin Act's definition of "pantomimes" and "entertainments in dumb show" and their relationship to "cinematograph productions" is consistent with the United Kingdom's copyright law at the time and how it was amended to account for the United Kingdom's accession to the Berlin Act.

In the nineteenth and early twentieth century, the copyright law of the United Kingdom did not address "choreographic works," "entertainments in dumb show," or "cinematograph productions." For example, Thomas Edward Scrutton's 1896 treatise on English and international copyright law, *The Law of Copyright*, does not mention any of these categories of works, presumably because the United Kingdom did not recognize copyright in choreographic works, no one was interested in claiming copyright in entertainments in dumb show, and cinematographic productions did not yet exist in any meaningful sense.⁸⁴

English courts used the term "pantomime" primarily to refer to English pantomimes, and occasionally to refer to farcical situations. On the few occasion that English courts used the term "dumb show," they used it to refer to acting consisting of gestures without dialogue.

Notably, English courts considered silent motion pictures "pantomimes" or "dumbshow" for copyright purposes even before the United Kingdom signed the Berlin Act. In *Karno v. Pathe Freres Ltd.* (1909), an English court considered an infringement action filed by Fred Karno, who had created a popular "farce or pantomimical sketch" titled *The Mummie Birds or Twice Nightly*, in which very poor vaudeville

⁸³ J. BERG ESENWEIN & ARTHUR LEEDS, *WRITING THE PHOTOPLAY* (The Project Gutenberg eBook 2006) (1913).

⁸⁴ THOMAS EDWARD SCRUTTON, *THE LAW OF COPYRIGHT* (London, William Clowes & Sons, Limited, 3d ed. 1896).

performers were interrupted by “audience members” on the stage.⁸⁵ The defendants filmed a performance of a licensed version of Karno’s pantomime and titled the film *At the Music-Hall*.⁸⁶ The trial court dismissed Karno’s action on the ground that his performance was not protected by copyright:

A pantomime sketch, which is performed chiefly in dumb show, but with a certain amount of “gag,” of which there is no book of the words or stage directions, and which is not capable of being printed and published as a literary piece, is not a “dramatic piece” within the protection of the Dramatic Copyright Act, 1833. Semble, if such a sketch was a dramatic piece, a cinematographic reproduction of it would be a “representation” of it within the meaning of the Act.”⁸⁷

The Imperial Copyright Act of 1911 amended the copyright law of the United Kingdom in order to conform it to the Berne Convention (as amended by the Berlin Act).⁸⁸ Among other things, it provided the exclusive right, “in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered.”⁸⁹ And it amended the subject matter of copyright to provide:

“Dramatic work” includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character.⁹⁰

The 1911 Act amended the subject matter of copyright to include choreographic works and entertainments in dumb show as dramatic works and provided an exclusive right to make a motion picture based on any such work.⁹¹ And it also provided that dramatic

⁸⁵ Karno v. Pathe Freres Ltd., 100 L. T. 260 (1909).

⁸⁶ See *id.*

⁸⁷ *Id.* The appellate court dismissed Karno’s appeal, holding that “the defendants, by merely selling the films to purchasers, would not ‘represent, or cause to be represented’ the dramatic piece, within the meaning of the Act, although at the time that the films were manufactured and sold they intended them to be exhibited by others at places of dramatic entertainment.” 53 SOLICITORS’ J. & WKLY. REP. 221, 228 (1909). 99 L.T.R. (n.s.) 114 (K.B. 1908), *aff’d*, 100 L.T.R. (n.s.) 260 (C.A. 1909).

⁸⁸ Imperial Copyright Act of 1911, 1 & 2 Geo. 5 ch. 46 (1911).

⁸⁹ *Id.* § 1(2)(d).

⁹⁰ *Id.* § 35(1).

⁹¹ See *id.*

works could be fixed in a motion picture.⁹² Essentially, the 1911 Act extended copyright protection to choreographic works and entertainments in dumb show, and provided that choreographic works and entertainments in dumb show could be fixed in motion pictures, among other media, presumably including movement notation systems or photoplays.⁹³ But it was also interpreted as providing that copyright could protect a motion picture as a series of photographic works. Thus, the 1911 Act effectively protected motion pictures as both cinematographic representations of dramatic works and as a series of photographs.⁹⁴

The legislative history of the 1911 Act supports this conclusion. The report of the House of Commons Law of Copyright Committee observed:

The British law protects most of the subject-matters mentioned except choreographic works and entertainments in dumb show, and works of architecture, but it will have to be amended in order to carry out the stipulation in par. 3 of the article in respect of these exceptions, and also to make it clear that all the subject-matters are to receive protection, so that there may be no doubt upon the law with regard to them.

....

With regard to choreographic works and entertainments in dumb show the British law is now obscure, and probably gives no protection against the performance of works which depend practically upon costume and get-up and dramatic action which is not dialogue or music; and it will require amendment in this respect.⁹⁵

The hearings before the Law of Copyright Committee explicitly connected “entertainments in dumb show” and “cinematograph productions”:

(*Chairman*) Would it not be sufficient if Article 13 did, as we suggested yesterday it ought to, include the authors of any literary and dramatic or musical works, placing them all in the same category? That was suggested yesterday. That would meet your point, would it not?

⁹² See *id.*

⁹³ See *id.*

⁹⁴ Anne Barron, *The Legal Properties of Film*, 67 MOD. L. REV. 177, 193–94 (2004).

⁹⁵ REPORT OF THE COMMITTEE ON THE LAW OF COPYRIGHT, *supra* note 21, at 9.

(*Mr. Granville Barker*) Yes, I think it would my Lord; but it does not quite meet the possible difficulty arising on B in Mr. Robinson's evidence: "The right of reproducing the words of a musical work as forming an integral part of the composition." Now there is no strict definition as to what a musical work is. There are dumb-show plays such as "L'Enfant Prodigue" which is not performed with words, and that could undoubtedly be reproduced with the music on a gramophone and the pictures on a cinematograph; and I wanted to know if that was a musical work within the meaning, as you could not call it a dramatic work.

(*Witness*) In that case there are no words.

(*Chairman*) Would it not be covered by the words "dramatico-musical"?

(*Mr. Granville Barker*) How is the author of "L'Enfant Prodigue" to obtain any copyright in his play as far as musical reproduction goes?

(*Chairman*) But in a dumb show there would be no sound, would there?

(*Mr. Granville*) There is music.

(*Mr. Cust.*) You cannot copyright a gesture.

(*Mr. Granville Barker*) According to the Convention you can.⁹⁶

In other words, the Law of Copyright Committee realized that it needed to amend the definition of "dramatic works" to include "entertainments in dumb show" in order to ensure that the subject matter of copyright covered motion pictures and photoplays.⁹⁷

II. THE COPYRIGHT LAW OF THE UNITED STATES

Notably, in the early twentieth century, before the Copyright Act explicitly protected motion pictures, United States courts also protected them as a form of "pantomime." The subject matter of United States copyright has gradually expanded over time. On May 31, 1790,

⁹⁶ MINUTES OF EVIDENCE TAKEN BEFORE THE LAW OF COPYRIGHT COMMITTEE, 1910, HC Cd. 5051, at 54 (UK).

⁹⁷ In 1956, the United Kingdom amended the subject matter of copyright to explicitly include "cinematograph films." Copyright Act, 1956, 4 & 5 Eliz. 2, c. 74, §13(10) (UK). For a critical account of that decision, see Anne Barron, *supra* note 94.

President Washington signed into law the first Copyright Act, which provided for copyright protection of “maps, charts, and books.”⁹⁸ In 1802, the subject matter of copyright was amended to include “historical and other prints.”⁹⁹ In 1831, the first general revision of the Copyright Act amended the subject matter to include musical compositions and engravings.¹⁰⁰ In 1856, it was amended to distinguish between literary and dramatic works.¹⁰¹ In 1865, it was amended to include photographs.¹⁰² And in 1870, the second general revision of the Copyright Act amended the subject matter of copyright to include paintings, drawings, chromolithographs, statues, and models or designs intended to be perfected as works of fine art.¹⁰³

In 1908, the United States was not a signatory of the Berne Convention or the Berlin Act.¹⁰⁴ And the Copyright Act did not explicitly protect choreographic works, entertainments in dumb show, pantomimes, or motion pictures. However, the Copyright Act protected motion pictures as either serial photographs or dramatic works. The Copyright Office initially registered motion pictures only as serial photographs, but it gradually began to register them as dramatic works as well.¹⁰⁵

In the late nineteenth and early twentieth centuries, United States courts typically referred to acting without speech as “pantomime” or “dumb show” and permitted copyright protection as a “dramatic work.”¹⁰⁶ For example, in *Daly v. Palmer* (1868), the Circuit Court for the Southern District of New York held that copyright could protect the scenes in a play, as well as the dialogue, observing:

A pantomime is a species of theatrical entertainment, in which the whole action is represented by gesticulation, without the use of words. A written work, consisting wholly of directions, set in order for conveying the ideas of the author on a stage or public place, by

⁹⁸ Act of May 21, 1790, ch. 15 (1 Stat. 124).

⁹⁹ Act of Apr. 29, 1802, ch. 36 (2 Stat. 171).

¹⁰⁰ Act of Feb. 3, 1831, ch. 16 (4 Stat. 436).

¹⁰¹ Act of Aug. 18, 1856, ch. 169 (11 Stat. 138).

¹⁰² Act of Mar. 3, 1865, ch. 126 (13 Stat. 540).

¹⁰³ Act of July 8, 1870, ch. 230, sec. 85-111 (16 Stat. 198) 212-16.

¹⁰⁴ See Berne Convention, *supra* note 2.

¹⁰⁵ WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 61-62 n.209 (2000).

¹⁰⁶ See, e.g., *Daly v. Palmer*, 6 F. Cas. 1132, 1135-36 (C.C.S.D.N.Y. 1868):

A tendency which has become noticeable in some courts is that of indicating by gestures those things which dare not be said. Lists of previous convictions are rustled ostentatiously and gestures of incredulity or despair are used at appropriate times to indicate a state of mind which the police think ought to be shared by the court. This dumb show and legal pantomime is a complete negation of the dignity and justice of the courts and ought to be suppressed by any officer concerned with police procedure.

means of characters who represent the narrative wholly by action, is as much a dramatic composition designed or suited for public representation, as if language or dialogue were used in it to convey some of the ideas.¹⁰⁷

But courts explicitly excluded non-dramatic choreographic works from protection. For example, in 1892, the Circuit Court for the Southern District of New York held that copyright could not protect choreography as a dramatic work. The choreographer and dancer Mary Louise “Loie” Fuller registered a written description of a choreographic work titled “The Serpentine Dance” with the Copyright Office and filed a motion for a preliminary injunction against Minnie Bemis. The court denied the motion, holding that The Serpentine Dance was not a “dramatic work” under the Copyright Act:

It is essential to such a composition that it should tell some story. The plot may be simple. It may be but the narrative or representation of a single transaction; but it must repeat or mimic some action, speech, emotion, passion, or character, real or imaginary. And when it does, it is the ideas thus expressed which become subject of copyright.¹⁰⁸

And in 1897, a New York court described an allegedly obscene theatrical production as follows:

The nuisance consisted of the public performance in a theater in this city of a pantomime called “Orange Blossoms,” which, as the information charged, was offensive to public decency. . . . The word “entrez” is the only word spoken throughout. The rest is dumb show.”¹⁰⁹

Unsurprisingly, early twentieth century courts and legal scholars also typically referred to motion picture acting as “pantomime” or “dumb show.”¹¹⁰ Even more so, they extended copyright protection to silent motion pictures as dramatic works performed in “pantomime” or “dumbshow.” For example, in 1905, American Mutoscope & Biograph Company filed an infringement action against the Edison

¹⁰⁷ *Id.* at 1136; see also J. W. Allon, *The Policeman in the Witness-Box*, 23 Police J. 222, 224 (1950).

¹⁰⁸ *Fuller v. Bemis*, 50 F. 926, 929 (C.C.S.D.N.Y. 1892). See generally Robert Freedman, *Is Choreography Copyrightable?: A Study of the American and English Legal Interpretations of “Drama”*, 2 DUQ. U. L. REV. 77 (1963–64).

¹⁰⁹ *People v. Doris*, 14 A.D. 117, 118, 43 N.Y.S. 571, 571–72 (1st Dep’t 1897).

¹¹⁰ See, e.g., Edward Manson, *Children and the Cinematograph*, 16 J. SOC’Y COMPAR. LEGIS. 346, 349 (1916) (referring to motion picture acting as “dumb show”).

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Manufacturing Company.¹¹¹ The complainant was the copyright owner of a motion picture titled “Personal,” which was filmed in 1904.¹¹² The court observed:

That the scene prominently depicted in said photograph occurred largely at Grant’s Tomb on Riverside Drive in New York City, and represents a French gentleman, who, having inserted an advertisement stating his desire to meet a handsome girl at Grant’s Tomb at a certain time, with the ultimate object of matrimony, appears at Grant’s Tomb, and is beset first by one woman, soon by another, then by several in succession, who are so importunate in their attentions that he is forced to flee, and does run away from them, with the women in close pursuit. In successive scenes the chase is depicted across the country in various situations, until at last the Frenchman is overtaken by one of the pursuers who discovers him in hiding, and, at the point of a pistol, compels him to yield.¹¹³

The respondent offered the following defense, with which the court agreed:

The negative prepared by me did not and does not contain a single copy of any of the pictures of complainant’s films. Each impression is a photograph of a pantomime arranged by me, and enacted for me at the expense of the owner of the film which I produced. My photograph is not a copy, but an original. It carries out my own idea or conception of how the characters, especially the French nobleman, should appear as to costume, expression, figure, bearing, posing, gestures, postures, and action.¹¹⁴

A. The Copyright Act of 1909

On March 4, 1909, President Theodore Roosevelt signed into law the third general revision of the Copyright Act, which amended the subject matter of copyright to include “all the writings of an author.”¹¹⁵ The 1909 Act enumerated eleven categories of copyrighted works: books, periodicals, lectures, dramatic or dramatico-musical compositions, musical compositions, maps, works of art, reproductions of works of art, drawings, photographs, and prints.¹¹⁶ But it also explicitly provided that “the above specifications shall not be held to

¹¹¹ *Am. Mutoscope & Biograph Co. v. Edison Mfg. Co.*, 137 F. 262 (C.C.D.N.J. 1905).

¹¹² *Id.*

¹¹³ *Id.* at 263.

¹¹⁴ *Id.* at 267.

¹¹⁵ Act of March 4, 1909, Pub. L. No. 60-349 (35 Stat. 1075) § 4.

¹¹⁶ *Id.* § 5.

limit the subject-matter of copyright as defined in section four of this Act.”¹¹⁷ While the 1909 Act certainly did not conform United States copyright law to the Berne Convention, the drafters of the 1909 Act did consider the Berne Convention and its recent revision by the Berlin Act.¹¹⁸

During the hearings on the 1909 Act, a representative of the Music Publishers’ Association explicitly argued that pantomime is a form of dramatic work, because it can express ideas:

When a drama is produced on a stage, you do not see a reproduction of a writing upon a screen. You see and hear the ideas of the author reproduced by means of dialogue and action. Take the case of a pantomime. The ideas of the author are reproduced by means of gesticulations. There is no word spoken. That is a dramatic composition, and what is the purpose of the drama? The main purpose is to produce it. Many dramas have no value for literary purposes. The entire value lies in the representation of them.¹¹⁹

The Copyright Office interpreted the subject matter of copyright to include both motion pictures and photoplays. It permitted the registration of motion pictures as photographs: “Photographs—This term covers all positive prints from photographic negatives, including those from moving-picture films (the entire series being counted as a single photograph), but not photogravures, half tones, and other photo-engravings.”¹²⁰ And it permitted the registration of photoplays as books:

The designation “dramatic composition” does not include the following: Dances, ballets, or other choreographic works; tableaux and moving picture shows; stage settings or mechanical devices by which dramatic effects are produced, or “stage business;” animal shows, sleight-of-hand performances, acrobatic or circus tricks of any kind; descriptions of moving pictures or of settings for the production of moving pictures (these, however, when printed and published, are registrable as “books”).¹²¹

In 1911, the Supreme Court weighed in on motion pictures and pantomime for the first time. The owners of the copyright in the novel

¹¹⁷ *Id.*

¹¹⁸ See generally Daniel Gervais, *The 1909 Copyright Act in International Context*, 26 SANTA CLARA HIGH TECH. L.J. 185 (2010).

¹¹⁹ 4 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 206 (E. Fulton Brylawski & Abe Goldman eds., 1976) (statement of Nathan Burkam, Music Publishers’ Association).

¹²⁰ U.S. COPYRIGHT OFFICE, RULES AND REGULATIONS FOR THE REGISTRATION OF CLAIMS TO COPYRIGHT (BULLETIN NO. 15) 8 (1910).

¹²¹ *Id.* at 7.

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Ben-Hur filed an infringement action against the Kalem Company for infringing the dramatization right by making a silent motion picture version of the novel without permission.¹²² The Kalem Company responded that a silent motion picture was not a “dramatic work” because it lacked dialogue.¹²³ The Supreme Court ruled for the plaintiffs, observing:

Whether we consider the purpose of this clause of the statute, or the etymological history and present usages of language, drama may be achieved by action as well as by speech. Action can tell a story, display all the most vivid relations between men, and depict every kind of human emotion, without the aid of a word. It would be impossible to deny the title of drama to pantomime as played by masters of the art.¹²⁴

The Townsend Amendment of 1912 amended the subject matter of copyright to explicitly include “motion picture photoplays” and “motion pictures other than photoplays.”¹²⁵ The 1912 amendment also amended the deposit requirements to provide:

[C]opyright may also be had of the works of author, of which copies are not reproduced for sale, by the deposit, with claim of copyright; . . . of a title and description, with one print taken from each scene or act, if the work be a motion-picture photoplay; . . . of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay¹²⁶

As the congressional reports explained:

The occasion for this proposed amendment is the fact that the production of motion-picture photoplays and motion pictures other than photoplays has become a business of vast proportions. The money invested therein is so great and the property rights so valuable that the committee is of the opinion that the copyright law ought to be so amended as to give them distinct and definite recognition and protection.¹²⁷

¹²² *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 60 (1911).

¹²³ *Id.* at 61–62.

¹²⁴ *Id.* at 61.

¹²⁵ The Copyright Act of 1909, Pub. L. No. 62-303 (37 Stat. 488) § 5(l)–(m) (amended 1912).

¹²⁶ *Id.* § 11.

¹²⁷ H.R. REP. NO. 62-756, at 1 (1912); S. REP. NO. 62-906, at 1 (1912).

After the passage of the Townsend Amendment, United States courts continued to describe silent motion picture films as “pantomimes” protected as dramatic works. For example, in 1914, the Southern District of New York explained:

Prior to September, 1912, the Nordisk Films Company manufactured or created a motion picture photo play known as ‘The Great Circus Catastrophe.’ The photographs on the film tell a story which was originally shown by human actors who played their parts before a camera, so that the photo play (i.e., the story told by the photographs successively shown to the audience) is a pantomime drama.¹²⁸

And they continued to recognize the connection between silent motion pictures and pantomime well into the 1940s, long after the silent era had ended. For example, in 1922, the Iowa Supreme Court observed:

Generally speaking, a drama is “a theatrical exhibition” wherein the actors speak their several parts, in addition to the settings of scenery, the costumes and acting, which give to the whole a living presentation of the thing portrayed. An opera is “a theatrical exhibition” wherein the scenery and costumes are the same as in a drama, but the words are sung by the actors to the accompaniment of music, instead of being spoken. The moving picture show is . . . likewise a “theatrical exhibition” in which the scenery, the costumes, and the action are all present. The spoken words are in pantomime, and frequently conveyed to the spectators by descriptive titles or by dialogue thrown upon the screen. The moving picture has not inaptly been called the “silent drama.” It is a well-known fact that under the growing popularity of exhibitions of this character in recent years, many actors who have won fame in what is now called the “legitimate drama” have devoted their talents to the production of moving pictures. The same play has been produced by the same actors by both methods. In one there is the scenery, the costumes, the actors, and the spoken words, in the other there is the identical scenery, costumes, and actors, and the words are in pantomime, or suggested by sentences displayed on the screen before the spectators. To hold that the first of these constituted a “theatrical exhibition,” and that the latter does not, would, we think, be doing violence to language and would likewise be contrary to common sense.¹²⁹

In 1936, the Second Circuit observed:

¹²⁸ Universal Film Mfg. Co. v. Copperman, 212 F. 301, 302 (S.D.N.Y. 1914) *aff’d*, 218 F. 577 (2d Cir. 1914).

¹²⁹ City of Ames v. Gerbracht, 194 Iowa 267, 189 N.W. 729, 730 (1922).

We have often decided that a play may be pirated without using the dialogue. . . . Were it not so, there could be no piracy of a pantomime, where there cannot be any dialogue; yet nobody would deny to pantomime the name of drama. Speech is only a small part of a dramatist's means of expression; he draws on all the arts and compounds his play from words and gestures and scenery and costume and from the very looks of the actors themselves. Again and again a play may lapse into pantomime at its most poignant and significant moments; a nod, a movement of the hand, a pause, may tell the audience more than words could tell. To be sure, not all this is always copyrighted, though there is no reason why it may not be, for those decisions do not forbid which hold that mere scenic tricks will not be protected.¹³⁰

In 1938, the Southern District of California observed:

It is conceded that a distinctive treatment of a plot or theme is properly the subject of copyright; and the sequence of incidents in the plot, taken in conjunction with its distinctive locale, and its original characterizations, will be protected. The absence of dialogue, however, is not fatal; the theme may be expressed in pantomime.¹³¹

And in 1947, the Ninth Circuit observed:

It has been said that a series of pictures thrown in rapid succession upon a screen of a man fleeing from a crowd of women tells a single connected story. The rule has also been stated in 18 C.J.S. Copyright and Literary Property, § 34, p. 175 as follows: 'If the composition tells a story intelligible to the spectator, it is immaterial whether it is done by means of dialogue or otherwise. Hence, it has been held that a series of incidents grouped in a certain sequence and realistically presented may constitute a 'dramatic composition' within the statute, although they are accompanied by very little dialogue, or none at all, as in the case of a pantomime. A written work consisting wholly of directions, set in order for conveying the ideas of the author on a stage or public place, by means of characters who represent the narrative wholly by action, is as much a dramatic composition designed or suited for public representation as if language or dialogue were used in it to convey some of the ideas. * * * It has been said that, in order for a composition to constitute a 'dramatic composition' within the meaning of that term as used in the copyright law, it is necessary that it should tell some story.'¹³²

¹³⁰ *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 55-56 (2d Cir. 1936) (internal citations omitted).

¹³¹ *Seltzer v. Sunbrock*, 22 F. Supp. 621, 628 (S.D. Cal. 1938) (internal citations omitted).

¹³² *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 378 n.7 (9th Cir. 1947) (internal

Unsurprisingly, legal scholars agreed. In his 1912 copyright treatise, Richard Rogers Bowker observed, “[m]oving pictures telling a dramatic story may infringe a dramatic or even literary work, as well as possibly a work of art, as was decided in the case of *Harper v. Kalem Co.*”¹³³

Likewise, in their 1918 treatise on the law of motion pictures, Frohlich and Schwartz described motion pictures as a means of recording a dramatic work rather than a unique category of works protected by copyright.¹³⁴ For example, they state that “a motion picture reproduction of such play is a dramatic work,” and that “where the author grants ‘all dramatization rights,’ the licensee secures not only the exclusive right to produce the play upon the stage with living actors, but he secures as well the exclusive right to make motion picture reproductions of such play.”¹³⁵ In addition, they argue that a “scenario” for a motion picture ought to be entitled to copyright protection as a dramatic work, because it enables the actors to reproduce a scene before the camera, citing *Daly v. Palmer*, which defines “pantomime” as acting without words: “where the composition tells a story not in narrative form, but by words giving directions as to acting and display of emotions, it is as truly a dramatic composition as a work narrating a story in the form of dialogue.”¹³⁶

In his 1925 copyright treatise, Richard C. De Wolf defined “pantomimes” as dramatic compositions without speech: “[t]he ordinary play, prepared for presentation on the stage and containing both speeches and directions for action, is a clear enough case, but there may be dramatic compositions without words to be spoken, *i.e.*, pantomimes.”¹³⁷ De Wolf further explained that the copyright owner of a play has the exclusive right to make a motion picture version of the play in pantomime:

The law as laid down by courts has, in this class of cases, even more markedly than in cases involving the right of dramatization, proceeded towards the view that the owner of the copyright retains the right to produce the play by means of motion pictures, wherever

citation omitted).

¹³³ RICHARD ROGERS BOWKER, COPYRIGHT: ITS HISTORY AND LAW BEING A SUMMARY OF THE PRINCIPLES AND PRACTICE OF COPYRIGHT WITH SPECIAL REFERENCE TO THE AMERICAN CODE OF 1909 AND THE BRITISH ACT OF 1911 241–42 (1912).

¹³⁴ See LOUIS D. FROHLICH & CHARLES SCHWARTZ, THE LAW OF MOTION PICTURES (1918).

¹³⁵ *Id.* at 5 (footnotes omitted).

¹³⁶ *Id.* at 19–20.

¹³⁷ RICHARD C. DE WOLF, OUTLINE OF COPYRIGHT LAW 89 (1925).

the language of the contract indicated that the parties had the spoken, and not the silent, form of dramatic production in mind.¹³⁸

But when the advent of the “talkies” ended the silent era, familiarity with “pantomime” as a dramatic form gradually fell into desuetude. And yet, as late as the 1950s, some United States copyright scholars recalled the prominence of pantomime during the silent era and tried to repurpose the form.

For example, on July 19, 1950, Richard S. MacCarteney, the Chief of the Reference Division of the United States Copyright Office, wrote a letter to Ann Hutchinson, a leading authority on dance notation, especially Labanotation, asking whether she had “considered the possibility of copyrighting the scores of new ballets as expressed by the dance notation.”¹³⁹ MacCarteney observed:

It seems not unreasonable that the dance notation, as devised by Laban and subsequently developed, could be held to be a “transcription or record” of a dramatic work. A pantomime has been held by the courts to be a dramatic composition, and am I not correct in assuming a ballet is a pantomime?¹⁴⁰

Apparently, MacCarteney was unaware of the cases denying copyright protection to certain choreographic works on the ground that they were not “dramatic works.”¹⁴¹ However, he may well have been correct that the choreography of a ballet may have comprised sufficient “story” to constitute a “dramatic work” under the 1909 Act.

In any case, choreographers took note. In 1952, Hanya Holm filed the first ever registration of a choreographic work with the Copyright Office, in Labanotation, for her choreography of the Cole Porter musical *Kiss Me, Kate*.¹⁴² Of course, mere registration is hardly conclusive of copyrightability. And it seems unlikely that the choreography of a musical, no matter how artistic, could qualify as a

¹³⁸ *Id.* at 117.

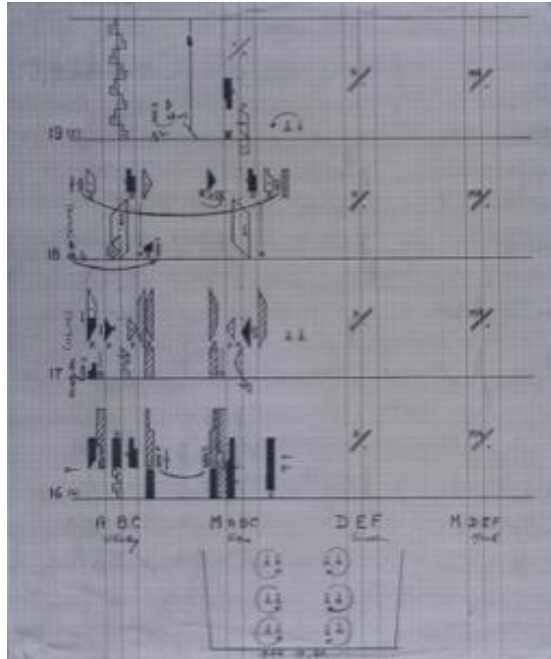
¹³⁹ Letter from Richard S. MacCarteney, Chief of the Reference Division of the United States Copyright Office, to Ann Hutchinson, Dance Notation Bureau (July 19, 1950). Ann Hutchinson later became Ann Hutchinson Guest and wrote a book. See GUEST, *supra* note 28.

¹⁴⁰ Letter from Richard S. MacCarteney, *supra* note 139.

¹⁴¹ See, e.g., *Daly v. Palmer*, 6 F. Cas. 1132, 1136–37 (C.C.S.D.N.Y. 1868).

¹⁴² See Paul V. Beckley, *Choreography Is Copyrighted For First Time: Dances of ‘Kiss Me Kate’ Get Same Legal Protection as Author, Musician*, N.Y. HERALD TRIB., Mar. 14, 1952, at 15. See also John Martin, *The Dance: Copyright—Hanya Holm’s Works Are First to be Registered*, N.Y. TIMES, Mar. 30, 1952, at X10; Lucy Wilder, *U.S. Government Grants First Dance Copyright*, DANCE OBSERVER, May 1952, at 69. For an excellent account of these incidents, see Arlene Yu, *NY Public Library’s Moving Image Specialist Arlene Yu on Dance as ‘Useful Art’*, BROADWAY WORLD (July 28, 2015), <http://www.broadwayworld.com/article/NY-Public-Librarys-Moving-Image-Specialist-Arlene-Yu-on-Dance-as-Useful-Art-20150728#>.

dramatic work. But in any case, the score for Holm's choreography would have been protected as a literary work.



Hanya Holm, *Kiss Me, Kate* (1952)

B. *The Copyright Act of 1976*

By the 1970s, the original purpose of copyright in pantomime was entirely forgotten.¹⁴³ President Ford signed the Copyright Act of 1976 into law on October 19, 1976.¹⁴⁴ One of the primary purposes of the 1976 Act was to conform United States copyright law as much as possible to the Berne Convention.¹⁴⁵ Consistent with this purpose, the Act eliminated registration requirements and changed the copyright term from a fixed term of fifty-six years to a term of “the life of the author and fifty years after the author’s death.”¹⁴⁶ But it also amended the subject matter of copyright to provide, *inter alia*, that the term

¹⁴³ In a rare exception, on March 26, 1980, Congress proclaimed April 1–7 as “National Mime Week.” Testimony relating to the resolution referred to silent motion picture acting as “pantomime.” 125 CONG. REC. 17375 (daily ed. July 9, 1979).

¹⁴⁴ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

¹⁴⁵ See generally Eric A. Savage, *Abandon Restrictions, All Ye Who Enter Here!: The New United States Copyright Law and the Berne Convention*, 9 N.Y.U. J. INT’L L. & POL. 455 (1977).

¹⁴⁶ Copyright Act of 1976, Pub. L. No. 94-553, §§ 302(a), 408(a), 90 Stat. 2541, 2572, 2580 (1976).

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“works of authorship” includes “pantomimes and choreographic works.”¹⁴⁷

The House Report on the 1976 Act rather unhelpfully explains that the “undefined categories” of works of authorship, including pantomimes, “have fairly settled meanings.”¹⁴⁸ And that’s it. It provides no additional insight on the supposedly “fairly settled meaning” of “pantomimes.” And it provides no explanation of the rationale for specifically protecting pantomimes.

Obviously, Congress amended the subject matter of copyright to specifically include “pantomimes” only because the Berne Convention’s definition of the subject matter of copyright specifically included “pantomimes.” There is no evidence to suggest that anyone asked why the Berne Convention explicitly provided copyright protection to pantomimes. And there is no evidence to suggest that Congress ever considered the wisdom of extending copyright protection to pantomimes. Apparently, no one objected, so it was written into law.

C. Contemporary Scholarship on Pantomime

The few scholars who have investigated the history and scope of copyright in choreographic works and pantomimes have focused on the former and ignored the latter. For example, in 1980, Martha M. Traylor provided a thorough investigation of the history of copyright in choreographic works but ignored the independent history of copyright in pantomime, incorrectly assuming that it was intended to protect mime.¹⁴⁹

But Traylor is hardly alone in ignoring pantomime. In a 1967 article anticipating the harmonization of United States copyright law with the Berne Convention, Melville B. Nimmer conflated choreographic works and pantomimes.¹⁵⁰ Ironically, Nimmer even suggested that Congress should treat choreographic works and pantomimes like cinematographic works. Nimmer did not realize that copyright in pantomime was originally intended to protect silent motion pictures.¹⁵¹

Then, in a 1977 article analyzing the subject matter of copyright under the 1976 Act, Nimmer recognized that “pantomime” is typically defined as “a dramatic performance by actors using only, or chiefly,

¹⁴⁷ *Id.* § 102(a)(4), 90 Stat. 2541, 2544–45.

¹⁴⁸ H.R. REP. NO. 94-1476, at 53 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5666–67.

¹⁴⁹ Martha M. Traylor, *Choreography, Pantomime and the Copyright Revision Act of 1976*, 16 NEW ENG. L. REV. 227, 228–30 (1981).

¹⁵⁰ Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499 (1967).

¹⁵¹ *Id.* at 499, 507.

dumb show.” Nimmer still concluded that the Copyright Act’s definition of “pantomime” must include non-dramatic works, in order to avoid redundancy on “dramatic works.”¹⁵²

If, then, the additional grant of copyright protection to pantomimes is not to be construed as a mere redundancy, it would seem that it must refer to gestures without speech, regardless of whether the presentation can be characterized as dramatic. This broad construction is further confirmed by the coupling of pantomimes with choreographic works, which for reasons suggested below, also need not be “dramatic.”¹⁵³

Of course, there is no evidence that Congress’s decision to amend the subject matter of copyright to explicitly include pantomimes was intended to accomplish anything other than to conform United States copyright law to the Berne Convention. While Nimmer recognized that under the 1909 Act, a dramatic pantomime could be protected as a “motion picture” or a “book” in the form of a photoplay,¹⁵⁴ seemingly it did not occur to him that the original purpose of amending the subject matter of copyright to include pantomime was precisely to ensure copyright protection of silent motion pictures.

III. PANTOMIME IN INTERNATIONAL LAW

In fairness, the signatories to the Berne Convention and the World Intellectual Property Organization (“WIPO”), which administers the Convention, have also apparently forgotten why the Berlin Act amended the subject matter of copyright to include “pantomimes” and “entertainments in dumb show.” When the Stockholm Act of 1967 amended the subject matter of copyright to include “cinematographic works to which are assimilated works expressed by a process analogous to cinematography,”¹⁵⁵ it did not exclude “entertainments in dumb show” and “pantomime.”¹⁵⁶ This implies that its drafters and signatories did not realize that the original purpose of protecting dumb show and pantomime was to ensure copyright protection of silent motion pictures.

WIPO’s 1978 exegesis of the Convention confirms the conclusion that it had forgotten the original reason for protecting dumb

¹⁵² Melville B. Nimmer, *The Subject Matter of Copyright Under the Act of 1976*, 24 UCLA L. REV. 978, 1011–12 (1977) (footnote omitted).

¹⁵³ *Id.* (footnote omitted).

¹⁵⁴ *Id.* at 1013–15.

¹⁵⁵ Paris Convention for the Protection of Industrial Property, Stockholm Act of 1967, July 14, 1967, Article 2(1). The Stockholm Act also eliminated the fixation requirement for choreographic works, entertainments in dumb show, and pantomimes. *Id.*

¹⁵⁶ *Id.*

show and pantomime, by explicitly conflating choreographic works and entertainments in dumb show:

[I]n the version prior to that of Stockholm, the Convention provided that, for [choreographic works and entertainments in dumb show] to enjoy protection, the acting form had to be fixed in writing or otherwise. This condition was not an exception to the rule of protection without formality, but is explained by considerations of proof: it was thought that only the ballet notation allowed one to appreciate the exact shape of the dance. The arrival and spread of television has markedly changed the baselines of the problem: there is a need to protect such a work, diffused live by television, against someone filming it. Besides, the requirement that the acting form must be fixed in writing could give rise to difficulties, since it is difficult to describe precisely by words; again, the requirements of proof may differ, country by country. Since the Convention now allows national laws to provide that fixation in some material form is a general condition for protection (see below Article 2), this need for fixation in writing of the acting form of choreographic works and entertainments in dumb show was abolished in the Revision in 1967.¹⁵⁷

WIPO obviously no longer realized that “entertainments in dumb show” and “pantomimes” originally meant “silent films,” and assumed that they were forms of choreography. But there is some redundancy to that assumption. If entertainments in dumb show and pantomimes are just categories of choreographic works, then why did the Berlin Act amend the subject matter of copyright to explicitly provide for their protection? Interestingly, WIPO’s analysis reveals at least some hesitation, especially insofar as it recognizes the role of movement notation and motion pictures.

Today, WIPO has completely forgotten the original reason for protecting dumb show and pantomime. Its 2003 exegesis of the Berne Convention explains:

The common element of the third group—*dramatic or dramatico-musical works; choreographic works and entertainments in dumb show*—is that they are intended for stage presentation. Dramatic works are normally fixed in writing; and thus they may be regarded as belonging to both the first group and the third group of categories of works included in the non-exhaustive list. Dramatico-musical works are also fixed in writing and in musical notation. The fixation

¹⁵⁷ WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO PUBLICATION 615(E): GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971) Art. II, § 2.6.(d) (1978), http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf.

of choreographic works and “entertainment in dumb show” may be more difficult (since for this, there are no such long established ways and means of fixation as for writings and musical works), but it is possible (as mentioned below in the commentary to paragraph (2), during the development of the text of the Berne Convention, the question of fixation of such works emerged in a specific way).¹⁵⁸

And it further explains:

It was in connection with choreographic works and entertainment in dumb show that the question of fixation as a condition of copyright protection first emerged. Fixation was found necessary in order to be able to identify and prove the existence of these works. Thus, when choreographic works and entertainment in dumb show (pantomime) were included in the non-exclusive list of literary and artistic works at the 1908 Berlin revision conference, the condition was added that their presentation (“*mise en scène*”) must be fixed “in writing or otherwise.”¹⁵⁹

In other words, WIPO’s current explanation of the Berne Convention demonstrates no awareness that the original reason for amending the subject matter of copyright to include “pantomimes” or “entertainments in dumb show” was to ensure copyright protection of silent motion pictures. Moreover, it reflects a total lack of interest in investigating why the Berne Convention specifically protects these works.

IV. PANTOMIME IN CONTEMPORARY COURTS

The few contemporary courts that have considered the meaning of “pantomime” under the Copyright Act have been thoroughly mystified. In *Aspen v. Newsom* (2010), the Northern District of California accepted the plaintiff’s definition of “pantomime” as “the ancient [G]reek art of non-verbal communication,” outside the context of copyright.¹⁶⁰ In *Bikram’s Yoga College of India, L.P. v. Evolation Yoga, LLC* (2012), the Central District of California conflated “choreographic works” and “pantomimes,” and held that copyright cannot protect yoga sequences because they are too simple and are not “dramatic works”:

¹⁵⁸ WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO AND GLOSSARY OF COPYRIGHT AND RELATED RIGHTS TERMS BC-2.35 (2003), http://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf.

¹⁵⁹ *Id.* BC-2.36.

¹⁶⁰ *Aspen v. Newsom*, No. C 09-5589 CRB, 2010 WL 2721458, at *1 (N.D. Cal. July 7, 2010).

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, such as a ballet or abstract modern dance, may incorporate simple routines, social dances, or even 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.¹⁶¹

By contrast, in *Teller v. Dogge* (2014), the Nevada District Court held that copyright could protect a magic trick as a “dramatic work” or “pantomime”:

While Dogge is correct that magic tricks are not copyrightable, this does not mean that “Shadows” is not subject to copyright protection. Indeed, federal law directly holds “dramatic works” as well as “pantomimes” are subject to copyright protection, granting owners exclusive public performance rights. The mere fact that a dramatic work or pantomime includes a magic trick, or even that a particular illusion is its central feature does not render it devoid of copyright protection. As previously stated, Teller’s certificate of registration describes the action of “Shadows” with meticulous detail, appearing as a series of stage directions acted out by a single performer. Because dramatic works and pantomimes clearly fall within the protection of the Copyright Act, Dogge has presented no reason for the court to doubt the validity of Teller’s copyright.¹⁶²

Given that the Berlin Act amended the subject matter of copyright to include pantomimes precisely to protect them as a category of dramatic works, it is telling that the court could not decide whether to describe the magic trick as a “dramatic work” or a “pantomime.” In addition, the court fails to identify any “dramatic” elements of the trick.

The Berlin Act amended the subject matter of copyright under the Berne Convention to include “pantomimes” and “entertainments in dumb show” with the aim of ensuring copyright protection of silent motion pictures. The 1976 Act amended the subject matter of copyright to include “pantomimes” merely in order to conform United States copyright law to the Berne Convention. In light of this history, United States courts should interpret copyright protection of “pantomimes” as redundant on copyright protection of “motion pictures” and “dramatic works.”

¹⁶¹ *Bikram’s Yoga College of India, L.P. v. Evolution Yoga, LLC*, No. 2:11-CV-5506-ODW (SSx), 2012 WL 6548505, at *3 (C.D. Cal. Dec. 14, 2012) (citation omitted).

¹⁶² *Teller v. Dogge*, 8 F. Supp. 3d 1228, 1233 (D. Nev. 2014) (citation omitted).

CONCLUSION

But what else, if anything, can we learn from this exegesis of the meaning of the term “pantomimes,” as used in the Copyright Act? I would suggest that we may draw at least three lessons. First, it reminds us that even seemingly banal questions about statutory interpretation may have unexpected answers. The meaning of a word may change over time, so we should be attentive to historical context. Second, it illuminates the carelessness of the drafters of the Copyright Act of 1976. Confronted with an unfamiliar term, they punted and resorted to hand-waving rather than engaging in even the most cursory investigation as to the term’s original meaning and purpose. Third, it serves as one more reminder of the need for the “next great copyright act.”¹⁶³ Hopefully, the next revision of the Copyright Act will reflect the careful drafting and concern for the public interest that its predecessor so conspicuously lacked.

¹⁶³ See Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013).