United States Copyright Office
Library of Congress - 101 Independence Avenue SE - Washington, DC 20559-6000 - www.copyright.gov

June 10, 2010

Beigelman, Feldman & Associates, P.C.
ATTN: Mark Beigelman
100 Wall Street, 23rd Floor
New York, NY 10005

Re: THE ELECTRIC
Control Number: 81-429-532.(B)

Dear Mr. Beigelman:

I am writing to you on behalf of the Copyright Office Review Board in response to your letter dated April 11, 2008, requesting the Copyright Office to reconsider, for a second time, our refusal to register a copyright claim in the above work as a "choreographic" work of authorship. You made this request on behalf of Mr. Richard Silver. The Review Board has carefully examined the applications, the deposits and all correspondence concerning these applications, and, for the reasons stated below, affirms the denial of claim of choreographic authorship.

I. DESCRIPTION OF WORK

THE ELECTRIC (sometimes referred to as "The Slide," "The Electric Slide,"[1] and "The Electric Boogie") is a 22-step dance routine created by Richard L. Silver from which the popular social dance "The Electric Slide" is allegedly derived. *See E-mail from Richard Silver to Laura Lee Fischer, Copyright Office* (September 29, 2008). A copy of the instructions for the dance, submitted as the deposit, is appended to this decision.

II. ADMINISTRATIVE RECORD

A. Initial renewal application and correspondence

On January 22, 2007, the Copyright Office received an application from Mr. Silver for renewal of THE ELECTRIC as a work of "choreography." *See* Addendum to Form RE (received January 22, 2007, and dated November 9, 2006). Mr. Silver listed THE

[1] Mr. Silver lists "The Electric Slide" as a previous or alternative title of his work while the second reconsideration request asserts that "The Electric Slide" is a slightly altered version of the original work. *See* Form PA (March 14, 2007); *Letter from Jordan R. Beckerman, Beigelman, Feldman & Associates, P.C., to the Copyright Office* of 8/6/07 at 3 ("*Second reconsideration letter*").

ELECTRIC'S publication date as June 10, 1976. *Id.* Through correspondence with Mr. Silver, the Office learned that Mr. Silver published a pamphlet containing instructions for performing THE ELECTRIC at the Vamps dance club in New York City by handing out copies of the dance routine instructions the night it was first performed. *See Letter from Laura Lee Fischer, Copyright Office, to Richard Silver* of 11/1/06 at 1 (detailing phone conversation between Mr. Silver and Carol Guglielm, Performing Arts Section Examiner, addressing distribution at the Vamps dance club).

Laura Lee Fischer, who was then the Section Head of the Performing Arts Section of the Examining Division, refused to register and renew[2] THE ELECTRIC on February 26, 2007, because she deemed it non-dramatic choreography that was not copyrightable under federal copyright law in effect at the time the text was published.[3] *See Letter from Laura Lee Fischer, Copyright Office, to Richard Silver* of 2/26/07 at 1. She explained that the 1909 copyright law governed any copyright secured by publication with notice in 1976 and that under the 1909 Act, federal copyright protection extended to choreographic works only to the extent that they qualified as "dramatic" works. *Id.* Since the initial application listed June 10, 1976, as the date of first publication of THE ELECTRIC, she decided this choreographic work was not copyrightable. *Id.* Ms. Fischer suggested that Mr. Silver submit an addendum to the application, describing the renewable matter as the "text instruction for line dance," protecting the expression of the instructions as a literary work, rather than a choreographic work. *Id.* at 2.

B. Performing arts application and Office's refusal to register

On March 14, 2007, David Kinitsky filed a new Performing Arts (PA) application on behalf of Mr. Silver that "supersede[d] any previous forms and revision Mr. Silver [had] made with respect to the choreographic work." *E-mail from David Kinitsky, Beigelman & Associates, P.C., to Laura Lee Fischer, Copyright Office* of 3/14/07. (*See* Form PA, dated March 14, 2007). The date of publication changed from June 10, 1976, to December 27, 1994, with no explanation accompanying this change in dates. Ms. Fischer requested an explanation for this change. *See Letter from Laura Lee Fischer, Copyright Office, to Richard Silver* of 3/16/07.

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[2] Mr. Silver's submission of an application for registration and renewal of the claim of copyright more than 28 years after his alleged publication of the instructions for the dance—after the initial 28-year term of copyright would have expired under the law that applied at the time of publication, the 1909 Copyright Act—was permissible due to the applicability of automatic renewal. As a result of the Copyright Renewal Act of 1992, Publ. L. No. 105-298, 112 Stat. 2827, neither registration applications nor renewal applications have to be submitted for works published between January 1, 1964, and December 31, 1977. However, the Copyright Renewal Act of 1992 permits the filing of an application to register and renew a claim of copyright at any time during the renewal term. 17 U.S.C. § 304(a)(3)(A).

[3] Laura Lee Fischer is currently acting Chief of the Performing Arts Division of the Registration and Recordation Program.

On April 4, 2007, David Kinitsky submitted a letter "maintaining that Mr. Silver's dissemination of the instructional pamphlets before 1978 constituted only a limited publication." *Letter from David Kinitsky, Beigelman & Associates, P.C., to Laura Lee Fischer, Copyright Office* of 4/4/07 ("*Letter of 4/4/07*"). Mr. Kinitsky argued that neither the performance of the dance nor the distribution of the pamphlet containing the dance instructions constituted a general publication. Under these facts, it was alleged that Mr. Silver's publication of the dance instructions on the Internet on December 27, 1994, would constitute THE ELECTRIC's first general publication. First, Mr. Kinitsky explained that a limited publication, as opposed to a general publication, is a "publication that communicates a work to a definitely selected group for limited purpose and without the right of diffusion, reproduction, distribution, or sale." *Id.* at 4. A limited publication before January 1, 1978, does not divest a choreographic work or any other work of copyright, or otherwise place the work in the public domain. *See id.* at 2-4. Next, he submitted that "[t]here is no question that the mere performance of a work is not a general publication." *See id.* at 3 (citing 1 M.B. Nimmer & D. Nimmer, *Nimmer on Copyright* § 4.13[A] (1998) and other sources). Then, Mr. Kinitsky argued that Mr. Silver's distribution of the pamphlet containing the dance instructions was analogous to the limited publications in *Allen v. Walt Disney Productions*, 41 F. Supp. 134, 135 (S.D.N.Y 1941) (holding that distributing copies of musical compositions to musicians, an orchestra, and companies to spark interest in their use was only a limited performance) and *Hirshon v. United Artists Corporation*, 243 F.2d 640, 645 (D.C. Cir. 1957) (finding that distributing 2,000 copies of a song to broadcasting companies and musicians to solicit interest in the song was only a limited publication). *Id.* at 4-5. He explained that "each recipient was chosen by Mr. Silver and handed a copy of the Pamphlet by Mr. Silver directly" similarly to the situations in each of these cases. *Id.* at 5. Finally, Mr. Kinitsky submitted that the Pamphlet was not distributed widely enough to be considered a general publication. *See id.* at 6-7.

On July 3, 2007, Attorney-Advisor Virginia Giroux-Rollow had a telephone conversation with Mr. Silver regarding the facts surrounding the distribution of THE ELECTRIC. *See Telephone Interview by Virginia Giroux-Rollow with Richard Silver in Washington, D.C.* of 7/3/07 ("*7/3/07 telephone conversation*"). Mr. Silver explained that he "distributed 25 copies of the pamphlet to the first 25 patrons that entered the club." *Id.* He also distributed 24 copies to friends and others who requested copies, keeping one copy out of the 50, for himself. *Id.* He also said that he "did not limit or restrict the use of the pamphlets that were distributed to the first 25 patrons." *Id.*

Ms. Fischer then denied registration of the work on July 12, 2007, based on the information received from the applications, the *Letter of 4/4/07*, and the *7/3/07 telephone conversation*, determining that Mr. Silver's distribution of copies of the work was a general publication of the work on June 10, 1976, and that this publication divested any copyright in the work. *Letter from Laura Lee Fischer, Copyright Office to Mark Beigelman, Beigelman & Associates* of 7/12/07 at 1-2 ("*Denial of Registration Letter*"). Ms. Fischer found that Mr. Silver's publication did not meet either of the requirements of a limited publication: it was

(1) not distributed to a limited or selected group, or (2) distributed for a limited purpose or use. *Id.* First, Ms. Fischer explained that Mr. Silver made "apparently no attempt to select or limit the number of people receiving the copies" by simply distributing copies to the first 25 patrons entering the dance club. *Id.* at 1. Second, Ms. Fischer stated that "Mr. Silver also said that he did not limit or restrict the use of the pamphlets distributed to the patrons of the club." *Id.* at 2.

Ms. Fischer then distinguished both *Allen* and *Hirshon*. *Id.* at 2. She submitted that the distributor of the musical composition in *Allen* "hand-picked" the musicians and companies and specifically limited its use to "performing the music and soliciting interest in it," unlike Mr. Silver's nondiscriminatory and unrestricted distribution. *Id.* (citing 41 F. Supp. at 135). Likewise, *Hirshon* involved a "selected group [where] the use of the right of further diffusion[,] reproduction or sale was withheld." *Id.* (citing 243 F.2d at 645).

C. First reconsideration request

The first request for reconsideration of this registration denial claimed that the Office's decision was "based upon an erroneous assessment of the facts and [that] the distribution of the work does qualify as a limited publication." *See Letter from Erica Ramirez, Beigelman, Feldman & Associates, P.C., to the Copyright Office* of 8/6/07 at 2 ("*First Reconsideration Letter*"). First, Ms. Ramirez sought to clarify the facts of the distribution at Vamps dance club on June 10, 1976. *Id.* Instead of an indiscriminate group of club attendees, the group was "personally pre-selected and sent individually addressed invitations from Mr. Silver to attend a private party." *Id.* Ms. Ramirez explained that this selection of the group, combined with Mr. Silver personally handing out copies, made this publication analogous to *Allen*. *Id.* (citing 41 F. Supp. at 135). Moreover, the fact that the "invitees were all professional members of the theater and dance industry," brought this situation closer to the facts of *Hirshon*, where the work was "distributed among broadcasting stations and other musicians in order to generate interest in the work." *Id.* at 3 (citing *Hirshon*, 243 F.2d at 645).[4] Second, Ms. Ramirez submitted that the copyright notice placed on each pamphlet provided the requisite limitation on the work's use. (citing *Allen*, 41 F. Supp. at 135 (explaining that "[t]he name on the copyright notice gives sufficient notice to the public of the name of the owner of the composition upon which copyright is claimed, and the date when this right was obtained.").

D. Examining Division's response

Ms. Giroux-Rollow reviewed the *First Reconsideration Letter* and determined that the Office could not register the work regardless of whether the distribution in 1976 constituted only a limited publication, because the work was an uncopyrightable social

[4] Mr. Ramirez did not directly assert that Mr. Silver distributed the pamphlet in order to stimulate interest in THE ELECTRIC with the intention to profit from further distribution, reproduction, etc.

dance. *See Letter from Virginia Giroux-Rollow, Copyright Office, to Mark Beigelman, Beigleman, Feldman & Associates, P.C.* of 2/20/08. She explained that the legislative history makes it clear that the term "choreographic works" does not include "social dance steps or simple routines." *Id.* at 1 (citing H.R. Rep. No. 94-1476, 54 (1976)). Also, Ms. Giroux-Rollow cited the "distinction made between social dances intended to be executed for the personal enjoyment of the participants and the theatrical or dramatic dances intended to be presented by skilled performers for an audience" in a study prepared by the Copyright Office for Congress. Study No. 28, "Copyright in Choreographic Works," by Borge Varmer. Ms. Giroux-Rollow explained three reasons why social dances are not protected: social dances (1) would "generally be too simple to qualify as creative works of authorship," (2) could not be considered the type of "dramatic" work that Congress sought to protect, and (3) the primary reason for protecting a choreographic work, ensuring right of public performance, "would have no application at all." *Id.* Expanding on this third point, Ms. Giroux-Rollow explained that social dances "are intended to be executed by the public, not to be performed for the public as an audience," so it would not serve the purpose of the Copyright Act to give someone the exclusive right to execute such a dance. *Id.* Thus, she concluded that the Copyright Act's protection for choreographic works is "confined to theatrical or dramatic dance" and does not include social dances such as THE ELECTRIC. *Id.*

E. Second reconsideration request

Your second request for reconsideration submitted that THE ELECTRIC was not an uncopyrightable social dance. *See Letter from Jordan R. Beckerman, Beigelman, Feldman & Associates, P.C., to the Copyright Office* of 8/6/07 ("*Second Reconsideration Letter*").[5] First, you noted that Ms. Giroux-Rollow's response focused on a point previously unmentioned in the original refusal – that the work was an uncopyrightable social dance. *Id.* at 2. You later argue that this issue was "settled prior to Mr. Silver's application for registration" through conversations with Ms. Fischer that "made it clear to him that he ought to proceed with his application, and that his work would qualify as a copyrightable dance." *Id.* 6-7.

You argue that THE ELECTRIC is not a social dance because Mr. Silver never intended it to become one. *See id.* at 4. You state that Mr. Silver never intended the dance to become the "slightly altered" dance "sensation" it is today, which occurred after the club opened its doors to the general public and Marcia Griffiths released the record "Electric Boogie" (a demo copy of which Mr. Silver used to create THE ELECTRIC).[6] *Id.* at 4.

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[5] Mr. Beckerman did not disagree with Ms. Giroux-Rollow's conclusion or the rationale behind the conclusion that social dances are uncopyrightable. *See Second Reconsideration Letter.*

[6] "Electric Boogie" was written by Neville Livingston and performed by Marcia Griffiths. Although Copyright Office registration records for the musical work state that the musical work was created in 1983, there is an assertion in the record of this request for reconsideration that a demo copy of the song performed by

Instead, you state that Mr. Silver created THE ELECTRIC "for performance by professional dancers." *Id.* at 3. In support, you explain that Mr. Silver "taught the dance to a troupe of friends who were also professional dancers," rehearsed the dance in preparation for its "private premier dance event," and limited this premier's attendees to professional dancers. *Id.* Thus, the transformation of THE ELECTRIC into a social dance was "unforeseen and unintended" and should not change the original nature of the work into a social dance as well. *Id.* at 4-5.

Moreover, you submit that the popular social dance is a derivative work of THE ELECTRIC that does not divest THE ELECTRIC's copyrightability and is a dance for which "Mr. Silver deserves credit and protection of his authorship rights." *Id.* at 5. You assert that the uncopyrightability of a derivative work does not affect the copyrightability of the work from which it derives because (1) a "copyright in a derivative work is 'independent of and does not affect or enlarge…any copyright protection in the preexisting material'" and (2) the entering into the public domain of derivative work does not also bring the underlying work into the public domain. *Id.* at 6 (citing 17 U.S.C. §103; *Batjac Productions Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223 (9th Cir. 1998)).

III. DECISION

A. Legal Background

The introduction of choreography into the 1976 Copyright Act as a distinct category of copyrightable authorship was intended to rectify perceived deficiencies that existed under the prior copyright law. Under the 1909 Act, choreography was not independently protectible subject matter, but rather was only protectible to the extent that the choreographic work constituted a "dramatic work."[7] "Dramatic compositions" were among the enumerated classes into which copyrightable works were divided for the purpose of registration.[8] The requirement that a choreographic work must tell a story in order to be protected by federal copyright law established an adequate dividing line between works of copyrightable choreography and uncopyrightable, nondramatic dances or movement. Copyright Office Regulations provided that:

Marcia Griffiths existed in 1976, and that this demo was used by Mr. Silver to create THE ELECTRIC and at the first performance of the dance at the Vamps dance club in 1976. Because the correct creation date does not affect the resolution of this claim in the choreographic work, the Review Board will assume that the facts as stated by the applicant are correct.

[7] Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (repealed 1976).

[8] *See* section 5(d) of the 1909 Act.

> Choreographic work of a dramatic character, whether the story or theme be expressed in music and action combined or by actions alone, are subject to registration in Class D. However, descriptions of dance steps and other physical gestures, including ballroom and social dances or choreographic works which do not tell a story, develop a character or emotion, or otherwise convey a dramatic concept or idea, are not subject to registration in Class D.[9]

As choreography developed, however, it became apparent that not all choreographic works told a story. Many forms of modern and abstract choreography did not attempt to "tell a story" in any conventional sense. If copyright protection for choreography was limited to dramatic works, there was growing concern that adequate protection for new, creative forms of the choreographic art would be unprotected.

During the years preceding the revision of the copyright law in 1976, the Copyright Office, pursuant to appropriations by Congress for this purpose, commissioned a series of studies on copyright law and practices. In addition to these commissioned studies, other studies were prepared by Copyright Office attorneys, including Study No. 28, "Copyright in Choreographic Works," by Attorney-Advisor Borge Varmer, published in October of 1959. This study is germane to our analysis.[10]

Mr. Varmer began the study by distinguishing the development of "choreography" from "dance":

> The dance is one of the oldest forms of human expression. Originally, perhaps, the bodily movements of a dance were spontaneous expression of the dancer's emotions for his own satisfaction. Group dances following an established pattern, as in ritual dance or a community folk dance, became the means of expressing the feelings of the group of dancers. Ultimately, the dance was developed into an art form, a work of choreography for theatrical presentation, by which bodily movements to be performed by dancers are devised to convey thought or feeling to an audience.
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> A dance created for theatrical performance may be comparable to a drama to be spoken and acted, or a musical composition to be

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[9] 37 C.F.R. chap. II, as amended; 24 Fed. Reg. 4955 (1959).

[10] Borge Varmer, Copyright in Choreographic Works, Copyright Office Study No. 28, Committee Print, Subcomm. on Patents, Trademarks, and Copyright, Senate Comm. on Judiciary, 86th Cong. 2d Sess. at 89 (1961), citing, Curt Sachs, WORLD HISTORY OF THE DANCE, Chapters 6 and 7 (1937).

> performed as an art form by which thought or feeling is conveyed to an audience.
>
> Herein lies an essential distinction between those relatively simple dances, such as the steps of a ballroom or other social dance, devised primarily for the enjoyment of the dancers themselves, and those intricate dances such as ballets, devised for execution by skilled performers for the enjoyment of an audience. "Choreographic work" is commonly understood as referring to the latter.[11]

This last statement is important since 17 years later when Congress added the class of "choreography" to the categories of copyrightable subject matter in section 102(a) of the Copyright Act of 1976, Congress left this class as an undefined term in the legislation. In the House Report accompanying the legislation, Congress stated that,

> Of the seven items listed (as categories of authorship in section 102(a)), four are defined in section 101. The three undefined categories—"musical works," "dramatic works," and "pantomimes and choreographic works"—*have fairly settled meanings*. There is no need, for example, to specify the copyrightability of electronic or concrete music in the statute, since the form of a work would no longer be of any importance, *nor is it necessary to specify that "choreographic works" do not include social dance steps or simple routines*.[12]

Whether or not it was prudent for Congress to leave the term choreography undefined is debatable.[13] It is clear, however, that the subject matter of copyrightable "choreography" was intended by Congress to be a discrete subset of dance. As the legislative history of the 1976 Act states, social dance steps and simple routines are not within the scope of the term choreography. Some commentators have suggested that this clarification in the legislative history was unnecessary, because individual steps or moves and very simple routines would be *de minimis*.[14] These elements, it is said, are simply the

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[11] *Id.* at 93.

[12] House Report 94-1476 at 53-54 (emphasis added).

[13] A number of commentators have stated that the lack of a legislative definition has harmed choreographers for various reasons. *See e.g.*, Katie Lula, The Pas De Deux between Dance and Law: Tossing Copyright Law into the Wings and Bringing Dance Custom Centerstage, 5 CHI.-KENT J. INTELL. PROP. 177 (2006); Barbara Singer, In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. The Custom of the Dance Community, 38 U. Miami L. Rev. 287, 298 (1984);

[14] *See, e.g.*, 1 M.B. Nimmer & D. Nimmer, *NIMMER ON COPYRIGHT* § 2.07[C] at 2-70 (2009).

building blocks from which the choreographer builds her work, like the use of words or phrases by a writer or notes and motifs by a musical composer. Such an interpretation of the legislative history would render these qualifications as mere surplusage.

The Register of Copyrights and the Review Board believe that any ambiguity in the scope of the term "choreography" can be clarified by this passage in the legislative history. The term "choreography," read together with this statement in the legislative history, indicates that Congress intended choreography to encompass certain types of dance, but not to extend to all dances generally. This interpretation of the statute is not only consistent with the legislative history, but also finds a strong basis in copyright law and public policy.

First, any interpretation that renders an expression by Congress as mere surplusage, should be viewed with circumspection. Congress's usage of the phrase "social dance steps" need not be interpreted narrowly to be limited to individual movements within a social dance. Such individual movements would, in any event, not be copyrightable because an individual dance step would constitute, at best, *de minimis* authorship and could not meet the admittedly low threshold of creativity required for copyright protection. Rather, crediting meaning to Congress's statement, a more cogent interpretation is that the phrase "social dance steps" was intended to refer to social dances generally in contrast to choreography prepared for performance to the public. As Varmer indicated, "Herein lies an essential distinction between those relatively simple dances, such as *the steps* of a ballroom or other social dance, devised primarily for the enjoyment of the dancers themselves, and those intricate dances such as ballets, devised for execution by skilled performers for the enjoyment of an audience."[15] The distinction being made was not a reference to the individual "steps" of a ballroom or social dance, but rather the distinction between ballroom and social dances on the one hand created for the enjoyment of the dancers themselves and those more intricate choreographic works that were created for the enjoyment of an audience. Congress's usage of the word "steps" is more appropriately read consistently with Varmer's Report for Congress, than with a meaning that would render the statement mere surplusage.

Similarly, the legislative history's reference to "simple routines" was not merely an indication that sufficient creativity is required for choreographic works as with all copyrightable authorship covered by the scope of the 1976 Act. The more consistent interpretation of this phrase is a contrast between simple routines and that subset of dance that would constitute "choreographic" authorship. The distinction Congress was making was not a denigration of social dance or simple dance routines, nor was it an imposition of artistic or aesthetic merit as a condition for eligibility for federal copyright protection. Congress did not raise the threshold of originality for dance, but rather delineated the subject

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[15] Varmer, at 93 (emphasis added).

matter that was eligible for copyright protection; Congress restricted federal copyright protection to that subset of dance that qualified as choreography.

Although Congress did not define "choreography" in section 101, the term "choreography" itself was believed to provide a definitional limitation according to its commonly understood meaning *at the time*. In order to more fully understand this point, it is necessary to understand the context in which Congress decided to include choreography as a distinct class of copyrightable subject matter. Moreover, it is necessary to explore the subclasses of authorship that may fit within this newly established class.

Part of Congress's hesitancy in defining the term explicitly in the statute appears to be that Congress did not want to create the same sort of problem that it intended to fix by adding choreography as a distinct class, *i.e.*, over-limiting the term in a manner that would become too restrictive in the future as was the case when choreography was protectible only as a sub-class of dramatic works. At the same time, if Congress intended to protect all forms of kinesthetic movement that included selection and arrangement, it could have chosen a broader term, such as "dance." The fact that Congress chose the term "choreography," and expressed its view that the term's coverage is limited to exclude social dance steps and simple routines compels the Register to conclude that some form of line-drawing is necessary. Although a bright line rule between protectable choreography and unprotectable dance may be elusive, in order for the Copyright Office to perform its registration functions under the statute, and in order to prevent unintended liability for the public's performance of social dances and simple routines, the Review Board concludes that some framework for distinguishing between two concepts—protected choreography and unprotectable dances—is necessary. In order to establish a framework, the Review Board looks to the copyright law revision process for guidance.

As previously noted, under the 1909 Act, choreography was only protected to the extent that it could be considered a dramatic work. At the time of the revision process, it became clear that new forms of choreography were emerging that did not necessarily meet the requirements of a dramatic work, but which were undeniably works of choreographic art. Moreover, choreography as an art form is not merely a species of drama, but rather "a separate and distinct art form, which embodies 'an arrangement in time-space, using human bodies as its units of design.'"[16] As Varmer wrote:

> Original dances that constitute "dramatic compositions," when fixed in some permanent record from which the dance can be performed, are deemed eligible for protection under the current copyright statute. That dances of this character are appropriate

[16] Barbara Singer, In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. The Custom of the Dance Community, 38 U. MIAMI L. REV. 287, 298 (1984) *quoting*, Varmer at 110 (letter from Agnes de Mille).

> subjects of copyright protection does not seem to be questioned. *The questions for consideration are whether the concept of "dramatic compositions" is sufficiently broad to encompass the kinds of choreographic works that should be given copyright protection*; whether fixation of a choreographic work, in a form adequate to enable performance of the dance therefrom, is a necessary condition of copyright protection; and whether the protection given to "dramatic" works (*i.e.*, the rights of the copyright owner of such works) is appropriate for choreographic works.[17]

Thus, the first basic query in the revision process relating to choreographic works involved whether all of the choreographic works that should be protected by copyright were encompassed within the scope of dramatic works. The answer to that general question was no.[18] Modern dance was distinguishable from traditional ballets in that no "story" was readily evident. At the same time the movements of modern dance generally are expected to convey some thematic or emotional concept to the audience. While some thematic or emotional concept could be interpreted as a "dramatic" work, the decision in *Fuller v. Bemis* raised as many questions as it answered.[19] In the opinion, the court stated that "It is essential to [a dramatic] composition that it should tell some story."[20] However, the court went on to say that: "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."[21] Although the court appeared to interpret "story" broadly, the requirement that choreography must tell a story created concern that some forms of modern or abstract dance might not fall within the scope of a dramatic work.

The conclusion of Varmer's study on choreography presented three options as to how the new copyright law should provide distinct protection for choreographic works. The

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[17] Varmer at 100, (emphasis added).

[18] This conclusion was not indisputable. Varmer wrote that "[t]here is little authority on this point, but there is reason to believe that "dramatic compositions" might include choreographic works that depict a theme or emotion other than a "story" in the literal sense of a sequence of events." Varmer at 101. It would appear that the uncertainty of this outcome prompted Congress to choose a course that assured that modern dance would be included in a new separate category of authorship: choreography.

[19] 50 F. 926 (C.C.S.D.N.Y. 1892). Applying the pre-1909 copyright law, the court in *Fuller* found that the plaintiff's work, "the devising of a series of graceful movements, combined with an attractive arrangement of drapery, lights, and shadows, telling no story, portraying no character, depicting no emotion," was not a dramatic work and therefore not protected by copyright.

[20] *Id.* at 929.

[21] *Id.*

first approach would be to maintain the status quo of providing protection to choreographic works to the extent that they were considered "dramatic compositions." The second approach offered by Varmer was naming "choreographic works" in the statute as a separate category of copyrightable works. This was the approach ultimately chosen by Congress in the 1976 Act and Congress accepted the argument that "choreography is a sufficiently important and distinct form of art to merit specific mention. . . ."[22] But Varmer went on to write that if Congress chose this approach, it would be on the assumption "that the term 'choreographic works' would be fairly well understood as meaning only theatrical dances of creative authorship."[23] In a footnote, Varmer indicated that the limitation to theatrical dances may be inherent in the term "choreographic works" and that such a limitation also seems to be inherent in many foreign laws for the fixation of the "acting form" or "scenic arrangement."[24] While the legislative history does not specifically address this issue, the fact that Congress stated that the term "choreographic works" had a "fairly settled meaning[]"—identical language to that used by Varmer—seems to indicate that Congress's choice of the second approach was premised on an understanding that the use of the particular term involved an implied limitation on the subject matter itself.

While Varmer thought that this second approach might avoid the question as to whether a choreographic work must "tell a story" in order to be protected, he cautioned that if the term "choreographic works" was not further defined, it might be construed so broadly as to include rather simple dance movements having no dramatic quality and a minimum of creativity.[25]

The third approach offered by Varmer was a hybrid of the first two—explicitly designating "choreographic works" as being included within the general category of dramatic work. Varmer suggested that this approach would give express recognition to "choreographic works" while "also defining that term to the extent of requiring that such works be dramatic in character, and placing such works in an established framework as to the rights accorded."[26]

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[22] Varmer at 102.

[23] *Id.*

[24] *Id.* at 102, n 57. It must also be noted that many of the bills introduced in Congress between 1924 and 1940 expressly included choreographic works among the enumerated categories of copyrightable authorship, in part, to address U.S. adherence to the Berne Convention. For example, the Dallinger bill, H.R. 9137, 68th Cong., 1st Sess. § 15(o) (1924), listed: "Choreographic works and pantomimes, the acting form of which is fixed in writing or otherwise." The Perkins bill, H.R. 11258, 68th Cong., 2nd Sess. § 9(p) (1925), as well as several other bills used the formulation of: "Choreographic works and pantomimes, the scenic arrangement or acting form of which is fixed in writing or otherwise." *See*, Varmer at 99.

[25] Varmer at 102.

[26] *Id.*

Since Congress chose the second approach and appeared to rely on Varmer's claim that the term "choreographic works" had a fairly settled meaning, Congress may have believed that the warning offered by Varmer—that some further definition was necessary to avoid expanding the scope of "choreography" too far—could be addressed in the legislative history. But Varmer's concern that the term might be construed too broadly is the precise issue that is faced in this request for reconsideration, namely, does the subject matter of "choreography" include a relatively simple dance routine comprised of a series of common repetitive movements?

The legislative history suggests that Congress did not intend the subject matter of "choreography" to be construed so broadly as to include social dances or simple routines. Even without getting into the meaning of these phrases, in the legislative history Congress stated that the term choreography (as well as musical works and dramatic works) had "fairly settled meanings." And, where as here, Congress has not defined the term in the statute, courts often consider the dictionary definition of the term to ascertain the ordinary meaning of the term when interpreting a statutory provision..[27]

The Varmer study cited Webster's New International Dictionary (Merriam, 2d edition, 1939) for the following three definitions: (a) the "art of representing dancing by signs, as music is represented by notes"; (b) "dancing, especially for [the] stage"; (c) "the art of arranging dances, especially ballets."

Webster's Third New International Dictionary (Merriam, 1961), provides the definitions as: 1: "the art of representing dancing by signs as music is represented by notes"; 2: "dancing; esp: stage dancing as distinguished from social or ballroom dancing"; 3: "the composition and arrangement of dance movements and patterns (as for a ballet) created usu. To accompany a particular piece of music or to develop a theme or a pantomime; also: a composition created by this art."

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[27] *CBS v. Primetime 24 J.V.*, 245 F.3d 1217 (11th Cir. 2001) ("In order to determine the common usage or ordinary meaning of a term, courts often turn to dictionary definitions for guidance. *See, e.g., United States v. Gonzales*, 520 U.S. 1, 5 (1997); *Harris v. Garner*, 216 F.3d 970, 973 (11th Cir. 2000)"). Where the meaning of the term remains ambiguous, courts then seek guidance from the legislative history. *In re Bardell*, 361 B.R. 468 (Bankr. N.D. W. Va. 2007) ("The court must first look to the plain language of the statute, and absent ambiguity in the language, the court's inquiry ends there. *United States v. Ron Pair Enters.*, Inc., 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989). If the statutory language is ambiguous or unclear, the court may then look to the legislative history for guidance in interpreting its meaning. *Id.*"); *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (U.S. 1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). In such cases, the intention of the drafters, rather than the strict language controls.")

The first definitions in both editions of the dictionary relate, in copyright terms, to the form of fixation of a choreographic work. In the 1976 Act, Congress expanded the means of fixation to any tangible medium now known or later developed.[28] Thus, in addition to representational fixation, such as Labanotation, choreographic works can now be fixed on film or digital media. The first definition is not of much relevance in this inquiry, because the question is not fixation but rather whether a work of choreographic authorship has been created. Typically, we would look to a consideration of originality and sufficient creativity. In the case of choreography, however, we need to determine what that word denotes before we can assess where the level of creativity begins. While this may appear to be a unique inquiry in the consideration of authorship, as explained further in the next section, such a definitional threshold exists for a number of other categories of authorship.

One "fairly settled meaning[]" in the definitions quoted above specifically distinguishes "choreography" from social or ballroom dancing, and also describes a subset of dancing, such as ballet, involving a level of creativity beyond that of simple routines. Yet since this is not the only dictionary definition, it is necessary to determine precisely what Congress intended by using the term "choreography." The legislative history's statement of choreographic authorship as distinct from social dance steps and simple routines supports a limited interpretation of the meaning of the term. Such a narrow interpretation is consistent with the Varmer study and is also consistent with a 1961 Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law.[29] The Report states:

> a. Choreographic works as proper subject of copyright
>
> Choreographic works, such as ballets, represent a recognized art form, and undoubtedly constitute works of authorship. Until fairly recent times it was difficult to secure copyright protection for choreographic works because of the absence of practical means of fixing them in a tangible form. Fixation is now feasible in the
>
> form of systems of notation recently developed or in the form of motion pictures.[30]

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[28] 17 U.S.C. § 102(a).

[29] Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, House Comm. of the Judiciary, 87th Cong., Copyright Law Revision Part 1 (Comm. Print 1961) at 16-17.

[30] Varmer also made this point: "despite the antiquity of the dance as a form of theatrical art, it was not until recently that standard forms of notation for dance movements—for example, the Laban system of notation, first published in 1928—were devised and generally utilized by the practitioners of the art." Varmer at 93, citing, Ann Hutchinson, The Preservation of the Dance Score Through Notation, in Sorell, THE DANCE HAS MANY FACES, 49-53 (1951). This is significant in that dance was a performance art that was historically incapable of distribution, and thus, incapable of being "published" in the copyright sense. Before means of fixation were available, "the knowledge of dance creations of a choreographer was largely a matter of memory,

For purposes of copyright at least, the term "choreographic works" is understood to mean dance works created for presentation to an audience, thus excluding ballroom and other social dance steps designed merely for the personal enjoyment of the dancers. This distinction is important because the copyright protection of choreographic works is concerned mainly with their public performance.

b. Coverage under the present law

Although not mentioned by name in the present copyright statute, choreographic works have been regarded as copyrightable if they qualify as "dramatic compositions." There are some old court decisions indicating that a dance which presents a story or definite theme qualifies as a "dramatic" work.

The treatment of choreographic works as a species of "dramatic compositions" for copyright purposes has two virtues: (1) it has served to define the choreographic works protected as being dance works created for presentation to an audience; and (2) it has placed choreographic works in an existing category in which the rights of the copyright owner are established.

c. Choreographic works as distinct from dramatic works

Treating choreographic works as a species of "dramatic compositions," however, has one serious shortcoming. Many choreographic works present "abstract" dance movements in which, aside from their esthetic appeal, no story or specific theme is readily apparent. Whether such "abstract" dances qualify as "dramatic compositions" is uncertain. We see no reason why an "abstract" dance, as an original creation of a choreographer's authorship, should not be protected as fully as a traditional ballet presenting a story or theme.

In view of the doubt as to whether "abstract" dances would come within the category of "dramatic compositions," we believe that choreographic works should be designated as a separate category. The statute should make clear that this category covers only dances prepared for the presentation to an audience. We believe that the rights of the copyright owner in dramatic works are appropriate for choreographic works.

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and the preservation of a particular dance depended on one person teaching it to another by word of mouth and demonstration." Varmer at 93-94.

d. Recommendations

(1) Choreographic works prepared for presentation to an audience should be mentioned specifically in the statute as a category of copyrightable works.

(2) They should be given the same protection as is accorded to dramatic compositions.

In the 1965 Register's Supplemental Report, the Copyright Office revised its recommendation to restrict protection to choreography prepared for presentation to an audience. The Register stated:

> Similarly, since "choreographic works" has a fairly definite meaning that excludes social dance steps and simple routines, and since the phrase recommended by the *Report*, "prepared for presentation to an audience," might be unnecessarily restrictive, we decided against any definition of the term.[31]

Congress adhered to the Register's view that "choreography" had a fairly definite meaning, and that a definitional requirement of presentation to an audience was unnecessary. However, the legislative history makes it quite clear that "choreography" was always viewed as distinct from social and ballroom dances. In those dances, the goal is not the enjoyment of an audience from a public performance of the choreography, but the enjoyment of the dancers themselves derived from their own dancing. In addition, social and ballroom dances typically are not created for professional dancers as are ballets or abstract choreographic works, but rather are created for the general public to engage in. In fact, while social dances and simple dance routines or movements can generally be performed by the public, choreographic works typically cannot.

The fact that social and ballroom dances are created with the intention that they are to be publicly performed by the general public is a critical issue. Were a social or ballroom dance to be within the subject matter of copyright, *every individual who danced publicly would be infringing the rights of the copyright owner*. And unlike singing a song in the shower, which would constitute a *private* performance, social dances are usually performed in public, and also are performed by the general public. Ballroom and social dances typically take place in a location open to the public or at a place where a substantial number of people outside the normal circle of a family and its social acquaintances are gathered. Were a social or ballroom dance to be within the subject matter of copyright, every

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[31] Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law; 1965 Revision Bill, House Comm. on the Judiciary, 89th Cong., Copyright Law Revision Part 6 (Comm. Print 1965) at 6.

individual who danced publicly would be infringing the rights of the copyright owner. There were clear public policy justifications for Congress's limitation of the scope of choreographic subject matter. Moreover, if social dances were protected as choreography, the improper or unskilled execution of the dance, including changes to modify the dance to the age or ability of the dancer, could conceivably result in liability for infringement of the copyright owner's exclusive right to prepare derivative works.[32]

Simple dance routines are excluded from the scope of choreography for similar reasons. A simple routine that is comprised of or repeats a relatively small number of movements, or the selection and arrangement of a relatively small number of common kinetic movements does not rise to the level of choreographic authorship. The perceived deficiency under the 1909 Act was that modern dance and abstract ballets might not be protected since they did not tell a story. The goal was to eliminate the requirement of storytelling as a condition of eligibility. But although modern and abstract dances did not clearly "tell a story," they were comparable to ballets in their compositional nature and were intended to be performed before an audience. In contrast, a simple dance routine, standing on its own, is not comparable to a ballet or an abstract modern dance. A simple dance routine may be part of, or supplement, another work, and when combined into a copyrightable whole with other forms of authorship may be copyrightable, but would not be copyrightable as a separate and distinct work of choreographic authorship.

Similarly, the textual description of a social dance or simple routine may be copyrightable as a literary work, or a video of a performance of an uncopyrightable dance may be protectible as a motion picture. But the scope of protection for both examples would cover only the description or specific depiction of the dance, not the dance itself. Such a copyright on the description or depiction would not extend to the uncopyrightable element being described or depicted. A literal reproduction of the description or depiction would infringe the copyright, because such a reproduction would infringe the expressive elements of the description or depiction. However, copying or publicly performing the uncopyrightable dance itself, would not infringe the copyright in the literary work or the motion picture, since uncopyrightable dance is not within the scope of the protection of such a copyrighted work.

Just as social dance in general is not copyrightable, a simple variation of a tango or a line dance would still constitute a social dance and not be copyrightable. Adding a few additional movements to a social dance would not alter the intrinsic nature of the dance as a social dance. However, if a choreographer utilized and built upon basic social dance steps

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[32] House Report 94-1476 at 62. ("The exclusive right to prepare derivative works, specified separately in clause (2) of section 106, overlaps the exclusive right of reproduction to some extent. It is broader than that right, however, in the sense that reproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form."

as part of a larger, more complex compositional work, the result may well be a copyrightable choreographic work. Similarly, if a social dance or a dance routine is incorporated into a film or musical performance, the combination into a coherent whole would be protectable as a motion picture, and the component dance may be protectable as a choreographic work if the choreographer's adaptation of the social dance or routine added sufficient choreographic authorship to transform it into something more than a social dance or simple routine. Similarly, choreography in a music video (*e.g.*, Michael Jackson's "Thriller") or a choreographed scene from a movie (*e.g.*, Gene Kelly dancing in "Singing in the Rain") may support a claim of choreographic authorship with respect to the claim in the overall choreographic routine (apart from the copyright in the motion picture).

The ease with which dance can now be fixed will invariably lead to many new and varied claims in choreographic authorship. Since the enactment of the 1976 Act, there has been an increase in the number and kind of works that have claimed choreographic authorship. This change appears to be due not only to the independent classification of choreographic works within the categories of authorship, but also a result of changes in the technologies of fixation. The ease with which simple routines, exercise routines, and social dances can now be fixed in video may have led to a misplaced belief that such fixation qualifies such efforts as "choreography." Not only has the advent of inexpensive video-recording capability altered the practical obstacles to fixation that existed when Labanotation was one of the only forms of fixation, but Copyright Office Practices have also changed to allow textual descriptions to serve as a deposit.[33]

The Copyright Office has long been concerned about whether some claims are sufficiently within the nature of what Congress intended when it extended protection to choreographic works as distinct subject matter in section 102(a). Videos of exercise routines, juggling acts, yoga stances, etc., all test the limits of this new category of copyrightable authorship. The Review Board now finds it necessary to deal with this issue more thoroughly, and the Copyright Office intends to clarify its registration practices to implement the distinctions that the Office finds that Congress had in mind when it extended copyright protection to choreography.

On the issue of the registrability of "choreography," the Review Board must interpret the statute in order to carry out its statutory obligation to determine whether the deposit contains copyrightable subject matter. Congress intended to expand the scope of protection for choreography beyond the 1909 Act's requirement that a choreographic work must tell a story in order to come within the scope of a "dramatic composition." But Congress did not intend the independent category of "choreography" to extend to all forms of dance.

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[33] *See* Compendium II, Copyright Office Practices, § 450.07(c) (1984) ("Textual description. Precise explanations in narrative form, whether in copies or phonorecords, are acceptable if the description is specific enough to indicate detailed movements of the dancers. Where the description is not sufficiently specific, it cannot be registered as a choreographic work, but may be registrable as a literary work.").

Choreography is a distinct subset of dance which excludes social dance, ballroom dance and simple routines.

B. Legal Analysis

For the reasons stated below, the Copyright Office Review Board finds that THE ELECTRIC does not constitute a copyrightable choreographic work, but rather is both a social dance and a simple dance routine—subject matter that Congress intended to be excluded from the scope of copyright protection.

As discussed above, Congress believed that "choreography" had a fairly settled meaning, and that this term did not include "social dances" or simple routines. Although you claim that Mr. Silver created the dance with the intent that it was to be performed by professional dancers, this fact alone does not create a work of choreography. The creation of a work for skilled dancers may be a factor to consider in assessing whether or not a work is a work of choreography or a social dance, but other characteristics about the dance must also be considered. Moreover, the intent of the author typically does not control the subject matter of a work; to determine whether it is a work of choreography, the work must be examined objectively rather than with a focus on the subjective intent of its creator. In this case, the objective facts relating to how THE ELECTRIC was performed immediately after it was made public seems much more relevant than any subjective intent of Mr. Silver. You state that after the club's opening and the initial performance, "the club made the decision to open its doors to the general public." Within a short time after the initial performance, this work was performed by the general public with Mr. Silver's knowledge. To the extent that the nature of the performers of the work is relevant, the intent of the author is less revealing than the objective fact that the public perceived this work as a social dance. Moreover, despite the claim that the work was intended to be performed by skilled dancers, the evidence suggests that this work was immediately accessible to the skill of the general public. A social dance is not transformed into a work of choreography simply because the creator intends the social dance to be limited to skilled professionals. The intent of the author provides little information in distinguishing between social dances, simple routines, and works of choreography.

However, the most compelling objective evidence of whether a work constitutes choreography is the work itself. In its examination of THE ELECTRIC, the Review Board takes administrative notice of Mr. Silver's existing registration of a motion picture incorporating a performance of THE ELECTRIC.[34] In that motion picture, Mr. Silver explains the dance while a group of teenagers loosely follow the instructions as a group.

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[34] Registration No. PA 1-274-833. A copy of the video deposited with the Copyright Office is available online, linked from Mr. Silver's website, at: http://vids.myspace.com/index.cfm?fuseaction=vids.individual&videoid=1093200188.

The dance depicted involves a series of simple movements that the group follows in loose unison, subsequently repeating those same movements in different directions. What is depicted, even under Mr. Silver's direction, is more in the nature of a social dance than a work of choreography. This dance is a form of line dance and is described as such on Mr. Silver's website.[35] The movements are comprised of simple "grapevine" steps to the left and right, as well as forward and backward. The primary hand movement in the dance consists of a clap at the end of most series of simple steps. There is a small amount of bending the body forward and backward, and a few hops, but the predominant movements are simple steps in four directions.

The Review Board has no difficulty in describing this depiction of THE ELECTRIC as a depiction of a social dance or, alternatively, a simple routine. The description on Mr. Silver's website of THE ELECTRIC as a line dance is accurate, and what is depicted in the video falls easily within the world of social dance. Moreover, the text deposited in connection with the application currently under review describes a series of social dance steps. Those dance steps – a handful of basic steps – appear to be the same steps that are depicted in the motion picture deposited in connection with Registration No. PA 1-274-833 and constitute nothing more than a simple routine. Moreover, what they depict is, to the perception and in the opinion of the Board, a social dance.

The assertion that the "current version of the dance" is "derived" from Mr. Silver's original creation is uninformative. The original work is not being denied protection due to the existence of a popular derivative version that is a social dance. In Mr. Silver's words, the dance that evolved, the Electric Slide, "is an 18 step variation of [his] original 22 step" work.[36] The addition or removal of a few steps does not alter the nature of a social dance or simple routine and it is not dispositive in this case. The evidence tends to reveal that what initially qualified as a social dance and a simple routine was simplified into a slightly easier social dance and simple routine. The Labanotation comparison of THE ELECTRIC and the Electric Slide submitted to the Review Board by you demonstrates that the changes to THE ELECTRIC that were made to create The Electric Slide resulted in nothing more than a trivial variation of the original dance. For example, rather than stepping in a grapevine movement, the Electric Slide substitutes a slide of the foot instead of a step. None of the differences between the two dances rise to more than *de minimis* variations of the same simple routine. In other words, neither THE ELECTRIC nor the Electric Slide is a choreographic work, and the inclusion of four additional steps does not alter that conclusion.

Furthermore, the fact that the Copyright Office's first refusal did not address the subject matter issue does not preclude the Review Board from now considering this issue. The Review Board examines refusals of registration on a *de novo* basis. Therefore, despite Mr. Silver's belief that the Office viewed the work as copyrightable dance, or despite any

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[35] http://www.the-electricslidedance.com

[36] *See* Email from Richard Silver to Laura Lee Fischer, Copyright Office of 2/29/08.

actual or perceived assurances of the copyrightability of a work from anyone in the Office, the Review Board is not bound by prior statements and is entitled to raise legal issues that were not previously addressed. We note that in refusing Mr. Silver's first request for reconsideration, Ms. Giroux concluded that THE ELECTRIC could not be registered because it is a social dance; therefore, you were fully apprised on this basis for refusal prior to submitting your second request for reconsideration to the Review Board, and you were given, and took advantage of, the opportunity to address the issue on the merits.

As discussed above, in the historical development of the creation of a new category of copyrightable authorship, the "essential distinction" between relatively simple dances, such as social dances, and choreographic works is whether they are created as a participatory activity for those who participate as dancers themselves or for the enjoyment of an audience.[37] Such a distinction cannot be made on the basis of an isolated performance of the work, but rather must be based on the intrinsic nature of the work. Where, as here, the work immediately became a social dance phenomenon, objective evidence underscores the social nature of this work, despite the divergent intent of the author.

THE ELECTRIC is also exclusively comprised of a number of simple movements in a largely repetitive fashion. For the sake of argument, even if the work was not found to be a social dance, it would constitute a simple, uncopyrightable dance routine. Even though individual movements were arranged to form THE ELECTRIC, the resulting whole does not rise to the level of a work of choreographic authorship. While the selection and arrangement of uncopyrightable elements *may* constitute copyrightable compilation authorship, that selection, coordination, or arrangement must be "in such a way that the resulting work as a whole constitutes an original work of authorship."[38] In the case of a claim for choreographic authorship, selection, coordination, or arrangement of uncopyrightable steps must be considered, but that selection, coordination, or arrangement must be done in such a way that the result as a whole constitutes choreographic authorship as opposed to a social dance or a simple routine. THE ELECTRIC does not rise to this level.

Placed on a continuum where, at the one end is a complex ballet, and on the other is a simple, social routine, such as The Twist, THE ELECTRIC would not fall even close to the dividing line between copyrightable and uncopyrightable authorship. THE ELECTRIC falls well within the realm of uncopyrightable dance comprised of a simple selection and arrangement of common movements into an uncopyrightable whole. THE ELECTRIC does not represent a related series of dance movements and patterns organized into a coherent compositional whole that would form the basis for a claim of choreographic authorship. Although dramatic content is not required, THE ELECTRIC does not contain any dramatic content to bolster a claim of choreographic authorship, and bears no resemblance to a

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[37] *See* supra at p.7, citing Varmer.

[38] 17 U.S.C. § 101 definition of "compilation."

copyrightable work of abstract or modern dance—works that were intended to be covered by this new category of copyrightable subject matter.

While none of these characteristics in isolation may be determinative of whether a work is a social dance, simple routine, or choreographic work, all of these characteristics considered together place THE ELECTRIC far on the side of social dance and simple routine rather than on the side of choreographic works that Congress sought to protect. There is no bright line, but rather a continuum. On the one extreme, there are simple routines and social dances. On the other extreme, we might find complex ballets and abstract compositions. Many works will fall somewhere in between and an analysis involving the considerations raised herein may involve difficult decisions. There are no such difficulties in this case.

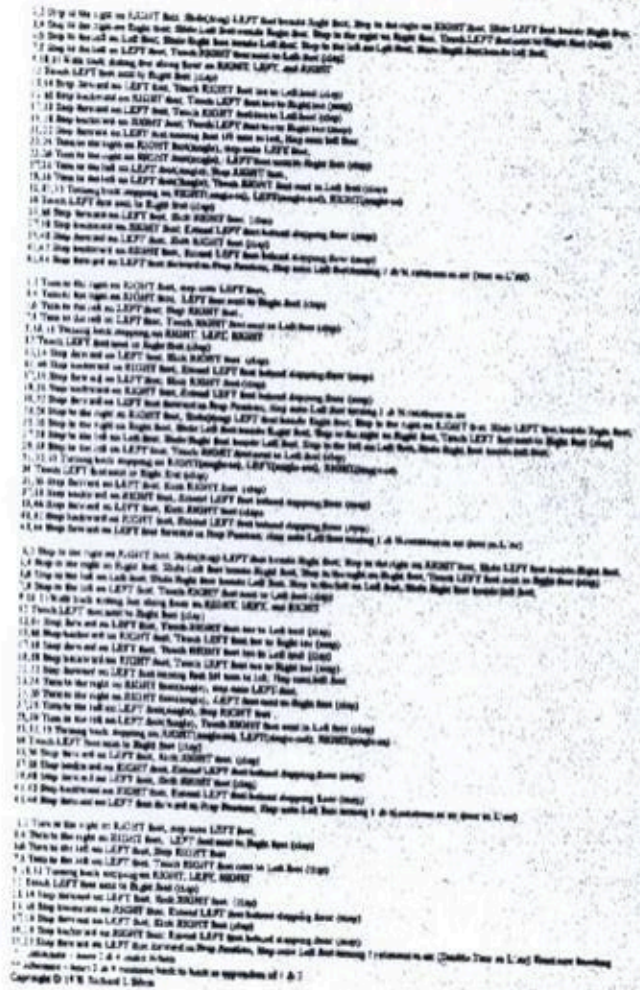
Instead of containing an expressive quality to be observed by an audience, THE ELECTRIC invites the performance of members of the audience as a participatory, social experience. THE ELECTRIC combines a number of common dance and physical movements (*e.g.*, the "grapevine" from ballet, a turn, a hop, a clap, a finger snap, etc.,) in a common manner. This dance is very similar to many social line dances, including the subsequent Cha Cha Slide that, like the Electric Slide, has become a commonplace social dance at social functions, such as primary school events and weddings. Despite whatever intent Mr. Silver may have had, the intrinsic nature of this dance is, objectively, a simple routine and a social dance.

For the reasons stated above, the Review Board finds that THE ELECTRIC is a simple routine and a social dance. As a simple routine and social dance, the Review Board finds that the deposit cannot support a claim of choreographic authorship. The Copyright Office would accept the deposit as support for a claim in "text instruction for a line dance," protecting the expression of the instructions as a literary work, rather than a choreographic work. However, the Review Board affirms the denial of registration for THE ELECTRIC as a choreographic work. This constitutes final agency action on this claim.

Sincerely,

/s/

Marybeth Peters
Register of Copyrights
for the Review Board
United States Copyright Office



VAMPS DISCO PRESENTS

"The Electric"

Choreographed

By

Richard L. Silver

June 1976

Copyright ©

1976 Ric Silver

"The Electric"

By The Silver Star Dance Troupe (CO)

CHOREOGRAPHER: Ric Silver

Dressed to: "Electric Boogie" by Marcia Griffiths Warner & Marcia by Marcia Griffiths