

A Reader

Edited by Daniel McClean

Artist

Authorship

 Legacy

Published in 2018 by Ridinghouse
46 Lexington Street
London W1F 0LP
United Kingdom
ridinghouse.co.uk

Distributed in the UK and Europe by
Cornerhouse Publications
c/o Home
2 Tony Wilson Place
Manchester M15 4FN
United Kingdom
cornerhousepublications.org

Distributed in rest of world by
ARTBOOK | D.A.P.
75 Broad Street, Suite 630
New York, New York 10004
artbook.com

Special thanks are due to Zsofia Jilling,
Sophie Kullmann, and Mark Thomson

Texts © the Authors
Introduction © Daniel McClean
For the book in this form © Ridinghouse

All rights reserved.
No part of this book may be reproduced
or transmitted in any form or by any
means, electronic or mechanical, including
photocopying, recording or any other
information storage or retrieval system,
without prior permission in writing from
the publisher.

British Library Cataloguing-in-
Publication Data
A full catalogue record of this book is
available from the British Library.

ISBN 978 1 909932 45 6

Copyedited by Zsofia Jilling
Proofreading by Sophie Kullmann

Designed by Mark Thomson

Printed in Estonia by Tallinna
Raamatutrükikoja oü

frontispiece:
Sol LeWitt
Wall Drawing #528/G, 2005
Private collection

Ridinghouse

Thing 000955 (Martha Graham's Choreographies)

AGENCY

In 1925, after completing her studies with Ruth St. Denis and Ted Shawn at the Denishawn School of Dancing and Related Arts in Los Angeles, Martha Graham (1894–1991) began to make dances. In 1926 she gave the first public performance of her dance *Chorale*, after which she formed an all-woman company named the Martha Graham Group. Later, when men were invited to join the group, she changed the name to the Martha Graham Dance Company.

In the late 1920s Graham developed her own system of dance exercises and movements focusing on contracted muscles and energy release. Around 1930, after teaching her work informally and as an instructor at various institutions, Graham also opened a school called the Martha Graham School of Dance. Graham ran both the dance company and the dance school.

In 1948 Graham founded and led a nonprofit corporation to support her work. Initially it was known as the Martha Graham Foundation for Contemporary Dance, but in 1968 the corporation was renamed the Martha Graham Center of Contemporary Dance.

In December 1956, on the advice of her tax accountant, Rubin Gorewitz, Graham also founded a second nonprofit corporation for the school. It was called the Martha Graham School of Contemporary Dance. In January 1957 Graham sold her sole proprietorship to the school and entered into a ten-year employment agreement with the school to serve as a program director. In June 1966 Graham's employment agreement was extended for another ten years. Graham's job title at the school later changed to artistic director. As artistic director, her responsibility was to create new dances, to maintain the repertory of

dances, to rehearse with the company, and to supervise the school. Graham worked with both nonprofit corporations: the Martha Graham Center of Contemporary Dance and the Martha Graham School of Contemporary Dance. The center oversaw and funded the performances of the Martha Graham Dance Company, Graham's unincorporated performance group, and the dance company often used dancers from the school to participate in performances. The center operated as an umbrella organization, encompassing the teaching, choreographing, and performing of dances by the school and the dance company. In 1968 Graham assigned all performing rights of her choreographies to the center. Graham served as artistic director and board member of both the center and the school until her death.

Around 1967 Martha Graham, then in her seventies, became acquainted with a twenty-six-year-old freelance photographer named Ronald Protas. With Protas's support, she pulled herself out of a depression that had developed when she retired from dancing. Protas and Graham became close friends. In 1972 Protas became an employee of the Martha Graham Center of Contemporary Dance. Although he had no prior dance background, Graham increasingly trusted him to represent her in both personal and professional matters. By 1975 Protas had become executive director of the center and a board member of the center and the school. In 1980 he was given the title of co-associate artistic director. As Graham's health waned in the final years of her life, Protas became her spokesperson. On January 19, 1989, Graham wrote a will naming Protas her sole executor and legatee. She gave him her personal property, her residuary estate, her personal papers, the use of her name, and any rights or interests in dance works, musical scores, and scenery sets.

Martha Graham died in April 1991 and Protas succeeded her as artistic director of the center. As heir, Protas claimed ownership of the copyrights in all of Graham's seventy-one choreographies. In 1998 he placed all copyrights in the Martha Graham Trust, a revocable trust that he had created and of which he was trustee and sole beneficiary. The trust licensed many of the dances and sets. In 1998 the trust sold

numerous books, musical scores, films, and tapes of performances and dance rehearsals and personal files relating to Graham's choreographies to the Library of Congress for \$500,000. As a result, the relations between Protas and the dancers of the company deteriorated. Many dancers also disagreed with the way Protas directed the center.

On July 15, 1999, the center and the school proposed a ten-year license agreement with the Martha Graham Trust. Their principal motive was to persuade Protas to resign as artistic director. The license agreement purported to license the ballets, sets, and costumes. The trust would give the school an exclusive license to teach the Martha Graham technique and give the center a nonexclusive license to present live performances of Graham's dances; to use sets, costumes, and properties; to use Graham's images; and to use the Martha Graham trademark. The center in return would agree that Protas approves the selection of a new artistic director, that he stays a member of the board, that he gets paid a salary of \$55,000 to \$72,000 for ten years, and that they bill him as artistic consultant.

In 2000, when Protas and the center failed to find a mutually agreeable replacement for the artistic director, the board voted to remove Protas from the post. On May 25, 2000, Protas sent a letter to the center's board of directors, terminating the license agreement with the Martha Graham Trust. Shortly thereafter, the board voted to suspend operations due to severe financial difficulties. Meanwhile, Protas, acting through the trust, founded the Martha Graham School and Dance Foundation, also a not-for-profit corporation.

In July 2000 Protas began to register copyright in forty of Graham's choreographic works as unpublished works. He obtained certificates of registration for thirty of Graham's dances as unpublished works. By agreement with the trust, the Martha Graham School and Dance Foundation became the exclusive licensee in the United States for live performance of virtually all of Graham's dances and use of the Martha Graham trademarks.

In 2001, after receiving substantial funding, the center and the school reopened. The center applied for copyright registration of fifteen

of Martha Graham's dances. In January 2001 the Martha Graham Center of Contemporary Dance also obtained registration certificates for initial and renewal terms for some of Graham's dances.

Protas sued the Martha Graham Center of Contemporary Dance and the Martha Graham School of Contemporary Dance for trademark and copyright infringement. He initiated a lawsuit to forbid the center and the school from using the Martha Graham trademark, from teaching the Martha Graham technique, and from performing all Graham's dances. He claimed that the trust owned all rights in the dances, that the Martha Graham School and Dance Foundation was the current and authorized licensee of such rights, and that any unauthorized use of these dances would constitute willful copyright infringement. But the Martha Graham Center claimed that the dances, sets, and costumes at issue belonged to the center either by virtue of the work-for-hire doctrine or Graham's assignments.

On August 7, 2001, the first court case, *Martha Graham School and Dance Foundation v. Martha Graham Center of Contemporary Dance*, took place at the District Court for the Southern District of New York. Judge Miriam Cedarbaum held that the Martha Graham Center of Contemporary Dance and the Martha Graham School of Contemporary Dance proved they were prior users of the trademarks and that Protas could not preclude the center and school's use of a name that they bought, used, and owned prior to Protas's registration of the trademark.¹ Protas appealed the decision. On July 2, 2002, the second court case took place at the United States Court of Appeals. The court concluded that Martha Graham's consent to the center and school's use of her name was not a license, but was an irrevocable assignment.

Protas then brought action against the center and the school to determine ownership of copyright in dances created by Graham and of related costumes and sets. On August 23, 2002, the third court case, *Martha Graham School and Dance Foundation v. Martha Graham Center of Contemporary Dance*, took place at the District Court for the Southern District of New York. Judge Miriam Cedarbaum held that:

What property did Martha Graham, the great dancer, choreographer, and teacher, own at the time of her death in 1991? That is the central question in the second phase of this lawsuit. The main dispute is with respect to ownership of copyright in the dances she created. . . . The parties agree that, during her lifetime, Graham created 70 dances that are fixed in a tangible medium of expression from which they can be reproduced. 34 of those 70 dances were created after 1956, during Graham's employment by [the Martha Graham Center of Contemporary Dance], and 36 were created prior to 1956. . . .

During a bench trial held between April 22 and April 29, eighteen witnesses testified in the courtroom and designations from the deposition of one witness were submitted. This trial was an effort to recapture a history that partially predated the knowledge and memory of the living witnesses. Accordingly, the few ancient documents that were produced became very important guideposts. . . .

I. The License Agreement . . .

This agreement is incomplete because no "Applicable Works Addendum" was ever finalized by Protas. . . .

II. Significance of Publication. . . .

The 1976 Act defines publication: "*Publication*" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication. . . .

Accordingly, 26 of the [filmed] dances have been published. . . . With respect to published works, the affixation of adequate notice was the principal "statutory formality" required for copyright protection prior to March 1, 1989. On March 1, 1989, United States adherence to the Berne Convention abolished affixation of notice as a statutory requirement for securing copyright. . . . Proof of authorship may be sufficient to establish copyright ownership in an unpublished work. . . .

III. Certificates of Copyright Registration . . .

Both sides have procured certificates of copyright in dances described in the applications as unpublished works. Protas has 30 such certificates, and [Martha Graham Center of Contemporary Dance] 12. . . . It is undisputed that the Copyright Office has no record of any copyright registration made prior to 2000 for any of the dances at issue. . . .

A preponderance of the credible evidence shows that 18 of the 30 dances registered by Protas as unpublished had been published at least seven years before the Copyright Office received any applications for copyright registration from him. . . . In 2001, the Center obtained certificates of copyright registration for 12 post-1956 works as unpublished works made for hire and certificates of copyright renewal for three published works made for hire. . . . Both Protas and the Center have obtained certificates of copyright registration for . . . [the same] eight dances. . . . With respect to dances as to which there is no evidence of publication, [Protas] has obtained nine, and [Martha Graham Center] have obtained six, non-competing certificates of copyright registration. . . .

IV. Dances Created by Graham During the 35 Years that She Was Employed by [Martha Graham Center of Contemporary Dance] . . . During the 35 years that Martha Graham was employed by the [Martha Graham Center of Contemporary Dance], she created 34 dances. . . .

In 1956, Graham entered into a ten-year employment agreement with the School for the position of Program Director. Her title of employment later changed to Artistic Director. . . . Graham remained a salaried employee of the Center until the time of her death in 1991. . . .

It is undisputed that Martha Graham was ultimately responsible for making all final artistic decisions relating to the dances. Nevertheless, a preponderance of the credible evidence shows that she created the dances as an employee. . . . [The Martha Graham Center of Contemporary Dance has] shown by a preponderance of the credible evidence that all of the 34 dances created by Martha Graham while she was employed by them between 1956 and her death in 1991 were works made for hire. . . .

Thing 000955 (Martha Graham's Choreographies)

V. Works Created by Graham prior to 1956 . . .

Of the 70 dances at issue, Graham created 36 prior to the time that she commenced her employment with the [Martha Graham Center of Contemporary Dance] in 1956. Of the 36 pre-1956 dances, 16 have been published. . . .

Copyrights secured before January 1, 1964 are governed by the stringent renewal requirements of the 1909 Act. . . . Under the renewal provisions of the 1909 Act, the copyright term of published works ended 28 years after the date of first publication with adequate notice unless copyright was renewed in the final year of copyright protection. . . . Of the 16 published dances created prior to 1956, ten were first published before January 1, 1964. . . . Since the Copyright Office has no record of any registration prior to 2000, the evidence is clear that any copyrights secured in those ten published works were not timely renewed. Accordingly, those ten works are in the public domain, even if they had been first published with adequate notice of copyright. . . .

A preponderance of the credible evidence shows that prior to 1956, Martha Graham was commissioned to create seven dances by a number of renowned musical and cultural organizations and that these dances were first performed between 1944 and 1953. . . . With respect to all of the commissioned works, no party has proved that Graham and the commissioning parties intended the copyright to be reserved to Graham. . . .

There is no writing in evidence in which Graham assigned copyright in the dances to the Center. . . . In January of 1957, Graham gave all her theatrical properties to the [Martha Graham Center of Contemporary Dance], but the document conveying these properties did not mention the copyright in the choreographic works. . . . A preponderance of the credible evidence shows that between January of 1957, but prior to 1965 or 1966, Graham assigned to the [Martha Graham Center of Contemporary Dance] copyright in 21 non-commissioned, pre-1956 works that were unpublished at that time. . . . Documentary evidence and the credible testimony of several witnesses show that throughout the 1960s, 1970s, and 1980s, the [Martha Graham Center of Contemporary Dance]

consistently acted as the owners of the ballers created by Graham prior to 1956, and that Graham did not object to such actions by the [Martha Graham Center of Contemporary Dance]....

Sixteen of the pre-1956 works have been published. As discussed above, ten of these works are in the public domain because of the failure to renew copyright timely, and two dances, *Herodiade* and *Cave of the Heart*, are commissioned works. The right to renew the copyright in *Seraphic Dialogue* has reverted to Protas. The remaining three works are *El Penitente* (published 1991), *Errand into the Maze* (published 1984), and *Diversion of Angels* (published 1976). [The Martha Graham Center of Contemporary Dance] copyright in *El Penitente* has been preserved because it was first published in 1991, after the permissive notice requirements of the Berne Convention Implementation Act took effect. With respect to the remaining two works, *Errand into the Maze* and *Diversion of Angels*, there is no evidence that copyright in these works was secured upon first publication by the affixation of the required notice of copyright.

VI. Sets and Costumes...

As discussed above, Graham transferred all of her then existing theatrical properties, costumes, and stage equipment to the [Martha Graham Center] in January of 1957. Accordingly, [Martha Graham Center of Contemporary Dance] own[s] all of that property.²

The court concluded that copyrights in a total of 45 dances belonged to the Martha Graham Center of Contemporary Dance.³ The copyright in only one dance, *Seraphic Dialogue*, belonged to Protas. Neither side has established ownership in twenty-four dances. Of those twenty-four dances, ten works, two of which were commissioned, are in the public domain for lack of timely renewal.⁴ And five dances belonged to commissioning parties who were not involved in the action.⁵ The remaining nine dances have been published, but neither side has shown whether any of those dances were published with adequate notice of copyright.⁶ The Martha Graham Center of Contemporary Dance was entitled to a

declaration of ownership of all the remaining sets and costumes for the dances.

The same year, the center and the foundation both appealed this decision. On August 18, 2004, the court case *Martha Graham School and Dance Foundation v. Martha Graham Center of Contemporary Dance* took place at the United States Court of Appeals. Judge Jon Newman held that:

The critical events span sixty-five years, many of the pertinent facts are obscured by inadequate recordkeeping, and the copyright issues require consideration of several provisions of both the 1909 and 1976 Copyright Acts.... Explicit federal copyright protection for choreography was not provided until the 1976 Act included choreographic works among the categories of works eligible for protection.... Under the 1909 Act, choreography could be registered, pursuant to regulations, as a species of dramatic composition.... Like other creative works, dances are available for statutory copyright if fixed in any tangible medium of expression.

Under the 1909 Act, applicable to works created before January 1, 1978, state common-law copyright provided protection until first publication, and thereafter the work was entitled to an initial 28-year term of statutory copyright, provided that adequate statutory notice was given at publication, or appropriate registration and deposit were made.... In the absence of adequate statutory notice at publication, the work was injected into the public domain. If adequate statutory notice was given, then application for renewal made during the last year of the initial term would extend the copyright for a renewal term of 28 additional years.

Under the 1976 Act, works that were created on or after January 1, 1978, acquired statutory copyright upon creation.... The copyright terms for works [registered between January 1, 1964 and December 31, 1977] in their initial 28-year term on January 1, 1978.... are automatically renewed for 67 years after the initial 28-year term ends.

With respect to works for hire, the employer is legally regarded as the author, as distinguished from the creator of the work.... A work

is made at the hiring party's instance and expense when the employer induces the creation of the work and has the right to direct and supervise the manner in which the work is carried out. . . . The concept of "work made for hire" . . . in the 1976 Act, . . . defines the phrase to mean *a work prepared by an employee within the scope of his or her employment or, for certain types of works, a work specially ordered or commissioned.*

As Graham's beneficiary, Protas inherited the copyrights in *Seraphic Dialogue* and *Acrobats of God*. The District Court correctly ruled that Protas owned the copyright in *Seraphic Dialogue*. However, the District Court erred in ruling that *Acrobats of God* belonged to the Center, and we therefore reverse the District Court's decision with respect to this work.⁷

The appeal court affirmed the district court for most issues in this case, but reversed the district court's determination of ownership of *Acrobats of God* because its renewal term belongs to Protas and vacated and remanded to the district court for determination of ownership with respect to seven dances created from 1956 through 1965, and two dances that were incorrectly deemed unpublished and for recalculation of the amount subject to the constructive trust.

On June 23, 2005, the partly remanded court case *Martha Graham School and Dance Foundation v. Martha Graham Center of Contemporary Dance* took place at the District Court for the Southern District of New York. The court answered the remaining questions of the court of appeals as follows. The dance *Tanagra* was in the public domain. There was no distinct dance within *Frescoes* and there is no dance called *Duets*. The copyright notice appearing at the end of the Kennedy Center Honors television broadcast was sufficient to preserve the copyright by the Martha Graham Center of Contemporary Dance in the excerpt from *Frescoes* that was published in the broadcast. And evidence showed that the common-law copyrights in the seven unpublished dances, created from 1956 through 1965, were also assigned to the center by Martha Graham.⁸

Although the dancers of Martha Graham's company were relieved by this decision, a fear rose in the dance community about the

implications of this conclusion. On the one hand choreographers gained legal protection for their dances with the addition of choreographic works to the copyright act. On the other hand it became obvious that the enforcement of the copyright doctrine interfered strongly with long-held customs in the dance community. According to some customs, dances were preserved by "guardians" of a dance. They teach the integrity of a dance in person, which involves the adaptation of movements in dialogue with the dancers. For many choreographers the fixation requirement of the copyright act is difficult to meet in dance.