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## DANCE AND THE CHOREOGRAPHER'S DILEMMA: A LEGAL AND CULTURAL PERSPECTIVE ON COPYRIGHT PROTECTION FOR CHOREOGRAPHIC WORKS

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Dancing is everywhere - from tenth grade musicals, high school proms, and anniversary parties, to Broadway. Dancing has been referred to as an art, made up of our own creative expressions. All individuals are comprised of the same basic blueprint of bones, organs, tissue, and muscle. It is justified to say that the basic movements of the human body are similar. To dance is to use and build off of these generic abilities. Therefore, can someone really call a human body movement their own creation or invention? This has been a growing problem for the world of dance.

Compare a dance step, such as the traditional box step, to the invention of the telephone. Some might say there is no relation between the two; others would see the apparent connection and similarity, as both are forms of communication. The invention of the telephone was a result of the strategic combination of basic resources to form one unique and efficient device, not unlike a dance performance, where the dancers pool various movements together to create the unique dance. But who invented dance steps such as the box step? Is the inventor the first person to do the movement, or the first to label it? Should another person have to gain permission to reproduce the move-

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ment from the so-called inventor? Can anyone call a series of movements their own?

In today's dance community, the majority of praise is not often shared with others, but claimed by individuals. It is difficult to recognize a person's success if their achievements are based on another person's ideas. To dance is to invent. This is a seemingly simple idea, yet not quite so basic. The mere act of dancing involves the use of the body and the mind, resources that were both inherited from previous 'inventors,' known as choreographers. This article will focus specifically on choreography rights, and the reasons why choreographers need to gain ownership through copyrights.

It is very hard to gain intellectual property rights for choreography because of the abstract nature of dance. This factor, along with financial restrictions and cultural considerations, are reasons why choreographers are not receiving proper protection for their works. In today's society, dance has become more of a business than an art. Yet judges and courts cannot be entrusted to make decisions regarding dance because they cannot appreciate the subtlety of a movement, as can a trained eye. Current literature shows the evolving need for choreographers to seek copyright protection for their works, yet we believe the current intellectual property laws do not provide sufficient protection for choreography in this new generation and culture. Taking financial and cultural aspects into consideration, reforms must be made to the current laws to more effectively incorporate copyright protection for dance.

Many articles have discussed dance and copyright. However, no article has examined dance from a dancer's cultural perspective. This paper examines the current problem of copyrighting choreography from a cultural viewpoint and concludes that the dancer's own culture, with its informal standards, creates barriers to increasing protection from copyright laws.

This article will present specific legal cases involving the need for choreographers to copyright their works and will address whether the need for copyright protection for a dance is overly disputed or immensely neglected. Part I of this article discusses the history and definition of choreography. This section reveals that legal protection of choreography has a checkered history, given legislative reluctance to grant protection to this important art form. Part II examines one of the leading cases addressing intellectual property protection for choreography, *Horgan v. McMillian*. Here, we establish the paramount need for choreographers to gain copyright protection over their works in order to ensure sole and unlimited ownership. Part III discusses another sig-

nificant case, involving Martha Graham and her schools. This discussion connects the need for choreographers to seek copyrights with the presence, or lack thereof, of artistic incentives. Part IV examines the various barriers choreographers face as well as continues to explain how copyright protection can be affected by these hindrances. The assertion is that there is not equity between the barriers mentioned and the ultimate rewards. Part V scrutinizes the heavy influence and involvement of culture in the dance community. It explains the thoughts and values of dancers and choreographers and displays how their culture significantly weighs on their choice to adopt copyright protection. Part VI concludes the article by offering solutions and opinions as to how this dilemma between choreographers and the legal system should be resolved.

### I. THE HISTORY AND DEFINITION OF CHOREOGRAPHY

It is impossible to discuss the need for choreography copyrights without first defining what is meant by choreography. History has shown that the mere definition of choreography has changed through the years, so in order to further analyze related rights we must first look to historical information. In 1909, the Copyright Act did not extend copyright law to choreography because only “useful” art forms were worthy of copyright protection.<sup>1</sup> During that time, Congress used the term “useful” to convey an idea of “morally proper,” and since dance was considered an immoral art form, it never qualified as “useful.” Motion pictures and books were eligible for copyright protection since they were deemed “useful” in the eyes of Congress,<sup>2</sup> because they told stories that taught lessons. These lessons were viewed as tools to help society grow strong and be of high moral character. In the years that followed, Congress consistently rejected any legislation that extended copyrights to choreography, since it never managed to fall into this “useful” category.

The Copyright office finally extended protection to choreographic works in 1947, but only if the dance could be classified as a dramatic, or dramatico-musical, composition.<sup>3</sup> In basic terms, the work had to convey a serious story in order to become eligible for consideration for a copyright. Not surprisingly, when George Balanchine submitted his *Symphony in C* as a ballet for copyright protection in 1953, he was rejected because it did not fulfill the requirements of being either a

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1. See Cheryl Swack, *The Balanchine Trust: Dancing Through the Steps of Two-Part Licensing*, 6 VILL. SPORTS & ENT. L.J. 265, 273 (1999).

2. See *id.* at 274.

3. See *id.* at 272.

dramatic or dramatico-musical composition.<sup>4</sup> Yet, in 1961, when submitted as a motion picture again by Balanchine, *Symphony in C* was quickly copyrighted, because motion pictures were eligible for Copyright protection by that time.<sup>5</sup> The motion picture form of *Symphony in C* told a story and was thus considered to be “useful.”<sup>6</sup>

There were three major reasons why Congress did not extend the copyright law to choreography.<sup>7</sup> The first reason was the issue of “usefulness” as mentioned above – Congress found dance “unworthy” of copyright protection.<sup>8</sup> To label dance as “unworthy” is to say that it is insufficient and undeserving, offering no true benefits to society.<sup>9</sup> It was implied that dance is unable to touch individuals in the way that a romantic movie can impact the romantic tendencies of individuals.

The second reason that copyright was not extended to choreography was that choreography could only be deemed worthy of protection if it told a story, was part of a dramatic work, or conveyed the proper moral tone.<sup>10</sup> This placed significant burdens on choreography because it is not inherently a drama-conveying medium. Choreography is not drama. Rather, it is only a separate art that can draw elements from drama. There is no way dance could fit into these criteria because it was in a completely different category than a dramatic-type work. In fact, Hanya Holm made history in 1952 when she became the first choreographer in the United States to gain copyright protection for *Kiss Me Kate*, because she registered her choreographic play as a dramatico-musical composition.<sup>11</sup>

The third and final reason that choreography was not eligible for copyright protection was that Congress was hesitant to include abstract choreography within the copyrightable limits, because in essence, they did not know how to define ‘abstract’ choreography.<sup>12</sup> It was not until the late 1960s that Congress began to extend copyright protection to ‘abstract’ choreographic works.<sup>13</sup> This helped initiate many changes for the dance community in the years to follow. It was especially imperative that abstract choreography be defined since modern choreography is often built as a series of abstract movements

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4. See *id.* at 275.

5. See *id.*

6. See *id.*

7. See *id.* at 273.

8. *Id.*

9. *Id.*

10. *Id.*

11. See *id.* at 275.

12. *Id.* at 274.

13. *Id.* at 275.

rather than precise steps.<sup>14</sup> Yet in the 1960s, it left many choreographers with only their legs. The Copyright Act of 1976 assisted in changing this issue through an extension of the law to include this abstract form of art.<sup>15</sup>

It was not until the Copyright Act of 1976 that copyright protection was granted to abstract choreography.<sup>16</sup> In the 1976 Act, Congress deemed choreography a "separate viable form of art" and allowed it to be copyrighted.<sup>17</sup> The law stated "copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."<sup>18</sup> The act defines "[w]orks of authorship [to] include the following categories . . . pantomimes and choreographic works."<sup>19</sup> Dance was now seen as a form of communication fulfilled solely by means of facial and bodily movements. "However, the definition section of the Copyright Act . . . contributes to the inadequacy of the Act by failing to specifically define either term."<sup>20</sup>

Questions remained as to what actually constituted a "choreographic work" and Congress was unable to positively label a "choreographic work."<sup>21</sup> Therefore, the Copyright Office developed a formal definition of choreography: "Choreography is the composition and arrangement of dance movements and patterns usually intended to be accompanied by music . . . . To be protected by copyright . . . choreography need not tell a story or be presented before an audience . . . a related series of dance movements and patterns organized into a coherent whole."<sup>22</sup> In addition, the Copyright Office stated that choreographers would now be permitted to use social dance steps and basic routines (including ballet steps) as their stepping stones to further

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14. Jessica Cassity, *Beginner's Edge: Even Modern is Within Your Reach*, DANCE SPIRIT, Dec. 2002, at 40.

15. See Swack, *supra* note 1, at 276.

16. *Id.*; see also Thomas J. Overton, Comment, *Unraveling the Choreographer's Copyright Dilemma*, 49 TENN. L. REV. 594, 595 (1982).

17. Swack, *supra* note 1, at 276.

18. Lauren B. Cramer, Note, *Copyright Protection for Choreography: Can it Ever Be 'En Pointe'?*, 1 SYRACUSE J. LEGIS. & POL'Y 145, 147 (1995)(quoting 17 U.S.C. § 102(a) (2004)).

19. *Id.* (quoting 17 U.S.C. § 102(a)(4) (2004)).

20. Leslie Erin Wallis, Comment, *The Different Art: Choreography and Copyright*, 33 UCLA L. REV. 1442, 1452 (1986).

21. Swack, *supra* note 1, at 276.

22. *Id.*

enhanced performances.<sup>23</sup> Just as numbers are essential 'basics' for mathematician's theories, so are dance steps the basic movements for a choreographer's works. Now there existed legal and formal justification for choreography and choreographers under the Copyright Act. Just as mathematicians received credit for theories, so should choreographers receive credit for their works (dances). Dance was finally finding and defining its own category and criteria within the legal world.

The new 1976 Act provided for registration of a choreographic 'endeavor' if it fulfilled three requirements: "(1) it must qualify as a choreographic work; (2) it must be an 'original'; and (3) it must be fixed in some tangible medium of expression."<sup>24</sup> First, the work must qualify as a choreographic work, based on the formal definition of "choreography" stated previously.<sup>25</sup> Second, the work must be an "original work of authorship" - the choreographer cannot simply copy a dance or performance and then seek copyright protection for it.<sup>26</sup> The basis for originality lies in the physical setup, composition, and execution of the choreography.<sup>27</sup> The choreographer must use his own creativity and imagination to use the basic dance steps, while simultaneously formulating his own unique creation. This new creation is what will be eligible to gain copyright protection. Third, the work must be "fixed in a tangible medium of expression."<sup>28</sup> Simply stated, this means that the work must be set in a stable and permanent medium, whereby it will be perceived or reproduced easily, based on its recognizable traits (i.e. musical accompaniment, staging, etc).<sup>29</sup> On this issue, courts have decided "regardless of the number of times a dance has been publicly performed, a choreographic work is 'created' when it is fixed in a copy for the first time."<sup>30</sup> Therefore, it is essential that choreographers take the appropriate steps toward copyright as soon as possible. This should be done when the choreographer feels he has produced a dance which he is proud to call his own. (It is true that a choreographic work is protected at the time of creation, however special or statutory damages can only be collected if the author has

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23. *Id.* at 277.

24. Cramer, *supra* note 18, at 147.

25. *Id.*

26. *Id.* at 148; Overton, *supra* note 16, at 601.

27. Swack, *supra* note 1, at 278.

28. *See id.*; Cramer, *supra* note 18, at 148; Overton, *supra* note 16, at 602.

29. Swack, *supra* note 1, at 279.

30. *Id.*

gained official and legal copyright protection from the Copyright Office).<sup>31</sup>

The issue of both originality and tangible mediums are both readily apparent in present times, since cases of this nature are fairly new and individually unique.<sup>32</sup> The 1976 Act cannot hope to fully protect choreographic works while the scope of the term remains quite vague.<sup>33</sup> However, future cases will assist the courts and Congress in better defining choreography as a whole to assure proper copyright protection for artists' creations. Setting case precedence is an enormous step for all choreographers, especially those who have been wronged, such as in the case of *Horgan v. MacMillan*.<sup>34</sup>

## II. *HORGAN v. MACMILLAN*: GEORGE BALANCHINE AND THE NUTCRACKER

The case of *Horgan v. MacMillan* is a prominent case which further displays the need for future enhancements and clarifications to the definition of choreography.<sup>35</sup> This case is significant because it specifically involves the dichotomy between choreography in performance form and choreography in book form. It shows how imperative it is for choreographers to attain proper copyright protection. In this case, Barbara Horgan was the executor of the late choreographer George Balanchine's estate.<sup>36</sup> In 1981, Balanchine had received copyright protection for the choreography of his famous ballet, *The Nutcracker*.<sup>37</sup> This granted him rights for his choreographic works under the provisions in the Copyright Act of 1976.<sup>38</sup> After his death, the copyright protection stood firm, as it lasts for the life of the ballet.<sup>39</sup> Problems arose in 1985 when MacMillan, Inc. released a children's book titled *The Nutcracker: A Story & A Ballet* (the book).<sup>40</sup> Throughout various parts of the segmented book, photographs of *The Nut-*

31. See William M. Borchard, *A Trademark is Not a Copyright or a Patent*, October 2003, available at <http://www.cll.com/articles/article.cfm?articleid=121> (last visited November 6, 2004).

32. See Swack, *supra* note 1, at 278.

33. See Patricia Solan Gennerich, *One Moment in Time: The Second Circuit Ponders Choreographic Photography as a Copyright Infringement*, 53 BROOK. L. REV. 379 (1987); Wallis, *supra* note 20, at 1446.

34. See Swack, *supra* note 1, at 268.

35. See *Horgan v. MacMillan, Inc.*, 789 F.2d 157, 158 (2d Cir. 1986).

36. *Id.* at 157.

37. *Id.* at 158.

38. *Id.*

39. See Swack, *supra* note 1, at 271.

40. *Horgan*, 789 F.2d at 158.



cracker ballet performances, dancers, and rehearsal scenes can be clearly viewed by any reader.<sup>41</sup> The creators and publishers of the book apparently received permission from the New York City Ballet to interview dancers and take photographs, however all fell under the category of *The Nutcracker*, which had received copyright protection from Balanchine years prior.<sup>42</sup> Horgan accused MacMillan of copyright infringement, because of their use of photographs of *The Nutcracker* related events without direct permission from Balanchine's estate.<sup>43</sup> Horgan applied for a temporary restraining order and a preliminary injunction "alleging an unauthorized presentation of the Balanchine ballet in book form."<sup>44</sup>

The *Horgan* case was initially heard in the District Court, where both requests on Horgan's behalf were denied.<sup>45</sup> In the decision, the court opined that "choreography is the flow of steps in a ballet," as in Balanchine's performances of videos of *The Nutcracker*.<sup>46</sup> However, Horgan based her claim on a photographic medium, which the court regarded as "catching dancers in various attitudes at specific instants of time," which was a type of work not yet eligible for copyright protection.<sup>47</sup> The judge stated that the photographs were just pictures of dancers, which could not enable *The Nutcracker* to be reproduced as a ballet.<sup>48</sup> He stated, "The still photographs . . . do not, nor do they intend to, take or use the underlying choreography. The staged performance could not be recreated from them . . . not an infringement."<sup>49</sup>

The decision is critical for two main reasons. First, it shows that a judge or a court cannot be responsible for deciding how a work can or cannot be recreated. Only a trained professional (dancer, choreographer, etc) should be able to make that determination. Second, and more importantly, this decision disregards the fact that choreographers can gain a wealth of information about a specific dance or performance from photographs. This is more obvious when considering the lyrics to a song. Just because one can only see the written form of the song, while not hearing the audio version of the musical composition, does not mean you cannot figure out the rhythm and then sing it exactly as the original creator intended. This case is based upon the

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41. *Id.* at 159.

42. Gennerich, *supra* note 33, at 384.

43. Cramer, *supra* note 18, at 151.

44. Gennerich, *supra* note 33, at 385.

45. *Horgan*, 789 F.2d at 158.

46. *Id.*; see Cramer, *supra* note 18, at 152.

47. *Horgan*, 789 F.2d at 162.

48. *Id.*

49. *Id.*

question of how much information a choreographer can obtain from a photograph of a dance. The answer is simple - he can gain enough information to recreate the choreographic work.

Based on this issue, the case was then brought to the Second Circuit, which eventually reversed the decision of the District Court.<sup>50</sup> The Second Circuit ruled that the District Court had been mistaken.<sup>51</sup> The judge went on to acknowledge the amount of pertinent information that is available through photographs of a dance.<sup>52</sup> The court recognized that the form of *The Nutcracker* ballet was being handled in a different medium than its original, in that it was copyrighted as a ballet in motion, and was being discussed in the photographic medium.<sup>53</sup> However, regardless of the medium, the court decided that a "snapshot of a single moment in a dance sequence may communicate a great deal" and an ordinary observer could perceive much more than a mere gesture or position.<sup>54</sup> The defendants, however, argued that *The Nutcracker* ballet was "created for movement . . . no one would mistake an inanimate photograph of a balletic scene for the fluid, vibrant movement of a ballet performance."<sup>55</sup> Yet the Second Circuit stood firm on remanding the District Court's decision. The court also determined that copyright infringement did exist in the form of photographs, and remanded the case to see if Balanchine's copyright protection had been breached.<sup>56</sup>

The *Horgan* case illustrates the necessity for Congress to provide an improved definition of "choreography" as well as to better outline the specific provisions of copyright protection for choreography. As the world of dance experiences changes, choreographers will constantly be developing new creations. These creations must be protected, which means they must be copyrighted. Although the problems often seem to arise after the choreographer's death, the issue remains. Balanchine himself had established the copyright protection as a way to help insure his works would live on.<sup>57</sup> Choreographers are artists whose creations, their dances, are their most significant assets. The use and impact of their dances will be forever enjoyed by future audiences and forever used as learning devices for future choreographers.

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50. *Id.* at 158.

51. *Id.*

52. *Id.*; see Gennerich, *supra* note 33, at 382.

53. See *Horgan*, 789 F.2d at 158.

54. *Id.* at 163.

55. Gennerich, *supra* note 33, at 404.

56. See *Horgan*, 789 F.2d at 162.

57. See Joseph Carman, *Graham Center Victory*, DANCE MAGAZINE, Nov. 2002, at 20.

It is only fair that they should receive the credit for their hard work and innovations, as well as for their contributions to the world of dance. Cases such as *Horgan v. MacMillan* should be used as examples to encourage choreographers to copyright their works, so as to possess exclusive rights and sole ownership to the work and also to maintain the power to decide how, where, and when their work is used.

### III. *MARTHA GRAHAM SCHOOL AND DANCE FOUNDATION V. MARTHA GRAHAM CENTER OF CONTEMPORARY DANCE*

Martha Graham remains one of the most renowned and talented choreographers of the century, even after her death in 1991.<sup>58</sup> She is well known for her interesting developments and innovative creations in dance, as well as for her acute business sense. Martha Graham was herself a talented dancer and choreographer who danced until she was 74 years old.<sup>59</sup> She ultimately affected the entire dance community forever with her enormous range of works as the choreographer of numerous dances and the director of many dance schools and programs.<sup>60</sup> Through the establishment of the Martha Graham School of Contemporary Dance, the Martha Graham Dance Company, and the choreography of over 180 works, Graham's technique and talents revolutionized dance.<sup>61</sup>

In the case of the Martha Graham School and Dance Foundation (the Foundation), versus Martha Graham Center of Contemporary Dance (the School), the issue of choreography rights and protection again emerges into the spotlight of the law.<sup>62</sup> Martha Graham, distinguished dancer, teacher, and choreographer, had been the sole proprietor of a dance school, from 1930 through 1956. During this time, she created thirty-six dances.<sup>63</sup> In 1956, Graham sold her sole proprietorship of the School, but maintained administrative rights.<sup>64</sup> The School's mission had been to "teach the science and art of the dance and in conjunction with the conduct of such school . . . to compose, perform, and demonstrate, and to commission the composition, performance, and demonstration of dances, ballets, dramas, and

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58. See *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 224 F. Supp. 2d 567, 569 (S.D.N.Y. 2002).

59. Susie Elsner Eley, *Dancing Through History*, DANCE SPIRIT, Dec. 2002, at 46.

60. *Martha Graham Sch.*, 224 F. Supp. 2d at 570.

61. See Eley, *supra* note 59, at 46.

62. See *Martha Graham Sch.*, 224 F. Supp. 2d at 570.

63. *Id.*

64. *Id.* at 572.

music . . . .”<sup>65</sup> By 1972, Graham had basically given her administrative duties over to the Board of the School, yet still had sufficient ‘say’ in what occurred there.<sup>66</sup> In 1972, Graham requested Ronald Protas, a non-dancer, be hired as an Executive Director and Board Member of the School.<sup>67</sup> In less than ten years, Protas was promoted to Co-Associate Artistic Director of the School, while still maintaining his role as a key executor over administrative dealings within the business aspects of the School (i.e. hiring, bookkeeping, minutes, etc).<sup>68</sup>

As Graham grew older and lost more and more physical abilities, Protas became her voice. Her death in 1991 left Protas as her sole executor and legatee.<sup>69</sup> Unfortunately, exactly what she owned remained undefined. The problems arose in 1992, when Protas was confronted and told that “an investigation [would] be made as to what rights the Estate actually owns and the status of copyright registration . . . .”<sup>70</sup> Protas’s response was that he “owned everything.”<sup>71</sup> Eight years passed before Protas initiated the copyright protection process. In July 2000, Protas applied for and gained copyright protection for thirty of Graham’s choreographic works, out of forty total requests.<sup>72</sup> The following January 2001, he obtained copyright registration for twelve out of another fifteen requested dances.<sup>73</sup> Simultaneously, the School possessed competing copyright registration certificates for eight out of the forty-two dances that Protas had just succeeded in protecting by copyright.<sup>74</sup> In June 2001, Protas’s attorney received notice from the Copyright Office regarding questions they had about twenty-six published dances.<sup>75</sup> Protas stated that the contract with the School of Contemporary Dance had in fact run out and thus all rights should revert back to the Graham Trust in which he was the executor.<sup>76</sup>

This case becomes even more complex as dates and locations become involved. Martha Graham herself had not obtained copyright protection for her works; it was Ronald Protas who gained the copy-

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65. *Id.*

66. *Id.* at 574.

67. *Id.*

68. *Id.*

69. *Id.* at 576.

70. *Id.*

71. *Id.* at 577.

72. *Id.* at 580.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

rights in Graham's name with her authorization.<sup>77</sup> The problem lies in the fact that Protas was only able to gain copyright protection over Graham's dances because he said they were unpublished.<sup>78</sup> As stated before, choreographic works can only be copyrighted if they are unpublished. However, the Copyright Office disagreed, saying eighteen of the dances had been published seven years before Protas began applying for copyright registration.<sup>79</sup> By looking at the facts together, the incidents become rather clear. Martha Graham had left Ronald Protas her Estate, giving him the sole rights to administer her assets and choreography. Protas waited eight years after Graham's death to begin proceedings to protect her works. At that time, the Copyright Office had stated certain works were published seven years prior, meaning Protas had illegally gained copyright protection for the works, which he assumed to be unpublished.<sup>80</sup>

An educated analysis of this case would lead one to see the evidence that someone had eighteen of Graham's works published in the year immediately after her death. Only Protas had permission to administer over Graham's choreographic works, publish them, or copyright them.<sup>81</sup> He would never have attempted to gain copyright protection over the works if he had published them seven years before. Or would he? Apparently Protas himself had not published those eighteen dances, however he had knowledge that they had been published.<sup>82</sup> Therefore, he should never have continued to apply for copyright protection on those 'published' dances, as he knew it was illegal. Protas, when gaining copyright protection for those dances, was accused of "deliberate misrepresentation" regarding Martha Graham's choreographic works.<sup>83</sup>

This case is another example of the necessity for choreographers to copyright their own works. If Graham had gained protection for her own dances, this entire case would never have been an issue. Although she gave rights over to Protas, it would have been more beneficial for her to copyright the works on her own - sign the forms, and create a legally binding copyright whereby she 'owned' her works. In giving over the unprotected right to Protas, Graham opened up her Estate to the chaos of misrepresentation and illegality.

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77. *Id.* at 585.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *See id.*

83. *Id.*

The issue of Protas's unethical attempts to copyright Graham's works is the lesser of the significant issues in this case. Overall, the School is fighting over rights to Graham's works - they feel that Protas should maintain the rights to Graham's pre-1956 dances, and the School should obtain the rights to Graham's post-1956 dances.<sup>84</sup> In addition, the School has explained that they simply wanted to have full access to the dances so they can preserve Graham's legacy; and they believe they are justified in their desires.<sup>85</sup> Connecting this argument with the overall issue of this article - how does anyone, other than Martha Graham herself, truly have the right to choose who owns Martha Graham's dances? The dances were created and performed based on Martha Graham's ideas and thoughts, and therefore the choreography should belong to her in some sense.<sup>86</sup> However, because she neglected to copyright her dances and submitted choreography to the School, Graham abandoned her rights to her own choreography and enabled the School to claim she was only the "author."<sup>87</sup>

The rule of authorship involves the Works Made for Hire Act, which states that "a work prepared by an employee within the scope of his or her employment" or "commissioned for use as a contribution to a collective work" is considered to be a Work Made for Hire, and thus the property of the employer.<sup>88</sup> However, the notion that Martha Graham did not own the copyright to her work because there was a corporation set up to facilitate her work is a shocking conclusion.<sup>89</sup> Graham had created choreographic works before and after she was an employee at the School. However, the Works Made for Hire Act deems all of her dances created while she was working at the School as property of the School.<sup>90</sup> If Graham had either copyrighted her dances or signed a written contract with the School stating ownership over her dances, the School would not maintain any rights over them.<sup>91</sup> However, no such procedures were followed, and the dances Graham choreographed while working at the School were no longer her own property - they belonged to the School at which she technically was an employee.<sup>92</sup>

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84. *See id.* at 570.

85. *See Carman, supra* note 57, at 20.

86. *See Martha Graham Sch.*, 224 F. Supp. 2d at 570.

87. *See id.*

88. *Id.* at 591 (quoting 17 U.S.C. §201 (2004)).

89. *See Carman, supra* note 57, at 20.

90. *Martha Graham Sch.*, 224 F. Supp. 2d at 591.

91. *See id.*

92. *See id.*

This term “employee” brings up another issue because it does not explain the actual definition of the term. Under the Works Made for Hire Act, all copyright protection and rights belong to the person for whom the work is prepared.<sup>93</sup> In other words, if person A pays person B to create a dance, person A is the owner of all the rights to that dance. This is valid unless there is some contractual agreement between person A and person B that states otherwise, or if the work has already been copyrighted by person B. There are two guiding principles that must be met under this Act. First, the work prepared by the employee must have been done during his or her time of employment.<sup>94</sup> Second, the work must have been custom-made to contribute to a collective work.<sup>95</sup> The *Martha Graham* court decided that neither of these principles were met. The issue was whether Graham’s dances were prepared during her time of employment at the School.<sup>96</sup> This argument was resolved in the District Court of New York in 2002.<sup>97</sup> The defendants were declared ownership of forty-five of the seventy dances in question, all created by Martha Graham.<sup>98</sup> The ownership of copyright for twenty-four of the dances is left unresolved. These twenty-four remaining dances were deemed either published or commissioned works that neither side can fittingly say were correctly copyrighted.<sup>99</sup> The remaining one dance was deemed to be not eligible for copyright or ownership, for unknown reasons, by either party in the case.<sup>100</sup>

Though some of the results of this case are somewhat inconclusive, one major point is validated, that there is a great need for choreographers to seek and obtain copyright protection over their choreography. These decisions are very significant for the dance community in that they may have a “strong impact on the way choreographers will need to plan for ownership of their works after they die.”<sup>101</sup> If Martha Graham had copyrighted her works as her own when she created each dance, there would not have been any ‘loose ends’ after her 1991 death. Her name would be associated with these dances forever. Unfortunately, she may never truly get the credit she deserves in

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93. *Id.*

94. *Id.*

95. *Id.*

96. *See id.*

97. *Id.* at 592.

98. *See Martha Graham Sch. & Dance Found., Inc. v. Marth Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 631 (2d Cir. 2004).

99. *See id.*

100. *See id.*

101. Carman, *supra* note 57, at 20.

the present, or the recognition within the dance community itself, with the passing of each generation. Someone else will reap the financial and prestigious benefits for each of her works. If artists can lose the ability to receive credit for their hard work it will certainly reduce artistic incentive to create dances in the future. In that sense, everyone loses.

#### IV. BARRIERS TO CHOREOGRAPHIC COPYRIGHTING

Although the present copyright laws are intended to protect choreographic works, these are the exact works that actually receive less protection than any others within the Copyright Act.<sup>102</sup> Despite the Copyright Act, the law actually hinders most choreographers in their pursuits. "The copyright laws are clearly intended to provide economic incentives to produce artistic works and the legislative objective behind the copyright laws is to bring as many new works into the public domain as possible."<sup>103</sup> Choreographers are not taking advantage of the law. This is because they either do not copyright their works or they fail to pursue legal action against those who infringe upon their copyright.

First, choreographers are hesitant to seek copyright protection for their works due to financial and social inadequacies.<sup>104</sup> It is common knowledge that the vast majority of choreographers are not financially successful. Many choreographers' rewards stem from the reactions of their audiences, but mere reactions do not pay the bills. Therefore, the high costs of copyrighting their works deter the choreographers from initiating the process of gaining protection.<sup>105</sup>

Furthermore, in the past, there have been two main approaches to dance preservation: notation and film.<sup>106</sup> Notation is very expensive – often twenty minutes of dance notation can cost \$10,000.<sup>107</sup> Therefore, most choreographers are submitting videotape forms of their works, which can cost as little as \$175.<sup>108</sup> The major drawback to this is that although less costly, videotape may not show the exact intentions of the choreographer. This is again due to the fact that most

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102. Wallis, *supra* note 20, at 1443.

103. Overton, *supra* note 16, at 611.

104. See Barbara A. Singer, *In Search of Adequate Protection for Choreography Works: Legislative and Judicial Alternatives vs. The Custom of the Dance Community*, 38 U. MIAMI L. REV. 287, 289 (1984).

105. See *id.* at 290.

106. See Cramer, *supra* note 18, at 149; Gennerich, *supra* note 33, at 380.

107. See Cramer, *supra* note 18, at 149; Overton, *supra* note 16, at 603.

108. See Cramer, *supra* note 18, at 149.



choreographers are not financially rewarded for their hard work and effort nearly as much as they are worth. The absence of these key elements is similar to looking at a math equation without the key numbers. It would be impossible to figure out the correct answer. Therefore, notation form<sup>109</sup> is often preferred by choreographers, being more efficient in effectively grasping the objectives of the choreographer, while not including any 'mistakes' as caught on film.<sup>110</sup> As noted by Peter Martins, Ballet Master of NYC Ballet, "when you make a dance for the stage, you work with a straight line, a circle, a semicircle, a diagonal . . . there are options. On television (video), these options become totally distorted."<sup>111</sup> This is because dance is unlike other forms of art in that it is rarely created in written form, and always three-dimensional, while not statutory, as are sculptures.<sup>112</sup> Putting limitations on an artist only limits their ability to be creative. This also limits the affects that a dance has on its audience. As Balanchine affirmed, choreography is "movement used to produce visual sensations, yet dance is different from the practical movement of everyday life" and that, "the important thing in dance is the movement itself . . . if the movement fails, the ballet fails."<sup>113</sup> If ballet fails so does the demand for it in society. Without the demand, this creative form of communication would cease to exist.

The mere art of dance is 'second-class' in society, drawing fewer artists to dance, especially in the form of choreography.<sup>114</sup> The emergence of new choreographers is lessening by the day because of three basic factors. First, outside of the popular Broadway and New York City arena, audiences are rarely abundant for dance performances.<sup>115</sup> Second, growing production costs are taking away from potential performance profits.<sup>116</sup> Third, most choreographers and dancers are seriously under-paid.<sup>117</sup> Due to these negative aspects of dance, choreographers are left feeling as if they are not reimbursed for their

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109. *Id.*; Overton, *supra* note 16, at 603 ("Dance notation, a generic term for recording dance movements on paper in much the same way a musical score is recorded, dates back several hundred years . . . [a]ttempts to convert the elements of time, space, energy, and the parts of the body involved in a choreographic work into symbols that can later be translated into movement.").

110. See Cramer, *supra* note 18, at 150; Gennerich, *supra* note 33, at 395.

111. Cramer, *supra* note 18, at 150.

112. Wallis, *supra* note 20, at 1445.

113. *Id.* at 1446.

114. See Singer, *supra* note 104, at 291.

115. *Id.*

116. *Id.*

117. *Id.*

efforts and ideas. Why would they further financially burden themselves by incurring an extra cost of protecting their work, especially if it will rarely be seen?

Second, those choreographers who do in fact gain copyright protection for their works are slow in defending or pursuing cases of infringement in courts.<sup>118</sup> They are aware that they possess legal rights concerning their works, however they believe that the customs of the 'dance community' offer "equal, if not superior, protection for choreographic works."<sup>119</sup> Simply stated, choreographers have faith in each other. They respect the rights and talents of their colleagues and hope that their colleagues maintain the same views. It is not ordinary for a choreographer to gain copyright protection, and even more uncommon for that choreographer to pursue legal action against a member of his community.<sup>120</sup>

A 'community' is exactly how choreographers denote themselves. "The majority of choreographers and allied artists committed to dance are primarily based in New York, which fosters a close-knit, protective community."<sup>121</sup> They possess the same beliefs, talents, and ideas, although seemingly unique at times. "The dance community considers recognition the ultimate reward for an artist's work, and views choreographic credit as the ultimate reward."<sup>122</sup> Therefore, choreographers remain concerned that courts do not have the understanding necessary to make artistic decisions. These decisions should be handled by members of the community. Having judges make dance decisions is like having a History teacher grade a Physics exam. Choreographers feel as if only a member of their community possesses enough credible knowledge to make choices or decisions as to the art of dance.<sup>123</sup>

This last issue seems contradictory - if choreographers consider themselves as part of a community, then why would they ever have to be concerned with copyrighting their works? Isn't the stated 'respect' enough? In a utopian society, people would not need regulations to protect their own ideas or creations, yet the world in which we live is certainly not a perfect society. Although choreographers maintain a respect for one another, the mere nature and enhancement of their

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118. *Id.* at 290.

119. *Id.*

120. *See id.*; Cramer, *supra* note 18, at 155.

121. Cramer, *supra* note 18, at 156.

122. *Id.*

123. *See id.* at 159.

career stems off of someone who has come before them.<sup>124</sup> Therefore, the risk of breaching someone else's ideas, thoughts, or creations, is fairly high. It is not only unavoidable, but also too tempting in some cases for many individuals to *not* consider using another choreographer's creations. Thus, there is a need for expanded copyright protections for choreographers, and therefore, a need to reduce the barriers to copyright. As society changes and generations of choreographers change, the need for choreographers to copyright their work is even more apparent.

However, these two factors - the financial insufficiencies of choreographers and the lack of choreographers actually pursuing cases of infringement in courts - are the major limitations that prohibit the Copyright Act of 1976, and its protection offered for choreographic works, from reaching its maximum potential for protection.<sup>125</sup> The Act was created to protect choreographers and their works. However, in 1980, only sixty-three of the 464,743 registered works were choreographic works or pantomimes.<sup>126</sup> This proves that choreographers are not taking advantage of this law. If they are not taking advantage of this law for any reason, especially the two aforementioned reasons, it will eventually be deemed useless. Choreographers should use this law for its intended purpose, without any fear of losing money, time, or respect. The copyright protection stated in the 1976 Act was developed to protect the choreographers, who inevitably will need that protection if they want their works to stay alive forever.<sup>127</sup> The process of gaining ownership and then proving copyright infringement in dance can be complicated and difficult, yet it is a challenge that results in significant rewards for choreographers and the entire dance world.

## V. THE CULTURAL IMPACT ON CHOREOGRAPHIC COPYRIGHT PROTECTION

At this point, the cultural aspect of choreography that has been so seriously stressed throughout this article can also be brought into question. The economic nature of the 1976 Copyright Act and its history are in conflict with the choreographic community's concern for artistic integrity.<sup>128</sup> Choreographers such as Balanchine and Graham danced and created their works during simpler times - in earlier years, when it was true that choreographers respected one another's

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124. See *id.* at 156.

125. See Singer, *supra* note 104, at 297.

126. Overton, *supra* note 16, at 595.

127. See Swack, *supra* note 1, at 280-81.

128. See Cramer, *supra* note 18, at 155.

works.<sup>129</sup> The culture of the dance community was in fact similar to that of a family. The dancers did not invade upon one another's ideas, nor steal one another's creations. For example, Fay Simpson, a well-known choreographer, only copyrighted one of her dances - "D-Train" - because of her concern that it was "more play-oriented and more accessible to someone."<sup>130</sup> In terms of copyrighting other works, she never felt a member of her community would steal them.<sup>131</sup>

Members of the dance community revere choreographers such as Balanchine and Graham. Even during her lifetime, the Graham technique became generic in the dance world; anyone who wished could help himself to her discoveries and inventions.<sup>132</sup> Furthermore, the choreographic community has relied primarily on state common law protection, which provides for indefinite protection so long as the work remains unfixed and unpublished.<sup>133</sup> In addition, most choreographers prefer negotiation and peer pressure as tactics to handle and protect their works or settle any disputes that may arise.<sup>134</sup>

However, it is clear that only after the deaths of Balanchine and Graham, in 1983 and 1991 respectively, that problems concerning 'ownership' arose. The Copyright Act included choreography as of 1976, yet there are no cases of infringement, or even articles based on disputes, until the mid-1980s.<sup>135</sup> During their immediate post-1976 careers, Balanchine and Graham did not experience troubles or dilemmas regarding their ownership of their choreographic works. It was only the past decade that problems arose concerning their creations.

Therefore, it is certain that more problems concerning choreographic protection exist that will arise in the future. Even now, as the new generation of dancers and choreographers emerge, an experienced eye can witness impending difficulties. Graham was one of the most accomplished and revered choreographers of all time, yet she did not seek copyright protection for her works. On the other hand, Savion Glover, the newest choreographer in the dance community to gain recognition similar to Graham for his contributions to the world of tap dancing, has choreographed works that are protected by copyright.<sup>136</sup> Glover, Tony award-winner for his choreography in *Bring In*

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129. Carman, *supra* note 57, at 20.

130. Cramer, *supra* note 18, at 157.

131. *Id.*

132. *See id.* at 158.

133. *Id.* at 155.

134. *See id.* at 158.

135. *See id.* at 157.

136. Playbill, *Bring In 'Da Noise, Bring In 'Da Funk*, 1997, at 21.

*Da' Noise, Bring In Da' Funk*, maintains full rights concerning his creations within that Broadway play.<sup>137</sup> Are his creations any more significant or creative than those of Balanchine or Graham? Or is Glover simply moving along with the changing times within the dance community?

One can only assume the latter to be valid. We feel Glover understands how important his ideas are and that if another individual were to use them, that person would reap the benefits. Glover's works are no more significant or creative than previous choreographers' creations; they have just been fashioned in a different era, during a different time, under different conditions. This new era is starting to acknowledge the impact of dance upon society as a whole. Choreographers of today maintain similar values and thought to those who went before them, yet they have slowly made the transition into the new business-like dance community where ownership and titles are priceless commodities.

## VI. OPINIONS AND SOLUTIONS

Throughout the articles and cases, it has become clear to us that choreographers are hesitant to copyright their works due to the sense of community which they possess.<sup>138</sup> This community does exist and it maintains standards by which choreographers do not want to steal from others or copy one another's works. However, the fact that choreographers are not protecting their work is being justified by this factor throughout the articles and reviews. It is continually noted how choreography enriches the culture of the dance community and how the laws are not conducive for choreographers to gain copyright protection.<sup>139</sup> In saying this, writers are accepting the fact that choreographers are not copyrighting their works, and are justifying the lack of incentive to not seek protection.<sup>140</sup> Specifically stated in one article, and agreed upon within others, "Dance should not be forced to conform to the unnecessarily limiting legislative standards currently imposed by the present mandate that all works must be fixed to receive copyright protection."<sup>141</sup> It is agreed that the culture does exist and it is strong, however writers, lawyers, or Congress are all wrong to say that choreographers should not take advantage of the copyright protection offered to them in the Copyright Act of 1976.

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137. *Id.*

138. See Cramer, *supra* note 18, at 158.

139. See Wallis, *supra* note 20, at 1443.

140. See *id.*

141. Cramer, *supra* note 18, at 160.

The only asset a choreographer possesses is his dance creations. Without his works, he is unknown and unsuccessful. Who knew Balanchine before *The Nutcracker*? It is the work that defines the choreographer. Even if those works do not result in financial success, it is clear that members of the dance community are interested in recognition and preservation, not in monetary rewards.<sup>142</sup> Choreographers are blinded by the traditional idea of the culture of the dance community and the recognition they receive from their peers. Yet, recognition is worth nothing if easily lost. Meanwhile, choreographers are not maintaining a clear view of the new and modern society - a society in which respect and community exist, but competition can easily prompt a choreographer to steal another's work. The only way a choreographer can assure his or her works will be preserved is to gain copyright protection.<sup>143</sup> Therefore, choreographers should take strides to continue to preserve their culture, but do so while also gaining copyright protection for their own choreographic works. In gaining copyright protection, the choreographer will gain sole ownership of his or her creation, and will forever possess the recognition and preservation he or she desire.<sup>144</sup> In addition, since these choreographers are concerned with preservation and not protection, monetary and economic rewards, as available from collecting damages from infringement, are not of paramount importance to choreographers.<sup>145</sup> Here, yet again, a choreographer's incentive for gaining protection is lacking.

Choreographers are also often hindered from gaining protection due to financial factors.<sup>146</sup> The majority of choreographers are currently unable to realize the full benefits of the 1976 Act, as seen in statistics from 1980. In 1980, only sixty-three of the 464,743 registered works were choreographic works or pantomimes.<sup>147</sup> The government developed inclusions of choreographic works into the Copyright Act of 1976 so that choreographers would gain protection. In doing so, it should also be understood that the majority of choreographers are not thriving financially and thus may not be able to afford to protect their works. The fee remains low, at about \$20 per work to simply gain protection, yet it is expensive to litigate and gain damages for breach or infringement.<sup>148</sup> The \$20 fee is not the issue, as that is

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142. See *id.* at 158.

143. See *id.* at 160.

144. See Borchard, *supra* note 31.

145. See Cramer, *supra* note 18, at 155.

146. Singer, *supra* note 104, at 291.

147. Overton, *supra* note 16, at 595.

148. See Cramer, *supra* note 18, at 149.

extremely inexpensive to merely gain protection. However, the fees involved in attempting to collect damages through lawsuits and infringement cases are absurd for a typical choreographer in the dance community to pay.<sup>149</sup> These fees could reach amounts in the thousands and above, as lawyer fees are exorbitant.<sup>150</sup>

Choreographers will never have incentive to protect their works if they know that they will never be able to afford to actually enforce the law if infringement does occur. Therefore, in order to increase the amount of choreographic works registered for copyright protection, the government must take certain action. This is an area of the law where government should adjust the monetary issues to appeal to the needs of the majority of choreographers. A fee must exist, yet it should not be so exorbitant as to cause choreographers to completely shy away from even seeking to gain protection over their works. This is a difficult yet necessary task.

“The goal of copyright law is to benefit society generally by protecting the rights of the individual author, including the choreographic author. This goal can be best achieved by removing current obstacles in the path of copyright protection.”<sup>151</sup> Removing obstacles will hopefully encourage choreographers to create. Creation without limits opens doors for many people, not just choreographers. The dances created by choreographers are seen, used, and inspire others. For example, this can be seen in high school plays. Even a high school production of a copyrighted Broadway play must seek and rent the rights to the selected show.<sup>152</sup> The rights to perform the dances, such as those in the well-known Broadway show “Grease,” can be rented with the permission of the owner.<sup>153</sup> Once rented, students can enjoy dancing and learning from those dances.

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149. *See id.* at 158.

150. *See id.* at 149.

151. Wallis, *supra* note 20, at 1471.

152. Interview with Gordon Inverno, Theatre Director, Bishop George Ahr High School, in Edison, NJ. (Mar. 1, 2003). In the interview, it was explained that even for a high school production the costs can be extravagant, but are necessary to avoid lawsuit or infringement. Bishop George Ahr High School paid for the rights to perform *Grease*. Basic costs included overall royalty based on the number of seats in the theater and ticket prices. For the first night, the fee is \$450 with all additional shows costing \$375 each. In addition, a director must purchase scripts that can be \$6 each (this show called for over 15 scripts). In addition, rental Music (Orchestra Parts & Chorus Parts) cost \$275.00 a month. These costs are simply to have the rights to the name of the show. Additional costs include costumes, props, tickets, publicity, wood for sets, lighting costs, and miscellaneous.

153. *Id.*

## VII. CONCLUSION

Cases such as *Horgan* and *Martha Graham* show the need for choreographers to seek copyright protection. These prominent artists did not find it necessary to copyright their work due to restrictions. The restrictions placed on gaining copyright protection did not reduce the need for copyright; it simply increased the amount of barriers to implementation.

The *Horgan v. MacMillan* case explained that choreographers can gain a wealth of information about specific dances from photographs. The *Martha Graham* case showed the problems that arise after a choreographer's death when they have not copyrighted his or her work.<sup>154</sup> In this type of situation, a dispute as to who will collect the financial benefits is inevitable.

The problem with ownership often arises due to copyright restrictions. These restrictions turn choreographers away from copyrighting their works.<sup>155</sup> If these financial and time burdens were alleviated more dances would be copyrighted and there would be fewer arguments over ownership. This means less money and time would go toward deciding who has rights to dances, allowing funds and time to be spent on more serious matters in society.

In both of these cases, the choreographers were from a different type, or era, of the dance community. Martha Graham and George Balanchine created their dances in the mid 1900s. That was a time when respect among choreographers was high and the value of the dance community was of utmost importance.<sup>156</sup> Each member admired and learned from each other's work and dancers would usually only study the styles of one choreographer and would not perform for others, as dancers today often do.<sup>157</sup> The dance community today lacks that same level of respect, which is why writers (and lawyers, etc.) need to stop using the community issue to justify why choreographers do not need copyright protection. Today, this community leans more toward competition with each other for both prominence and money.<sup>158</sup> Dance will always be based on foundations of community, but times are changing and competition is increasing. This attitude has led choreographers to shy away from producing their own original creations. Copyrighting is an essential way to eliminate the tempta-

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154. *Martha Graham Sch.*, 224 F. Supp. 2d 567 *passim*.

155. See Singer, *supra* note 104, at 291.

156. See Kate Mattingly, *A Trend Toward Self-Reliance*, DANCE MAGAZINE, Nov. 2002, at 39.

157. See Carman, *supra* note 57, at 20.

158. See Cramer, *supra* note 18, at 158.



tions to steal or reap the benefits of others' hard work. As long as people continue to ignore the fact that the dance community has changed over the years, there will continue to be a problem - a lack of incentive or encouragement for choreographers to copyright their works.

Choreographers are dealing with the law based on the beliefs of their community, however they are not realizing that the sense of community has changed. The law must change as the community changes. Laws are often amended when outdated laws conflict with current practices. For example, think of the problems that would have arisen if civil rights were never obtained. Copyright will obviously not affect as many people as the civil rights movement but it is just as important because it allows individuals the freedom to create and not fear someone else will get the credit for their hard work. Also, possible amendments to the Copyright Act in relation to choreographic works hold potential to change the entire art community.

This major contradiction between writers, community, the law, and choreographers can be addressed in two ways: government and culture. The government needs to handle the financial aspects. Simply stated, it should not be so expensive for choreographers to actually enforce the law if infringement exists on a copyrighted work. Also, copyrights should be obtainable in a timely manner, with no loopholes. If a work is copyrighted then all rights should be given to the choreographer, with no exceptions. In the case of a choreographer's death, the work(s) should still be acknowledged as property of the creator and specification in a will should determine the financial benefactor. We should focus on keeping the dance community culture strong and prominent, while understanding that society, with its norms and values, are changing. People need to protect their work if they want it to endure. Choreographers are concerned with preservation, and in today's society, the only way to attain preservation is copyrighting.<sup>159</sup>

Choreographers should be strongly advised and encouraged to copyright their works despite the strong nature of their community involvement. At this point, there is no turning back - change is necessary and must be initiated soon in order to protect choreographers and the choreographic community within the dance world.

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159. Cramer, *supra* note 18, at 155.