

**Preservation and Protection in Dance Licensing:
How Choreographers Use Contract to Fill in the Gaps of
Copyright and Custom**

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Abstract. Despite gaining copyright protection for their works in 1976, choreographers infrequently register their creations and virtually never sue for infringement. Choreographers' reluctance to assert and enforce their rights stems from the imperfect fit between copyright doctrines and long-held dance community customs, which include rules for licensing dances. Given choreographers' extremely limited funds, the high cost of litigation and the infrequency of conflicts within the dance community, choreographers have little incentive to invoke the remedies of copyright law. Instead, the dance world has used licensing agreements to tailor the default copyright rules to its unique needs and to ensure that its works are preserved with integrity. This Note classifies these licensing agreements into three categories and then analyzes the advantages and disadvantages of each category for choreographers, licensees and nonchoreography right holders. The analysis reveals how choreographers effectively use the flexibility of contract law to respond to their individual financial circumstances, goals and concerns. Ultimately, contract reconciles custom and copyright by enabling choreographers to realize the economic value of their copyrights while also tailoring those rights to conform to long-held industry customs.

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INTRODUCTION¹

Members of the performing arts community typically contend with three potentially competing goals: maintaining a creative vision, increasing the public's exposure to their works and making a living. Prior to 1976, choreographers had only dance customs and contract law to help them achieve these goals.² With the addition of "choreographic works" to the Copyright Act of 1976, however, choreographers gained federal copyright protection for their works.³ However, copyright alone is insufficient to protect choreographers' needs for a number of reasons: the definition of "choreographic works" in the Act is unclear; the so-called "fixation requirement" is difficult for choreographers to meet; courts have provided limited guidance for infringement standards; and the "work for hire" doctrine blatantly conflicts with dance community customs regarding ownership.⁴ Meanwhile, dance customs may no longer be as reliable as they once were; although the dance world remains close-knit, companies have developed differing procedures regarding copyright ownership, licensing methods and choreographer compensation.⁵ As a result, among the three categories of protection for choreographic works—custom, copyright and contract—contract has emerged as an essential tool of the dance community, providing the advantage of flexible terms and a focus on the intent of the parties.⁶

Choreographers use licensing contracts to serve four functions. First, licenses generate present income that facilitates the creation of new choreographic works.⁷

1. For this Note, I interviewed various choreographers and dance company representatives. All factual assertions herein are consistent with those interviews, and specific interviews are cited where necessary. I interviewed ten dance professionals, including choreographers and executive directors of dance companies: Karole Armitage, choreographer and Artistic Director, Armitage Gone! Dance (Oct. 30, 2010); Dana Boll, former dancer, Manager, American Ballet Theatre Studio Company (now ABT II), 2001–04, and current choreographer (Nov. 5, 2010); Bob Bursey, Producing Director, Bill T. Jones/Arnie Zane Dance Company (Oct. 28, 2010); Richard Caples, Executive Director, Lar Lubovitch Dance Company (Oct. 21, 2010); Deborah Crocker, former dancer and Director of Development, Koresh Dance, current Community Relations Director, Rock School for Dance Education (Oct. 29, 2010); Bill Evans, freelance tap and ballet choreographer who has been licensing his works since the late 1960s (Oct. 27, 2010); Jesse Huot, choreographer Twyla Tharp's son and Executive Director, Tharp Productions (Nov. 2, 2010); Elizabeth Olds, Artistic Administrator/Assistant to the Artistic Director, Boston Ballet (Nov. 8, 2010); Ellen Sorrin, Director, The George Balanchine Trust (Nov. 11, 2010); Nancy Umanoff, Executive Director, Mark Morris Dance Group (Oct. 29, 2010).

2. Katie M. Benton, Comment, *Can Copyright Law Perform the Perfect Fouetté?: Keeping Law and Choreography on Balance to Achieve the Purposes of the Copyright Clause*, 36 PEPP. L. REV. 59, 71–74 (2008); Barbara A. 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, 297 (1984).

3. Copyright Act, 17 U.S.C. § 102(a)(4) (2006).

4. *Id.* §§ 102(a), 102(a)(4). See also *infra* note 19.

5. See Joi Michelle Lakes, Note, *A Pas De Deux for Choreography and Copyright*, 80 N.Y.U. L. REV. 1829, 1830 (2005).

6. See *infra* Part II.

7. See Anne W. Braveman, Note, *Duet of Discord: Martha Graham and Her Non-Profit Battle Over Work for Hire*, 25 LOY. L.A. ENT. L. REV. 471, 472, 491–92 (2005) (noting that many choreographers have turned to nonprofit organizations, and generally are in need of private and public

Second, licenses facilitate public performances, which increase the choreographer's visibility and artistic influence during his lifetime.⁸ Third, the choreographer may insist upon specific terms in the license to grant her creative control over the production, thereby ensuring that the licensee performs the work with integrity.⁹ Finally, increased dissemination of the choreography ensures that the dances are accurately preserved and continue to be influential and performed even after the choreographer's death.¹⁰

To achieve these four functions, choreographers use three broad categories of licenses, which may be termed "the all-inclusive license," "the limited license" and "the selective license."¹¹ These models offer different flavors of licenses from which a choreographer may choose, based on his personal preferences and circumstances.¹² Within these models, choreographers may add, subtract or tailor specific provisions to their individual needs.¹³

Part I of this Note explains how copyright law alone fails to satisfy the needs of choreographers. Part II details traditional licensing customs and evaluates the three licensing models choreographers have developed to supplement dance customs and copyright. Finally, Part III provides a recommendation to the dance community regarding the protection and licensing of choreographic works, namely that some combination of custom, copyright and contract can form more solid protections for choreographers than those that currently exist. Which licensing model will best serve a choreographer's interests will depend on the choreographer's circumstances. Regardless of which model any given choreographer uses, increased communication and cooperation within the dance community would enable choreographers to implement effective licensing methods to meet their goals. Such intracommunity efforts would enable more widespread use of the all-inclusive license, which provides not only for choreography rights but also the rights for music, lighting, set design and costumes. Such a license would benefit

aid to support their artistic endeavors); Krystina Lopez de Quintana, Comment, *The Balanchine Act: How Copyright and Customary Practices Protect Large Dance Companies over Pioneering Choreographers*, 11 VILL. SPORTS & ENT. L.J. 139, 147 (2004) (suggesting that unknown choreographers, without the financial backing of a large dance company, cannot enforce their copyright); Singer, *supra* note 2, at 291, 295 ("[M]ost choreographers and dancers are seriously underpaid . . .").

8. See Singer, *supra* note 2, at 309 (explaining that "[t]he success of a choreographer's career depends on how the public perceives his works").

9. *Id.* at 293-95.

10. See Cheryl Swack, *The Balanchine Trust: Dancing Through the Steps of Two-Part Licensing*, 6 VILL. SPORTS & ENT. L.J. 265, 267 (1999) (discussing the creation of the George Balanchine Trust to license domestic and foreign performance rights in Balanchine's works to ballet companies around the world in a way that would guarantee authentic performances); Arthur Lubow, *Can Modern Dance Be Preserved?*, N.Y. TIMES MAG., Nov. 8, 2009, at 38, 40 (discussing how Merce Cunningham, in the last few years of his life, laid out a plan to preserve his choreography by separating it from his dance company); Alex Witchel, *To Dance Beneath the Diamond Skies*, N.Y. TIMES MAG., Oct. 22, 2006, at 80, 85 (quoting Twyla Tharp's son and business manager: "It's all about preserving the work in its entirety . . . as it was seen originally.").

11. See *infra* Part II (describing these licenses and analyzing their benefits and drawbacks).

12. See *infra* Part II.

13. See *infra* Part II.

well-established choreographers and their companies, licensees and nonchoreographic right holders and designers. However, in implementing such a license, choreographers should not limit reproductions of their works in ways that are too costly or cumbersome for licensees, or in ways that would effectively prevent future audiences from seeing their works.

The licensing methods and economics of choreography can vary widely among choreographers and genres.¹⁴ To narrow the analysis, this Note will focus on individual, living modern dance choreographers who have their own dance companies or groups.¹⁵ These choreographers tend to license to two different groups: ballet companies and university dance programs.¹⁶ Because universities license principally for specific educational and preservation-related aims, these licenses are simpler and typically feature lower fees and less creative control for the choreographer over the production.¹⁷ This Note will therefore focus on the licensing of modern dance works to ballet companies.

14. See Lakes, *supra* note 5, at 1830 (noting the expansion of the dance community and that “dance has never been more commercial” in the wake of “television shows and increasingly popular dance competitions [which] have sparked the interest of corporate players who may be more anxious to obtain and enforce copyright protection . . .”).

15. Ballet choreographers and representatives of deceased choreographers may have similar interests as the modern dance choreographers on which this Note focuses. However, ballet choreographers differ in that they are either entirely freelance, or they are employed full-time by a ballet company. In contrast, the choreographers on whom this Note focuses have incorporated their own dance companies or groups, which bear their respective names. See, e.g., Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 153 F. Supp. 2d 512, 525–26 (S.D.N.Y. 2001) (holding that the choreographer assigned her name to a nonprofit dance corporation formed for her benefit). In addition, when licensing a choreographic work, an organization that holds the copyrights of a deceased choreographer will have similar concerns regarding integrity and public exposure to high-quality performances. See generally Swack, *supra* note 10. See also Telephone Interview with Ellen Sorrin, Dir., The George Balanchine Trust (Nov. 11, 2010). For such an organization, the preservation of the works presents a more pressing issue, and compensation functions to keep the licensing organization afloat to further disseminate the works, rather than to enable the choreographer to create new works. See generally Swack, *supra* note 10.

16. See *infra* Part II.B.4 (discussing choreographers Mark Morris and Karole Armitage’s reasons for not licensing their modern dance works except under limited circumstances to university dance programs). Ballet companies tend to have larger budgets and regularly commission new choreography and license prior works. Compare Bos. Ballet Inc., IRS Form 990 (2008), at 1, available at <http://www2.guidestar.org/Home.aspx> (search “Boston Ballet”) (providing \$25,805,657 in expenses), and S.F. Ballet Ass’n, IRS Form 990 (2008), at 1, available at <http://www2.guidestar.org/Home.aspx> (search “San Francisco Ballet”) (showing expenses of \$44,924,531), with Found. for Dance Promotion, Inc. (also known as Bill T. Jones/Arnie Zane Dance Company), IRS Form 990 (2008), at 1, available at <http://www2.guidestar.org/Home.aspx> (search “Bill T. Jones”) (listing \$2,547,559 in expenses), and Discalced, Inc. (doing business as Mark Morris Dance Group), IRS Form 990 (2008), at 1, available at <http://www2.guidestar.org/Home.aspx> (search “Mark Morris Dance Group”) (showing expenses of \$5,449,881). For instance, Boston Ballet has spent as much as \$200,000 in a single year on commissions. Telephone Interview with Elizabeth Olds, Artistic Adm’r/Assistant to the Artistic Dir., Bos. Ballet (Nov. 8, 2010).

17. Interview with Richard Caples, Exec. Dir., Lar Lubovitch Dance Co., in N.Y.C., N.Y. (Oct. 21, 2010); Telephone Interview with Jesse Huot, Exec. Dir., Tharp Prods. (Nov. 2, 2010); Telephone Interview with Nancy Umanoff, Exec. Dir., Mark Morris Dance Grp. (Oct. 29, 2010).

I. THE INITIAL PROBLEM: HOW COPYRIGHT LAW FAILS TO EFFECTIVELY SERVE CHOREOGRAPHERS

Although choreography gained copyright protection in 1976, the dance community has been reluctant to protect its works and enforce its rights under the Copyright Act, and has generally preferred to rely upon custom and contract.¹⁸ Section A of this Part details the financial constraints of dance companies and choreographers, which help explain the dance community's frequent failure to fix and register choreographic works and to litigate copyright disputes. Section B outlines relevant copyright doctrines, including the definition of "choreographic works," the fixation and registration requirements, infringement standards and the work for hire doctrine and explains their strained application to the dance community.¹⁹ While the current copyright jurisprudence suggests that copyright is an imperfect answer to the creative and economic needs of choreographers, copyright remains capable of benefiting choreographers in its present form, despite the fact that the dance community has largely declined to litigate.²⁰ Without copyright, the choreographer would not have a protectable right in her intellectual property and potential licensees might refuse to license choreography, finding that there is no legal need. Although choreographers licensed their works before they gained copyright protection, copyright ownership adds economic value to choreographic works by providing an enforcement mechanism that goes beyond contract remedies. Even with choreographers' reluctance to engage in litigation, copyright provides valuable protection to choreographers, as copyright owners may

18. See Copyright Act, 17 U.S.C. § 102(a)(4) (2006); Lopez de Quintana, *supra* note 7, at 162–64; Singer, *supra* note 2, at 317–19.

19. See generally Sharon Connelly, Note, *Authorship, Ownership, and Control: Balancing the Economic and Artistic Issues Raised by the Martha Graham Copyright Case*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 837 (2005) (detailing how the application of the work for hire doctrine in the *Martha Graham* case countered the dance community's assumption of choreographer ownership); Bethany M. Forcucci, Case Note, *Dancing Around the Issues of Choreography & Copyright: Protecting Choreographers After Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 24 QUINNIPIAC L. REV. 931 (2006) (arguing that in order for choreographers to rely upon copyright rather than custom, further revision to the Copyright Act is required in light of *Martha Graham*); Lakes, *supra* note 5 (arguing for a redefinition of "choreography" that will only protect the expressive elements of choreographic works, and for a liberalization of the fixation requirement); Lopez de Quintana, *supra* note 7 (arguing for a new definition of choreography, modification of the originality requirement to allow some borrowing, the recognition of an exception to the fixation requirement for choreographers and the enactment of moral rights). *But see* Benton, *supra* note 2, at 106–20 (arguing that copyright law should not be amended for choreographers); Edwina M. Watkins, Note, *May I Have This Dance?: Establishing a Liability Standard for Infringement of Choreographic Works*, 10 J. INTELL. PROP. L. 437 (2003) (arguing for application of current infringement standards to choreographic works).

20. Extensive research uncovered only two reported cases where choreographers or their representatives have litigated copyright doctrines. See *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 639–42 (2d Cir. 2004) (holding that dances created by the choreographer were "works for hire" in dispute between choreographer's dance company and legatee); *Horgan v. MacMillan, Inc.*, 789 F.2d 157, 162–63 (2d Cir. 1986) (holding that photographs of George Balanchine's *Nutcracker* may infringe Balanchine's choreography as a derivative work).

enforce their rights without filing suit. The existence of the law itself might deter potential infringers, and cease-and-desist letters could effectively stop an infringement and compensate a choreographer without court involvement.

A. THE NONPROFIT NATURE OF DANCE

In the words of choreographer Karole Armitage, dance is “absolutely, literally and utterly noncommercial.”²¹ It is not-for-profit in the most basic sense: neither the goal, nor the product of choreography is monetary profit. And yet, choreography is an expensive art form. To translate an artistic concept into a performance, a choreographer must compensate dancers and pay for a venue, music rights, lighting, set designs and costumes.²² In addition, to survive, a choreographer requires compensation for his own time and creative efforts. Because performances, and particularly the creation of new works, are expensive, choreographers have largely founded nonprofit dance companies.²³ These companies frequently use the choreographer’s name and have the explicit purpose of supporting the choreographer, especially by presenting new works.²⁴ In this nonprofit corporate haven, choreographers can select their own full-time dancers to perform new, experimental works without the burden of personal legal and financial liabilities.²⁵

The revenues that support dance companies are frequently meager—even less

21. Telephone Interview with Karole Armitage, choreographer and Artistic Dir., Armitage Now! Dance (Oct. 30, 2010).

22. See John Munger, *Dancing with Dollars in the Millennium: Who’s Moving Ahead, Who’s Falling Behind, and Why*, DANCE MAG., Apr. 2001, Supplement Insert, at 4, 8, available at http://www.danceusa.org/uploads/Research/Dancing_Dollars.pdf; Benton, *supra* note 2, at 120–21; Forcucci, *supra* note 19, at 968. Although the median hourly wages of dancers in performing arts companies was merely \$15.30 in May 2008, earnings for dancers at some of the largest companies are governed by union contracts. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, OCCUPATIONAL HANDBOOK: DANCERS AND CHOREOGRAPHERS (2010–11), available at <http://www.bls.gov/ocos094.htm#empty> [hereinafter OCCUPATIONAL HANDBOOK: DANCERS AND CHOREOGRAPHERS].

23. Braveman, *supra* note 7, at 472; Connelly, *supra* note 19, at 848. Dance companies frequently file taxes under I.R.C. § 501(c)(3), which “is effectively a requirement for survival.” Micah J. Burch, *National Funding for the Arts and the Internal Revenue Code*, 37 FLA. ST. U. L. REV. 303, 303 (2010). However, if a choreographer’s operation is particularly small, the requirements for maintaining Section 501(c)(3) status under the Internal Revenue Code may make filing as a private foundation more attractive. See, e.g., Twyla Tharp Dance Foundation, Inc., IRS Form 990-PF (2008), available at <http://www2.guidestar.org/Home.aspx> (search “Twyla Tharp”); Telephone Interview with Jesse Huot, *supra* note 17 (explaining Twyla Tharp’s reasons for no longer filing as a Section 501(c)(3) nonprofit).

24. See generally Braveman, *supra* note 7 (discussing model of a choreographer creating a nonprofit company in her own name).

25. See, e.g., *Martha Graham*, 380 F.3d at 629 (“[B]y the 1940s, for tax reasons and because she wanted to extricate herself from funding and legal matters, [Martha Graham] began relying on nonprofit corporations, which she led, to support her work.”). A choreographer may choose to completely excise himself from legal and financial burdens by assigning all intellectual property interests to the company. For instance, Mark Morris has chosen this route because it is more beneficial for the company and the choreographer trusts that he will always retain artistic control because he has worked with the same administrators for decades. Telephone Interview with Nancy Umanoff, *supra* note 17.

than those generated by other performing arts.²⁶ Income from performances is typically inadequate to cover production costs, and dance companies infrequently pursue merchandising and videography sales because the market is small and high-quality videos are costly to create.²⁷ Private patronage is necessary but limited, as generally only individuals donate.²⁸ Meanwhile, government funding and federal grants have declined in the last few decades.²⁹ The choreographer is naturally affected by the financial constraints of his company. Although under the typical model the choreographer derives a salary as the “artistic director,” frequently he will also derive necessary income from teaching outside the company, completing commissioned works for ballet companies and licensing prior works.³⁰

The dance community’s limited economic resources are paired with limited employment opportunities, both of which enable the dance world to remain close-knit. According to the Bureau of Labor Statistics, choreographer employment is expected to grow more slowly than the average for *all other occupations*, including dancers.³¹ In May 2009, there were only 14,700 choreographers and the national median annual wages of salaried choreographers was \$37,860.³² Choreographers

26. Singer, *supra* note 2, at 291 (“[D]ance has yet to achieve the prominent position that other performing art forms, such as music and drama, have traditionally enjoyed with American audiences. The second-class status of dance has had a detrimental effect on the development of the art of choreography.”).

27. There is simply “no way to make enough money from ticket sales.” Telephone Interview with Karole Armitage, *supra* note 21. Films of dance performances typically are not well produced, so dance companies are reluctant to release them for integrity reasons. Interview with Richard Caples, *supra* note 17. However, Bill T. Jones/Arnie Zane Dance Company shoots multicamera videos of all works and frequently distributes DVDs, both on its own and through an arts distributor. Telephone Interview with Bob Bursey, Producing Dir., Bill T. Jones/Arnie Zane Dance Co. (Oct. 28, 2010). Merchandising strategies seem generally ineffective and have not been widely used. Interview with Richard Caples, *supra* note 17.

28. Benton, *supra* note 2, at 122; Telephone Interview with Karole Armitage, *supra* note 21. See also Kathryn Shattuck, *Arts Patrons, The Next Generation*, N.Y. TIMES, June 29, 2008, at AR1; Roslyn Sulcas, *Richest Kids on the Block Find That Money May Talk, but Money Can’t Dance*, N.Y. TIMES, May 14, 2006, at AR30. Large corporations do occasionally make donations, but the patronage is typically more involved than merely writing a check as the corporation desires publicity. See, e.g., Robin Pogrebin, *Target’s Sponsorships Support Arts Activities*, N.Y. TIMES, Nov. 11, 2009, at F6. Tax incentives exist for private donation to the arts. NAT’L ENDOWMENT FOR THE ARTS, HOW THE UNITED STATES FUNDS THE ARTS 18–20 (2007), available at <http://www.nea.gov/pub/how.pdf>.

29. Benton, *supra* note 2, at 122, 122 n.404 (noting that while federal funding is on the decline, the number of dance companies is currently on the rise).

30. For example, Lar Lubovitch earns an annual salary as Artistic Director of the Lar Lubovitch Dance Company. This salary is rather low—less than the Executive Director’s salary. On top of that, Lubovitch may earn an additional 30% to 50% from licensing his works. Interview with Richard Caples, *supra* note 17. In contrast, Mark Morris earns a salary as Artistic Director of Mark Morris Dance Group (MMDG) and receives fees for teaching. MMDG owns and licenses all of Morris’s choreography. Licensing fees are extremely important for the company’s financial health, generating income of anywhere from \$30,000 to \$200,000 each year, depending on Morris’s availability. Telephone Interview with Nancy Umanoff, *supra* note 17.

31. OCCUPATIONAL HANDBOOK: DANCERS AND CHOREOGRAPHERS, *supra* note 22.

32. However, the mean salary of a choreographer in New York is more—\$67,150 for New York State and \$103,040 for the New York City metropolitan area. OCCUPATIONAL HANDBOOK: DANCERS AND CHOREOGRAPHERS, *supra* note 22; *Occupational Employment and Wages: Choreographers*, U.S. BUREAU OF LABOR STATISTICS (May 2009), <http://data.bls.gov/cgi-bin/print.pl/oes/2009/may/>

generally struggle, especially given the difficulty of success in the dance community.³³ The financial statistics help explain both why the dance community has remained so close-knit and why choreographers so infrequently litigate copyright infringement.³⁴

B. COPYRIGHT DOCTRINES AND THEIR IMPACT ON THE DANCE COMMUNITY

Copyright doctrines provide formidable hurdles for choreographers to enforce their rights. The lack of case law regarding choreographic copyrights discourages choreographers from taking the gamble of going to court.³⁵ Four particular aspects of copyright may discourage choreographers from claiming copyright protection. First, Congress left unclear what type of dance pieces qualify for protection by declining to define the term “choreographic works.”³⁶ The Copyright Office has suggested a narrow definition that may leave many works unprotected.³⁷ Second, fixation and registration requirements present significant burdens for even successful choreographers, leaving many works unprotected or at least limiting the remedies available to choreographers.³⁸ Third, despite some guidance from the Second Circuit, standards for infringement remain unclear as they apply to choreography.³⁹ Finally, the Second Circuit’s application of the work for hire doctrine conflicts with the customs of the dance community.⁴⁰ These four challenges, each of which are further explained below, and the lack of clarity regarding what protection means in the context of dance discourage choreographers from using the full benefits of the copyright law.⁴¹

1. Defining “Choreography”

Choreographers gained significant legal protection for their dances with the addition of “choreographic works” to the Copyright Act of 1976, but Congress left

oes272032.htm [hereinafter *Occupational Employment and Wages*].

33. OCCUPATIONAL HANDBOOK: DANCERS AND CHOREOGRAPHERS, *supra* note 22 (“Dancers and choreographers face intense competition; only the most talented find regular work.”).

34. *See supra* notes 2–10 and accompanying text.

35. *See supra* note 21.

36. *See* 17 U.S.C. § 102(a)(4) (2006).

37. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM II: COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 450 (1984) [hereinafter COMPENDIUM II].

38. *See* 17 U.S.C. § 102(a) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . .”); Lakes, *supra* note 5, at 1852–53.

39. *See Horgan v. MacMillan, Inc.*, 789 F.2d 157, 162–63 (2d Cir. 1986) (holding the “substantially similar” standard for infringement applies to choreographic works and that photographs of choreography may infringe a choreographic work). *See also* Watkins, *supra* note 19 (arguing that pre-established infringement standards should apply to choreography).

40. *See* Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 639–41 (2d Cir. 2004); Connelly, *supra* note 19, at 839.

41. Singer, *supra* note 2, at 299 (“[I]t is not difficult to see why choreographers, particularly those operating outside of the mainstream of traditional dance, are reluctant to register their works under the statutes: to do so would be to offer tacit approval to the statutory and case law definitions of choreography that they, as choreographers, find so offensive.”).

the term undefined.⁴² In the list of eligible subject matter in 17 U.S.C. § 102(a), “choreographic works” is one of the only terms not defined in § 101.⁴³ Congress concluded that a definition was unnecessary, deciding that the term had a “fairly settled meaning[]” and that “‘choreographic works’ do not include social dance steps and simple routines.”⁴⁴

However, legislative history suggests that the dance community disagrees with the Copyright Office’s conception of the scope of “choreography” in terms of what should gain protection. The dance community would recognize a broader scope of protected works, including simple dance routines. For instance, choreographer Anatole Chujoy disapproved of the denial of protection to “ordinary ‘dance routine[s],’” warning that an undefined term would create minimum standards for copyrightability which would deny protection to important works.⁴⁵ Choreographer Agnes de Mille, who advocated for copyright protection for choreography after she received no compensation for the widespread reuse of her choreography in the musical *Oklahoma!*, expressed similar concerns.⁴⁶ De Mille distrusted judges’ abilities to determine the “creative original value” of dance, and therefore opposed defining choreography on the basis of “difficulty, simplicity or familiarity.”⁴⁷

In an attempt to clarify the meaning of “choreographic works” and the scope of their newly established copyrightability, the Copyright Office released *Compendium II* in 1984.⁴⁸ The Copyright Office interpreted the term consistently with the House Report, but provided additional guidance. *Compendium II* defined “choreographic works” as:

Choreography is the composition and arrangement of dance movements and patterns, and is usually intended to be accompanied by music. Dance is static and kinetic successions of bodily movement in certain rhythmic and spatial relationships. Choreographic works need not tell a story in order to be protected by copyright.⁴⁹

A “characteristic[] of choreographic works” is “a related series of dance

42. See 17 U.S.C. §§ 101, 102(a)(4). Under the Copyright Act of 1909, choreography was only protected as a “dramatic or dramatico-musical composition” if it presented a story. Copyright Act of 1909, Pub. L. No. 60-349, § 5, 35 Stat. 1075 (current version at 17 U.S.C. § 102 (2006)); Adaline J. Hilgard, *Can Choreography and Copyright Waltz Together in the Wake of Horgan v. Macmillan, Inc.*?, 27 U.C. DAVIS L. REV. 757, 762 (1994). Because the 1909 Act left “abstract” choreography unprotected, choreographers lobbied for independent protection. Benton, *supra* note 2, at 78–79.

43. 17 U.S.C. §§ 101, 102(a)(4).

44. H.R. REP. NO. 94-1476, at 53–54 (1976).

45. STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS 115 (Comm. Print 1961) [hereinafter COPYRIGHT REVISION STUDIES] (comments by Anatole Chujoy).

46. Benton, *supra* note 2, at 79 (noting that while de Mille was paid a lump sum of \$15,000 for her choreography, she never received any royalties for future productions). See COPYRIGHT REVISION STUDIES, *supra* note 46, at 110 (comments by Agnes George de Mille).

47. COPYRIGHT REVISION STUDIES, *supra* note 46, at 110 (comments by Agnes George de Mille).

48. COMPENDIUM II, *supra* note 37, § 450. The Second Circuit quoted the *Compendium II* language in *Horgan*, but did not meaningfully discuss the scope of “choreographic works.” *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986).

49. COMPENDIUM II, *supra* note 37, § 450.01.

movements and patterns organized into a coherent whole.”⁵⁰

Compendium II also reflects Congress’s statement that “social dance steps and simple routines” are not protected by copyright.⁵¹

Social dance steps and simple routines are not copyrightable Thus, for example, the basic waltz step, the hustle step, and the second position of classical ballet are not copyrightable. However, this is not a restriction against the incorporation of social dance steps and simple routines, as such, in an otherwise registrable choreographic work. Social dance steps, folk dance steps, and individual ballet steps alike may be utilized as the choreographer’s basic material in much the same way that words are the writer’s basic material.⁵²

Here, the Copyright Office clarifies the logic behind not protecting social dances and simple routines. The restriction is not a judgment of the artistic merit of such choreography, but rather a way in which to incorporate fundamental copyright principles such as the idea/expression dichotomy, *scènes à faire* and *de minimis* copying.⁵³ Under the idea/expression dichotomy, just as a writer cannot claim a copyright to the individual words he uses, a choreographer may not claim the positions or discrete movements that function as the building blocks of his work.⁵⁴ In addition, a traditional series of movements may become an example of *scènes à faire*, and thus that particular series alone will not be copyrightable.⁵⁵ Finally, in accordance with the *de minimis* doctrine, sampling a few movements from another choreographer may not qualify as an infringement, just as copyright permits quoting a sentence from a novel.⁵⁶

While the exclusion of social dance steps serves the public interest by enabling the free performance of old routines and of dances that serve a social rather than an artistic function, the exclusion of simple routines is more difficult to justify.⁵⁷ In comparison to the protections under the 1909 Act, the legislative history prior to the 1976 Act clarifies congressional intent to expand the protection for choreographic works, which no longer need be “dramatic,” and therefore need not be prepared for presentation to an audience.⁵⁸ However, Congress draws a line based on the complexity of the technique. A choreographic work comprised

50. *Id.* § 450.03(a).

51. H.R. REP. NO. 94-1476, at 53–54 (1976).

52. COMPENDIUM II, *supra* note 37, § 450.06.

53. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.02 (2011) (explaining that only the expression of ideas, not the ideas themselves, are copyrightable); 4 NIMMER & NIMMER, *supra*, § 13.03[B][4] (explaining that “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic” are unprotectible *scènes à faire*); 2 NIMMER & NIMMER, *supra*, § 8.01[G] (describing concept that minimal or “*de minimis*” copying is not an infringement).

54. See 1 NIMMER & NIMMER, *supra* note 53, § 2.02.

55. See 4 NIMMER & NIMMER, *supra* note 53, § 13.03[B][4].

56. See 2 NIMMER & NIMMER, *supra* note 53, § 8.01[G].

57. In addition, the value of a social dance derives from the entertainment the nonprofessional performer enjoys when he does the steps with a group of friends, rather than from performing an artistic work for an audience.

58. 1 NIMMER & NIMMER, *supra* note 53, § 2.07[B].

entirely of a simple routine could be highly original and artistically significant. For instance, Paul Taylor is known for his minimalist choreography.⁵⁹ In 1957, he performed the innovative “Duet,” wherein he stood “next to a reclining woman in street clothes, and neither one move[d].”⁶⁰ The arts community continues to appreciate the piece’s conceptual underpinnings.⁶¹ One commentator writes:

This four-minute piece was a distillation of many essential elements of dance, calling attention to posture and the interconnection of people within a space. Similar to other minimalist experimental artists of the time, Taylor’s break with convention was simply a starting-off point for further investigation . . . It is Taylor’s combination of the subtlety of ballet with the spontaneity of everyday gesture that has made him such a force in modern dance.⁶²

Although “Duet” presents a radical example, many choreographic works are composed predominately or entirely of simple, pedestrian movements.⁶³ As an art form, choreography is valued for the concepts it presents to the public as much as for its impressive techniques.

Therefore, despite awarding legal protection to choreography, Congress suggested in legislative history that dance receive less protection than the other enumerated works in 17 U.S.C. § 102(a).⁶⁴ This suggestion cuts against the policy that “the copyright law is to be uniformly applied across a variety of media.”⁶⁵ The House Report of 1976 suggests a qualitative threshold for choreographic copyright protection that is not required for other artistic or literary media.⁶⁶ For instance, copyright would presumably protect a simple children’s story, an abstract and technically simple painting and a quick snapshot taken with an automatic camera.⁶⁷

59. *About Paul Taylor*, PBS (Oct. 8, 2001), <http://www.pbs.org/wnet/americanmasters/episodes/paul-taylor/about-paul-taylor/719/>.

60. *Id.* The piece has also been described as featuring Taylor and his pianist remaining motionless on stage, to a musicless score by John Cage. Andrea Peters, *Dancemaker: A Tribute to Paul Taylor*, WORLD SOCIALIST WEB SITE (Mar. 16, 1999), <http://www.wsws.org/articles/1999/mar1999/danc-m16.shtml>.

61. *About Paul Taylor*, *supra* note 59.

62. *Id.*

63. For example, Douglas Dunn uses elements of silence, stillness and simple and pedestrian movements in his pieces. See SALLY BARNES, TERPSICHORE IN SNEAKERS: POST-MODERN DANCE 187–91 (1979). Yvonne Rainer’s *Trio A* provides another example. The piece has been described as “reminiscent of not the bravura of a ballet dancer but rather of the competence of a pedestrian walking on the street.” Jill Sigman, *How Dances Signify: Exemplification, Representation, and Ordinary Movement*, 25 J. PHIL. RESEARCH 489, 497 (2000). Although the choreography uses difficult movements, it involves “patterns which suggest physical fitness exercises rather than ballet or the technical systems codified by the older generation of modern dancers.” *Id.* at 498, 512 (citations omitted). In her Note, Joi Michelle Lakes argues: “The utilization of seemingly ‘commonplace’ movements does not keep *Trio A* from performing an expressive function . . .” Lakes, *supra* note 5, at 1846 (arguing that such “expressive” works should qualify for copyright, despite their usage of quotidian movements).

64. Singer, *supra* note 2, at 288 (providing that American law has “treat[ed] dance as the black sheep of the arts”).

65. *Williams v. Crichton*, 84 F.3d 581, 590 (2d Cir. 1996) (stating that policy).

66. See H.R. REP. NO. 94-1476, at 53–54 (1976).

67. See *Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359–60 (1991) (“[O]riginality,

The level of copyright protection for these creations might be “thin,” but they would nonetheless be protected by the Copyright Act.⁶⁸ Indeed, copyright requires merely independent creation and a “modicum of creativity.”⁶⁹ As a matter of policy, courts refrain from judging the artistic merit of works, which, according to Justice Oliver Wendell Holmes, would be a “dangerous undertaking.”⁷⁰ Although Congress could restrict the definition of any copyrightable subject matter, general copyright jurisprudence and policy caution against a definition of choreography based upon artistic merit or technical difficulty.⁷¹

Moreover, “the legislative history . . . suggest[s] a definition [of choreography] far narrower than that customarily followed by the choreographic community,” which loosely defines the term as “anything a choreographer presents to the public.”⁷² Therefore, an industry definition of “choreography” would envelop any dance performance, regardless of the level of technical difficulty.⁷³ Because choreographers may prefer to defer to their community’s broader definition of the art form, they may refrain from testing the waters of courts that have not ruled on the issue.⁷⁴

2. Fixation and Registration

The Copyright Act’s fixation and registration requirements pose a significant hurdle for choreographers.⁷⁵ Because dance is naturally an intangible art form, fixation is expensive and fixation methods serve as imperfect preservation devices, choreographers rarely create recordings of their works. The absence of a tangible record leaves many choreographic works unprotected.⁷⁶ Furthermore, the burden

not ‘sweat of the brow,’ is the touchstone of copyright protection . . .”).

68. See *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1265 (10th Cir. 2008) (suggesting that “thin” copyright would only protect against the most blatant infringements, such as exact duplication).

69. *Matthew Bender & Co. v. West Publ’g Co.*, 158 F.3d 674, 681 (2d Cir. 1998). See also 1 NIMMER & NIMMER, *supra* note 53, § 2.01.

70. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”).

71. However, Barbara Singer might argue that jurisprudence actually supports treating choreography differently from other art forms, although this should not be the case. She argues:

Article I, section 8 of the Constitution restricts copyright protection to works of authorship that promote the “useful” arts. Courts have interpreted this restriction as an invitation to judge the moral worth of choreographic works. But just as choreographers shrink from the notion of any application of arbitrary standards of difficulty to their works, they also abhor any legal judgment of the morality of their works.

Singer, *supra* note 2, at 299.

72. Singer, *supra* note 2, at 297–98.

73. *Id.* Even under the current legal conception of choreography, a work need not be presented to an audience. 1 NIMMER & NIMMER, *supra* note 53, § 2.07[B].

74. See Singer, *supra* note 2, at 299. See also *Horgan v. Macmillan*, 789 F.3d 157, 161 (2d Cir. 1986) (suggesting an endorsement of *Compendium II*’s definitions, but not ruling on the issue).

75. See 17 U.S.C. § 102(a) (2006) (requiring fixation for copyright protection); *id.* § 411(a) (requiring registration or preregistration before bringing a civil action for infringement).

76. See *Benton*, *supra* note 2, at 87–90; *Lakes*, *supra* note 5, at 1851–57; *Lopez de Quintana*,

of registration presents a larger obstacle than most commentators have recognized, thereby preventing choreographers from taking full economic advantage of copyright's remedies.⁷⁷

a. Fixation

To gain copyright protection, the Copyright Act requires a work to be "fixed in any tangible medium of expression, now known or later developed, from which [it] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."⁷⁸ In *Compendium II*, the Copyright Office clarified the application of the fixation requirement to choreographic works, which are traditionally unfixed.⁷⁹ The fixed form of the choreographic work must be "capable of performance as submitted," meaning it must independently enable the recreation of the work.⁸⁰

Presently, three methods of fixation are available to choreographers: written dance notation, film and computer notation.⁸¹ While each method satisfies the Copyright Office's fixation requirement, none perfectly addresses the needs of choreographers. The Copyright Office prefers precise written notations (presumably including computer notation), but also accepts film, and courts have recognized both notation and film as appropriate fixation methods.⁸²

Written notation systems, such as Labanotation and Benesh Notation, provide the most accurate form of fixation.⁸³ These types of dance notations resemble a musical score and produce a written record in which marks representing individual steps are placed on a staff.⁸⁴ In addition, dance notation may also document the emotions and mood of the choreography, thereby portraying a choreographer's full

supra note 7, at 158–61; Singer, *supra* note 2, at 301–04; Anne K. Weinhardt, Note, *Copyright Infringement of Choreography: The Legal Aspects of Fixation*, 13 J. CORP. L. 839, 846 (1988) ("The problem is that choreography is transient; it is expressed by the planned movement of dancers through time and space, which makes it difficult to fix in a tangible medium.")

77. When a copyright holder registers a work, he may seek statutory damages, which in the choreographic community will be higher than actual damages because dance revenues are comparatively low. See *infra* note 117 and accompanying text. Most commentators view registration, apart from the corollary fixation requirement, to be a low hurdle. See, e.g., Lopez de Quintana, *supra* note 7, at 158.

78. 17 U.S.C. § 102(a).

79. See COMPENDIUM II, *supra* note 37.

80. *Id.* § 450.05.

81. See Benton, *supra* note 2, at 88–90; Lakes, *supra* note 5, at 1854–55; Lopez de Quintana, *supra* note 7, at 158.

82. Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 632 (2d Cir. 2004) (accepting video); Horgan v. Macmillan, Inc., 789 F.2d 157, 160 n.3 (2d Cir. 1986) (recognizing both video and written notation); COMPENDIUM II, *supra* note 37, § 450.07.

83. Benton, *supra* note 2, at 89; Lakes, *supra* note 5, at 1854; Lopez de Quintana, *supra* note 7, at 158–59. There are many more systems of written notation, as a new notation method has been developed every four years since 1928. Katie Lula, Essay, *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, 183 (2006).

84. Benton, *supra* note 2, at 89.

intentions for a piece.⁸⁵ However, the expense and logistical difficulties of dance notation make it an unrealistic tool for most choreographers.⁸⁶ Few people are trained in notation methods and twenty minutes of choreography can cost between \$1,200 and \$1,400—or even more—to notate.⁸⁷ Furthermore, because written notations must be retranslated into three-dimensional choreography, it is not an efficient rehearsal or reconstruction tool.⁸⁸ Indeed, it only preserves a work if there is an expert to retranslate the written notation into living choreography, and a choreographer—who often cannot read the notation—may not trust an expert’s interpretation.⁸⁹ As a consequence, many choreographers forego notation as a fixation method.⁹⁰

By contrast, the most popular form of fixation is film, which provides the advantage of affordability and convenience.⁹¹ The dance community recognizes that, as a result of these benefits, “[i]t’s a very useful tool It’s the best we have at the moment.”⁹² In addition, film can serve multiple functions as a choreographer may fix the work, deposit a copy with the Copyright Office for registration, use the film to rehearse and restage the work in the future and sell copies (or distribute free clips) of a high-quality version.⁹³ Despite these advantages, film introduces both

85. *Id.*; Lula, *supra* note 83, at 182–83.

86. Benton, *supra* note 2, at 89–90; Lakes, *supra* note 5, at 1854 (“For working choreographers more interested in copyright protection for economic control than for preservation of the art form, written notation is an unattractive option.”); Lopez de Quintana, *supra* note 7, at 159.

87. Singer, *supra* note 2, at 302 n.66 (citing Thomas Overton, Comment, *Unraveling the Choreographer’s Copyright Dilemma*, 49 TENN. L. REV. 594, 605–06 n.52 (1982)); Lula, *supra* note 83, at 183. A more contemporary source provides that twenty minutes of Labanotation can cost up to \$12,000, and the time required to notate the average ballet is approximately 10,000 hours. Margaret Putnam, *Notation Takes Steps to Preserve Dance*, DALL. MORNING NEWS, Dec. 6, 1998, at 1C.

88. Singer, *supra* note 2, at 302.

89. Lopez de Quintana, *supra* note 7, at 159 (noting that “[n]otation is a dying art form” and requires hiring “the rare professional who understands it . . .”). Richard Caples, Executive Director of Lar Lubovitch Dance Company, adds, regarding Labanotation:

Very few people can write it, and very few people can read it No choreographer I know can do it. They don’t trust giving it over to someone and saying, “I can’t check on you, but I am going to trust you to pass on this work to the world.”

Lubow, *supra* note 10, at 41 (quoting Richard Caples).

90. Singer, *supra* note 2, at 302. Of the dance companies I spoke with, only Mark Morris Dance Group ever used dance notation. The company registers every choreographic work, and only two have been notated. Telephone Interview with Nancy Umanoff, *supra* note 17.

91. Benton, *supra* note 2, at 88 (“It is relatively easy for a choreographer to record a particular work with a basic video recorder at a fairly low cost.”); Lopez de Quintana, *supra* note 7, at 159 (describing “[t]he advent and widespread use of video recording systems” as “an inexpensive and speedy solution to the fixation problem”).

92. Lubow, *supra* note 10, at 41 (quoting Nancy Umanoff, Executive Director, Mark Morris Dance Group).

93. A choreographer may film her works for preservation or rehearsal purposes without registering the work with the Copyright Office. For instance, Karole Armitage has never registered a choreographic work, but she has videos of all her dances. Telephone Interview with Karole Armitage, *supra* note 21. Similarly, Twyla Tharp maintains rehearsal and performance videotapes of 132 dances. Witchel, *supra* note 10, at 85. Few choreographers seem to sell video performances because creating a high-quality film can be expensive and the market for such videos is small. Interview with Richard Caples, *supra* note 17. However, Bill T. Jones/Arnie Zane Dance Company creates multicamera films

artistic and legal disadvantages for choreographers. Film not only adds some expense to a choreographer's budget, but also fails to fully represent a dance.⁹⁴ Film does not accurately depict a viewer's perception of a performance because the videographer selects the angle and zoom of the film.⁹⁵ Furthermore, video flattens three-dimensional choreography and does not accurately present the spatial relationships between dancers and the stage.⁹⁶ As Barbara Horgan of the Balanchine Trust has said, "video is cruel to dance."⁹⁷

The inability of film to completely capture a performance has negative legal consequences for choreographers because the film determines the scope of the work's copyright. Video fixation only extends copyright protection to "what is disclosed therein."⁹⁸ Film may thus fix "too little"—what it fails to capture—and simultaneously fix "too much"—dancers' mistakes or imperfect display of the intended emotion of the piece.⁹⁹ These issues make it difficult to recreate a choreographic work from a film with integrity, which presents both an obstacle to full copyright protection and an obstacle to using film as a preservation device.¹⁰⁰ As a result, many choreographers reject film recording and those who do record find it a disappointing solution.¹⁰¹

for each choreographic work, and has offered many videos for sale, both by self-publication and by using an arts distributor. Telephone Interview with Bob Burse, *supra* note 27. In addition, the company posts some YouTube video clips of both performances and rehearsals on its web site, which serves as a publicity tool. See, e.g., *A Quarreling Pair*, BILL T. JONES/ARNIE ZANE DANCE CO., <http://www.newyorklivearts.org/event/aquarrelingpair> (last visited Dec. 3, 2011). Similarly, Karole Armitage posts excerpts from select works on her company's website, and many of the videos link directly to YouTube. *Videos*, ARMITAGE GONE! DANCE, http://www.armitageonedance.org/index.php?option=com_content&view=article&id=14&Itemid=17 (last visited Nov. 21, 2011).

94. Benton, *supra* note 2, at 88–89 (detailing integrity problems); Lakes, *supra* note 5, at 1855 (discussing integrity problems); Singer, *supra* note 2, at 302 ("Visual preservation, though less expensive than notation, may likewise be beyond the budget of a struggling choreographer.")

95. Lakes, *supra* note 5, at 1855; Lubow, *supra* note 10, at 41.

96. Lopez de Quintana, *supra* note 7, at 160; Singer, *supra* note 2, at 303.

97. Sheryl Flatow, *The Balanchine Trust: Guardian of the Legacy*, DANCE MAG., Dec. 1990, at 58, 61.

98. COMPENDIUM II, *supra* note 37, § 450.07(a).

99. See Lakes, *supra* note 5, at 1855–56 (describing how video records "too little" in the sense that it is an incomplete representation of choreography, and "too much" by capturing, and thus protecting, "material which is not intended to be part of the choreography" and should be left to the public domain).

100. See Lopez de Quintana, *supra* note 7, at 160 ("[R]econstructing a ballet from film is laborious because even a skilled observer has difficulty discerning the various movements on stage."); Singer, *supra* note 2, at 303 (noting that film "offers only moving images, which are not very useful to the choreographer or reconstructor wishing to observe isolated movements," and "film provides a mirror image of the dance, reversing left and right," which provides another obstacle for reconstruction). Due to the difficulty of restaging a work from video, Lar Lubovitch never allows a licensee to restage his work from a video. Interview with Richard Caples, *supra* note 17. Karole Armitage adds that the problem with only viewing a video is that the reconstructor will not be familiar with the philosophy behind the choreography, which is essential for an accurate performance. "If I look at a video of something I don't know, I can't understand it." Telephone Interview with Karole Armitage, *supra* note 21. Thus, video must be used in conjunction with traditional forms of teaching. *Id.*

101. See Singer, *supra* note 2, at 303 ("[M]any choreographers, particularly those who have not achieved financial success, pass up visual fixation as an unnecessary luxury."). All the dance companies I interviewed videotaped their works, but not all works were registered. The choreographers who did

In recent years, computer notation has provided a third alternative for choreographers to fix their works.¹⁰² This method provides the dual advantage of an affordable and accurate recording form.¹⁰³ The choreographer retains complete control over the authenticity of the work as he manipulates three-dimensional figures that he can view from every angle on the screen.¹⁰⁴ Computer notation serves two distinct functions: a choreographer can either create a new work using the program and then use the resulting visuals to teach the piece to dancers, or the choreographer can notate a preexisting work. When a choreographer uses computer programs to compose *through* notation, he departs from the traditional method of entering the studio with a theme or general plan and then choreographing onto the dancers themselves.¹⁰⁵ Instead, the choreographer will first compose the dance on the computer and the dancers will then learn the movements by mimicking the forms on the screen.¹⁰⁶ Because many choreographers prefer to choreograph directly onto dancers when they create new works, many choreographers may also resist using computer notation.¹⁰⁷ Alternatively, to document preexisting dances using computer notation, the choreographer must go through the arduous and time-consuming process of entering the movements into the computer.¹⁰⁸ This makes the notation method particularly unattractive given that choreographers frequently prefer to devote their limited time to developing new works rather than preserving old works.¹⁰⁹

register generally had companies with larger budgets. See Telephone Interview with Bob Bursey, *supra* note 27; Interview with Richard Caples, *supra* note 17; Telephone Interview with Nancy Umanoff, *supra* note 17. However, Twyla Tharp, whose foundation in 2008 reported expenses of merely \$35,159, also registers every choreographic work by depositing a video. See Twyla Tharp Form 990-PF, *supra* note 23; Telephone Interview with Jesse Huot, *supra* note 17.

102. See Benton, *supra* note 2, at 90; Lakes, *supra* note 5, at 1855; Lopez de Quintana, *supra* note 7, at 160.

103. See Benton, *supra* note 2, at 90; Lakes, *supra* note 5, at 1855; Lopez de Quintana, *supra* note 7, at 160.

104. See Lopez de Quintana, *supra* note 7, at 160–61.

105. Singer describes the traditional choreographic process:

For most choreographers, the creative process is a long, arduous task. The choreographer usually begins with an inspiration derived from an intriguing story, musical composition, or vague mental image of movement. In the studio, the choreographer uses his body or the body of selected dancers to translate his inspiration into movement. For weeks and hours, the choreographer carefully develops and refines his dance. Eventually, the dance is “set” and ready for performance.

Singer, *supra* note 2, at 292.

106. See Lakes, *supra* note 5, at 1855.

107. See Benton, *supra* note 2, at 90. See also Singer, *supra* note 2, at 292 (describing the choreographer’s process of composing a dance “us[ing] his body or the body of selected dancers to translate his inspiration into movement”).

108. Lakes, *supra* note 5, at 1855 (“To put it all [into the computer] would take years” (quoting Merce Cunningham)).

109. For instance, although Merce Cunningham considered preservation methods in his last years, he remained most interested in choreographing new works. Journalist Arthur Lubow quotes the choreographer:

“I don’t mind keeping up some old pieces, bringing them back, but I’m not very concerned about it,” Cunningham, in midcareer, said to Jacqueline Lesschaeve. “It takes a lot of rehearsal to

Similarly, computer programs cannot capture “the fundamental choreographic element of emotion,” although a choreographer may leave some written indication of how a dancer should perform a work.¹¹⁰ This differs from dance notation techniques that have a built-in mechanism for expressing the emotions that accompany the choreographic movements.¹¹¹ Furthermore, even if a choreographer wants to use computer notation, such programs are not yet widely available to choreographers.¹¹² Therefore, computer notation remains only a partial and premature solution.

b. Registration

If a choreographer does successfully fix a work, then he may register the work with the Copyright Office by depositing a copy of the video or notation.¹¹³ Although the Copyright Act no longer requires registration as a prerequisite for copyright protection, a right holder gains economic advantages by registering the work.¹¹⁴ Generally, a right holder of a U.S. work must register that work in order to file suit for infringement, although he may register after infringement has occurred.¹¹⁵ Most significantly, a right holder of a registered work may seek statutory damages and attorney’s fees, but only if he has registered before the infringement commenced.¹¹⁶ Because actual damages of infringement will likely be low and potentially difficult to prove in the context of choreography, statutory damages provide a large incentive for registration.¹¹⁷ Additionally, choreographers have recently focused on registering their works as a way to counteract the Second

bring a piece back, and for lack of time I have to make the choice between giving rehearsals to old pieces or making new ones. Basically I feel more interested in working on new pieces.” The day before he died, he told a former company member that he hoped his energy levels would allow him to bring dancers to his apartment to try out steps in a new piece that he was developing.

Lubow, *supra* note 10, at 41.

110. Lopez de Quintana, *supra* note 7, at 161. For instance, before he turned to computer notation, Merce Cunningham used self-styled notations that indicated the aesthetic he was after, such as “[a]nger, fury, demonic,” or “[s]low enough to have weight and fast enough to flow.” Lubow, *supra* note 10, at 41. However, Cunningham never shared these writings with his dancers, “believing that if he taught the correct movements, the expressive content would follow.” *Id.*

111. See *supra* note 90 and accompanying text.

112. Lopez de Quintana, *supra* note 7, at 161.

113. 2 NIMMER & NIMMER, *supra* note 53, § 7.17[A] (distinguishing deposit from registration), § 7.18 (explaining the mechanics of registration).

114. See generally *id.* § 7.16 (detailing the significance of registration).

115. *Id.* § 7.16[B][1][a].

116. *Id.* § 7.16[C][1][a] (citing 17 U.S.C. § 412 (2006)).

117. Richard Caples expressed the statement that actual damages would be low and difficult to prove for choreography. Interview with Richard Caples, *supra* note 53. The Copyright Act sets a range for statutory damages of \$750 to \$30,000 per infringement, although the court may increase the award to \$150,000 or decrease the award to \$200 based upon whether the infringement was willful. 17 U.S.C. §§ 504(c)(1), (2). In contrast to the view that registration is important, one scholar points out that choreographers only object to unlicensed performances that corrupt the work’s integrity, and that once a work has been infringed through an improper performance, monetary damages are inadequate. Lopez de Quintana, *supra* note 7, at 169–70.

Circuit's *Martha Graham* decision, which suggested that choreographic works belong to dance companies rather than to choreographers.¹¹⁸ In *Martha Graham*, the court held that choreographer Martha Graham's dances were "works made for hire" and that the copyrights to her works therefore belonged to Graham's dance company.¹¹⁹ Indeed, Lar Lubovitch only began registering his works in the wake of the *Martha Graham* decision.¹²⁰ Although registration alone will not suffice, choreographers believe that registering the work in the choreographer's name may help to ensure that the choreographer, rather than the company, retains the copyright.¹²¹

However, not all choreographers register their works, and choreographers may pick and choose which works to register.¹²² The cost of registration presents a difficulty for choreographers.¹²³ Currently, the registration fee for a single work of authorship is \$35 for online filing, and either \$50 or \$65 for paper filing.¹²⁴ Although at first glance these fees seem affordable, a choreographer who has completed 100 works or more may not be able to afford registering each work.¹²⁵ As a result, a choreographer may need to choose which works to register.¹²⁶ For instance, Lar Lubovitch Dance Company conducts a cost-benefit analysis in deciding which of the choreographer's more than 100 works to register.¹²⁷ Lubovitch likely will not register a work that has gone unperformed for decades because the cost of recreating the piece from video for licensing will be expensive and timely, and the risk of infringement for such a dormant work will be low.¹²⁸ Conversely, all of Lubovitch's signature pieces are registered.¹²⁹ Registration is therefore frequently connected to licensing as a choreographer may prioritize registering the works that dance companies most frequently license.¹³⁰

118. *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 639–42 (2d Cir. 2004) (holding that dances created by choreographer were "works made for hire" in dispute between choreographer's dance company and legatee); Interview with Richard Caples, *supra* note 17. *See also infra* Part I.B.4.

119. *Martha Graham*, 380 F.3d at 641–42.

120. Interview with Richard Caples, *supra* note 17.

121. *Id.* *See also infra* Part I.B.4.

122. Interview with Richard Caples, *supra* note 17. Indeed, Karole Armitage has been a professional dancer and choreographer for over thirty-five years and confessed that she was completely unfamiliar with the process of registration. Telephone Interview with Karole Armitage, *supra* note 21.

123. Prior commentators have failed to recognize registration as an economic burden. *See, e.g.*, Lopez de Quintana, *supra* note 7, at 158.

124. *Fees*, U.S. COPYRIGHT OFFICE (revised Sept. 24, 2010), <http://www.copyright.gov/docs/fees.html>. The \$50 fee for paper filing requires filing with a 2-D barcode-generated form, whereas the \$65 fee paper filing does not. *Id.*

125. Interview with Richard Caples, *supra* note 17.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

3. Proving Infringement

In addition to contending with the uncertainty around and underinclusive scope of the definition of “choreographic works” and the logistical difficulties of fixation and registration, choreographers struggle to assert their exclusive rights to protected works. Given choreographers’ extremely limited funds, the high cost of litigation and the infrequency of conflicts within the dance community, choreographers have little incentive to provide courts with additional opportunities to clarify the law.¹³¹

The only adjudicated case to consider infringement of a choreographic work is *Horgan v. Macmillan*.¹³² In that case, choreographer George Balanchine’s executrix, Barbara Horgan, brought suit against the publisher of a book that included photographs of a performance of Balanchine’s *Nutcracker*, claiming the book constituted an infringing copy, or in the alternative, a derivative work.¹³³ The district court held that the book did not infringe Balanchine’s copyright because the photographs captured only “dancers in various attitudes at specific instants of time,” rather than “the flow of the steps in a ballet”; therefore, “[t]he staged performance could not be recreated” from the photographs.¹³⁴

On appeal, the Second Circuit rejected this standard because it carved out a novel doctrine for choreography which was inconsistent with infringement analysis for other copyrighted media.¹³⁵ The court rejected the district court’s interpretation, writing, “the standard for determining copyright infringement is not whether the original could be recreated from the allegedly infringing copy, but whether the latter is ‘substantially similar’ to the former.”¹³⁶ The court articulated the test for substantial similarity to be whether “the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.”¹³⁷ Under this test, the fact that the infringing material is in a different medium, such that recreation of the original from the infringing material would be difficult if not impossible, provides no defense.¹³⁸

Although the Second Circuit remanded the case to the district court to develop a full record and determine whether the book infringed Balanchine’s choreography, its decision did provide some meaningful guidance for applying the “substantially

131. See Singer, *supra* note 2, at 295 (explaining that “[b]oth choreographers and potential licensees view choreographic licensing agreements as a fair and efficient method of determining their rights and responsibilities”); see *supra* Part I.A (discussing economics of dance companies).

132. *Horgan v. Macmillan, Inc.*, 621 F. Supp. 1169 (S.D.N.Y. 1985), *rev’d*, 789 F.2d 157 (2d Cir. 1986).

133. *Horgan*, 789 F.2d at 161.

134. *Horgan*, 621 F. Supp. at 1170.

135. *Horgan*, 789 F.2d at 162–63 (providing instructive examples from literature, film and music).

136. *Id.* (citations omitted). *But see* Lakes, *supra* note 5, at 1849 (arguing that the district court’s standard was preferable because “it is the movement between individual dance steps which should be considered the copyrightable element—what the *Horgan* district court correctly identified as the ‘flow’”).

137. *Horgan*, 789 F.2d at 162–63 (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960)).

138. *Id.* (citations omitted).

similar” standard.¹³⁹ First, the court corrected the district court’s “far too limited view of the extent to which choreographic material may be conveyed in the medium of still photography.”¹⁴⁰ The district court had analogized a photograph of choreography to a single chord of a symphony.¹⁴¹ However, the Second Circuit found the analogy inapt as “[a] snapshot of a single moment in a dance sequence may communicate a great deal.”¹⁴² A photograph may constitute a “freezing of a choreographic moment” by “captur[ing] a gesture, the composition of dancers’ bodies or the placement of dancers on the stage.”¹⁴³ Moreover, snapshots of choreography may actually infringe more than the selected positions captured because “[a] photograph may also convey to the viewer’s imagination the moments before and after the split second recorded.”¹⁴⁴ The court explained that a viewer may fill in the gaps between the photographs by deducing subsequent actions dictated by gravity and that a viewer who has recently seen a performance may be able to recollect even more.¹⁴⁵

Despite the Second Circuit’s helpful analysis of the infringement standard and its application to choreography, the decision left much uncertain for choreographers. In particular, the court recognized that the photographs may be “of insufficient quantity or sequencing to constitute infringement,” or they may constitute a copy, “but also [be] protected as fair use.”¹⁴⁶ Similarly, the Second Circuit directed the district court to consider such unresolved issues as: “[t]he validity of Balanchine’s copyright, the amount of original Balanchine choreography (rather than [that of prior choreographers]) in the New York City Ballet production of the Nutcracker and in the photographs, and the degree to which the choreography would be distinguishable in the photographs without the costumes and sets”¹⁴⁷ Thus, the Second Circuit’s decision is limited to the holding that photographs may infringe choreography and that the standard of infringement is substantial similarity, or whether the ordinary observer would regard the aesthetic appeal of the photograph as the same as the choreography.¹⁴⁸

Unfortunately, because the parties settled before the remand proceeding, *Horgan* provides choreographers limited guidance regarding how a court would decide an infringement action.¹⁴⁹ The Second Circuit gave no guidance regarding what combination or number of photographs would be sufficient to infringe a choreographic work.¹⁵⁰ Furthermore, the ordinary observer standard may invite

139. *Id.* at 157, 163.

140. *Id.* at 163.

141. *Horgan v. Macmillan, Inc.*, 621 F. Supp. 1169, 1170 n.1 (S.D.N.Y. 1985), *rev’d*, 789 F.2d 157 (2d Cir. 1986).

142. *Horgan*, 789 F.2d at 163.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Watkins*, *supra* note 19, at 442.

150. *Horgan*, 789 F.2d at 163.

decisions that constrict or enlarge a choreographer's exclusive rights.¹⁵¹ For instance, the ordinary observer may not be attuned to significant but subtle differences that a member of the dance community would see as distinguishing the alleged copy.¹⁵² A related risk is that the ordinary observer may elevate the differences in a way that ignores the substantial similarities, though the Second Circuit's encouragement of expert testimony may help solve the potential conflict that the standard poses.¹⁵³ How a court or jury would receive an expert's testimony remains unclear.

Due to the lack of clarity surrounding the infringement standard, choreographers may remain hesitant to attempt judicial enforcement of their rights. Not only is likelihood of success uncertain, but many choreographers also fear a judicial decision that would contradict the dance community's understanding of what constitutes creative borrowing or referencing and what constitutes stealing.¹⁵⁴ Indeed, "[d]ance has a long tradition of borrowing and expanding upon movement" and a strict infringement standard might stifle choreographic creativity.¹⁵⁵

4. Ownership and Work for Hire

As the foregoing discussion suggests, judicial determination of the application of copyright to dance may disadvantage choreographers and their companies by contradicting existing industry customs. The most contentious issue regarding copyright protection for choreographers in recent years has been the rule that when a choreographer works within his own company, the company rather than the choreographer is the "author" and thus the default owner of the work.¹⁵⁶ This rule, established in *Martha Graham School & Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, subverted the industry-accepted policy that a choreographer is always the right holder, and that the dance company merely has an implied license to perform the works.¹⁵⁷

151. See Lopez de Quintana, *supra* note 7, at 166–67 ("In requiring the ordinary observer to make judgments on substantial similarity based on overall aesthetic appeal, the court may potentially invite observers to falsely conclude that dissimilar works are actually substantially similar.").

152. *Id.* at 167.

153. *Horgan*, 789 F.2d at 163.

154. Lopez de Quintana, *supra* note 7, at 167.

155. *Id.* at 167–68 (citing Hilgard, *supra* note 42, at 783–84).

156. Numerous interviewees characterized this as the most currently pressing issue for choreographers and their companies. See, e.g., Interview with Richard Caples, *supra* note 17. Numerous scholars have written about the dance community's negative reaction to this ruling. See generally Braveman, *supra* note 7 (explaining the dance communities outrage); Connelly, *supra* note 19 (calling the rule "an affront to the accepted tenets of the dance world"); Forcucci, *supra* note 19; Nancy S. Kim, *Martha Graham, Professor Miller and the "Work for Hire" Doctrine: Undoing the Judicial Bind Created by the Legislature*, 13 J. INTEL. PROP. L. 337 (2006).

157. See *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 639–42 (2d Cir. 2004) (holding that choreography copyrights belonged to dance company rather than choreographer under work for hire doctrine); Connelly, *supra* note 19, at 839 ("The ruling is an affront to the accepted tenets of the dance world, where there has 'always been the assumption . . . that the choreographer owns his or her own work and can leave that work to whomever he or she would like to.'" (citing Jennifer Dunning, *Dance and Profit: Who Gets It?*, N.Y. TIMES, Sept.

Sections 101 and 201(b) of the Copyright Act provide a default standard of ownership that favors the choreographer's employer, i.e., the dance company.¹⁵⁸ If a work of authorship is considered a "work made for hire," then the employer "is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, [the employer] owns all of the rights comprised in the copyright."¹⁵⁹ For a work governed by the 1976 Act to qualify as a "work made for hire," it must fall within one of two statutory categories.¹⁶⁰ The only category that a choreographic work may fall under is the first: "a work prepared by an employee within the scope of his or her employment."¹⁶¹

In the *Martha Graham* case, the Second Circuit held that the dances Martha Graham created while employed full-time by her dance company qualified as works for hire and that the company, rather than her legatee, therefore owned the copyrights therein.¹⁶² The case arose from a conflict between the Martha Graham Center of Contemporary Dance, Inc. ("the Center"), joined by the Martha Graham School of Contemporary Dance, Inc. ("the School") and the choreographer's sole beneficiary under her will, Ronald Protas.¹⁶³ After Graham's death, Protas's relationship with the Center broke down and he eventually filed suit to enjoin the Center and the School from using the Martha Graham trademark, teaching the Martha Graham Technique and performing seventy of Graham's dances.¹⁶⁴

For the dances that fell under the 1976 Act, the court applied the Supreme Court's rule from *Community for Creative Non-Violence v. Reid* that whether a creator qualifies as an "employee" is determined by reference to the common law of agency and a list of nonexclusive factors.¹⁶⁵ According to the Second Circuit, the following factors have particular significance: "(1) the hiring party's right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party."¹⁶⁶ Graham's position as Artistic Director—and her receipt of employee, travel and medical benefits, reimbursement for personal expenses and a regular salary to

20, 2003, at B9 (quoting Charles Reinhart, Dir., Am. Dance Festival))). Indeed, Jesse Huot of Twyla Tharp referred to the decision as "scary." Telephone Interview with Jesse Huot, *supra* note 17.

158. 17 U.S.C. §§ 101, 201(b) (2006); Kim, *supra* note 156, at 339–40.

159. 17 U.S.C. § 201(b).

160. See *id.* § 101 (defining "work made for hire"). The judge-made test for pre-1976 works differs from the statutory embodiment of the doctrine in the 1976 Act. See *Martha Graham*, 380 F.3d 624, 637–41 (discussing Martha Graham's choreographic works that came under the 1909 Act).

161. 17 U.S.C. § 101. A choreographic work cannot qualify as a "work specially ordered or commissioned" because it does not fall within one of the nine enumerated subject matter categories therein. *Id.* See 18 AM. JUR. 2D *Copyright and Literary Property* § 63 (2010).

162. *Martha Graham*, 380 F.3d at 639–42.

163. *Martha Graham*, 380 F.3d at 628. Protas founded and litigated through the Martha Graham School and Dance Foundation, Inc. *Id.* at 628, 630.

164. *Id.* at 630.

165. *Id.* at 635–36 (citing *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 732, 738–41, 751–52 (1989)). The dances under the 1909 Act that Graham created while a full-time employee also qualified as works for hire, but under the "instance and expense test." *Id.* at 637–41.

166. *Id.* at 636 (quoting *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992)).

create new choreography—weighed in favor of finding an employment relationship.¹⁶⁷ Furthermore, the Center routinely withheld income and social security taxes from her salary.¹⁶⁸ Moreover, the creation of dances was a regular activity for the Center, and Graham choreographed on the Center’s premises using its resources.¹⁶⁹

The only factor weighing against finding an employment relationship was that the Center did not exercise much control over Graham.¹⁷⁰ However, the court noted that employer control was not in itself determinative and that Graham’s impressive talent “understandably explain[ed] the Center’s disinclination to exercise control over the details of her work”¹⁷¹ Indeed, the Second Circuit explicitly rejected the argument that Graham’s artistic talent and the Center’s purpose of promoting that talent should preclude a holding that the dances were works for hire.¹⁷² Therefore, the court held that choreographers are subject to the same copyright doctrines as other artists, regardless of party intentions and industry customs.¹⁷³ After the *Martha Graham* case, choreographers and their companies were faced with the decision of whether to accept the work for hire status of choreography or to contract around the default copyright law. The dance community’s varied responses will be considered in detail below.¹⁷⁴

II. CONTRACT STEPS IN

Due to the tensions between industry customs and the copyright doctrines explained in the preceding section, choreographers frequently do not register and enforce their copyrights. Contract allows choreographers to escape default copyright rules and create their own laws that take into account the industry customs that formerly regulated the dance community.¹⁷⁵ Although the field has grown in recent years as dance has expanded into television and film media, the choreographic community remains close-knit.¹⁷⁶ Choreographers within this community have subscribed to copyright protections to varying degrees and have

167. *Id.* at 641.

168. *Id.*

169. *Id.*

170. *Id.* at 642.

171. *Id.* The court found explicit support for this in the Restatement (Second) of Agency, which recognizes that there are many occupations in which the employer will not exercise control over the details of an employee’s work, such as the example of a “full-time cook.” *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 220(1) cmt. d (1958)).

172. *Id.* at 642.

173. *See id.* *See also* Kim, *supra* note 156, at 341 (arguing that the current work for hire doctrine fails to capture parties’ intentions, and recommending an amendment to the Copyright Act that would “emphasize the reasonable expectation of the parties rather than the existence (or nonexistence) of an employment relationship”).

174. *See infra* Part II.A.

175. *See generally* Singer, *supra* note 2 (discussing dance customs).

176. *See* discussion *supra* Part I.A (discussing how the dance community’s limited economic resources enable it to remain close-knit).

developed different solutions for addressing perceived inadequacies in the law.¹⁷⁷ Faced with the penetrable armors of copyright and custom, contract law has become a necessary reinforcement for choreographers and their companies.

This Part details how choreographers use contract law to simultaneously assert the protections of copyright and rely on the protections of custom, providing examples by exploring choreographic licenses of prior works to ballet companies. Although the dance community developed a set of licensing customs before choreography gained copyright protection, choreographers have continued to experiment with and tailor contract provisions to their unique needs. Currently, choreographers use three broad categories of licenses, which may be termed the “all-inclusive license,” the “limited license” and the “selective license.” These licensing models are described in detail below and analyzed in terms of their benefits and drawbacks for choreographers, licensees and nonchoreography right holders and designers.

A. FILLING IN THE GAPS OF COPYRIGHT AND CUSTOM

In recent years, choreographers and their dance companies have experimented to fortify the protections of copyright and custom. The main methods reflect an attempt on the part of choreographers to escape the default work for hire rule explicated in *Martha Graham*, and to preserve and maintain control over works by granting licenses that incorporate and build upon standard licensing customs that companies and choreographers have implemented for decades.

In response to the *Martha Graham* case, dance companies have registered works under the choreographer’s name to establish the choreographer’s ownership.¹⁷⁸ However, registration in the choreographer’s name alone would be insufficient to transfer ownership from the company to the choreographer because the parties have not “expressly agreed” to waive the work for hire doctrine “in a written instrument signed by them.”¹⁷⁹ As a result, dance companies have used various contracting methods to cement choreographers’ ownership of their works.¹⁸⁰ These methods include the dance company and choreographer entering into a written contractual agreement, or spelling out an agreement in the board minutes, that specifies the choreographer’s ownership of the choreographic copyrights.¹⁸¹

177. Lakes, *supra* note 5, at 1830. See also discussion *infra* Part II.A, B.

178. Interview with Richard Caples, *supra* note 17. However, some choreographers prefer that their companies own their works. For instance, Mark Morris Dance Group employs choreographer Mark Morris to create new works, which the company registers in its own name. The company then earns all of the licensing and royalty fees related to both works that the choreographer has developed for his own company, and works that he has created under a commission from a ballet company. The choreographer selected this ownership structure to ensure the economic health of his dance company and to free himself of financial and business complexities. Interview with Richard Caples, *supra* note 17; Telephone Interview with Nancy Umanoff, *supra* note 17.

179. See 17 U.S.C. § 201(b) (2006) (stating requirement for an express waiver in writing signed by the parties).

180. Interview with Richard Caples, *supra* note 17.

181. *Id.* Despite Richard Caples’s suggestion that an agreement in the board minutes might constitute a transfer of ownership, it is unclear whether it would qualify as “a written instrument signed

The flexibility of contract law provides a promising solution for choreographers who wish to simultaneously control their works and to profit from them. First, contract is a cost-effective measure for choreographers who lack the financial resources to litigate. Written and negotiated agreements may decrease the likelihood of conflict because the parties have carefully considered the terms of agreement. Moreover, because dance is a small industry, parties are likely to be familiar with licensing terms and peer pressure can be a powerful enforcement tool.¹⁸² The threat of a tarnished reputation provides a nonlegal incentive to fully perform the contract's terms.¹⁸³ As a result, contractual breaches within the dance community are virtually nonexistent, assuring the performance of both the choreographer and the licensing dance company.¹⁸⁴

The advantages of licensing are multifaceted for all parties involved. Licensing serves multiple purposes for choreographers: preservation of works for future audiences; publicity; maintenance of artistic control; and monetary remuneration, which can fuel the development of new works. Licensees gain clear permissions, access to talented choreographers and the opportunity to expand their audiences and gain economic rewards. In addition, licenses frequently benefit the dancers and other contributors to the original production. For instance, music right holders and costume, set and lighting designers gain the opportunity to work with another dance company, and thus make new contacts and earn additional income.¹⁸⁵

B. CONTRACTING FOR CONTROL: LICENSING MODELS

Choreographers began licensing their works long before choreography gained copyright protection.¹⁸⁶ Recognizing the need to protect the integrity of the works

by [the parties]" under § 201(b). 17 U.S.C. § 201(b); Interview with Richard Caples, *supra* note 17.

182. Lopez de Quintana, *supra* note 7, at 168 (citing Singer, *supra* note 2, at 295–96).

183. *Id.* (citing Singer, *supra* note 2, at 296 n.36).

184. Singer, *supra* note 2, at 295, 295 n.34 (noting that there are no recorded cases of actions for breach of choreographic licensing agreements). In interviews, dance company representatives said they were not aware of any such breach. Telephone Interview with Bob Bursey, *supra* note 27; Interview with Richard Caples, *supra* note 17; Telephone Interview with Jesse Huot, *supra* note 17.

185. The extent to which nonchoreographers will need to be involved in a restaging will vary depending on the nature of their contributions and the difficulty of replicating those contributions without their direct involvement. For instance, a composer of a recorded piece of music need merely grant permission for the licensee to use his work. The composer gains the advantage of compensation without additional time and work; however, the composer may prefer to exercise control over the way in which his work is used in the new production. Costume designers may or may not need to be involved in the new production. Frequently, a licensor will loan the original costumes to the licensee, negating the need for the costume designer's involvement. However, the licensee may require the designer's involvement if new costumes need to be made or altered. The same analysis applies to set designers, who will only need to be involved if there is a problem with loaning the original sets. On the other end of the spectrum are lighting designers, whose involvement licensors require more frequently. Original lighting will be more difficult to replicate if the performance space for the new production differs from that of the original production. As a result, a licensor may require the licensee to employ the lighting designer to tailor the design for the new stage. Interview with Richard Caples, *supra* note 17; Telephone Interview with Jesse Huot, *supra* note 17; Telephone Interview with Nancy Umanoff, *supra* note 17.

186. See Singer, *supra* note 2, at 292–95.

and also to profit from them, the industry developed a set of licensing customs tailored to the unique needs of dance.¹⁸⁷ As the dance community has grown and choreographers contend with the constraints of copyright law, choreographers have built upon the basic licensing customs to develop innovative licensing techniques.¹⁸⁸ In addition, a recent focus on the preservation of choreography has motivated choreographers to implement licenses that not only address the short-term goals of generating income, preserving artistic vision and increasing exposure to their works but also address the long-term goal of ensuring the choreographer's legacy even after the expiration of his copyrights.¹⁸⁹ Interviews with dance companies reveal that these licenses fall into three categories: the all-inclusive license, the limited license and the selective license. Each model goes beyond ordinary dance customs to address the specific needs of individual choreographers. Before discussing current licensing models, Section 1 explains the customary terms that are a part of all licensing contracts.

1. Customary Terms: Providing a Floor¹⁹⁰

All dance licenses both implicitly and explicitly incorporate customary terms, which pre-date copyright protections for choreography. The dance community developed customs based upon respect for the choreographer's creative vision.¹⁹¹ Before gaining copyright protection, piracy of choreographic works was of little concern and the industry generally regulated itself.¹⁹² Today, choreographers continue to use customs that the industry developed, which form the foundation of all dance licenses.¹⁹³ Customary terms are explicitly incorporated into the language of dance licenses.¹⁹⁴ In addition, there is a customary process for deciding whether to enter a licensing agreement.¹⁹⁵ Dance companies ordinarily consult with a choreographer or his representative before formally requesting permission to perform the work.¹⁹⁶ If the choreographer is not already familiar with the company

187. *Id.*

188. *See infra* Part II.B.1-4.

189. Telephone Interview with Jesse Huot, *supra* note 17 (indicating that for Twyla Tharp, the primary motivation to license is preservation of the works, even after they fall into the public domain and that the choreographer has developed her method of licensing to address that goal). *See generally* Flatow, *supra* note 97; Lubow, *supra* note 10; Swack, *supra* note 10.

190. In addition to the citations to Barbara Singer's article, all facts in this section are supported by interviews with choreographers and their representatives, as well as licensee dance companies. *See* Telephone Interview with Karole Armitage, *supra* note 21; Telephone Interview with Bob Bursey, *supra* note 27; Interview with Richard Caples, *supra* note 17; Telephone Interview with Jesse Huot, *supra* note 17; Telephone Interview with Elizabeth Olds, *supra* note 16; Telephone Interview with Ellen Sorrin, *supra* note 15; Telephone Interview with Nancy Umanoff, *supra* note 17. Where a proposition comes from a specific interview, that is indicated in the footnote.

191. Singer, *supra* note 2, at 292-95.

192. *See id.* However, Agnes de Mille and other choreographers who sought copyright protection serve as exceptions to this general proposition. Benton, *supra* note 2, at 79.

193. Singer, *supra* note 2, at 292-95.

194. *See id.* at 294-95 (discussing aspects of "formal licensing agreement[s]").

195. *Id.* at 293-94.

196. *Id.*

and its dancers, he visits the company to determine the technical capabilities and personalities of the dancers.¹⁹⁷ The choreographer “will permit the performance of his work only after being convinced that the skills of the company reflect the artistic worth” of the dance to be performed.¹⁹⁸

The parties enter into a formal licensing agreement if the choreographer is satisfied with the company and assents to performance of his work.¹⁹⁹ The contract provides that “[t]he licensee has the right to perform a specified work for a certain period of time or number of performances.”²⁰⁰ The contract includes time and perhaps geographical limits, both of which may be negotiated.²⁰¹ Most license agreements span between one and three years, but will not exceed five years.²⁰² The contract term may include varying levels of exclusivity, wherein the licensee may have an exclusive right of performance for only the first year.²⁰³ Durations of more than two years are preferable to the licensee dance company because the company may not want to repeat a performance during consecutive years.²⁰⁴ In addition, contracts frequently include geographic limits to ensure that multiple companies do not perform the same work during the same period in the same area.²⁰⁵ For instance, a New York City-area company may only be allowed to perform within fifty miles of the city.²⁰⁶ In return, the licensee pays the choreographer a license fee for the performance rights and a per-performance royalty, and agrees to credit the choreographer in the program.²⁰⁷

The licensing agreement also ensures the integrity of the choreographer’s work in the new production.²⁰⁸ The contract typically requires the choreographer, or a

197. *Id.* at 294.

198. *Id.*

199. *Id.*

200. *Id.*

201. Telephone Interview with Elizabeth Olds, *supra* note 16.

202. Telephone Interview with Jesse Huot, *supra* note 17; Telephone Interview with Nancy Umanoff, *supra* note 17. A three-year contract will typically include only two performing years. Telephone Interview with Jesse Huot, *supra* note 17. A choreographer may allow the licensee to make regular payments to distribute the licensing costs. For instance, Twyla Tharp frequently divides the licensing fee into thirds, which the licensee will pay over time. *Id.* If a dance company commissions a new work from a choreographer, the company may purchase a three-year performance right, and each year will have varying levels of exclusivity. Telephone Interview with Karole Armitage, *supra* note 21. The circumstances of a dance company commissioning a new work are largely the same as when a dance company licenses a prior work because, in both instances, the rights to the choreography stay with the choreographer. Telephone Interview with Nancy Umanoff, *supra* note 17.

203. For instance, in the context of a company commissioning a new work, the licensee may have an exclusive performance right for the first year, after which the choreographer may gain the right to perform the work on her own company. A choreographer, however, will infrequently exercise this right. Telephone Interview with Karole Armitage, *supra* note 21; Telephone Interview with Nancy Umanoff, *supra* note 17.

204. Telephone Interview with Elizabeth Olds, *supra* note 16.

205. *Id.* Some choreographers, such as Mark Morris, do not include geographical limits because the companies with which they work generally do not tour. Telephone Interview with Nancy Umanoff, *supra* note 17.

206. Telephone Interview with Elizabeth Olds, *supra* note 16.

207. Singer, *supra* note 2, at 292–93, 294.

208. *Id.* at 294.

dancer who has performed the work, to travel to the licensee to teach the choreography.²⁰⁹ The licensee covers the costs of the choreographer's travel and lodging, in addition to paying the choreographer for his time.²¹⁰ During this time, the choreographer may also select specific dancers for the piece.²¹¹ At the licensee dance company, a rehearsal director is typically appointed to learn all of the choreography and to work closely with the choreographer to ensure the new dancers properly perform the work.²¹² After the choreographer rehearses the pieces for a set period of time (typically two or more weeks), the choreographer will leave, entrusting the work to the dance company.²¹³ The choreographer, however, frequently will return for the first performance week to supervise the transition to the stage.²¹⁴ At this point, the choreographer gains the final advantage of ensuring not only that the dancers have adequately learned the steps but also that the piece presents well on the specific stage, using acceptable music, lighting, costumes and sets.²¹⁵

Frequently, the choreographer will retain control even after the first performance.²¹⁶ The contract may allow the choreographer's periodic review, and may "prohibit any choreographic or staging alterations" unless the licensee consults with the choreographer.²¹⁷ Similar to the moral right of "withdrawal" in some European countries, the choreographer may also retain the right to withdraw the work if he believes the company is no longer able to perform it with integrity.²¹⁸

Licensing contracts only extend for a few years because choreographers understand that the execution of the style of a work atrophies when the choreographer is no longer present.²¹⁹ Additionally, choreographers recognize that

209. *Id.* at 294–95.

210. *Id.* at 295 n.30.

211. Telephone Interview with Karole Armitage, *supra* note 21; Telephone Interview with Bob Bursey, *supra* note 27; Interview with Richard Caples, *supra* note 17; Telephone Interview with Elizabeth Olds, *supra* note 16; Telephone Interview with Nancy Umanoff, *supra* note 17.

212. *See* Singer, *supra* note 2, at 295 n.31; Telephone Interview with Karole Armitage, *supra* note 21; Telephone Interview with Elizabeth Olds, *supra* note 16.

213. Interview with Richard Caples, *supra* note 17; Telephone Interview with Elizabeth Olds, *supra* note 16. As Karole Armitage says, "you basically have to trust the people you work with. . . . They want to do their best; you know they are going to try." Telephone Interview with Karole Armitage, *supra* note 21.

214. If the rehearsal and staging are during consecutive weeks, the choreographer may stay straight through. Interview with Richard Caples, *supra* note 17; Telephone Interview with Elizabeth Olds, *supra* note 16.

215. Interview with Richard Caples, *supra* note 17; Telephone Interview with Elizabeth Olds, *supra* note 16.

216. Singer, *supra* note 2, at 295.

217. *Id.*

218. *Id.* at 295, 310 n.107 (discussing examples of withdrawals that have actually occurred). *See generally* Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARVARD INT'L L.J. 353 (2006) (discussing moral rights outside the United States).

219. Nancy Umanoff reiterated the problem of ballet dancers reverting to their old habits and losing Mark Morris's choreographic style. She added that if the choreographer has the opportunity to teach the dancers as well, then the choreographer can more easily maintain the integrity of a piece. As a result, much depends on how much time the choreographer can spend with the company, the training of the company's dancers and whether a particular work is especially suited for a given company.

cast changes can directly impact the integrity of the performance.²²⁰ For instance, a ballet dancer will naturally revert to a classical style that is inconsistent with the more nuanced style of the modern dance choreographer.²²¹ Similarly, dancers that have not trained with the choreographer (or a representative of the choreographer's company) will be more likely to rely on classical techniques.²²² As a result, the licensing contract will frequently require the choreographer to approve any cast changes, although in practice a choreographer will also weigh the economic, time and personnel constraints of the company.²²³ At the expiration of the license, the dance company may wish to contract for additional performances of the work.²²⁴ In that event, the parties may enter into a new agreement, in which case the choreographer, or his representative, will travel to the company to "refresh" the work.²²⁵

Choreographers have used these licensing customs to protect the integrity of their works and to secure compensation for themselves, independent of whether their works have been protected by copyright.²²⁶ Changes in the dance community and developments in copyright jurisprudence have encouraged choreographers to further develop and build upon these customs to preserve and protect the integrity of their works, while also profiting from them.

2. The All-Inclusive License

Around 2003, Twyla Tharp pioneered a new licensing model, which may be called the all-inclusive license.²²⁷ In Tharp's all-inclusive license, the licensee agrees to use all of the original elements of the production, such as choreography,

Telephone Interview with Nancy Umanoff, *supra* note 17.

220. Karole Armitage said that cast changes are problematic because the movement becomes more superficial and generic with new dancers, especially because they will not know the theory behind the choreography. As a result, she will never license a piece for more than three years. However, she says, "if the dancers remain the same, you can be absolutely tranquil that [the choreography] will stay the same because dancers get it in their bodies." Telephone Interview with Karole Armitage, *supra* note 21.

221. Telephone Interview with Nancy Umanoff, *supra* note 17.

222. Telephone Interview with Karole Armitage, *supra* note 21.

223. *Id.*; Telephone Interview with Nancy Umanoff, *supra* note 17.

224. Telephone Interview with Karole Armitage, *supra* note 21; Telephone Interview with Nancy Umanoff, *supra* note 17.

225. Telephone Interview with Karole Armitage, *supra* note 21; Telephone Interview with Nancy Umanoff, *supra* note 17. There are instances where, due to time constraints, the parties will not sign a written agreement for the licensee to continue to use the piece. For instance, after the Alvin Ailey Dance Company licensed a work from Lar Lubovitch for a three-year term, the company requested to perform an excerpt of the work in an anniversary special performance. Lar Lubovitch orally assented, but with the understanding that the company would only perform an excerpt in a limited number of performances—each for which Lubovitch would receive a royalty. A written contract was never signed because the parties had worked together for decades and therefore trusted one another. Interview with Richard Caples, *supra* note 17.

226. Singer, *supra* note 2, at 292–95, 294 n.27 (providing that the choreographers Singer interviewed "indicated that their licensing customs make no distinction between dances that are protected by statutory copyright registration and those that are not").

227. Telephone Interview with Jesse Huot, *supra* note 17.

music, lighting, costumes and set design.²²⁸ The truly innovative concept of the license is that by paying one fee, the licensee gains the legal right to use all of these elements.²²⁹ Tharp is able to offer such a contract by negotiating with each right holder beforehand.²³⁰ In such negotiations, Tharp will offer the right holder a percentage of the license fee.²³¹ The right holder will then either accept the fee or make a counteroffer, which Tharp may or may not accept.²³² The agreed-upon percentage will then apply to all future licenses of the work.²³³ In some instances, a composer will completely refuse to license the rights to his music.²³⁴ In such cases, Tharp refrains from licensing the entire work, rather than licensing the work without the original music.²³⁵

In order to minimize the need for the participation of the other right holders in the restaging of the piece, and to enable preservation, Tharp provides the licensee with all the materials it needs to reproduce the production.²³⁶ In addition to sending a ballet master who has performed the work to teach the choreography and to monitor its transition from rehearsal to performance, Tharp sends digitized information that conveys specifications for lighting and set design elements.²³⁷ The proper music recording is also provided, along with the technical cues.²³⁸ Finally, the original costumes will either be loaned to the licensee, or they will be redesigned.²³⁹ After a dance company has performed the work, Tharp asks the licensee for feedback regarding the utility of the materials provided.²⁴⁰ Based on this feedback, Tharp then updates and improves these materials, making it easier for dance companies to recreate her works in the future.²⁴¹

a. Advantages

The all-inclusive license is ideal for the choreographer concerned with controlling and preserving her works, but whose primary focus remains on developing new works. Tharp, for example, licenses her work primarily for the purpose of preservation.²⁴² While copyright protects a choreographer by ensuring ownership rights in a choreographic work, it does not preserve that work for the future. According to Jesse Huot, Tharp's son and business manager: "It's all about preserving the work in its entirety . . . as it was seen originally. The more we get it

228. *Id.*

229. Witchel, *supra* note 10, at 85; Telephone Interview with Jesse Huot, *supra* note 17.

230. Telephone Interview with Jesse Huot, *supra* note 17.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. Witchel, *supra* note 10, at 85; Telephone Interview with Jesse Huot, *supra* note 17.

embedded in the community, the more sure we can be that it will be danced in the future.”²⁴³

A choreographer like Twyla Tharp, who is concerned with preserving her works, prefers a license that gives the licensee detailed guidance and thereby eliminates the need for direct contact with the choreographer.²⁴⁴ Tharp does not travel to licensing dance companies, as she prefers to develop new works while leaving the preservation to her staff and ballet masters.²⁴⁵ As of 2006, Tharp had licensed nineteen pieces to thirty-nine companies.²⁴⁶ On her desire to focus her time on new choreography, Tharp confessed to a journalist, “I can’t park myself in the past yet.”²⁴⁷

Although all-inclusive licensing cannot ensure complete preservation, it increases the number of dancers and company members who are aware of and able to replicate the choreography. It thereby enables choreographers to reach larger and more diverse audiences and to encourage continued critical discussion about their works with minimal involvement.²⁴⁸ Furthermore, licensing fees can fund additional preservation initiatives, such as educational outreach and varied forms of fixation.²⁴⁹ In turn, the licensee gains the advantage of one-stop shopping, which facilitates accurate budgeting and lowered transaction costs, while assuring the ability to maintain the original intent of the choreographer and produce a high quality production. Further, the digitized instructional materials help licensees to understand the choreographer’s true intent and mitigate the confusion that might arise from lone verbal instructions.

This license model may also advantage nonchoreography right holders, like musicians and costume, setting and lighting designers, to the extent they do not value a high level of control over new productions of the piece. Like the licensee, these right holders benefit from decreased transaction costs, as they need only negotiate once with respect to their rights in a given work. They also gain compensation without any additional effort; Tharp simply sends them a check for their negotiated percentages, usually without requiring their work on the new production.²⁵⁰ Moreover, even if the right holders do not participate in the new production, they gain increased visibility, as the licensee will credit them in the

243. Witchel, *supra* note 10, at 85 (quoting Jesse Huot). Huot reiterated this motivation when I interviewed him. Telephone Interview with Jesse Huot, *supra* note 17.

244. Telephone Interview with Jesse Huot, *supra* note 17.

245. Witchel, *supra* note 10, at 85.

246. *Id.* However, Tharp herself will certify which videotapes should be used to help teach the choreography. Telephone Interview with Jesse Huot, *supra* note 17.

247. Witchel, *supra* note 10, at 85.

248. The all-inclusive license enables the choreographer the option of being less involved in the second company’s production, but he can choose to be involved more if he so desires.

249. Tharp, for example, funnels profits from licensing into preservation. Telephone Interview with Jesse Huot, *supra* note 17. About five years ago, Tharp repriced all of her works, making them significantly less expensive to license (now, a license costs about \$25,000). Telephone Interview with Nancy Umanoff, *supra* note 17. Other dance companies responded by lowering their prices as well. *Id.*

250. Interview with Jesse Huot, *supra* note 17; Telephone Interview with Nancy Umanoff, *supra* note 17.

program.²⁵¹

b. Disadvantages

The all-inclusive license also has drawbacks for licensors, licensees and third party right holders. First, the model may be unattractive to a choreographer who prefers to work directly with the company. Such a choreographer may want to focus on preserving old works, rather than developing new works or may not trust others to recreate his works.²⁵² Moreover, use of the license may actually prevent the dispersion of a choreographic work—thereby having the opposite of the intended effect—in the event that one of the other right holders refuses to license his contribution, as has been the case with some of Tharp’s works.²⁵³

A related problem of any license that exerts complete control over a work is that the increased control results in less opportunity for transformative works based on the original. A transformative work is one that is based on a pre-existing piece of art.²⁵⁴ The transformative work adapts, reinterprets, adds to or otherwise changes the original work in such a way that it becomes a wholly new piece of art.²⁵⁵ This new work is valuable because it provides the public with a new way to view the original work, while also offering an independent piece of art.²⁵⁶ The all-inclusive license may disable future choreographers from creating transformative works by requiring that a dance be performed under the same circumstances as the original performance. As noted earlier, choreographers routinely borrow and experiment with each other’s movements.²⁵⁷ If a given work may only be performed under the most specific circumstances, then dance as a whole loses the chance to present something new.

Furthermore, the all-inclusive model may disadvantage licensees and non-choreography right holders. First, the model will be inappropriate for a licensee who wants to work directly with a choreographer, which may be likely with famous

251. Interview with Jesse Huot, *supra* note 17; Telephone Interview with Nancy Umanoff, *supra* note 17.

252. See, e.g., *supra* notes 212–14 and accompanying text (explaining that frequently, choreographers retain the right to periodically review their work and may retain the right to withdraw the work if the company is no longer able to perform it with integrity).

253. Telephone Interview with Jesse Huot, *supra* note 17.

254. Numerous fair use cases discuss transformativeness. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Blanch v. Koons*, 467 F.3d 244, 251–54 (2d Cir. 2006); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001); *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998).

255. See *Blanch*, 467 F.3d at 251–54 (holding that an artist’s use of a fashion photograph in a painting was transformative because it was used for the purpose of commentary on the social and aesthetic consequences of mass media). Cf. *Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513, 544 (S.D.N.Y. 2008) (finding that an encyclopedia based on a series of fantasy novels was not entirely “transformative” where the former “fail[ed] to ‘minimize[] the expressive value’ of the original expression” of the latter).

256. See *Campbell*, 510 U.S. at 579 (“[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”).

257. See discussion *supra* Part I.B.3. See also Lopez de Quintana, *supra* note 7, at 167.

choreographers.²⁵⁸ Second, the nonchoreography right holders who are willing to agree to an all-inclusive license lose the opportunity to control the integrity of their own contributions, as the licensing model requires the right holders to trust both the choreographer and the licensee to properly implement the music and design elements. Because the license eliminates the right holders' involvement in the new production, right holders risk association of their names with an inferior staging. The utility of the all-inclusive license will therefore depend on whether the choreographer is sufficiently famous to warrant the support of nonchoreography right holders and the extent to which he is known to prioritize control over the preservation of his works.²⁵⁹

3. The Limited License

In contrast to the all-inclusive license, most choreographers avoid negotiating with other right holders or designers and instead license only their choreography.²⁶⁰ This "limited license" requires the licensee to use the other elements of the original performance; however, the licensee bears the responsibility of securing these components.²⁶¹ The licensor may help the licensee secure the other pieces of the production by putting the licensee in contact with the music right holder, lighting, costume and set designers.²⁶² In addition, the choreographer will frequently loan the costumes and any set pieces to the dance company.²⁶³ Because the choreographer typically will oversee the transition from dance rehearsals to the stage, he will have the opportunity to ensure that the licensee properly combines the music and design elements with the choreography.²⁶⁴

a. Advantages

The limited license model is most appropriate for independent choreographers and small dance companies who lack the resources to implement the all-inclusive license. The choreographer may maintain the integrity of his work by requiring the licensee to secure the nonchoreography production elements.²⁶⁵ At the same time,

258. This criticism applies to choreographers who use the all-inclusive model as a way to free themselves from the restaging process. Although Twyla Tharp uses the model this way, a choreographer interested in implementing the all-inclusive model could be more involved.

259. For instance, Lar Lubovitch Dance Company expressed a desire to implement the license. Interview with Richard Caples, *supra* note 17.

260. For instance, Lar Lubovitch and Bill Evans both follow this model. Interview with Richard Caples, *supra* note 17; Telephone Interview with Bill Evans, Modern, Tap, and Ballet Choreographer (Oct. 27, 2010).

261. Interview with Richard Caples, *supra* note 17.

262. This is standard practice for Lar Lubovitch, but not for Bill Evans, who leaves the burden entirely on the licensee. Interview with Richard Caples, *supra* note 17; Telephone Interview with Bill Evans, *supra* note 260.

263. Interview with Richard Caples, *supra* note 17; Telephone Interview with Bill Evans, *supra* note 260.

264. Interview with Richard Caples, *supra* note 17.

265. *Id.*

the choreographer avoids the expense and effort of negotiating with the music right holder and designers.

The license maintains the basic customary terms, while also allowing licensors and licensees to benefit from the flexibility of contract law.²⁶⁶ A lesser-known choreographer will be eager to have his work performed, even if he must change some of the contract provisions to the licensee's advantage.²⁶⁷ In the case of an uncooperative music right holder or designer, the choreographer may be more willing to allow for modifications to ensure that the choreography is performed. This freedom benefits both choreographers and licensee dance companies.

Licensees may also benefit from negotiating with the choreographer and the other right holders separately. The nonchoreography right holders gain more control over their respective works and thus maintain the integrity of each production element. Ultimately, the right holder may be able to negotiate a higher fee (even discounting transaction costs) than he would receive under an all-inclusive license. The opportunity to restage works may also provide the right holder with additional compensation for his time, which is particularly helpful for a freelance artist who is frequently unemployed.

Credit and future collaborations are further considerations. The right holder may prefer to have more contact with the licensee in order to increase his visibility and make new professional contacts, which could lead to future commissions. Although under the all-inclusive license the licensee will know the identity of and will credit the right holder, the licensee will be less likely to employ the right holder for future productions because the two will not have had direct contact. However, this benefit of the limited license will be relevant primarily for lesser known composers and designers.

b. Disadvantages

The limited license may not effectively meet the needs of a choreographer who is particularly concerned with maintaining control over the entire production. A choreographer may face difficulty maintaining the integrity of a piece because the licensee may not faithfully secure the rights to and implement the other production elements. If a licensee cannot secure the cooperation of the other right holders despite its best efforts, and if the choreographer still allows performance, the end result will be an incomplete production, which is especially undesirable for works that are dependent upon nonchoreographic elements. Indeed, Bill T. Jones uses a modified version of the all-inclusive license because the choreographer believes that the choreography cannot be separated from the other components.²⁶⁸

266. *Id.*

267. Generally, bargaining power based upon the choreographer's level of success will have a large impact on the licensing terms. Telephone Interview with Dana Boll, former dancer, Manager, Am. Ballet Theatre Studio Co. (now ABT II) 2001-04, and current choreographer (Nov. 5, 2010).

268. Bill T. Jones/Arnie Zane Dance Company licenses all the rights and design elements, except the music because many music right holders are resistant to such a licensing scheme. Telephone Interview with Bob Bursey, *supra* note 27.

Moreover, without the assurance of the cooperation of the other right holders, a licensee has less incentive to license a choreographic work, which ultimately results in less visibility for the choreographer and less preservation of the work.

The limited license necessarily disadvantages the licensee as well by forcing it to negotiate with the other right holders. However, in the event that the other right holders are uncooperative, a choreographer could allow the dance company to dissolve the license as a professional courtesy. The nonchoreography right holders suffer the related problem of having to negotiate with multiple licensees and, perhaps, having to travel to these licensees to facilitate restaging. The nonchoreography right holder therefore loses the benefit of decreased transaction costs. As a result, the simpler terms of the limited license may actually complicate the licensing and restaging process.

4. The Selective License

The final licensing model allows a choreographer to maintain maximum control over select pieces by simply refusing licenses to dance companies. A choreographer may use this method sparingly—by refusing to license select works—or may implement an invariable policy against licensing a certain category of works. This category of license distinguishes between modern dance works that the choreographer licenses only to university dance programs and ballets that are commissioned by a ballet company and licensed to that company, which the choreographer may license to another ballet company after the expiration of a stated term.²⁶⁹

For instance, Mark Morris Dance Group (MMDG) will only license a work under two narrow circumstances.²⁷⁰ First, MMDG will license certain modern dance works to university dance programs, but never to professional dance companies.²⁷¹ Only works that students are capable of performing will be licensed; especially complex or difficult works will not be licensed, and therefore only MMDG will perform such works.²⁷² Second, the company may license ballets that Mark Morris originally choreographed under a commission from a ballet company.²⁷³ In such instances, a ballet company will have commissioned Morris to create a new dance.²⁷⁴ This commission functions as a license and MMDG owns the copyright.²⁷⁵ After the expiration of the initial license term (typically three years), the parties may renegotiate for an additional term and the choreographer will need to restage the piece.²⁷⁶ Alternatively, MMDG may license the piece to

269. See Telephone Interview with Elizabeth Olds, *supra* note 16; Telephone Interview with Nancy Umanoff, *supra* note 17.

270. MMDG owns all rights to the choreography and thus acts as the choreographer for licensing purposes. Telephone Interview with Nancy Umanoff, *supra* note 17.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* This is consistent with the basic licensing customs discussed above. See discussion *supra*

another ballet company.²⁷⁷

Karole Armitage's licensing practice is similar in the sense that she does not license the modern dance works that her own company performs, but she does create ballets under commissions and will license those ballets to other companies.²⁷⁸ However, she does not have a specific policy against licensing her modern dance works, whereas MMDG does have such a restrictive policy.²⁷⁹

a. Advantages

A choreographer's reasons for distinguishing between modern dance and ballet works, and between professional companies and universities, stem from the nature of and theory behind the work. Mark Morris feels strongly that only his own dancers are capable of performing his modern dance pieces.²⁸⁰ Similarly, Karole Armitage believes that her modern dance choreography is uniquely fitted to her small group of eleven dancers, who she has specifically selected and with whom she is accustomed to working.²⁸¹ Indeed, two of the main reasons for a choreographer having her own company are the opportunity to develop experimental works with the creative input of her dancers and to select dancers that are uniquely suited to the choreographer's style. For a choreographer, the risk of a flattened or improperly executed style becomes too great when her work is performed by dancers that the choreographer herself has not trained.²⁸² For instance, Armitage's choreography frequently pushes against the traditional geometries and rhythms with which dancers are comfortable.²⁸³ She prefers to use a "more fractal geometry" that implements many curves, rather than creating movements along a horizontal or vertical axis.²⁸⁴ For other dancers to learn her style "is like speaking a foreign language," which they speak with a "big accent" because "they can't make themselves move as deeply as [her] dancers" can.²⁸⁵

Choreographers with such innovative styles feel comfortable licensing to university dance programs because the goal of such a license is to educate dancers and to increase dancers' awareness of the theory behind the choreography.²⁸⁶ Students work not only to learn the steps and improve their techniques, but also to learn about the historical and conceptual context of the choreography.²⁸⁷ Because the philosophy that informs the choreography is essential to a proper appreciation

Part II.B.1.

277. Telephone Interview with Nancy Umanoff, *supra* note 17.

278. Telephone Interview with Karole Armitage, *supra* note 17.

279. *Id.*; Telephone Interview with Nancy Umanoff, *supra* note 17.

280. Telephone Interview with Nancy Umanoff, *supra* note 17.

281. Telephone Interview with Karole Armitage, *supra* note 21.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. Telephone Interview with Bob Bursey, *supra* note 27; Telephone Interview with Nancy Umanoff, *supra* note 17.

287. Telephone Interview with Nancy Umanoff, *supra* note 17.

and performance of the work, a choreographer will tolerate imperfect performances for the greater good of education.²⁸⁸ Furthermore, integrity concerns are less pressing because performances are clearly presented within an educational context and the license is limited in duration and geography.²⁸⁹ Typically, the piece is only performed during a single year and the students do not tour.²⁹⁰ Moreover, educational licenses enable choreographers with innovative dance styles to both preserve and educate people about their choreography, while maintaining strict control. If a choreographer felt strongly that his work could not exist professionally outside of his company, then licensing works to other companies would not function as an accurate preservation tool. By licensing select works to universities, the choreographer can remain an important figure in dance history without risking the loss of authenticity of his more complex works.

b. Disadvantages

Although there are valid reasons for a choreographer to license only a category of works to universities and/or ballet companies, the policy may ultimately prevent the choreographer from effectively preserving his works. Audiences will have less exposure to modern dance, and the choreographer's company may feel additional pressure to perform widely to ensure public exposure to the works. In addition, other dance companies and dancers will have fewer opportunities to benefit from performing such innovative modern dance works.

Most importantly for the purposes of copyright policies, the choreographer's refusal to license may make others reluctant to use the movement in a transformative way. First, it would be more difficult for other choreographers to know the movements. In a selective licensing world, the only opportunities for dancers and choreographers, outside of the original choreographer's company to learn the movement, will be by viewing performances or learning it in a university dance program. The first option is limited because, as discussed above, the availability of performance videos is unlikely.²⁹¹ Likewise, the possibility of learning the dance in a university setting is limited, as only a small number of dance programs will license a given work and such a work may not be licensed at all for many years. As a result, adapting or transforming a choreographic work that has only been licensed to universities presents logistical barriers. Second, a choreographer may fear ostracism from the dance community, or even a lawsuit, if he knows that the original choreographer aggressively protects his works by refusing to license. This fear may dissuade a choreographer from attempting to restage a prior work by another choreographer, even in a transformative way.

288. *Id.*

289. *Id.*

290. *Id.*

291. *See supra* note 27 and accompanying text.

III. RECOMMENDATION AND CONCLUSION: COMBINING CUSTOM, COPYRIGHT AND CONTRACT TO FORM MORE SOLID PROTECTIONS FOR DANCE

Currently, choreographers have three tools at their disposal for protecting, preserving and monetizing their works: custom, contract and copyright. Each tool partially addresses the artistic and economic needs of choreographers and choreographers can effectively use a combination of these tools. However, in specific instances, some mechanisms may conflict. The most problematic conflicts arise when the application of copyright doctrines clash with dance community customs. Before choreographers gained copyright protection for their works, they developed their own set of rules and enforcement techniques to protect the integrity of their works and to generate income.²⁹² On the other hand, copyright provides choreography with default legal protections, which choreographers desired and have used.²⁹³

Dance is a valuable art form, but differs from other categories of works protected by copyright. These differences sometimes complicate the application of copyright doctrines.²⁹⁴ First, choreographers may find it difficult to qualify for copyright protection because the Copyright Office's definition of "choreographic works" excludes certain types of experimental creations.²⁹⁵ Even if a work does fall under the subject matter of copyright, a choreographer may find it difficult to "fix[] [a work] in any tangible medium of expression."²⁹⁶ The three available fixation methods may only partially protect choreographic works because only "what is disclosed therein"—what is actually depicted in the notation, film or computer animation—will be copyrighted.²⁹⁷

The economic and employment structures of dance also disadvantage choreographers within the realm of copyright.²⁹⁸ Dance is naturally a community-based art form, as a choreographer does not create new works in a vacuum.²⁹⁹ To mitigate the economic burdens of creating new works, and to facilitate group organization, choreographers tend to form dance companies, which gives them a basic salary and a forum for artistic experimentation.³⁰⁰ These companies differ from other artistic groups, such as film companies, in that each dance company has the express purpose of promoting the work of one choreographer.³⁰¹ Although the

292. See generally Singer, *supra* note 2.

293. 17 U.S.C. § 102(a)(4) (2006) (protecting "choreographic works"); *Horgan v. MacMillan, Inc.*, 789 F.2d 157, 162–63 (2d Cir. 1986) (holding that photographs of George Balanchine's *Nutcracker* may infringe Balanchine's choreography as a derivative work); Benton, *supra* note 2, at 79 (discussing choreographers' efforts to gain copyright protection).

294. See *supra* Part I.B.

295. 17 U.S.C. § 102(a)(4); COMPENDIUM II, *supra* note 37, § 450. See *supra* Part I.B.1.

296. 17 U.S.C. § 102(a); see *supra* Part I.B.2.

297. COMPENDIUM II, *supra* note 37, § 450.07(a); see *supra* Part I.B.2.

298. See *supra* Part I.A.

299. See generally Singer, *supra* note 2.

300. See *supra* Part I.A.

301. *Id.* See also generally Braveman, *supra* note 7.

company functions solely to promote and benefit the choreographer, the company technically employs the choreographer, typically as the artistic director.³⁰² The nature of the choreographer-dance company relationship has the legal effect under copyright of turning the company, rather than the choreographer, into the “author” of choreographic works.³⁰³

Regardless of who owns the copyrights to choreographic works, the dance community remains reluctant to enforce its rights due to uncertainty surrounding infringement analysis.³⁰⁴ Because funds are extremely limited for choreographers and their companies, and the one reported court decision regarding an infringement of choreography, *Horgan v. Macmillan*, provides limited guidance, the dance community has little incentive to litigate.³⁰⁵ Moreover, the *Martha Graham* case may further deter choreographers from seeking court judgments because that decision conflicted with industry customs, to the disadvantage of choreographers.³⁰⁶ However, the *Horgan* case marked a partial victory for choreographic right holders by holding that photographs may infringe choreography.³⁰⁷ And yet, the *Horgan* decision may have limited relevance to current choreographers because it did not conflict with community customs, and it came before the *Martha Graham* case.³⁰⁸ A decision that more thoroughly fleshes out infringement standards could conflict with dance customs relating to permissible borrowing and impermissible appropriation.³⁰⁹ As choreographers continue to address the *Martha Graham* case by reclaiming creative and economic control through contract, they also have little reason and opportunity to press the courts to further define an infringement standard.³¹⁰

Due to the uncertainty of copyright protections for choreographers, the dance community has used contract to alter the default rules of copyright for the benefit of choreographers.³¹¹ Licenses provide the advantage of compensating choreographers while also enabling them to further disseminate and accurately preserve their works.³¹² In recent years, choreographers have developed more sophisticated licensing models that build upon the standard terms that custom dictate.³¹³ Within this context, copyright lends choreographic works additional value by making an unlicensed production illegal.

The main categories of licensing models are the all-inclusive license, the limited license and the selective license. These licenses use contract law’s flexibility to

302. See generally *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004). See also *supra* Part I.B.4.

303. See generally *Martha Graham*, 380 F.3d 624. See also *supra* Part I.B.4.

304. See *supra* Part I.B.3.

305. *Horgan v. MacMillan, Inc.*, 789 F.2d 157 (2d Cir. 1986). See also *supra* Part I.B.3.

306. *Martha Graham*, 380 F.3d 624. See also *supra* Part I.B.4.

307. *Horgan*, 789 F.2d at 162–63.

308. See *Martha Graham*, 380 F.3d 624; *Horgan*, 789 F.2d 157.

309. See *supra* notes 152–53 and accompanying text.

310. See *Martha Graham*, 380 F.3d 624.

311. See *supra* Part II.A.

312. See *supra* Part II.B.

313. See *supra* Part II.B.

meet the needs of each choreographer, licensee and choreographic work.³¹⁴ Which model is most appropriate will depend upon the circumstances and goals of the parties.

In addition to continuing to use the flexibility of contract law, the industry would benefit from increased communication and cooperation to both perfect licensing schemes and to take advantage of copyright protections. First, choreographers should communicate with each other about their licensing policies and work together to find efficient solutions.³¹⁵ Although a choreographer may isolate himself from the needs and concerns of other choreographers, his work does not exist in a vacuum and all choreographers must contend with the basic need to profit from and to preserve their works. Increased communication and cooperation may provide an efficient way for choreographers to improve their various methods for monetizing, protecting and preserving their works.

Such intracommunity communication would enable more dance companies to implement the all-inclusive license, which is particularly useful for established choreographers.³¹⁶ A major obstacle for dance companies interested in using this license is coordination with nonchoreography right holders.³¹⁷ Collaboration between dance companies in shifting to the all-inclusive model might make nonchoreography right holders more willing to agree to such a licensing scheme, ultimately facilitating the accurate preservation of more choreographic works.

In addition, choreographers should coordinate to make better use of copyright protections. Choreographers gain no advantage by not enforcing their rights. However, the law poses certain obstacles for choreographers, which the dance community should address as a group.³¹⁸ Because the dance world remains somewhat close-knit, cooperation is feasible.³¹⁹ Choreographers need not choose between or among custom, copyright or contract. Rather, all three mechanisms may be used in conjunction to meet the basic needs of the dance community as a whole and the more nuanced needs of the community's artists.

314. See *supra* Part II.B.2-4.

315. However, the fixing of prices for licenses might violate antitrust laws. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

316. See discussion *supra* Part II.B.2.

317. See discussion *supra* Part II.B.2.

318. See *supra* Part I.B (explaining the obstacles for choreographers in copyright doctrine).

319. See *supra* Part I.A.