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Authorship, Ownership , and Control: Balancing the Economic and Artistic Issues Raised by the Martha Graham Copyright Case

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Cover Page Footnote

Hugh Hansen, Stanley Rothenberg, and Linda Sugin; Barbara Quint, Assistant Attorney General, Charities Bureau, New York State Department of Law; Nicole Serratore; Craig Flanagin; Sarah Adams; and Elizabeth Hoag

Authorship, Ownership, and Control: Balancing the Economic and Artistic Issues Raised by the Martha Graham Copyright Case

Sharon Connelly*

We have all walked the high wire of circumstance at times.
We recognize the gravity pull . . . as [the acrobat] does.
The smile is there because he is practicing living at that
instant of danger. He does not choose to fall.

Martha Graham (1894–1991)¹

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¹ MARTHA GRAHAM, BLOOD MEMORY 5 (1991). Graham's dance technique, by contrast, contains a series of falls, because "[w]hen one physically rises from the ground, it empowers the possibility of beginning again." Jennifer Dunning, *Still Paying Heed to Graham's Cry*, N.Y. TIMES, Sept. 16, 2001, § 2, at 18 (quoting Pearl Lang, choreographer and former lead performer in the Martha Graham Dance Company).

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INTRODUCTION

By upholding a district court ruling that has been condemned as a dangerous precedent by many in the dance community,² the Second Circuit has affirmed that Martha Graham’s nonprofit creation, the Martha Graham Center for Contemporary Dance (“Center”), owns the rights to the bulk of her work.³ 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.”⁴ Even more unsettling to many in the field was the determination by the court that the Center was the “statutory ‘author’”—for purposes of copyright—of works created while Graham was Artistic Director of the Center.⁵

² See Brief of Amici Curiae American Dance Festival, Inc. et al. at 2, 11, *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)) (This brief was filed on behalf of the American Dance Festival; Gerald Arpino, co-founder and Artistic Director of the Joffrey Ballet of Chicago; and Gordon Davidson, Artistic Director of the Center Theatre Group/Mark Taper Forum of the Los Angeles County Music Center). The Amici Curiae warned that the district court’s decision would have “far-reaching implications in the art world” and “turn[ed] the rationale of the work-for-hire doctrine on its head.” *Id.* at 2.

³ *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 647 (2d Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3570 (U.S. Mar. 21, 2005) (No. 04-1277) [hereinafter *Graham IV*] (This case was argued before Circuit Judges Newman, Kearsse, and Pooler on January 29, 2004. It was decided on August 18, 2004.); see also *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 224 F. Supp. 2d 567, 612–13 (S.D.N.Y. 2002), *aff’d in part*, 380 F.3d 624 (2d Cir. 2004) [hereinafter *Graham III*].

⁴ Jennifer Dunning, *Dance and Profit: Who Gets It?*, N.Y. TIMES, Sept. 20, 2003, at B9 [hereinafter Dunning, *Dance and Profit*] (quoting Charles Reinhart, Director of the American Dance Festival). “The whole structure of the Martha Graham Dance Company and its legal entities was to support Martha, not the other way around.” *Id.*; see also Jennifer Dunning, *Hearings Start in Suit over Graham Legacy*, N.Y. TIMES, Mar. 22, 2001, at E8 [hereinafter Dunning, *Hearings Start*] (“[L]eading and innovative choreographers like Graham, George Balanchine, Merce Cunningham and Paul Taylor have long been assumed to own their work rather than to be employees hired by the institutions they worked with and created.”).

⁵ *Graham IV*, 380 F.3d at 634, 641–42 (holding that the Center, as Graham’s employer, was the legal “author,” whereas Graham, as the creator of the work, was the

Ronald Protas, Graham's legatee and her successor as Artistic Director, claimed the rights to her work and instigated the suit against the nonprofit Center which had supported and maintained Graham's choreography since 1948.⁶ At issue in this case were the copyrights to seventy choreographic works created by Martha Graham between the early 1920s and her death in 1991.⁷ The main issue on appeal was whether the work-for-hire doctrine applied to works choreographed by the primary artistic employee of a nonprofit corporation that was "created to serve the creative endeavors of an artistic genius."⁸ The Second Circuit upheld the application of the work-for-hire doctrine to works created after 1966 while Graham was a full-time employee of the Center, during which time her contractual duties as Artistic Director included choreography.⁹

While the primary question considered in the case was whether Graham actually owned the rights to her work at the time of her death, the overriding issue seemed to be whether her beneficiary should be allowed to remove those works from the nonprofit dance company she had founded. Consequently, the court's decision may have been influenced by the fundamental equitable consideration of who *deserves* to own these works. A finding in favor of the Center, which had served as incubator and home to the work for more than fifty years, would likely insure continued life for the works through performance and preservation. In contrast, a finding in favor of Protas, who had refused to allow the Martha Graham Dance Company to perform any of Graham's works after his removal as Artistic Director of the Center, would possibly leave no single living repository for the work and might place the

"author" in the colloquial sense); *see also* Dunning, *Dance & Profit*, *supra* note 4 ("It has been hard for some in dance to reconcile the image of Graham as a pioneering artist in American modern dance, an art known for its unruly independence, with the idea of a choreographer as a negotiating employee . . ."); *infra* notes 138–40 and accompanying text.

⁶ *See* discussion *infra* Parts I.A–B.

⁷ *Graham III*, 224 F. Supp. 2d at 570. Although Graham choreographed 180 works during her lifetime, only seventy are "fixed in a tangible medium of expression from which they can be reproduced." *See id.*

⁸ *Graham IV*, 380 F.3d at 628 (quoting Brief for Plaintiff-Counter-Claimant-Appellant Martha Graham School and Dance Foundation at 20, *Graham IV* (No. 02-9451(L))).

⁹ *See id.* at 628, 639–41.

dances in danger of disappearing forever from the public eye.¹⁰ Although these concerns were not cited as reasons for the court's holding, their underlying presence was inescapable.

According to custom within the dance community, a choreographer is presumed by her peers to "own" her choreography, in the absence of an agreement to the contrary.¹¹ Choreographers creating under the auspices of nonprofit organizations have previously willed their works to other parties without question, and their beneficiaries, motivated by a respect for the work and a desire to see it preserved and performed, have licensed or sold the works to the companies for which the dances had been created.¹² In the present case, a rift between Protas and the Center led to the legal challenge and a ruling that questions the tradition and custom of a field subject to little prior legal interference.

This Note uses the work-for-hire portion of the *Graham* ruling as a catalyst for exploring the legalities and realities of control within "artist-driven"¹³ nonprofit organizations. Part I introduces the parties involved in the *Graham* dispute, defines "artist-driven" nonprofit organizations, surveys the development of copyright protection within the field of dance, and provides an overview of the *Graham* case. Part II examines the relevant legalities of control, focusing first on the application of the work-for-hire doctrine to Graham's works and then explaining related nonprofit

¹⁰ See Paul Ben-Itzak, *If Protas Wins, Martha Will Die a Second Death*, DANCE INSIDER (May 7, 2002), at http://www.danceinsider.com/f2002/f0507_1.html ("[P]ractically speaking, if the Graham work is consigned to Protas—a non-artist who has never taken a dance class in his life, and who would have difficulty finding a real Graham dancer to stage the work—it could indeed be relegated to the dustbin of history.").

¹¹ See *supra* note 4 and accompanying text.

¹² Alvin Ailey, José Limón, George Balanchine, and Jerome Robbins, for example, did not leave their works to the nonprofit dance companies with which they were affiliated, the Alvin Ailey American Dance Theater, José Limón Dance Company, and New York City Ballet (Balanchine and Robbins), respectively. See *infra* notes 111–12 and accompanying text.

¹³ An "artist-driven" organization's programs and activities primarily revolve around the work of a founding artist or artists. See discussion *infra* Part I.C. This Note will not consider the rights of non-founding artists hired by nonprofit organizations, as these artists more clearly resemble "employees." They do not wield the same level of control over the organization as do founding artists, and their rights are generally subject to specific contract terms.

and moral rights considerations that are significant in analyzing the precedent set by this case. Part III interprets the *Graham* decision through a prism of nonprofit, moral rights, and equitable considerations and suggests that: (1) the economic rights of nonprofit organizations ultimately benefit their founding artists; (2) a constraint on an artist's right to transfer copyright ownership at the time of her death might be viewed as a fair exchange for the benefits provided to the artist by a nonprofit organization; (3) artistic control, which is not a feature of U.S. copyright law but is often of primary concern to artists, may be analogous to the "moral rights" recognized in other countries and, to a limited extent, within the United States; and (4) founding artists generally have the freedom and power to contract to retain rights to their works.

This Note concludes that the precedent set by the *Graham* ruling, that copyright vests in a nonprofit employer in the absence of an agreement to the contrary, does not necessarily undercut the rights that are of primary concern to artists. Not only may this presumed employer ownership be overruled by memorializing the parties' specific intentions in a written agreement, but it is also possible that an artist's primary interests may be better protected by a nonprofit organization created by the artist specifically to nurture, advance, and preserve her work.

I. SETTING THE STAGE

The artist is doom eager, but never chooses his fate. He is chosen, and anointed, and caught.¹⁴

A. *Martha Graham, the Center, and the School*

Martha Graham, one of the leading dancers and choreographers of the twentieth century, "forever changed the way American performers move and dance."¹⁵ She began dancing in the early

¹⁴ GRAHAM, *supra* note 1, at 118.

¹⁵ SACRAMENTO BEE, *People of the Century: Candidates Biographies*, at http://www.sacbee.com/static/archive/news/projects/people_of_century/entertainers/index.html (last visited Jan. 27, 2005); *see also* Martha Graham Sch. & Dance Found., Inc. v.

1920s and by 1926, Graham had given her first public performance of her own works, eventually forming a performance troupe that became known as the Martha Graham Dance Company (“Company”).¹⁶ The Company was run as a sole proprietorship, and Graham’s choreography was initially financed by commissions.¹⁷ Graham performed with the Company from its inception until the late 1960s (at which time Graham was in her seventies) and choreographed more than 180 works.¹⁸ “Her fierce choreography sometimes amazed and sometimes horrified, but in it she embodied modern dance—arrogantly and spectacularly.”¹⁹

When Graham began teaching in New York in 1926, she developed her own system of dance movements and exercises

Martha Graham Ctr. of Contemporary Dance, Inc., 153 F. Supp. 2d 512, 515 (S.D.N.Y. 2001), *aff’d*, 43 Fed. Appx. 408 (2d Cir. 2002) [hereinafter *Graham I*].

Her uniquely American vision and creative genius earned her numerous honors and awards such as the Laurel Leaf of the American Composers Alliance in 1959 for her service to music. Her colleagues in theater, the members of the International Alliance of Theatrical Stage Employees Local One, voted her the recipient of the 1986 Local One Centennial Award for dance, not to be awarded for another 100 years. In 1976, President Gerald R. Ford bestowed upon Martha Graham the United States’ highest civilian honor, the Medal of Freedom, and declared her a “National Treasure,” making her the first dancer and choreographer to receive this honor. Another Presidential honor was awarded Martha Graham in 1985 when President Ronald Reagan designated her among the first recipients of the United States’ National Medal of Arts.

Martha Graham Center of Contemporary Dance, *Biography of Martha Graham*, at <http://www.marthagrahamdance.org/us/#Bio> (last visited Jan. 27, 2005) [hereinafter *Biography of Martha Graham*].

¹⁶ See *Graham I*, 153 F. Supp. 2d at 515.

¹⁷ See *Graham IV*, 380 F.3d 624, 629 (2d Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3570 (U.S. Mar. 21, 2005) (No. 04-1277). Early patrons of Graham included Lila Acheson Wallace, Joan Davidson, Katharine Cornell, Baroness Bethsabée de Rothschild, Doris Duke, and Halston. See GRAHAM, *supra* note 1, at 6, 134, 145–47, 181, 267–69; Anna Kisselgoff, *Rebuilding the Martha Graham Legacy*, N.Y. TIMES, Jan. 31, 1999, § 2, at 1.

¹⁸ See ABOUT MARTHA GRAHAM, MARTHA GRAHAM DANCE CO. AT CITY CENT., PLAYBILL, Vol. 120, No. 5 (May 2004). Graham’s last complete dance, *Maple Leaf Rag*, was premiered in the year before Graham’s death. See PROGRAM NOTES, MARTHA GRAHAM DANCE CO. AT CITY CENT., PLAYBILL, Vol. 120, No. 5 (May 2004).

¹⁹ Terry Teachout, *The Time 100: Martha Graham*, TIME, June 8, 1998, at 200, available at <http://www.time.com/time/time100/artists/profile/graham.html> (last visited Jan. 27, 2005).

known as the Martha Graham Technique.²⁰ “Using the principles of contraction and release as the foundation for her technique, Martha Graham built a vocabulary of movement that would increase the emotional activity of the dancer’s body.”²¹ Around 1930, Graham opened the Martha Graham School of Dance, a sole proprietorship through which she taught her Technique.²²

Graham established the Martha Graham Foundation for Contemporary Dance (“Foundation”) as a nonprofit corporation in 1948.²³ “The Foundation was created to support modern dance by promoting and disseminating the Martha Graham technique, as well as raising funds for performances of the Martha Graham Dance Company.”²⁴ In 1956, Graham incorporated the Martha Graham School of Contemporary Dance (“School”) and subsequently sold her sole proprietorship dance school, including its name, assets, and goodwill, to the newly incorporated School.²⁵

²⁰ See *Graham I*, 153 F. Supp. 2d at 515; *Biography of Martha Graham*, *supra* note 15. “I did not teach the technique classes that I learned at the Denishawn school [of Ruth St. Denis and Ted Shawn] for the simple reason that I could not afford the five-hundred-dollar fee they demanded from anyone who taught their method.” GRAHAM, *supra* note 1, at 120.

²¹ *Biography of Martha Graham*, *supra* note 15 (internal quotations omitted).

Martha left a magnificent legacy in a unique technique. . . . A technique of how to train the interior of the body, the visceral center of the torso that reacts to the range of emotional experience. Whether it is fear or anger or sobbing or laughing, the center informs the rest of the movement and gives it a deep resonance.

Dunning, *supra* note 1 (quoting Pearl Lang).

²² See *Graham I*, 153 F. Supp. 2d at 515. Graham’s students included many who would become major modern dance choreographers in their own right—Merce Cunningham, Paul Taylor, and Twyla Tharp, to name a few—as well as actors such as Bette Davis, Gregory Peck, Liza Minelli, Woody Allen, Joanne Woodward, and Tony Randall. See also GRAHAM, *supra* note 1, at 120; *Biography of Martha Graham*, *supra* note 15.

²³ See *Graham I*, 153 F. Supp. 2d at 515. The Foundation was incorporated under New York state law. See *id.*

²⁴ *Id.* at 525. “The Center was established for . . . the dual purposes of *enabling the creation and performance of choreography by Graham and perpetuating and preserving Graham’s work after her death.*” Brief for Defendants-Counter-Claimants-Appellees at 10, *Graham IV*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)) (emphasis added) (citations omitted).

²⁵ *Graham I*, 153 F. Supp. 2d at 526.

The purposes of the School, as stated in its certificate of incorporation were to, *inter alia*, “teach the science and art of the dance,” and “in conjunction with the

Graham was not employed by either organization in any capacity prior to 1956,²⁶ although eventually Graham's works were exclusively created through these organizations.²⁷

In 1968, the Foundation's name was changed to the Martha Graham Center of Contemporary Dance.²⁸ The Center served as an umbrella organization for the incorporated School and the unincorporated Company.²⁹ Although separately incorporated, the Center and the School largely operated as a single entity.³⁰ By 1980, the two corporations filed combined statements and had identical boards of trustees.³¹ Graham served as Artistic Director and a board member of both the Center and the School from 1966 until her death in 1991.³² Graham's responsibilities as Artistic Director were "to *create new dances*, to maintain the repertory of dances, to rehearse the company, and to supervise the School."³³

B. *The Protas Factor*

Ronald Protas met Martha Graham in 1967, when he was twenty-six and she was seventy-three, and they developed a close

conduct of such school . . . to compose, perform and demonstrate, and to commission the composition, performance and demonstration of dances, ballets, dramas and music."

Graham III, 224 F. Supp. 2d 567, 572 (S.D.N.Y. 2002), *aff'd in part*, 380 F.3d 624 (2d Cir. 2004) (quoting the School's Certificate of Incorporation). Graham's accountant had advised her "to form this new not-for-profit entity because . . . contributions to the School would be tax-deductible." *Graham I*, 153 F. Supp. 2d at 526.

²⁶ See *Graham IV*, 380 F.3d at 637.

²⁷ See *id.* at 629.

²⁸ *Id.*

²⁹ See *id.* at 629 n.2; *Graham III*, 224 F. Supp. 2d at 572. Today, the Center "provides the Martha Graham School (a separate . . . organization that shares the same Board of Trustees), the Martha Graham Dance Company and the Martha Graham Resources with fundraising and marketing support and legal, financial and audit services." Martha Graham Center of Contemporary Dance, *Mission & Programs*, at <http://www.martha-grahamdance.org/us/#Mission> (last visited Jan. 27, 2005).

³⁰ See *Graham IV*, 380 F.3d at 629 n.2.

³¹ See *id.*; *Graham III*, 224 F. Supp. 2d at 572.

³² See *Graham I*, 153 F. Supp. 2d 512, 516 (S.D.N.Y. 2001), *aff'd*, 43 Fed. Appx. 408 (2d Cir. 2002).

³³ *Graham III*, 224 F. Supp. 2d at 573 (emphasis added). Judge Cedarbaum concluded that Center board members "Francis Mason, Judith Schlosser, and Lee Traub . . . testified credibly that Graham's responsibilities during her employment included the creation of dances." *Id.*

friendship.³⁴ Although he had no prior training in dance, Protas had become Executive Director of the Center and had joined the boards of both the Center and the School by the mid-1970s; he became Co-Associate Artistic Director of the Center around 1980.³⁵ Protas eventually gained control of the board of directors.³⁶ Graham trusted Protas, “whom I have trained over the years to oversee my works and to whom I have entrusted the future of my company. . . . He knows deeply the roles I have created and can intuit what I want.”³⁷

When Graham died in 1991, Protas succeeded her as Artistic Director of the Center and the School.³⁸ Graham’s last will, executed on January 19, 1989, did not specify what Graham owned at the time of her death but named Protas as executor and residuary legatee.³⁹ Although Protas had been advised by his attorney and others to investigate what rights he had acquired under Graham’s will, he made no such investigation.⁴⁰ Nevertheless, he represented to his fellow directors at the Center that he owned the exclusive rights to Martha Graham’s works.⁴¹ The other board

³⁴ See *Graham IV*, 380 F.3d at 629; *Graham I*, 153 F. Supp. 2d at 516.

³⁵ See *Graham I*, 153 F. Supp. 2d at 516.

³⁶ *Cf. id.* “Protas had the ‘final say’ on who could or could not be a board member: ‘He put them on and took them off.’” *Graham III*, 224 F. Supp. 2d at 575 (quoting Center board member Lee Traub).

³⁷ GRAHAM, *supra* note 1, at 11.

³⁸ See *Graham I*, 153 F. Supp. 2d at 516.

³⁹ See *Graham IV*, 380 F.3d at 629; *Graham III*, 224 F. Supp. 2d at 576. Graham’s will included the following provisions:

The residue . . . of all my property, real and personal, of every kind and description and wherever situated, including all property over which I may have power of appointment at the time of my death . . . and including all property not otherwise effectively disposed of hereunder . . . I give, devise and bequeath to my said friend, Ron Protas, if he shall survive me, or, if he shall not survive me, to the Martha Graham Center of Contemporary Dance, Inc.

In connection with any rights or interests in any *dance works*, musical scores, scenery sets, my personal papers and the use of my name, *which may pass to my said friend Ron Protas* . . . I request, but do not enjoin, that he consult with my friends, Linda Hodes, Diane Gray, Halston, Ted Michaelson, Alex Racolin and Lee Traub, regarding the use of such rights or interests.

Id. (emphasis added).

⁴⁰ See *Graham IV*, 380 F.3d at 630; *Graham I*, 153 F. Supp. 2d at 516.

⁴¹ See *Graham IV*, 380 F.3d at 630.

members trusted Protas and accepted his representations.⁴² In 1998, Protas created the Martha Graham Trust (“Trust”), of which he was trustee and sole beneficiary, to license Graham’s works.⁴³

In response to an increasingly strained relationship with Protas and difficulty with fundraising, the Center attempted to persuade Protas to resign as Artistic Director in July 1999 by entering into a ten-year licensing agreement with the Trust.⁴⁴ The licensing agreement, *inter alia*, gave the Center a non-exclusive license to perform Graham’s dances; in return, the Center agreed to keep Protas on the board, pay him a salary for ten years, and credit him as Artistic Consultant.⁴⁵ An implicit term of the licensing agreement was that Protas was to resign as the Center’s Artistic Director.⁴⁶ When Protas had not resigned nearly a year later, the board voted to remove him as Artistic Director.⁴⁷ Facing continued financial problems, the Center suspended operations on May 25, 2000.⁴⁸ That same day, Protas terminated the license agreement between the Trust and the Center.⁴⁹ Protas was removed from the Center’s board on June 22, 2000.⁵⁰ “Following Protas’ departure, the Center and the School received a significant amount of funding . . . and a grant for the renovation of the

⁴² See *Graham III*, 224 F. Supp. 2d at 577 (quoting board chairman Francis Mason). “The [other directors] trusted him and relied on him to perform in good faith the high duty of loyalty of a fiduciary. Protas had a fiduciary duty not to appropriate to himself corporate opportunities that might belong to the [Center].” *Id.* at 610 (citing *Sharp v. Kosmalski*, 40 N.Y.2d 119, 122 (1976)).

⁴³ See *Graham IV*, 380 F.3d at 630.

⁴⁴ See *id.*; *Graham III*, 224 F. Supp. 2d at 579; see also Deborah Jowitt, *Dance—Honoring the Founding Vision, and Moving On; When a Company’s Creator is Gone*, N.Y. TIMES, Nov. 22, 1998, § 2, at 1. “Mr. Protas, in his zeal to promote and protect Graham and her masterpieces during her lifetime, seems to have offended quite a few presenters and donors.” *Id.*

⁴⁵ See *Graham IV*, 380 F.3d at 630. The licensing agreement also granted “the Center an exclusive license to teach the Martha Graham technique, and a non-exclusive license . . . to use sets, costumes[,] and properties; to use Graham’s images; and to use the Martha Graham trademark.” *Id.*

⁴⁶ See *id.*

⁴⁷ See *Graham I*, 153 F. Supp. 2d at 519.

⁴⁸ See *id.*

⁴⁹ See *Graham III*, 224 F. Supp. 2d at 580.

⁵⁰ See *id.*

Center's and the School's premises. . . . The School reopened on January 16, 2001."⁵¹

After his removal from the board of the Center, Protas founded the nonprofit Martha Graham School and Dance Foundation ("School and Dance Foundation"), to which the Trust granted an exclusive license to license performances of Graham's dances.⁵² Protas filed suit through the nonprofit Martha Graham School and Dance Foundation on January 12, 2001, to enjoin the Center, *inter alia*, from performing seventy of Graham's dances choreographed between 1926 and 1991.⁵³

To understand the many facets of the case and the field's reaction to the ruling, it is essential to understand the general structure of the field of dance and the development of copyright protection for works of choreography.

C. Artist-Driven Organizations within the Nonprofit Rubric

"Artists are . . . inextricably tied to not-for-profit organizations," which provide a structure, a home, and financing for artistic works.⁵⁴ Most dance companies, including the Center, are incorporated under state not-for-profit law⁵⁵ and receive tax-exempt status under the Internal Revenue Code (the "Code").⁵⁶

⁵¹ *Graham I*, 153 F. Supp. 2d at 519.

⁵² *Id.* The Trust also granted the School and Dance Foundation an exclusive license to establish a school under Graham's name. *Id.*

⁵³ See *Graham IV*, 380 F.3d 624, 630 (2d Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3570 (U.S. Mar. 21, 2005) (No. 04-1277). Protas also sought to enjoin the Center from using the Martha Graham trademark and teaching the Martha Graham Technique. See *id.*; *Graham I*, 153 F. Supp. 2d at 514; see also *infra* note 113 and accompanying text. Protas also asserted rights to the costumes and sets from some of Graham's dances. See *Graham III*, 224 F. Supp. 2d at 569.

⁵⁴ Brief of Amici Curiae American Dance Festival, Inc. et al. at 3, *Graham IV*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)).

⁵⁵ The Center was incorporated under New York Membership Corporation Law, "the statutory predecessor of the current Not-For-Profit Corporation Law." *Graham I*, 153 F. Supp. 2d at 515; see N.Y. NOT-FOR-PROFIT CORP. LAW § 201(b) (McKinney 1997 & Supp. 2005) ("A not-for-profit corporation . . . may be formed for any one or more of the following non-business purposes: charitable, educational, religious, scientific, literary, cultural . . .") (emphasis added).

⁵⁶ See 26 U.S.C. § 501(c)(3) (2004) (requiring that an organization be "organized and operated exclusively for [exempt purposes]. . ." to qualify for the tax exemption provided for in the same section); see also Treas. Reg. § 1.501 (c)(3)-1(d) (1990). In addition to

Federal tax exemption is granted to such organizations due to their charitable purposes since they serve the public good rather than a private interest.⁵⁷ Arts and cultural organizations have been recognized as having an educational purpose, one of the enumerated exempt purposes in the Code.⁵⁸ From an economic perspective, the nonprofit structure may be an artist's only financial option, especially "where significant resources must be marshaled for an artist's vision to be realized."⁵⁹ Changes in the available funding streams for the arts in the mid-twentieth century increasingly channeled the formation of arts organizations into the nonprofit structure.⁶⁰ The majority of foundation and corporate grant-making programs authorize donations only to nonprofit, tax-

tax exemption, arts organizations generally qualify to receive tax-deductible donations under section 170 of the Code. *See* 26 U.S.C. § 170(c)(2)(B) (2004). The tax deduction for charitable contributions was adopted in 1917 in response to the fear that higher tax rates would cause philanthropy to decline. *See* JAMES J. FISHMAN & STEPHEN SCHWARTZ, *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 308 (1st ed. 1995).

⁵⁷ *See* Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (stating that an exempt organization must serve "a public, rather than a private, interest"); *see also generally* *Summers v. Cherokee Children & Family Servs., Inc.*, 112 S.W.3d 486 (Tenn. Ct. App. 2002) (holding that two nonprofit public benefit corporations formed to perform child care services of their executive director had abandoned any public or charitable purposes).

⁵⁸ *See* Rev. Rul. 64-175, 1964-1 C.B. 185. A nonprofit corporation organized "to stimulate, promote, and develop the interest of the American public in the dramatic arts and which operates a permanent repertory theatre" was found to be educational, much in "the same manner as a symphony orchestra is considered educational." *Id.* Symphony orchestras are one of the examples of educational organization listed in the regulations. *See* Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii); *see also* Rev. Rul. 73-45, 1973-1 C.B. 220 (holding that "a nonprofit organization created to foster the development . . . of an appreciation for drama and musical arts by sponsoring professional presentations qualifies for exemption under section 501(c)(3) of the Code"); Rev. Rul. 64-174, 1964-1 C.B. 183 (holding that a foundation established to create interest in American theatre was an exempt organization under section 501(c)(3)).

⁵⁹ Brief of Amici Curiae American Dance Festival, Inc. et al. at 3, *Graham IV* (No. 02-9451(L)).

⁶⁰ *See* John Kreidler, *Leverage Lost: The Nonprofit Arts in the Post-Ford Era*, IN MOTION MAG., Feb. 16, 1996, at pt. 2, <http://www.inmotionmagazine.com/lost.html>. These changes included the establishment of arts grants by the Ford Foundation, Carnegie Foundation, The Rockefeller Foundation, and The Andrew W. Mellon Foundation, as well as the formation of the National Endowment for the Arts ("NEA") in 1965 (which led to the formation of state arts agencies in all states by 1980, followed by the formation of more than 3000 local arts agencies). *See id.* Most NEA grants to arts organizations also required matching support and served to stimulate a broad base of funding from individual and institutional sources. *See id.*

exempt organizations, and the tax deduction available to individuals provides a strong incentive to restrict their philanthropy to nonprofit organizations.⁶¹

The defining characteristic of a nonprofit organization is the “nondistribution constraint” (also known as the “private inurement doctrine”), which means that such organizations may not distribute income or assets to shareholders, owners, directors, or officers.⁶²

Just as the goal of a for-profit corporation is to make money for its investors, the goal of a not-for-profit is to make money that can be spent on furthering its [exempt purpose] objectives. . . . What distinguishes a not-for-profit is not whether it receives money, but what it does with the money.⁶³

Many choreographers are employed by nonprofit organizations which they have founded. Such organizations are frequently referred to as “artist-driven” organizations, and their programs and activities primarily revolve around the work of their founding artists.⁶⁴ The primary purposes of such organizations are generally to support, utilize, and preserve the work of the founding artist.⁶⁵

A nonprofit organization is legally controlled by its board members, who bear ultimate fiduciary responsibility for the

⁶¹ N.Y. Found. for the Arts, *Frequently Asked Questions*, at <http://www.nyfa.org/level3.asp?id=64&fid=1&sid=44> (last visited Jan. 27, 2005) (“Individual artists and new organizations face genuine obstacles when seeking the funding necessary to continue and complete their work.”).

⁶² See VICTORIA B. BJORKLUND ET AL., *NEW YORK NONPROFIT LAW AND PRACTICE: WITH TAX ANALYSIS* § 1-2 & n.16 (1997 & Supp. 2005); see also 26 U.S.C. § 501(c)(3) (2004) (stating that no part of the net earnings of an exempt organization may inure “to the benefit of any private shareholder or individual”); N.Y. NOT-FOR-PROFIT CORP. LAW §§ 102(a)(5), 204, 508, 515(a) (McKinney 1997 & Supp. 2005).

⁶³ BJORKLUND ET AL., *supra* note 62, § 1-2 n.17 (quoting *Am. Baptist Churches of Metro. N.Y. v. Galloway*, 710 N.Y.S.2d 12, 15 (App. Div. 2000)).

⁶⁴ See, e.g., Gregory Kandel, *The Art in the Process of Planning*, Nat’l Endowment for the Arts, <http://www.nea.gov/resources/Lessons/kandel1.html> (last visited Dec. 8, 2004) (listing a modern dance company that has a single choreographer as an example of an artist driven organization).

⁶⁵ The Center and the School, for example, are nonprofit “educational institutions which contribute to the advancement of the art of dance and Martha Graham’s legacy.” *Graham I*, 153 F. Supp. 2d 512, 522 (S.D.N.Y. 2001), *aff’d*, 43 Fed. Appx. 408 (2d Cir. 2002).

management of the organization.⁶⁶ In many artist-driven organizations, however, the board will defer to the wishes of the founding artist.⁶⁷ Deference to the artist may be justified as an application of the board's business judgment⁶⁸ in serving the mission of the organization, which often revolves around the founding artist's work.⁶⁹

Graham exercised unfettered artistic control over the Center.⁷⁰ Although the Center's board of directors bore ultimate fiduciary responsibility for the organization, the board did not interfere with Graham's artistic decisions and understood its role and the role of the Center to be one of support for Graham.⁷¹ The board's deferral of control to Graham was a significant consideration both in the court's application of the work-for-hire doctrine and in the field's reaction to the ruling.

⁶⁶ See N.Y. NOT-FOR-PROFIT CORP. LAW §§ 701, 717 (McKinney 1997 & Supp. 2005).

⁶⁷ See, e.g., Jennifer Dunning, *Suit Over Graham's Dances Moves into a New Phase*, N.Y. TIMES, Apr. 23, 2002, at E4 [hereinafter Dunning, *Suit Over Graham's Dances*]. The Second Circuit conceded that "as the revered doyenne, Graham held remarkable sway over the Center's Board of Directors." *Graham IV*, 380 F.3d 624, 640 (2d Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3570 (U.S. Mar. 21, 2005) (No. 04-1277).

⁶⁸ A board's decisions will not be second-guessed by the court so long as the directors discharge the duties of their positions "in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions." N.Y. NOT-FOR-PROFIT CORP. LAW § 717(a). Board members are entitled to rely on the opinions of employees of the organization who are believed to be "reliable and competent in the matters presented." *Id.* § 717(b). As a result, board members would be justified in relying on the opinions of an artistic director (such as Graham) in making artistic decisions. *Cf. id.*

⁶⁹ See, e.g., *Nationalist Movement v. Comm'r*, 102 T.C. 558, 574 (1994), *aff'd*, 37 F.3d 216 (5th Cir. 1994) ("Substantial domination of an organization by its founder does not necessarily disqualify the organization from [tax-exempt status]."); see also Rev. Rul. 66-259, 1966-2 C.B. 214 (noting that the mere fact that the creator of an organization has control will not, in itself, prevent the organization from qualifying for exemption.).

⁷⁰ See *infra* note 152 and accompanying text.

⁷¹ See *Graham III*, 224 F. Supp. 2d 567, 590 (S.D.N.Y. 2002), *aff'd in part*, 380 F.3d 624 (2d Cir. 2004); see also Dunning, *Suit Over Graham's Dances*, *supra* note 67 ("Francis Mason, the chairman of the center's board, described that organization as an informal family that existed to enable Graham to create and maintain dances.").

D. Copyright Protection and the Field of Dance

1. Historic Overview

“Custom . . . draws its strength from the consent of those who agree to be bound by it.”⁷² As members of a “close-knit, protective community,”⁷³ American choreographers have long yielded to their self-imposed rules, and the custom of the dance community continues to offer a means of recognizing and protecting the rights of choreographers.⁷⁴

There is little case law in the field of choreography.⁷⁵ The few early choreography cases dealt not with ownership or infringement, but with whether the works at issue were even eligible for copyright protection.⁷⁶ Prior to the enactment of the Copyright Act of 1976 (“1976 Act”),⁷⁷ choreographic works were only eligible for copyright protection as a type of “dramatic composition.”⁷⁸ To qualify as such, the movement had to be used to tell a story—abstract work was not eligible for protection⁷⁹—

⁷² 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, 319 (1984).

⁷³ *Id.* at 291.

⁷⁴ *See id.* at 319.

⁷⁵ *See* Anne K. Weinhardt, *Copyright Infringement of Choreography: The Legal Aspects of Fixation*, 13 J. CORP. L. 839, 842 (1988). As of 1984, “not one case involving a statutory copyright of choreography [had] yet reached an American court of law.” Singer, *supra* note 72, at 290 n.12.

⁷⁶ *See* Fuller v. Bemis, 50 F. 926, 929 (C.C.S.D.N.Y. 1892) (denying copyright protection to a choreographic work by modern dance pioneer Loie Fuller); *see also* Martinetti v. Maguire, 16 F. Cas. 920, 921 (C.C. Cal. 1867). Although not specifically a “choreography” case, *Martinetti* dealt with the issue of whether a play, which “cannot be read . . . a mere spectacle [that] must be seen to be appreciated,” was eligible for copyright protection. *Id.*

⁷⁷ Pub. L. No. 94-553, 90 Stat. 2451 (codified as amended in scattered sections of 17 U.S.C.).

⁷⁸ *See* Singer, *supra* note 72, at 298. The Regulations enacted under the Copyright Act of 1909, which was superseded by the Copyright Act of 1976, allowed “choreographic works of a dramatic character” to be registered under the section which provided for the registration of “dramatic or dramatico-musical compositions.” *See id.* n.46 (citing Joseph Taubman, *Choreography under Copyright Revision: The Square Peg in the Round Hole Unpegged*, 10 PERF. ARTS REV. 219, 220 (1980)).

⁷⁹ *See* Fuller, 50 F. at 929. In *Fuller*, copyright protection was denied to a work of choreography by modern dance pioneer Loie Fuller since the work was found to be

and the movement had to be “suited for public representation.”⁸⁰ Congress’ reluctance to grant protection to choreographic works may be attributable to the comparatively recent advent of written dance notation and videotape, which provided a reasonable means for fixing choreography in a tangible medium.⁸¹ The dance field also faced general public “resistance to the acceptance of abstract, non-literary dance as a worthy form of artistic expression.”⁸² Past courts have interpreted the Constitutional mandate limiting copyright protection to works that promote the “useful arts”⁸³ as an “invitation to judge the moral worth of choreographic works.”⁸⁴ In the 1886 case of *Martinetti v. Maguire*,⁸⁵ the California circuit court proclaimed that although the court did not “pretend to be the

“solely the devising of a series of graceful movements . . . telling no story, portraying no character, depicting no emotion.” *Id.*

⁸⁰ See *Martinetti*, 16 F. Cas. at 922 (“In conferring [the] privilege or monopoly [of copyright] upon authors and inventors, I suppose that it is both proper and constitutional for congress so to legislate, as to encourage virtue and discourage immorality.”).

⁸¹ See *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 160 (2d Cir. 1986) (citing Leon I. Mirell, *Legal Protection for Choreography*, 27 N.Y.U. L. REV. 792, 792–93 & nn.4–5 (1952)); see also Leslie Erin Wallis, *The Different Art: Choreography and Copyright*, 33 U.C.L.A. L. REV. 1442, 1445–46 (1986).

⁸² *Horgan*, 789 F.2d at 160 (citing Leon I. Mirell, *Legal Protection for Choreography*, 27 N.Y.U. L. REV. 792, 806–07); see also Melanie Cook, Comment, *Moving to a New Beat: Copyright Protection for Choreographic Works*, 24 U.C.L.A. L. REV. 1287, 1288–94 (1977). “Concert dance in the United States didn’t command attention as a popular art form until well into the 20th century.” Joseph Carman, *Who Owns a Dance? It Depends on the Maker*, N.Y. TIMES, Dec. 23, 2001, at § 2, p. 28.

⁸³ U.S. CONST. art I, § 8, cl. 8 (“The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . .”).

⁸⁴ Singer, *supra* note 72, at 299 & n.52 (citing *Martinetti*, 16 F. Cas. at 922 (finding that an “exhibition of women “lying about loose” or otherwise’ was indecent, corrupt, and in no way promoted the useful arts”); *Fuller*, 50 F. at 92 (“The *Fuller* court was likewise wary of the seductive effect created by modern dance pioneer Loie Fuller as she swirled her skirts in her ‘Serpentine Dance.’”)) “As late as 1963 a court rejected protection of a choreographic work on [morality] grounds.” *Id.* at 299 n.52 (quoting *Dane v. M & H Co.*, 136 U.S.P.Q. 426, 429 (N.Y. Sup. Ct. 1963) (finding that a striptease dance number did not “tend to promote the progress of science of the useful arts” where the performance contained “nothing of a literary, dramatic or musical character which [was] calculated to elevate, cultivate, inform, or improve the moral or intellectual natures of the audience”)).

⁸⁵ 16 F. Cas. 920 (C.C. Cal. 1867).

conservator of the public morals . . . it [was] the duty of all courts to uphold public virtue.”⁸⁶

With the passage of the 1976 Act, which for the first time recognized choreography as a separate protectable category of work,⁸⁷ Congress finally acknowledged what choreographers had long been aware of: that “choreography is neither drama nor storytelling. It is a separate art.”⁸⁸ Under the 1976 Act, all dances, even those that are non-narrative, are eligible for copyright so long as they are “fixed in any tangible medium of expression.”⁸⁹

The 1985 case of *Horgan v. MacMillan, Inc.*,⁹⁰ which dealt with the question of whether George Balanchine’s⁹¹ choreography could be infringed by photographs of his work, was the first case in which a choreographic copyright was alleged to have been infringed under the 1976 Act.⁹² Infringement case law relating to

⁸⁶ *Id.* at 922. Not all courts, however, have endorsed this puritanical view. *See generally* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [artistic creations], outside of the narrowest and most obvious limits . . . [S]ome works of genius would be sure to miss appreciation . . . It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time.

Id. at 251–52.

⁸⁷ *See* Copyright Act of 1976, 17 U.S.C. § 102 (2004). Section 102(a) provides that: Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include . . . (4) pantomimes and choreographic works

Id.

⁸⁸ Nicholas Arcomano, *The Copyright Law and Dance*, N.Y. TIMES, Jan. 11, 1981, § 2, at 8 (quoting Agnes de Mille from a comment she submitted to the Copyright Office in 1959). Ms. de Mille further elaborated that dance “is an arrangement in time-space, using human bodies as a unit design. It may or may not be dramatic or tell a story.” *Id.*

⁸⁹ 17 U.S.C. § 102(a). Dances are generally “fixed” on film, videotape, or notated scores. *See generally* Weinhardt, *supra* note 75.

⁹⁰ 621 F. Supp. 1169 (S.D.N.Y. 1985), *rev’d*, 789 F.2d 157 (2d Cir. 1986).

⁹¹ George Balanchine, along with Lincoln Kirstein, co-founded the school that would serve as the incubator of the New York City Ballet in 1933. *About NYCB*, at <http://www.nycballet.com/about/aboutnycb.html> (last visited Apr. 20, 2005). Balanchine served as ballet master and chief choreographer of the company from its inception in 1948 until his death in 1983. *See Horgan*, 789 F.2d at 158.

⁹² *See* Wallis, *supra* note 81, at 1445 n.23.

choreography continues to remain scarce,⁹³ and breaches of dance licensing agreements are rare as well.⁹⁴ “Many choreographers maintain that the threat of ostracism from the dance community is sufficient to deter most potential breaches.”⁹⁵ Therefore, custom continues to act as a formidable regulatory force within the field.

For the vast majority of the field, there is little economic incentive driving considerations of intellectual property; thus, infringements rarely warrant litigation.⁹⁶ “[T]he ‘economic remuneration of choreographers’ ha[s] not kept pace ‘with their creative achievements.’”⁹⁷ Most choreographers make little from the performance or licensing of their work, so a suit based on actual damages or the infringer’s profits generally would be of little value.⁹⁸ “[W]hatever the legality of the situation, most of the time the bottom line is the cost of litigation. ‘The copyright law merely gives you the right to sue But lawsuits are enormously expensive.’”⁹⁹

Although choreographers have not often taken advantage of their legal right to assert ownership of their works, the addition of choreography to the Copyright Act was not in vain. Recognizing choreography as a copyrightable form of expression has had great symbolic value and was a major step in the struggle for recognition of choreography as a unique and viable art form. Nevertheless, the general elusiveness of dance continues to raise challenges in fitting choreography into the system of copyright protection.

⁹³ See Weinhardt, *supra* note 75, at 843. This remains true even though many choreographic works have been filmed, or notated and registered with the Copyright Office in the past decades. *See id.*

⁹⁴ See Singer, *supra* note 72, at 295. As of the January 1984 publication of Ms. Singer’s article, there were “apparently no recorded cases of actions for breach of a choreographic licensing agreement.” *Id.* at 295 n.34.

⁹⁵ *Id.* at 296 n.36.

⁹⁶ *See id.* at 296.

⁹⁷ Horgan v. Macmillan, Inc., 789 F.2d 157, 161 (citing Cook, *supra* note 82, at 1287).

⁹⁸ See Singer, *supra* note 72, at 305. Under § 504 of the 1976 Act, a copyright owner is entitled to recover either (i) actual damages and the infringer’s profits or (ii) statutory damages that generally range from \$750 to \$30,000. *See* 17 U.S.C. §§ 504(b), 504(c)(1) (2004). Statutory damages may be as high as \$150,000 if the infringement is determined to have been willful. *See id.* § 504(c)(2).

⁹⁹ Leslie Bennetts, *Pirating of “The Pirates of Penzance,”* N.Y. TIMES, Aug. 18, 1982, at C15 (quoting Wilford Leach, director of the New York Shakespeare Festival production of “The Pirates of Penzance”).

2. The Essence of “Owning” a Dance

Determining the economic value of a dance copyright is a difficult task. The value rests in the potential to exploit the rights secured by copyright by performing the work publicly, licensing performance rights to other dancers or dance companies, allowing the creation of derivative works of choreography, or authorizing derivative works in other media such as film, videotape, or television.¹⁰⁰ It is often difficult to speculate what the future value will be, especially at the moment of creation when—for the vast majority of choreographers—the economic value may be minimal or non-existent.¹⁰¹ Determining the future value of a dance remains challenging even once a company or choreographer begins to license and receive income from the work.¹⁰²

In order to exploit the rights granted to a work of choreography by copyright, resources beyond the copyright itself are required. Access to the original work, one such resource, may be provided through tangible media such as film, videotape, and/or a notated score,¹⁰³ or through the memory of the choreographer, original

¹⁰⁰ Section 106 of the Copyright Act includes, among the exclusive rights protected by copyright, the rights to reproduce the work in copies and phonorecords, to prepare derivative works, to distribute copies to the public, and to perform and display the work publicly. 17 U.S.C. § 106 (2002).

¹⁰¹ Cf. DIANE M. ZORICH, *MANAGING DIGITAL ASSETS: OPTIONS FOR CULTURAL AND EDUCATIONAL ORGANIZATIONS* 88–89 (1999) (Assessing the economic value of creative works requires consideration of the intended context and users of the work, the associative value, the rights conveyed to others, current events and timely associations, transformative use, and increased visibility.).

¹⁰² Cf. *id.* The José Limón Dance Foundation, for example, does not place a financial value on its ownership of José Limón’s works, even though the company generates considerable revenue through licensing fees and the restaging of these works. Interview with Ann Vachon, Institute Director, Limón Institute, in New York, NY [hereinafter Vachon Interview] (Apr. 1, 2004) (on file with author). “The idea of owning a dance as property is relatively new.” Jennifer Dunning, *Warning: Ephemeral but Private Property; Notions of Ownership Tie Up Dance Legacies*, N.Y. TIMES, July 26, 2000, at E1.

¹⁰³ Notated dance scores function for dance the same way music scores function for music; dance notation captures in writing the direction, level and timing of movement, as well as the part of the body producing the movement. See Dance Notation Bureau, *Notation Basics*, at <http://www.scottsutherland.com/DNB> (last visited Jan. 27, 2005); Dance Notation Bureau, *About DNB*, at <http://dancenotation.org/DNB> (last visited Jan. 27, 2005) [hereinafter Dance Notation Bureau, *About DNB*].

performers, or other parties familiar with the work.¹⁰⁴ Beyond access, utilization of the work requires the participation of someone with the technical expertise to translate the work from the film, videotape, score, or personal memory onto the bodies of dancers.¹⁰⁵ Financial resources also are required to fund the reconstruction, resetting, and production of the work.¹⁰⁶

There must be some connection between the copyright itself and the other resources necessary to utilize the work, or the copyright has no functional value. Nonprofit dance companies make excellent repositories for such resources, and there is enormous cultural value, beyond the economic value of the copyright itself, to keeping the work alive in the repertoire of a dance company.¹⁰⁷ Carla Maxwell, Artistic Director of the

¹⁰⁴ See Carman, *supra* note 82 (noting that “[a] distinct difference between the preservation of dance and other artistic media is that choreography often depends on an oral tradition to uphold its integrity through style, motivation and content”).

¹⁰⁵ See Julie Charlotte Van Camp, *Philosophical Problems of Dance Criticism* 169 (Dec. 1981) (unpublished Ph.D. dissertation, Temple University), <http://www.csulb.edu/~jvancamp/diss.html> (last visited Feb. 1, 2005) (“[M]any companies are finding themselves unable to perform certain works, because a rehearsal master who knows the ballet is unavailable to teach it to the company.”).

¹⁰⁶ Common costs for reconstruction and resetting include studio space, dancer fees, and licensing fees; performance and/or documentation may incur additional costs, such as theater rental and videographer fees. See generally Dance Notation Bureau, *Staging from the Score*, at <http://dancenotation.org/DNB> (last visited Feb. 1, 2005).

¹⁰⁷ “[T]he longer ballets are out of circulation, the more difficult it is to recreate them.” Carman, *supra* note 82.

Granted, these resources may also exist outside of an artist-driven nonprofit institution. Organizations such as the nonprofit Dance Notation Bureau provide access to dance works of the past and serve as clearinghouses for the rights and documentation necessary to utilize choreographic works. See Dance Notation Bureau, *About DNB*, *supra* note 103. The Dance Notation Bureau produces and houses notated dance scores by more than 160 artists including George Balanchine, Paul Taylor, Antony Tudor, Bill T. Jones, Doris Humphrey, William Forsythe, José Limón, and Laura Dean. *Id.* “Each year DNB assists in staging some 40 works from scores.” *Id.*

The Balanchine Trust, a repository for the works of George Balanchine which was created by his legatees, retains ballet masters to set Balanchine works on more than 150 companies around the world. See Carman, *supra* note 82.

Charles Woodford, son and heir of Doris Humphrey, who was not affiliated with a dance company at the time of her death, has secured the future of her dances without having a nonprofit organization at his disposal by utilizing the services of the Dance Notation Bureau and actively pursuing notation, licensing, and the reconstruction of Humphrey’s works on other dance companies. Telephone Interview with Charles Woodford (Apr. 15, 2004) (on file with author); see also Dunning, *supra* note 102. To

nonprofit dance company of José Limón, a contemporary of Martha Graham, observed, “The overwhelming thing that hit us all when Jos[é] died was that if we disbanded, an entire lifetime of work was going to disappear.”¹⁰⁸

Due to the specific dance knowledge required to utilize works of choreography and to the lack of case law in the area of choreographic copyright protection, the customary views of ownership within the field carry great weight with choreographers.

3. Presumption of Ownership within the Field

Often, the fact that a choreographer owns and has the right to control his choreography is taken for granted within the contemporary American dance community.¹⁰⁹ “[A]n artist in the process of creation injects his spirit into the work and . . . the artist’s personality . . . should therefore be . . . preserved.”¹¹⁰ This presumption has been affirmed when other choreographers, who had created dances under the auspices of nonprofit organizations, left their works to other parties and their bequests were not challenged.¹¹¹ Following the deaths of José Limón in 1972, George Balanchine in 1983, Alvin Ailey in 1989, and Jerome Robbins in 1998, their beneficiaries licensed or sold the choreographers’ works to the companies for which they were created.¹¹² The parties involved did not seek a legal determination

preserve works under such circumstances requires extreme dedication and commitment on the part of the heir.

¹⁰⁸ Jowitt, *supra* note 44. “Artists of [Limón’s] generation didn’t concern themselves with business . . . ‘He really, really believed . . . that if he was good enough, somebody was going to come up and give him money.’ . . . He named no successor to lead [the company]. His will didn’t even mention his dances.” *Id.* (quoting Carla Maxwell, Artistic Director of Limón’s company since 1978).

¹⁰⁹ See *supra* note 4 and accompanying text. “As George Balanchine explained, ‘I can do with my ballets whatever I like. They are mine . . . I made them . . .’” Singer, *supra* note 72, at 310 n.106 (citations omitted).

¹¹⁰ *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) (citations omitted).

¹¹¹ See Joseph Carman, *Graham Center Victory*, DANCE MAG., Nov. 1, 2002, at 20.

¹¹² See *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 158 (2d Cir. 1986); Jowitt, *supra* note 44; Alvin Ailey American Dance Theater, History, 1989, at <http://alvinailey.org/history.asp?dateid=29> (last visited Apr. 20, 2005).

“Balanchine’s . . . will . . . left selected ballets to treasured dancers associated with them. He also willed a bit of chaos to his legatees.” Jowitt, *supra* note 44. He divided his body of work among several people, even splitting the American, foreign, and media

of copyright ownership; thus, the legal standard was not called into question.

Respecting the custom of the field, the Center would likely have continued to pay Protas a licensing fee for use of Graham's works while allowing him to reap the profits of licensing the works to other companies. Graham's right to leave her dances to Protas would have remained unquestioned had Protas not attempted to deny the Center access to the works.

*E. Overview of the Martha Graham Copyright Case*¹¹³

In January 2001, Protas filed suit against the Center and School under section 2201(a) of title 28 of the U.S. Code, seeking a

rights of single ballets among different people. *See id.* "Fortunately all of us cared for Mr. Balanchine, and all of us care for each other." *Id.* (quoting Barbara Horgan, Balanchine's executor). The legatees created the George Balanchine Trust, which has streamlined the process of licensing Balanchine's works. *See Carman, supra* note 82. After Jerome Robbins's death, "he left his ballets in the hands of a trust that specified that a committee composed of trustees, ballet masters, and his close friends should oversee the licensing of his ballets." *Id.* "Generally meeting once a month, the Trust reviews requests for staging Robbins's works." *Id.* The board of the Alvin Ailey American Dance Theater "bought the rights to Ailey's dances from his mother, to whom [Ailey] had left" his work. *See Dunning, supra* note 102. "The board felt the dances had to be owned by a nonprofit institution and not a single person who could sell [Ailey's masterwork] *Revelations* to the Rockettes." *Id.* (quoting Sharon Luckman, executive director of the Ailey company). José Limón's heirs sold the rights to Limón's work to the José Limón Dance Foundation, the parent organization of the Limón Dance Company. Vachon Interview, *supra* note 102; *see also Dunning, supra* note 102.

Of course, the specific facts of the relationship between the choreographer and the dance company in each of the above situations may distinguish these choreographers' rights from those of Graham. In the case of Balanchine, for example, the New York City Ballet paid Balanchine a royalty each time the company performed his works. *See Horgan*, 789 F.2d at 158. In *Graham*, the district court found that no credible evidence was offered to prove that Graham received royalties from the Center for use of her dances. *See Graham IV*, 380 F.3d 624, 641 (2d Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3570 (U.S. Mar. 21, 2005) (No. 04-1277).

¹¹³ The Martha Graham copyright case was the second phase of Protas's suit. *See generally Graham III*, 224 F. Supp. 2d 567 (S.D.N.Y. 2002), *aff'd in part*, 380 F.3d 624 (2d Cir. 2004). The first phase of the suit dealt with trademark claims: Protas attempted to enjoin the Center and School from using the names under which they had been incorporated and from claiming to teach the "Martha Graham technique." *See Graham I*, 153 F. Supp. 2d 512, 514 (S.D.N.Y. 2001), *aff'd*, 43 Fed. Appx. 408 (2d Cir. 2002). Protas was unsuccessful on all counts. *See Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 43 Fed. Appx. 408, 410 (2d Cir. 2002) [hereinafter *Graham II*]; *Graham I*, 153 F. Supp. 2d at 526-27.

declaratory judgment that: (1) none of the seventy dances in question were in the public domain, (2) he owned all rights in these works, and (3) unauthorized performance of these dances would constitute willful copyright infringement.¹¹⁴ The Center counterclaimed for a declaration of ownership of the works in question, arguing that it owned the dances via Graham's assignment and the work-for-hire doctrine, and thus, Protas had not inherited any rights to these works.¹¹⁵ New York State Attorney General Eliot Spitzer intervened on behalf of the Center to protect the interests of the citizens of New York in the assets of this New York state nonprofit corporation.¹¹⁶

The bench trial held in April 2002 before Judge Miriam Goldman Cedarbaum of the District Court for the Southern District of New York was "an effort to recapture a history that partially predated the knowledge and memory of the living witnesses."¹¹⁷ The specific circumstances of each work further complicated the district court's analysis. Some works were governed by the Copyright Act of 1909 ("1909 Act"), others by the 1976 Act; some were created before the Center was established, others after; some had been published, others had not.¹¹⁸ Additionally, the critical

¹¹⁴ See *Graham IV*, 380 F.3d at 630–31.

¹¹⁵ See *id.* at 631. The Center also counterclaimed for breach of fiduciary duty, fraud, and negligent misrepresentation by Protas and for replevin of items possessed and money improperly borrowed by Protas. See *Graham III*, 224 F. Supp. 2d at 570. The Center sought "a constructive trust to recover the proceeds of [Protas's] licensing of the ballets, sets, and costumes to third parties and of his sale of defendants' property to the Library of Congress [and] disgorgement of ten years of Protas' salary and of payments made to Protas by defendants under [the] 1999 license agreement." *Id.*

¹¹⁶ See *Graham IV*, 380 F.3d at 631 (stating that the Center's position was supported by Attorney General Spitzer); Paul Ben-Itzak, *Who Owns Martha Graham? Protas Gets His Close Up, and Dancers Get Their Day in Court*, DANCE INSIDER (Mar. 24, 2001) ("[T]he citizens of New York have an interest and investment in the outcome of the case."), at <http://www.danceinsider.com/f2001/f324.html>. Attorney General Spitzer's office had previously tried to mediate the dispute. See Doreen Carvajal, *A State Grant Could Help Save Graham Studio*, N.Y. TIMES, Oct. 30, 2000, at E1.

¹¹⁷ *Graham III*, 224 F. Supp. 2d at 570–71.

¹¹⁸ "The copyright claims in this case have to be assessed through the prism of the changes in the copyright law that took effect in 1978, 1989, and 1992. The chronology of creation, publication, and copyright registration and renewal of the choreography of each dance is critical to a determination of copyright ownership." *Graham III*, 224 F. Supp. 2d at 582–83 (citations omitted). For a complete overview of the issues presented by this

events of this litigation spanned sixty-five years and “many of the pertinent facts [were] obscured by inadequate record keeping.”¹¹⁹ Also informing the district court’s decision was the fact that, “after listening to his evasive and inconsistent testimony and observing his demeanor, [Judge Cedarbaum found] Protas not to be a credible witness.”¹²⁰

The district court overwhelmingly found in favor of the Center, holding that forty-five dances were owned by the Center.¹²¹ Thirty-four dances created by Graham while she was employed by the School or the Center between 1956 and 1991 were found to have been works for hire.¹²² The district court found that the Center held the copyrights to only twenty-seven of these thirty-four dances because seven dances had been published without sufficient evidence as to whether there was copyright notice.¹²³ The district court also found that Graham had assigned a total of twenty-one of her earlier unpublished works to the Center.¹²⁴ Although there was no evidence of a written assignment by Graham, the district court held that “a preponderance of the credible evidence” established the transfer of the common law copyright in these unpublished works.¹²⁵ This evidence included letters, documents, contracts with third parties, minutes of the Center’s board of directors meetings, financial records, and witness

case, see David Goldberg & Robert J. Bernstein, *Shall We Dance?: Choreographic Works and ‘Martha Graham,’* 228 N.Y. L.J. 3 (2002).

¹¹⁹ See *Graham IV*, 380 F.3d at 629.

¹²⁰ *Graham III*, 224 F. Supp. 2d at 572. Although the trial was not officially about who deserved to own the works, the plaintiff’s “erratic, ingratiating, spiteful, dissembling, un-mindful, vindictive, simpering and quite possibly demented personality [was] also on trial.” Paul Ben-Itzak, *If Protas is Defeated, Would Dancers Win the Battle but Lose the War?*, DANCE INSIDER (Apr. 26, 2002), at http://www.danceinsider.com/f2002/f04-26_1.html.

¹²¹ See *Graham III*, 224 F. Supp. 2d at 612. The district court’s ruling as to each dance is detailed in the Appendix to the Second Circuit’s decision. *Graham IV*, 380 F.3d at 647–48.

¹²² See *id.* at 592.

¹²³ See *id.* at 594.

¹²⁴ See *id.* at 597.

¹²⁵ *Id.* at 596–97. “[T]he transfer of the ‘common law copyright’ in unpublished works did not have to be in writing but could be oral or inferred from conduct.” *Id.* at 596 (quoting *Jerry Vogel Music Co. v. Warner Bros., Inc.*, 535 F. Supp. 172, 174 (S.D.N.Y. 1982)).

testimony showing that the Center consistently acted as the owner of these dances and that Graham did not object.¹²⁶ Eighteen of the twenty-one assigned works were held to presently belong to the Center.¹²⁷ The district court held that neither party had established ownership of twenty-four dances, ten of which had entered the public domain for lack of timely renewal, five of which were commissioned works, and nine of which were published but for which neither side had proven whether they had been published with adequate notice of copyright.¹²⁸ Protas established ownership of one dance.¹²⁹ As executor of Graham's estate he was entitled to the renewal term in one dance originally assigned to the Center and subsequently published with notice of copyright in 1969.¹³⁰

The appeal was argued before the Second Circuit on January 29, 2004.¹³¹ The Second Circuit largely upheld the district court's work-for-hire ruling, disagreeing primarily in the application of the work-for-hire doctrine to ten works choreographed by Graham between 1956 and 1965 while she was a part-time employee of the School.¹³² The Second Circuit also disagreed with the district court's determination that two works were unpublished.¹³³ The case was remanded to the district court for a determination of ownership of seven of the ten dances created between 1956

¹²⁶ See *id.* at 598–600.

¹²⁷ See *Graham IV*, 380 F.3d at 631; *Graham III*, 224 F. Supp. 2d at 612. Present ownership of two of the twenty-one assigned works was not established because they were subsequently published and neither party established whether they had been published with adequate notice of copyright. See *Graham III*, 224 F. Supp. 2d at 613. Protas was found to own the one remaining assigned work. See *infra* notes 129–30 and accompanying text.

¹²⁸ See *Graham III*, 224 F. Supp. 2d at 612–13. Both parties requested that the Second Circuit clarify whether the fourteen works for which ownership remained unproven (the five commissioned works and the nine lacking evidence of adequate statutory notice) were in the public domain or whether there remained a possibility of proving ownership. See Brief for Plaintiff-Counter-Claimant-Appellant Martha Graham School & Dance Found. at 64–66, *Graham IV*, 380 F.3d 624 (No. 02-9451(L)); Brief for Defendants-Counter-Claimants-Appellees at 67, *Graham IV*, 380 F.3d 624 (No. 02-9451(L)). The Second Circuit, however, simply affirmed the district court's ruling that neither party had established ownership of these dances. See *Graham IV*, 380 F.3d at 637 n.25, 647–48.

¹²⁹ See *Graham III*, 224 F. Supp. 2d at 613.

¹³⁰ See *id.* at 602.

¹³¹ *Graham IV*, 380 F.3d at 624.

¹³² See *id.* at 628, 637–39, 647; discussion *infra* notes 158–61.

¹³³ See *id.* at 637, 640, 642.

through 1965 and the two dances that were incorrectly held to be unpublished.¹³⁴ A remand hearing has been scheduled for May 2005.¹³⁵

A petition for a writ of certiorari was filed by Protas on March 21, 2005, challenging the Second Circuit's work-for-hire holdings and questioning "[w]hether the work-for-hire doctrine can divest an artist from the ownership of her body of work in situations where that artist has established a not-for-profit entity to facilitate the creation and presentation of those same works."¹³⁶ Both the Center and Intervener Eliot Spitzer have waived their right to respond to the petition.¹³⁷ As this Note went to press, the Supreme Court had not yet ruled on the certiorari petition.

II. LEGALITIES OF CONTROL: WORKS FOR HIRE, NONPROFITS, AND MORAL RIGHTS

A. *The Right to Control and the Work-for-Hire Doctrine*

Congress has not fully defined the term "author" as used in the Copyright Act, although both the 1909 and 1976 Acts state that an employer is considered the "author" in the case of works made for hire.¹³⁸ "[W]ith respect to works for hire, the employer is legally

¹³⁴ See *id.* at 647; see also discussion *infra* notes 162–65. The district court also was instructed to recalculate the amount of Protas' proceeds from the licensing of the works determined to belong to the Center, that the Center is entitled to recover in light of its findings on remand in determining ownership of these nine dances. See *id.* at 646–47; see also *supra* note 115.

¹³⁵ Petition of Writ of Certiorari, 2005 WL 682101 (U.S. Mar. 21, 2005) (No. 04-1277) (appeal from *Graham IV*, 380 F.3d 624 (2d Cir. 2004)).

¹³⁶ *Id.* The second question presented for review was "[w]hether the conflict between the . . . Second and Ninth Circuits with respect to scope of the work-for-hire doctrine as applied to copyrights of creative works should be resolved in favor of Ninth Circuit's interpretation?" *Id.*

¹³⁷ Docket for No. 04-1277, at <http://www.supremecourtus.gov/docket/04-1277.htm> (last visited Apr. 22, 2005). Attorney General Spitzer's waiver of right to respond was filed on March 31, 2005; the Center's waiver was filed on April 6, 2005. *Id.*

¹³⁸ See Copyright Act of 1976, 17 U.S.C. § 201(b) (2000) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title . . ."); Copyright Act of 1909, 17 U.S.C. § 26 (1909) (current version at 17 U.S.C. § 102 (1994)) ("[In] the interpretation and construction of

regarded as the ‘author,’ as distinguished from the creator of the work, whom Learned Hand referred to as ‘the “author” in the colloquial sense.’”¹³⁹ The Supreme Court has defined “author” in this sense to be “[h]e to whom anything owes its origin; originator, maker.”¹⁴⁰

Under both the 1909 and 1976 Acts, the work-for-hire doctrine embraces the tenet that in a typical employer-employee relationship, the employer has some right of control over the creation of a work by an employee.¹⁴¹ Although “no one sells or mortgages all the products of his brain to his employer by the mere fact of employment,”¹⁴² the Center’s right to control Graham’s work, as her employer, was a factor in determining that the work-for-hire doctrine applied.¹⁴³ As the Second Circuit highlighted in its opinion, so long as the employer has the *right to supervise* the manner in which a work is created, the fact that the employer did

this title . . . the word ‘author’ shall include an employer in the case of works made for hire.”).

¹³⁹ *Graham IV*, 380 F.3d at 634 (quoting *Shapiro, Bernstein & Co. v. Bryan*, 123 F.2d 697, 699 (2d Cir. 1941)).

¹⁴⁰ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884); *see also* *Goldstein v. California*, 412 U.S. 546, 561 (1973) (holding that the term “author” is not to be construed in its “narrow literal sense, but, rather, with the reach necessary to reflect the broad scope of constitutional principles”). Because the Center financially enabled the creation of Graham’s works, the works at least partially “owed their origin” to the Center. *Compare Burrow-Giles*, 111 U.S. at 58, *with Nottage v. Jackson*, 11 Q.B. 627 (1883) (quoted by the U.S. Supreme Court in *Burrow-Giles*, 111 U.S. at 60–61) (stating that an author “is the person who effectively is as near as he can be, the cause of the picture which is produced . . . the person who has superintended the arrangement, who has actually formed the picture by putting persons in position and arranging the place where the people are to be.”).

¹⁴¹ *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989) (establishing that, for works created under the 1976 Act, the extent of the employer’s control is a factor to be considered in determining whether a party is an employee under the common law of agency); *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 554 (2d Cir. 1995) (quoting *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216 (2d Cir. 1972)) (holding that in applying the “instance and expense” test to works created under the 1909 Act, “an essential element of the employer-employee relationship, [is] the right of the employer to direct and supervise the manner in which the writer performs his work”).

¹⁴² *Pub. Affairs Assocs. v. Rickover*, 177 F. Supp. 601, 604 (D.D.C. 1959), *rev’d on other grounds*, 284 F.2d 262 (D.C. Cir. 1960), *vacated for insufficient record*, 369 U.S. 111 (1962).

¹⁴³ *See Graham IV*, 380 F.3d at 633–42.

not *exercise control* does not preclude application of the work-for-hire doctrine.¹⁴⁴

1. Works for Hire under the 1909 Act

a) The “Instance and Expense” Test

An employer-employee relationship signifying work-for-hire status for works created under the 1909 Act is determined through application of the “instance and expense” test, first utilized by the Second Circuit in *Brattleboro Publishing Co. v. Winmill Publishing Co.*,¹⁴⁵ which held that when an employee’s work was created at the employer’s instance and expense and the intent of the parties could not be determined, the presumption of copyright ownership ran in favor of the employer.¹⁴⁶ These principles were found to apply to both the traditional employer-employee relationship as well as in the relationship of employer and independent contractor.¹⁴⁷ The Second Circuit has since defined the “instance and expense” test as being met when the employer both induced the creation of the work and had the right to direct and supervise how the work was executed.¹⁴⁸ Significantly, “[t]he

¹⁴⁴ See *id.* at 635 (citing *Scherr v. Universal Match Corp.*, 417 F.2d 497, 500–01 (2d Cir. 1969)), 642 (citing *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 85–88 (2d Cir. 1995)).

¹⁴⁵ 369 F.2d 565 (2d Cir. 1966).

¹⁴⁶ See *id.* at 567–68 (2d Cir. 1966); see also *Graham III*, 224 F. Supp. 2d 567, 588 (S.D.N.Y. 2002), *aff’d in part*, 380 F.3d 624 (2d Cir. 2004) (citing *Brattleboro*, 369 F.2d at 568). The Second Circuit traced the use of the phrase “instance and expense” in copyright jurisprudence back to the 1887 case of *Hanson v. Jaccard Jewelry Co.*, 32 F. 202, 202 (C.C.E.D. Mo. 1887). See *Graham IV*, 380 F.3d at 635 n.17. “[T]he phrase was first used in an operative sense in a provision of a [1905] draft bill prepared by . . . Thorvald Solberg, then the Register of Copyrights,” that would have offered protection for a “composite or collective work . . . produced at the instance and expense of a publisher.” *Id.* (citation omitted). The next use of the phrase was found in the 1964 edition of *Nimmer on Copyright*. See *id.* The phrase first appeared in a reported opinion in 1965: *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965). See *id.*

¹⁴⁷ See *Graham IV*, 380 F.3d at 635 (citing *Brattleboro*, 369 F.2d at 568).

¹⁴⁸ See *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 554 (2d Cir. 1995) (citing *Siegel v. Nat’l Periodical Publ’ns, Inc.*, 508 F.2d 909, 914 (2d Cir. 1974); *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216 (2d Cir. 1972)).

right to direct and supervise the manner in which work is created need never be exercised.”¹⁴⁹

b) The “Instance and Expense” Test as Applied to
Graham’s Works (1956–1977)

i. District Court

In holding that nineteen dances choreographed by Graham from 1956 through 1977 were works for hire, the district court found the “expense” test to be satisfied because Graham choreographed on dancers employed by the Center; thus, the tools used to create Graham’s choreographic works were provided by the Center.¹⁵⁰ Graham herself had recognized that “[she] could never have done what [she did] if [she] had not had such a place.”¹⁵¹ While acknowledging that it was “undisputed that Martha Graham was ultimately responsible for making all final artistic decisions relating to the dances,”¹⁵² the court found the “instance” test to be satisfied as well, holding that the fact that “the Center’s board of directors did not interfere with Graham’s artistic decisions does not show that it did not have the legal authority, as her employer, to ensure that dances were created at the ‘instance’ of the defendants.”¹⁵³

ii. Second Circuit

On appeal, Protas contended that Graham was not an employee within the scope of the 1909 Act since “she choreographed at no one’s instance but her own.”¹⁵⁴ The Second Circuit found, however, that whether Graham would have choreographed without her salary and the support of the Center was irrelevant, and that Protas attempted to give the word “instance” a “more particularized meaning” than appropriate for the instance and expense test, which does not require that the employer be the

¹⁴⁹ *Graham IV*, 380 F.3d at 635 (citing *Scherr v. Universal Match Corp.*, 417 F.2d 497, 500–01 (2d Cir. 1969)).

¹⁵⁰ *See Graham III*, 224 F. Supp. 2d at 589–90 (“The creation of the dances was a collaborative process in which the Center’s employees played an indispensable role.”).

¹⁵¹ *Id.* at 589.

¹⁵² *Id.* at 590.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

“precipitating force” behind each work created by an employee.¹⁵⁵ “Many talented people . . . are expected by their employers to produce the sort of work for which they were hired, without any need for the employer to suggest any particular product. ‘Instance’ is not a term of exclusion as applied to specific works created within the scope of regular employment.”¹⁵⁶ The fact that Graham was paid by the Center specifically to create the intellectual property at issue in this litigation was significant in finding that a work-for-hire relationship existed.¹⁵⁷

Despite the Second Circuit’s agreement with the district court’s application of the instance and expense test, it concluded that the district court erred in finding ten works choreographed by Graham from 1956 through 1965 to be works for hire.¹⁵⁸ Per Graham’s employment contract, she was employed by the School during that period only to teach and supervise the School’s education program as part-time Program Director, despite the fact that part of the School’s purpose was the creation of dances.¹⁵⁹ There was no evidence that her duties included choreography, while there was evidence that during this period Graham received income from

¹⁵⁵ See *id.* at 640. But see *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 206 F.3d 1322, 1326 (9th Cir. 2000) (finding that writings by a monk who founded his own religious order were “motivated by [his] own desire for self-expression or religious instruction of the public” and therefore did not qualify as works for hire under the 1909 Act). The Second Circuit distinguished the employee in *Self-Realization Fellowship Church* from Graham in that Swami Paramahansa Yogananda had much less of a connection to his putative employer church than would an employee in a traditional employment relationship. *Graham IV*, 380 F.3d 624, 640 (2d Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3570 (U.S. Mar. 21, 2005) (No. 04-1277). Additionally, while Graham’s choreography was clearly part of the regular business of the Center, see *infra* note 190 and accompanying text, the Swami’s writings were not necessarily part of the regular business of the Self-Realization Fellowship Church. Cf. Aims & Ideals of Self-Realization Fellowship (listing the aims and ideals of the Church as set forth by founder Paramahansa Yogananda), at http://www.yogananda.com/aboutsrf/aims_ideals.html (last updated Sept. 12, 2000). Although the Ninth Circuit’s opinion did not define the regular business of the Church, whether the “employee created the work as part of the regular course of business of the employer” was mentioned as a consideration in establishing a work-for-hire relationship. See *Self-Realization Fellowship Church*, 206 F.3d at 1326–27 (citation omitted).

¹⁵⁶ *Graham IV*, 380 F.3d at 640–41.

¹⁵⁷ See *id.* at 640.

¹⁵⁸ See *Graham IV*, 380 F.3d at 637.

¹⁵⁹ See *id.* at 637–38.

other sources for her choreography.¹⁶⁰ Although the resources provided by the Center, including rehearsal space and dancers, may have aided Graham in her choreography—arguably satisfying the “expense” test—“no dances were proved to have been created before 1966 at the ‘instance’ of the Center.”¹⁶¹

The Second Circuit vacated the district court’s ruling with respect to seven unpublished works created during this timeframe.¹⁶² The question of the ownership of these dances was remanded to the district court to determine if Graham had assigned any of these dances to the Center or whether the works had passed to Protas as part of Graham’s estate.¹⁶³ As to the remaining three works created from 1956 through 1965, which the Second Circuit determined not to be works for hire, the Second Circuit affirmed the district court’s holding that two of these works belonged to neither the Center nor Protas because it had not been sufficiently proven that the works had been published with the required statutory notice of copyright.¹⁶⁴ The Second Circuit reversed the district court’s holding with respect to the third work, determined to have been published with copyright notice, because even if Graham has assigned the renewal term for that work to the Center, her death prior to the beginning of the renewal term would have voided such assignment; therefore, this work had passed to Protas as Graham’s beneficiary.¹⁶⁵

The Second Circuit upheld the district court’s work-for-hire finding with respect to the nine works created from 1966 through 1977, finding that Graham had signed a new ten-year contract with the Center in 1966 that changed her status to full-time Artistic Director of the Center.¹⁶⁶ After this contract was signed, Graham’s “primary duty was to choreograph new dances.”¹⁶⁷ This contract

¹⁶⁰ *See id.*

¹⁶¹ *Id.* at 638.

¹⁶² *Id.*

¹⁶³ *Id.* at 638–39; *see also supra* note 135 and accompanying text.

¹⁶⁴ *See id.* at 638.

¹⁶⁵ *See id.* at 645.

¹⁶⁶ *See id.* at 639.

¹⁶⁷ *See id.* at 640.

was renewed indefinitely in 1976 and remained in effect until Graham's death in 1991.¹⁶⁸

2. Works for Hire under the 1976 Act

a) "Employee" Status under the Common Law of Agency

Under the 1976 Act, there is a presumption of ownership by the employer, unless contracted otherwise in writing.¹⁶⁹ To ascertain whether a work created on or after January 1, 1978, is a work for hire, the determinative question is whether it was "prepared by an employee within the scope of his or her employment."¹⁷⁰ Definitions for "employee" and "scope of employment" are lacking under the 1976 Act,¹⁷¹ but the Supreme Court has held that "the term 'employee' should be understood in light of the general common law of agency."¹⁷² Work is within an employee's "scope of employment" if (1) it is of the kind the employee was hired to perform, (2) its creation occurs substantially within the authorized time and space limits of the job, and (3) it was at least partially motivated by a desire to serve the employer.¹⁷³

In *Community for Creative Non-Violence v. Reid*,¹⁷⁴ the Supreme Court listed twelve factors to consider in determining whether a party is an employee under the common law of agency: (1) the right to control the manner and means of production, (2) the necessary skill, (3) the source of the instrumentalities and tools, (4) the location of the work, (5) the duration of the relationship, (6) the right to assign additional projects, (7) control over when and how

¹⁶⁸ See *id.* at 639.

¹⁶⁹ See Copyright Act of 1976, 17 U.S.C. § 201(b) (2000). This section provides: In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and *unless the parties have expressly agreed otherwise in a written instrument signed by them*, owns all of the rights comprised in the copyright.

Id. (emphasis added).

¹⁷⁰ *Id.* § 101; Copyright Act of 1976, Pub. L. 94-553, § 102, 90 Stat. 2541, 2598 (1976).

¹⁷¹ See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 85 (2d Cir. 1995).

¹⁷² *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989).

¹⁷³ See *Avtec Sys., Inc. v. Peiffer*, 21 F.3d 568, 571 (4th Cir. 1994) (citing RESTATEMENT (SECOND) OF AGENCY § 228 (1958)).

¹⁷⁴ 490 U.S. 730 (1989).

long to work, (8) the method of payment, (9) the choice and compensation of assistants, (10) the regular business of the hiring party, (11) employee benefits provided, and (12) tax treatment.¹⁷⁵ “No one of these factors is determinative.”¹⁷⁶ The *Reid* Court “held that ‘employee’ should not be interpreted exclusively in terms of whether the hiring party retains the right to control the product, nor in terms of whether the hiring party has actually wielded control over the creation of the work.”¹⁷⁷

In *Aymes v. Bonelli*,¹⁷⁸ the Second Circuit subsequently narrowed the list to five factors that “will be significant in virtually every situation . . . and should be given more weight in the analysis:” (1) requisite skill, (2) the right of the hiring party to control the manner and means of production, (3) whether the hired party may be assigned additional projects, (4) tax treatment of the hired party, and (5) provision of employee benefits.¹⁷⁹

b) Agency Factors as Applied to Graham’s Works (1978–1991)

i. District Court

The status of fifteen of Graham’s works, choreographed from 1978 through 1991, was assessed under the 1976 Act.¹⁸⁰ A balancing of the *Aymes* factors by the district court showed that Graham was an employee of the Center.¹⁸¹ Although Graham’s level of skill was uncontested, the court found that the board exercised its control “in all the ways it saw fit while giving deference to Graham’s talent as a choreographer.”¹⁸² The board

¹⁷⁵ See *id.* at 751–52 (citing RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958)).

¹⁷⁶ *Id.* at 752.

¹⁷⁷ *Graham III*, 224 F. Supp. 2d 567, 591 (S.D.N.Y. 2002), *aff’d in part*, 380 F.3d 624 (2d Cir. 2004) (citing *Reid*, 490 U.S. at 742–43).

¹⁷⁸ 980 F.2d 857 (2d Cir. 1992).

¹⁷⁹ *Id.* at 861.

¹⁸⁰ See *Graham III*, 224 F. Supp. 2d at 587, 590–92.

¹⁸¹ See *id.* at 591.

¹⁸² *Id.* at 592 (“Graham reported regularly to the board on her new works, and the board set the financial bounds within which she could work.”). The Second Circuit has held that a sculpture created by artists who “had complete artistic freedom with respect to every aspect of the sculpture’s creation,” was a work made for hire. See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 86–87 (2d Cir. 1995).

also “encouraged her to produce new work, and occasionally suggested themes for new dances.”¹⁸³ Graham received a salary from the Center as Artistic Director, from which taxes were withheld, and the Center paid personal, travel, and medical expenses and other employee benefits on her behalf.¹⁸⁴

The court also applied additional factors from *Reid* which further supported its determination of Graham’s employee status.¹⁸⁵ The Center was the “source of [Graham’s] instrumentalities and tools,” as it paid for the dancers, pianists, sets, and costumes and provided the rehearsal space.¹⁸⁶ The “location of the work” was the defendants’ premises.¹⁸⁷ The “duration of the relationship” was more than three decades of employment.¹⁸⁸ The “method of payment” was a fixed annual salary, set by the board of directors, “with no separate compensation for the creation of dances.”¹⁸⁹ And the creation of dances by Martha Graham was part of the “regular business” of the Center.¹⁹⁰ These factors pointed “overwhelmingly to the conclusion that Graham was an employee of the defendants.”¹⁹¹

¹⁸³ *Graham III*, 224 F. Supp. 2d at 592.

¹⁸⁴ *See id.* at 573. Graham’s salary was described as “‘several hundred a week’ when there was money.” Dunning, *Hearings Start*, *supra* note 4 (quoting Cynthia Parker Kaback, general manager of the Center from the mid-1970s to the early 1980s).

¹⁸⁵ *See Graham III*, 224 F. Supp. 2d at 592; *see also supra* text accompanying *supra* note 175.

¹⁸⁶ *Id.* (citing *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989)).

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* Interestingly enough, in considering when a work that was “specially ordered or commissioned” (as opposed to created by an employee within the scope of his employment) is entitled to work-for-hire status under 17 U.S.C. § 101(2), the Register of Copyrights has stated that visual artists and photographers were “among the most vulnerable and poorly protected of all the beneficiaries of the copyright law, and it seems clear that, like serious composers and *choreographers*, [these artists] were not intended to be treated as ‘employees’ under the carefully negotiated definition in section 101.” *Reid*, 490 U.S. at 747 n.13 (emphasis added) (quoting U.S. COPYRIGHT OFFICE, SECOND SUPPLEMENTARY REP. OF THE REG. OF COPYRIGHTS ON THE GEN. REVISION OF U.S. COPYRIGHT LAW ch. XI, at 12–13 (1975)).

ii. Second Circuit

The Second Circuit agreed with the district court's conclusion that Graham's dances created from 1978 through 1991 were works for hire.¹⁹² Conceding that the Center did not exercise much control over Graham, the Second Circuit focused on the fact that "the absence of a hiring party's *exercise* of control does not mean that an artist is not an employee where other factors weigh in favor of finding an employment relationship."¹⁹³ Thus, while recognition of Graham's artistic genius would explain the Center's disinclination to exercise control over her choreography, such uncontested artistic skill would not preclude a finding of an employment relationship for purposes of the work-for-hire doctrine.¹⁹⁴

B. *The Significance of Control within Nonprofit Organizations*

An additional prism through which to interpret the *Graham* case is the nonprofit structure of the Center. Moving beyond the legal issue of Graham's "employee" status, she was undisputedly the founder and artistic director of the nonprofit Center, a member of its board of directors, and, in practice if not legally, the person with primary control over the organization.¹⁹⁵ Graham's leadership role was significant because her control over the Center could have potentially raised fiduciary duty and private inurement issues in connection with the ownership and use of her works during her lifetime. Although not raised in the *Graham* case, these considerations could strengthen the equitable rationale for allowing ownership to vest in the Center.

¹⁹² See *Graham IV*, 380 F.3d 624, 641 (2d Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3570 (U.S. Mar. 21, 2005) (No. 04-1277).

¹⁹³ *Id.* at 642 (citing *Carter v. Helmsley Spear, Inc.*, 71 F.3d 77, 85–88 (2d Cir. 1995)) (emphasis added).

¹⁹⁴ See *id.* "The Restatement offers the example of a 'full-time cook' over whose culinary activity 'it is understood that the employer will exercise no control.'" *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 220(1) cmt. d (1958)).

¹⁹⁵ See *supra* notes 67–68; *Graham I*, 153 F. Supp. 2d 512, 516 (S.D.N.Y. 2001), *aff'd*, 43 Fed. Appx. 408 (2d Cir. 2002).

1. Fiduciary Duty

New York Not-for-Profit Corporation Law requires that nonprofit directors and officers “discharge [their] duties . . . in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions.”¹⁹⁶ The district court found that by virtue of his role as a board member and as principal managerial employee of the Center, “Protas had a fiduciary duty of undivided loyalty to the Center and the School.”¹⁹⁷ The Second Circuit affirmed that he violated this duty and profited improperly at the Center’s expense when he failed to investigate what he owned under Graham’s will (as he had been advised to do by his attorney) and represented to the other board members that he owned Graham’s dances.¹⁹⁸ In doing so, he “failed to exercise the ‘degree of diligence, care and skill’ required of directors and officers of not-for-profit corporations.”¹⁹⁹

The board of the Center had a comparable fiduciary duty to uphold the mission of the organization by protecting and preserving Graham’s work.²⁰⁰ This duty provided a strong motivation for the Center’s position in the *Graham* case; the board could not allow Protas to endanger the existence of the Center by removing Graham’s works from the Company’s repertoire.

¹⁹⁶ N.Y. NOT-FOR-PROFIT CORP. LAW § 717(a) (McKinney 1997 & Supp. 2005).

¹⁹⁷ *Graham I*, 153 F. Supp. 2d 512, 521–22 (S.D.N.Y. 2001), *aff’d*, 43 Fed. Appx. 408 (2d Cir. 2002) (citing *Aramony v. United Way of Am.*, No. 96 Civ. 3962, 1998 WL 205331, at *7 (S.D.N.Y. Apr. 27, 1998) (“As chief executive officer of UWA, Aramony owed the organization and its members a fiduciary duty of undivided loyalty.”)). Protas’s position as Artistic Director of the Center “carried with it an implied promise to act in the Center’s best interest.” *Graham IV*, 380 F.3d at 646.

¹⁹⁸ See *Graham IV*, 380 F.3d at 630; *Graham III*, 224 F. Supp. 2d 567, 609 (S.D.N.Y. 2002); *Graham I*, 153 F. Supp. 2d at 516.

¹⁹⁹ *Graham III*, 224 F. Supp. 2d at 609. “These assertions were, at best, irresponsibly made, and, at worst, intentionally misleading.” *Graham IV*, 380 F.3d at 646.

²⁰⁰ See BJORKLUND ET AL., *supra* note 62, § 11-4(a) (“One of a director’s basic responsibilities is to ensure that the mission of the organization . . . is carried out.”). “It is firmly established that the directors of a corporation have the fiduciary obligation to act on behalf of the corporation in good faith and with reasonable care so as to protect and advance its interests.” *Graham III*, 224 F. Supp. 2d at 608 (citing *Pebble Cove Homeowners’ Ass’n v. Shoratlantic Dev. Co.*, 595 N.Y.S.2d 92, 93 (App. Div. 1992)).

Martha Graham—as founder, artistic director, and member of the board—was bound by a similar duty to the Center. This duty required her to place the interests of the Center above her own.²⁰¹ Since the Center was founded to promote and disseminate Graham’s work,²⁰² Graham and the Center shared a common purpose. By furthering her own artistic interests, Graham was also furthering the interests of the Center.²⁰³ Had she made an attempt to personally profit from works created with Center resources at the expense of the Center, however, a duty of loyalty question might have been raised.²⁰⁴ Simply owning the copyright in her works should not have called this duty into question, but private economic exploitation of the rights secured by copyright, to the detriment of the Center, might have raised a question of whether the assets of the Center had been “distributed” to Graham in violation of the nondistribution constraint.²⁰⁵ During Graham’s lifetime, her ability to exploit her rights in her choreography may have been limited by her leadership role within the Center.

²⁰¹ See *Aramony*, 1998 WL 205331, at *7; see also *S.H. & Helen R. Scheuer Family Found., Inc. v. 61 Assocs.*, 582 N.Y.S.2d 662, 665 (App. Div. 1992) (citation omitted) (“[I]t is well established that, as fiduciaries, board members bear a duty of loyalty to the corporation and ‘may not profit improperly at the expense of the corporation.’”).

²⁰² See *Graham I*, 153 F. Supp. 2d at 525.

²⁰³ *Cf. id.* at 526.

²⁰⁴ A contract or transaction between a nonprofit organization and one of its directors or officers is allowed if the director’s or officer’s interest in the transaction is disclosed or known to the board, and the other board members authorize the transaction with such knowledge. See N.Y. NOT-FOR-PROFIT CORP. LAW § 715(a) (McKinney 1997 & Supp. 2005). Without disclosure of the director’s interest, such a transaction may still be considered valid so long as it was fair and reasonable to the nonprofit organization at the time of the transaction. See *id.* § 715(b). Practically speaking, the board of the Center would have been well aware of Graham’s interest in any transaction involving her work, and this knowledge would have validated such a transaction. So long as the board had authorized such an arrangement, the “fair and reasonable” question would never have been raised. Thus, a duty of loyalty question would have been relevant only if Graham had personally utilized her works without the board’s knowledge and consent.

²⁰⁵ See *id.* § 508 (providing that all “profits shall be applied to the maintenance, expansion or operation of the lawful activities of the corporation, and in no case shall be divided or distributed in any manner whatsoever among the members, directors, or officers of the corporation”); see also *supra* notes 62–63 and accompanying text.

2. Private Inurement

On the federal level, to qualify for tax exemption under § 501(c)(3) of the Internal Revenue Code, “no part of the net earnings [may] inure to the benefit of any private shareholder or individual.”²⁰⁶ To allow “private inurement” would indicate that the organization was operated for a private, rather than public, purpose.²⁰⁷ The Treasury Department regulations define prohibited private interests as those of “*the creator* or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests.”²⁰⁸ As the founder of the Center, Graham would have qualified under this definition as a “private shareholder or individual.”²⁰⁹

The Internal Revenue Service has denied or revoked tax exemption from nonprofit organizations found to serve the private interests of artists who were founders or directors of the organizations, including “an organization whose primary purpose [was] to promote the circulation of books [written by] one of its incorporators;”²¹⁰ “a cooperative art gallery formed and operated by a group of artists for the purposes of exhibiting and selling their work;”²¹¹ and a foundation, the resources of which were used for the benefit of a board member who was a well-known textile artist and wife of the foundation’s president.²¹² “The heart of § 501(c)(3) tax exempt status is the phrase ‘inures to the benefit.’ . . . Unaccounted for diversions of a charitable organization’s

²⁰⁶ 26 U.S.C. § 501(c)(3) (2000).

²⁰⁷ *See id.*

²⁰⁸ Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (2004) (emphasis added).

²⁰⁹ *See* Treas. Reg. § 1.501(a)-1(c) (“The words private shareholder or individual in section 501 refer to persons having a personal and private interest in the activities of the organization.”).

²¹⁰ *See* Rev. Rul. 55-231, 1955-1 C.B. 72 (holding that an organization was not organized and operated exclusively for educational purposes where its primary activity was the purchase and distribution of an incorporator’s books).

²¹¹ *See* Rev. Rul. 71-395, 1971-2 C.B. 228 (holding that a gallery served only the private purposes of its members, and therefore was not exempt under § 501(c)(3), where it was a vehicle for advancing the careers of its members and promoting the sale of their work).

²¹² *See* Tech. Adv. Mem. 94-08-006 (Dec. 4, 1992) (holding that the foundation’s earnings inured to the textile artist/board member where the foundation promoted the board member’s art work and career).

resources by one who has complete and unfettered control can constitute inurement.”²¹³

Intellectual property rights in choreography are a resource for a dance company, although one for which the value is speculative and contingent on access to other resources.²¹⁴ As a party with a prohibited private interest under the Treasury Regulations,²¹⁵ Graham’s retention of copyright could have raised a question of private inurement.

C. Artistic Control and Moral Rights

Another issue not arising in the *Graham* case but essential to interpreting the significance of the ruling concerns “rights” of artistic control, which may be viewed as analogous to moral rights—personal rights of the author recognized as independent from the economic rights of copyright.²¹⁶ Although the U.S. Copyright Act does not acknowledge such moral rights in either works of choreography or works for hire, nor does the Act recognize the existence of any moral rights after an artist’s death,²¹⁷ the relationship of moral rights to artistic control as recognized within the dance field is noteworthy.

²¹³ *Church of Scientology v. Comm’r*, 823 F.2d 1310, 1316 (9th Cir. 1987) (affirming a tax court decision which upheld the Commissioner’s revocation of tax exemption from the Church of Scientology of California, the “Mother Church” of the many Scientology churches, because significant sums of money had inured to the benefit of the church’s founder, L. Ron Hubbard, and his family). *But cf.* *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 206 F.3d 1322 (9th Cir. 2000) (holding that common law copyrights to works of a Swami monk who was founder, president, and a director of Self-Realization Fellowship Church did not vest in the church as a matter of law). Following authorization of the IRS intermediate sanctions in 1996, a transaction providing an “excess benefit” to a person in a position to exercise substantial influence over the nonprofit organization may result in taxes on such person and on the nonprofit director or officer allowing the transaction, rather than resulting in an immediate revocation of tax exempt status. *See* 26 U.S.C. § 4958 (2000).

²¹⁴ *See* discussion *supra* Part I.C.2.

²¹⁵ *See supra* notes 208–09 and accompanying text.

²¹⁶ *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.01[A] (2003) (citing WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Paris Act, 1971) 41 (1978); H.R. Rep. No. 101-514, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6928 (1990)).

²¹⁷ *See infra* note 235 and accompanying text.

1. Moral Rights Defined

Moral rights are rights of a “spiritual, non-economic, and personal nature,”²¹⁸ which are based on the theory that an original creation reflects the personality of its creator.²¹⁹ These rights “result in a climate of artistic worth and honor that encourages the author in the arduous act of creation.”²²⁰ In countries that recognize such rights, even a full transfer of copyright for economic purposes does not serve to divest an author of his moral rights.²²¹ European courts, however, have allowed these “inalienable” rights to be waived or modified by contract.²²²

Moral rights are commonly believed to have originated in France and developed in civil law jurisdictions.²²³ Specific moral rights are defined by the national laws protecting their existence, but such rights are generally of two types: rights of paternity (also known as rights of attribution) and rights of integrity,²²⁴ which are mandated by Article *6bis* of the Berne Convention, which states:

- (1) Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any

²¹⁸ Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995).

²¹⁹ See WORLD INTELL. PROP. ORG., GUIDE TO THE BERNE CONVENTION OF THE INTERNATIONAL UNION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Paris Act, 1971) 41 (1978).

²²⁰ Carter, 71 F.3d at 83 (citation omitted).

²²¹ See Berne Convention for the Protection of Literary and Artistic Works, art. *6bis*, Sept. 9, 1886, revised July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention], available at <http://www.wipo.int/clea/docs/en/wo/wo001en.htm>. Under French law, moral rights attach to the author rather than to the work itself, “and, therefore remain vested in the artist even after the work is transferred.” 2 RALPH E. LERNER & JUDITH BRESLER, ART LAW 947 (2d ed. 1998) (citing Registrar of Copyrights Final Report, Waiver of Moral Rights in Visual Artworks 39 (1996)).

²²² See Singer, *supra* note 72, at 317 n.141 (citing William Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506, 516–17 (1955)). The Berne Convention “disregards the principle of assignability and does not prohibit waivability.” LERNER & BRESLER, *supra* note 221, at 948 (citing Registrar of Copyrights Final Report, Waiver of Moral Rights in Visual Artworks 52 (1996)).

²²³ See LERNER & BRESLER, *supra* note 221, at 944. The term “moral rights” is literally a translation of the French *le droit moral*. See Carter, 71 F.3d at 81.

²²⁴ See Carter, 71 F.3d at 81. Rights of paternity and integrity are protected by most of the legal systems which currently acknowledge moral rights. See LERNER & BRESLER, *supra* note 221, at 946.

distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.²²⁵

Basic paternity rights under French law include the artist's rights to be publicly recognized as the creator of his work or to publish anonymously or pseudonymously, to prevent another from claiming authorship of his work, and to prevent his name from being used in connection with the work of another or in connection with an altered or distorted version of his own work.²²⁶ The paternity right has been said to encompass an artist's right "to have his work attributed to him in the form in which he created it."²²⁷ Enduring choreographic credit each time a dance is performed is an example of a paternity right.²²⁸ Integrity rights allow an author to prohibit or control alterations of his works.²²⁹ With choreography, an integrity right is acknowledged in that those performing the work are not allowed to make unauthorized changes, but the choreographer retains the right to revise the work "whenever aesthetic or practical reasons dictate."²³⁰ In some jurisdictions, the integrity right also allows an author to protect his work from destruction.²³¹

In addition, some European countries recognize a withdrawal right which allows an artist to withdraw the work from the public or to make modifications.²³² This right may be exercised even if exploitation rights have been transferred, "so long as the artist indemnifies the transferee before exercising the right."²³³

²²⁵ Berne Convention, *supra* note 221, art. 6bis; *see also* LERNER & BRESLER, *supra* note 221, at 947.

²²⁶ *See Carter*, 71 F.3d at 81; LERNER & BRESLER, *supra* note 221, at 946.

²²⁷ *Gilliam v. ABC*, 538 F.2d 14, 24 (2d Cir. 1976).

²²⁸ *See Singer*, *supra* note 72, at 292–93.

²²⁹ *See Carter*, 71 F.3d at 81; LERNER & BRESLER, *supra* note 221, at 947.

²³⁰ *Singer*, *supra* note 72, at 310.

²³¹ *See Carter*, 71 F.3d at 81–82. Protection against destruction is not expressly mentioned in the Berne Convention, but such a right is recognized in the United States. *See* LERNER & BRESLER, *supra* note 221, at 947 (citing Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 963 (1990)).

²³² *See* LERNER & BRESLER, *supra* note 221, at 945.

²³³ *Id.* This right is rarely invoked. *See id.* at 946 (“[F]ew French cases have even addressed the right.”).

2. Limited U.S. Recognition of Moral Rights

American copyright law seeks primarily to vindicate the economic rights of artists.²³⁴ The only moral rights currently acknowledged by the 1976 Act are limited rights of attribution and integrity, which are provided only to authors of works of visual art.²³⁵ The Second Circuit has recognized, however, that “the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent.”²³⁶

Even though Congress has yet to acknowledge full moral rights for all genres of work, some federal and state courts have recognized these rights as “necessary and proper adjuncts to the creative process.”²³⁷ Courts have provided sporadic relief for infringements of paternity and integrity rights by “cloaking the concept in the guise of other legal theories,”²³⁸ such as invasion of privacy,²³⁹ unfair competition,²⁴⁰ false designation of origin under

²³⁴ See *Gilliam v. ABC*, 538 F.2d 14, 24 (2d Cir. 1976). According to the Supreme Court, “the economic philosophy behind the clause” is “the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors . . .” *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

²³⁵ See Visual Artist Rights Act of 1990 (“VARA”), 17 U.S.C. § 106A(a) (2004). These rights are limited to the life of the author, and they may not be transferred to another party, although they may be waived via a signed writing. See *id.* § 106A(d)–(e). Works of visual art include paintings, drawings, prints, sculptures, and photographs. See *id.* § 101. Works for hire are excluded from the definition of a “work of visual art.” See generally *id.* Thus, neither works for hire nor works of choreography are eligible for any moral rights protection under the 1976 Act.

²³⁶ *Gilliam*, 538 F.2d at 24 (internal citations omitted).

²³⁷ Singer, *supra* note 72, at 311.

²³⁸ *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 82 (2d Cir. 1995). Per § 301(b)(3) of the 1976 Act, state court remedies that are not equivalent to those secured by the Act are not preempted. See 17 U.S.C. § 301(b); Singer, *supra* note 72, at 311 n.111. “[F]ederal preemption is generally inapplicable to state laws of unfair competition of the passing off variety, defamation, invasion of privacy, and contracts.” NIMMER & NIMMER, *supra* note 216, § 8D.02(B). While the specific provisions of VARA preempt some state laws with respect to moral rights in works of visual art, it is likely that state laws are not preempted with respect to moral rights in other categories of work. *Id.*

²³⁹ See Singer, *supra* note 72, at 313 (citing *Kerby v. Hal Roach Studios*, 127 P.2d 577, 579–81 (Cal. Ct. App. 1942) (finding that an improper attribution adversely affected an artist’s good reputation and, therefore, constituted an invasion of privacy)).

the Lanham Act,²⁴¹ breach of contract,²⁴² and defamation.²⁴³ These decisions “vindicate the author’s personal right to prevent the presentation of his work to the public in a distorted form,” even though the holdings have been based on proprietary rights in one’s creation rather than an acknowledgement of the legal existence of moral rights.²⁴⁴ “Where, however, the parties have entered into a contract . . . [any] so-called ‘moral right’ is controlled by the law of contract.”²⁴⁵

To the extent that an employment relationship exists and copyright ownership vests in the employer rather than the artist,

²⁴⁰ See *id.* (citing *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952)). The *Granz* case held that “although the purchaser of the plaintiff’s master record discs could lawfully use, produce, and sell abbreviated versions of the records, to publicly attribute them to the plaintiff without express contractual authorization would constitute unfair competition.” *Id.*

²⁴¹ See *id.* at 315 n.133 (citing *Gilliam v. ABC*, 538 F.2d 14, 23–24 (2d Cir. 1976) (holding that disputed mutilations to Monty Python’s work might deter viewers from becoming Monty Python fans and thus constituted false representation under the Lanham Act; additionally, “the Lanham Act was violated by a representation that, while technically correct, creates a false impression of a product’s origin”)); *Geisel v. Poynter Prod., Inc.*, 283 F. Supp. 261, 268 (S.D.N.Y. 1968) (holding that use of the pseudonym “Dr. Seuss” on the advertising and sale of dolls, without authorization, constituted false designations of origin under the Lanham Act).

²⁴² See *Gilliam*, 538 F.2d at 24–26 (citing *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952) (holding that, as a matter of contract, an obligation to mention the name of the author carries with it the implied duty not to make such changes in the work as would render the credit line a false attribution of authorship)).

²⁴³ See *LERNER & BRESLER*, *supra* note 221, at 957 (citing *Clevenger v. Baker Voorhis & Co.*, 8 N.Y.2d 187, 189, 192 (1960) (holding that a publisher had impaired the reputation of an author by publishing an error-ridden edition of his book without indicating that the author had not performed the revision, as “the purchase of the copyright did not carry with it a license to defame”)).

²⁴⁴ See *Gilliam*, 538 F.2d at 24 (citing *Gardella v. Log Cabin Prods. Co.*, 89 F.2d 891, 895–96 (2d Cir. 1937)). “[T]he Lanham Act does not deal with artistic integrity. It only goes to misdescription of origin and the like.” *Id.* at 27 (Gurfein, J., concurring).

²⁴⁵ *Edison v. Viva Int’l, Ltd.*, 421 N.Y.S.2d 203, 206 (App. Div. 1979) (holding that plaintiff’s moral right to protection had been subsumed in his contractual right to seek redress for the alleged mutilation of his article); see also *Gilliam*, 538 F.2d at 27 (Gurfein, J., concurring) (noting that if the “licensee may, by contract, distort the recorded work, the Lanham Act does not come into play”); *McGuire v. United Artists Television Prods., Inc.*, 254 F. Supp. 270, 271–72 (S.D. Cal. 1966) (holding that where there was a contract, the artist’s right of artistic control was lost absent express reservation by the artist within the contract, regardless of the custom of the film industry).

the right to attribution is relinquished unless expressly reserved.²⁴⁶ In a work-for-hire situation, listing authorship credit under the corporate name “accurately reflects the legal state of affairs.”²⁴⁷ “[A]ll U.S. creators working in an employment relationship will, on account of that employment status, be most challenged to vindicate, under copyright law, any of the quasi-moral rights” recognized by U.S. courts.²⁴⁸

III. REALITIES: THE CONTROL CONUNDRUM

The *Graham* ruling is significant to both artists and legal practitioners because it establishes that artists employed by nonprofit organizations, even those organizations that they themselves have created, are not exempt from the work-for-hire doctrine.²⁴⁹ While *Graham* is also one of the few cases to deal with a dance copyright issue, it arguably sets a precedent not only for choreographers, but also for artists creating in other genres while employed by nonprofit organizations. This precedent, however, is not as “dangerous” as it may seem to many artists. Artists do not necessarily give up all rights to their creations by forming nonprofit organizations to finance and facilitate their works, even following the Second Circuit’s ruling that an artist creating under the aegis of a nonprofit organization had ceded authorship status to the nonprofit employer.²⁵⁰

²⁴⁶ *Cleary v. News Corp.*, 30 F.3d 1255, 1260 (9th Cir. 1994) (citing *Vargas v. Esquire, Inc.*, 164 F.2d 522, 524–27 (7th Cir.1947) (holding that an artist could not claim a right of attribution against a magazine where the artist was found to have granted the magazine all rights to his drawings in exchange for monthly compensation)); *Nelson v. Radio Corp.*, 148 F. Supp. 1, 3 (S.D. Fla. 1957) (denying a singer a right to attribution in the absence of an agreement to provide label credit, where the singer was found to be an employee of the recording company).

²⁴⁷ *NIMMER & NIMMER*, *supra* note 216, § 8D.03(A)(3) (citing *Dun & Bradstreet Corp. v. Harpercollins Publ’rs, Inc.*, 872 F. Supp. 103 (S.D.N.Y. 1995)); *see also Graham IV*, 380 F.3d 624, 638 n.30 (2d Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3570 (U.S. Mar. 21, 2005) (No. 04-1277) (holding that a copyright notice in the Center’s name was sufficient to preserve *Graham*’s copyright even though the work was not determined to be a work for hire) (citing *Goodis v. United Artists Television, Inc.*, 425 F.2d 397, 402–03 (2d Cir. 1970)).

²⁴⁸ *NIMMER & NIMMER*, *supra* note 216, § 8D.02(D)(1).

²⁴⁹ *See generally supra* Part II.A.

²⁵⁰ *See generally supra* Part II.A.

A. *Nonprofit Organizations Promote Artists' Economic and Artistic Interests*

Graham made a conscious choice in the nonprofit structure of the Center because of the many benefits it provided.²⁵¹ In 1957, Graham wrote:

The [Center] has made a legal arrangement with me by means of which they 'buy' the school and my name. . . . I am in a position to solicit funds from large foundations because [the Center] is tax exempt. Also the [Center] takes over matters of management. . . . There is not much more money available [sic] but there is so much less worry and fear because it is well taken care of and the future is better arranged for than ever before.²⁵²

She chose to establish and rely on a nonprofit organization so that she would not have to deal with financial and legal matters, freeing her to focus on creative endeavors,²⁵³ and she recognized that, "[f]or the future there must always be the security of a place to work for people like us."²⁵⁴

"[T]he policy reason for granting copyright protection to choreographic works is to encourage production of choreographic works that will inure to the public benefit."²⁵⁵ The purposes of

²⁵¹ See *Graham IV*, 380 F.3d at 640 ("Graham went to great lengths to become an employee of the Center so that she could insulate herself from the legal and financial aspects of her work.").

²⁵² Brief for Defendants-Counter-Claimants-Appellees at 2, *Graham IV*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)) (citations omitted) (quoting a letter from Graham to her mother). In the letter, Graham also explained, "I shall have a salary over the years regardless of the intake of the school." Dunning, *Dance and Profit*, *supra* note 4.

²⁵³ See *Graham IV*, 380 F.3d at 629 (finding that Graham began relying on nonprofit corporations, which she led, to support her work "for tax reasons and because she wanted to extricate herself from funding and legal matters"); Brief for Defendants-Counter-Claimants-Appellees at 2, *Graham IV*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)) (noting that Graham was "clear-sighted enough to take steps" to ensure her legacy and free her time for creative endeavors, "leaving the financial and practical worries to others").

²⁵⁴ Brief for Defendants-Counter-Claimants-Appellees at 3, *Graham IV*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)) (quoting Joint Appendix A2977).

²⁵⁵ Thomas J. Overton, Comment, *Unraveling the Choreographer's Copyright Dilemma*, 49 TENN. L. REV. 594, 597 (1982). "The copyright laws are clearly intended to provide economic incentives to produce artistic works, and the legislative objective

copyright protection can be well served by allowing copyright to vest in a nonprofit organization, especially an artist-driven organization established for the purpose of supporting the development of work by a particular artist and maintaining, protecting, and preserving that work.²⁵⁶ The physical author's interests may be furthered by this arrangement as well, especially when the artist and the nonprofit organization have a shared interest and a symbiotic relationship. Thus, the motivating factors in the choice of the nonprofit structure are often the same as the reasons why the nonprofit may be better equipped to protect and secure the work.

Nonprofits must reinvest any profits into their programs.²⁵⁷ In the case of an artist-centered organization, the nonprofit's programs are integrally tied to the founding artist's work.²⁵⁸ This reinvestment generally translates into the financing of further creative works by the founding artist,²⁵⁹ thus, the artist reaps the benefit of the economic right, and the copyright serves its purpose as an impetus for creativity. In the case of the Center, income from the performance and the licensing of Graham's dances helped to finance rehearsal space, dancer salaries, and other resources utilized by Graham for the creation of subsequent works.²⁶⁰ The nonprofit structure also provides the artist with other financial resources—such as the ability to solicit contributions and generate tax-free revenue—which provide additional support for the creation of new work.²⁶¹

Nonprofit organizations have perpetual life.²⁶² They are empowered to outlive their founders and thus can give creative

behind the copyright laws is to bring as many new works into the public domain as possible." *Id.* at 611 (citation omitted).

²⁵⁶ See, e.g., *supra* note 24 and accompanying text.

²⁵⁷ See N.Y. NOT-FOR-PROFIT CORP. LAW § 204 (McKinney 1997 & Supp. 2005); BJORKLUND ET AL., *supra* note 62, § 1-2; *supra* notes 62–63 and accompanying text.

²⁵⁸ See *supra* notes 24, 64–65 and accompanying text.

²⁵⁹ See *supra* notes 24, 62–65 and accompanying text.

²⁶⁰ See *supra* notes 150–51, 161, 186–87 and accompanying text.

²⁶¹ See *supra* notes 54–61 and accompanying text.

²⁶² N.Y. NOT-FOR-PROFIT CORP. LAW § 202(a)(1).

work a life beyond the natural life of a founding artist.²⁶³ Although there is some debate as to whether all artists want their works to live on after their deaths,²⁶⁴ and though it has been posited that Graham “may have subconsciously wished to take her work with her to the grave,”²⁶⁵ Graham expressed a clear desire for the Center to continue after her death. “So deeply concerned am I for the future of my work and that the Martha Graham Center goes on,” Graham wrote, “that I have ensured through my attorney that the technique and the ballets will continue to be available and used by the Martha Graham Company and School.”²⁶⁶ In her will, Graham also named the Center as the sole contingent beneficiary²⁶⁷ and “requested that, in lieu of a funeral or memorial service, ‘contributions be made to the Martha Graham Center of Contemporary Dance, Inc. to support that which has played such a rich and meaningful part in my life.’”²⁶⁸

²⁶³ One of the reasons for the establishment of the Center was to “perpetuat[e] and preserv[e] Graham’s work after her death.” Brief for Defendants-Counter-Claimants-Appellees at 10, *Graham IV*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)); see also *Graham I*, 153 F. Supp. 2d 512, 525 (S.D.N.Y. 2001), *aff’d*, 43 Fed. Appx. 408 (2d Cir. 2002).

²⁶⁴ See Singer, *supra* note 72, at 301 n.61.

The late George Balanchine viewed his ballets as “butterflies” destined to live for a season. In answer to a question concerning the preservation of his ballets, Balanchine once remarked, “They don’t have to be preserved. Why should they be? I think ballet is NOW. It’s about people who are NOW. Not about what will be. Because as soon as you don’t have these bodies to work with, it’s already finished.”

Id. (quoting George Balanchine, *Work In Progress*, in *DANCE AS A THEATRE ART: SOURCE READINGS IN DANCE HISTORY FROM 1581 TO THE PRESENT 187*, 192 (Selma Jean Cohen ed., 1975)). And yet, more than two decades after his death, Balanchine’s works continue to be performed by major ballet companies around the world. See *George Balanchine*, at <http://www.balanchine.org/01/index.html> (last visited Feb. 3, 2005). Eighty-seven works are currently in active repertory. See *Ballets in Active Repertory*, at <http://www.balanchine.org/01/activerrep.html> (last visited Dec. 9, 2004).

²⁶⁵ Carman, *supra* note 82. “Choreographers . . . rarely wish to deal with the consequences of their deaths.” Jowitz, *supra* note 44.

²⁶⁶ *Graham I*, 153 F. Supp. 2d at 521 (quoting a September 14, 1990 letter written by Ron Protas on behalf of Martha Graham to Jim McGarry “concerning a potentially negative article that was to be written by Laura Shapiro of *Newsweek*”).

²⁶⁷ Brief for Defendants-Counter-Claimants-Appellees at 11, *Graham IV*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)); see also *supra* note 39.

²⁶⁸ Brief for Defendants-Counter-Claimants-Appellees at 12, *Graham IV*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)). In a letter to Jerome Robbins shortly before her death

Not only are artists' interests upheld by this arrangement, but the artist may still retain ultimate artistic control, even if divested of personal economic ownership. Representatives of the dance community have argued that "depriving [the] artist of all rights in the work, including the rights to create derivative works, to perform, publicly display, license and otherwise control the work does great damage to the organization's mission, and to the author personally."²⁶⁹ If the artist controls the board of directors, however—either through actual, acknowledged control or through a more subtle sense of deference to the artist's wishes—the artist would likely remain in control of the work even if the nonprofit organization were to hold the copyright. It was established that Graham controlled the activities of the Center;²⁷⁰ thus, it stands to reason that she retained ultimate control over its property, which, according to the court, included her dances.²⁷¹ Even pure employee status would allow the artist to act as an agent of the organization and make decisions regarding the use of her works; in hiring her as Artistic Director, the board would have vested in Graham the authority to make artistic decisions.²⁷²

B. Artists' Rights as Distinct from Successors' Rights

It is worth noting that the *Graham* case was not a dispute between a nonprofit organization and the artist that had created the works in question, but rather a dispute with that artist's legatee.²⁷³ In a copyright dispute similar to that between Protas and the Center, but between a living artist and a nonprofit organization, many other issues would likely come into play. If board members were denying a founding artist any control over her works, this

in 1991, Graham also wrote that "the company must continue now and in the future." Carman, *supra* note 82.

²⁶⁹ Brief of Amici Curiae American Dance Festival, Inc. et al. at 11, *Graham IV*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)).

²⁷⁰ See *supra* note 71 and accompanying text.

²⁷¹ See *Graham III*, 224 F. Supp. 2d 567, 592 (S.D.N.Y. 2002), *aff'd in part*, 380 F.3d 624 (2d Cir. 2004).

²⁷² See, e.g., RESTATEMENT (SECOND) OF AGENCY § 43 (2004) ("Acquiescence by the principal in conduct of an agent whose previously conferred authorization reasonably might include it, indicates that the conduct was authorized; if clearly not included in the authorization, acquiescence in it indicates affirmance.")

²⁷³ See discussion *supra* Part I.B.

action might cause concern among funding organizations or could potentially be construed as a breach of the board's duty to uphold the mission of the organization, because a board could not claim to be furthering the development of an artist's work while divesting the artist of any control over that same work. Although the work-for-hire doctrine may require that the nonprofit be acknowledged as the "statutory author" for copyright purposes,²⁷⁴ a living artist would likely have other avenues for redress. Where underlying equitable considerations—such as who *deserved* to own the works—weighed against Protas in his dispute with the Center, these same considerations would likely weigh in favor of a living artist in a dispute with a nonprofit organization over either control or ownership of the artist's works.

The Second Circuit's use of the work-for-hire doctrine could potentially be interpreted as nothing more than a constraint on the artist's right to transfer copyright ownership at the time of her death. Admittedly a limitation on ownership, this restriction might be viewed as a fair exchange for the benefits provided by the nonprofit organization. "Ms. Graham obtained crucial public support for her creative enterprise by forming corporations that could take advantage of tax exempt, tax-deductible treatment. . . . It is important that the public also receive the benefit of this bargain, so that her great achievements can be perpetuated by the charities she founded."²⁷⁵

C. Artistic Control and the "Moral" Aspects of Economic Rights

Apart from the control an artist may wield via her leadership role within a nonprofit organization, artists retain intrinsic moral

²⁷⁴ See discussion *supra* Part II.A.

²⁷⁵ Press Release, Office of New York State Attorney General Eliot Spitzer, Spitzer Says Court Ruling Will Preserve Martha Graham Dance Legacy (July 5, 2002) (quoting Attorney General Eliot Spitzer as he hailed the Second Circuit's earlier decision in the Graham case, *Graham II*, 43 Fed. Appx. 408, 410 (2d Cir. 2002), as "a unanimous federal appeals court ruling upholding the rights of two charities, the Martha Graham School of Contemporary Dance and the Martha Graham Center of Contemporary Dance, to continue to operate according to the wishes of the legendary dancer"), available at http://www.oag.state.ny.us/press/2002/jul/jul05a_02.html (last visited Feb. 3, 2005).

rights as well.²⁷⁶ To artists, there is definite value in rights of artistic control.²⁷⁷ Artistic control as recognized among artists is essentially the enforcement of the moral facets of the economic rights of copyright. Although traditional moral rights, as such, are not widely recognized in the United States,²⁷⁸ the essence of these moral rights can be found within U.S. economic rights. Each of the economic rights of copyright may be said to have a moral component, and if the strictly economic element of each right could be detached, a moral right would remain.

It is inherent that the economic rights secured by copyright may also be asserted in the negative, thus guaranteeing that an author has the right to *not* reproduce, *not* prepare derivative works, *not* distribute copies, *not* perform, and *not* display.²⁷⁹ These negative rights may be equated with artistic control over the work. Additionally, traditional moral rights infuse the basic economic rights. All of the rights secured by copyright carry with them the right of attribution, such that the party in control of these rights may require that appropriate credit be given in any licensed use of a right.²⁸⁰ The right to prepare derivative works also encompasses the right to control the creation of derivative works by other parties, which equates with a right of integrity.²⁸¹ The right to *not* perform or display is in essence the right to withhold or withdraw the work from the public, like the European withdrawal right.²⁸² Due to the founding artist's influence within a nonprofit organization, the deference accorded the artist's wishes, and the

²⁷⁶ "A statement from the Max Planck Institute avers that 'each moral right has what is called a "positive nucleus," which is regarded as being so vital to the expression of the respective personality that any waiver would be null and void.'" NIMMER & NIMMER, *supra* note 216, § 8D.01(A) n.30 (quoting Register of Copyrights, Technological Alterations to Motion Pictures 78 n.134 (1989)).

²⁷⁷ See Singer, *supra* note 72, at 307. "It all comes down to this: if you put your name on something, you should be there." GRAHAM, *supra* note 1, at 14.

²⁷⁸ See discussion *supra* Part II.C.2.

²⁷⁹ See *supra* note 100 and accompanying text.

²⁸⁰ See *supra* notes 226–28 and accompanying text.

²⁸¹ See *supra* notes 229–31 and accompanying text.

²⁸² See *supra* notes 232–33 and accompanying text.

artist's unique ability to utilize these rights, the artist herself remains in control of the moral elements of economic rights.²⁸³

The custom of the American dance community provides choreographers with an effective mechanism for the acknowledgement and enforcement of their moral rights.²⁸⁴ The right of paternity is upheld through enduring choreographic credit.²⁸⁵ "The choreographer's name attaches to his work at the first and all subsequent performances of the work, whether or not the choreographer, his company, or another company has legal ownership of the piece."²⁸⁶ Dance community custom recognizes the artist's rights to preserve the integrity of his work, even after he has relinquished control of the economic rights to that work, as evidenced in choreographers' ability to withdraw a licensed work due to artistic concerns.²⁸⁷

"[T]he primary interest of choreographers in maintaining the artistic integrity of their works conflicts with the Copyright Act's favoring of economic benefits at the expense of artistic

²⁸³ Such control would necessarily be limited to the extent it might infringe on the "public benefit" provided by the nonprofit organization. *See supra* notes 57, 255 and accompanying text. Where a choreographer's decision to withdraw a single work from a dance company's repertoire would likely be deferred to as an aesthetic choice, a choreographer's attempt to withdraw her entire body of work from public presentation might be interpreted as threatening the existence of the nonprofit organization. *Cf. supra* Part II.B.

²⁸⁴ *See Singer, supra* note 72, at 318.

²⁸⁵ *See id.* at 292.

²⁸⁶ *Id.* at 292–93. Marius Petipa's name, for example, is still linked to the classic ballet *Sleeping Beauty*, which was first performed in 1890, even though the choreography has undergone many changes since its first performance and the work has long since been in the public domain. *See id.* at 293 n.22.

²⁸⁷ *See id.* at 310, 318. George Balanchine was known to withdraw works from licensee companies' repertoires when the artistic director to whom he had licensed the works left the dance company. *See id.* at 310 n.107 (citations omitted).

When the Pennsylvania Ballet forced its artistic director, Barbara Weisberger, to resign in February 1982, Balanchine promptly notified the company that he intended to withdraw his ballets from the company's repertoire. Balanchine explained that he had originally given the works to Weisberger (a Balanchine protégé), and since she was no longer in charge of "her" company, he did not wish to have his ballets performed by them. . . . Balanchine also withdrew works from the Pacific Northwest Ballet when former NYCB principal Melissa Hayden left that company.

Id.

concerns.”²⁸⁸ Since copyright law does not acknowledge these rights of control that are of the utmost importance to artists, the repercussions of a determination of copyright ownership are limited and, as a matter of practice or custom, control of such rights does not necessarily vest in the “statutory author.”

D. Contracting for Control

A nonprofit organization is not required to assert its work-for-hire rights against a founding artist; yet, in light of the issues unearthed by the *Graham* case, artists creating work while employed by nonprofit organizations would be well advised to validate their ownership assumptions in writing. “[T]he initial ownership of rights in a work made for hire are only presumed to be in the employer . . . , which presumption may be rebutted by an express agreement in writing between the parties.”²⁸⁹ Since founding artists generally exert control over nonprofit dance companies and other artist-driven organizations, these artists are in a strong bargaining position and should be able to contract for an arrangement that reflects their wishes. In response to the concerns raised by the *Graham* ruling, Dance/NYC, a service organization for the dance community, has drafted several model intellectual property agreements²⁹⁰ which may suffice for most dance artists’ needs. With an eye toward fairness in light of potential private inurement issues, and being mindful not to reap a personal profit at the expense of the nonprofit organization, the artist should be able to own and/or control the rights to her work within the confines of both copyright and nonprofit law.

²⁸⁸ Singer, *supra* note 72, at 304.

²⁸⁹ NIMMER & NIMMER, *supra* note 216, § 5.03(D); *see also supra* notes 146, 169 and accompanying text. “If such a presumption were not rebuttable, a serious issue of constitutional validity would be raised.” NIMMER & NIMMER, *supra* note 216, § 5.03(D). As the Constitution “authorizes only the enactment of legislation securing ‘authors’ the exclusive right of their writings, [i]t would thus be quite doubtful that Congress could grant employers the exclusive right to the writings of employees regardless of the circumstances.” Scherr v. Universal Match Corp., 417 F.2d 497, 502 (2d Cir. 1969).

²⁹⁰ *See Contract Templates*, at <http://www.dancenyc.org/dancers.asp?file=contract> (last visited Feb. 4, 2005). *See in particular* the “Letter of Agreement covering work created in the past or to be created in the future by the artistic director/choreographer of a single choreographer company.” *Id.*

In contracting for the rights to their work, choreographers should give careful consideration to their ultimate goals. Although an artist may choose to contract for full ownership of all economic and moral rights, she should keep in mind the potential artistic repercussions if her heir or legatee should be uncooperative or if she should die intestate and without an heir.²⁹¹ It is conceivable that choreographic rights would be better protected in the hands of a nonprofit organization with a board dedicated to nurturing and preserving the artist's work, than in the hands of the artist's chosen beneficiary, statutory heir, or a disinterested party chosen to dispose of intestate assets.²⁹² As an alternative to retaining full copyright ownership, an artist might choose to allow the copyright to vest in the nonprofit organization, while contracting for a consultation right or, better yet, some level of control over exploitation of one or more of the exclusive rights of the copyright holder. This would in essence be a contract for the artist to retain moral rights. Retention of these rights should not raise a private inurement issue, since these rights do not hold a legally acknowledged economic value.

CONCLUSION

The Second Circuit's ruling is not cause for alarm among artists. Where an artist is the primary creative force behind a nonprofit organization, the artist will generally retain artistic control regardless of who holds the copyright, the economic rights of the nonprofit organization will ultimately benefit the artist, and

²⁹¹ Choreographer Erick Hawkins, for example, died without leaving a will. See Jennifer Dunning, *Forum Asks, Who Owns A Dance?*, N.Y. TIMES, Oct. 10, 2002, at E1. Upon his death in 1994, his wife and collaborator, Lucia Dlugoszewski, inherited his work and took over the supervision of the Erick Hawkins Dance Company. *Id.* When Dlugoszewski died in 2000, also without a will, the company seemed to die with her, and the disposition of Hawkins' dances was left up to the public administrator. *Id.*

²⁹² Choreographer Paul Taylor has decided that his works will go to his company, the Paul Taylor Dance Company, after his death. See Jennifer Dunning, *Graham Company Leaps Back to Life; But After a Favorable Court Ruling, Questions Linger About Choreographers' Legacies*, N.Y. TIMES, Sept. 2, 2002, at E1. "The thing about [Graham's] works going to the company seems right to me, . . . [n]ot just because she was an employee of the company and the company therefore owns the dances. That seems logical. But I'm real glad the dances will be seen." *Id.* (quoting Paul Taylor).

informal recognition of “moral rights” within the field likely will not change as a result of *Graham*.²⁹³ The *Graham* case should, however, alert artists to the importance of carefully considering their intentions for the future of their work as well as the need to memorialize these intentions in writing.

In the end, most choreographers will never be faced with such a controversy over the rights to their legacy. According to choreographer Eliot Feld, “I wish people were stealing my work left and right, and it became an enormous issue for me. . . . The idea that any of us would share the problem that Martha’s work has engendered is presumptuous beyond belief.”²⁹⁴ No one can predict the future, however, and the financial climate for dance is constantly evolving.²⁹⁵ It is important for choreographers to consider the future and make arrangements for the rights to their works as if that work might someday be the subject of such a dispute. As an emerging choreographer in the early twentieth century, even Martha Graham could not have predicted the chaos that would ensue after her death.

²⁹³ *But see generally* Sarah Kutner & Holly Rich, Note, *Dirty Dancing: Attributing the Moral Right of Attribution to American Copyright Law: The Work-for-Hire Doctrine and the Usurping of the Ultimate Grand Dame and Founder of Modern Dance, Martha Graham*, 22 HOFSTRA LAB. & EMP. L.J. 325 (analyzing similar issues but reaching a contrary conclusion).

²⁹⁴ Carman, *supra* note 82. “Martha was and is a transformer of dance of the first order.” *Id.* (quoting Eliot Feld).

²⁹⁵ *See generally* Dunning, *Dance and Profit*, *supra* note 4.

This is definitely a success problem. . . . These problems would never have existed 50 years ago, because the concept of a penny being made by a choreographer or from a dance was unheard of. So now that the commercial aspect of making money has prevailed in this nonprofit world of dance, and the valuable asset is the dance itself—hey, that’s a success story.

Id. (quoting Charles Reinhart, director of the American Dance Festival).