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In a Post Graham World: Choreographing Dance Rights in the World of Media, Technology and Social Networking

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Abstract

Michelle Burkhart writes an article diagramming the Choreographing Dance Rights in today's social media world. Her article highlights the famous Martha Graham case and in detail describes: Works for higher art; and responsiveness within the dance community. Burkhart provides an interesting take on how technology has drastically changed the world of dance.

Keywords

choreography

Cover Page Footnote

Michelle N. Burkhart has a twenty-year successful history in the arts/entertainment field as a dancer, administrator, consultant and board member. Most recently Michelle worked as Director of Sponsorship and Business Affairs for Association of Media and Entertainment Counsel (AMEC). She founded Spectrum Equality Arts, Inc. in 2008 a consulting firm dedicated to supporting culturally specific artists and arts organizations. She has worked as Executive Director for multiple organizations and instructed as an adjunct professor at New York University from 2006-2010. She has served as a panelist for Westchester Arts Council and the New York City Department of Cultural Affairs and has worked with Columbia University and Cornell University in an advisory capacity on research and academic arts studies. She recently published her first book entitled "Just Let Her Dance" a guidebook for parents of aspiring dancers. She holds a B.S. in Organizational Behavior from University of San Francisco and a J.D. with specialization in intellectual property law from Golden Gate University where she received the Witkin Award for Entertainment Law in 2004.

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Michelle N. Burkhart¹

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I. INTRODUCTION (A Graham Recap)

Martha Graham had a legendary career as a dancer, dance instructor, and dance choreographer that began in the early 1900's. She created a "business" or sole proprietorship as a dance company and school. The District Court of New York treated the Center and the School as a single entity for purposes of determining copyright ownership.² In 1967, Graham became associated with Ronald Protas, a 26-year-old freelance photographer.³ Graham hired him as the Center's General Director.⁴ In 1989, two years before her death, Graham in her will named Protas her executor and left him her personal property, her residuary estate, and rights and interests in dance works, musical scores, and scenery sets.⁵

Following Graham's death in 1991, Protas became Artistic Director of the Center. In 1998, he placed the copyrights in the Martha Graham Trust ("the Trust"), a revocable trust that he had created and of which he was trustee and sole beneficiary.⁶

In 2000, the Board voted to remove Protas as Artistic Director.⁷ Meanwhile, Protas, acting through the Trust, founded the Martha Graham School and Dance Foundation ("S&D Foundation"), originally named The Night Journey Foundation, a not-for-profit corporation.⁸ In 2000, Protas obtained certificates of registration for many of Graham's dances and unpublished works.⁹ The S & D Foundation became the exclusive licensee in the United States for live

² *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).

³ *Id.* at 612-13.

⁴ *Id.* at 612-13.

⁵ *Id.* at 613.

⁶ Jennifer Dunning, *Hearings Start in Suit over Graham Legacy*, NY TIMES, (Mar. 22, 2001), <http://www.nytimes.com/2001/03/22/arts/hearings-start-in-suit-over-graham-legacy.html?src=pm>.

⁷ *Id.*

⁸ *Id.*

⁹ *Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 153 F.Supp.2d 512, 512-19 (S.D.N.Y.2001) *aff'd*, 43 F.App'x. 408 (2d Cir. 2002).

performance for most all of Graham's dances.¹⁰ The Plaintiffs sought a judgment under 28 U.S.C. § 2201(a) declaring that none of the dances was in the public domain, and that the S & D Foundation was the holder of such rights, and that any unauthorized use would constitute willful copyright infringement.¹¹

In the opinion after a bench trial that reviewed the case found largely in favor of the Defendants.¹² The Court concluded that the dances that Graham had created during the years she was employed by the School or the Center (1956-1991) were works for hire, and that Graham had assigned to the Center many of the dances that were not works for hire.¹³ The Court ruled that estoppel did not preclude the Defendants from obtaining relief.¹⁴

In the end, the Court found that Protas was entitled to ownership of only the renewal term of copyright in a single dance.¹⁵ The Defendants were entitled to a declaration of ownership of copyright in 45 dances.¹⁶ Of these, eighteen, listed in the margin, six belonged to the Center by assignment. The other 27 belonged to the Center because they were works for hire, “authored” by the Center for purposes of copyright proprietorship. The Court imposed a constructive trust on the proceeds that the Trust had collected from licensing and selling intellectual property created by Graham.¹⁷

At the time these issues seemed overwhelming in light of the distance between dance and intellectual property. While works for hire continue to present challenges for the dance community, navigating the intellectual property land field now presents challenges not even imagined during the Graham era.

¹⁰ *Id.* at 512-19.

¹¹ *Id.* at 512-19.

¹² *Id.* at 518-19.

¹³ *Id.* at 518-19.

¹⁴ *Id.* at 519.

¹⁵ *Id.* at 612-13.

¹⁶ *Id.* at 612-13.

¹⁷ *Id.* at 613.

II. WORKS FOR “HIGHER” ART?

Interestingly enough copyright protection in the dance community is a new concept. A choreographer’s right to his or her work were undefined up until the enactment 1976 Copyright Act.¹⁸ Currently, dance works are now protectable by copyright provided that they are an “original work of authorship” which is “fixed in any tangible medium of expression.”¹⁹ Today, choreography can be easily “fixed” in various recording options including video, HD, online, 3D and more. As a result of the lack of legal cases surrounding dance and copyright law, there are fewer guidelines for artists and companies for determining whether a piece of choreography infringes upon the rights of another’s work.

The area in which this issue arises frequently is in the creation of not for profit dance organizations. Since the 1970’s, and the creation of the NEA, the gold standard guidelines were reserved only for those arts organizations holding a 501c(3).²⁰ There has been a saturation of incorporated nonprofit arts organizations competing for this and other funding; many incorporating without full knowledge of the legal and business responsibilities involved in establishing a legal entity.²¹

A not for profit organization is not required to assert its work-for- hire rights against a dance artist; yet as a result of the Graham case, artists creating work while employed by not for profit organization would be well advised to codify their ownership right and interests in writing.²²

¹⁸ N.Y. NOT-FOR-PROFIT-CORP LAW §§ 701, 717 (McKinney 1997 & Supp. 2005).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

The initial ownership of rights in a work made for hire are only presumed to be in the employer is a rebuttable presumption which can be altered by an express agreement in writing between the parties.²³ The question that follows is where does that leave the choreographer and how can he/she protect their rights in the growing arena of dance in the media?

Contemplate the contacts that must be negotiated for the dance prime time television shows. These dance shows such as “So You Think You Can Dance” and “Dancing with the Stars” have given choreographers a prominent visible platform to promote their works globally. These choreographers are placed in the role of instant “celebrity” and have taken dance to the public in a way never imagined. While many in the non-commercial dance world refute the artistic validity of these choreographers, many of these high profile artists would argue they have created a place within the new digital world where multi-page contracts, rights, royalties and compensation are highly negotiated business transactions.²⁴ They may still be works for hire, but may offer a choreographer an opportunity to actually make a living doing their work and still hold ownership of their work product. Meanwhile the creators of these shows and others now struggle with the never-ending issue of piracy and policing on the Internet, the new stage for ownership wars.²⁵

A. What was not foreseen

Despite a dance artist’s best effort to protect their works, often they have failed to secure copyrights from those whom they are collaborating with. Many receiving take down notices from their websites, You Tube Channels and Facebook pages for infringing music rights of a musical

²³Melville 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)).

²⁴ Julia Haye, *So You Think You Can Steal My Dance? Copyright Protection in Choreography*, (Sept. 13, 2010), <http://www.lawlawlandblog.com/attorneys/julia.haye/>.

²⁵*Id.*

artist work they are using without permission. Others finding their work replicated by a dancer in their company and being unable to file an infringement claim because they listed the dancers as “co-choreographers or collaborators” in their programs and works.

Automated programs search for titles of copyrighted works and fragments of copyrighted songs or videos. If anything is found, the work is hit with a takedown notice, frequently without any real examination of the allegedly infringing item.²⁶ Often time fair use comes into play as a defense, unfortunately in the non-commercial dance world there is not enough solid working “legal” knowledge about how to best use this tool for protection.²⁷

The International Olympic Committee was a prime example in 2008 of the overzealous nature of take down notices. Students for a Free Tibet created a You Tube video and a takedown notice was immediately posted.²⁸ Once that notice became public the International Olympic Committee had a press problem on their hands and eventually withdrew the request.²⁹

On You Tube alone, ten hours of video content are place up online every minute of every day, that’s more than 250,000 clips per day.³⁰ “Once these things are legitimately taken down, often other users will put the same or very similar material up on the same website within minutes,” says Kim Jessum, an attorney in Philadelphia and chair of the ABA’s Special Committee on Online Copyright Issues.³¹

²⁶ *Id.*

²⁷ *Id.*

²⁸ Stephanie Condon, *Olympic committee rethinks copyright infringement claim on YouTube*, CNET (Aug. 15, 2008), http://news.cnet.com/8301-13578_3-10018234-38.html.

²⁹ *Id.*

³⁰ Steven Seidenberg, *Copyright in the Age of You Tube*, ABANET (Mar. 15, 2009), http://www.abajournal.com/magazine/article/copyright_in_the_age_of_youtube.

³¹ *Id.*

Take the 2007 lawsuit between Viacom and You Tube.³² Viacom asserted that You Tube had over 150,000 unauthorized clips of Viacom programs posted and argues not enough was being done about it.³³ Seeking liability for direct and secondary copyright infringement, an injunction was requested in addition to monetary damages and technological means to cease future infringements.³⁴

The argument made was that there was not enough “policing” and the variances between licensed and unlicensed work made too many missed infringements.³⁵ If a work is unlicensed it often will not be caught. This is problematic in technology auto screening programs.³⁶

The Digital Millennium Copyright Act established a carefully articulated compromise between the rights of copyright owners and those of online companies. Section § 512 of the DMCA established a safe harbor for online service providers, mandating they would not be liable for infringing material at their users’ direction, provided certain conditions were met.

- Only if the online company does not know or should not reasonably have known about the infringement
- Once the online company learns about the infringement, it must act “expeditiously” to remove the infringing material.³⁷

Online companies must respond. A failure to do this compromises its safe-harbor protection.

When an online company removes allegedly infringing material that was posted by a user, that company is statutorily required to notify the user of what happened and why. The

³² Viacom Int'l Inc., v. YouTube, Inc., Nos. 07-Civ-2103 (LLS), 07-Civ-3582 (LLS) Opinion and Order (S.D.N.Y. June 24, 2010).

³³ *Id.* at 4.

³⁴ *Id.* at 1.

³⁵ *Id.* at 8.

³⁶ *Id.* at 24.

³⁷ 17 U.S.C. §§ 512, 1201–1205 (2006).

individual has a right to send a counter notification stating he or she has a “good-faith belief” the material is not infringing.³⁸ Once this counter notification is received, the online company must put the disputed material back online within 14 business days, unless the company receives notice from the copyright owner that it has filed an infringement suit against the person who posted the material.³⁹

While these steps seem fairly rudimentary for a corporation or established for profit business this additional work on top of an already understaffed underpaid non profit administrator is virtually impossible to police or track. Protecting and securing dance works becomes a full time job. Evolving new technology platforms make it even more challenging.

B. Technology and Media change the game

You Tube became a platform of choice for the dance community early on. Many companies and artists utilized the online program to post works, rehearsals and personal documentaries about the “process of dance.”⁴⁰ While this brought a new opportunity for viewing the work it did not create a funding stream for most artists, many who barely make a living doing the art they love.⁴¹ Marc Kirschner of Tendu TV, the first media distribution label dedicated to dance in the country changed all that. “No other art form has as much of an imbalance between popularity and revenue capability [as] dance, and we believe the time has come for a change.”⁴²

A graduate of Columbia Business School, Kirschner worked as a consultant in the for profit arena.⁴³ Recognizing most companies and artists posting online were at a disadvantage

³⁸ *Id.* § 1209.

³⁹ *Id.*

⁴⁰ Zachary Whittenberg, *An Idea that Clicks*, TIME OUT CHICAGO, (Nov. 24,2010), <http://chicago.timeout.com/articles/dance/90546/tendutv-mainstreams-and-monetizes-dance-film>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

both in their content and options of publication. He launched a solution, but not without initial pushback from the dance community.⁴⁴ Again the fear paralyzed many from signing on to Kirschners arts promoting, revenue generating idea. Many were suspicious and unwilling to take a chance on something and someone new. Kirschner was not discouraged.⁴⁵

TenduTV launched in 2008, with intellectual-property firm MasurLaw, and the support of Dance/NYC, Dance Films Association and Dance New Amsterdam.⁴⁶ The company formed relationships with industry players like Amazon, Hulu and iTunes. Four titles will be available for download by the end of 2010, and Kirschner says more than a dozen are planned for 2011.⁴⁷ “It’s as easy to click on dance film as it is to click on Iron Man 2,” Kirschner says.⁴⁸ When asked recently about the challenges of technology and dance, Marc sites lack of case law and proof of damages, as two of the largest hurdles for technology in the dance field.⁴⁹

One must first determine what constitutes protectable choreography in the first place. The general test for copyright infringement is whether the infringing work is substantially similar to the copyrighted work. In the dance context, to determine whether two pieces are substantially similar in the new arena of technology, making your case for choreographic infringement might seem easier to prove in light of the plethora of media platforms that could be used as “evidence” of the infringement.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

III. RESPONSIVENESS IN THE FIELD

Revolutionary types of technology that can be used to help create a dance performance or piece are in development. There are programs used for cue storage, lighting control, virtual lighting design and other production tasks.

Dance notation tools enable the artist to create or document a dance without the need for human dancers.⁵⁰ For example there is a program called Life Forms Dance.⁵¹ It allows the choreographer with several dancers to create and view a dance work virtually.⁵² Movement projections allow you to produce more complex movements like skipping and jumping.⁵³ It will take the movement sequences and change them into a 3D modeling and animation packages to produce a movie.⁵⁴ Motion capture take the process of notating a dance piece and then transfer it to a 3D animation package. Some systems rely on multiple video cameras to capture a movement sequence and then process it. Dancers wear special clothing that is interpreted by the analysis software.⁵⁵

These systems still require the choreographer to significantly edit the final product; which is now in the next stages of development of the technology. The corrected output can then be either used as is to record, teach a piece, or can be merged with other programs.⁵⁶ The release of AVATAR is a prime example of how technology, choreography and art come together successfully in this new era, but others have not been quite as successful; finding unexpected complications for the choreographer or work product of a dance organization.

⁵⁰ Jeffrey Bary, *Leaping into Dance Technology*, Connect: Information Technology at NYU. 1, 3 (Fall 2002), http://www.nyu.edu/its/pubs/connect/archives/fall02/bary_dance.pdf.

⁵¹ *Id.* at 3.

⁵² *Id.* at 3.

⁵³ *Id.* at 3.

⁵⁴ *Id.* at 3.

⁵⁵ *Id.* at 3.

⁵⁶ *Id.* at 3.

Copyright owners are looking for more effective ways to enforce their rights in the online world. The arts field wants to change the law to protect their existing business models but the arts field needs to change their business models to adapt to new technology. Copyright owners may need to compromise with more than just the new online businesses. Content owners may need to reach an understanding with tens of millions of U.S. Internet users and what their viewing habits are. If dance companies and artists believe their live performance alone will sustain their art form in the future, they are in for a very rough road.

IV. CONCLUSION

The lesson learned from the Graham case was that dance is a business. Today's dance makers and dance organizations need to focus with as much detail and attention on rights clearance and ownership as they do their artistry. This can be a challenge since legal guidelines for the dance community are ambiguous at best and many dance artists resist learning more about rights issues as a result of the fear coming from the Graham case. Many artists lack the comprehensive skills to embrace the business of dance. Hopefully, they will acknowledge the need for assistance and seek out those in the arts community and the for profit sector that can help to strengthen their work and organizations. Service organizations like Dance/USA, Fractured Atlas and Pentacle should partner with legal organizations to create legal educational programming for artists to take the fear out of the process.

The renewed popularity of dance, in addition to creating new dance audiences may elicit the courtroom case the field has been looking for to provide clarity in this ever-changing arts/high tech world. One thing is certain, the dance field must keep up with law, media and technology if it wants to remain competitive, protect its interests and remain a player in the post-Graham arts global sandbox.