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Copyright and Choreography: The Negative Costs of the Current Framework for Licensing Choreography and a Proposal for an Alternative Licensing Model

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Copyright and Choreography: The Negative Costs of the Current Framework for Licensing Choreography and a Proposal for an Alternative Licensing Model

by MATT KOVAC*

Abstract

Although approaches rooted in copyright law are available, choreographers tend to rely instead on contract law in order to control distribution of their work; choreographers license their ballets to dance companies via contracts which are typically negotiated on an ad hoc basis. This relatively conservative approach allows choreographers to maintain tight artistic control over subsequent reproductions of their ballets, but it comes at a cost to both the dance community and the general public. This conservative approach to distribution means that a choreographic work may be performed infrequently or not at all, and it also forecloses the possibility for transformative adaptations that would benefit individual dancers and the general public in several significant ways. Is there a possibility of a "middle-ground approach," a framework utilizing copyright law (rather than exclusively contract law) that provides a choreographer with certain artistic assurances, but allows for a far greater dissemination of the choreographer's work? This Note argues that such an approach is possible, using existing models rooted in copyright law.

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I. Introduction

Why can you cover a song, but not a ballet? A musician who wants to perform a cover version of a song may simply go ahead and do so;[1] existing copyright law provides a framework for (i) allowing the live performance of the cover song, and (ii) allowing for royalty payments to be awarded to the appropriate copyright holder.[2] In contrast, "cover versions" of contemporary ballets and modern dance works are nonexistent.[3] Dance companies do not stage "cover versions" of pre existing ballets unless the ballet is so old that it is clearly in the public domain.[4]

Choreographic works and musical compositions are both recognized as copyrightable subject matter under the current Copyright Act,[5] but the framework which has arisen to govern the dissemination of dance works is vastly different than the framework which governs musical compositions.[6]

1. JULIE E. COHEN, LYDIA LOREN, RUTH OKEDIJI & MAUREEN O'ROURKE, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 440–41 (3d ed. 2010) [hereinafter "COHEN"].

2. 17 U.S.C. § 115 (2006) ("Compulsory license for making and distributing phonorecords.").

3. See *infra* Part V.

4. For example, La Sylphide and The Flower Festival in Genzano are classical ballets choreographed by the Danish balletmaster August Bournoville in 1836 and 1858, respectively. During the course of his career, Bournoville, who died in 1879, choreographed over thirty ballets, all of which are now in the public domain. In 1992, a "registry" of productions of Bournoville's ballets was prepared which revealed that "literally hundreds of stagings of his ballets had been made on six continents." Marilyn Hunt, *Bournonville's Ballet Outside Denmark*, BOURNONVILLE (Aug. 2001), http://www.bournonville.com/bournonville18.html.

5. 17 U.S.C. § 102 (2006) ("Subject matter of copyright: In general").

6. *See infra* Part II.

Since 1909, musical compositions have been subject to a "compulsory" license system. That is, after a musical composition has been recorded and released by a properly authorized artist, then any subsequent artist can do a "cover version" of the song, which is a re-recording of the song per the terms of a statutorily mandated compulsory mechanical license.[7] An artist may also perform the song live, subject to the payment of performance royalties to the original composer.[8] In contrast, once a ballet is created, the choreographer (or copyright holder) is allowed to maintain tight control over any and all future performances.[9] A dance company would not attempt to perform a ballet without explicit permission from the choreographer, which usually takes the form of a negotiated license agreement.[10] Moreover, dance companies do not perform adaptive "cover versions" of ballets protected by copyright, period.[11]

Much of the existing legal commentary regarding choreography focuses on how copyright alone does not meet the needs of choreographers and the dance community in a satisfactory manner.[12] Instead of copyright, dance companies and choreographers have relied primarily upon contract law to achieve their objectives: the choreographer and the dance company will negotiate a contract which contains a license to perform a specific ballet, subject to strict restrictions regarding the integrity of the choreography itself and the number of performances allowed.[13] In addition to contract law, the dance community also relies on social norms to assist with policing against the theft of choreography.[14] Copyright protection serves as a "backstop," looming in the background as a deterrent for infringement.[15]

This note will address the advantages and disadvantages of the current framework in which contract, social norms and copyright combine to define the parameters of what is permissible with regards to choreographic

7. 17 U.S.C. § 115 (2006). ("Compulsory license for making and distributing phonorecords.")

8. JEFFREY BRABEC AND TODD BRABEC, Music Money & Success 31 (7th ed. 2011).

9. *See infra* Part III.B.

10. 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, 294 (1984).

11. *See infra* Part III.D.

12. *See* Singer, *supra* note 10; *see generally* Shanti Sadtler, *Preservation and Protection in Dance Licensing: How Choreographers Use Contract to Fill in the Gaps of Copyright and Custom,* 35 COLUM. J.L. & ARTS 253 (2012).

13. *See* Sadtler, *supra* note 12, at 279–81.

14. *See* Singer, *supra* note 10, at 318 ("The custom of the American dance community does, however, provide choreographers with a realistic, effective mechanism for the enforcement of their artistic rights.").

15. *See* Sadtler, *supra* note 12, at 269–71.

works. This note then makes a recommendation for an alternative model of distribution, a model that will appeal to choreographers who are comfortable with widespread distribution of their work.

Within this note, the term "ballet" refers to any choreographic work created by a ballet or modern dance choreographer. In the interest of narrowing the analysis, this note focuses exclusively on this particular category of choreographic work, and this note does not address in detail the existing frameworks for dissemination of other forms of choreography that are found in musicals, dance videos, movies, and trade shows.

II. Background: Musical Compositions and Choreographic Works – Vastly Different Models of Dissemination to the Public

The model under which choreographic works are made available to the public is vastly different from the model for musical compositions. Under one model, the copyright holder is allowed to maintain tight control over the creative work after its initial release to the public. Under the other model, a compulsory license ensures that others are permitted to reinterpret and build upon the copyright holder's work.[16]

A. Musical Compositions – A Compulsory License Model

In the music industry, the guidelines for creating a cover version of a song are explicit and clear; as long as the song has been recorded and released on an album by an authorized recording artist, then any other subsequent recording artist may record or perform a cover version of that song.[17] No permissions are necessary, although artists who wish to make a recording of a cover song will frequently seek permission from the copyright holder in order to obtain a more favorable royalty rate.[18] Here is how the compulsory license for cover songs works:

Live Performances of Cover Songs. An artist may perform a cover song in a live performance without obtaining pre-authorization or permission from the copyright holder.[19] When a band performs a cover song in a live performance, the venue hosting the live performance will pay a royalty to either ASCAP, BMI, or SESAC. These three entities are performing rights organizations ("PRO") that collect and disseminate

16. *See infra* Parts II, III.B, and III.C.

17. *See* 17 U.S.C. § 115 (2006) ("Compulsory license for making and distributing phonorecords.").

18. COHEN, *supra* note 1, at 440–41.

19. *Id.* at 437–41.

royalties for composers and music publishers.[20] On a yearly basis, the venue will pay a royalty fee to ASCAP, BMI, or SESAC, and the venue may also provide ASCAP. BMI, or SESAC with information about the cover songs played at that venue during the year.[21] ASCAP, BMI, or SESAC then distributes royalty payments to copyright holders on the basis of the frequency their songs were performed that year.[22]

Recording a Cover Song. If an artist wishes to make a sound recording of a song written by someone else and then include that cover song on an album, then the artist can do so utilizing the compulsory license system set up by Congress in the Copyright Act of 1909.[23] These licenses are called "mechanicals" because they involve the mechanical reproduction of musical compositions on some medium (vinyl, CDs, tapes).[24] The artist who wants to record a cover version of a copyrighted song may simply pay a statutory royalty rate (currently 9.1 cents, or 1.75 cents per minute of playing time, whichever is greater) or the artist may attempt to negotiate a better royalty rate with the authorized agent of the copyright holder.[25]

Thus, once a song has been recorded, any artist who wishes to perform a cover version of that song may do so.[26] If the cover version is performed in front of a live audience, then the venue will be responsible for paying royalty to PROs.[27] If the cover song is included on an album, then the artist can either rely on the mechanical (compulsory) license and pay a statutory royalty fee, or negotiate a better royalty rate with the Harry Fox Agency ("HFA").[28]

B. Choreographic Works – Contract-Based Dissemination (In the Absence of a Compulsory License)

The model for dissemination of choreographic works is completely different than that for musical compositions. With no compulsory license

20. BRABEC, *supra* note 8.
21. *Id*.
22. *Id*.
23. Today, the "compulsory license" is codified at 17 U.S.C. § 115 (2006) ("Compulsory license for making and distributing phonorecords.").
24. COHEN, *supra* note 1, at 440–41.
25. *Id*. The statutory royalty rate is set by a panel of Copyright Royalty Judges, and adjusted from time to time. *Id.* An artist who wants to record a cover song can always use this mechanical license and then pay the statutory royalty rate, but the majority of artists instead approach the HFA and try to negotiate a royalty rate. *Id.* The HFA is authorized to negotiate such licenses on behalf of "over 27,000 music publishers who collectively own over 2.5 million copyrighted works." *Id.*
26. *Id*.
27. BRABEC, *supra* note 8.
28. COHEN, *supra* note 1, at 440–41.

to rely on, a dance company that wants to perform a particular copyrighted ballet must approach the choreographer or copyright holder and negotiate a contract that will include an individual license to publicly perform the work.[29] Thus, contract law rather than copyright law is the legal mechanism for the distribution of modern choreographic works.[30]

As discussed in Part III.B, these negotiated contracts will invariably include safeguards designed to ensure that any subsequent performances of the ballet will be carried out in strict accordance with the choreographer's original artistic vision. For example, a typical contract will require the dance company to hire a "ballet master" or "*repetiteur*"—an expert already familiar with the choreography—who is personally selected by the choreographer.[31] This ballet master will travel to the dance company's home studio and oversee the casting, rehearsal, and staging of the work in order to ensure that the ballet is performed faithfully to the choreographer's style and original vision.[32] Additionally, the negotiated contract will frequently require that other elements of the work—costumes, sets and lighting, for example—be reproduced exactly, duplicating the original version of the ballet in every way possible.[33] As such, the terms of the contract allow the choreographer to maintain tight artistic control over all subsequent performances of the ballet. It is not unusual for the contract terms to give the choreographer the right to periodically review the company's performances, and the right to withdraw the ballet if the choreographer feels that "the company is no longer able to perform it with integrity."[34]

The goal of this contract-based licensing model is to ensure that each subsequent performance of the ballet is as close as possible to the original production.[35] Because this model has been used for decades by the choreographic community and because its goal is to prevent the licensee from changing the choreography or any other elements of the ballet, this note will refer to this model as the "traditional (restrictive) model" of disseminating ballets.

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29. *See* Sadtler, *supra* note 12, at 278–79.

30. This applies to the licensing of "modern" ballets that are still under copyright. As noted previously, if a ballet is sufficiently old to be in the public domain, then any dance company may perform a version of that ballet; no license is necessary.

31. *See* Sadtler, *supra* note 12, at 279–80.

32. *Id*.

33. *Id*. at 281–87.

34. *Id*. at 280.

35. *Id*. at 280–81.

35. *Id*.

The traditional (restrictive) licensing model for choreography stands in marked contrast to the compulsory license for musical compositions, under which any artist can do a cover version of any existing song, without permission from the original copyright holder and with an allowance for creative interpretation of the work. These two very different models arose in response to several distinct factors, as explained in the section below.

C. Technology, Law, and Social Factors Within the Two Models

The current ways in which musical compositions and choreographic works are disseminated to the public were unplanned. The frameworks for dissemination arose over time in response to market forces, social change and emerging technologies, which eventually led to changes in copyright law.

In 1909, Congress enacted the compulsory license for musical compositions.[36] Why—what had changed? One convincing explanation is technology; new means of distribution had arisen, causing changes in the market dynamics for musical compositions. The resulting pressure eventually led Congress to amend the Copyright Act and establish the compulsory license system that still exists today.

For most of the nineteenth century, the only way to "distribute" musical compositions was on paper–sheet music.[37] Sales of sheet music represented a substantial income stream for music publishers.[38] However, in the 1870s two new technologies emerged: *paper rolls* for player pianos, and *wax cylinders*, which would later evolve into vinyl records. Each presented an exciting new way of making musical compositions available to the public.[39] The new technologies became increasingly popular, and by 1909, it seemed that Congress was poised to extend the Copyright Act to cover these new "mechanical" ways of recording musical compositions.[40] In anticipation of this, one particular company—the Aeolian Company, a manufacturer of piano rolls—sought to lock up the national market for piano rolls by signing exclusive deals with as many music publishers as possible.[41] Congress responded to the Aeolian threat by including the compulsory license in the Copyright Act of 1909.[42]

36. Timothy A. Cohan, *Ghost in the Attic: The Notice of Intention to Use and the Compulsory License in the Digital Era*, 33 COLUM. J.L. & ARTS 499, 502–06 (2010).

37. *Id.* at 502.

38. *Id.* at 505.

39. *Id.* at 502.

40. W. Jonathan Cardi, *Uber-Middleman: Reshaping the Broken Landscape of Music Copyright,* 92 IOWA L. REV. 835, 872–73 (2007).

41. *Id.*

42. *Id.*

Congress did not consider it to be in the public's interest for one company to have a monopoly over piano rolls. The compulsory license was designed to ensure that other piano roll companies and other musical artists would be able to make their own recordings of a given musical composition, using "any arrangement or setting" which appealed to them.[43] Thus, the public was not forced to listen to just one arrangement of "By The Light of The Silvery Moon"[44] or "Alexander's Ragtime Band"[45]—the public could pick and choose between different recorded versions. Cover songs were born.

The benefits brought to the public by the compulsory licensing system (and the benefits brought to the public by cover songs, in particular) are discussed further in Part III.C. With regards to choreographic works, however, the development of the current framework for disseminating ballets to the public followed a much different path, again due to factors of social and technological change.

Choreographic works were not recognized as copyrightable subject matter until the passage of the Copyright Act of 1976.[46] Prior to passage of the 1976 Act, some choreographic works were indeed eligible for copyright protection, but only if they fell into the category of dramatic or dramatico-musical works.[47] This category of "dramatic or dramatico-musical compositions" had been included in the Copyright Act of 1909 alongside ten other categories of work eligible for copyright protection.[48] Under the 1909 Act, works of choreography were copyrightable, but only if the choreography "told a story, portrayed characters, or depicted emotion,"

43. Cohan, *supra* note 36, at 504.

44. Published in 1909, "By The Light of the Silvery Moon" was written by Gus Edwards with lyrics by Edward Madden. The song was first performed on stage by Lillian Lorraine and later covered by Doris Day, Jane Powell (in a duet with Ricardo Montalban), The Three Stooges, and others. *See* Search results for "By the Light of the Silvery Moon/By Edward Madden & Gus Edwards," LIBRARY OF CONGRESS PUBLIC CATALOG, http://cocatalog.loc.gov (last visited Oct. 8, 2013); Biography of Lillian Lorraine, FANDANGO, http://www.fandango.com/lillianlorraine/biography/p283080 (last visited Oct. 8, 2013); and Search results for "By the Light of the Silvery Moon (All Versions)"), DISCOGS, http://www.discogs.com (last visited Oct. 8, 2013).

45. Published in 1911, "Alexander's Ragtime Band" was the first hit written by Irving Berlin, and was later covered by Bessie Smith, Louis Armstrong, Bing Crosby, Ray Charles, and The Bee Gees. *See* Search results for "Alexander's Ragtime Band, Song," ALLMUSIC http://www.allmusic.com/composition/alexanders-ragtime-band-song-mc0002355229 (last visited Oct. 15, 2013).

46. Cohen, *supra* note 1, at 26.

47. Julie Van Camp, *Copyright of Choreographic Works*, ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 1994–1995 59 (Stephen F. Breimer, Robert Thorne & John David Viera eds., 1994), *available at* http://www.csulb.edu/~ jvancamp/copyrigh.html#copyright.

48. COHEN, *supra* note 1, at 26.

thus falling into the "dramatic/dramatico" category.[49] Abstract works such as plotless ballets with no dramatically delineated characters were not eligible for copyright protection.[50]

The first choreographic work to be recognized by the U.S. Copyright Office was Hanya Holm's choreography for the 1948 musical "Kiss Me Kate."[51] Holm's choreography was recorded on paper in Laban Dance Notation[52] and was then submitted to the Copyright Office under the dramatico-musical work category.[53] The successful registration of a choreographic work "caused considerable excitement in the dance community," but this was tempered by the fact that plotless and abstract ballets remained unprotectable.[54]

In the 1960s and 1970s, ballet and modern dance in America surged in popularity during a period often referred to as the "Dance Boom."[55] The number of local dance companies (ballet and modern) increased at an "explosive" rate, responding to both an increase in audience demand and the new availability of funding for the arts at the state and federal level.[56] In 1965, the National Endowment for the Arts (NEA) was created by Congress. In a sign of the emerging prominence of dance, the NEA promptly awarded its first grant to a New York City ballet company.[57] The dance world was further electrified during this time by the defections of Russian ballet stars such as Rudolf Nureyev, Natalia Makarova, and Mikhail Baryshnikov.[58] By the mid-1970s, ballet "superstars" were appearing on the cover of *TIME* magazine[59] and a major motion picture

49. Sheila A. Skojec, Annotation, *Copyright of Dance or Choreography*, 85 A.L.R. FED. 906 (originally published in 1987).

50. *Id*.

51. *See* Van Camp, *supra* note 47, at n.2.

52. Laban notation is a system of written symbols indicating direction and dance movement. *See Read a Good Dance Lately?*, DANCE NOTATION BUREAU, http://dancenotation.org/lnbasics/frame0.html (last visited Oct. 17, 2013).

53. *See* Van Camp, *supra* note 47, at n.2.

54. *Id*.

55. Thomas M. Smith, *Raising the Barre: The Geographic, Financial, and Economic Trends of Nonprofit Dance Companies*, NATL. ENDOWMENT FOR THE ARTS, 2 (Aug. 2003), http://www.nea.gov/ research/RaisingtheBarre.pdf.

56. *Id*. at 2.

57. *National Endowment for the Arts: A History, 1965–2008*, 10, 28 (Mark Bauerlein & Ellen Grantham eds., 2009), http://www.nea.gov/pub/nea-history-1965-2008.pdf.

58. JOHN FRASER, PRIVATE VIEW: INSIDE BARYSHNIKOV'S AMERICAN BALLET THEATRE 1–11 (1988).

59. *See* Cover page, TIME, May 19, 1975, *available at* http://www.time.com/time/covers/0,16641,19750519,00.html; Cover page, TIME, May 1, 1978, *available at* http://www.time.com/ time/covers/0,16641,19780501,00.html.

was in production starring Baryshnikov and several other stars of the American Ballet Theatre.[60]

Congress overhauled the Copyright Act in 1976, near the peak of this dance boom. Instead of revising the lengthy and growing list of works protectable by copyright,[61] the 1976 Act instead set forth eight broad categories of content—including "pantomimes and choreographic works."[62] For the first time, choreography was explicitly recognized as protectable subject matter.[63]

The 1976 Act did not offer a definition for the phrase "choreographic work." The legislators indicated that they believed the phrase to be fairly settled in its meaning.[64] At any rate, it was clear that copyright protection was now available for ballets and modern dance works that were abstract and plotless.[65] Furthermore, the 1976 Act seemed to be a giant step forward for choreographers in terms of placing their creative works on the same legal footing as the creative works of authors, painters, and composers.[66]

In order to qualify for copyright protection, a work must be fixed in a tangible medium of expression.[67] For choreographic works, the Copyright Office has recognized that dance notation, film and video are acceptable methods of fixation.[68]

III. Analysis

A. Choreography and Copyright: An Imperfect Pairing

In the four decades since the passage of the 1976 Act, choreographers have registered their works with the Copyright Office with varying degrees

60. The film (THE TURNING POINT, 20th Century Fox, 1977) was nominated for eleven Academy Awards. *See* Webpage for THE TURNING POINT, IMDB, http://www.imdb.com/title/tt0076843 (last visited Oct. 17, 2013).

61. *See* COHEN, *supra* note 1, at 26 (At this point, the lengthy list of classes of works that were protected under the 1909 Act included "lectures," "sermons," "motion-picture photoplays," "prints or labels used for articles of merchandise," and many more. To simplify, the 1976 Act replaced this listing with eight broad categories of content, including choreography.).

62. 17 U.S.C. § 102(a)(4) (2006).

63. Skojec, *supra* note 49.

64. H.R. Rep. No. 94-1476, at 53 (1976).

65. Skojec, *supra* note 49.

66. *See generally* Singer, *supra* note 10; Joi Michelle Lakes, *A Pas De Deux for Choreography and Copyright*, 80 N.Y.U. L. REV. 1829 (2005).

67. 17 U.S.C. § 102(a) (2006).

68. Skojec, *supra* note 49.

of regularity.[69] The barriers to registration are not high; there is a cost involved with meeting the fixation requirement (noted above), and also a nominal filing fee of $35 to $65.[70]

Still, choreographers today often do not avail themselves of copyright law.[71] Many choreographers do not bother to register their works and almost never sue for copyright infringement;[72] since 1976, only one infringement case has been heard by the federal courts.[73] Instead of relying upon copyright law and its attendant statutory remedies, American choreographers have continued to operate much as before 1976, following their own customary rules and utilizing contract law, rather than copyright law. Choreographers have declined to rely upon copyright law because they believe that the "traditional" system that they have constructed (through use of contracts and social norms) is superior to any framework offered to them by current copyright law.[74]

There are several specific reasons for choreographers' reluctance to rely on copyright law. Copyright litigation is expensive and often the outcome is uncertain.[75] Choreographers and dance companies have extremely limited funds and little appetite to engage in expensive litigation.[76] Furthermore, nonlegal remedies exist in the dance community to guard against unauthorized performances of a choreographer's work.[77]

The dance community was surprised and shocked by the Second Circuit's ruling in a 2004 case in which the heir of Martha Graham had sued the Martha Graham Dance Company, seeking to forbid the company from performing Graham's choreography after her death.[78] This case was only the second copyright case involving choreography to reach the federal

69. Interview with Amy Seiwert, choreographer and Artistic Director of Amy Seiwert's Imagery (February 12, 2013); Sadtler, *supra* note 12, at 253 ("[C]horeographers infrequently register their creations and virtually never sue for infringement.").

70. The regular paper filing is $65 and the reduced fee for an electronic filing is $35. *See* Filing Fees, U.S. Copyright Office, http://www.copyright.gov/docs/fees.html (last visited Apr. 1, 2013).

71. Sadtler, *supra* note 12, at 253.

72. *Id.*

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

74. *See* Singer, *supra* note 10, at 319 (On relying on dance community custom, rather than copyright law: "American choreographers have their own 'law,' and they, at least for now, choose to be governed by it.").

75. *Id.* at 296.

76. *Id.*

77. *Id.* at 295–97.

78. Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 630 (2d Cir. 2004).

courts since the passage of the 1976 Act.[79] In this dispute over ownership of Martha Graham's works, the Second Circuit held that Martha Graham herself never owned the copyrights to some of her legendary modern ballets.[80] The court noted that Martha Graham was a salaried employee of the Martha Graham Center of Contemporary Dance, and that she had created her ballets within the scope of her employment.[81] Applying the work-for-hire doctrine, the Second Circuit held that the copyrights for many of the ballets belonged to the Center, not to Graham.[82]

The Second Circuit's ruling may be unremarkable to those familiar with copyright law and the work-for-hire doctrine, but it was an unexpected jolt for the dance community.[83] The long established custom and belief in the dance community was that the choreographer was the sole owner of her ballets; the idea that a master choreographer was merely an employee creating works-for-hire was a notion that was almost repugnant to some.[84] This ruling had two immediate effects. First, choreographers and artistic directors quickly added ownership provisions to their basic contracts to make clear that the choreographer, not the ballet company, would retain any copyrights.[85] Second, the "legal awareness" of the dance community increased, as did their skepticism of the copyright regime that returned a result so contrary to the established customs of the community.[86]

Today, choreographers continue to rely primarily on a mixture of contract law and dance community custom in order to control reproductions and public performances of their works.[87] Copyright law remains a useful "backstop" for choreographers—now that ballets are protectable by copyright, it would indeed be possible for choreographers to invoke statutory protection in an infringement action, if need be. But in general, choreographers have not relied extensively on copyright law to

79. The first case was *Horgan v. Macmillan*.

80. Anne W. Braveman, *Duet of Discord: Martha Graham and Her Non-Profit Battle over Work for Hire*, 25 LOY. L.A. ENT. L. REV. 471, 471–72 (2005).

81. *Martha Graham Sch. & Dance Found., Inc.*, 380 F.3d at 638–39.

82. *Id.*

83. *See* Sofi Li Sinozich, *How Graham v Graham Shocked Artists into Legal Awareness*, COLUM. UNDERGRADUATE L. REV. (Fall 2012), *available at* http://blogs.cuit.columbia.edu/culr/2012/ 11/28/horeography/.

84. For example, Ronald Protas, director of the American Dance festival, scoffed at the notion of calling Martha Graham's choreographies' "works for hire" of the dance company she founded. *See* Felicia R. Lee, *Graham Legacy, on the Stage Again; The Heir's Determination Is Unabated After a Second Court Ruling*, N.Y. TIMES, Sept. 29, 2004, at E1, *available at* http://www.nytimes.com/2004/09/29/ arts/dance/29grah.html?_r=0.

85. Sadtler, *supra* note 12, at 276.

86. *Id.* at 275–76 ("Contract Steps In").

87. *Id.*

accomplish their goals.[88] Instead, choreographers have relied on the traditional (restrictive) model to distribute their work, as discussed in detail below.

B. The Traditional ("Restrictive") Model for Licensing Ballets

The traditional (restrictive) model has as its lodestar the idea that a choreographer has a right to control her works, even after she "has released them to the public."[89] Under this model, it is the choreographer who grants or withholds permission to perform a particular ballet.[90]

If a dance company wishes to add an existing ballet to its repertory, the artistic director of that company will typically consult with the choreographer of the ballet before requesting permission to perform the work.[91] The choreographer or his or her representative will visit the company and evaluate the abilities and strengths of the dancers to determine if they are capable of performing the ballet in accordance with the choreographer's artistic standards.[92] The choreographer "will permit the performance of [his or her] work only after being convinced that the skills of the company reflect the artistic worth of" the ballet that the company is seeking to license.[93]

If the choreographer assents, the two parties will negotiate a contract that includes a license to perform the ballet for a set period of time or number of performances.[94] As discussed previously, the contract terms will frequently include a right of withdrawal that the choreographer can exercise if she feels that the dance company is no longer able to perform the ballet at a standard acceptable to her.[95]

The traditional (restrictive) model is the licensing framework currently used by choreographers and major dance companies.[96] This model emerged over time in recognition of the choreographer's central role in the artistic process of bringing new ballets to the stage. An example of this model in action is provided below.

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88. *See generally* Singer, *supra* note 10; Sadtler, *supra* note 12.
89. Singer, *supra* note 10, at 293.
90. *Id.*
91. *Id.*
92. *Id.* Note that a personal visit may not be necessary if the choreographer is already familiar with the ballet company or has worked with them in the past. *See* Sadtler, *supra* note 12, at 278–79.
93. Singer, *supra* note 10, at 294.
94. *Id.*
95. Sadtler, *supra* note 12, at 280.
96. *See generally id.* at 277–89.

Example of Traditional Licensing Model: The George Balanchine Trust

George Balanchine, the longtime artistic director of the New York City Ballet, is widely considered one of the greatest choreographers of the past century.[97] Balanchine, who died in 1983, bequeathed the rights to many of his ballets to a small group of dancers, who then deposited these rights in an irrevocable trust.[98] The George Balanchine Trust currently oversees the licensing of over seventy-five ballets created by Balanchine during his lengthy career.[99]

If a dance company wants to license a Balanchine ballet from the Trust, the company sends a written request to the Trust that specifies the contemplated performance dates, the proposed duration of the license, information about the venue or venues hosting the performances, and the anticipated ticket prices.[100] The company must also send a DVD of the company's dancers in a recent performance so that the Trust can evaluate the caliber of the dancers and determine if the dancers are capable of performing Balanchine's choreography in a manner consistent with the Trust's standards.[101]

Based on the information provided, the Balanchine Trust will propose terms for the license agreement.[102] The Trust will also require that the dance company hire a Balanchine-approved "*repetiteur*"—a ballet master who is familiar with the ballet and who will work with the company in rehearsal to stage the work and ensure that the final version performed on stage is an exact and faithful replica of Balanchine's original choreography.[103]

The goal of this process is to ensure that the dancers will be taught (and will absorb) the unique style and approach of Balanchine so that they can

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97. *See George Balanchine*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/49801/George-Balanchine (last visited Sept. 13, 2013) (Balanchine is the "most influential choreographer of classical ballet in the United States in the 20th century.").

98. Katie M. Benton, *Can Copyright Law Perform the Perfect Fouette? Keeping Law and Choreography on Balance to Achieve the Purposes of the Copyright Clause*, 36 PEPP. L. REV. 59, 95 (2008).

99. *See The Trust*, THE GEORGE BALANCHINE TRUST, http://balanchine.com/the-trust/ (last visited Sept. 13, 2013).

100. *See Licensing the Ballets*, THE GEORGE BALANCHINE TRUST, http://balanchine.com/licensing-the-ballets (last visited Sept. 13, 2013).

101. *Id.*

102. *Id.*

103. *Id.* ("All licensed ballets require a Balanchine approved repetiteur to stage the work in rehearsals and get the work on stage for the premiere. *Repetiteurs* are contracted separately from the Trust license."). Typically, the *repetiteur* has performed the ballet many times as a dancer and is intimately familiar with the ballet's nuances. *Id.*

faithfully execute Balanchine's choreography onstage. And, when an audience member attends an authorized restaging of a Balanchine ballet, he may take comfort in knowing that the product on stage is as close as possible to Mr. Balanchine's original vision.

Part III.D discusses in detail the major drawbacks associated with the traditional (restrictive) model of disseminating ballets. However, it must be noted that the traditional model does have significant benefits. In addition to allowing the choreographer to maintain tight artistic control over subsequent productions of her ballet (which can be viewed as virtue or vice, depending on your perspective), the traditional model also represents a continuation of the dance community's long-standing practice of handing down dance knowledge and insight in person.[104] Under this model, the dancers will learn the choreography directly from the choreographer or from a ballet master who is intimately familiar with the ballet's nuances.[105] The members of the dance company thus get an opportunity to work in person with an expert who can provide insight into the choreography and inspire the dancers to approach movement in new ways. For many dancers, the chance to work with highly creative artists is a primary motivating factor for their choice of profession.[106] And, for ballet masters (who are often retired dancers) this system provides a way for them to pass on their hard-earned knowledge to a new generation while also finding gainful employment.[107]

The traditional (restrictive) model is designed to allow the choreographer to continue to "control" the ballet long after its premiere.[108] This choreographer-centric framework, which arose in the absence of a compulsory license, has firmly embedded itself in the dance community and is rarely challenged.[109]

C. The Benefits of the Compulsory License; Cover Songs

The compulsory license for musical compositions and the mechanical royalty (both adopted in 1909) in effect determined how music would be

104. Interviews with Celia Fushille, Artistic & Executive Director, Smuin Ballet (February 8, 2013); Amy Seiwert, choreographer and Artistic Director, Amy Seiwert's Imagery (Feb. 12, 2013); Christopher Pennington, Executive Director, The Jerome Robbins Rights Trust (March 5, 2013).

105. *Id.*

106. *Id.*

107. *Id.*

108. Singer, *supra* note 10, at 293.

109. *See generally* Singer, *supra* note 10; Sadtler, *supra* note 12.

made available and consumed by listeners in the twentieth century.[110] The passage of the 1909 Act meant that when a composer released a song to the public, that song could be covered in live performance and also recorded and released on albums by an unlimited number of artists.[111] And, a composer who held the copyright to a musical composition had two new sources of income: sales of recorded music and royalties from the live performances of his composition.[112]

The public reaped the benefits of this compulsory license system; composers (the initial copyright holders) would release song after song, and these songs would be covered by singers and bandleaders.[113] The hit song of the month was played by orchestras in dancehalls across the country and could usually be heard on the radio in several different versions.[114] This system remains in place today; if an artist wants to record a song on an album, he is free to do so, per the terms of the compulsory license.[115]

Innumerable examples can be given of musical compositions that have been covered under the compulsory license; three examples are provided below, merely to highlight the benefit to the public that has resulted due to the relative lack of restrictions on who can perform or record a particular song.

The song "Stardust" was composed in 1927 by Hoagy Carmichael and lyrics were added two years later.[116] In 1930, Ishram Jones became the first artist to make a hit recording of the song. Bing Crosby released his own recording of "Stardust" in 1931 and by the following year, over two dozen bands had recorded the song.[117] "Stardust" has since been covered by artists including Louis Armstrong, Dave Brubeck, Frank Sinatra, Doris Day, Dizzy Gillespie, Nat King Cole, Django Reinhardt, Barry Manilow, John Coltrane, Willie Nelson, Ringo Starr and many, many more.[118]

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110. Cohan, *supra* note 36, at 505. ("The Compulsory License Gives Rise to the Recorded Music Industry.").

111. See COHEN, *supra* note 1.

112. Cohan, *supra* note 36, at 505

113. *See* Shourin Sen, *The Denial of a General Performance Right in Sound Recordings: A Policy That Facilitates Our Democratic Civil Society?,* 21 HARV. J.L. & TECH. 233, 243–49 (2007) ("Emerging Business Structures," "Industry Expansion," and "Dominance of the Musical Recording over Sheet Music.").

114. Donald Clarke, *The Rise and Fall of Popular Music; Chapter 6,* DONALD CLARKE MUSIC BOX, *available at* http://www.donaldclarkemusicbox.com/rise-and-fall/detail.php?c=7 (last visited Oct. 25, 2013).

115. *See* COHEN, *supra* note 1.

116. *See* Bruce S. Hapanowicz and Arthur Bailey, *They're Still Playing That Song*, HOAGY CARMICHAEL'S STARDUST, http://www.stardustsong.com//history.htm (Last visited Oct. 25, 2013).

117. *Id.*

118. *Id.*

Since its initial recording in 1970, Paul Simon's gospel-styled song "Bridge over Troubled Waters" has been covered over two hundred times, by artists as varied as Aretha Franklin, Elvis Presley, Lee Ann Rimes, Annie Lennox and the Mormon Tabernacle Choir.[119]

The blues-rock classic "Proud Mary" was written by John Fogerty and released on record by Fogerty's band in January 1969.[120] In 1970, Ike and Tina Turner recorded a version of the song that greatly altered the structure of the original recording and also added elements of R&B and funk. This cover version reached number four on the pop charts in 1971 and has since become one of Tina Turner's signature songs in concert.[121]

The last example highlights what the compulsory license makes possible; an artist (Tina Turner, in this case) is permitted to cover an existing musical composition and also to build upon and transform it. The compulsory license has made it impossible for a composer to maintain "tight control" over his song once he has authorized the song to be released to the public. If there were no compulsory license, a composer like John Fogerty would have the option to block all subsequent artists from performing or recording his composition for as long as his copyright lasted. Thus without the compulsory license, the public could have been left with just the Carl Perkins recording of "Blue Suede Shoes" (and not Elvis Presley's cover.)[122]

The compulsory license for musical compositions requires that the copyright holder (the composer) relinquish some control over the song after it is released to the public.[123] Composers are not allowed to prevent others from covering their compositions.[124]

For choreographers, the opposite is true; because there is no compulsory license for choreographic works, a choreographer is allowed to retain tight control of a ballet long after it has premiered.[125] The negative costs of this model are discussed in the section below.

119. *See* "Search: Bridge Over Troubled Water (All versions)," DISCOGS, http://www.discogs.com/search/?q=like+a+bridge+over+troubled+water&type=all (last visited Sept. 5, 2013).

120. *Proud Mary*, LASTFM, http://www.last.fm/music/Ike+&+Tina+Turner/_/Proud+ Mary (last visited Sept. 5, 2013).

121. *Id.*

122. Perkins wrote and recorded "Blue Suede Shoes" in 1955. *See Legend Carl Perkins*, ROCKABILLY TENNESSEE, http://rockabillytennessee.com/legend_carl_perkins.htm.

123. *See* Cohan, *supra* note 36.

124. *Id.*

125. *See* Cohan, *supra* 36; *see generally* Part III.B.

D. Policy Discussion: Negative Costs of Current Licensing Model

The traditional (restrictive) model of disseminating ballets is based on contract law; a choreographer distributes her work via contracts that are negotiated with dance companies on a case-by-case basis. Under this model, the choreographer maintains tight artistic control over her ballet; the goal is to ensure that the dance company (the licensee) will not change the choreography in any way, but will instead perform the ballet in exact accordance with the choreographer's original vision, following the steps, style and stage instructions of the original staging of the ballet.[126]

There are three main negative costs to this model. First, because choreographers will often insist on being personally involved in any re-staging of their ballets, some works of choreography are performed rarely, or not at all.[127] The general public experiences this loss—if a ballet is staged only once every ten years, and performed only in London or New York, then the public is limited in its opportunities to see the ballet performed live.

Second, there is a negative cost for professional dancers: dancers may have little or no opportunity to perform challenging choreography by some of the most innovative choreographers of the last century. A dancer may have a professional career of fifteen or more years, and yet never get the chance to challenge herself by performing in a ballet by Twyla Tharp, Elliot Feld or Ulysses Dove.

Finally, perhaps the most profound negative cost of the current distribution framework is that there is no possibility for creative adaptations—no "cover" versions of ballets that extend and expand upon the concepts of the original ballet. This loss is borne chiefly by the public, but it is a loss to the dance community as well. All three of these negative costs are discussed in detail below.

1. *Scarcity of Certain Masterworks; Dearth of Live Performances*

The traditional (restrictive) model imposes a negative cost on the public and the dance community by causing masterworks to be preformed sparingly, or not at all. Jerome Robbins is considered one of America's

126. Krystina Lopez de Quintana, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies over Pioneering Choreographers,* 11 Vill. SPORTS & ENT. L.J. 139, 162–63 (2004).

127. *See infra* Section III.D.1. A choreographer has finite time to spend restaging previously created ballets; if a choreographer insists on personally restaging all subsequent productions of her work, and her schedule is booked for the next eighteen months, a company that wants to perform one of her ballets may have to wait a long time indeed. If five ballet companies are waiting to perform a particular ballet, the problem is amplified. *Id.*

greatest choreographers.[128] In addition to creating dance for film *Westside Story* and Broadway's *Fiddler on the Roof*, Robbins also choreographed over sixty works for the New York City Ballet and other classical ballet companies.[129] Throughout most of his lengthy career, Robbins preferred to personally cast and rehearse all subsequent stagings of these ballets.[130] As a result, Robbins' ballets were performed only sparingly during his career.[131]

This negative cost—the scarcity of live performances of certain masterworks—is borne chiefly by the general public; the traditional (restrictive) model has the effect of restricting the number of live performances available to the public.

2. Loss of Performance Opportunities for Dancers

There is a second group that experiences a loss under the traditional (restrictive) model: the community of professional dancers. Many professional dancers will go their entire careers and then retire without ever getting a chance to perform a ballet by Lar Lubovitch or Jose Limon.[132] This negative cost—imposed by the current traditional (restrictive) framework—is attributable to the lack of a compulsory license for choreographic works.

To illustrate this point, it is useful to contrast the performance options of a professional ballet dancer with that of a professional jazz musician. When a jazz musician takes the stage at Yoshi's in San Francisco, if the musician and his colleagues want to attempt an exact copy of "Take Five" as performed by The Dave Brubeck Quartet on their 1959 album "Time

128. Multiple winner of Academy Awards and Tony Awards, Jerome Robbins is considered by the Dance Heritage Coalition to be "[t]he greatest of American-born ballet choreographers and the best choreographer in Broadway's golden years . . . ." *Jerome Robbins*, THE HERITAGE COALITION, http://www.danceheritage.org/robbins.html (last visited Oct. 25, 2013).

129. *See About Jerome Robbins*, THE JEROME ROBBINS FOUNDATION AND ROBBINS RIGHTS TRUST, http://jeromerobbins.org/about (last visited Sept. 5, 2013).

130. Interview with Christopher Pennington, Executive Director of The Robbins Rights Trust (Mar. 5, 2013).

131. *Id.* Robbins's ballets are now licensed to dance companies by The Robbins Rights Trust, using a model similar to that of the Balanchine Trust. *Id.* There are currently between ten and fifteen ballet masters who are authorized to restage Robbins's ballets and as a result, his work is performed more frequently today than during his career. *Id.*

132. Lar Lubovitch is an award-wining American choreographer who has created over 100 ballets. *See Lar Lubovitch*, LUBOVITCH, http://lubovitch.org/Company/Lar_ Lubovitch/lar_ lubovitch.html (last visited Oct. 25, 2013). Jose Limon, choreographer of the ballets *Missa Brevis* and *The Moor's Pavane* was an American choreographer who is considered one of the seminal figures in the development of modern dance. *See Founders*, LIMON, http://limon.org/about-us/founders/ (last visited Oct. 25, 2013).

Out"[133] then the musicians are free to do so.[134] Likewise, if the jazz musicians want to attempt a version of "Moon River"[135] that alters the tempo and time signature of the musical composition, and also playfully inverts the melody in several different ways, then they are free to do this, as well.[136] The framework for covering and performing musical compositions allows them to perform both an "exact" or near exact copy of a preexisting work, or an innovative new "cover version" of a pre-existing work.

A professional dancer has no compulsory license on which to rely; if the dancer is inspired by a work and wants to perform it onstage, she must obtain permission in advance. Thus, under the traditional (restrictive) model, the performance options of professional dancers are constrained; dancers do not have the freedom to perform whatever ballet they wish.[137] The traditional (restrictive model) has placed control directly in the hands of the choreographer or copyright holder; this allocation of rights has negative consequences for professional dancers who may wish to test themselves with innovative new choreography, but are constrained from doing so.

3. Absence of Transformative "Covers" / Adaptations

Perhaps the most profound cost of the traditional (restrictive) model of disseminating ballets is that the model does not permit transformative, creative, and innovative adaptations of recent masterworks.[138] Put simply, the dance community and the general public suffer from the absolute absence of creative re-stagings (cover versions) of modern ballets.

Previous sections of this note have discussed the benefits that the compulsory licensing scheme for musical compositions has brought to musicians and the general public.[139] By allowing subsequent artists to make their own creative adaptations of existing songs, the compulsory

133. Brubeck's *Time Out* was the first jazz album to sell a million copies. *Newshour*: *A Musician of His Time – Remembering Jazz Great David Brubeck* (PBS television broadcast Dec. 5, 2012), *available at* http://www.pbs.org/newshour/bb/remember/july-dec12/brubeck_1205.html.

134. *See* Cohan, *supra* note 36.

135. Composed by Henry Mancini with lyrics by Johnny Mercer for the motion picture BREAKFAST AT TIFFANY'S, the song "Moon River" won the 1962 Academy Award for Best Original Song. *See Awards for Breakfast at Tiffany's*, IMBD, http://www.imdb.com/title/tt0054698/awards?ref_=tt_awd (last visited Oct. 25, 2013).

136. *See* COHEN, *supra* note 1.

137. For most dance companies, the decision to attempt a particular ballet is a decision made by the artistic director of the company, rather than the rank-and-file dancers. Still, artistic directors are likewise constrained by the lack of a compulsory license, and the negative cost of this is borne by the dancers and artistic directors alike.

138. *See supra* Part III.B.

139. *See supra* Part III.C.

license provides an invaluable benefit to professional musicians; it allows musicians to build upon music which inspires them. The compulsory license scheme also provides a significant benefit to the general public, who are free to enjoy several different versions of a masterful song or composition, and may compare, evaluate and consume the versions that appeal to them the most.[140]

What effect would a "compulsory license for choreographic works" have on the dance community? When considering this question, it is useful to examine the one area of the ballet world in which "cover versions" of ballets are permitted, and even celebrated: public domain ballets.

For older ballets that are clearly in the public domain—*Swan Lake*, *Giselle*, *Romeo and Juliet*, *The Sleeping Beauty*, *Cinderella*, etc.—choreographers and dance companies are free to create unique and innovative adaptations of these ballets.[141] Choreographers and artistic directors have responded with an outpouring of creativity. For example, the ballet *Romeo and Juliet* has been staged by choreographers as diverse as John Cranko, Sir Kenneth MacMillan, Rudolph Nureyev, Peter Martins, and Alexei Ratmansky.[142] *Giselle* has received a recent reimagining in which the events of the ballet take place in Creole Louisiana and features a predominantly African-American cast.[143] The venerable ballet *Cinderella* received a notable new restaging in 1987 which transported the characters of the story to 1930s Hollywood.[144] And the stunning commercial success of Matthew Bourne's radical reimagining of *Swan Lake* demonstrates the appetite of the dance public for creative adaptations of master works.[145]

Of course, not every "cover version" of these public domain ballets is equally masterful or equally well received, but that is beside the point; the analysis above merely demonstrates that choreographers who are inspired by these "public domain ballets" *are free to embark upon their own creative adaptations of these ballets.* That is not the case for ballets that

140. *Id.*

141. *Swan Lake* received its first performance in 1877; *Giselle* premiered in 1841. *See* GEORGE BALANCHINE AND FRANCIS MASON, 101 STORIES OF THE GREAT BALLETS 193, 432 (1975). The stories of *Cinderella*, *The Sleeping Beauty*, and *Romeo and Juliet* are firmly in the public domain; choreographers are free to stage whatever versions of these ballets they wish.

142. *Romeo and Juliet*, THE BALLET BAG (Jan. 8, 2009), http://www.theballetbag.com/2010/01/08/romeo-and-juliet.

143. Jennifer Dunning, *Make Way For Two Romeos and a Creole Giselle*, N.Y. TIMES, Sept. 9, 1984, *available at* http://www.nytimes.com/1984/09/09/arts/make-way-for-two-romeos-and-a-creole-giselle.html?pagewanted=all.

144. Rosalyn Sulcas, *Nureyev's Cinderella Is Back*, N.Y. TIMES, Dec. 6, 2011, *available at* http://www.nytimes.com/2011/12/07/arts/07iht-ballet07.html?_r=0.

145. Gia Kourlas, *Prince's Fate, Entwined with Desire*, N.Y. TIMES, Oct. 17, 2010, *available at* http://www.nytimes.com/2010/10/18/arts/dance/18swan.html.

are still subject to the traditional (restrictive) model of dissemination.[146] Thus, the traditional model claims a third group as victims: the choreographers themselves, who are unable to use their creative gifts to produce provocative re-stagings of contemporary ballets that have inspired them.

The "public domain ballet" that is most widely familiar to American audiences is *The Nutcracker*.[147] During the holiday season, *The Nutcracker* will be re-staged and performed by several hundred different dance companies and ballet schools across the United States.[148] In the vast majority of these productions, the choreographers who are in charge will feel free to change the choreography, the sets, the costumes, the sequence of dances, and even the story itself.[149] The choreographer is also free to tailor the ballet to the particular strengths of the performers with whom she is working.[150] The benefits to the public are obvious: the public can enjoy a host of different versions of *The Nutcracker* and decide for themselves if they prefer the version of Lew Christensen, the George Balanchine version, the collaboration between choreographer Kent Stowall and artist Maurice Sendak, Mark Morris's *The Hard Nut*, or even a version performed by a ballet academy at a local community college.[151] All of these benefits are directly attributable to the fact that "The Nutcracker," as a public domain ballet, is not subject to the traditional (restrictive) model.

In summary, allowing a choreographer to tightly control her ballet long after its premiere has a number of profound negative costs for the dance community and the public in general. The traditional (restrictive) model is

146. *See supra* Part III.B.

147. *See* JENNIFER FISHER, NUTCRACKER NATION: HOW AN OLD WORLD BALLET BECAME A CHRISTMAS TRADITION IN THE NEW WORLD (2004).

148. *Id.*

149. *Id.*

150. *Id.*

151. For an excellent account of a dance critic viewing two dozen different productions of *The Nutcracker* during a single winter season, see Alastair Maculay, *Nutcracker' Nation: Yes We Can!* N.Y. TIMES, Dec. 8, 2010 at C1, *available at* http://www.nytimes.com/2010/12/09/arts/dance/09nutcracker.html?_r=0. The Lew Christensen version of *The Nutcracker* is performed yearly by the San Francisco Ballet. *Christensen Brothers*, S.F. BALLET, http://www.sfballet.org/planyourvisit/learn/ christensen_brothers (last visited Oct. 25, 2013). The George Balanchine version is performed by The New York City Ballet and others; *see George Balanchine's The Nutcracker*, N.Y. CITY BALLET, http://www.nycballet.com/Ballets/G/George-Balanchine-s-The-Nutcracker.aspx_(last visited Oct. 25, 2013). Kent Stowell and Maurice Sendak collaborated on a version of *The Nutcracker* created for The Pacific Northwest Ballet, *see Stowell and Sendak Nutcracker*, PACIFIC NORTHWEST BALLET, http://www.pnb.org/ Season/13-14/Nutcracker/ (last visited Oct. 25, 2013); Choreographer Mark Morris created his version of the ballet (*The Hard Nut*) in 1991 and it is a fixture on the yearly December calendar of Zellerbach Hall in Berkeley, CA. *The Hard Nut*, MARK MORRIS DANCE GROUP, http://markmorrisdancegroup.org/hardnut (last visited Oct. 8, 2013).

the framework currently in place; the next section of this note explores the willingness of the dance community to consider alternative frameworks.

E. The "Mindset" of the Dance Community, New Technologies, and the Willingness to Consider New Models of Distribution.

As noted previously, the traditional (restrictive) model is the framework that has arisen over the past century to serve the needs of the dance community.[152] The notion that a choreographer should be allowed to retain tight control over subsequent productions of her ballet has become a core belief for choreographers and the dance community in general.[153]

This traditional (restrictive) model arose before copyright protection was available for choreographic works.[154] Additionally, this model developed before the widespread availability of inexpensive video technology and the rise of the Internet. Changes in copyright law and changes in technology provide ample reason to revisit the question of whether the traditional (restrictive) model is the optimal framework for disseminating choreographic works today.

Consider this example: in 1986, American choreographer Ulysses Dove premiered *Vespers,* a seventeen-minute ballet for six women soloists and six bare wooden chairs, an "explosive dance set to driving percussive music."[155] If this ballet had premiered in 1955, then no copyright protection would have been available, and video technology, of course, would not yet exist. It is likely that the ballet would have been seen only in live performance, and by a relatively small number of audience members.

How would a ballet company in another part of the country become aware of *Vespers*, and how would they learn the choreography? If it were 1955, the traditional (restrictive) model would handle dissemination of this ballet. A dance company in the 1950s might learn of the ballet through a positive newspaper review, word-of-mouth or perhaps the executive director of the dance company saw the live performance. If the dance company wished to attempt the ballet, it would need to license the ballet from the choreographer, and it would also need someone to physically visit the dance company in order to teach the choreography (because no film or video of the ballet existed).[156]

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152. *See supra* Part III.B.

153. Singer, *supra* note 10, at 293.

154. *See supra* Part II. Copyright protection was not available for choreographic works until 1976.

155. Jennifer Dunning, *Review/Dance; Linked by Chairs, in Dove's* Vespers, N.Y. TIMES, Dec. 31, 1989, *available at* http://www.nytimes.com/1989/12/31/arts/review-dance-linked-by-chairs-in-dove-s-vespers.html.

156. *See supra* Part III.B.

Much has changed since 1955. Today, *Vespers* is protected by copyright and available for viewing via PBS's "Great Performances" series[157] and also on YouTube.[158] Thanks to video and Internet technology, ballets can be viewed much more easily than in the past, and as a result, ballet companies in remote locations can readily become aware of appealing new ballets.

And today, virtually every ballet studio is equipped with a VCR/DVD player; an entire generation of dancers has grown up learning ballets from videotapes of old company performances and from DVDs of the previous year's *Nutcracker*.[159] New ballets today are frequently recorded on video; this presents an opportunity for a dance company to learn the choreography of a ballet directly from video, without a personal visit from someone who is familiar with the choreography.

This is not to say that learning choreography from video is equivalent to learning choreography from a ballet master, or from the choreographer herself. It is definitely not equivalent.[160] But the notion that choreography can *only* be learned from the choreographer herself (or an authorized ballet master) in practice functions as an excuse and a justification for restricting access to choreographic masterworks.[161]

In 1927, Hoagy Carmichael composed "Stardust" and fixed the composition on paper in the form of musical notation.[162] Imagine if Carmichael then insisted on personally visiting *each subsequent artist* who wanted to perform "Stardust" to instruct them on exactly what the musical notes meant. Imagine the artist then protested, saying, "I am a professional musician; I am fully capable of reading the musical notes as written on the paper," and then Carmichael responded by saying that there were "nuances" that were not conveyed by the sheet music, and that only he knew exactly how the composition should be played.

The argument made by the fictitious Carmichael above—namely, that only he knows how "Stardust" should be played, and that no one else should be able to perform it unless Carmichael personally instructs him or

157. Mikel Rouse, "*Ulysses Dove's* Vespers *Set To Mikel Rouse's 'Quorum'*" MIKELROUSE, *available at* http://mikelrouse.com/new/ulysses-doves-vespers-set-to-mikel-rouses-quorum/ (last visited Oct. 25, 2013).

158. *Vespers* has been posted on YouTube in several different locations. *See e.g.*, DuncanzibarNo2, *Vespers-Part 1*, YOUTUBE (Aug. 28, 2008), http://www.youtube.com/ watch?v=RNW5VUWRf5k.

159. *See* FISHER, *supra* note 147.

160. Dance community professionals are firm in their belief that learning choreography from the choreographer or a ballet master is superior to learning it from video. Interviews with Fushille, Seiwert and Pennington, *supra* note 104.

161. *See supra* Part III.D. ("Scarcity of Certain Masterworks; Dearth of Live Performances").

162. *See supra* note 116.

her—may strike us today as arrogant or wrongheaded. Yet in essence, this is the argument that is made by defenders of the traditional (restrictive) model; that only the choreographer (or her ballet master) is capable of teaching the choreography in an acceptable manner.[163] And, the traditional model has served to embed the notion that the choreography of a particular ballet should only be performed one way—the way specified by the original choreographer.[164]

Today, technology allows ballets to be seen more widely than ever before; it is perhaps inevitable that dancers, choreographers, and ballet instructors who view these ballets will be inspired and will seek to perform the ballets publicly. As mentioned previously, *Vespers* is available for viewing on YouTube.[165] As of this date the work has been viewed over thirty thousand times, and the enthusiastic fans of this work have left comments, and observations, including: "Studying this dance at the moment and performing an inspired version in my school performance!"[166] and "It would [be] cool to see this with all male dancers."[167]

This note stops short of advocating a compulsory license for choreographic works. It does so for mainly practical reasons: enacting a compulsory license would not only require a change to existing law (a challenge in itself), but it would also be met with ferocious resistance from established choreographers and many other well-intentioned members of the dance community.

Instead, this note proposes a new licensing model that is completely voluntary—each choreographer may choose for herself which model best suits her goals for dissemination of her work. The alternative model described in the next section relies on copyright law (not contract law), and emulates the compulsory license found in the music industry. It is likely that the majority of established choreographers will elect to remain in the current traditional model, deciding that tight artistic control is more important than widespread dissemination of their ballets. However, if a choreographer is comfortable with wider distribution of her work, then the

163. *See supra* Part III.B.

164. *Id.*

165. *See supra* note 158.

166. *Id.* (Comment visible as of March 8, 2013. Performing "an inspired version in [my] school performance" would technically be a copyright violation; the current model of distribution does not allow a public performance without permission from the copyright holder.).

167. *Id.* (Restaging *Vespers* with an all-male cast is an intriguing idea, but it is a creative modification that is not permitted under the traditional (restrictive) model. Under the current model, permission from the copyright holder would be needed before the ballet could be altered or even performed as is.).

new framework described in the next section will provide an attractive alternative to the traditional model.

IV. Proposal: Alternative Licensing Framework for Choreographic Works

Using existing copyright law, it is possible to create an alternative "public license" for choreographers who would like to see widespread performance of their work; choreographers who embrace this (voluntary) licensing model are those choreographers who are comfortable with the potential artistic risks that widespread dissemination brings.[168]

This note proposes a "public license" for choreographic works; actually, a suite of four different licenses, based on models developed by Creative Commons, a nonprofit organization dedicated to providing content creators with "simple, standardized way[s]" to grant others permission to share and use copyrighted works.[169] These four licenses would provide choreographers a way to utilize copyright law (instead of relying solely on contract law) to achieve their goals; the four licenses would provide choreographers with several different ways to customize copyright terms to serve their own particular needs.[170]

The four licenses for choreographers would be entitled: (i) Attribution License, (ii) Attribution License permitting derivative works, (iii) Attribution License with payment terms and, (iv) Attribution License permitting derivative works, with payment terms.

In each of the four licenses, the choreographer would retain control over the attribution requirement—the licensing choreographer would specify how the ballet should be attributed and described in programs and in advertising. The choreographer would specify the exact attribution she wants, or alternatively would provide the licensee with a range of different attributions and instructions.[171]

168. *See supra* Parts III.C. and III.D.

169. *About*, CREATIVE COMMONS, http://creativecommons.org/about (last visited Oct. 25, 2013).

170. This is consistent with the Creative Commons approach ("Creative Commons licenses are not an alternative to copyright. They work alongside copyright and enable you to modify your copyright terms to best suit your needs."). *Id.*

171. For example, the license could specify the attribution "Original choreography by Y" is to be used when the ballet is performed "unchanged" and "in toto." The license could further instruct that, if the choreography is changed in any way, the attribution should instead be "Based on original choreography by Y," or some variation thereof.

The first license, the Attribution License ("AL"), would be based on the Creative Commons model entitled "CC BY-ND."[172] This license would grant the right to perform the copyrighted ballet in public (in commercial, noncommercial or academic settings) with the requirement that the choreography be performed unchanged, as close as possible to the original vision of the choreographer.

By contrast, the Attribution License, permitting derivative works ("AL-PDW")[173] would not only grant the right to publicly perform the ballet, it would also allow the licensee to modify and otherwise build upon the original choreography.

A choreographer would elect to use the AL-PDW if she wanted to see widespread performance of her work and she was also interested in unleashing the creative potential represented by "cover versions" and derivative works of her ballet. This license provides a way for choreographers to engage in new "artistic experiments" akin to those that occur in the music industry when a recording artist releases tracks to the general public specifically with the intent that DJs and other artists take these tracks and "remix" them in interesting ways.[174]

The third and fourth licenses would be identical to the AL and the AL-PDW, except that a brief section ("Payment Terms") would be included. The payment terms would be entirely at the discretion of the original choreographer. If a choreographer wanted set a low price in order to encourage other companies to attempt the ballet, perhaps a flat rate of $100 per performance would be appropriate. Or, a choreographer could specify a sliding scale; for example, "$100 per performance if the box office receipts for the production are less than X, but $500 (or $1,000) per performance if the box office receipts are greater than X." At any rate, a choreographer could decide for herself which payment structure to use, based on her goals for dissemination of the ballet.

After selecting one of the four licenses, the choreographer would customize the sections regarding attribution and payment terms, and then post the final form of the license on his/her website. The choreographer could also elect to post instructions and video of the ballet for licensees to use in recreating the work, and suggestions as to how to perform, adapt or expand upon the ballet.

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172. *See About the Licenses*, CREATIVE COMMONS, http://creativecommons.org/ licenses/ (last visited Oct. 25, 2013).

173. *Id.* This license would be based upon the Creative Commons license entitled "CC BY."

174. For example, when the rap artist Jay-Z released his BLACK ALBUM in 2003, he also released a capella tracks of the vocals to the public, and famously challenged DJs to "remix the sh** out of it." KEMBREW MCLEOD, FREEDOM OF EXPRESSION 153 (2005), *available at* http://www.freedomofexpression.us/documents/mcleod-freedomofexpression.pdf.

The dance company that accepts the terms of the license and performs the ballet would be responsible for sending payment to the choreographer. At present, the dance community has no PRO (such as ASCAP) and no equivalent of the HFA to collect royalty payments for choreographers.[175] As such, the license structure outlined in this Section places the burden on the licensee to remit payment to the choreographer.[176]

The four public licenses described in this section are designed to allow choreographers to use copyright law in order to make their work available to a wider audience. One clear benefit of these public licenses is the reduction in transaction costs—the public licenses are intended to replace the lengthy, individual negotiations that must take place under the traditional (restrictive) model. The lower transaction costs will make widespread dissemination of a choreographer's work all the more likely; the whole idea of the public licenses is to make it easier to perform the already existing works of a choreographer, proceeding on the assumption that that is a good thing.[177]

Two of the licenses (AL-PDW and AL-PDW with payment terms) also allow what the traditional (restrictive) model of licensing ballets does not; namely, the possibility of creative new versions of existing ballets—the equivalent to "cover versions" of musical compositions.[178]

And finally, participation in this new "public license" regime is strictly voluntary; if a choreographer prefers to retain tight artistic control over all subsequent productions of her ballets, then she will eschew these public licenses and continue to rely on contract law and the traditional (restrictive) model. These public licenses merely provide a way—without changing existing law—for willing choreographers to adopt a licensing scheme that emulates the compulsory license for musical compositions. These licenses allow choreographers, if they wish, to permit others to create "cover versions" of their ballets, with all of the potential benefits and hazards

175. *See supra* notes 1, 20.

176. Undoubtedly, there will be some instances in which a ballet is performed but no payment sent to the choreographer. This is less than optimal, but it must be noted that this is no different than the system that already exists today. Currently, a dance company may attempt to perform a ballet without obtaining permission or making payment to the copyright holder; this sort of behavior is typically deterred by a combination of factors including the dance community's non-legal policing mechanisms. *See* Singer, *supra* note 10, at 318 ("The custom of the American dance community does . . . provide choreographers with a realistic, effective mechanism for the enforcement of their artistic rights.").

177. Again, this is a view not necessarily shared by all. An individual choreographer may not be interested in "making it easier" for companies to perform her work; she may prefer that companies be allowed to perform her work only if they are willing to commit to the difficult process outlined in Section III.B. Presumably, a choreographer with this mindset will continue to rely on the traditional (restrictive) model.

178. *See supra* Part III.C.

associated therewith. Choreographers will make up their own minds as to which model best suits their individual needs.

V. Conclusion

At its most essential, copyright provides parameters that govern how creative works may be accessed and also how they may be used.[179] The current framework for accessing and using choreographic works is not based on copyright, but rather contract law; this traditional (restrictive) model arose before choreographic works were eligible for copyright protection and before choreography could be recorded and widely distributed via video technology. One of the objectives of this note is to heighten awareness that the current framework imposes several profound negative costs.

The alternative licensing model proposed herein is based on copyright and is guided by the notion that both the dance community and the general public would benefit from greater access to choreographic works and from allowing choreographers to more freely build upon existing ballets.

Dances are meant to be performed. The dance community and the public are best served by a distribution model that facilitates—and celebrates—that verity.

179. Julie E. Cohen, *Copyright As Property in the Post-Industrial Economy: A Research Agenda*, 2011 Wis. L. Rev. 141, 154 (2011).

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