

DIRTY DANCING:
ATTRIBUTING THE MORAL RIGHT OF
ATTRIBUTION TO AMERICAN COPYRIGHT LAW:
THE WORK FOR HIRE DOCTRINE AND
THE USURPING OF THE ULTIMATE GRAND
DAME AND FOUNDER OF MODERN DANCE,
MARTHA GRAHAM[†]

INTRODUCTION

Martha Graham is an icon of modern artistry.¹ Her glamorous presence and intriguing movements² were of mythic stature even up until her death in 1991 at age ninety-six. At her death she left behind 181 works and a classroom technique that is still taught all over the world.³ Even though her audience grew exceptionally over the thirty years she ran her dance school and company, Graham's dance company, her sole proprietorship and labor of love, was often short of funding. In 1948, she incor-

[†] A different version of this Note was recognized as the winner of the Law Student Initiative writing competition, sponsored by the Entertainment, Arts and Sports Law Section of the New York State Bar Association. In the Summer of 2004, the winning piece was published in Volume 15, Number 2 of the *Entertainment, Arts and Sports Law Journal*, a publication of the Entertainment, Arts and Sports Law Section of the New York State Bar Association.

1. In 1979, The John F. Kennedy Center for the Performing Arts placed Martha Graham in the distinguished Kennedy Center Honoree category in its annual ceremony. The John F. Kennedy Center for the Performing Arts, *The Kennedy Center Honors*, at <http://www.kennedy-center.org/programs/specialevents/honors/history/home>. In 1998, Time Magazine anointed Martha Graham as the most influential dancer of the twentieth century in its "Time 100" series. Terry Teachout, *Time 100: Artists and Entertainers of the Century*, TIME MAGAZINE, June 8, 1998, at 200. See also *Dance World Loses a Pioneer*, ASSOCIATED PRESS, Apr. 2, 1991, at A01 (comparing Graham's early work to Picasso's art and Stravinsky's music).

2. When Margot Fonteyn first witnessed the Martha Graham Company perform, she remarked to Martha how differently the Graham Company's dancers fell than the Royal Ballet dancers. MARTHA GRAHAM, *BLOOD MEMORY* 253 (1991). Fonteyn said, "Why, we fall like paper bags. You fall like silk." *Id.* In her memoirs, Graham wrote that "[M]y dancers never fall to simply fall. They fall to rise." *Id.*

3. Judith Mackrell, *Looking after Martha, After 20 years, the Martha Graham Dance Company is back in London but at a Cost*, THE GUARDIAN, May 25, 1999, at 10.

porated the Martha Graham Foundation for Contemporary Dance⁴ and in 1956, Graham formed her sole proprietorship into a nonprofit, and named it the Martha Graham School of Contemporary Dance, Inc. (“the School”).⁵ The Martha Graham Center of Contemporary Dance (“the Center”) operated as an umbrella organization and oversaw the School and the Dance Company; the Center and the School operated as one entity.⁶

After a staggeringly incredible and much lauded fifty years on the stage, in her seventy-fifth year, Graham reluctantly agreed to stop dancing.⁷ In the wake of her decision, one of her friends advised her to think of herself not as a goddess but as a mortal. Graham replied, “That’s difficult when you see yourself as a goddess and behave like one.”⁸ Subsequently she was hospitalized for a physical breakdown.⁹ Ronald Protas, a close friend and confidant, dedicated himself to caring for her during this time.¹⁰ When she regained her health, Protas helped her reorganize her company.¹¹ Indeed, although his early background was in photography, Graham trained him in her technique, and convinced him to discontinue seeking a law degree in order to help her run the company.¹² He worked closely with her during the final twenty-two years of her life and began serving as the company’s General Director and Associate Artistic Director in the late 1970’s.¹³

As Graham grew frail over the years, afflicted by arthritis, poor eye sight and failed hearing, Protas became “to a great extent her eyes, her ears and her public voice.”¹⁴ Even though he was not a dancer, Graham chose her close companion of over a quarter century to be the Artistic Director of the Center and School.¹⁵ In 1988, in a signed, notarized

4. *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 224 F. Supp. 2d 567, 572 (S.D.N.Y. 2002).

5. *Id.* See discussion of nonprofits, *infra* at 342.

6. *Martha Graham*, 224 F. Supp. 2d at 572.

7. See Laura Shapiro, *After the Ball is Over: Is Martha Graham, 96, Being Done a Disservice by her Handpicked Successor?*, NEWSWEEK, Oct. 15, 1990, at 70.

8. Martha Duffy, *The Deity of Modern Dance, Martha Graham: 1894-1991*, TIME MAGAZINE, Apr. 15, 1991, at 69.

9. Shapiro, *supra* note 7, at 71.

10. *Id.*

11. *Id.*

12. Karen Campbell, *Here in Spirit: Ronald Protas Carries on the Tradition, Grace and Substance of Martha Graham*, THE BOSTON HERALD, Jan. 16, 1996, at 029.

13. Susan Reiter, *Graham Co.: Can Troupe Carry On?*, LOS ANGELES TIMES, June 3, 1991, at F1.

14. In 1990, Protas told NEWSWEEK that he was “sorry people feel [he is] overprotective, but [he did not] think Miss Graham feels [that way].” Shapiro, *supra* note 7, at 71.

15. Clive Barnes, *Is This Crisis Critical?*, DANCE MAGAZINE, Feb. 1, 2001, at 162.

statement, Graham specified to both the structure and future of her company and school: “It will be for Ron Protas... to make the final artistic decision as to the rightness of things artistically for my company and school.”¹⁶ Shortly before her death, she told Protas something to the effect of, “[i]f things don’t work out, not to worry. I’ll settle for the legend.”¹⁷ Protas understood that Graham knew that he was “so steadfastly devoted to her that if things did fall below a certain standard, [he would] stop it all in the blink of an eye.”¹⁸ In her last will, executed on January 19, 1989, Graham named Protas as her sole executor and legatee.¹⁹

In May of 2000, the Center suspended operations because of financial troubles.²⁰ That same year, Protas’ relationship with the Board of Directors (“the Board”) became strained, prompting the Board to vote to remove him from its ranks.²¹ The primary cause for the discord may have been his non-dance background.²² However, it is undisputed that preserving his inheritance from Martha Graham has been Protas’ life work; even his critics “credit him for helping to keep Graham alive and steering the company through financial trauma.”²³ As Graham’s legal heir, once removed from the Center, Protas disallowed the Graham company to either use her name or perform her repertory.²⁴ In July of 2000, he applied to register copyright in forty of Graham’s choreographic works and secured registration for thirty of those works.²⁵

16. Reiter, *supra* note 13, at F1.

17. Campbell, *supra* note 12, at 029. In her memoirs, Martha Graham recounts collaborating with American Ballet Theatre (“ABT”), when Mikhail Baryshnikov was the head of the organization. GRAHAM, *supra* note 2, at 247-49. She recounts that Baryshnikov and she agreed that should ABT perform some of her company’s dances they “would be monitored, and would be coached properly.” *Id.* She goes on to say that other companies asked her to do “absolutely impossible” things, such as wanting to have one of her ballets and wanting “to be able to perform it within two weeks,” which were refused because she became upset when “the technique [was] taught badly.” *Id.* She viewed “technique as a science” and her memoirs make it clear that she was very exacting in whom she trusted to carry on her legacy. *Id.*

18. Campbell, *supra* note 12, at 029.

19. Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 224 F. Supp. 2d 567, 576 (S.D.N.Y. 2002).

20. See Jennifer Dunning, *Martha Graham Center Wins Rights to the Dances*, THE NEW YORK TIMES, Aug. 24, 2002, at B7.

21. See Tresca Weinstein, *Body Language Troupe Sets the Stage in the Martha Graham Tradition for Visit to The Egg*, THE TIMES UNION, Sept. 11, 2003, at 22.

22. See Susan Kraft, *Love Is Not Enough*, THE VILLAGE VOICE, Sept. 23, 1997 (on file with authors) (observing that a layman, such as Protas, can not think about dancing in the same way that a dancer can).

23. Mackrell, *supra* note 3, at 10.

24. See Sylviane Gold, *Modern Phoenix*, NEWSDAY, Feb. 2, 2003, at D19.

25. Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 224 F. Supp. 2d 567, 580 (S.D.N.Y. 2002).

The Center balked at Protas' copyright application and in January 2001, Protas commenced an action in the Southern District of New York against the Center and the School. He sought a declaration of copyright ownership in the ballets choreographed by Graham during her lifetime and that he owned the costumes and sets used in connection with those ballets.²⁶ Protas based his claims on his status as both legatee under Graham's will and as trustee of the Martha Graham Trust, "a revocable trust of which he is the creator, trustee, and sole beneficiary."²⁷ In August 2002, the Southern District of New York held against Protas, and ruled that the Center owned most of the dances in question, per the work for hire doctrines of both the 1909 and 1976 Copyright Acts.²⁸ Most recently, in August 2004, the Second Circuit affirmed.²⁹

With its decision to award ownership of Martha Graham's dances to the nonprofit, the Southern District and the Second Circuit implicitly ignored the principle of moral rights,³⁰ which has governed this type of situation in European civil law countries for many decades. Moral rights protect a creator's personal integrity in her work from being interfered with by others.

This Note argues that the moral right of attribution, (the right to have one's name attached to one's work) which is in direct conflict with the work for hire doctrine, must be applied to the narrow circumstances in which the posterity of the work of a founder of a nonprofit, created solely to further her own artistic vision, is in question. Such an application warrants a critical look at the theory behind the work for hire doctrine in relation to American copyright law. Ultimately, as this Note posits, applying the moral right of attribution to the work for hire doctrine in such narrow circumstances is not a radical proposition. Indeed, a ruling by the Ninth Circuit in 2000 indicates that a shift toward recognizing the fundamental rights of creator-founders of nonprofits is a move this country might be willing to make.³¹

26. Plaintiffs-Appellants Reply Brief at 6, *Martha Graham*, 224 F. Supp. 2d 567.

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

28. *See id.* at 567.

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

30. The word "moral" used in this context does not have a direct translation to the modern English meaning of the word.

31. *See Self-Realization Church v. Ananda Church of Self-Realization*, 206 F.3d 1322 (9th Cir. 2000).

THE SOUTHERN DISTRICT OF NEW YORK AND THE SECOND CIRCUIT
IMPERILED MARTHA GRAHAM'S LEGACY WHEN BOTH COURTS
MISAPPLIED THE WORK FOR HIRE DOCTRINES OF THE COPYRIGHT ACTS
OF 1909 AND 1976

Congress derives the right to enact copyright legislation from the United States Constitution, which grants Congress the power “[t]o promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries.”³² The purpose of federal copyright legislation is to give “the owner of copyrighted materials the exclusive right to reproduce a copyrighted work, to prepare derivative works based upon the copyrighted work, to distribute copies of the copyrighted work to the public by sale or transfer of ownership or by rental, lease or lending, to perform the copyrighted work publicly, or to display the copyrighted work publicly.”³³

*The Courts Misapplied the “Instance and Expense” Test of the
Work for Hire Doctrine of the Copyright Act of 1909*

Although the work for hire doctrine was first codified in the Copyright Act of 1909,³⁴ the common law courts had already fleshed out the doctrine prior to congressional initiative.³⁵ Six years before the codification of the 1909 Act, the Supreme Court laid the groundwork for the work for hire doctrine in *Bleistein v. Donaldson Lithographing Co.*,³⁶ where it ruled that “where an employee creates something as part of his duties under his employment, the thing created is the property of the employer.”³⁷ The work for hire doctrine arose from the common law rationale that when one employs another to produce a creative work, that work properly belongs to the employer.³⁸ The presumption implicit in this rationale is that the work is not entirely the product of the employee’s creativity, because the employer supplied the initial idea and

32. U.S. CONST. art. I, § 8, cl. 8.

33. SCHS. LEGAL SERV. ORANGE COUNTY DEP’T OF EDUC., COPYRIGHT 1 (2002).

34. The Copyright Act of 1909 is applicable to works created and published before January 1, 1978. Copyright Act of 1976, Pub. L. No. 94-553, § 102, 90 Stat. 2598 (1976).

35. See, e.g., *Dielman v. White*, 102 F. 892 (D. Mass. 1900); *Schumacher v. Schwencke*, 25 F. 466 (S.D.N.Y. 1885); *Roberts v. Myers*, 20 F. Cas. 898 (D. Mass. 1860).

36. 188 U.S. 239 (1903).

37. *Brown v. Molle Co.*, 20 F. Supp. 135 (S.D.N.Y. 1937) (citing *Bleistein*, 188 U.S. 239).

38. Scott K. Zesch, Annotation, *Application of “Works for Hire” Doctrine Under Copyright Act of 1976*, 132 A.L.R. FED. 301 (1996).

motivation for the project and the means for executing it. The work for hire doctrine provides an efficient, bright-line rule that easily enables courts to resolve conflicts in an employer-employee situation. The 1909 Act added little to the then existing common law work for hire doctrine.³⁹ The Act made the employer the “author” and initial copyright holder of “works made for hire,”⁴⁰ but failed to define both “employer,” and “work for hire.” The legislative history of the Act does not provide any insight into these omissions.⁴¹

In 1966, the Second Circuit considered the 1909 Act’s work for hire doctrine in *Brattleboro Publishing Co. v. Winnill Publishing Corp.*⁴² The *Brattleboro* court set forth the “instance and expense” test. The opinion stated that the works made for hire doctrine was “applicable whenever an employee’s work is produced at the instance and expense of his employer. In such circumstances, the employer has been presumed to have the copyright.”⁴³ Several years later, in 1972, the Second Circuit held in *Picture Music, Inc. v. Bourne, Inc.* that “an essential element of the employer-employee relationship, [is] the right of the employer ‘to direct and supervise the manner in which the writer performs his work.’”⁴⁴ In 1974, the Second Circuit stressed, in *Siegel v. National Periodical Publications, Inc.*, that the “instance and expense test” is met “when the motivating factor in producing the work was the employer who induced the creation.”⁴⁵

More recently, the Ninth Circuit applied the work for hire doctrine of the 1909 Act in *Self-Realization Church v. Ananda Church of Self-Realization*.⁴⁶ The issue in *Self-Realization* was whether the written works of a monk who lived in a nonprofit church that he founded in order to teach and share his religious vision could be considered works for

39. Matthew R. Harris, Note, *Copyright, Computer Software and Work Made for Hire*, 89 MICH. L. REV. 661, 670 (1990).

40. *Id.*

41. *But see* CONFERENCE ON COPYRIGHT, MEMORANDUM DRAFT OF A BILL TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT 13 (1906), reprinted in *Legislation History of the Copyright Act of 1909* pt. E, at xxxix-xxx (E. Brylawski & A. Goldman eds. 1976). It is notable that an early draft of the bill included employers within the definition of “author” in the case of a work produced by an employee during the hours for which his salary is paid, subject to any agreement to the contrary.” *Id.*

42. 369 F.2d 565 (2d Cir. 1966). This case adopted the Ninth Circuit’s holding in *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965) (reasoning under the Copyright Act of 1909 that “the copyright shall be in the person at whose instance and expense the work is done”).

43. *Brattleboro*, 369 F.2d at 567.

44. 457 F.2d 1213, 1216 (2d Cir. 1972).

45. 508 F.2d 909, 914 (2d Cir. 1974).

46. 206 F.3d 1322 (9th Cir. 2000).

hire under the 1909 Act.⁴⁷ The monk, Yogananda, founded Self-Realization Fellowship Church (“SRF”), and while living there wrote various books and articles and delivered religious lectures.⁴⁸ SRF obtained copyrights to most of Yogananda’s published books in its own name, classifying them as works for hire.⁴⁹

A decade after Yogananda’s death, James Walters, a member of the church, left SRF to form Ananda, “a rival church dedicated to the teachings of Yogananda.”⁵⁰ Ananda copied some of the copyrighted books, and SRF filed an infringement action.⁵¹ SRF based its claim on the work for hire doctrine, and while Ananda admitted having published the works, it argued that the original church’s copyrights were not valid since the works were not made for hire.⁵² The court decided in favor of Ananda.⁵³ In acknowledging the Second Circuit’s definition of the instance and expense test as reasoned in *Playboy Enterprises, Inc. v. Dumas*,⁵⁴ the Ninth Circuit unambiguously declared that there was no demonstrative evidence that it was at SRF’s instance “that Yogananda decided to write, teach, and lecture.”⁵⁵ The court firmly stated that Yogananda’s “own desire” perpetuated his creations, and because those works were “motivated by [his own] desire for self-expression” they could not be considered to be works for hire.⁵⁶ The court relied on precedent in its description of the rationale underlying the work for hire doctrine, qualifying it as a presumption that “the parties expected the employer to own the copyright.”⁵⁷ Because SRF’s relationship with Yogananda apparently did not involve such a presumption, and even more importantly because “there was no evidence of supervision or control of Yogananda’s work by SRF,” the court decided that the works in question were patently not works for hire.⁵⁸ The courts that heard the Martha Graham case should have used the same cogent reasoning.

In August 2002, Judge Miriam Goldman Cedarbaum of the Southern District of New York wrote a lengthy opinion in which she essen-

47. *Id.* at 1324.

48. *Id.* at 1325.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 1326.

53. *Id.*

54. 53 F.3d 549 (2d Cir. 1995).

55. *Self-Realization Church v. Ananda Church of Self-Realization*, 206 F.3d 1322, 1326 (9th Cir. 2000).

56. *Id.*

57. *May v. Morganelli-Heumann & Assocs.*, 618 F.2d 1363, 1368 (9th Cir. 1980).

58. *Self-Realization*, 206 F.3d at 1327.

tially attempted to answer the question, “What property did Martha Graham, the great dancer, choreographer, and teacher, own at the time of her death in 1991?”⁵⁹ The court focused on the thirty-five year period (between 1956 and 1991) that the Center and the School operated as a combined entity.⁶⁰ The court held that the nonprofits proved ownership in forty-five of the seventy dances in question.⁶¹ In addition, the court held that Protas proved ownership in just one dance.⁶² The court concluded that ten of the dances⁶³ in question are in the public domain, which essentially means that they may be legally performed by anyone, and that in regard to five commissioned dances (two published and three unpublished),⁶⁴ neither side had proven that the commissioning party intended for Graham to reserve the copyright.⁶⁵ Lastly, the court held that neither side had proven that the remaining nine published dances⁶⁶ were published with the required statutory copyright notice.⁶⁷

The court evaluated the dances separately. The dances created before January 1, 1978 are governed by the Copyright Act of 1909, and the dances created after that effective date are governed by the Copyright Act of 1976.⁶⁸ In interpreting the 1909 Act, the Southern District invoked the “instance and expense” test developed by *Brattleboro* and its

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

60. *Id.* at 570. Dances that Martha Graham created before the founding of the Center and the School were not the subject of this litigation.

61. *Id.* The nonprofits were given copyright ownership of *Tanagra*, *Three Gopi Maidens*, *Harlequinade*, *Primitive Mysteries*, *Serenade*, *Satyric Festival Song*, *Dream*, *Saraband*, *Imperial Gesture*, *Deep Song*, *Every Soul is a Circus*, *El Penitente*, *Letter to the World*, *Punch and the Judy*, *Salem Shore*, *Deaths and Entrances*, *Eye of Anguish*, *Ardent Song*, *Embattled Garden*, *Episodes: Part I*, *Acrobats of God*, *Phaedra*, *Secular Games*, *Legend of Judith*, *The Witch of Endor*, *Part Real-Part Dream*, *Cortege of Eagles*, *Plain of Prayer*, *Mendicants of Evening*, *Jacob's Ladder*, *Lucifer*, *The Scarlet Letter*, *O Thou Desire Who Art About to Sing*, *Shadows*, *The Owl and the Pussycat*, *Ecuatorial*, *Frescoes*, *Judith* (created in 1980), *Andromache's Lament*, *Phaedra's Dream*, *Song*, *Tangled Night*, *Persephone*, *Maple Leaf Rag*, and *The Eyes of the Goddess*. *Id.* at 612.

62. Protas was given ownership of *Seraphic Dialogue*. *Id.* at 612.

63. *Id.* at 612-13. The ten dances found to be in the public domain include *Flute of Krishna*, *Heretic*, *Lamentation*, *Celebration*, *Frontier*, *Panorama*, *Chronicle/Steps in the Street*, *American Document*, *Appalachian Spring*, and *Night Journey*. *Id.*

64. These five dances are *Herodiade*, *Dark Meadow*, *Cave of the Heart*, *Judith*, and *Canticle for Innocent Comedians*. *Id.* at 613.

65. *Id.* at 570.

66. These nine dances are *Errand into the Maze*, *Diversion of Angels*, *Clytemnestra*, *Circe*, *Adorations*, *Acts of Light*, *The Rite of Spring*, *Temptations of The Mood*, and *Night Chant*. *Id.* at 613.

67. *Id.* at 570.

68. *Id.* at 587.

progeny, and the court held that Graham's dances were indeed created at the instance and expense of the Center.⁶⁹

The court held that the expense prong of the test had been met because available audit reports revealed that the combined account of the School and Center paid Graham salaries and also because a reading of both the Center's Annual Report and payroll records tended to show that Graham was a full-time employee.⁷⁰ The court stated further that the Center paid Graham's personal and medical expenses, although this point is not explained or elaborated upon in the decision.⁷¹ The court also stated that because it happened that some of the Center's employees, namely other principal dancers, occasionally aided Graham in her creative process, the dances were thus created at the expense of the Center.⁷² Finally, the court rejected Protas' argument that Graham cannot be considered to have been an employee because of her receipt of royalties from the Center and School for her ballets, by holding that there was not enough credible evidence of royalty payments made to Graham by the Center.⁷³

While the court's application of the expense prong is questionable, the Southern District's blatant misapplication of the instance prong of the *Brattleboro* test renders the entire test incorrect. While the court conceded that "Martha Graham was ultimately responsible for making all final artistic decisions relating to the dances," it nevertheless strangely held that the instance prong of the *Brattleboro* test had been satisfied.⁷⁴ The court argued, unpersuasively, that even though the Board had not interfered with her artistic decisions, the "board would try to assist her in her choreographic endeavors," and "made suggestions of an artistic nature to her," and thus contributed to the creative process.⁷⁵ The court's decision that the instance prong had been met is decisively incorrect. In fact, Graham completely dominated the Board of Directors of her non-profit.⁷⁶ And although the Board made suggestions and offered assis-

69. *Id.* at 587-91. *See Playboy Enters. v. Dumas*, 53 F.3d 549 (2d Cir. 1995); *Elec. Publ'g Co. v. Zalytron Tube Corp.*, 376 F.2d 592 (2d Cir. 1967); *Irving J. Dorfman Co. v. Borlan Indus. Inc.*, 309 F. Supp. 21 (S.D.N.Y. 1969).

70. *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 224 F. Supp. 2d 567, 588-89 (S.D.N.Y. 2002).

71. *Id.* at 589.

72. *Id.*

73. *Id.* For this point, Protas relied on *Playboy*, which held that "where the creator of a work receives royalties as payment, that method of payment generally weighs against finding a work-for-hire relationship." *Playboy*, 53 F.3d at 555.

74. *Martha Graham*, 224 F. Supp. 2d at 590.

75. *Id.*

76. *See* Transcript 726-28, *Martha Graham*, 224 F. Supp. 2d 567.

tance, “she alone decided what projects to undertake and when and where she would work.”⁷⁷ The Board’s offers of assistance were simply a natural consequence of its dependence on Graham as the lifeblood of the entire organization. Judge Cedarbaum’s opinion is at its weakest when it attempts to make these instance-related points; evidence that could establish that Martha Graham was a mere hired hand of the nonprofit she founded is just too scarce to be relied upon.

The Second Circuit erroneously affirmed the district court’s decision because as a matter of law, under the 1909 Act, the instance prong of the work for hire doctrine was not fulfilled. Should Protas appeal to the Supreme Court for *certiorari*, our nation’s highest court would be wise to follow the cogent and appropriate reasoning of the Ninth Circuit in *Self-Realization Church v. Ananda Church of Self-Realization*.⁷⁸

As was the case in *Self-Realization Church*, Graham’s dances were motivated by her own “desire for self-expression,” and thus cannot be deemed works for hire. The paradigm present in *Self-Realization Church* is exactly the same as that in *Martha Graham*: an artistic creator founded a nonprofit to promote and spread her own creative vision. The creator then died and a dispute arose regarding the ownership of copyrighted works governed by the 1909 Act. The nonprofit claimed ownership based on the work for hire doctrine. The Southern District and the Second Circuit should have adopted the Ninth Circuit’s logical reasoning. The Center did not play a substantive role in the creation of Martha Graham’s dances. Graham was already an accomplished choreographer before the nonprofit was founded, and her reputation made the Center possible and then successful. It is hard to imagine a scenario in which a creator could establish a successful nonprofit without already having established a reputation for herself in a certain artistic field. The compensation she received could hardly be called an adequate exchange for her unprecedented dances. Further, Graham created the dances independently, without direct supervision from anyone at the Center.

To follow the Ninth Circuit’s reasoning in *Self-Realization Church* is to be logically consistent with the rationale behind the work for hire doctrine. The reason that the United States espouses the work for hire doctrine is because it provides a bright line rule as to who owns a copyright to work in situations where an employer contributes substantially to an individual’s creation through the terms and conditions set forth for

77. Plaintiffs-Appellants Brief at 15, *Martha Graham*, 224 F. Supp. 2d 567.

78. 206 F.3d 1322 (9th Cir. 2000).

her employment. Martha Graham was clearly not on the employee side of that bright-line rule.

The Courts Erroneously Evaluated the Aymes Factors of the Work For Hire Doctrine of the Copyright Act of 1976

In 1955, a movement to reform copyright law commenced.⁷⁹ In its effort to rewrite the Act, Congress faced the formidable challenge of replacing a statute that covered a difficult, technical area, one in which the lawmaking body had little expertise. This problem was somewhat alleviated by the legislature's decision to turn to authors, publishers, and artists for assistance.⁸⁰ The Copyright Act of 1976 is the product of Congress' effort to completely rewrite copyright law,⁸¹ so as to enhance the "predictability and certainty of copyright ownership."⁸² The works for hire provisions were included in this all-embracing revision.⁸³

The 1976 Act specified that works created after January 1, 1978, are governed by the Copyright Act of 1976,⁸⁴ and if a copyrightable work is made for hire, the employer or commissioner is considered the author and thus owns the copyright.⁸⁵ Under the 1976 Act, a work is considered made for hire if (1) it is prepared by an employee within the scope of his or her employment, or (2) is prepared by an independent contractor and falls within one of the varieties of specially ordered or commissioned works identified in the statute, under the proviso that the parties expressly agree in writing that the work is made for hire.⁸⁶ Accordingly, there are two different ways through which a work made for hire can develop: one involving employees, and the other involving in-

79. H.R. REP. NO. 1476, at 47, reprinted in 1976 U.S. Code Cong. & Admin. News 5659, 5660.

80. See Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987).

81. See *Comty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 743 (1989) ("The Act, which almost completely revised existing copyright law, was the product of two decades of negotiation by representatives of creators and copyright-using industries, supervised by the Copyright Office and, to a lesser extent, by Congress."); Litman, *supra* note 80, at 859.

82. Alexandra Duran, Note, *Community for Creative Non-Violence v. Reid: The Supreme Court Reduces Predictability by Attributing an Agency Standard to the Work for Hire Doctrine of the 1976 Copyright Act*, 56 BROOK. L. REV. 1081, 1083 (1990) (citing *Reid*, 490 U.S. at 749).

83. For works made for hire, the duration of the copyright is 95 years from the publication of the work, or 120 years from its creation, whichever is shorter. 17 U.S.C. § 302 (2000).

84. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2598, 17 U.S.C. §§ 101-702 (2000).

85. 17 U.S.C. § 201(b) (2000).

86. *Id.* § 101.

dependent contractors.⁸⁷ The Copyright Act of 1976 altered the doctrine as it was interpreted under the 1909 Act by specifying that only nine types of commissioned works⁸⁸ qualify as works for hire, and then only if the parties have agreed in writing to designate a work as such.⁸⁹

Because the legislative history behind the revisions was not significantly enlightening in terms of Congress' intent regarding the work for hire provisions, the courts were once again confronted with the task of interpreting the modifications.⁹⁰ The application of the work for hire doctrine first involves an inquiry as to the status of the party who prepared the work in question.⁹¹ Because the 1976 Act does not define the terms "employee" or "scope of employment" in its definition section,⁹² the Supreme Court was forced to resolve this glaring omission in *Community for Creative Non-Violence v. Reid*.⁹³

In late 1985, the Community for Creative Non-Violence ("CCNV"), a Washington D.C. nonprofit organization committed to eradicating homelessness, and one of its trustees, entered into a verbal contract with James Earl Reid, a local sculptor, for a sculpture to be featured in the annual Christmas Pageant of Peace in Washington, D.C. CCNV had elected to participate in the event "by sponsoring a display to dramatize the plight of the homeless."⁹⁴ The nonprofit visualized a sculpture of a modern nativity scene in which the traditionally Caucasian, Christian holy family was to be replaced by an African-American family, where "the two adult figures and the infant would appear as contemporary homeless people huddled on a street-side, steam grate."⁹⁵ In addition, CCNV specified that the figures were to be life-sized and that the steam grate would be set on top of a platform base, "within which special-effects equipment would be enclosed to emit simulated 'steam' through the grid to swirl about the figures."⁹⁶ Finally, CCNV indicated that the title of the work was to be "Third World America," and that the inscription on the base was to read "and still there is no room at the

87. *Id.* § 101(2).

88. The nine types of commissioned works include a contribution to a collective work, part of a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer materials for a test, and an atlas. 17 U.S.C. § 101 (2000).

89. 17 U.S.C. § 101 (2000) (defining "work made for hire").

90. See Litman, *supra* note 80, at 901. "Indeed, because the work made for hire definition was part of a settled compromise package, it received little mention." *Id.*

91. See, e.g., Zesch, *supra* note 38, at 311.

92. 17 U.S.C. § 101 (2000).

93. 490 U.S. 730, 738-41 (1989).

94. *Id.* at 733.

95. *Comty. for Creative Non-Violence v. Reid*, 652 F. Supp. 1453, 1454 (D.C. 1987).

96. *Id.*

inn.”⁹⁷ Reid agreed to sculpt the three human figures, while CCNV agreed to construct both the steam grate and the base for the sculpture.⁹⁸ The parties did not sign a written agreement and did not discuss copyright for the work.⁹⁹

Reid worked exclusively on the statue throughout November and half of December in 1985, and was assisted periodically by several people who were paid in installments by CCNV.¹⁰⁰ On December 24, 1985, Reid delivered the completed sculpture to the CCNV premises in Washington, D.C., and was paid the final installment.¹⁰¹ “Third World America” remained on display for one month, and in late January of 1986 it was returned to Reid’s studio for minor repairs.¹⁰² A few weeks later CCNV planned a tour of several cities to raise money for the homeless and requested that Reid return the statue so that it could be the centerpiece of the nonprofit’s initiative.¹⁰³ Reid objected on the ground that the casting material “was not strong enough to withstand the ambitious itinerary.”¹⁰⁴ In March 1986, CCNV again asked Reid to return the sculpture and Reid again refused.¹⁰⁵

Reid subsequently filed a certificate of copyright registration in his name and proclaimed that he planned to take “Third World America” on a “more modest” tour than the one that CCNV had intended.¹⁰⁶ CCNV trustee Mitch Snyder, acting on behalf of the nonprofit, filed a competing certificate of copyright registration.¹⁰⁷ In addition, Snyder and CCNV commenced an action in federal district court seeking return of the sculpture and a determination of copyright ownership.¹⁰⁸ The district court declared that “Third World America” was a work made for hire under section 101 of the Copyright Act of 1976, and that CCNV exclusively owned the copyright in the sculpture.¹⁰⁹ The district court reasoned that Reid was CCNV’s employee within the meaning of section 101(1) of the Copyright Act, and because CCNV was “the motivating

97. *Id.*

98. *Reid*, 490 U.S. at 733.

99. *Id.* at 734.

100. *Id.*

101. *Id.* at 735.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Cnty. for Creative Non-Violence v. Reid*, 652 F. Supp. 1453 (D.C. 1987).

109. *Id.* at 1457.

factor” in the statue’s production.¹¹⁰ The Court of Appeals for the District of Columbia reversed and remanded, holding that “Third World America” was not a work for hire.¹¹¹ The Court of Appeals concluded, in agreement with the Fifth Circuit in *Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises*,¹¹² that “the 1976 Act has greatly restricted the scope of the ‘work for hire’ doctrine,” and that a literal interpretation of the 1976 Act is the most appropriate method of explication.¹¹³ In applying a literal interpretation, the court held that Reid was an independent contractor and not an employee of CCNV, and that “Third World America” did not fall within a category of commissioned work enumerated in section 101(2) of the 1976 Act.¹¹⁴ Thus, Reid owned the copyright in the sculpture.

The Supreme Court “granted certiorari to resolve a conflict among the courts of appeals over the proper construction of the ‘work made for hire’ provisions of the [1976 Act].”¹¹⁵ In *Reid*, the Supreme Court provided working definitions for the terms “employee” and “scope of employment.”¹¹⁶ The Court resolved the disagreement among the circuit courts by firmly adopting the view that these terms should be construed in light of the general common law of agency,¹¹⁷ concluding that Congress had intended to encompass the “conventional master-servant relationship.”¹¹⁸ The Court set forth several factors that may be considered when determining whether someone is to be considered an employee.¹¹⁹ No single factor is determinative, and it is not necessary for the factors

110. *Id.* at 1456.

111. *Cnty. for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1499 (D.C. Cir. 1988).

112. 815 F.2d 323 (5th Cir. 1987).

113. *Reid*, 846 F.2d at 1487.

114. *Id.* at 1494.

115. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 736 (1989).

116. *Id.* at 739-42.

117. *See also* *Aymes v. Bonelli*, 980 F.2d 857 (2d Cir. 1992); *Easter Seal Soc’y for Crippled Children & Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 322 (5th Cir. 1987); *Moore Publ’g, Inc. v. Big Sky Mktg., Inc.*, 756 F. Supp. 1371 (D. Idaho 1999); *City of Newark v. Beasley*, 883 F. Supp. 3d (D.N.J. 1995); *Miller v. CP Chems., Inc.*, 808 F. Supp. 1238 (D.S.C. 1992).

118. *Reid*, 490 U.S. at 740.

119. *Id.* at 751-52. These factors include the hiring party’s right to control the manner and the means by which the product is accomplished, the skill required for execution, the source of the instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party’s discretion over when and how long to work, the method of payment, the hired party’s role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in the business, the provision of employee benefits, and the tax treatment of the hired party. *Id.*

to be given equal weight. Indeed, in some cases, some of the factors will be completely irrelevant.¹²⁰

The Supreme Court affirmed the decision reached by the court of appeals that Reid was not an employee of CCNV, but rather an independent contractor.¹²¹ The Court conceded that “CCNV members directed enough of Reid’s work to ensure that he produced a sculpture that met their specifications,”¹²² but stated that the extent of control a hiring party exercises over the particulars of a work is not dispositive.¹²³ The Court pointed out in its opinion that “all the other circumstances weigh heavily *against* finding an employment relationship.”¹²⁴ Specifically, Reid procured his own tools and performed the work in his own studio in Baltimore, where supervision of his activities by CCNV operatives in Washington was “practically impossible.”¹²⁵ Further, Reid was retained for roughly six weeks, a rather short amount of time, and throughout this time and afterwards, CCNV had no right to allocate additional projects to him.¹²⁶ In fact, except for the deadline set by CCNV for finishing “Third World America,” “Reid had absolute freedom to decide when and how to work.”¹²⁷ Additionally, Reid was paid a fixed amount contingent on the satisfactory completion of the statue, and he had absolute discretion in his selection of assistants.¹²⁸ Finally, the Court reasoned, “CCNV did not pay payroll or Social Security taxes, provide any employee benefits, or contribute to unemployment insurance or workers’ compensation funds.”¹²⁹ Accordingly, the Court concluded, Reid was an independent contractor.¹³⁰

120. In *Aymes*, the Second Circuit noted that “the *Reid* test can be easily misapplied, since it consists merely of a list of possible considerations that may or may not be relevant in a given case.” *Aymes*, 980 F.2d at 861. Accordingly, the court stressed that only a few of the *Reid* factors will be “significant in virtually every situation.” *Id.* The court classified those important factors as “the hiring party’s right to control the manner and means of creation, the skill required, the provision of employee benefits, the tax treatment of the hired party, and whether the hiring party has the right to assign additional projects to the hired party.” *Id.*

121. *Reid*, 490 U.S. at 752.

122. *Id.*

123. *Id.*

124. *Id.* (emphasis added).

125. *Id.*

126. *Id.* at 752-53.

127. *Id.* at 753.

128. *Id.*

129. *Id.*

130. In remanding the authorship issue to the district court, the Supreme Court made clear that if the court determined that “CCNV and Reid prepared the work ‘with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole,’” then CCNV and Reid would be co-owners of the copyright in the work. *Reid*, 480 U.S. at 753 (citing 17 U.S.C. §

In the Martha Graham case, the Second Circuit should have reversed the district court's ruling because the Southern District did not accurately apply the body of law pertaining to the 1976 Act. The district court concluded that the dances created after the effective date of the 1976 Act were, within the meaning of the Act, prepared by Graham within the scope of her employment.¹³¹ In its application of *Reid*, the Southern District laid out the balancing test for determining whether an employment relationship exists.¹³² While it acknowledged all thirteen of the traditional *Reid* factors to be considered in applying the balancing test,¹³³ the district court stressed that those factors "should not merely be tallied but should be weighted according to their significance in the case."¹³⁴ Indeed, the district court applied only the five factors deemed to be the most significant by the Second Circuit in *Aymes v. Bonelli*.¹³⁵ However, the Southern District misapplied three of the five *Aymes* prongs. Therefore, Graham cannot be considered an employee of the Center.

First, the court misapplied the prong that examines the hiring party's right to control the manner and means of creation. Under this prong, the court incorrectly dismissed the fact that Graham possessed all artistic control of her work. The court unconvincingly argues that simply because the Board did not actually exercise its right to control the creation of Graham's dances does not mean that the Board did not still possess such a right.¹³⁶ However, the court overlooks the fact that the Board never had the right to control the creation of Graham's work.

Second, the *Aymes* factor that examines whether the hiring party has the right to assign additional projects is also unfulfilled in this case. As discussed *supra*, the Board made mere suggestions from time to time, but never under any circumstances was it allowed to instruct Graham on how to create and perform.¹³⁷ The right to control prong and the right to assign additional projects prong, analyzed together, are reminiscent of the instance prong under the 1909 Act, which, as discussed *supra*, the court misapplied.

101 (2000)).

131. *Martha Graham Sch. & Dance Found., Inc., v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 224 F. Supp. 2d 567, 591 (S.D.N.Y. 2002).

132. *Id.*

133. *See supra* note 119 and accompanying text.

134. *Martha Graham*, 224 F. Supp. 2d at 591 (quoting *Aymes v. Bonelli*, 980 F.2d 857, 861-62 (2d Cir. 1992)).

135. 980 F.2d 857 (2d Cir. 1992). *See supra* note 120.

136. *Martha Graham*, 224 F. Supp. 2d at 592.

137. *See supra* notes 74-77 and accompanying text.

The third *Aymes* factor that the court misapplied is the skills factor. Graham's talent is undeniable; her place in history is legendary.¹³⁸ Her skills as a choreographer and dancer are arguably unparalleled.¹³⁹ If the Supreme Court in *Reid* found that sculpting is a "skilled occupation,"¹⁴⁰ in its analysis of a local, relatively unknown artist, then there can be no question that under governing law, Graham's occupation is a skilled one as well. Instead of looking to the Supreme Court's interpretation for guidance, the district court characterized Graham as a "senior employee" of the Center, one whose "high level of skill in choreography" does not render her of the "project-oriented status" associated with independent contractors.¹⁴¹ The basis for the court's lackluster qualification of Graham as a mere hired hand, albeit a "senior" one, is preposterous.

Due to the court's misapplication of three of the five *Aymes* factors under the 1976 Act, the Second Circuit should have reversed the Southern District's decision and held that Graham's repertoire cannot be considered a collection of works made for hire. Under both the 1909 Act and the 1976 Act, it is obvious that Graham was not an employee of the Center and thus the work for hire doctrine is inapplicable. The following section of this Note will illustrate how Graham, as a creator-founder of a nonprofit organization, cannot be considered an employee of her organization.

CREATOR-FOUNDERS OF NONPROFITS SHOULD NEVER BE CONSIDERED EMPLOYEES OF THEIR ORGANIZATIONS

Martha Graham's School and Center, as well as most of the nation's artistic and cultural activity, are a part of American economic society known as the nonprofit sector.¹⁴² Nonprofits have long been a major driving force behind American culture, and represent our society's belief that individuals can improve the lives of those around them.¹⁴³ This belief exists because nonprofits, unlike any other type of American

138. See *supra* pages 326-327.

139. *Id.*

140. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989).

141. *Martha Graham*, 224 F. Supp. 2d at 592.

142. MICHAEL O'NEILL, *NONPROFIT NATION: A NEW LOOK AT THE THIRD AMERICA* 151 (2002). "According to the IRS... there were 23,779 nonprofit arts, culture, and humanities organizations circa 1998, with \$19.4 billion in revenue, \$15.2 billion in expenses, and \$46.5 billion in total assets..." *Id.* at 153. See *id.* at 11, Table 1.2.

143. LESTER M. SALAMON, *THE RESILIENT SECTOR* 1-2 (2003).

institution, are “dedicated to mobilizing *private initiative for the common good*.”¹⁴⁴

The United States government does not play a major role in the country’s arts and culture scene. In contrast, many governments in other developed countries, such as France, Germany and Sweden, are extremely involved in their arts and culture scenes.¹⁴⁵ However, Congress and state legislatures do recognize that certain types of organizations benefit communities and society as a whole, but are not profitable enough to support themselves financially.¹⁴⁶ Per this recognition, the government acknowledges that these enterprises ought to be exempt from the burden of income taxes shouldered by other types of businesses.¹⁴⁷ It is generally recognized that society ought to support and foster these organizations in return for the societal benefits they provide.¹⁴⁸ Tax exemptions lift the financial burden of nonprofits considerably because most cannot financially support their operations.¹⁴⁹ Tax advantages are vital to the survival of arts nonprofits, since donations and grants are their single largest source of income.¹⁵⁰

In particular, arts nonprofits provide vehicles for expression that “enrich human existence”¹⁵¹ by providing our social and cultural communities with dynamic forums for healthy debate and the articulation of diverse sentiments. One leading civic and community behavioral expert pointed out that art is invaluable in “transcending conventional social barriers....”¹⁵² In addition, art in America has a significant economic impact on society, an assertion strengthened, for example, by a 1999 study conducted by the National Endowment for the Arts that concluded that consumers spent \$10.2 billion on admission to performing arts events, as

144. *Id.*

145. O’NEILL, *supra* note 142, at 151; *see also id.* at 157, Table 8.4 (listing income sources of selected arts nonprofits).

146. *Id.* at 151.

147. The Nonprofit Resource Center, *What is a Nonprofit Corporation?*, at <http://www.not-for-profit.org/page2.htm> (last visited Mar. 29, 2004).

148. *Id.* *See also* SALAMON, *supra* note 143, at 8. The largest category of nonprofit organizations are those eligible for exemption from federal income tax under §501(c) (3) of the Internal Revenue Code, and the “closely related ‘social welfare organizations’ eligible for exemptions under §501(c) (4) of the Internal Revenue Code.” *Id.* There is no definitive number of nonprofit organizations in the United States, but “[a] conservative estimate would put the number of... §501(c) (3) & (c) (4) at 1.2 million as of the mid-1990s....” *Id.*

149. *See* I.R.C. § 501(c) (3) (2003).

150. O’NEILL, *supra* note 142, at 20, Table 1.4.

151. *Id.* at 13.

152. *Id.* at 159.

compared with \$8.2 billion on admission to spectator sports, and \$7.4 billion on admission to motion pictures.¹⁵³

While a nonprofit cannot have an owner, it can have a board of trustees and often an executive director.¹⁵⁴ In the case of an artistic nonprofit, if there is a person whose artistic vision drove the founding of the corporation and drives its agenda, she is often named the executive director, since she is likely to be “uniquely qualified.”¹⁵⁵

In fact as well as in theory, [the founder] serve[s] at the pleasure of the Board of Directors and [is] subject to a contract. In practice, however, [her] job security come[s] from [her] status as the single entrepreneur. Without [her], the organization fails (or at least suffers tremendous artistic and financial crises). [The founder is] the organization’s single largest asset.¹⁵⁶

Artists found nonprofits so that they can continue to create artworks, execute them for the public, and teach their techniques to others. If creator-founders are considered mere hired hands of these infant nonprofits, then the founding of the organization becomes adversarial and the nonprofit’s benefits to society are threatened. Further, from a public policy standpoint, society can only stand to benefit from exposure to creator-founders’ reputable teachings and works. To qualify such an artist as a hired hand of the nonprofit is to effectively punish her for having a vision. If willing and able, creator-founders of nonprofits should presumptively always be deemed the executive directors of their nonprofits.

As this Note will continue to illustrate, creator-founders should never be treated as employees. The theory of moral rights, and specifically the right of attribution, provides further credence for this argument.

153. NAT’L ENDOWMENT FOR THE ARTS, RESEARCH DIVISION NOTE NO. 77, “The Arts in the GDP: Consumers Spend \$10.2 Billion on Admission Receipts for Performing Arts Events in 1999” (Washington D.C. 2001).

154. Bruce R. Hopkins, Bruce R. Hopkins Nonprofit Law Center, *Resource Center: Basic Concepts*, at <http://www.nonprofitlawcenter.com/resources.jsp?docId=137> (last visited Oct. 31, 2003).

155. Michael L. Wyland, Sumption & Wyland, *Can the Founder of an Organization Also be an Employee?*, Internet Nonprofit Center, at <http://www.nonprofits.org/npofaq/19/43.html> (Sept. 8, 2003).

156. *Id.*

THE UNITED STATES SHOULD EXTEND VARA'S MORAL RIGHTS
PROTECTION TO PERFORMING ARTISTS

The theory of moral rights, originating from the French term “droit moral,” arises from the European concept that an artist’s creation is the direct product of, and therefore part of, her personality.¹⁵⁷ Moral rights protect the creator’s personal and spiritual expressions in her work.¹⁵⁸ Moral rights allow the law to recognize a creator’s inherent rights in works of art, revealing a societal belief that artists ought to have a level of control over their creations not enjoyed by creators of other types of personal property, because of the perceived connection between an artist and her artwork.¹⁵⁹ This perceived connection caused European civil law countries, most notably France,¹⁶⁰ to historically recognize the personal interests of a creator in her work separately from her copyright interests.¹⁶¹

The Berne Convention for the International Union for the Protection of Literary and Artistic Works (the “Berne Convention”),¹⁶² originally drafted in 1886, codified the notion of an artist’s separate personal interest in artwork by requiring that signatory countries provide protection for artists’ moral rights.¹⁶³ The Berne Convention currently has more than 90 members.¹⁶⁴ Article 6b provides for the limited moral

157. Colleen Creamer Fielkow, *Clashing Rights Under United States Copyright Law: Harmonizing an Employer’s Economic Right with the Artist-Employee’s Moral Rights in a Work Made for Hire*, 7 DEPAUL-LCA J. ART & ENT. L. & POL’Y 218, 221 (1997).

158. *Id.*

159. Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 WASH. L. REV. 827, 828-29 (1992).

160. See Russel J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists’ Rights in France and the United States*, 28 BULL. COPYRIGHT SOC’Y U.S.A. 1, 7 (1980). The French *droit d’auteur* protects both the artist’s monetary rights and her moral right. *Id.* at 3. Moral rights attach to a creative work under French law if the creator is a natural person and is the actual creator of the work. *Id.* at 12.

161. Alicia M. Phidd, Law Office of Phidd & Associates, *Entertainment Law: Moral Rights & Fair Use – Striking a Balance*, at <http://phiddlawfirm.tripod.com/phiddassociates/id4.html> (Sept. 2001). Even the United Kingdom, from which the United States inherited its common law tradition and copyright law, revised its copyright law to include express moral rights for artists. Copyright, Designs and Patents Act, 1988, c. 48, § 12(1) (Eng.).

162. See The Berne Convention for the International Union for the Protection of Literary and Artistic Works, reprinted in Melville B. Nimmer & David Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas*, 27-2 (1996).

163. Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 96 (1997).

164. See Benjamin S. Hayes, Note, *Integrating Moral Rights into U.S. Law and the Problem of the Works for Hire Doctrine*, 61 OHIO ST. L.J. 1013, 1022 (2000).

rights of attribution and integrity.¹⁶⁵ The Berne Convention was an attempt to provide a “broad provision for moral rights recognition” and a move towards a uniform international body of law with respect to the rights of authors in the works they create.¹⁶⁶

A creator’s right of attribution entitles her to either attach her name to her work, or not to attach her name to her work (anonymity), as well as to the right to publish or display her work under a pseudonym or anonymously.¹⁶⁷ The right of integrity gives the creator the right to protect the physical integrity of her work, namely the right to prevent alteration, distortion or mutilation, or any other derogatory action which affects the work and results in prejudice to the creator’s honor or reputation.¹⁶⁸ The concept embodied by the Berne Convention that a creator’s moral and economic rights in a work are separate, manifests itself in the artist’s right to retain moral rights in a work even after transferring the economic rights to another person.¹⁶⁹

The United States finally joined the Berne Convention in 1988 with the passage of the Berne Convention Implementation Act of 1988 (“BCIA”),¹⁷⁰ and formally adopted its provisions in 1990 with its passage of the Visual Artists Rights Act (“VARA”).¹⁷¹ VARA amends the Copyright Act,¹⁷² and was the result of a long, hard-fought Congressional campaign.¹⁷³ The United States was reluctant to join the Berne Convention because moral rights are inconsistent with the United States’ and United Kingdom’s common law view that copyright is a part of *property* rights, as opposed to the view of European civil law countries that copyright is part of a creator’s *human* rights.¹⁷⁴ Congress, as well as

165. *Id.* See Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 10-11 (1985). Other generally recognized moral rights not included in the Berne Convention include the right of disclosure, the right of withdrawal, and *droite de suite*. See Hayes, *supra* note 164, at 1019-22.

166. Fielkow, *supra* note 158, at 221.

167. *Id.* at 222-23, 223 n.20.

168. *Id.* at 223.

169. See the Berne Convention, *supra* note 162, at 26-27, art. 6b.

170. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

171. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128, 5128-33 (1990). The terms of the Berne Convention are not self-executing; thus it is the responsibility of the member country to execute its terms through its own legal system. Phidd, *supra* note 161.

172. *Carter v. Helmsley-Spear*, 861 F. Supp. 303, 313 (S.D.N.Y. 1994).

173. Charles Ossola, *Law for Art’s Sake*, LEGAL TIMES, Dec. 10, 1990, at 27.

174. William Belanger, *U.S. Compliance With the Berne Convention*, 3 GEO. MASON INDEP. L. REV. 373, 385-87. It is thought that it may be unconstitutional for the United States to fully comply with all of the Berne Convention’s provisions. *Id.* at 385-87. The U.S. Constitution, Article I, § 8, cl. 8, grants Congress the right to secure for authors and inventors the exclusive rights to their crea-

the courts, however, have been, and continue to be, extremely reluctant to expand artists' rights under VARA.¹⁷⁵

In fact, VARA only represents Congress' compromise between protecting the rights of attribution and integrity, and protecting copyright interests.¹⁷⁶ After the ratification of the Berne Convention in 1935, "Congressional support quickly vanished upon realizing that copyright laws would have to be changed to accommodate the inclusion of moral rights."¹⁷⁷ The United States almost always places economic interests before artists' rights.¹⁷⁸

VARA affords considerably less protection to American artists than the Berne Convention does to European artists.¹⁷⁹ This is mostly the result of strong political concerns voiced by those who opposed the introduction of the moral rights concept into American copyright law.¹⁸⁰ VARA only protects two of the different facets of European moral

tions, but only for a limited time. *Id.* at 390 n.138. Some argue that Congress is permitted to provide this limited monopoly right as an incentive for the creation of artworks that are made available to the public. *Id.* Full compliance with the Berne Convention would expand the monopoly beyond that necessary to promote the dissemination of art works. *Id.* For further discussion, see generally Hayes, *supra* note 164, at 1024-27.

175. There have only been three cases in which a court construed the provisions of VARA. See *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 329 (S.D.N.Y. 1994) (holding that a work may not be distorted, mutilated or modified under VARA, if the work is proven to be of recognized stature by satisfaction of a two pronged test); *Moncada v. Rubin-Spangle Gallery, Inc.*, 835 F. Supp. 747, 750 (S.D.N.Y. 1993) (showing that dispute over destruction of a wall mural settled before the merits of the claim were addressed); *Gegenhuber v. Hystopolis Prods., Inc.*, No. 92-C-1055, US Dist. LEXIS 10156, at *11-12 (N.D. Ill. July 13, 1992) (holding that plaintiffs' contributions to a puppet show were not protected works under VARA). None of these cases is instructive in a situation like that of Martha Graham's work.

176. See Edward J. Damich, *A Comparison of State and Federal Moral Rights Protection: Are Artists Better Off After VARA?*, 15 HASTINGS COMM. & ENT. L. J. 953, 955 (1993).

177. Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 382 (1998).

178. See *id.* at 381-82 (explaining the origin of the United States preference of economic efficiency over artists' rights). See also Dasilva, *supra* note 160, at 6 ("[N]o matter how diligently a state may try to protect moral rights, the failure of the federal copyright law even to address the issue creates a national standard of indifference toward artists' rights," and puts copyright above artists' rights.). "By ignoring moral rights, federal law creates a fundamentally 'amoral' copyright." *Id.* at 6.

179. Many European groups have protested the United States' failure to fully comply with the terms of the Berne Convention agreement. European Commission, *Intellectual Property: EU and US at Odds over Authors' Moral Rights*, EUROPEAN REPORT: BRUSSELS, Sept. 14, 1996, Vol. 14, Iss. 2157. One main criticism of the Berne Convention is its failure "to provide [the] legal means to compel a state failing to respect the provisions contained in the Convention." *Id.*

180. See VerSteeg, *supra* note 159, at 830-31 (describing the legislative process leading to the United States accession to the Berne Convention).

rights, those of integrity and attribution.¹⁸¹ The artist is only afforded these rights for the duration of her life,¹⁸² whereas under French law, a creator's moral rights in her creations are perpetual, and can be bequeathed upon the creator's death.¹⁸³ Article 6b of the Berne Convention requires that moral rights in a work continue for the same length of time as the economic copyright.¹⁸⁴ VARA does not provide the rights of anonymity and pseudonymity afforded by the Berne Convention, "nor does it provide the right of faithful reproduction."¹⁸⁵

VARA arbitrarily distinguishes between similarly situated artists, protecting only those who happen to create the "right kind" of *visual art*.¹⁸⁶ In addition, VARA only protects specific types of visual art,¹⁸⁷ whereas Article 6b of the Berne Convention protects all literary and artistic works.¹⁸⁸ In fact, the Congressional debate surrounding the passage of VARA reveals that there was "a consensus that the bill's scope should be limited to certain carefully defined types of works and artists," and that this limitation was considered by lawmakers to be the "critical underpinning of the limited scope of the [Act]."¹⁸⁹ The final version of the Act "was a negotiated solution that confines the application of moral rights to a narrow class of works in which copyright industries have little interest."¹⁹⁰ Thus, although VARA purports to protect artists' rights, it

181. Hansmann, *supra* note 163, at 97.

182. See Matthew A. Goodin, *The Visual Artists Rights Act of 1990: Further Defining the Rights and Duties of Artists and Real Property Owners*, 22 GOLDEN GATE U. L. REV. 567, 569 (1992).

183. DaSilva, *supra* note 160, at 14.

184. Dana L. Burton, Note, *Artists' Moral Rights: Controversy and the Visual Artists' Rights Act*, 48 SMU L. REV. 639, 642-43 (1995). It is uncertain whether VARA will preempt state laws that extend the moral right of an artist past the time of death. See Ossola, *supra* note 173, at 27.

185. Belanger, *supra* note 174, at 375.

186. In one of the few cases interpreting VARA, the Second Circuit noted that "Congress instructed courts to 'use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition [of a 'work of visual art'];' and explicitly stated that 'whether a particular work falls within the definition should not depend on the medium or materials used.'" *Pollara v. Seymour*, 344 F.3d 265, 269 (2d Cir. 2003) (quoting H.R. Rep. 101-514, 101st Cong., *reprinted in* 1990 U.S. Code Cong. & Admin. News 6915, 6921).

187. 17 U.S.C. § 101 (2000). "A work of visual art does not include – (A) (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audio-visual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication...." *Id.*

188. Damich, *supra* note 176, at 947. Fielkow, *supra* note 158, at 225. VARA also provides that moral rights are not transferable, although they may be waived by the creator, and that the duration of moral rights is limited to the life of the creator. *Id.*

189. *Pollara*, 344 F.3d at 269 (citing H.R. Rep. 101-514, 101st Cong., *reprinted in* 1990 U.S. Code Cong. & Admin. News 6915, 6919).

190. Ossola, *supra* note 173, at 27.

only protects a narrow niche of artists engaged in the creation of *visual* works.¹⁹¹ The exclusion of dance works (e.g., choreography) is inconsistent with Congress' alleged reasoning behind the exclusion, namely to cover only unique works, not works that are commonly reproduced.¹⁹²

Most importantly, for the purposes of this Note, VARA explicitly excludes any works made for hire.¹⁹³ Moral rights in a work made for hire do not exist for either party under VARA.¹⁹⁴ Allowing an artist to retain moral rights in ballet choreography, surely a unique creation, would not interfere with the constitutional objective of American copyright law, namely, to ensure "public availability of a broad array of intellectual and artistic works."¹⁹⁵ Indeed, the restrictive scope of VARA is illogical and troubling.

The classification of an artist as an employee becomes vitally important to the life and spirit of both the artist and her art. Choreography is a unique art medium that cannot necessarily be expressed on paper.¹⁹⁶ A dance, made up of a long series of complicated and intricate steps, can only be accurately performed, one might argue, by the choreographer herself, or alternatively by someone who is carefully trained in her method. Martha Graham's dances were legally copyrighted by way of a sequence of notations on paper,¹⁹⁷ but the copyright was truly on the sequence of dance moves as she herself danced, saw, and taught them. Performing art should be considered visual art under VARA, and the courts should abandon the statute's arbitrary distinctions. To separate these renowned dances from an artistic genius such as Martha Graham is to leave her artistically destitute and violates her most basic moral rights in her masterpieces.

This Note proposes that the inconsistency between VARA and the stated purpose of the Berne Convention (the moral rights doctrine) can be resolved through a series of synchronized steps that harmonize the

191. See Hayes, *supra* note 164, at 1023.

192. Michael R. Klipper & John B. Glicksman, *Berne Measure Doesn't Incorporate New Moral Rights into U.S. Law*, LEGAL TIMES, Dec. 24, 1990, at 19.

193. 17 U.S.C. § 101 (2000). "A work of visual art does not include ... (B) any work made for hire; or (C) any work not subject to copyright protection under this title." *Id.*

194. Fielkow, *supra* note 157, at 233.

195. Burton, *supra* note 184, at 656.

196. See generally Kathleen Abitabile & Jeanette Picerno, *Dance and the Choreographer's Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works*, 27 CAMPBELL L. REV. 39 (2004).

197. But see Kraft, *supra* note 22 (stating that "choreography is notoriously difficult to preserve" and that "[n]ot even the best efforts, combining notation with visuals and employing the filter of a writer's selective memory and point of view, bring a work to life as forcefully as direct communication from body to body.").

moral right of attribution with the work for hire doctrine, specifically for creator-founders of nonprofits. The first step, as discussed *supra*, must be the exclusion of creator-founders of nonprofits from the work for hire doctrine, making a non-issue of the fact that full application of the affirmative right of attribution squarely conflicts with the work for hire doctrine.

The second step must be the expansion of VARA to include art forms beyond “visual art,” namely performing arts. The purpose of copyright law, to strike a balance between artists’ rights and the public’s need to access creative works, will not be weakened by this expansion. This Note posits that of all performing art, choreography is the most misunderstood and underestimated because, although it is highly complicated, it tends to look effortless and undisciplined when executed, unlike more mainstream types of visual art, such as film or painting. If Congress were to initiate such an expansion, creator-founders of nonprofits, like Martha Graham, would have the opportunity to take advantage of VARA’s moral right provisions. This narrow subset of artists would be protected from the usurping of their legacy. This is not a radical proposition.

This Note does not suggest that VARA be re-promulgated. While we are dismayed by its lackluster subscription to the Berne Convention and by its minimal usefulness to artists, it is unrealistic to expect a major overhaul of a concededly progressive piece of American legislation. Instead, this Note proposes to work with what Congress has passed. In light of America’s prioritization of economic rights over human rights, one author proposes that full application of the right of attribution can be construed as an economic right.¹⁹⁸ From this point of view, ascribing the moral right of attribution to the creator-founders of nonprofits seems *even less* radical of a proposition for America’s law to recognize. Either the United States should withdraw from the Berne Convention, because its support of the organization is completely paltry, and therefore embarrassing, or the legislature should bring the United States into full compliance with the terms of the Berne Convention by giving artists moral rights in their work and expanding the coverage of VARA to include the performing arts.

Had the Southern District of New York correctly applied the instance and expense test as well as the *Aymes* factors correctly to Martha

198. Hayes, *supra* note 164, at 1027 (arguing that applying the right of attribution to the work for hire doctrine “would tend to give employee-authors greater recognition in their field, and greater bargaining power over the terms of their employment.”).

Graham's works after the inception of the Center, then the logical result would have been that her dances were not works made for hire at all, but rather dances written and taught and performed by her at the very Center that she herself specifically founded for such purposes. Graham would then have had the right, under section 201 of the Copyright Act,¹⁹⁹ to bequeath her copyrights in her dances to Ronald Protas. Although Protas could allow the Center to use these dances if he wished, he could not assert any moral rights to the dances because VARA does not extend to any moral rights in an artistic work past the life of the artist. However, if the United States had fully complied with all of the terms of the Berne Convention, specifically giving artists perpetual moral rights in their works, then Martha Graham's ownership of her dances could rightfully have passed to her protégé Protas. In turn, through Graham's transferred moral right, Protas could assert control over the dances.

CONCLUSION

It is a fundamental truth of human nature that people desire acknowledgement of their accomplishments. The practical manifestation of this axiom is that no one should receive recognition for work that is not one's own. These corollaries provide the backbone for the theory behind American copyright law, as well as for the moral right of attribution. While in language these two theories are in direct conflict, in practice they can be properly distinguished without great disruption to our legal system. Specifically, because the work for hire doctrine should be inapplicable to creator-founders of nonprofits, the moral right of attribution should be freely applicable to this narrow subset of people. Creators of nonprofits such as Martha Graham utilize the nonprofit form in order to relieve themselves of tax burdens that ordinarily would inhibit them from creating their art. To apply the work for hire doctrine to this group is to ironically thrust this burden back upon these creators by forcing them to treat the nonprofit as an adversary even before its birth. The Southern District of New York and the Second Circuit erroneously applied the work for hire doctrines of the Copyright Acts of 1909 and 1976 in the Martha Graham case. Should Protas appeal to the Supreme Court, our nation's highest judges would do well to re-evaluate American copyright law, especially as the work for hire doctrine, an integral component of American employment law, continues to evolve.

199. 17 U.S.C. § 201(d) (1) (2000).

2004]

DIRTY DANCING

351

*Sarah Kutner** and Holly Rich****

** I would like to thank my co-author and friend, Holly Rich, for her tireless work on our Note, and for her spirited encouragement when I wanted to throw in the towel. Thanks also to the *Journal* staff, who diligently helped to edit this Note, and to our advisor, Professor Grant Hayden, whose insightful critiques made us work so much harder. And thanks to my family, friends and Mike, who put up with the many moods that came with writing this Note.

*** Thank you to my co-author, Sarah, for her friendship and patience. I would also like to thank Professor Grant Hayden, for his humor and insight. Many thanks to Elissa Hecker, whose encouragement to undertake this project helped it to succeed, and to Judith Prowda, for her inspiration and gusto. I also wish to thank Matthew Mehnert for his keen editing of this piece. And to the *Hofstra Labor & Employment Law Journal*, it has been a pleasure to serve as your Editor-in-Chief, and I thank you for your hard work on this Note. Thanks to my darling sister, Emily, for showing me the true meaning of grace. I'd like to dedicate this Note to my fabulous parents, Steve and Barbara Rich, for their unwavering belief in me.