

## COMMENTS OF THE DANCE HERITAGE COALITION IN RESPONSE TO THE COPYRIGHT OFFICE'S NOTICE OF INQUIRY CONCERNING ORPHAN WORKS

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Dance Heritage Coalition (DHC), and other members of the dance community, face issues with orphan works that should be solved by enabling more extensive use of copyrighted works.

- DHC serves the dance community by preserving, making accessible, and enhancing materials that document the artistic heritage of choreography and dance performance. DHC's constituencies include dance-related libraries, archives, and museums, as well as academics, critics, and artists.
- The creativity and legacy of the dance community is unnecessarily impeded by orphan works.
  - Members of the dance community are often frustrated in their efforts to use copyrighted works when information relating to the identity and location of owners is incorrect, unavailable, or disputed.
  - When the presumed copyright owner is unresponsive, members of the dance community are unable to license and use works.
  - Members of the dance community are hesitant to rely on the right of fair use because they are unsure whether fair use includes commercial uses and whether it can be used in conjunction with orphan works.
- In consideration of our constituencies' needs, DHC requests the following:
  - Any orphan works definition must be broad enough to encompass copyrighted works with unknown original or subsequent generation owners, works with unresponsive owners, and works with disputed ownership.
  - Any legal standard for determining whether a user has sufficiently searched for the original owner of a work should depend on the facts and circumstances.

- Subsequent generation owners of copyrighted works desiring full protection against good-faith unlicensed uses should maintain correct, searchable ownership information and transfer recordation with the Copyright Office.
- For works owned by subsequent generation owners, a good-faith user must only search the Copyright Office's records.
- Any solution addressing orphan works should apply to commercial as well as noncommercial uses.
- Any solution addressing orphan works should be free from licensing schemes that require end users to pay any entity other than the copyright owner.
- It should be clear that the fair use doctrine can operate concurrently with any solution addressing orphan works.

**I. Dance Heritage Coalition (DHC), and other members of the dance community, face issues with orphan works that should be addressed through a solution enabling more extensive use of copyrighted works whose owners cannot be ascertained or contacted.**

Dance Heritage Coalition (DHC) submits this comment in response to the Copyright Office's Notice of Inquiry "Orphan Works and Mass Digitization." DHC welcomes this opportunity to address the issue of so-called "orphan works" on its own behalf and to offer information about how the issue affects the larger dance community of which DHC is a part. In particular, these comments reflect the concern that the orphan works issue is interfering with the preservation of dance heritage and its transmission across generations.

Historians have found that, "as long as men and women have lived upon this earth, they have danced."<sup>1</sup> Through traditional dances and contemporary interpretations, members of society stay in touch with their pasts and create a shared cultural future. Indeed, every artist and practitioner "find[s] the dance of the future in the dance of the past."<sup>2</sup> Today, dance flourishes in smaller communities and with the greater public; from the concert hall to the community center, to the school or studio, providing a broad public sense of pride and personal investment. However, artistic creation, arts education, and scholarship all must build on what has been created before—and by extension what has been protected by copyright. The inability to engage effectively in negotiations for permission to use preexisting materials can operate as a major bar to new cultural production, namely because information about copyright ownership is absent or confused, or because presumed copyright owners are unresponsive. These self-evident propositions are well illustrated in the various aspects of the dance community.

Part II of this Comment discusses in greater detail DHC's mission to protect and encourage accessibility of dance-related works to the dance community. Part III of this Comment covers situations in which DHC and the dance community as a whole encounter orphan works in

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<sup>1</sup> Jack Anderson, *BALLET AND MODERN DANCE: A CONCISE HISTORY* 13–30 (1992).

<sup>2</sup> Dance Heritage Coalition, *Sustaining America's Dance Legacy: How the Field of Dance Heritage Can Build Capacity and Broaden Access to Dance in the Next Ten Years* (quoting Isadora Duncan), *available at* [http://www.danceheritage.org/leadership\\_forum.pdf](http://www.danceheritage.org/leadership_forum.pdf).

fulfilling their missions. Part IV suggests solutions and recommendations that should be taken into account in the discussion of orphan works.

## **II. DHC serves the dance community by preserving, making accessible, and enhancing materials that document the artistic heritage of choreography and dance performance.**

An educator, archivist, curator, choreographer, dancer, or any other participant in the field of dance must make new uses of the works of previous dancers and choreographers.<sup>3</sup> Access to these works is fundamental for the dance community to celebrate its past. DHC's mission includes access to these works and the promotion of knowledge about dance through collaborative projects that make use of both traditional methods and emerging technologies. DHC is a national alliance of major dance collections and archives, and its members include representatives of major dance collections and archives throughout the country.<sup>4</sup> The material within these collections is maintained for the benefit of dancers, choreographers, dance scholars, historians, folklorists, educators, and the public-at-large. The organization's efforts have resulted in wider access to dance heritage materials.

Examples of DHC's projects include creation of traveling and online exhibitions titled *America's Irreplaceable Dance Treasures*; establishment of fellowships in dance documentation and preservation; development of a statement of best practices in fair use of dance-related materials for archivists, curators, and librarians; assessments and inventories of dance company in-house archives and records; and creation of an online digital resource of seminal dance records and moving images. Dance-related materials in the collections of DHC member institutions (and other collections to which DHC provides support) are a major source of information for scholars, writers, and teachers of dance. In addition, access to dance heritage resources permits existing works to be performed for new audiences<sup>5</sup> and for the rediscovery of lost or forgotten dances and dance forms by performers and dance companies.

As a member of the larger dance community, DHC enables archivists, librarians, academics, teachers, independent choreographers, small and large dance companies, among others,<sup>6</sup> to draw on materials that document the history of dance and to lay the foundation of its future. Therefore, the issues faced by DHC not only extend to the dance community as a whole, but are also representative of the concerns of the broader community. DHC needs a solution addressing issues with orphan works to fulfill their mission. Any solution should also extend to DHC's constituencies (both for-profit and nonprofit), who should be able to use DHC's database of dance records and moving images without fear of legal reprisal from third parties.

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<sup>3</sup> This community also includes photographers, videographers, sets and costume designers, instructors, production staff, and other creators of copyrighted dance-related material.

<sup>4</sup> Member institutions include: American Dance Festival, Dance Notation Bureau, Harvard Theatre Collection, Arizona State University School of Dance in the Herberger Institute, Jacob's Pillow Dance Festival, Jerome Lawrence and Robert E. Lee Theatre Research Institute at The Ohio State University, Jerome Robbins Dance Division at New York Public Library for the Performing Arts, Library of Congress, Museum of Performance & Design, Newberry Library, and UCLA Library.

<sup>5</sup> Productions like *The Nutcracker*, *Swan Lake* and *Sleeping Beauty* have become cornerstones of American culture and are a part of the lives of generations of Americans. See Krystina Lopez de Quintana, *The Balancing Act: How Copyright and Customary Practice Protect Large Companies Over Pioneering Choreographers*, 11 VILL. SPORTS & ENT. L.J. 139, 139-42 (2004).

<sup>6</sup> See *supra* note 3.

### **III. The creativity of the dance community is unnecessarily impeded when its members must defer to the rights of copyright owners who are unascertainable or deal with situations of disputed ownership and lack of responsiveness by presumed owners.**

Copyright protection is above all intended as a means of promoting, enriching, and disseminating national culture. Such protection allows a society's cultural heritage to evolve. The proliferation of orphan works creates a level of legal uncertainty that prevents the realization of these goals. As the Copyright Office explores issues around orphan works in this round of comments, DHC looks forward to a solution that will enhance not only its own activities but also those of nonprofit and for-profit entities within the dance community. Today, however, orphan works create a chilling effect on new creativity and cultural enterprise within the entire dance community.

Members of the dance community, including DHC, regularly encounter three kinds of problems with orphan works. First, their efforts to search out copyright owners who fail to update their copyright information with the Copyright Office are often prohibitively expensive or time-consuming and frequently unsuccessful. Second, they become embroiled in ownership disputes as they seek permission to use certain works. Third, the missions of DHC and other members of the dance community are frustrated when presumed copyright owners fail to respond to licensing requests. Unfortunately, experience has shown that the copyright fair use doctrine has not, as yet, done much to ameliorate these problems.

#### **a. Members of the dance community are often frustrated in their efforts to use copyrighted works when information relating to the identity and location of original and subsequent generation owners is incorrect or unavailable.**

The dance community is often confronted with the problem of identifying and locating copyright owners for works they wish to use.<sup>7</sup> Without access to these works, educators, dance companies, and others involved in the performing arts do not have the raw materials needed to pursue their creative, scholarly, or educational goals.

In the context of preservation and exhibition of dance materials, an example of this problem was mentioned in DHC's 2005 submission on orphan works,<sup>8</sup> in which DHC curators wanted to use a publicity poster from Bob Fosse's Broadway musical *Dancin'*, designed by Bob Gill, in an important exhibit designed to promote the American dance tradition. Neither the Library of Congress (which has the Fosse archive) nor the New York Public Library (which holds other Fosse materials) was able to provide information on the location of Gill or possible heirs. All known avenues were pursued, including the records of the Copyright Office, an effort that consumed approximately two weeks of staff time and yielded no information. Seeking the copyright owner cost DHC significant time and money, while not locating the owner left the organization exposed to potential liability if they chose to use the work. Many members of the dance community, especially smaller dance companies and publishers, lack the resources to conduct an extensive search of this kind. For many potential users, such a search is impossible if they have no reliable means to access updated contact information.

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<sup>7</sup> Owners include both original and subsequent generation owners; subsequent generation meaning when any interest has been conveyed through inheritance, sale, or otherwise.

<sup>8</sup> Dance Heritage Coalition, Statement on Orphan Works (2005), available at <http://www.copyright.gov/orphan/comments/OW0649-DHC.pdf>.

**b. When the ownership of copyrighted works is disputed, members of the dance community frequently find themselves unable to license and use works.**

Problems involving disputed ownership occur when multiple parties, including heirs, assignees, and competitors, disagree as to who rightfully owns a copyrighted work. In these cases, identifying the true owner(s) is an often-insuperable challenge, making it difficult or impossible for a potential user to contract confidently for permission to use the work. This puts them in a familiar dilemma: they can use the disputed works and run the risk of liability, or refrain and forego the cultural benefits of use.

Disputed ownership is especially pronounced where the original choreographer, photographer, or producer has created a work and died without leaving a clear will.<sup>9</sup> DHC confronted this problem when seeking to use the work of Pearl Primus, a dance legend.<sup>10</sup> After her death, three parties claimed the right to perform and license her works. Unfortunately, there was no record that indicated to which of these three parties Ms. Primus intended to convey ownership. The existence of this conflict prevented DHC from using a sample of Ms. Primus' work in an exhibit; likewise, dance companies have been frustrated in their attempts to perform her work. As a result, the public was deprived of access to her powerful choreography that celebrated African dance in the United States.

In another case, DHC attempted to gain permission to use a one-minute clip of the Hollywood film *A Chorus Line* (1985) for a project. Metro-Goldwyn-Mayer (MGM), Warner Brothers, and Canal+ all appeared to be potential owners to the film's copyright.<sup>11</sup> But when contacted, each denied owning the rights and suggested that one of the others did. DHC ultimately spent nine months attempting to resolve the issue.

Disputed ownership creates numerous roadblocks to the access of copyrighted works, while effectively limiting the possibility of using these works to further creative endeavors. Disputed ownership substantially inhibits the dance community's ability to use copyrighted works when many members of the dance community, especially smaller publishers and dance companies, cannot afford to allocate considerable resources and time. Even if the user decides to license from one of the disputed owners, there is no assurance that this license is with the correct party, thereby subjecting the licensee to liability.

**c. When presumed owners fail to respond to permission requests, members do not use the works due to uncertainty about the status of their request.**

An unresponsive owner is an owner of a copyright who fails to respond to inquiries made by a potential user requesting licensing or permission to use a work. This lack of responsiveness to permissions requests is another aspect of the problem of copyright ownership clouded by doubt. When the person who has tentatively been identified as the owner of a work fails to respond to requests from a potential user directed to his or her last address, it puts the user in the position of uncertainty. Is the attribution of ownership incorrect? Did the request fail

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<sup>9</sup> See *Roth v. Pritikin*, 710 F.2d 934 (2d Cir. 1983); see generally 17 U.S.C. § 101.

<sup>10</sup> Anna Kisselgoff, *DANCE VIEW; Pearl Primus Rejoices in the Black Tradition*, N.Y. TIMES, June 19, 1988, available at <http://www.nytimes.com/1988/06/19/arts/dance-view-pearl-primus-rejoices-in-the-black-tradition.html>; see Peggy Schwartz & Murray Schwartz, *Dance Heritage Coalition: Pearl Primus*, available at <http://www.danceheritage.org/primus.html>.

<sup>11</sup> *Supra* note 8.

to reach its target? Or is the owner simply uninterested? In many of these cases, real risks of potential liability attach to a user's decision to proceed. A prospective user with limited resources requesting a license is usually left with three options: deplete finite resources to continue the search for owners, give up entirely on using the work, or risk the looming threat of a copyright infringement suit. In practice, the first and the third are often not available options.<sup>12</sup> Often, members of the dance community are forced to abandon the project in these circumstances.

As an example, DHC wanted to use a photograph by Soichi Sunami in a recent exhibition. The photo titled *Tagore Poem* was of dancer Ruth St. Denis. DHC obtained an address for Ms. Sunami's daughter and sent a letter via certified mail. DHC received the certified mail receipt showing that the letter had been delivered. However, an unknown person named Victor Mercado signed for the letter, and DHC never received any further response. Unable to confirm whether this was where the putative heir currently resided, DHC ultimately chose not to use Ms. Sunami's photograph because the risk was perceived as too great. The dance community's ability to bring the history of the form to the public frequently suffers as a result of such failures of the licensing system.

The issue of unresponsive owners will only become more pervasive as technology progresses. One variant occurs when potential users try to gain permission to use copyrightable works found on the Internet. It is often difficult for potential users to access the information about who owns the work and how to contact that owner because, even when copyrighted materials on the Internet have identifying information, they often are only identified with a user name or email address. If it is already difficult to get a response from owners whose physical addresses are known, having only a user name or email address for owners will make the process of securing a response even more challenging.

**d. Members of the dance community are hesitant to rely on the fair use doctrine in situations of unknown ownership, conflicting ownership claims, or nonresponsive owners.**

Of course there are many situations in which the doctrine of fair use authorizes the use of copyrighted materials by some members of the dance community. For example, dance collections and archives often preserve materials by transferring them to new formats of data storage, curating public exhibitions or presentations of copyrighted material, recording such exhibitions or presentations, discussing copyrighted works in an academic or scholarly setting, or making illustrative materials available to the public via the Internet.<sup>13</sup> In other words, dance collections make transformative use of these materials by adding historical background and critical commentary and making them available to entirely new audiences who would otherwise be unacquainted with the richness of dance legacy.<sup>14</sup> For example, a dance collection's online

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<sup>12</sup> See Jenna Newman, *The Google Books Settlement: A Private Contract in the Absence of Adequate Copyright Law*, 2 Scholarly and Research Communication (2011), available at <http://src-online.ca/index.php/src/article/view/29/47> (stating that unresponsive owners subject potential users to a level of legal uncertainty in using the copyrighted works, thus tying the users' hands).

<sup>13</sup> Dance Heritage Coalition, *Statement of Best Practices in Fair Use of Dance-Related Materials* 8–17 (2009) (explaining the many fair uses and limitations of use of copyrighted materials by a Dance Collection).

<sup>14</sup> *Id.* at 10–11.

exhibit of a particular company's dance records might transform a poster, which had the original function of advertising a performance, into an illustration of the company's rich artistic legacy.

However, other members of the dance community (such as publishers and performing companies) are uncertain of how to apply the fair use doctrine and lack general confidence in applying it to situations where the owner is unknown, disputed, or unresponsive. Further uncertainty stems from the fact that some small commercial entities in the dance community fear that, unlike nonprofit schools or libraries, they may be ineligible to claim fair use.

**i. Many in the dance community believe fair use cannot be used in conjunction with a potential orphan work despite fair use being a right applicable to uses of orphan works.**

Some members of the dance community are uncertain about the application of the fair use doctrine to works with unascertainable or disputed ownership, or those whose presumed owners are unresponsive. First, there is no case law specifically applying fair use to orphan works of any kind. Second, ambiguity has historically surrounded the application of fair use to certain statutory exceptions. Before the incorporation of a provision explicitly stating fair use could be used with Section 108 of the Copyright Act, creating a specific exception for libraries and archives, there was confusion in these and other fields about the applicability of the fair use doctrine. Due to these uncertainties in the context of orphan works, many in the dance community only feel comfortable relying on fair use where the owner of a work is known and responsive: for example, as when permission for use has been requested and unreasonably refused.

The impact of this misunderstanding of fair use is manifested in increased time and resources spent on fruitless attempts to locate owners, ending in the abandonment of plans to use works of dance heritage.<sup>15</sup> As an example, DHC excluded important material from its recent touring exhibition, *America's Irreplaceable Dance Treasures: The First 100*; although DHC itself was confident that fair use allowed its use,<sup>16</sup> one of its project funders took a more conservative line.<sup>17</sup> Thus, uncertainty surrounding the fair use doctrine as applied to orphan works has a chilling effect on the dance community.

**ii. While some commercial uses of orphan works may qualify under the right of fair use, uncertainty surrounding fair use in this context still discourages its application by members of the dance community.**

Many entities in the dance community operate as commercial entities and feel that arguing fair use to defend using orphan works is too uncertain to risk potential litigation. These entities advertise and sell books and performance tickets, put on special shows in exchange for payments, and make films that seek (even if they do not always find) commercial distributions.

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<sup>15</sup> Orphan works may, in fact, be particularly susceptible to fair use. See Jennifer M. Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 BERKELEY TECH. L.J. (Forthcoming) (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2089526](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089526).

<sup>16</sup> These pieces included less than one minute from a 1958 film clip of noted choreographer Helen Tamaris; less than one minute of a clip from the film, *A Chorus Line*; and less than one minute of famed flamenco dancer, Jose Greco. *Id.*

<sup>17</sup> *Supra* note 8 at 1, 3.

Because the Copyright Statute mentions the “commercial nature” of a use as a consideration weighing against fair use,<sup>18</sup> many in the dance community are uncomfortable justifying unlicensed use of orphan works on this basis.<sup>19</sup> Although commercial uses can be considered fair when they are sufficiently transformative,<sup>20</sup> some entities in the dance community either do not understand this principle or are uncertain about its application to their projects.<sup>21</sup> In this vein, many nonprofit and for-profit dance community members alike find that orphan works are not only unavailable to be licensed because the author is unknown, unable to be located, in dispute, or unresponsive, but unavailable to be used under fair use.

Within the dance community, neither for-profit or nonprofit entities have the time or the resources to track down the owners of works that do not have a relatively clear chain of title. Often, they simply choose not to use them rather than try to justify their use under an argument of fair use. For example, rather than building on an obscure but interesting piece from the 1940s for a student recital, a small ballet studio might elect to do yet another rendition of an over-familiar public domain “classic.”<sup>22</sup> As another example, some small specialized publishers may refrain from using educationally valuable but unlicensable educational material for their books, including photographic illustrations. In each instance, fair use might support the use, but because such entities feel that the risk presented by using an excerpt from an unlicensed orphan work is too great, dance students, the dance community as a whole, and the public at large are likely to miss out.

#### **IV. For DHC and the larger dance community, certain essential elements must be part of any solution to the problem of orphan works.**

The future of the dance community and its cultural mission depends on the proper crafting and implementation of an effective and appropriate orphan works solution. To adequately address the issues facing the dance community, listed above, any solution should: (a) provide a definition of orphan works broad enough to encompass the issues presented by unresponsive owners, subsequent generation owners, and disputed ownership; (b) include a clause establishing an affirmative obligation for subsequent generation owners of copyrighted works to maintain correct ownership information; (c) avoid any legal standard requiring a search

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<sup>18</sup> 17 U.S.C. § 107(a).

<sup>19</sup> Within the dance community, the line between commercial and noncommercial uses is blurred. The dance community consists of many entities, including some that are organized as nonprofits but fund themselves, in part, through technically commercial uses of copyrighted material. This community also includes for-profit enterprises, like local dance schools, that deliver important educational services to the community. Just like their nonprofit counterparts, these dance organizations play an important cultural role. They have an equally clear need for predictable, transparent solutions to orphan works issues. *See generally* 4 Nimmer on Copyright § 13:05 (“[T]he statutory juxtaposition between uses of a ‘commercial nature’ and those for ‘nonprofit educational purposes’ divides the world into a Procrustean bed of questionable validity.”).

<sup>20</sup> *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 569 (1994) (“The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”).

<sup>21</sup> Is a small company’s recreation of a “lost” dance transformative? What about a specialized publisher’s use of unprovenanced photographs in an illustrated book? Although strong claims can be made in each instance, the fact that these enterprises are technically “commercial,” whether or not they make profits, can discourage risk-taking.

<sup>22</sup> Although these schools are technically for-profit organizations, and the use of the materials for teaching could thereby be considered a commercial use, many for-profit organizations are small and turn meager profits, if any. Therefore, just like their nonprofit counterparts, there is a clear need for these dance organizations to have access to solutions to orphan works issues.

by the would-be user beyond a database of official ownership records; (d) cover both commercial and noncommercial uses of orphan works; (e) abstain from establishing licensing schemes that require end users to pay a person or entity other than the copyright owner, and (f) clearly allow a concurrent defense of fair use.

**a. Any orphan works definition must be broad enough to encompass copyrighted works that cannot be traced to contemporary owners who would consider giving licenses or permissions.**

Traditionally, works are recognized as orphan either when the original owner of the work is unknown or cannot be located, or when ownership of copyrighted works is transferred to subsequent parties who cannot be located.<sup>23</sup> Regardless of the method used to convey interest in these works, a change in ownership can result in uncertainty and difficulty for potential users to find the new owner. Members of the dance community regularly encounter situations related to this narrow definition of orphan works, namely problems with unknown original and subsequent generation owners. As already noted, however, they also commonly encounter situations involving ownership disputes and unresponsive presumed owners. In any legislative or other initiative to address the issue, the definition must be broad enough to cover the range of problems encountered by members of the dance community.

**i. Works with unknown original or subsequent generation owners fall into the traditional definition of orphan works.**

Traditionally, works are recognized as orphan either when the original owner of the work is unknown or cannot be located, or when ownership of copyrighted works is transferred to subsequent parties who cannot be located. Regardless of the method used to convey interest in these works, a change in ownership results in uncertainty and difficulty for potential users to find the new owner.

Small businesses and nonprofits, including DHC, archivists, and academics, do not have the available administrative capacity or budget to search through indeterminate numbers of records for names and locations of original and subsequent generation owners. The copyright structure in the United States does not provide potential users with a reliable and cost-effective system of finding subsequent owners. Additionally, when original or subsequent owners ignore or abandon any interest they have in a copyrighted work, the public should have proper access without the burden of an intensive, and often fruitless, search; the ease of accessibility and the comprehensiveness of the Copyright Office's searchable database should be on par with the current trademark and patent systems.

**ii. Works with unresponsive presumed owners should be included in the definition of orphan works.**

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<sup>23</sup> The Copyright Office has previously defined an orphan work as “an original work of authorship for which a good faith, prospective user cannot readily identify and/or locate the copyright owner(s) in situations where permission from the copyright owner(s) is necessary as a matter of law.” U.S. Copyright Office, Report on Orphan Works, Register of Copyrights, Library of Congress (2006), available at <http://www.copyright.gov/orphan/orphan-report.pdf>.

As a prospective user repeatedly attempts to contact a presumed copyright owner, sometimes for months or even years, the user wastes time and resources, both of which are already limited for most entities in the dance community. At some point, resource-strapped users are forced to abandon their search. Accordingly, like unknown owners, unresponsive owners cause increased transaction costs that result in a market failure.<sup>24</sup> Therefore, an addition of unresponsive owners to the definition of orphan works is appropriate.

**iii. Works with disputed ownership should be included in the definition of orphan works.**

When ownership of a work is disputed, a potential user should not be required to do a factual investigation to determine the likely outcome of a dispute to which he or she is not a part. This is an inefficient procedure, one that unfairly shifts the costs of dispute resolution away from the actual disputing parties. By contrast, any new solution should allow a user who took a grant from a credible disputant to rely on the grant for the purposes of the particular licensing transaction. This would relegate the question of who should enjoy the license proceeds to a proceeding among the claimants. There may be other solutions available to address the issue of disputed ownership, but the dance community needs a resolution to this issue as part of any orphan works solution.

**b. Subsequent generation owners of copyrighted works desiring full protection against good-faith unlicensed uses should maintain correct, searchable ownership information and transfer recordation with the Copyright Office.**

A user should not have to bear the burden of spending resources on finding an owner that has taken no steps to provide notice. The connection between works and their owners easily can be lost when ownership information is not made public and updated. The Copyright Office already has a method of allowing owners to update their information, but owners are not required to use this procedure.<sup>25</sup> When rights are claimed, when contact information changes, or when rights pass from one owner to a subsequent owner (due to a sale or other transfer), the responsibility should be placed on the owners to identify themselves and provide contact information. Providing ownership information should be a prerequisite to a subsequent generation owner's full protection against good-faith users without actual notice. If requirements were created, the value of the resultant records to the public would depend, additionally, on the ease with which the database or databases in question could be accessed. The goal should be to create a record of ownership data on par with the current trademark and patent systems.

**c. Any legal standard for determining whether a user has searched sufficiently should depend on all the facts and circumstances.**

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<sup>24</sup> See Urban, *supra* note 15 (explaining that while works with uninterested or unaware heirs are not orphan works in the usual understanding of that term, they still present the same unreasonable transaction costs).

<sup>25</sup> See 17 U.S.C. § 205(a). See generally U.S. Copyright Office, Circular 12: Recordation of Transfers and Other Documents 1 (2012), available at <http://www.copyright.gov/circs/circ12.pdf> ("Recording a document is voluntary in most cases. However, to encourage document recordation, the law confers certain legal advantages, including priority between conflicting transfers and "constructive notice.").

Small businesses and nonprofits, including DHC’s constituents, other archives, and academics, do not have the available administrative capacity or budget to search through an indeterminate number of records for names and locations of owners. When original or subsequent owners ignore or effectively abandon their works, the public should have a means of using those works without the burden of an extensive, and often fruitless, search. The copyright structure in the United States currently does not provide potential users with a reliable and cost-effective system of finding subsequent owners because there are no reasons for owners to contribute to such records.

In any event, a good-faith user should be required only to perform an electronic search of these official records before proceeding to exploit a work without a clear chain of title, in confidence that if the copyright owner were to emerge, there would not be recourse against the user. A search requirement qualified by legal standards such as “due diligence” and “best efforts” not only would breed uncertainty and confusion, but would unfairly place the burden on a copyright user by forcing him or her to spend resources on a search of unknown final scope. The purpose behind copyright protection—to promote the creation and dissemination of culture—justifies assigning the burden to the owner rather than the user.

**d. Any solution addressing orphan works should apply to commercial as well as noncommercial uses.**

Any solution addressing orphan works should be flexible enough to accommodate both commercial and noncommercial uses of copyrighted works because this distinction is often arbitrary and difficult to apply. As mentioned above, the line between commercial and noncommercial uses is blurred in the dance community, with nonprofit entities making commercial uses of copyrighted material and for-profit entities making noncommercial uses of copyrighted work. Regardless of their enterprise structure, most of these entities do not have the time or resources to track down the owners of orphan works, which limits their ability to thrive as institutions of cultural production. If commercial uses are not embraced in the solution to orphan works, the uncertainty (or irrationality) of the commercial/noncommercial distinction will continue to impede creativity in the dance community.<sup>26</sup>

**e. Any solution addressing orphan works should be free from licensing schemes that require end users to pay any entity other than the copyright owner.**

In countries that have already implemented them, licensing schemes place large burdens on the user, including a cost burden for each license obtained and a time burden in filing for and securing each license. Extended Collective Licensing (ECL), Administered Licenses, and other licensing systems, such as the ones that have been established in most Northern European

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<sup>26</sup> See *supra* Part III(d)(ii) (illustrating how having a noncommercial-commercial dichotomy as part of the fair use doctrine has prevented members of the dance community from using fair use); see also Nimmer, *supra* note 19 (“[T]he statutory juxtaposition between uses of a ‘commercial nature’ and those for ‘nonprofit educational purposes’ divides the world into a Procrustean bed of questionable validity.”); 4 Patry on Copyright §§ 10:14 and 10:16.50 (stating “the reference to ‘commercial use,’ has caused endless difficulties,” and “not all uses may be classified as purely either commercial or noncommercial, and the vast majority of publicly disseminated uses involve some degree of monetary gain, whether direct or indirect. In logic, those who espouse a noncommercial-commercial distinction are invoking a bivalency that doesn’t exist . . .”).

countries,<sup>27</sup> evidence these problems. Experience suggests that such systems create more of a burden on users, and even some owners, than a benefit.

Although some argue that the benefit of a licensing system is that the user does not have to perform a search,<sup>28</sup> it is costly in many other ways. Many licensing systems impose a fee based on fair market value for the use of any work, whether orphan or not.<sup>29</sup> As applied to orphan works, the essence of these licensing schemes is that the user is required to pay license fees for works whose owners may never surface.<sup>30</sup> In such a situation, rather than benefitting users or owners of works, often the money that is collected benefits collecting society administrators, other copyright owners whose works have not necessarily been used, or cultural charities.<sup>31</sup> Furthermore, these licensing schemes will often require the user to license the same work several times for each different type of use. Like above, if members of the dance community have to apply for numerous licenses to use a single work from owners that may never surface, the high cost would prohibit them from even attempting to use the work at all.

The cost of licenses in this scheme also unduly impinges on creativity and freedom of expression. The lengthy and complicated licensing process, as well as high licensing fees collected by the various licensing agencies, does not necessarily render orphan works more accessible in the countries that have embraced them. On the contrary, although data is incomplete, there is reason to be concerned that licensing schemes actually tend to inhibit uses for cultural organizations such as DHC, and thus may have harmful impacts on the creativity and freedom of expression of end users.<sup>32</sup> In this connection, it is worth emphasizing that the underlying assumptions of the “authors’ rights” systems in which such licensing schemes flourish are profoundly different from the utilitarian values on which copyright in the United

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<sup>27</sup> See Annette Dille, Thomas Dyekjaer, *The Danish Copyright System and Copying Within Libraries*, 31 INT’L J. LEGAL INFO. 445, 447–49 (2003) (discussing Northern European licensing systems); Thomas Riis & Jens Schovsbo, *Extended Collective Licenses and the Nordic Experience: It’s A Hybrid but Is It A Volvo or A Lemon?*, 33 COLUM. J.L. & ARTS 471, 482 (2010).

<sup>28</sup> The costs associated with a reasonably diligent search are “arguably a burden for users,” thus counter-balancing any benefits that a statutory based limited liability provision like that proposed by the Copyright office provides. Lois F. Wasoff, *If Mass Digitization Is the Problem, Is Legislation the Solution? Some Practical Considerations Related to Copyright*, 34 COLUM. J.L. & ARTS 731, 736–38 (2011).

<sup>29</sup> For example in Canada the Government, acting as a “Centrally Administered Licensing Agency,” collects licensing fees from the user, which creates “both a costs and administrative burdens for the user of the orphan work.” *Id.*

<sup>30</sup> David R. Hansen, Orphan Works: *Mapping the Possible Solution Space, Berkeley Digital Library Copyright Project* 18 (Mar. 9, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2019121](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2019121) (“Commentators have noted that the structure of the Centrally Administered License . . . would require potentially wasteful payments to owners that may never collect them.”).

<sup>31</sup> When licensing fees are collected for orphan works, this money is distributed differently depending on the country, but beneficiaries often include selected charities and other copyright owners who are members of the collecting societies involved. Ariel Katz, *The Orphans, The Market, and the Copyright Dogma: A Modest Solution to a Grand Problem*, BERKELY TECH. L.J. 37 (Forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2118886](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118886).

<sup>32</sup> See *id.* (stating that with the Canadian Centrally Administered License system, the protections are weak and expensive. There must be a reasonable effort to find the owner, the license is “nonexclusive and is subject to such terms and conditions as the Board may establish,” and “copyright owner may, not later than five years after the expiration of a license collect the royalties fixed in the license or, in default of their payment, commence an action to recover them in a court of competent jurisdiction”); *id.* at 37 (“Such an [ECL] payment is a windfall for the recipient, and therefore cannot provide any additional incentive to create beneficial works, and from the user side, such a fee constitutes an additional cost, and therefore it would decrease, rather than enhance, access to and dissemination of orphan works.”).

States is founded.

**f. It should be clear that the fair use doctrine can operate concurrently with any solution addressing orphan works.**

As mentioned above,<sup>33</sup> members of the dance community are hesitant to assume that the fair use doctrine permits the use of orphan works. Therefore, any solution regarding orphan works should clarify the nature of its relationship to the fair use doctrine. The doctrine of fair use and any orphan work solution should both be available to any potential user.<sup>34</sup> As shown with existing statutory exceptions that limit copyright owners' exclusive rights, specific exceptions available to users are complementary to the general fair use provision and do not preclude a party from raising fair use in litigation in conjunction with other statutory defenses. Where fair use clearly applies, individual creators and cultural organizations should be entitled to rely on the doctrine, regardless of whether the work in question is arguably orphaned. Failing to ensure that both defenses are clearly available would create ambiguity subjecting organizations to unnecessary duplication of efforts. Any other approach would result in unnecessary use of limited resources and blunt the effectiveness of future orphan works solutions.

## **V. Conclusion**

Any future orphan works solution must consider the hurdles that must be overcome by organizations and individuals operating within the dance community when considering the use of copyright works whose owners are unascertainable, unresponsive, or disputed. Any attempt to overcome these hurdles must be broad in scope, in part considering both commercial and noncommercial contexts equally. Any solution must expand the traditional definition of orphan works since questions of ownership already arise in a number of forms and are likely to increase in number and kind with technological evolution. Encouraging owners, especially those who have acquired works through inheritance or conveyance, to register their claims with the Copyright Office would diminish the financial and administrative strain on organizations that now must search, sometimes fruitlessly, for some trace of the owner. Conversely, establishing compulsory licensing schemes, like those that have been developed in other countries, would merely increase the financial pressure on dance community organizations and stifle artistic expression.

Dance is a prime example of an art form that relies on previous works as source material for inspiration of new works, as well as for the study, discussion, and celebration of its history. A comprehensive and balanced solution to the orphan works problem will assure the future progress of the art of dance. Allowing institutions within the dance community to preserve and

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<sup>33</sup> See *supra* Part III(d)(i) (presenting the concern of the application of fair use for orphan works).

<sup>34</sup> The fair use doctrine is designed to balance the rights of copyright holders of original works with the interests of subsequent authors by maintaining the interest of the public to reasonable access of such copyrighted materials. See 17 U.S.C. § 107 (granting an affirmative defense of fair use contingent on the purpose and character of use, the nature of the copyrighted work, the amount used in relation to the copyrighted work as a whole, and the effect of this use on the market of the copyrighted work); see also Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2539 (2009) (contracting the areas of fair use to contain three main policies: the promotion of free speech, the ongoing progress of authorship, and learning); Dance Heritage Coalition, *supra* note 13, at 6 (describing judicial doctrine as focusing on two factors in the fair use analysis: (1) the extent of which the use of the copyrighted material is transformative, and (2) the amount of copyrighted material used).

disseminate their history without fear of liability to undetermined copyright owners will promote scholarship and learning in the field. Ultimately, it will allow the next generation of creators to build on their common dance heritage without the unnecessary fear of legal liability, and frees them from the burden of attempting to connect works with their missing owners, a task that more properly belongs to those owners themselves.