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DUET OF DISCORD: MARTHA GRAHAM AND HER NON-PROFIT BATTLE OVER WORK FOR HIRE

I. OVERTURE —INTRODUCTION

According to the Second Circuit, Martha Graham, an icon in the world of choreography and beyond, does not own the copyright to most of her masterpieces.¹ This may be shocking to some, especially artists, who often presume that as the creator of a work they are also the owners of its copyright. While artists may be deprived of their rights in a work for hire arrangement,² Graham's situation draws attention to a more complex issue. Many artists like Graham have turned to non-profit organizations to support them in their artistic endeavors. Graham was under the employ of a non-profit organization created solely to support and benefit her creative achievements. However, what may have seemed like an ideal arrangement at the time has now left the copyrights to many of Graham's choreographies with the non-profit organization rather than her estate.

The Second Circuit ruled in *Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.* that Graham never owned the rights to some of her legendary modern dances.³ Although Graham is regarded as on par with some of the most celebrated artists of our time, the court paid little heed to her status when determining the copyright ownership of her work.⁴ Instead, the court ruled that the Martha Graham Center of Contemporary Dance (the "Center"), a non-profit entity formed to benefit and support Graham, and for which Graham worked as Program Director and later as Artistic Director, owned the copyright.⁵ The court, based on the doctrine of work for hire, concluded that because Graham created the dances while she worked as a

1. *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 628 (2d Cir. 2004) [hereinafter *Graham III*].

2. See 17 U.S.C. §101 (2000) (defining work for hire as "(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work" in certain enumerated situations).

3. *Graham III*, 380 F.3d at 628.

4. See Anna Kisselgoff, *Martha Graham Dies at 96; A Revolutionary in Dance*, N.Y. TIMES, Apr. 2, 1991, at A1.

5. *Graham II*, 380 F.3d at 628.

salaried employee, her choreographies belonged to the Center.⁶ The dance community's initial outrage with the Second Circuit's decision stems from the fact that, traditionally, if a work is created at the employer's instance, recommendation, and under the employer's supervision, then it is a work for hire.⁷ Using this guideline, it is difficult for those familiar with Graham's talents to fathom that without the Center's instance she would have failed to choreograph her famed works. In response to the Second Circuit's reasoning, Charles Reinhart, the director of the American Dance Festival and co-author of an amicus curiae brief supporting the plaintiff, retorted that "[t]o think Martha is for hire is like the pope saying to the devil, 'Come to dinner.'"⁸

Although there is virtually no precedent dealing with the work for hire doctrine as applied to a non-profit organization created entirely for an artist's benefit, this matter deserves careful consideration. Given the increase in artists creating non-profits to support their art, the issue presented in Graham's case is not a rarity and is bound to become a reoccurring problem for the courts.⁹ In its analysis, the court ignored the fact that as a non-profit, the Center's objective was to promote, and not obtain, art on behalf of the organization.¹⁰ This key distinction highlights the contradictory goals of for-profits and non-profits. As non-profits serve different needs than for-profit corporations, the court must scrutinize the type of the organization. The court's assumption that the employer-employee relationship is the same for both types of organizations is misguided, and the uniform application of the work for hire doctrine does not best reflect each organization's goals.

Should appellant successfully appeal to the Supreme Court, Judd Burstein, the lawyer for the plaintiff-appellant, should draw attention to the current split among the circuits in the application of work for hire.¹¹ Furthermore, he should argue that when non-profits are created to support an individual artist, "the presumption should be that the artist maintains

6. *Id.*

7. *See id.* at 634-35.

8. Felicia R. Lee, *Graham Legacy, on the Stage Again; The Heir's Determination Is Unabated After a Second Court Ruling*, N.Y. TIMES, Sept. 29, 2004, at E1.

9. *See generally* Brief of Amici Curiae Am. Dance Festival, Inc., Mr. Gerald Arpino and Mr. Gordon Davidson, In Support of Plaintiff's Appellants at 3-6, *Martha Graham Sch. And Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)) (explaining how artists must rely on non-profit support to fund their projects).

10. *See id.* at 9 (highlighting that when for-profit organizations commission work, it is to benefit the corporation, where as non-profits are exclusively trying to benefit the artist).

11. Lee, *supra* note 8.

ownership of the work and they are not works for hire.”¹² Such a presumption would best reflect the purpose of non-profits while maintaining the general principle that the creator retains the rights to his or her work.¹³

Before deconstructing the Second Circuit’s decision, Part II of this Note offers a background on relevant copyright law. It will briefly trace the historical relationship between copyright law and choreography, as well as analyze how courts have applied work for hire under both the 1909 and 1976 Copyright Acts. Part III provides the specific factual background to this case, followed by a description of the procedural history in Part IV. Part V analyzes the court’s flawed application of work for hire to a non-profit entity and finds that this reasoning is in direct conflict with Supreme Court precedent. Additionally, this section sets forth a recommendation for a creative arts policy that supports the original intent behind work for hire and safeguards the artist’s interest. Finally, Part VI concludes that the Second Circuit erred in finding that the Center, irrelevant of its non-profit status, owns the rights to Graham’s dances under work for hire.

II. BACKGROUND ON COPYRIGHT LAW

A. Copyright Law and Choreography

The United States Constitution provides the basis for copyright law by granting Congress the power to “[p]romote the Progress of Science and useful Arts, by securing for limited Times to Authors and Investors the exclusive Right to their respective Writings and Discoveries.”¹⁴ However, courts have not always viewed choreography, the art of creating a dance, as an art worthy of federal protection.¹⁵ Common law copyright first applied to choreography in the nineteenth century.¹⁶ These early decisions illustrate the courts’ general reluctance to extend copyright protection to

12. *Id.*

13. 17 U.S.C. § 101 (2000) (evidencing the general presumption and principle of Copyright Law that the creator is the owner of his or her work).

14. U.S. CONST. art. I, § 8, cl. 8.

15. *See, e.g., Fuller v. Bemis*, 50 F. 926, 929 (C.C.S.D.N.Y. 1892) (denying recovery to choreographer because infringed stage dance was not copyrightable as it lacked apparent story or characters); *Martinetti v. Maguire*, 16 F. Cas. 920, 922 (C.C.D. Cal. 1867) (No. 9,173) (denying copyright protection because the work consisted of scant dialogue accompanied by ballet-like movements).

16. Adaline J. Hilgard, Note, *Can Choreography and Copyright Waltz Together in the Wake of Horgan v. Macmillan, Inc.?*, 27 U.C. DAVIS L. REV. 757, 761 (1994).

dance.¹⁷

1. Choreography Under the 1909 Copyright Act

Under the 1909 Copyright Act, although choreography was not explicitly protected, it could be registered as part of a "dramatic composition."¹⁸ To classify a dance as a dramatic composition, the piece must have a bona fide plot or story told by characters.¹⁹ As a result, abstract or experimental dances choreographed before January 1, 1978 received virtually no protection.²⁰

2. Choreography under the 1976 Copyright Act

In response to an increased popularity of choreography in film, television, and theater, it became necessary for legislators to create a specific category of protection for dance.²¹ To that end, the 1976 Copyright Act collectively lists "pantomimes and choreographic works" as an independent genre deserving of full protection.²² By defining the category this way, rather than as "dramatic compositions," the legislators sought to expand the scope of the Act to include modern dance and other works which lacked a traditional storyline.²³ While the 1976 Act no longer necessitated that dances have plots or tell stories, it limited protection by requiring a work to be both original and fixed. By not explicitly defining the terms "originality" or "choreographic work", the legislators have left the door open for varying interpretations of what constitutes copyrightable dance.

Horgan v. Macmillan, Inc.,²⁴ a landmark decision in the copyright and choreography field, is an example of the confusion which arises absent a clear and uniform definition for choreographic works. In *Horgan*, the estate of choreographer George Balanchine sued Macmillan, a publisher,

17. See *Fuller*, 50 F. at 929; *Martinetti*, 16 F. Cas. at 922.

18. *Seltzer v. Sunbrock*, 22 F. Supp. 621, 629 (S.D. Cal. 1938) (explaining the courts' refusal in the 1909 Act to classify a work as a dramatic composition if it lacks a plot).

19. Borge Varmer, *Study No. 28 Copyright in Choreographic Works, October 1959*, in *STUDIES ON COPYRIGHT* 93, 95-96 (Copyright Soc'y of the U.S.A. ed., 1963).

20. See *id.*

21. See *id.* at 94.

22. 17 U.S.C. § 102(a)(4) (2000). The 1976 Copyright Act applies to work created after or on January 1, 1978. *Id.*

23. See Varmer, *supra* note 19, at 101 (explaining that modern dance deserves protection because it is an original work of authorship, and even if "no 'story' may be readily evident . . . the dance movements are expected to convey some thematic or emotional concept to the audience").

24. *Horgan v. Macmillan, Inc.*, 789 F.2d 157 (2d Cir. 1986).

for copyright infringement.²⁵ Macmillan published a book that featured still photographs of dancers performing Balanchine's version of the Nutcracker ballet.²⁶ The district court reasoned that the photographs did not constitute copyright infringement because they depicted "dancers in various attitudes at specific instants of time," rather than "the flow of the steps in a ballet," and, thus, "[t]he staged performance could not be recreated" from the photographs.²⁷ The Second Circuit overruled the district court's limited understanding of choreography, concluding that even "a single moment in a dance sequence may communicate a great deal."²⁸

The second major addition to the 1976 Act, the requirement for fixation, has proved trying in actual application. Due to the live, performance-driven nature of dance, it is a more difficult medium to fix than a static form such as a novel or painting.²⁹ As a result, courts have accepted different methods of fixation including dance notation, film, and computer software.³⁰ By fixing the work, a copyright owner gains the legal and exclusive right to reproduce the works, to create derivative works, and to perform the work in public.³¹

B. *The Work for Hire Doctrine*

The choreographer's mere creation of a work does not guarantee copyright ownership. Work for hire is an exception to the general rule that the person who creates the work is the author.³² Under this exception, the employer—be it a firm, organization, or individual, rather than the employee—is deemed to be the author of the work.³³ The roots of this doctrine can be traced to the common law of the early twentieth century,

25. *Id.* at 158.

26. *Id.*

27. *See id.* at 160 (citing *Horgan v. Macmillan, Inc.*, 621 F. Supp. 1169, 1170 (S.D.N.Y. 1985)).

28. *Id.* at 163.

29. Leslie Erin Wallis, *The Different Art: Choreography and Copyright*, 33 UCLA L. REV. 1442, 1456 (1986).

30. Krystina Lopez de Quintana, Comment, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies Over Pioneering Choreographers*, 11 VILL. SPORTS & ENT. L.J. 139, 150 (2004).

31. 17 U.S.C. § 106 (2000).

32. *See* United States Copyright Office, *Works Made for Hire Under the 1976 Copyright Act*, Circular 9 (Dec. 2004), available at <http://www.copyright.gov/circs/circ09.pdf> (explaining 17 U.S.C. § 101).

33. *Id.*

when the presumption was that unless contracted to the contrary, the employer of an artist owned the copyright to the artist's works.³⁴ Supporters of this doctrine offer the rationale that "the product of employment should ordinarily belong to the employer" as this is "the result that would usually be brought about by contract or trade custom."³⁵ However, the concept is commonly criticized for creating an artificial designation because it is the *actual* creator who is "intended to be the primary beneficiary of the copyright."³⁶

Despite this criticism, the Supreme Court adopted this common law precept in 1903 because of its supposed simplicity and definiteness.³⁷ In *Bleistein v. Donaldson Lithographing Co.*, the first Supreme Court case to apply the principle, the Court held that the employer owned the copyright to advertisements created by its paid employee as the works were created in the course and scope of employment.³⁸ Later, Congress codified the common law principle in the 1909 and 1976 Copyright Acts.³⁹ To determine which act applies to artistic works, courts follow the Ninth Circuit and look to the date of creation.⁴⁰

1. Work for Hire Under the 1909 Copyright Act

The 1909 Copyright Act includes an employer within its definition of "author."⁴¹ As a result, as long as the employer files a timely application, the employer owns the original term and renewal copyrights to its employee's creation.⁴² Unfortunately, the Act was silent as to which employer-employee relationship qualified under the work for hire doctrine, leaving courts to fill the void.⁴³

Under the 1909 Act, absent express contractual language, courts

34. See Diane C. H. McNamara, *Preserving the Creator's Right of Authorship to Works Made for Hire*, 7 A.B.A. F. ENT. AND SPORTS INDUSTRIES 1, 2 (1989).

35. Borge Varmer, *Study No. 13 Works Made for Hire and On Commission, April 1958*, in STUDIES ON COPYRIGHT 127, 139 (Copyright Soc'y of the U.S.A. ed., 1963).

36. *Id.*

37. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248 (1903).

38. *Id.*

39. McNamara, *supra* note 34, at 2.

40. ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 1.4 (2d ed. 2004) (citing *Wilkes v. Rhino Records, Inc.*, 133 F.3d 931 (9th Cir. 1997)) (holding that artwork created for a regional musical festival that took place in 1966–67 was governed by the 1909 Act even though the infringement occurred after January 1, 1978).

41. 17 U.S.C. § 26 (revised 1976).

42. See 17 U.S.C. § 23 (revised 1976).

43. McNamara, *supra* note 34, at 2 (citing *Dumas v. Gommerman*, 865 F.2d 1093, 1096 (9th Cir. 1989)).

generally use the “instance and expense test” to determine if a work is a work for hire.⁴⁴ This test applies when the employer is the catalyst for a work’s creation and has the right to direct and supervise the project throughout the creative process.⁴⁵ However, some courts have extended this rule in favor of the employer and do not require that the employer actually direct and supervise the creation for it to be deemed a work for hire.⁴⁶ Further, if the parties’ intent cannot be determined, the courts presume that ownership vests in the employer. This presumption is based on the belief that absent the employer’s motivation and furnishing of resources, the work would not have been created.⁴⁷

In *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, the court interpreted the test to apply to both traditional employees and independent contractors.⁴⁸ Any work the employee creates outside the scope of his or her normal duties is not considered to be a work for hire.⁴⁹ In response to the limited guidance offered by the 1909 Act and the varying interpretations that resulted, Congress decided to clarify its original intent for the doctrine in the 1976 Copyright Act.

2. Work for Hire Under the 1976 Copyright Act

To reduce confusion, the 1976 Copyright Act expressly identifies work for hire and distinguishes between independent contractors and traditional employees.⁵⁰ The statute defines the concept either as “a work prepared by an employee within the scope of his or her employment,” or, depending on the medium, “a work specially ordered or commissioned.”⁵¹ This limitation was a Congressional attempt to offer more protection to the

44. See *Graham III.*, 380 F.3d at 634 (under the instance and expense test “the copyright shall be . . . at whose instance and expense the work is done.”); see also *Graham III.*, 380 F.3d at 634 and n.17 (citing *Nimmer on Copyright* § 238 (1964) (explaining when to apply the instance and expense test)).

45. See *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 554 (2d Cir. 1995).

46. See *Scherr v. Universal Match Corp.*, 417 F. 2d 497, 500–01 (2d Cir. 1969).

47. *Brattleboro Publ’g Co. v. Winmill Publ’g Corp.*, 369 F.2d 565, 568 (2d Cir. 1966).

48. *Id.*

49. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F.2d 569, 570 (2d Cir. 1955) (holding that when an employee wrote lyrics for a song that was outside the scope of his employment, he owned the author’s right to the lyrics, subject to the terms of his contract).

50. 17 U.S.C. §101 (2000) (defining work for hire).

51. *Id.* To reduce the instances in which an independent contractor would be subject to work for hire, Congress created nine categories where work is considered to be a work for hire. These categories are (1) a contribution to collective work, (2) a part of a motion picture or other audiovisual work, (3) a translation, (4) a supplementary work, (5) a compilation, (6) an instructional text, (7) a test, (8) answer material for a test and (9) an atlas. *Id.*

employee.⁵² As such, a new presumption emerged that an independent contractor is deemed the author unless one of the listed exceptions applies.⁵³ Additionally, the 1976 Act benefits artists because it shifts the burden to their employers by requiring them to include contractual language regarding copyright ownership.⁵⁴ Although the new Act provided some needed guidance, the statute was unclear as to how exactly the court should apply this concept to the traditional employer-employee relationship.

In the face of this ambiguity, four interpretations of employer-employee type of work for hire emerged.⁵⁵ The first approach, which echoed the 1909 Act, turned on whether the hiring party retains the right to control the product.⁵⁶ A second approach, created by the Second Circuit and followed by the Fourth and Seventh Circuits, focused on whether the hiring party actually wielded control over the creation of the work.⁵⁷ A third tactic used the common law agency definition to identify an employee. Support for this approach is found in the Act's use of "scope of employment," a term of art frequently used in agency law.⁵⁸ A fourth minority approach designated a party as an employee only if he or she is salaried.⁵⁹

The Supreme Court first interpreted works for hire under the 1976 Act in the 1989 case *Community for Creative Non-Violence v. Reid* (hereinafter "*CCNV*").⁶⁰ In *CCNV*, a non-profit association formed to eliminate homelessness hired sculptor Earl Reid to create "Third World America," a display depicting the local homeless population.⁶¹ The

52. See *Graham III*, 380 F.3d at 635–36 n.20 (citing Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 889 (1987)).

53. See 17 U.S.C. § 101 (2000) (listing the exceptions for when a work is a work for hire rather than an independent commission).

54. Michael B. Landau, "Works Made for Hire" After *Community for Creative Non-Violence v. Reid: The Need for Statutory Reform and the Importance of the Contract*, 9 CARDOZO ARTS & ENT. L.J. 107, 146 (1990) (resulting in the requirement that a writing must evidence a transfer of copyright, otherwise copyright vests with the creator).

55. *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 738–739 (1989) (detailing the four judicial interpretations of work for hire under the 1976 Copyright Act) [hereinafter *CCNV*].

56. See *Peregrine v. Lauren Corp.*, 601 F. Supp. 828, 829 (Colo. 1985); *Clarkstown v. Reeder*, 566 F. Supp. 137, 142 (S.D.N.Y. 1983).

57. See *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 553 (2d Cir. 1984); *Brunswick Beacon, Inc. v. Schock-Hopchas Pub'g Co.*, 810 F.2d 410, 413 (4th Cir. 1987); *Evans Newton, Inc. v. Chicago Sys. Software*, 793 F.2d 889, 894 (7th Cir. 1986).

58. *CCNV*, 490 U.S. at 740.

59. See *Dumas v. Gommerman*, 865 F.2d at 1093, 1105 (9th Cir. 1989).

60. See *CCNV*, 490 U.S. at 730.

61. See *id.* at 733–34.

Community for Creative Non-Violence ("CCNV") claimed it owned the copyright to the sculpture because it was a work for hire.⁶²

In determining whether Reid's art was a work for hire, the Supreme Court rejected the notion that the hiring party's right to control the creation should be the determinative factor.⁶³ The Court reasoned that this approach failed to promote the congressional goal in drafting the 1976 Act—to enhance predictability and certainty of copyright ownership.⁶⁴ Instead, the Court adopted common law agency principles to define employee because this approach corresponded with original congressional intent.⁶⁵ The Court based its analysis on the Restatement of Agency factors.⁶⁶ Under this approach, the Court concluded that despite CCNV's initial development of the premise for the sculpture, Reid was an independent contractor and therefore retained copyright ownership of the piece.⁶⁷ The Court classified Reid as an independent contractor because he used his own equipment, in his own workspace, and away from the direct supervision of CCNV.⁶⁸ Further, Reid's project was not a part of CCNV's regular business because, as a non-profit, "CCNV is not a business at all."⁶⁹

Following *CCNV*, lower courts began to apply the so-called "Reid

62. *See id.* at 738–39. In particular, CCNV supported their argument that the organization provided the title for the sculpture, as well as the general design concept. *Id.*

63. *Id.* at 748.

64. *Id.* at 749 (citing H.R. REP. NO. 94-1476, at 129 (1976)).

65. *Id.* at 740–41.

66. *CCNV*, 490 U.S. at 751–52; *see* RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) (The agency factors include:

(a) the extent of control which, by the agreement, the [hiring party] may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business);

see also *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992) (ruling that the Second Circuit affords specific attention to "(1) the hiring party's right to control the manner and means of creation; (2) the skill required; (3) provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party.").

67. *CCNV*, 490 U.S. at 752–53.

68. *Id.* at 752.

69. *Id.* at 753.

factors,” which borrow notions from agency law.⁷⁰ Despite providing the lower courts with a set of factors, many believe that Congress needs to rewrite the Copyright statute because the agency definition of an “employee” is too broad for the fact-specific work for hire analysis.⁷¹

III. CASE FACTS

A. *Martha Graham*

As a dancer and choreographer, Martha Graham’s “name became synonymous with modern dance.”⁷² Dancers around the globe revered Graham for her “inventive style which provided a welcome alternative to the preponderance of classical ballet.”⁷³ However, recognition of her immense talent was not limited to fellow artists, as the mainstream also embraced her and christened her as one of the century’s most important people.⁷⁴

Despite her death in 1991, Graham’s legacy remains a powerful force in the dance world and the majority of her masterpieces “have never been extensively restaged or redesigned.”⁷⁵ Fiercely protective of her work, Graham allowed very few dance companies to perform her repertoire during her lifetime.⁷⁶ Preferring the avant-garde early in her career, Graham elected to forgo association with an established dance company or working in the commercial theater world in order to teach and develop her own unique style.⁷⁷

B. *The Creation of the Center*

In the late 1920s, Graham, eager to impart her specific vision to others, formed a dance company consisting of a few female dancers.⁷⁸ Although artistically fulfilling, financing the company proved to be

70. LINDEY, *supra* note 40, § 1.4. Hereinafter the “Reid factors” will be referred to as Reid factors.

71. *See, e.g.,* McNamara, *supra* note 34, at 18 (supporting a more individualized approach to work for hire which eliminates the need for the supervision and direction).

72. Kisselgoff, *supra* note 4, at A1.

73. *Id.*

74. Terry Teachout, *Martha Graham*, TIME, June 8, 1998, at 200 (including Graham in its list of the 20th Century’s 100 Most Important People).

75. Lewis Segal, *In Thrall to a Phantom*, L.A. TIMES, Mar. 30, 2003, at E46.

76. *Id.*

77. Kisselgoff, *supra* note 4, at B7.

78. *Id.*

difficult. Since the dancers had to support themselves, they spent the majority of their time earning revenue from tours and recitals, leaving only a fraction of the year to create new works.⁷⁹ In 1930, Graham expanded her small company to include a dance school, which she ran as a sole proprietorship until 1956.⁸⁰ However, Graham's attention was once again divided between staying afloat financially and pursuing her artistic endeavors. As a result, to free herself from funding and legal headaches and to be eligible for tax benefits, Graham began to rely on non-profit corporations to fund her ventures in the 1940s.⁸¹ In 1948, the Center was incorporated.⁸² Following suit, the Martha Graham School of Contemporary Dance ("the School") was incorporated in 1956.⁸³ The School and the Center operated as one entity and the court treated them as such because they shared the same board of directors and facilities, and maintained combined bank accounts.⁸⁴ During this time, the Center and other non-profits supported Graham by "promoting and disseminating her technique and by raising and managing funds for performances."⁸⁵

C. *Graham's Employment with the Center*

In 1956, Graham sold her sole proprietorship to the School.⁸⁶ At this time, she entered into a ten-year, part-time employment agreement with the School to serve as its Program Director.⁸⁷ The contract obligated Graham to provide the School annually with "one-third of her professional time."⁸⁸ Her contractual duties included teaching and overseeing the educational program, but not choreographing.⁸⁹ Graham was able to continue choreographing while teaching due to funding from other non-profits.⁹⁰ In 1966, the school extended Graham's contract for another ten years and appointed her Artistic Director, with new duties, including maintaining the repertory, rehearsing the company, creating new work and continuing to

79. *Id.*

80. *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) [hereinafter *Graham II*].

81. *Graham III*, 380 F.3d at 629.

82. *Id.* (The Center was initially known as the Martha Graham Foundation for Contemporary Dance, Inc.).

83. *Id.*

84. *Graham II*, 224 F. Supp. 2d at 572.

85. *Graham III*, 380 F.3d at 637.

86. *Id.* at 629.

87. *Id.* at 637.

88. *Id.* at 638.

89. *Id.*

90. *See id.*

supervise the School.⁹¹ The Center maintains that during this time there was an unspoken understanding between the board of directors and Graham that any new work created became the organization's property and responsibility.⁹² With her contract renewed again in 1976, Graham remained the Artistic Director and Chief Executive of the School and Center until her death in 1991.⁹³

D. The Effect of Graham's Will and Death upon the Center's Operation

In the late 1960s, Graham developed a close relationship with photographer Ronald Protas.⁹⁴ He became Graham's trusted confidante and spokesperson.⁹⁵ In 1972, Protas became an employee of the Center, which appointed him to Co-Associate Artistic Director in 1980.⁹⁶ With no children or spouse, Graham decided to name Protas as the executor of her estate.⁹⁷ In her final will, she bequeathed him the rights and interests to her "dance works, musical scores, scenery sets, [Graham's] personal papers and the use of [Graham's] name."⁹⁸ In the event that Protas did not survive her, the will left these rights to the Center.⁹⁹

Following Graham's death, Protas replaced Graham as the Center's Artistic Director.¹⁰⁰ In 1998, he created the Martha Graham Trust ("the Trust"), in which he placed the copyrights to Graham's intellectual property without any questioning from the Center's board as to his ownership.¹⁰¹ Shortly thereafter, "Protas, acting through the Trust, founded the [non-profit] Martha Graham School and Dance Foundation ("S&D Foundation")."¹⁰² The Trust licensed Graham's dances to many licensees and in 1999 gave the Center "an exclusive license to teach the Martha Graham technique, and a non-exclusive license to present live performances" of her work.¹⁰³ As a condition of this agreement, Protas would remain a salaried employee of the Center but no longer serve as

91. *Graham II*, 224 F. Supp.2d at 573.

92. *Id.*

93. *Graham III*, 380 F.3d at 639.

94. *Id.* at 629.

95. *Id.*

96. *Graham II*, 224 F. Supp. at 574; *Graham III*, 380 F.3d at 629.

97. *Graham III*, 380 F.3d at 629.

98. *Id.*

99. *Id.* at 629–30 n.3.

100. *Id.* at 630.

101. *Id.*

102. *Id.*

103. *Graham III*, 380 F.3d at 630.

Artistic Director.¹⁰⁴ In 2000, following a clash between Protas and the Center's board regarding a mutually agreeable replacement, the Center was forced to postpone operations due to financial difficulties.¹⁰⁵

From 2000 to 2001, Protas and the Center each separately obtained the copyright certificates of registration for the same thirty dances choreographed by Graham.¹⁰⁶ The S&D Foundation was the exclusive American licensee for performances of Graham's choreography and use of the Martha Graham trademark.¹⁰⁷ In 2001, the Center received financial support and was able to reopen.¹⁰⁸ Although its financial woes had disappeared, the Center directed its energy towards legal concerns as Protas filed suit seeking to enjoin the Center and School from using the Martha Graham trademark, teaching her style, and performing her choreography. Further, Protas sought a judgment declaring that the Trust owned the rights to all of Graham's dances, and the sets and jewelry associated with these works.¹⁰⁹

IV. PROCEDURAL HISTORY

A. *Graham's Works in Dispute*

At issue in this case is the ownership of the seventy dances created and fixed by Graham. Both the 1909 and 1976 Copyright Acts apply because Graham choreographed before and after January 1, 1978.¹¹⁰ Work for hire is vital to determining ownership of her works. Hence, whether the Center employed Graham and what position she held is crucial to the court's analysis.

The 1909 Copyright Act applies to fifty-five of the dances.¹¹¹ Graham created thirty-six of these works while she ran her dance school as a sole proprietorship.¹¹² She created ten works while employed by the Center as the Program Director of the School.¹¹³ Graham completed nine

104. *Id.*

105. *Id.*

106. *See id.*

107. *Id.*

108. *Id.*

109. *Graham III*, 380 F.3d at 631.

110. *Id.* at 632–33.

111. *See id.* at 637–40.

112. *Id.* at 637.

113. *Id.*

dances while serving as the Artistic Director of the Center.¹¹⁴ The 1976 Copyright Act applies to Graham's final works, including fifteen choreographies completed from 1978 to 1991, while she continued to serve as the Artistic Director of the Center.¹¹⁵

B. The Decision of the Southern District of New York

The primary issues before the district court were Protas' allegations that the Center had infringed the trademark and was not the copyright owner of Graham's dances.¹¹⁶ The court approached each issue in separate opinions.¹¹⁷ As to the trademark issues, the court ruled that the agreement granting the Center the license to dances from the Trust never took effect, therefore licensee estoppel did not preclude the Center from obtaining relief.¹¹⁸

The majority of the controversy and the focus of this Note is to determine whether Graham owned the copyrights to her dances. The district court ruled that of Graham's seventy dances the Center owned the copyright to forty-five dances, while Protas's S&D Foundation owned the copyright for one dance.¹¹⁹ To reach its holding of work for hire, the court applied the instance and expense test to the dances created under the 1909 Copyright Act¹²⁰ and the Reid factors to the later dances made under the 1976 Act.¹²¹ Regarding the remaining work, the court ruled that ten of the dances were in the public domain and nine were not published with the required notice. Additionally, for five of the works, neither side had met the burden for proving the commissioner intended for Graham to reserve the copyright.¹²²

114. *Id.* at 639.

115. *See Graham III*, 380 F.3d at 641.

116. *See Graham II*, 224 F. Supp. 2d at 607-09 (The Center also filed a counterclaim advancing that Protas had breached his fiduciary duty to the non-profit. The court ruled that by misrepresenting the ownership rights of Graham's works, Protas "violated his duty of good faith and profited improperly at defendants' expense.").

117. *See id.* at 569 (determining who owned the copyright to Graham's works); *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 153 F. Supp. 2d 512, 514 (S.D.N.Y. 2001) (determining whether the Center and School had infringed the Martha Graham trademark) [hereinafter *Graham I*].

118. *See Graham I*, 153 F. Supp. 2d at 512.

119. *See Graham II*, 224 F. Supp. 2d at 570.

120. *Id.* at 588-90.

121. *Id.* at 591.

122. *Id.* at 570.

C. The Decision of the Court of Appeals for the Second Circuit

On appeal, Protas contended that the district court's decision was erroneous because none of Graham's dances was work for hire.¹²³ The Second Circuit affirmed most of the district court's opinion, holding that the majority of Graham's choreographies were work for hire and, therefore, belonged to the Center.¹²⁴ However, the court reversed the district court's decision as to the works created between 1956 and 1965.¹²⁵ The court found that they were not work for hire because of Graham's status as a part-time employee during this period.¹²⁶ The court also reversed the ownership of the dance *Acrobats of God* to Protas since he owned the renewal term.¹²⁷ Finally, the court remanded the case to the district court to determine ownership for seven dances between 1956 and 1965 because two were incorrectly cited as unpublished.¹²⁸

V. ANALYSIS OF THE SECOND CIRCUIT'S APPLICATION OF THE WORK FOR HIRE DOCTRINE

A. The Court Inconsistently Applied the Instance and Expense Test

Although facially Graham's promotion as the Center's Artistic Director appeared to have little impact on her choreography, the Second Circuit ruled otherwise.¹²⁹ The court applied the instance and expense test, determining that Graham's choreography from 1966 to 1977 was work for hire because of her new position.¹³⁰ However, the court utilized the same test to determine that the dances created during Graham's term as Program Director were *not* work for hire.¹³¹ These contrasting conclusions necessitate an analysis of the change, if any, in Graham's status between 1965 and 1966 to warrant a finding of work for hire and to reveal a

123. *Graham III*, 380 F.3d at 632. Protas also argued on appeal that the district court erred in deeming that some of the dances were published, that the Center owned the theatrical property associated with the dances, and that he breached his fiduciary duty to the Center. The Second Circuit reaffirmed the district court's opinion with respect to the property ownership and breach of duty. *Id.*

124. *Id.* at 637-42.

125. *Id.* at 637-39.

126. *Id.* at 637.

127. *Id.* at 647.

128. *Id.*

129. *Graham III*, 380 F.3d at 639-40.

130. *Id.*

131. *See id.* at 637-39.

potentially inconsistent application of the instance and expense test.

In its holding, the court relied heavily on Graham's shift from part-time to full-time status as an indicator that she relinquished her copyright ownership to the Center.¹³² However, Graham's change in position merely reflected the reality that smaller non-profits like the Center "are often founded, staffed and run by a small number of individuals, who usually serve as 'employees' of these groups."¹³³ In order to keep the understaffed Center financially viable, Graham had to "pitch in" and take on a full-time position.¹³⁴ Despite her dual roles as employee and artist, Graham arguably did not intend to change the nature of her creative process or her ownership rights.

1. The Expense Prong

The Second Circuit's holding is troubling in part because under the "expense" prong, the Center did not provide Graham with more resources when she was Artistic Director than in her earlier post as Program Director.¹³⁵ Under both positions, Graham had access to dancers and rehearsal space, and yet as Program Director, her dances were not considered work for hire.¹³⁶ Defending its holding, the court argued that Graham's choreographies while Program Director "arguably satisfi[ed] the 'expense' component," but because they ultimately failed the instance prong the dances were not works for hire.¹³⁷ This clarification does not necessarily cure the potential inconsistencies in the court's decision, though, as the court's use of "arguably" may be its concession to the weakness of this argument. Further, the fact that the court even provided this insight speaks to what appears to be an inconsistent application of the expense prong.

The court claims that the expense prong is met for the time period in question because the Center paid Graham a "salary specifically to create the intellectual property."¹³⁸ However, merely receiving a salary cannot be determinative because Graham received a salary while functioning as

132. *Id.* at 639.

133. Brief of Amici Curiae Am. Dance Festival, Inc., Mr. Gerald Arpino and Mr. Gordon Davidson, In Support of Plaintiffs-Appellants at 6, *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)).

134. *Graham III*, 380 F.3d at 639.

135. *See id.* at 638.

136. *Id.*

137. *Id.*

138. *Id.* at 640.

Program Director.¹³⁹ Other than the salary the Center paid Graham to teach and carry on general administrative duties, the Center seems to have financially supported her exactly as it did before she was an employee and running her dance school as a sole proprietor.¹⁴⁰

2. The Instance Prong

In addition to the employer funding the project, to qualify as a work for hire, the employer must also insist or request that the work be performed.¹⁴¹ Assuming that Graham choreographed her work at the Center's expense as a salaried employee, it is difficult to comprehend how the instance prong is met in light of Graham's central role at the Center.¹⁴² The court dismissed appellant's argument that the dances were not created at the Center's instance as "beside the point" because Graham would have created the same work absent her employment with the Center.¹⁴³ The court also refused to apply a particularized meaning of "instance," reasoning that often creative artists are expected to produce work without their employer providing specific recommendations.¹⁴⁴ While the offered rationale may hold true for a more traditional relationship, it does not seem as applicable to the arrangement at issue, when the non-profit organization and its employee are as entwined as Graham and the Center. The court declined to address the key issue of whether the Center motivated Graham's creations or Graham motivated the Center's creation. Nothing indicates the Center's influence on Graham's work increased when Graham became Artistic Director. In fact, the Center did not stimulate Graham's choreography any more than it did when she was the Center's Program Director. Although the Center reportedly urged Graham to focus on creating rather than teaching, this does not mean that it directed her to choreograph.¹⁴⁵ Rather, this reiterated the very purpose of the non-profit: to champion Graham's artistic projects. As a result, Graham's new position in 1966 as Artistic Director did not significantly alter her relationship with the Center enough to warrant that these dances be deemed works for hire.

139. *Id.* at 639.

140. *Graham III*, 380 F.3d. at 637.

141. *Graham II*, 224 F. Supp. 2d at 588.

142. *Graham III*, 380 F.3d at 639.

143. *Id.* at 640.

144. *Id.* at 640-41.

145. *Id.* at 639.

B. Application of the Reid Factors Support the Conclusion that Graham's Choreographies Are Not Works For Hire

In its analysis of Graham's work under the 1976 Copyright Act, the court applied the Reid factors to conclude that these creations were works for hire. *CCNV* mandated that courts use the thirteen Reid factors taken from agency law to determine whether someone qualifies as an employee under the 1976 Act.¹⁴⁶ In choosing a multi-factor test over other alternatives, the Supreme Court sought a flexible method to handle the gamut of "work for hire" situations. The Second Circuit has afforded specific attention to five factors, but no one factor is determinative.¹⁴⁷ However, depending on the particulars of each case, certain factors will be more relevant. Although it is debatable whether the Reid factors are suitable to analyze a non-profit, since they are the accepted standard the Second Circuit must apply them correctly.¹⁴⁸ Admittedly two of the five factors preferred by the Second Circuit—the provision of employment benefits and the Center's tax treatment of Graham—evidence a work for hire relationship.¹⁴⁹ Nonetheless, four other Reid factors particularly applicable to Graham's situation do not overwhelmingly support the Second Circuit's holding; instead, they bolster the appellant's argument that Graham's dances are not works for hire.

One of the Reid factors to which the Second Circuit pays particular attention is "the hiring party's right to control the manner and means of creation."¹⁵⁰ In applying this factor, the court conceded that the Center exercised hardly any control over Graham's work.¹⁵¹ Recycling logic from its analysis of the works under the 1909 Act, the court reasoned that the Center's lack of actual control may be justified because this is the type of situation where the "employer would not normally exercise control over the details" and the control, if any, "may be very attenuated."¹⁵² By lowering the threshold to this degree, the court's definition makes it nearly impossible for an artist to rebut the employer's ownership. This interpretation clearly favors the employer by extending deference to his or her management style whenever the artist is particularly talented.

146. *CCNV*, 490 U.S. at 751–52.

147. *Aymes*, 980 F.2d at 861 (listing the five of the thirteen Reid factors the Second Circuit focuses on).

148. *See infra* Part V.D.1 (recommending that courts do not apply the Reid factors to their analysis of work for hire in non-profits).

149. *Aymes*, 980 F.2d 861.

150. *Id.*

151. *Graham III*, 380 F.3d at 642.

152. *Id.*

However, even if minimal control is found, other factors must also weigh in the Center's favor for Graham's dances to be deemed work for hire.¹⁵³

Another factor that appears to weigh against the Second Circuit's decision categorizes how the parties characterize their relationship; specifically "whether or not the parties believe they are creating the relation of master and servant."¹⁵⁴ In its brief, appellant describes Graham as having "enormous influence" over the Center's board, and in turn, the "directors served at the pleasure of Miss Graham" supporting "whatever creative energies Martha Graham had."¹⁵⁵ While the very existence of a board hints at a structural hierarchy used to keep Graham in check, in practice, the relationship suggests that if anyone was the master it was Graham. Graham arguably did not view the Center to be her master and judging from appellant's description, albeit subjective, the board did not conduct business under the guise that it was the choreographer's master. Absent a master-servant relationship, it becomes a matter for the court to conclude whether the Center possessed even minimal control over Graham. Appellant's brief illustrated that the relationship between Graham and the Center falls outside of the scope of what would be considered a work for hire arrangement under the Reid factors.

A third factor ignored by the Second Circuit, is whether Graham's choreography can be considered to be "part of the regular business of the employer" in light of what the Center held out to be its purpose.¹⁵⁶ When Graham incorporated her school in 1948, the purpose expressed in the certificate of incorporation was the "development of cultural education in connection with those arts which function through the dance and the stage."¹⁵⁷ This illustrates her vision that the organization emphasized education rather than creation. When Graham sold her foundation in 1956 to the School and Center, the certificate of incorporation again highlighted education, specifically the teaching of "the science and art of the dance" as the key focus of the organization.¹⁵⁸ In addition to the educational programs, the Center also aimed "to compose, perform and demonstrate" choreography, lending support to its assertion that Graham's choreography

153. *Id.* at 641.

154. RESTATEMENT (SECOND) OF AGENCY § 220(2)(i) (1958).

155. Brief for Plaintiff-Appellants at 9, *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 224 F. Supp. 2d 567 (S.D.N.Y. 2002) (No. 01-9055).

156. RESTATEMENT (SECOND) OF AGENCY § 220(2)(h) (1958).

157. Brief for Plaintiff-Appellants at 7, *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 224 F. Supp. 2d 567 (S.D.N.Y. 2002) (No. 01-9055).

158. *Graham II*, 224 F. Supp. 2d at 572.

was within the scope of its business.¹⁵⁹ Arguably, the Center's *regular* business was the teaching of Graham's technique, not the creation of new works. Therefore, the court can view any composition created during this time as created outside of the perimeters of the non-profit's purpose.

Finally, even if the choreography is within the Center's regular activity, the question remains whether a non-profit meets the "Reid" qualification of being "in business."¹⁶⁰ As discussed later in this article, the non-profit status is crucial to the Second Circuit's analysis.¹⁶¹ Because Graham's dual roles in the organization blur the traditional employer-employee relationship, the Court must look closely at the nature of the organization in reaching its conclusion, as the Reid factors do not provide a clear answer.

C. The Court Failed to Weigh the Center's Non-Profit Status

In its amicus curiae brief, the American Dance Federation ("ADF") advised the Second Circuit to treat work for hire situations involving non-profits "formed [solely] for the purpose of encouraging and supporting authors in their creative endeavors" differently than for-profit organizations.¹⁶² The ADF recommended adopting a default rule allowing the copyright to remain with the artist, not the non-profit.¹⁶³ Despite the merits of ADF's brief, the court rejected ADF's suggestion, delegating the issue to Congress.¹⁶⁴ Burstein, the attorney for Graham's heir, appeared stunned by the court's logic, remarking that, "I think future choreographers should be very wary of this decision" and "[t]he notion that Martha Graham did not own the copyright to her work because there was a corporation set up to facilitate her work is a shocking conclusion."¹⁶⁵ Part of Burstein's disbelief appears to stem from the court's finding that

159. *Id.*

160. RESTATEMENT (SECOND) OF AGENCY § 220(2)(j) (1958); *see infra* Part V.C.2. (discussing that being a non-profit does not qualify as being in business under the Supreme Court's holding in *CCNY*).

161. *See infra* Part V.C.2.

162. Brief of Amici Curiae Am. Dance Festival, Inc., Mr. Gerald Arpino and Mr. Gordon Davidson, In Support of Plaintiffs-Appellants at 2, *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)).

163. *Id.* at 4.

164. *Graham III*, 380 F.3d at 640 (concluding that since the statute does not distinguish between a for-profit and non-profit employer, the issue should be decided by Congress).

165. Joseph Carman, *Graham Center Victory*; *News*, DANCE MAGAZINE, Nov. 1, 2002, at 20.

Graham's arrangement with the Center was an aberration from the norm.¹⁶⁶ Rather, the norm is that artists rely on non-profits out of necessity and are strongly encouraged to do so in order to obtain government funding.¹⁶⁷ Additionally, the Second Circuit's decision appears at odds with the Supreme Court's holding in *CCNV*, which did take into account that the artist's employer was a non-profit.¹⁶⁸ The court creates a dangerous precedent by excluding the Center's non-profit status from its work for hire analysis.¹⁶⁹ Consequently, this may chill the creations of artists whom depend on non-profits created exclusively to support their art.

1. Many Artists like Graham Must Rely on Non-Profit Support

Many artists, especially those within genres that are less commercially motivated and lack an established source of funding, must become "inextricably tied" to non-profits for their vision to reach an audience.¹⁷⁰ These artists cannot simply relinquish the non-profit's support as proposed by the Second Circuit.¹⁷¹ The trend of artist reliance on non-profit support is a result of tax law and the changing landscape of philanthropy in the United States.¹⁷² Early in her career, when running her school as a sole proprietorship, financial headaches plagued Graham.

166. Brief of Amici Curiae Am. Dance Festival, Inc., Mr. Gerald Arpino and Mr. Gordon Davidson, In Support of Plaintiff's-Appellants at 3, *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)) citing PETER DOBKIN HALL, *Inventing the Nonprofit Sector: 1950-1990*, in THE NATURE OF THE NONPROFIT SECTOR (J. Steven Ott, ed., 2001) (finding that where as in 1940 there were only 12,500 tax-exempt non-profits in the United States, fifty years later in 2002, the number had grown to over 700,000, indicating an undying trend).

167. See generally Brief of Amici Curiae Am. Dance Festival, Inc., Mr. Gerald Arpino and Mr. Gordon Davidson, In Support of Plaintiff's-Appellants at 3-6, *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)) (explaining how artists must rely on non-profit support to fund their projects).

168. *CCNV*, 490 U.S. at 753.

169. *Graham III*, 380 F.3d at 640 (explaining that rather than consider the Center's non-profit status, the court will conduct its analysis only "under prevailing work-for-hire principles").

170. Brief of Amici Curiae Am. Dance Festival, Inc., Mr. Gerald Arpino and Mr. Gordon Davidson, In Support of Plaintiff's-Appellants at 3, *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)) (explaining that there are very few dance companies in the United States which operate as for-profit entities; the majority are non-profits).

171. *Graham III*, 380 F.3d at 640 (arguing that if Graham was unhappy with the Center's control she could have voluntarily severed her ties to the organization).

172. Brief of Amici Curiae Am. Dance Festival, Inc., Mr. Gerald Arpino and Mr. Gordon Davidson, In Support of Appellants' Petition for Rehearing and, Alternatively, for Rehearing En Banc at 3, *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)).

Graham realized that forming a non-profit, rather than relying on the funding from non-profits, entitled her work to be tax-exempt and eligible for grants from the government, private foundations, and public charities.¹⁷³ Arguably, in making her decision to sell the school, Graham was not motivated by a desire to transfer the ownership of her work or have her work performed at the Center's "instance and expense." Rather, Graham made her decision under the belief that it would grant her the opportunity to focus on creating, rather than dealing with the administrative tasks that come with running a business. Graham was not misguided in this belief because many organizations that support individual artists allow artists to retain ownership and control of their art.¹⁷⁴

2. Ignoring the Center's Non-Profit Status is Contrary to the Supreme Court's Ruling in *CCNV*

Applying the Reid factors to Graham's employment, the Second Circuit chose to gloss over the Center's non-profit status in its analysis.¹⁷⁵ The court's inability to apply the factors with flexibility runs counter to the Supreme Court's intent, ultimately leading to an incomplete application of the ruling in *CCNV*. One of the key agency factors is "whether the principal is or is not in business."¹⁷⁶ Analyzing this factor in *CCNV*, the Supreme Court recognized the significance of non-profit status by commenting that "*CCNV* is not a business at all," because it is a tax exempt non-profit organization.¹⁷⁷ In this simple observation, the Supreme Court diluted the theory that the distinction between for-profits and non-profits is frivolous. Rather, it is a viable difference, and it was imperative to the Supreme Court's conclusion that the sculpture was not a work for hire. The Supreme Court's direct and deliberate recognition of non-profit

173. Brief of Amici Curiae Am. Dance Festival, Inc., Mr. Gerald Arpino and Mr. Gordon Davidson, In Support of Plaintiffs-Appellants at 4, *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)); see Brief for Defendants-Appellees at 7 n.5, *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 224 F. Supp. 2d 567 (S.D.N.Y. 2002) (No. 01-9055) (explaining that by getting tax exemption under Section 501(c)(3) of the IRS Code, public donations and government grants to the school were tax-deductible and tuition was exempt from revenue tax).

174. Brief of Amici Curiae Am. Dance Festival, Inc., Mr. Gerald Arpino and Mr. Gordon Davidson, In Support of Plaintiffs-Appellants at 5, *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, (2d Cir. 2004) (No. 02-9451(L)). For example, the New York Foundation for the Arts makes it clear that the artists it supports "retain creative control and ownership of their project." *Id.*

175. See *Graham III*, 380 F.3d at 641-42.

176. RESTATEMENT (SECOND) OF AGENCY § 220(2)(j) (1958).

177. *CCNV*, 490 U.S. at 753.

status as being crucial to the work for hire analysis epitomizes the Second Circuit's gross error in denying its relevance. Accordingly, the Second Circuit's decision must be scrutinized.

D. Policy Recommendations for Safeguarding Artistic Endeavors

In absence of a successful appeal to the Supreme Court, Congress should remedy the Second Circuit's errors by adopting the default rule recommended by ADF, modifying it to apply only to those non-profits founded to support a specific artist.¹⁷⁸ Under this rule, the artist who is also an employee of a non-profit created to promote his or her creative endeavors retains the copyright to works created during employment.¹⁷⁹ This rule would better protect artists and the intent behind work for hire.

1. The Reid Factor Analysis is Inappropriate for Non-Profits

No two employer-employee relationships are alike; therefore, work for hire requires a context-specific analysis. Under the 1976 Act, courts have adopted a fact-driven analysis composed of the thirteen Reid factors. In its application, a court weighs the various factors based on the specifics of the case.¹⁸⁰ In theory, this tailor-made approach appears to take into account the nature of the employment. However, in actuality, this approach allows courts to pick any of the thirteen factors, thereby giving them far too much discretion. Although such flexibility may be acceptable for a for-profit entity, when applied to non-profits the courts can simply decide to pass over the non-profit status.¹⁸¹ Courts should not retain a one-size-fits-all test because non-profits and for-profits have different goals. In situations involving non-profits, Congress should set forth a clear rule that forces courts to consider an organization's non-profit status.

2. Non-Profits are Inadequately Organized to Retain Ownership

Also in support of the ADF's proposed rule is the fact that a majority of non-profits are unprepared to handle the responsibility of being a copyright owner. New York Attorney General Eliot Spitzer is mistaken to

178. See Brief of Amici Curiae Am. Dance Festival, Inc, Mr. Gerald Arpino and Mr. Gordon Davidson, In Support of Plaintiff's Appellants at 19, *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)).

179. See *id.*

180. *Aymes*, 980 F.2d at 861-62 (explaining that the Reid factors are "not intended to be applied in a mechanistic fashion").

181. See *Graham III*, 380 F.3d at 639-40.

believe the public will be best served if Graham's "great achievements can be perpetuated by the charities she founded."¹⁸² Many non-profits operate on a temporary basis because funding often disappears.¹⁸³ For example, financial difficulties plagued the Center and led to an interim end of operations in 2000.¹⁸⁴ Due to its rocky financial past there is a high probability the Center might be forced to close permanently. If the Center were to close and retain ownership of Graham's works, most dance companies would hesitate to endure the risk that comes with staging "a work in which a copyright is owned by an inactive but still formally existing" organization.¹⁸⁵ The Second Circuit's decision disserves future audiences because "a defunct or inactive organization . . . cannot exploit or maintain" works the way the artist would have desired.¹⁸⁶

If the Center remains active, there is little chance that it can maintain a staff capable of addressing the copyright issues. Counsel for the Attorney General even conceded that many non-profits "are not set up to hold and administer intellectual property."¹⁸⁷ Moreover, the lack of funding often leads to a high turnover rate and an understaffed facility. Practically, the Center must focus on more pressing day-to-day tasks as opposed to ensuring the copyright is renewed and free from infringers. Additionally, with a high turnover rate, new staff members are unfamiliar with the artist's creative vision and may make decisions that conflict with the artist's sensibilities. To ensure that the art is preserved for future audiences, the artist or someone the artist explicitly chooses and trusts, such as an heir, should retain the copyright rather than a temporary non-profit.

182. Press Release, Office of New York Attorney General Eliot Spitzer, Spitzer Says Court Ruling Will Preserve Martha Graham Dance Legacy (July 5, 2002), at http://www.oag.state.ny.us/press/2002/jul/jul05a_02.html.

183. See Brief of Amici Curiae Am. Dance Festival, Inc., Mr. Gerald Arpino and Mr. Gordon Davidson, In Support of Plaintiff-Appellants at 14-15, *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)) (discussing the temporary nature of many non-profits).

184. *Graham III*, 380 F.3d at 630.

185. Brief of Amici Curiae Am. Dance Festival, Inc., Mr. Gerald Arpino and Mr. Gordon Davidson, In Support of Plaintiff-Appellants at 15, *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)).

186. *Id.*

187. Brief of Amici Curiae In Support of Appellants' Petition for Rehearing and, Alternatively, For Rehearing En Banc at 9, *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)) (quoting Ms. Quint, counsel for Attorney General, during oral arguments).

3. Artists Retaining the Copyright Satisfies the Intent Behind Work for Hire

The three commonly offered rationales for work for hire support the artist retaining the copyright.¹⁸⁸ First, work for hire prevents surprise for those unfamiliar with copyright law.¹⁸⁹ Because the artist's rights as an employee of a non-profit and the artist's rights as a creator are blurred, avoiding surprise should be a priority. This could easily be accomplished by placing the burden on the employer to communicate with the artist about the ownership of the work, thus protecting the artist, the party with less bargaining power and potentially less familiarity with copyright law. In Graham's situation, having a default rule that the artist—rather than the non-profit, retains the copyright would have avoided the egregious surprise experienced by Graham's heir. Adopting this rule “weighs in favor of the untutored artists” forced to rely on the non-profit for support.¹⁹⁰

Second, the doctrine serves the constitutional requirement that the copyright remain with an “Author.”¹⁹¹ Since non-profits are often temporary, once a non-profit closes down, it loses its ability to fully support and maintain the copyright. Therefore, the artist should retain the copyright to guarantee that the right remains with the person best qualified to maintain it.

Third and finally, work for hire enhances predictability and certainty of copyright ownership.¹⁹² The proposed rule would serve this purpose because it avoids “disrupting settled expectations concerning ownership,” and allows the creative relationship between the artist and the non-profit to run smoothly and remain focused on the art.¹⁹³ Moreover, this rule's adaptation would lead to less litigation over ownership issues and provide the courts with a consistent solution. Congress should adopt a rule

188. Brief of Amici Curiae Am. Dance Festival, Inc., Mr. Gerald Arpino and Mr. Gordon Davidson, In Support of Plaintiff-Appellants at 14, *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)).

189. See *Brattleboro Publ'g v. Winmill Publ'g Corp.*, 369 F.2d 565, 567–68 (2d Cir. 1966).

190. Brief of Amici Curiae Am. Dance Festival, Inc., Mr. Gerald Arpino and Mr. Gordon Davidson, In Support of Plaintiff's Appellants at 14, *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)).

191. *Id.* (citing U.S. CONST. art. I, § 8, cl. 8).

192. See *CCNV*, 490 U.S. at 749.

193. Brief of Amici Curiae Am. Dance Festival, Inc., Mr. Gerald Arpino and Mr. Gordon Davidson, In Support of Plaintiffs-Appellants at 14, *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)).

allowing artists who create non-profits to retain ownership because the current system serves neither the needs of artists nor the intentions behind the work for hire doctrine.

E. Resulting Impact on Artists Who Are Supported by Non-Profits

The Second Circuit's decision may lead choreographers and other artists to reconsider whether the non-profit support on which they rely will ultimately rob them of their creations. Therefore, the decision serves as a wake-up call for artists to prepare adequately for copyright ownership in the wake of their death.¹⁹⁴ Theoretically, one way to protect their ownership rights is to explicitly contract for them. Shortly after the Second Circuit's ruling, Dance NYC, a professional dance organization, posted boilerplate contracts on its website for choreographers and artistic directors.¹⁹⁵ These sample documents aid dancers who may be unfamiliar with how to approach legal drafting. They provide that the artist shall retain the copyrights to his or her work by stating explicitly that, "the Parties mutually agree that the Choreography shall not constitute Work Made for Hire" and "in the event that it should be determined that the Choreography qualifies as Work Made for Hire, the Company will and hereby does assign to the Choreographer all right, title and interest."¹⁹⁶ Further, in the event the artist decides to terminate his or her affiliation with the organization, the organization retains a non-exclusive right of performance with continued use to "be negotiated in good faith between the Company and the Artist or with his assigns or heirs."¹⁹⁷

Although such a contract might have protected Graham, there is no guarantee the Center would have signed it. Additionally, Graham should not carry the burden to seek out a right that she assumed was not in dispute. The Center's website argues that "dance companies can and do make arrangements with choreographers establishing that ownership of the dance(s) created by the choreographer resides with the choreographer."¹⁹⁸

194. Carman, *supra* note 165.

195. See, e.g., Dance NYC, *Contract Templates*, available at <http://www.dancenyc.org/dancers.asp?file=contract> (providing sample contracts governing long-term and short-term relationships, in addition to a sample letter of agreement for arrangements with a single dance company).

196. *Id.*

197. *Id.*

198. Press Release, Martha Graham Center of Contemporary Dance, Legal Update: August 27, 2002, at <http://www.marthagrahamdance.org/us/newsandevents.html> (citing choreographer George Balanchine and others as examples of artists who contracted for ownership to their dances).

Even if there were such a contract between the Center and Graham, there is nothing to prevent the Center from still claiming ownership under work for hire.

While contracting for ownership may solve disputes in some cases, the non-profit that willingly enters into such an agreement would likely not be seeking ownership of the artist's work in the first place. This also places the artist in a perilous position: if the non-profit refuses to sign this agreement, should the artist forgo the organization's support? Forcing the artist to seek out protection is an unnecessary step that circumvents the greater problem of non-profits claiming ownership of work not belonging to them while punishing the artist for relying on this support.

VI. THE FINALE — CONCLUSION

The Second Circuit's misapplication of the work for hire doctrine demonstrates a flawed understanding of Supreme Court precedent and an ignorance of the current relationship between artists and non-profits. Besides confusing the issues and the application of the law, this decision effectively continues a cycle of depriving artists of their right to retain their copyrights. Artists, like Graham, earn the right to retain ownership of their copyrights by spending countless hours creating a piece and pushing themselves to the artistic limit. The Center did not earn copyright to Graham's pieces by promoting her to Artistic Director and allowing her to devote more time to create new works. Furthermore, the distinction made by the Second Circuit between her protected works and unprotected works spurned by a misapplication of the Reid factors seems arbitrary. Ultimately, the Center's involvement in Graham's creations, although helpful, amounted to little more than cheering on the choreographer as she took her final bow.

To remedy the Second Circuit's wrongs and prevent inconsistent rulings on this issue, there are two options; either a successful appeal to the Supreme Court or congressional action. If successfully appealed to the Supreme Court, it is likely that the Court will reverse the Second Circuit's decision for ignoring the non-profit status in light of the Court's decision in *CCNV*.¹⁹⁹ A congressional act that allows artists to retain their copyrights when working for non-profits created exclusively for their benefit would fulfill Graham's desire that the Center "preserve and carry forward her legacy in dance" rather than place her works in potential copyright

199. *CCNV*, 490 U.S. at 753.

limbo.²⁰⁰ Through either a Supreme Court decision or congressional action, Graham's wishes and the wishes of future generations of artists who rely on non-profit funding will be satisfied.

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200. Press Release, Martha Graham Center of Contemporary Dance, Appeal Press Release, Aug. 18, 2004, at <http://www.marthagrahamdance.org/us/newsandevents.shtml>.

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