A TANGO BETWEEN COPYRIGHT AND CHOREOGRAPHY: WHITENESS AS STATUS PROPERTY IN BALANCHINE'S BALLETS, FULLER'S SERPENTINE DANCE AND GRAHAM'S MODERN DANCES

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INTRODUCTION

The stage is dark, but in one corner, in the shadows, kneels the curved, still body of a man. His silhouette shows his face buried in his palms, as if in anguish, as if remembering . . . or as if dreaming. Out of the darkness behind him, in a single shaft of light, steps the figure of a young girl. Her hair is loose, her white gown is flowing and translucent.[2]

Well before and alongside George Balanchine (1904-1983), women like Loïe Fuller (1862-1928), Isadora Duncan (1877-1927), Ruth St. Denis (1879-1968), and Martha Graham (1894-1991) pioneered American modern dance. They were white women working in male-dominated and visually racially-mixed theatrical markets—while maintaining the dominance of whiteness. By examining legal issues in relation to choreography by pioneering figures like George Balanchine and Martha Graham, this Article argues that the effort to win copyright protection for modern dance in the United States was a simultaneously racialized and gendered contest. Copyright and choreography, particularly as tied with whiteness,

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[2] Suzanne Farrell's description of a scene from *Don Quixote*, which she performed with George Balanchine. SUZANNE FARRELL & TONI BENTLEY, HOLDING ON TO THE AIR 9 (2d ed. 2002).

have a complex history—one of attraction and repulsion, much like a metaphorical tango.

This Article illustrates the significance of choreography first gaining copyright protection through Balanchine; it is thus important to understand why Balanchine succeeded where Fuller failed, even if they both partook of an aesthetic of whiteness. Furthermore, although Graham, following Balanchine, was able to gain copyright protection for her choreographic works, her estate, unlike Balanchine's, was not able to maintain control of her creations. The idea that ownership of choreographic works could be wrested away from the chosen heir of the choreographer was alarming to many in the dance community, resulting in the dance and legal communities becoming more aware of contractual provisions and their effects.[3]

Part I discusses the method this Article uses, which moves across critical race theory and copyright.[4] Part II reviews Fuller's story as the first white female choreographer in the United States to attempt to establish an infringement claim in response to what she saw as the stealing of her "original" dance material.[5] Though Fuller failed, her ability to file a complaint was an important milestone in the history of dance choreography in relation to copyright.[6] Crucially, Fuller's claim depended on implicitly racialized formulations that correlated whiteness with intellectual property rights.

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[3] Diane Solway, *When the Choreographer is Out of the Picture*, N.Y. TIMES (Jan. 7, 2007), http://www.nytimes.com/2007/01/07/arts/dance/07solw.html?ref=ronprotas.

[4] There are five other approaches that have been used to analyze why copyright and choreography have had such a refractory relationship. The first approach: copyright's history, being bound with printing and copying, is antithetically related to dance, with its bodily based and oral traditions. *See* Francis Yeoh, *The Value of Documenting Dance*, BALLET-DANCE MAGAZINE (June 2007), http://www.ballet-dance.com/200706/articles/Yeoh200706.html; *see also* Martha M. Traylor, *Choreography, Pantomime and the Copyright Revision Act of 1976*, 16 NEW ENG. L. REV. 227, 234, 237 (1980). The second approach: dance's non-verbal representation and scarcity of reliable records make it difficult to fix. *See* FRANCIS SPARSHOTT, A MEASURED PACE: TOWARD A PHILOSOPHICAL UNDERSTANDING OF THE ARTS OF DANCE 420 (1995); *see also* CYNTHIA LYLE, DANCERS ON DANCING 115 (1977). The third approach: traditionally, dancers have relied on memory to conserve and pass on choreography. *See* Traylor, supra note 4, at 234, 237; William Patry, *Choreography and Alternatives to Copyright Law*, THE PATRY COPYRIGHT BLOG (Aug. 18, 2005, 1:45 P.M.), http://williampatry.blogspot.com/2005/08/choreography-and-alternatives-to.html. The fourth approach: the Copyright Office prefers forms of notation that are more precise and text-based, but are not necessarily perceived as the most effective by the dance community and are extremely expensive. *See* Joi Michelle Lakes, *A Pas De Deux for Choreography and Copyright*, 80 N.Y.U. L. REV. 1829, 1854 (2005); Margaret Putnam, *Notation Takes Steps to Preserve Dance*, DALL. MORNING NEWS, Dec. 6, 1998, at 1C. The fifth approach: even the evolution of new technologies, like film or videotape, is insufficient to adequately record dance choreography. *See* Melanie Cook, *Moving to a New Beat: Copyright Protection for Choreographic Works*, 24 U.C.L.A. L. REV. 1287, 1296 (1976-1977). While not denying the value of these approaches, this Article seeks to show that an attention to the dynamics of race, gender and class in how these stories of copyright and choreography adds an important analytic lens.

[5] For a related discussion of Fuller and the history of copyright and dance, *see* Heather Doughty, *The Choreographer in the Classroom: Loïe Fuller and Leonide Massine*, *in* PROCEEDINGS OF THE FIFTH ANNUAL CONFERENCE OF THE SOCIETY OF DANCE HISTORY SCHOLARS 35 (1982).

[6] *See id.*

Part III analyzes how whiteness as status property functioned in Balanchine's rise to stardom as a "genius," enshrining his hyper-whitened feminine aesthetic as the iconic look of American modern ballet. That hyper-whitened aesthetic and Balanchine's authority as a white male ballet master helped delimit his choreography as copyrightable, and therefore, worthy of protection from infringement. Part IV discusses how Martha Graham's reputation as an "exotic" white woman helped cement her power as a choreographer. However, whiteness as status property functioned refractorily in her case, and unlike Balanchine's heirs, Graham's heir was unable to maintain unchallenged control over Graham's choreographic creations. Finally, Part V compares Loïe Fuller, George Balanchine, and Martha Graham in relation to their possession of whiteness as status property, and their attempts at seeking copyright protection for their choreographic works. Whereas Balanchine triumphed and Fuller failed, Graham presents a more complex narrative, showing that the proverbial tango between copyright and choreography is far from over. The findings of this study are in sharp contrast to the way in which, for example, black female blues artists have been affected by the intellectual property system. There, the sadly familiar patterns of exploitation, devaluation, and promotion of derogatory stereotypes persist.[7]

I. METHOD

The analytic fulcrum of this Article focuses on Balanchine because it was with his "abstract" ballets that contemporary dance choreography became accepted as "intellectual property."[8] Balanchine, a Russian émigré, was the first U.S. choreographer to acquire copyright protection for his choreographic works through his will[9] and, eventually, it was through his estate that the first copyright infringement claim occurred.[10] Balanchine's estate eventually won the infringement dispute, and the landmark decision established a foundation for thinking through what "copyright infringement" entails, in relation to choreography.[11] However, Balanchine's copyrighted choreography also sharply delimited the privileged sphere of the copyrightable from the non-copyrightable, or communal public domain property. Crucially, this Article argues, Balanchine's claim depended on implicitly racialized formulations that correlated "whiteness"—often conflated with abstract expressiveness, or "pure" dance movement as an end in itself, not requiring a narrative—with intellectual property rights.

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[7] *See, e.g.*, K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. OF GENDER, SOC. POL'Y & L. 365 (2007).

[8] *See* Horgan v. MacMillan, Inc., 789 F.2d 157 (2d Cir. 1986).

[9] *See Horgan*, 789 F.2d at 158-159.

[10] *See* Horgan v. MacMillan, Inc., 621 F. Supp. 1169 (S.D.N.Y. 1985); *Horgan*, 789 F.2d at 157.

[11] *See generally Horgan*, 789 F.2d at 157.

It was Balanchine, a Caucasian male foreigner, who institutionalized the "standard look" of the hyper-whitened, ethereally slim ballerina, and with that, the history of copyrightable American modern dance choreography formally begins.[12] It is Balanchine's choreography that becomes institutionalized as "property"—one that the law regards as "whitened" enough to delimit from the public domain.[13] And it is through Balanchine's copyrighted choreography that his estate becomes powerful enough to lay claim to photographs of productions of his choreography as "derivative" or corollary property.[14] Thus, a review of the Balanchine estate's legal forays offers insight into the complex and fluid matrices connecting constructions of race, gender, and dance copyright in the United States.

In addition, because of the dearth of primary material, especially in relation to Fuller, this Article adopts an interdisciplinary approach, interacting scholarship on copyright and authorship in legal and cultural studies with dance studies and critical race theory, while drawing on primary sources such as autobiographies, copyright and legal records, periodical and newspaper accounts, and website sources. This Article builds from scholarship on the relationship between whiteness and property rights, particularly Cheryl Harris's 1993 article, which argues that, historically, U.S. law has "accorded 'holders' of whiteness the same privileges and benefits accorded holders of other types of property."[15] To enhance Harris's characterization of "whiteness," this Article also employs Kimberle Crenshaw's "intersectional model" of critical race theory, showing that race, gender and class are interrelated, rather than isolated factors, in the negotiation of agency and identity.[16]

This Article also adopts Kenneth Nunn's critique of Eurocentrism as enshrined in law,[17] especially his observation that "[i]t is the core cultural dynamics of Western societies that produce social structures in which male traits, material possessions and white racial characteristics are so highly privileged."[18] In addition, Richard Dyer's work on "whiteness," although it has been employed more for film studies, would also be of interest, because of the theatrical nature of performance dance, and its use of lighting to enhance visual illusion.[19] For example, Balanchine's choreography for Goldwyn's *American in Paris*, an updated *Swan Lake*, in which the beauteous white nymph, Zorina, emerges from a pool at a

12 *See generally id.*

13 *See generally id.*

14 *See* Horgan v. MacMillan, Inc., 789 F.2d 157, 161 (2d Cir. 1986).

15 Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1731 (1993).

16 *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 357 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, Kendall Thomas, eds., 1995).

17 *See* Kenneth B. Nunn, *Law as Eurocentric Enterprise*, 15 LAW & INEQ. J. 323 (1997); *see also* Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 HOW. L.J. 1 (1996).

18 *Id.* at 331.

19 *See generally* RICHARD DYER, WHITE (1997).

garden party to surrealistic effects, showed a brief flirtation with an experimentation with light reminiscent of Loïe Fuller's own experimentations with light and surrealistic effects, which predated Balanchine's by approximately 75 years.[20] Finally, Anthea Kraut's *White Womanhood, Property Rights and the Campaign for Choreographic Copyright: Loïe Fuller's Serpentine Dance* examines how Fuller's whiteness did not automatically grant her property rights, especially when that "property" is as simultaneously abstract and embodied as choreography.[21] Kraut's thesis that "white privilege, like hegemony in general, has been neither monolithic nor a foregone conclusion but, rather, continuously asserted and contested" is crucial to this Article.[22] To close, this Article briefly compares, in relation to Balanchine, how whiteness-as-property operated in the cases of Loïe Fuller and Martha Graham—both white women pioneers in American modern dance, whose efforts at seeking copyright protection for and control over their choreographic works were not as successful as Balanchine's.

II. LA LOÏE'S AMBIGUOUS HERITAGE

A. The Genesis Stories and Legal Precedent

In her autobiography, *Fifteen Years of a Dancer's Life*, Fuller narrated how she was inspired to create what eventually became her signature and a quintessential Art Nouveau motif.[23] While touring in a new play, *Quack M.D.*, Fuller was instructed to create a scene in which she would appear to be hypnotized.[24] She described what appears to be the bricoleur's holy grail: a fortuitous conjunction of improvisational resourcefulness and just the right materials, at the right time. Fuller grabbed a long skirt sent to her from India by acquaintances; she pulled the waist of the skirt up to just underneath her breasts, creating an empire-waist gown made of very light and diaphanous material.[25] What happened next is an iconic Eureka moment of modern dance history:

> He raised his arms. I raised mine. Under the influence of suggestion, entranced—so, at least, it looked—with my gaze held by his, I followed his every motion. My robe was so long that I was continually stepping upon it, and mechanically I held it up with both hands and raised my arms aloft. . . . There was a sudden exclamation from the house: 'It's a butterfly! A butterfly!' I turned on my steps, running from one end of the stage to the

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[20] BERNARD TAPER, BALANCHINE: A BIOGRAPHY WITH A NEW EPILOGUE 188-90 (3d ed. 1996).

[21] *See* Anthea Kraut, *White Womanhood, Property Rights and the Campaign for Choreographic Copyright: Loïe Fuller's Serpentine Dance*, 43 DANCE RESEARCH J. 3, 3-5 (2011).

[22] *Id.* at 5.

[23] LOÏE FULLER, FIFTEEN YEARS OF A DANCER'S LIFE 28 (1913).

[24] *See* ANN COOPER ALBRIGHT, TRACES OF LIGHT: ABSENCE AND PRESENCE IN THE WORK OF LOÏE FULLER 17 (2007).

[25] *Id.* at 17.

> other, and a second exclamation followed: 'It's an orchid!' To my great astonishment sustained applause burst forth.[26]

Like all myths, there appear to be several versions of the serpentine dance "genesis" story. In another version, while Fuller was playing around, in front of a mirror, with a "voluminous white skirt" she had received from an "admirer," she had a vision: "With dramatic lighting, she could create fantastic, evanescent, suggestive shapes onstage by agitating swaths of silk from underneath with a pair of hand-held wands."[27]

To achieve iconic status, Fuller had to become elevated to pure "whiteness"—an ethereal abstraction—a fairy of light and illusion, an archetypal descendant of the Greeks, devoid of corporeality. Her onstage persona mesmerized audiences. Whirling around on a glass platform, lit by as many as fourteen electric spotlights whose colors kept metamorphosing, she held up voluminous fabrics billowing about her in three-dimensional evocations of flowers, butterflies and flames. The illusion was powerful enough to inspire and enthrall poets like Mallarmé and Yeats, painters like Toulouse-Lautrec and Whistler, and scientists like Pierre and Marie Curie. For example, below is one of the ecstatic reviews of one of Fuller's performances:

> Suddenly the stage is darkened and Loïe Fuller appears in a *white light* which makes her radiant and a *white robe* that surrounds her like a cloud. She floats around the stage, now revealed, now concealed by the exquisite drapery which takes forms of its own. . . . She is Diana dancing in the moonlight with a cloud to veil her from Acteon. She is a *fairy* flitting about with a cloak of thistledown. The surprised and delighted spectators do not know what to call her performance. It is not a skirt dance, although she dances and waves a skirt. It is unique, *ethereal*, delicious. As she vanishes, leaving only a *flutter* of her *white robe* on the stage, the theater resounds with thunders of applause.[28]

But that description is of *La Loïe*, at the pinnacle of her artistic career, when she had achieved the celebrity of being the "inventor" of the serpentine dance,[29] even if she failed to establish copyright ownership to it, when she sought an injunction against Minnie Renwood Bemis in 1892. Despite her lack of a formal education, Fuller displayed a sense of compositional acumen and business-savvy when she "asserted that [because] she originated the dance, and . . . copyrighted [it], [the serpentine dance] was her exclusive property."[30] Thirty years old, plump, and hardly the conventional beauty, Fuller, knowing that her theatrical career and

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[26] FULLER, *supra* note 23, at 31.

[27] GERALD JONAS, DANCING: THE PLEASURE, POWER, AND ART OF MOVEMENT 192 (1992).

[28] Jody Sperling, *Loie Fuller's Serpentine Dance: A Discussion of its Origins in Skirt Dancing and a Creative Reconstruction*, *in* PROCEEDINGS OF THE TWENTY-SECOND ANNUAL SOCIETY OF DANCE HISTORY SCHOLARS CONFERENCE 53 (Juliette Willis, comp., 1999) (emphasis added).

[29] *See id.*

[30] *Dancing and Copyright*, N.Y.TIMES, June 19, 1892 at 20.

financial stability hinged on her ability to control ownership of the serpentine dance, attempted what was then unconventional. She turned to the legal apparatus for protection against copyright infringement, rather than relying on community norms within the dance community.[31] Yet in an opinion that has become much-quoted, Judge Lacombe of the New York Circuit Court dismissed Fuller's serpentine dance as unworthy of copyright protection because of its lack of "narrative" or "dramatic" content.[32] In his opinion in *Fuller v. Bemis*, the district court judge held:

> It is essential to such a composition that it *should tell some story*. The plot may be simple. It may be but the narrative or representation of a single transaction; but it must repeat or mimic some action, speech, emotion, passion, or character, real or imaginary. And when it does, it is the ideas thus expressed which become subject of copyright. An examination of the description of the complainant's dance, as filed for copyright, shows that the end sought for and accomplished was solely the devising of a series of graceful movements, combined with an attractive arrangement of drapery, lights, and shadows, telling no story, portraying no character, depicting no emotion. The *merely mechanical movements* by which effects are produced on the stage are not subjects of copyright where they convey no ideas whose arrangement makes up a dramatic composition. Surely, those described and practiced here convey, and were devised to convey, to the spectator, no other idea than that a comely woman is illustrating the poetry of motion in a singularly graceful fashion. Such an idea may be pleasing, but it can hardly be called dramatic. Motion . . . denied.[33]

This opinion became virtually enshrined as the legal basis for denying dance choreography—or anything that was *simply* "spectacle" or "decorative"—copyright protection.[34] Thus, in *Glazer v. Hoffman*, a similar copyright infringement suit praying for injunctive relief involving a dispute between competing magician-performers over ownership of a magician's sleight of hand performance, Judge Chapman cited *Fuller v. Bemis* as legal precedent for dismissing the case.[35]

> The case of *Fuller v. Bemis* . . . involved an infringement complaint. The act consisted of a stage dance illustrating the poetry of motion by a series of graceful movements, combined with an attractive arrangement of

31 *See* Fuller v. Bemis, 50 F. 926 (S.D.N.Y. 1892).

32 *Id.* at 929.

33 *Id.* (emphasis added).

34 The restrictive effect of the Court's denial of copyright protection to Fuller (and how Fuller's work prefigures modern music and dance) comes into sharp relief when one examines characterizations of modern music and dance stated by artists like John Cage and Merce Cunningham: "We are not, in these dances and music, saying something. . . . [I]f we were saying something we would use words. We are rather doing something. . . . There are no stories and no psychological problems. *There is simply an activity of movement, sound and light*." JOHN PERCIVAL, EXPERIMENTAL DANCE 20 (1971) (emphasis added).

35 Glazer v. Hoffman, 16 So.2d 53, 55 (Fla. 1943).

> drapery, light and shadows. While the idea may be 'pleasing,' said the Court, it is *not such a dramatic composition as to bring it within the meaning of the copyright act*. We therefore conclude that the plaintiff below failed to bring his act or performance within the terms of the Federal copyright statutes.[36]

What the judge's opinion does not explicitly address is Fuller's—and by extension, Martinetti's—class status as vaudeville performers and their proximity to the purely "popular," merely "illusory," or "decorative" forms of entertainment, such as belly dancing. In 1892, within the context of the infringement case against Bemis, Fuller's identity as a white woman and her entitlement to white privilege were trumped by her working class status; she was simply one among many dancing girls of vaudeville theatre. Ambivalences marked the relationship between copyright and choreography in Fuller's case, much like the attraction-repulsions of a tango.

B. From Skirt Dancing To Art Nouveau: The Rise of Loïe Fuller

Despite Fuller's eventual commercial success at branding herself an "original," skirt dancing—from which her serpentine dance sprang—was already very much in vogue in the popular variety entertainment circuit. Letty Lind, one of the popularizers of the skirt dance, was a celebrated star of Gaiety Theatre, a London music hall known for the "'Gaiety Girls,' a nineteenth-century British version of the Radio City Music Hall Rockettes;" she was also one of the celebrities Fuller replaced in some 1889 productions, prior to becoming "La Loïe."[37] Along a parallel track, Flitch characterized the skirt dance as a "compromise between the overly academic ballet of the time and the more outrageous step-kick dancing, such as the can-can (*le chahut*) or its English derivative, the 'ta-ra-ra-boom-de-ay.'"[38] Thus, the skirt dance uneasily straddled the realms of vulgarity and the "grace of flowing drapery, the value of line, the simplicity and naturalness that were characteristic of Greek dance."[39] "As it evolved, skirt dancing became increasingly associated with the burlesque, an excuse to flaunt what was hidden underneath the skirt."[40]

As a choreographer, Fuller's genius lay in her appropriation of the general aesthetic of the skirt dance, to "whiten" it beyond its burlesque, working class roots to become an iconic image of Art Nouveau. Fuller's serpentine dance, at the height of her artistic career, became immortalized through Mallarmé's poetry as a

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[36] *Id.* (emphasis added) (internal citations omitted).

[37] ALBRIGHT, *supra* note 24, at 17.

[38] *Id.* at 18.

[39] *Id.*

[40] *Id.*

metaphor for a powerful, abstract expressiveness beyond language and corporeality.[41]

C. Ugly Duckling, Fairy, and Orientalist Temptress

Despite her fame, Fuller was an unlikely candidate for celebrity, and there was a large divide between her stage persona and her image offstage. According to Rhonda K. Garelick, off-stage, Fuller clearly had no formal dance training, little natural grace, and had no fashion sense.[42]

> To say [Fuller] was unglamorous is an understatement. Her round face, wide blue eyes, and short, stout body gave her a cherubic rather than sultry look. And at thirty, Fuller was nearly of retirement age for a music-hall dancer of that time. Offstage, she dressed haphazardly in oversized clothes, kept her hair in a tight bun, and wore little round spectacles.[43]

Fuller herself tearfully recounts how the fissure between her stage presence as a supernatural incarnation and her reversion back to an ordinary woman, led to a little girl's fearful recoil from her while backstage. To preserve the illusion, Fuller pretended to be "the fairy's" emissary.[44]

For as long as Fuller remained in her role as the quintessential disembodied symbol of artistic whiteness, both the public and her critics were forgiving of her idiosyncrasies, and tended to treat her as something in between "a female version of Thomas Edison, a mad scientist lady,"[45] and a chaste, sexless, and "proper" creature, despite her open lesbian relationship with her live-in companion of twenty years, Gabrielle Bloch, "a Jewish-French banking heiress who dressed only in men's suits."[46]

Correspondingly, Fuller's most memorable artistic failure appears to have been her first staging in 1895 of Salomé, the quintessential seductress.[47] Everything about the Salomé production seemed radically at odds with the tried and tested recipe that had made her a success in her serpentine dance numbers.[48] Unlike her earlier productions, where all she seemed to need was black space, which she then filled with color, movement, and sound, here, she collaborated with George Rochegrosse, a popular salon painter, who did the costumes and set,

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41 *Id.* at 41.

42 RHONDA K. GARELICK, ELECTRIC SALOME: LOÏE FULLER'S PERFORMANCE OF MODERNISM 3 (2009).

43 *Id.*

44 FULLER, *supra* note 23, at 141-42.

45 GARELICK, *supra* note 42, at 6.

46 *Id.* at 4.

47 *See Miss Fuller's New Dance*, N.Y. TIMES (Jan. 24, 1896), http://query.nytimes.com/mem/archive-free/pdf?res=9907E0D6153EE333A25757C2A9679C94679ED7CF; *see also* ALBRIGHT, *supra* note 24, at 126.

48 ALBRIGHT, *supra* note 24, at 126.

inclusive of a "perspectival view of Jerusalem on a backdrop."[49] Nevertheless, one feature of her earlier performances was kept, in terms of press coverage: the *New York Times* heralded her use of underlighting for dramatic effect and her "expressive" treatment of the well-known story.[50]

Unfortunately, Fuller's genius at self-promotion and artistic projection this time backfired, largely because of her earlier success. Her hyper-whitened ethereal image, as status property, became devalued by her self-unveiling as a woman of flesh and blood: slightly corpulent, and prone to all fleshly weakness and imperfection.[51] Jean Lorraine's acid expression of disappointment over Fuller's rendition of Salomé reveals how deeply invested the Parisiennes had become in Fuller's hyper-whitened artistic illusion: "One perceives too late that the unhappy acrobat is neither mime nor dancer; heavy, ungraceful, sweating with make-up running at the end of ten minutes of little exercises . . . she maneuvers her veils and her mass of materials like a *laundress* using her paddle."[52] Reference to Fuller's thighs, a synecdoche of her class origins, and her "exotic" status as an American foreigner, were not uncommon in Paris.[53] But it was not until then that Fuller's "Yankee-ness" became a diatribe dripping with contempt and condescension, when Lorraine wrote: "[L]uminous without grace, with the gestures of an English boxer and the physique of Mr. Oscar Wilde, this is a Salomé for Yankee drunkards."[54]

Perhaps even stranger is Fuller's restaging of the Salomé pantomime in November 1907 titled, *La tragédie de Salomé*.[55] The program notes combine what was then a typical blend of Greek and Orientalist themes, visualized through a series of studio head shots of Fuller decked in "Egyptian-looking" wigs.[56] Admittedly, there was a great deal of difference between the 1895 and 1907 productions, with a great deal more preparation, both in terms of choreographic preparation and the use of lights.[57] Reputedly, in the third tableau at the climatic moment of "*La danse du paon*," Fuller unveiled an "iridescent tail of large feathers," which she could transform into a fan.[58] Albright reports that this outfit was comprised of "4,500 peacock feathers . . . along with other equally impressive statistics such as [Fuller's] use of 650 lamps and 15 projectors to create 10,240 watts of candlepower."[59]

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[49] *Id.*

[50] *Miss Fuller's New Dance*, *supra* note 48.

[51] *See* MARGARET HAILE HARRIS, LOÏE FULLER: MAGICIAN OF LIGHT 20 (Virginia Museum Exhibition Catalogue, 1979).

[52] *Id.* (quoting JEAN LORRAIN, POUSSIÉRES DE PARIS 143 (Ollendorf, 1902)) (emphasis added).

[53] *See, e.g.*, Lynn Garafola, *The Travesty Dancer in Nineteenth-Century Ballet*, *in* LEGACIES OF TWENTIETH-CENTURY DANCE 137-47 (2005).

[54] HARRIS, *supra* note 51 (quoting JEAN LORRAIN, POUSSIÉRES DE PARIS 143 (Ollendorf, 1902)).

[55] *See id.; see also* ALBRIGHT, *supra* note 24, at 135.

[56] ALBRIGHT, *supra* note 24, at 135.

[57] *Id.* at 139.

[58] *Id.* at 135, 138.

[59] *Id.* at 138.

Fuller's second *Salomé* rendition thus attempted to bring together her genius in lighting artistry with another foray into more "expressive" and less abstract artistry. Though the result was generally hailed as a "triumph of feminism,"[60] what emerges is that Fuller's "expressive" version of Salomé was also an attempt to return to the conventional "Orientalized" stereotype. What is also clear is that Fuller, onstage, even as the quintessential possessor of whiteness as status property, remained fascinated with the imaginative reworkings of an Orientalist or non-white "other." La Loïe, having achieved the immortal status of a hyper-whitened goddess of light and abstraction, in her *Salomé* productions unveiled white envy of, and fascination with, constructions of non-white mortal Otherness.

D. Preserving La Loïe's Legacy

Despite—and probably because of—Fuller's defeat in her copyright infringement suit against Bemis, she left behind an impressive collection of scientific patents, especially in terms of lighting and set design. For example, three of Fuller's best-known inventions were registered with the U.S. Patent Office between 1893 and 1895; these were her "Garment for Dancers," her "Mechanism for the Production of Stage Effects"—a device for underlighting—and her "Theatrical Stage Mechanism"—a design for a mirrored room.[61] Fuller's backstage persona as a mild mannered female "mad scientist" seemed congruent with her mastery of lighting and staging. Nevertheless, despite Fuller's failure to gain copyright protection, Fuller's choreographic legacy ironically seemed best protected, not by copyright, but by her effective acquisition of celebrity through the smart marketing of her image as *La Loïe*, the originator of the serpentine dance. To show how successfully Fuller had acquired ownership of a hyper-whitened form of popular artistry, Albright claims, "Fuller had even more imitators than Madonna on an early-1980s karaoke night."[62] As Fuller's reputation grew, so did the legions of imitators. Yet that proliferation of faux-serpentine dance copycats only served to bolster Fuller's uniqueness as *La Loïe*. Where copyright failed, popular cultural mechanisms of the creation of stardom, through the generation of multiple copies, rather than their prevention, succeeded in cementing Fuller's legacy. Nevertheless, Fuller herself perceptively commented in an interview:

> There are 500 . . . little misses—who can twirl a few yards of muslin, and bob in and out of the focus of a lime light . . . but twirling a few yards of muslin and playing at touch with the limelight . . . do not make a skirt dancer. To be an artist at your business calls for a life's experience. . . . I leave nothing to chance. *I drill my light men . . . tell them to throw the light*

[60] *See* RICHARD CURRENT & MARCIA EWING CURRENT, LOÏE FULLER: GODDESS OF LIGHT 182 (1997).

[61] ALBRIGHT, *supra* note 24, at 185.

[62] *Id.* at 38.

> *so, or so, and they have to do their business with the exactitude of clockwork*. . . . Theme, style, time, all differ in one dance from another.[63]

What emerges from the interview excerpt is not only Fuller's confidence in the unassailability of her position, but also her awareness of what it takes to move from being an interchangeable popular dancing girl to being a respected artist. Instead of focusing on the physical labor of dancing, she focused on the conceptual aspects of composition; rather than focusing on the disciplining of her body, she stressed the command over her supporting crew and the technical aspects of production. In so doing, Fuller rhetorically kept her dance legacy within the realm of the abstract and non-corporeal: the whitened realm of privilege. Though Fuller flirted with Orientalist themes in her *Salomé* productions, as Garelick remarks, this seems like a "sanitized 'borrowing' . . . because Fuller seems too high-tech, too asexual, too white, and too 'unforeign' to be compared to such 'exotic' and scantily clad dancers as the era's popular Algerian troupe, the Ouled-Nayl."[64]

Well before Balanchine successfully copyrighted his ballets as intellectual property, Fuller had begun the process of rhetorically converting dance choreography from simply popular entertainment, which is not protectable, to "art," which is eminently copyrightable.[65] Fundamental to Fuller's—and eventually Balanchine's—project was the association of abstractness with the aesthetic of whiteness.

III. BALANCHINE'S ARTISTIC IMMORTALITY

A. Balanchine's Hyper-Whitened Aesthetic

George Balanchine, born Georgi Melitonovitch Balanchivadzein in St. Petersburg, Russia,[66] came to the United States in 1933, in acceptance of Lincoln Kirstein's invitation.[67] Born from a wealthy, mercantile Jewish family, Kirstein dreamed of creating a world-class ballet company,[68] and thought Balanchine was the most promising candidate to choreograph pieces for such a new company.[69] At Balanchine's behest, Kerstein also funded the founding of the American Academy

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63 *"La Loïe" Talks of Her Art*, N.Y. TIMES, Mar. 1, 1896 (emphasis added).

64 GARELICK, *supra* note 43, at 17.

65 "Art," like "literature" or "poetry," is seen as the unique work of "inspired" and "creative" individuals, and as such, deserves copyright protection. The "artistic" is often set apart from its subaltern other, the merely "popular" or "folkloric," which is deemed as lacking originality and thus belongs in the public domain. *See* LAURELYNN WHITT, SCIENCE, COLONIALISM, AND INDIGENOUS PEOPLES: THE CULTURAL POLITICS OF LAW AND KNOWLEDGE 159-60 (2009) (providing a postcolonial critique of the origins of copyright law).

66 *Biography*, THE GEORGE BALANCHINE FOUNDATION, http://www.balanchine.org/balanchine/01/bio.html (last visited Dec. 25, 2011).

67 TAPER, *supra* note 20, at 152.

68 *Id.* at 147-48.

69 *Id.* Prior to working with Kerstein, Balanchine already had an impressive resume as a choreographer and ballet master; he had worked with Serge Diaghilev and his renowned Ballets Russes, the Royal Danish Ballet in Copenhagen, and the Ballets Russes de Monte Carlo, among others.

of Ballet in 1934.[70] After several ballet companies directed by Kirstein and Balanchine dissolved, the New York City Ballet was born, inaugurated with a performance on October 11, 1948.[71] Under Balanchine's leadership as its ballet master and principal choreographer, the company evolved to become one of the most reputable ballet companies internationally.[72]

Many biographies of Balanchine abound, all of which are extremely complimentary. Robert Gottlieb compares Balanchine to other "geniuses," like Shakespeare and Mozart, who "composed with amazing fluency and ease."[73] Gottlieb's portrait of Balanchine captures the master choreographer's iconic stature in superlative, semi-divine terms—one who did not need "divine inspiration," but simply worked, pragmatically impervious to all external factors.[74] In Gottlieb's eyes, Balanchine, the artist, towered above the contingencies of the human condition.

> Always, he adjusted himself to the immediate situation, whatever it was: big stage or little stage; large cast or small; money or no money; ballet, musical comedy, film, or television. . . . He was a leader, a model—both a supreme artist and a brilliant executive. To his dancers he was everything. To other choreographers he was a figure of awe. As Twyla Tharp has put it, "*Balanchine is God*."[75]

In comparison, Bernard Taper describes Balanchine, despite the heavy Russian accent that persisted throughout Balanchine's life, as a quintessential American—eclectic, adaptable, shrewd, aware of the commercial nature of his craft—; traits he shared with other modern dance pioneers, like Fuller and Graham.[76] In Taper's biographical portrait, Balanchine saw himself more as a craftsman than an artist.

> When [Balanchine] spoke of what he did, he often compared himself to a chef, whose job it was to prepare for an exacting clientele a variety of attractive dishes that would delight and surprise their palates, or to . . . a good carpenter, with pride in his craft.[77]

Despite the variance in portraiture, what is clear is Balanchine's total command over his dancers. It was as if Balanchine were the puppet-master, and they were the wooden objects, into whom he breathed life, rendering them immortal vessels of eternal emotions and passions. As Taper remarks, "In [Balanchine's] cosmogony,

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[70] *Id.* at 154.
[71] *See Biography*, *supra* note 66.
[72] *See id.*
[73] ROBERT GOTTLIEB, GEORGE BALANCHINE: THE BALLET MAKER 2 (2004).
[74] *Id.* at 3.
[75] *Id.* (emphasis added).
[76] *See* TAPER, *supra* note 20, at 6-10.
[77] *Id.*at 6.

dancers were like angels: celestial messengers who may communicate emotions but do not themselves experience the joys or griefs of which they bring tidings."[78]

Balanchine's creativity seemed inextricably bound up with his romantic life, and he is legendary for having married many of his muses at the height of his creative powers—they were always young dancers under his mentorship, always still unformed, like Galateas waiting to be sculpted into being by a balletic Pygmalion. For example, Balanchine, at forty-one, married twenty-one-year-old Maria Tallchief, whose exotic dark looks made her resemble a Mayan princess; he said he was charmed by her Indian heritage, and even remarked that by marrying her, he was becoming truly American, reminiscent of how John Smith married Pocahontas.[79] The Orientalist and patriarchal undertones, as well as Balanchine's complete identification with the romantic image of the American frontiersman, are clear, in that revealing remark. Equally clear is Tallchief's acceptance of his paradigm:

> [Tallchief] stood *in awe of Balanchine. He was the master*. She had said that she was astonished when he proposed, for he had not previously showed any lover's ardor. . . . There was no thought of refusing him, just as in the rehearsal hall there was no thought of refusing to attempt whatever he demanded of her.[80]

Balanchine's creative and personal pattern clearly worked itself in cycles. Like a painter or sculptor, these young muses represented both the reality and potentiality of his art—their limits were the limits of his creations. Like Michelangelo, he would then patiently awaken the ethereal forms he saw asleep in their young, mortal frames, still rough and uncut—as Tallchief, unlike his other dancers, still had some "flesh" on her when he started working with her. And they, in turn, submitted, serving him faithfully, and then when age or infirmity began to take their toll, made way for the next muse; it was unthinkable that they would rebel as they were grateful to have been made artistically immortal, for a few years, by the master choreographer. "That one young woman should be supplanted in this role by another in the course of time had begun to seem by then, as with Picasso's succession of wife-mistress-models, an outward manifestation of the constantly renewed youthfulness of the artist's creative powers."[81]

Balanchine married and divorced four women: Tamara Geva, Vera Zorina, Maria Tallchief, and Tanaquil Le Clercq; he had a common law wife, Alexandra Danilova, whom he never formally married.[82] All the women were dancers, and under the aegis of his choreographic mentorship, blossomed into stars. Although

[78] *Id.* at 13.

[79] *Id.* at 213.

[80] *Id.* at 215 (emphasis added).

[81] *Id.* at 212.

[82] *See* Richard Nilsen, *The Wives of Balanchine*, THE AZ. REPUB. (May 5, 2009), http://www.azcentral.com/thingstodo/stage/articles/2009/05/05/20090505balanchine0503women.html.

Balanchine could never exercise as much control over Geva, Danilova, and Zorina, by the time he was in his forties, Balanchine was well established enough to become a virtual artistic god. During that period, the women he married, Tallchief and Le Clercq, were also his artistic "property," for it is upon their frail, hyper-whitened frames, which he thoroughly commanded, that he "wrote" his ballets. With the complete integration of his personal and professional lives, through an artistic justification, Balanchine had total control over his wives; he is reported to have said, "If you marry a ballerina, . . . you never have to worry about whether she's running around with somebody else or anything like that. You always know exactly where she is—in the studio, working."[83]

Unlike Fuller, Balanchine did not have to work hard at establishing a virtual trademark—the name "Balanchine" had by then come to signify both a certain classical purity of line and a hyper-whitened feminine aesthetic, as his ballets tended to glorify women with these kinds of physical attributes.[84] Unlike Fuller, Balanchine did not have to work hard to distinguish his art form from the burlesque because ballet's classical and regal heritage[85] already distinguished it from the realm of "mere spectacle," devoid of any moral or artistic higher purpose.

Nevertheless, like Fuller, Balanchine also experimented with film, though his work in this medium was more in keeping with Hollywood's mainstream narrative style than Fuller's experimental work. For example, in the spring of 1937, Samuel Goldwyn contracted Balanchine to come to Hollywood and choreograph "numbers for *The Goldwyn Follies*, its score to be written by George Gershwin."[86] Goldwyn hired the half-German, half-Norwegian blonde soloist with the Ballets Russes, Vera Zorina, to dance the Geva role.[87] Balanchine had confided in a female friend, Lucia Davidova, that what he sought in a wife was not a "housewife," but "a nymph who fills the bedroom and floats out."[88] Balanchine romanticized elusiveness: in his artistic world, the man sought, and the woman fled.[89] And Zorina, his dance-muse—and eventual second wife—for his most famous cinematic foray, the "Water Nymph" ballet, was perfect for the part, both artistically and personally: she was cool, guarded, disdainful, and emotionally unavailable.[90]

Balanchine himself seduced Zorina with his vision of the updated *Swan Lake* concept:

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83 TAPER, *supra* note 20, at 215-16.

84 *See generally* NANCY GOLDNER, BALANCHINE VARIATIONS (2008) (an overall look at Balanchine's oeuvre by a dance critic).

85 *See* RUSSELL FREEDMAN, MARTHA GRAHAM: A DANCER'S LIFE 47 (1998).

86 GOTTLIEB, *supra* note 73, at 91.

87 *Id.* at 92.

88 *See id.* at 93.

89 *See id.*

90 *See id. at 94*.

> There will be marvelous, beautiful, big stage, round, with Greek columns on each side like Palladio; then, in the back, statue of big white horse. Poet comes and sees beautiful Undine coming out of pool . . . covered with beautiful white flowers. . . . She dances with poet. Then big storm starts, wind blows like mad, and we discover her on the horse. Then the wind blows all her dress away and she slides slowly, slowly from horse and in her little tunic and bare feet she goes back to lily pool, and slowly her body disappears in the water until only her head is visible, and then she puts her cheek on the water like a pillow and she is gone like sun disappearing in ocean.[91]

Here is the essence of Balanchine's artistic vision: a *mise en scene* drenched with classical referents such as the column or the horse; a hyper-whitened muse, not of flesh and blood, but of the elements, who conspire in making her elusive; the ubiquity of whiteness, which adds to the visual ethereality of the muse.[92] Though the eventual movie was shot in color, with Zorina swathed in gold, Balanchine's idealized vision had her clothed in white. This is an aesthetic that repeatedly surfaces in Balanchine's corpus. Personally, despite his artistic productivity, Balanchine was predominantly unhappy during his seven-year marriage to Zorina—who claimed to have felt "suffocat[ed]" by being placed "on a pedestal"[93]—and she eventually left him for classical-record producer, Goddard Lieberson.[94]

Nevertheless, at the height of his career, Balanchine delighted principally in transforming a natural-looking, uninhibited "*tsoupolia*,"[95] a concocted Russian word meaning a young chicken, into a disciplined, immortal swan, swathed in the aesthetic of hyper-whitened beauty. He succeeded in that project, essentially emotionally intact, with Maria Tallchief and Tanaquil Le Clercq. He had probably grown so accustomed to being able to convince his muses to marry him, out of artistic duty and ambition, that when Suzanne Farrell came along, he was in shock when she resisted and married Paul Mejia, a young male dancer in the New York City ballet, and left the company for a while, in protest against Balanchine's refusal to cast Mejia in the "roles [Mejia] expected and deserved."[96]

Suzanne Farrell began her tutelage under Balanchine, whom she called "Mr. B.," when she was sixteen; her breakthrough occurred because then-prima ballerina Diana Adams became pregnant, and Farrell had to learn Adams' part for *Movements for Piano and Orchestra*, initially without music, and within days, for Balanchine and Stravinsky.[97] Violette Verdy, one of Balanchine's most

[91] *Id.* at 94-95.
[92] *See* GOTTLIEB, *supra* note 73, at 94-95
[93] *Id.* at 103.
[94] *Id.* at 104.
[95] TAPER, *supra* note 20, at 185.
[96] *Id.* at 324.
[97] GOTTLIEB, *supra* note 73, at 130-31.

"analytical" dancers remarked that: "[T]he person who has come closest to surrendering to Balanchine is Suzanne Farrell. She has managed that kind of wonderful surrender that is also a glorification of the self."[98] And indeed, Farrell herself, after describing what she remembered as a torturous rehearsal, filled with mistakes and lacking musicality because she was late from algebra class and did not have time to warm up before performing for Stravinsky and Balanchine, remembered Balanchine's faith in her when she was ready to withdraw from the part.[99] "I trusted him not to let me be a fool, but rather a tool, an instrument in his hands. In short, I trusted him with my life."[100]

What clearly emerged after Farrell's triumph in *Movements* was Balanchine's increasing obsession with her, as evidenced in the pieces he created for her. *Meditation* was a highly emotionally charged duet in which an older man, danced by Jacques d'Amboise, conjures up a memory of a woman he had loved.[101] Two years later, Balanchine's three-act ballet, *Don Quixote*, left little doubt of his feelings for her.[102] Balanchine himself, now in his 60's, danced the part of Don Quixote, an old befuddled nobleman, who is inspired, cared for and tantalized by his beautiful servant, Dulcinea—played by Farrell—who symbolizes both purity and sensuality.[103] "[I]t was obvious that [Balanchine] was dancing not only *with* Farrell but *for* her. This was both a coronation (he called her an 'alabaster princess') and a declaration of personal worship."[104]

Perhaps partly because of the poignant contrast between Balanchine's age and Farrell's youth and delicate beauty, Balanchine produced some of his most emotionally expressive works, crystallizing his hyper-whitened, impossibly frail feminine aesthetic—combined with an almost unnatural athleticism—as the norm for American ballet's prima ballerinas. Again and again, Balanchine cast Farrell as the chosen one in the white dress;[105] in 1982, when she had returned to the fold, and as Balanchine's health grew more tenuous, he chose to dress her again in white in a re-creation of *Elegie*—a part she had originally danced in black in 1966.[106]

As this section shows, Balanchine had no problems with acquiring copyright protection partly because he was already so effectively integrated into the upper crust elite of American ballet that his vision of the hyper-white, anorexically thin ballerina became the iconic "natural" look of the ballerina in the United States. According to one commentator, Balanchine himself stated "that the color of a

98 *Id.* at 130.
99 *Id.* at 130-31.
100 FARRELL, *supra* note 2, at 80.
101 GOTTLIEB, *supra* note 73, at 131.
102 *Id.*
103 *Id.*
104 *Id.*
105 FARRELL, *supra* note 2, at 90.
106 *See id.* at 259.

ballerina's skin should match that of a peeled apple."[107] It is hardly surprising, in some ways, that where Loïe Fuller failed, Balanchine and his estate succeeded, despite the equally "abstract" nature of his ballets. Yet Balanchine's legacy, casting the iconic hyper-whitened, waif-like look as the status property required for or to become prima ballerinas, is far more than artistic, as it has shaped copyright history as well in that it has become the unassailable standard for gaining copyright protection.

B. Balanchine's Will: Converting Choreographic Works Into Financial Assets

Balanchine's creation of a will bequeathing his ballets as property occurred because of a conversation with a lawyer, Theodore M. Sysol, whom Barbara Horgan, Balanchine's personal assistant, had hired.[108] Balanchine, who had always lived in the present and never thought about the future, found out that upon his death without a will, his sole heir would be his brother who lived in the Soviet Union.[109] Appalled, Balanchine was determined not to let all of his possessions go, not so much to his brother, whom he had seen barely three times, but the Communist government, whom he suspected would claim everything.[110] Initially, Balanchine thought his ballets were "not worth anything," but the lawyer, knowing of the 1976 Copyright Act granting copyright protection to choreographic works, convinced Balanchine that the ballets could be bequeathed to Balanchine's selected heirs.[111]

Galvanized into action, Balanchine drew up detailed lists of his ballets—thus partially fulfilling the "fixation" requirement for copyright protection—as well as his other assets.[112] Balanchine signed the will on May 25, 1978; except for one minor modification, incorporated through a codicil on June 18, 1979, the will remained unchanged.[113] With that step, the world of dance choreography in relation to law changed forever: eventually, Balanchine's ballets, inclusive of its look of hyper-whitened, impossibly thin feminine beauty, became delimited from the public sphere as private property. The ability to control not only performances of the ballets, but also their "look" or representation, now passed into the hands of Balanchine's principal legatees: Tanaquil Le Clercq, his fourth and last wife, who was felled by polio at the height of her career, and from whom he obtained a

[107] SUZANNE GORDON, OFF BALANCE: THE REAL WORLD OF BALLET 97 (1983). For remarks regarding the hyper-whitened, skeletally thin ballerina, *see* Paula T. Kelso, *Behind the Curtain: The Body, Control, and Ballet*, 3 EDWARDSVILLE J SOC. 2 (2003), *available at* http://www.siue.edu/sociology/EJS/v32kelso.htm.

[108] TAPER, *supra* note 20, at 399.

[109] *Id.*

[110] *Id.* at 400.

[111] *Id.*

[112] *Id.*

[113] *Id.*

Mexican divorce with the intent of pursuing Farrell;[114] Karin von Aroldingen, a prima ballerina who became a close platonic friend to the aging choreographer after Farrell had rejected Balanchine's romantic advances;[115] and Barbara Horgan, Balanchine's faithful and devoted personal assistant.[116] Yet it would take years before the financial details, involving essentially the translation of things that belie financial calculation, such as balletic choreography, into raw dollar values that could be transmitted across generations, would be worked out.

The story of how the will produced choreographic intellectual property, which eventually became institutionally owned, is a fascinating and complex one, steeped in the contingencies of choreographic production, much of which is intangible. When the will was unsealed, it specified 113 ballets, to be bequeathed to fourteen legatees, but not all of the ballets were still extant.[117] Approximately seventy-five were still potentially available for performance, and perhaps another six could be resurrected, with research.[118] The rest of the 425 ballets that Balanchine had prolifically created, now either no longer resided in the muscle memories of his dancers, or had disappeared with the passing of its dancers.[119]

Approximately seventy percent of the rights were willed to the three principal legatees.[120] Horgan and von Aroldingen were designated to share foreign royalty rights to all but twenty-one of the ballets identified in the will, and media royalty rights to all but twenty-five, including all rights to other ballets not specified in it, such as ballets created after Balanchine had signed the will.[121] Balanchine willed another ballet, *Brahms-Schoenberg Quartet*, to Barbara Horgan.[122] But Balanchine willed most of his choreographic intellectual property to Tanaquil Le Clercq, perhaps partially moved by his guilt over his abandonment of her, now saddled in a wheelchair due to a polio attack, in his Quixotic pursuit of Farrell.[123] To his fourth wife, Balanchine willed all American performance royalty rights to eighty-five ballets, out of which about sixty were actually still viable.[124] None of Balanchine's other official wives, including his first common-law one, Alexandra Danilova, got anything.[125] Taper, one of Balanchine's biographers, describes the complex distribution of choreographic assets:

114 *Id.* at 324.
115 *Id.* at 341-42.
116 *Id.* at 401.
117 *Id.* at 400.
118 *Id.*
119 *Id.*
120 *Id.* at 401.
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.*

> Other ballet bequests were Diana Adams (*A Midsummer Night's Dream*), Lincoln Kerstein (*Concerto Barocco* and *Orpheus*), Edward Bigelow (*The Four Temperaments* and *Ivesiana*), Betty Cage (*Symphony in C*), Mrs. André Eglevsky (*Sylvia Pas de Deux*, *Minkus Pas de Trois*, and *Glinka Pas de Trois*), Suzanne Farrell (*Meditation*, *Don Quixote*, and *Tzigane*), Patricia McBride (*Tarantella*, *Pavane*, and *Étude for Piano*), Kay Mazzo (*Duo Concertant*), Rosemary Dunleavy (*Le Tombeau de Couperin*), Merrill Ashley (*Ballo della Regina*), and Jerome Robbins (*Firebird* and *Pulcinella*).[126]

Such a wide distribution of assets would eventually require consolidation, if Balanchine's legacy were to survive, especially given that Balanchine left nothing for the New York City Ballet or the School of American Ballet—the immediate instruments for continuing to stage his choreographic productions.[127]

It was only when Horgan actually had to deal with the Internal Revenue Service ("I.R.S.") that the conversion of intangible choreographic productions into monetary values became an issue. How much was each choreographed piece worth? How long could one expect his value to last? Despite Horgan's initiative in depositing videotapes of many of Balanchine's ballets with the Copyright Office in Washington, to maintain control over them, as Horgan's first estate filing noted: "there has been no recorded case in which a choreographer's right to control his work, and thus, its value, has been protected by copyright."[128]

What resulted in response to I.R.S. scrutiny was a masterful probate statement effectively arguing for keeping the tax on estate royalties as low as possible. A team from the law firm of Proskauer, Rose, Goetz & Mendelsohn, in consultation with Horgan, crafted the document.[129] Succinctly summarized, the legal team argued that because, historically, choreographers' fees have been low and dance audiences crave novelty, inevitably, the legal team predicted, the New York City Ballet would eventually become the forum of new choreographers; without Balanchine to refresh and renew his works, the Balanchine ballets would depreciate, and thus, the I.R.S. could predict no longer than five years of posthumous income for the choreographic works.[130] As to the actual itemized royalty breakdown, the team came up with a figure: "$190,691.37—precise to the penny and as close presumably as [Horgan and the law firm] dared come to Balanchine's [initial] dismissive 'Oh, they're [the ballets] not worth anything.'"[131] But the I.R.S. agent disagreed, and after the requisite haggling over some ballets that could arguably last more than the predicted five years, all parties settled on an agreement: the official taxable value of the estate was pegged at $1,192,086; the

126 *Id.* at 401.
127 *Id.* at 402.
128 *Id.*
129 *Id.* at 402-03.
130 *Id.* at 403.
131 *Id.*

federal tax was estimated at $300,562, and the New York State tax at $69,787.80.[132] In hindsight, it is now clear that the I.R.S. agent "could well have justified increasing the assessment ten fold" given the increased, rather than decreased, demand for performances of Balanchine's works.[133] But that is only part of the reason why Balanchine's estate now commands a fortune.

The consolidation of intellectual property rights in Balanchine's choreography occurred largely through the efforts of Horgan and von Aroldingen. The two women, following the advice of Paul H. Epstein, the attorney for Balanchine's estate, established the Balanchine Trust, into which they deposited the ballet rights that had been bequeathed to them, and invited other legatees to join them.[134] The goal, ostensibly, was to create order. "With fourteen legatees, the prospect of administrative chaos loomed, whereas a centralized entity could facilitate the licensing of the ballets, foster their dissemination throughout the world, and make sure that performances would be authentic and of satisfactory quality."[135] Patricia McBride and Rosemary Dunleavy joined the trust; Tanaquil Le Clercq chose not to, but requested Horgan, as trustee-administrator of the estate, to represent her.[136] On March 30, 1987, the Trust went into effect.[137]

Nevertheless, tensions between the Balanchine Trust and the New York City Ballet Company continued to simmer. Using various legal theories, the board of the New York City Ballet Company tried to gain some control over Balanchine's ballets.[138] One theory was that because Balanchine was actually an employee of the New York City Ballet Company, his choreographic productions belonged to the company, since he had done them on company time, and used company resources, such as the dancers.[139] Another theory was that the Company was at least "owed" co-ownership of the choreographic productions.[140] Yet another was that the company had at least a proprietary—which Horgan humorously inadvertently renamed "predatory"—right to perform these ballets as it desired.[141] Despite the New York City Ballet Company's board counsel, Randal J. Craft, Jr., who sought legal advice from two firms experienced in entertainment law and copyright law, the board's efforts to wrest some control over Balanchine's ballets were ineffectual.[142] After months of threats to sue, Horgan in turn threatened to hold a press conference; the board amicably dropped its legal claims.[143] Ultimately,

132 *Id.*
133 *Id.*
134 *Id.* at 404.
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.*
141 *Id.* at 404-05.
142 *Id.* at 405.
143 *Id.* at 406.

painstaking negotiations resulted in a mutually satisfactory licensing agreement between the Company and the Balanchine Trust.[144]

C. Horgan v. MacMillan: Choreography and Copyright Infringement

Nevertheless, the proverbial tango between copyright and choreography in Balanchine's case did not end there. Since Balanchine's choreographic works were now legally delimited from the public domain, heirs of his intellectual property had to be vigilant to ensure that their newly acquired rights would not be violated. One such protective action, which resulted in a landmark copyright infringement case, *Horgan v. McMillan*,[145] was initiated in response to MacMillan's publication of a book, *The Nutcracker: A Story & A Ballet*, authored by Ellen Switzer, which had photographs of Balanchine's version of *The Nutcracker*.[146] The New York City Ballet Company's "'official' photographers" took the photographs, and the Company and its unions, as well as individual dancers, had granted permission to use the images.[147] Briefly summarized, Horgan, as the executor of Balanchine's estate, sought to block publication of the book by suing in the Southern District of New York on grounds of copyright infringement.[148] The district court ruled that because dance is an art of motion, still photographs, which capture static images, could not constitute copyright infringement, since they could not sufficiently capture motion and thus, could not provide a basis for infringement.[149] Undeterred, Horgan appealed and this time, won.[150] The appellate court held that the district court had applied the wrong test[151] and reversed and remanded.[152] According to Chief Judge Wilfred Feinberg, the correct test to apply is "not whether the original could be recreated from the allegedly infringing copy, but whether the latter is 'substantially similar' to the former."[153] The purpose of this section is to analyze both decisions,[154] not only in terms of their formal legal content, but also in view of their rhetorical construction. While the appellate court does not discuss the concept of whiteness-as-status property, Balanchine's "iconic" look becomes legally delimited from the public domain because of the outcome of this legal battle.

144 *Id.*

145 Horgan v. MacMillan, Inc., 621 F. Supp. 1169 (S.D.N.Y. 1985); Horgan v. MacMillan, Inc., 789 F.2d 157 (2d. Cir. 1986).

146 *See Horgan*, 621 F. Supp. at 1169; *Horgan*, 789 F.2d at 169.

147 *Horgan*, at 1170 n.2.

148 *Id.* at 1170.

149 *Id.*

150 *See Horgan*, 789 F.2d at 164.

151 Horgan v. MacMillan, Inc., 789 F.2d 157, 163 (2d. Cir. 1986).

152 *Id.* at 164.

153 *Id.* at 162 (internal quotations omitted)

154 For a detailed review of the facts of both cases, *see* Patricia Solan Gennerich, *One Moment in Time: The Second Circuit Ponders Choreographic Photography as a Copyright Infringement: Horgan v. MacMillan, Inc.*, 53 BROOK. L. REV. 379, 383-89 (1987).

1. *Horgan I*: The Reproducibility Test

The first decision, stated by District Judge Owen, is short and concise. Briefly, the judge began with a definition of what choreography is, in relation to the specific issue at stake: "the flow of the steps in a ballet."[155] Since the still photographs in the book simply "catch dancers in various attitudes at specific instants of time[,] they do not, nor do they intend to, take or use the underlying choreography."[156] Thus, the judge concluded that the photographs, though "numerous,"[157] could not be used to recreate the staged performance, much as "a Beethoven symphony could not be recreated [or reproduced] from a document containing only every twenty-fifth chord of the symphony."[158] Furthermore, the judge also concluded that Balanchine's right to be free from publicity was not being violated because of Balanchine's status as a public figure and because the judge did not get "the sense that [the book was] . . . published for trade or advertising purposes."[159] Finally, the judge delayed Horgan's request for a preliminary injunction because the plaintiff had "unduly delayed in seeking the claimed relief."[160] That is, although Horgan knew of MacMillan's intent to publish the book as early as May 1985, the estate did not file a claim until November of the same year.[161]

Rhetorically, *Horgan I*'s opinion is remarkable for its paucity. The judge very briefly described the ballet almost as if it were a run-of-the-mill production: "Each Christmas, the New York City Ballet features the ballet. . . ."[162] Furthermore, the judge attributed copyright credit for the production not only to Balanchine, but also Tchaikovsky for the music, Rouben Ter-Arutunian for the scenery and lighting, and Karinska for the costumes.[163] Despite the nod to Balanchine's reputation as a "world-renowned choreographer,"[164] the judge clearly thought that the staging of a ballet production entailed far more than choreography, and thus, granting a blanket prohibition against any representational rights of the ballet might give Balanchine's estate too much control.[165]

2. *Horgan II*: The "Substantial Similarity" Test

However, when the issue was revisited at the appellate level, the Court this time gave the facts a thorough review before stating the basis for its opinion to

155 Horgan v. MacMillan, Inc., 621 F. Supp. 1169, 1170 (S.D.N.Y. 1985).
156 *Id.*
157 *Id.*
158 *Id.* at 1170 n.1.
159 *Id.* at 1170.
160 *Id.* at 1170.
161 Horgan v. MacMillan, Inc., 621 F. Supp. 1169, 1170 (S.D.N.Y. 1985).
162 *Id.* at 1169.
163 *Id.*
164 *Id.*
165 *See id.* at 1169-70.

reverse and remand. This time, photographers Steven Caras and Costas were identified, and the number of photos was specified to be sixty.[166] In addition, this time, the Court unambiguously condemned the lower court's decision as using the wrong legal standard, and "strongly" suggested that "any further hearing on the preliminary injunction be consolidated with consideration of the claim for permanent injunctive relief."[167] While the Court's instructions could be seen as simply maximizing efficiency, the emphatic phrasing used also showed the Court's determination to buttress its opinion as the final word on the matter.

Rhetorically, the facts as presented were set up to showcase Balanchine's dominance as an artist and, therefore, to justify more stringent measures in delimiting Balanchine's choreographic works from the public domain, which cannot be protected. The Court, quoting Bernard Taper's biography,[168] now described Balanchine as a "genius," and an "artist of the same magnitude as Picasso."[169] This time, no mention was made of the artists responsible for costume design and lighting. Rather, the opinion cited Tchaikovsky[170] as the composer of the music used, along with two unprotected works in the U.S., as prior material from which Balanchine borrowed elements to create his ballet: E.T.A. Hoffman's nineteenth century folk tale, "The Nutcracker and the Mouse King," and Russian choreographer Ivanov's earlier balletic rendition of the story.[171]

The Court did acknowledge that there was some dispute regarding the extent of Balanchine's "borrowing" from Hoffman and Ivanov,[172] but did not dally there. Instead, the Court immediately emphasized how the Balanchine rendition of the Nutcracker story, performed for the past thirty years by the New York City Ballet Company—with Balanchine as its director, ballet master, and chief choreographer until 1983, when he passed away—had become a "classic."[173] In addition, the Court pointed out that the New York City Ballet and other companies all pay royalties to Balanchine's estate,[174] showing the estate's dominance in the ownership of Balanchine's intellectual property. Finally, the Court gave a detailed account of how Balanchine's choreography came to be copyrighted, and how Horgan came to be one of his legitimate heirs and the executor of the estate:

> In December 1981, Balanchine registered his claim to copyright in the choreography of The Nutcracker [sic] with the United States Copyright Office. As part of his claim, he deposited with the Copyright Office a videotape of a New York City Ballet Company dress rehearsal of the ballet.

166 Horgan v. MacMillan, Inc., 789 F.2d 157, 159 (2d. Cir. 1986).
167 *Id.* at 158.
168 TAPER, *supra* note 20, at 8.
169 *Id.* at 158 n.1.
170 *Id.* at 158.
171 *Id.*
172 Horgan v. MacMillan, Inc., 789 F.2d 157, 158 (2d. Cir. 1986).
173 *Id.*
174 *Id.* at 158.

> Under Balanchine's will, which is presently in administration, all media, performance and other rights in The Nutcracker [sic] were left to certain named legatees, including Ms. Horgan, who was his personal assistant at the New York City Ballet for 20 years.[175]

Rhetorically, the facts were stacked up to show that Balanchine's choreography had already passed from the anonymous, non-published, unfixed realm of the public domain into the recognizable, published, and delimitable realm of the copyrighted. The Court's description of the history of how Balanchine's choreographic materials became copyrighted emphasized the requirements for copyright protection: publication, through a thirty-year history of well-known public performances by an internationally renowned ballet company, closely associated with Balanchine, and fixation, through the videotape, which was deposited with the Copyright Office.[176] Finally, the reference to Balanchine's will, which had been unsealed and was being enforced by its appointed executor, personally handpicked by Balanchine himself, sealed the now-obvious argument that Balanchine's choreography legitimately deserved strong protection from infringement. Balanchine was no longer simply a "world-renowned choreographer" but, more importantly, a "genius" comparable to Picasso.[177] What better rhetorical proof was there that Balanchine's choreography, along with its hyper-whitened feminine aesthetic, had now crossed into the realm of status property?

Then the Court turned to outlining the facts of particular relevance to the issues on appeal. The photos germane to the dispute were the sixty photographs taken by Caras and Costas, interspersed with Switzer's description of the story, some parts of which were not visually portrayed.[178] The Court drew attention to Caras and Costas's status as "official photographers," which in this context, using Horgan's description, meant "Balanchine authorized them to take photographs of the Company, some of which might be purchased by the Company for publicity and related purposes."[179] Similarly, Switzer, a freelance journalist, had access to the performers for her interviews in the book only because an unnamed press liaison to the Company had granted Switzer permission and backstage entry to interview the dancers.[180] Finally, the Court also pointed out that Horgan and her counsel, after reading the galleys of the book, gave notice three times to MacMillan.[181] The first letter asked MacMillan to withhold publication "until 'appropriate licenses' were in place."[182] The second letter advised MacMillan that

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175 *Id.*

176 *See generally id.*

177 *See generally id.* at 158 n.1; Horgan v. MacMillan, Inc., 621 F. Supp. 1169 (S.D.N.Y. 1985).

178 *See* Horgan v. MacMillan, Inc., 789 F.2d 157 (2d. Cir. 1986).

179 *Id.* at 159.

180 *Id.*

181 The dates included April 3, April 15, and October 8, 1985. *Id.*

182 *Horgan*, 789 F.2d at 159.

Balanchine's estate was not willing to grant the licenses.[183] The third letter clearly indicated that publication of the book, in the estate's eyes, would "constitute a 'willful violation of the rights of the Estate.'"[184] Thus, the facts, as recounted by the Court, already delegitimized Switzer's text and Caras and Costas's photographs as "original" work that deserved protection because the only reason they were able to produce these materials was because they were given special dispensation by Balanchine's estate and its agents—and such permission was not meant to be abused. Furthermore, that Balanchine's estate had given repeated notice strengthened the argument that publication of the book was a flagrant and willful violation of the copyright owned by the estate.

From here on, the Court's remaining rhetorical task was simply to justify its decision for reversing and remanding. This time, the Court did not rely upon an arbitrary "intuition" about choreography entailing a "flow of movement,"[185] but instead cited, in depth, *Compendium II*'s definition:

> Choreography is the composition and arrangement of dance movements and patterns, and is usually intended to be accompanied by music. Dance is *static* and kinetic successions of bodily movement in certain rhythmic and spatial relationships. Choreographic works need not tell a story in order to be protected by copyright.[186]

The Court's noting of "static and kinetic successions of bodily movement" opened the door for photographs infringing upon Balanchine's copyright because photographs freeze movement into still poses, which could, under *Compendium II*'s definition, be a protected element of choreography.[187] Additionally, for supplementary guidance, the Court cited Section 450.01 of *Compendium II*, under "Characteristics of choreographic works: . . . Choreography represents a related series of dance movements and patterns organized into a coherent whole."[188] This characterization added justification for protecting the whole ballet, rather than segmenting it into parts, such as choreography versus music, costumes, and lighting. Furthermore, the Court distinguished between social dance steps, folk dance steps or individual ballet steps, which are in the public domain and can be used as raw material by anyone, and copyrighted material, such as Balanchine's choreography and its hyper-whitened feminine aesthetic, which were set apart from the public domain.[189] Yet as the lower court's analysis showed, the distinction between Balanchine's choreography from pre-existing folk-related elements was problematic.

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183 *Id.*

184 Horgan v. MacMillan, Inc., 789 F.2d 157, 159 (2d. Cir. 1986).

185 *See generally* Horgan v. MacMillan, Inc., 621 F. Supp. 1169 (S.D.N.Y. 1985).

186 *Horgan*, 789 F.2d at 161 (quoting COMPENDIUM II: COPYRIGHT OFFICE PRACTICES, (1987)) (emphasis added).

187 *Horgan*, 789 F.2d at 161.

188 *Id.* (quoting COMPENDIUM II: COPYRIGHT OFFICE PRACTICES, (1987)).

189 *Horgan*, 789 F.2d at 161.

Then came the crux of the matter. The estate claimed that the book was an unauthorized "copy" of Balanchine's work because it "portray[ed] the essence of the Balanchine Nutcracker."[190] Alternatively, the estate also claimed that the book was "derivative," meaning it was based on preexisting copyrighted work.[191] In contrast, the appellee, citing the court below, focused on Balanchine's reliance on prior-existing works already in the public domain and the photos' use of "non-choreographic" aspects of the production, such as costuming and lighting.[192] Furthermore, the appellees echoed the lower court's opinion that because the central characteristic of choreography is movement, and a photograph only captures a fraction of an instant, "even the combined effect of [sixty] color photographs does not reproduce the choreography itself, nor [does it] provide sufficient details of movement to enable a choreographic work to be reproduced from the photographs."[193]

To resolve the dispute, the Court rejected the district court's test for infringement and substituted its own: "not whether the original work may be reproduced from the copy . . . but whether the alleged copy is substantially similar to the original."[194] That test, explained by Judge Learned Hand, was "whether 'the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.'"[195] Furthermore, though the Court acknowledged that when the allegedly infringing material is in a different medium, "recreation of the original from the infringing material is unlikely if not impossible,"[196] the Court also firmly stated that that is not an automatic, affirmative defense.[197] Even more strongly, the Court cautioned that even a minimal amount of copying, if it were "qualitatively significant,"[198] could be sufficient to constitute copyright infringement, even if the original could not be reproduced from the copies.[199] More crucially, the Court argued against a

190 Horgan v. MacMillan, Inc., 789 F.2d 157, 161 (2d. Cir. 1986).

191 *Id.*

192 *Id.* at 162.

193 *Id.*

194 *Id.* at 161.

195 *Id.* at 162 (quoting Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960)).

196 Horgan v. MacMillan, Inc., 789 F.2d 157, 162 (2d. Cir. 1986).

197 *Id.*

198 *Id.*

199 As analogies, the Court cited a hypothetical and two cases. The first was the "Gone with the Wind" hypothetical, phrased as a rhetorical question—that it would surely not be a defense against infringement that one could not reproduce the book from the movie. *Horgan*, 789 F.2d at 162. Second, as instructive but not binding precedent, the Court cited two cases: 1) the employment of short clips used in a film memorial to Charlie Chaplin was held to infringe full-length films. *Horgan*, 789 F.2d at 162-63 (citing Roy Export Co. Establishment v. Columbia Broadcasting System, Inc., 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980), aff'd, 672 F.2d 1095 (2d Cir. 1982)); and 2) the use of a mere four notes from a musical composition composed of 100 measures was sufficient for copyright infringement of the original. *Horgan*, 789 F.2d at 162-63 (citing Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741, 744 (S.D.N.Y. 1980), aff'd, 623 F.2d 252 (2d Cir. 1980)).

"limited" or literal way of viewing photographs as depicting merely a fraction of an instant.[200] Rather, it argued for a more expansive interpretation:

> A snapshot of a single moment in a dance sequence may communicate a great deal. It may, for example, capture a gesture, the composition of the dancers' bodies or the placement of the dancers on the stage. . . . A photograph may also convey to the viewer's imagination the moments before and after the split second recorded. . . . *The single instant thus communicates far more than a single chord of a Beethoven symphony*—[an] analogy suggested by the district Judge.[201]

Using that standard, the Court found numerous examples of copyright infringement of Balanchine's choreography in Switzer's book. The Court identified photographs 30, 38, 42, 66-67, 68, 69, 74, 75, 78, 80, 81[202] as examples of photographs that "fr[oze the] . . . choreographic moment," thus "captur[ing] a gesture," revealing "the composition of dancers' bodies," and the dancers' "placement" onstage.[203] Additionally, the Court took the time to explain, in some detail, why a two-page photograph of the "Sugar Canes," one of the troupes to perform in Balanchine's *Nutcracker*, was a clear infringement.[204]

> One member of the ensemble is jumping through a hoop, which is held extended in front of the dancer. The dancer's legs are thrust forward, parallel to the stage and several feet off the ground. The viewer understands instinctively, based simply on the laws of gravity, that the Sugar Canes jumped up from the floor only a moment earlier, and came down shortly after the photographed moment. An ordinary observer, who had only recently seen a performance of The Nutcracker [sic], could probably perceive even more from this photograph.[205]

Interestingly, the "ordinary observer," for both the ballet and the Switzer book, would have been a child, not an adult, because the target markets for both the ballet and the book were children.[206]

Nevertheless, the Court acknowledged that a number of issues needed to be worked out: the "validity" of Balanchine's copyright, as the appellees questioned the scope of the applicability of Balanchine's copyright, which failed to mention preexisting material[207] from Hoffman, for example; the amount of "original" material in Balanchine's choreography, as opposed to Ivanov's, in both the New York City Ballet Company's performance of the ballet and the photographs;[208] and

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200 *Horgan*, 789 F.2d at 163.

201 *Id.* (emphasis added).

202 Horgan v. MacMillan, Inc., 789 F.2d 157, 163 (2d. Cir. 1986).

203 *Id.*

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.* at n.8.

208 Horgan v. MacMillan, Inc., 789 F.2d 157, 163 (2d. Cir. 1986).

the confusion spawned by "the overlapping propriety rights of Balanchine's estate, the New York City Ballet Company, and the 'official photographers,' including defendants Caras and Costas."[209] Nevertheless, the Court ruled in favor of Balanchine's estate on the remaining issue—the injunction—and did not consider the estate's delay in filing for an injunction as rising to the level of laches and therefore a bar to a permanent injunction.

Horgan II thus completely reversed *Horgan I*. Where *Horgan I* effectively left Balanchine's estate with no control over photographic reproductions of the choreography, *Horgan II* left absolute control of photographic materials of Balanchine's ballets in the hands of Balanchine's estate. Indeed, it is difficult to think of an exception that lies beyond *Horgan II*'s characterization of the "substantial similarity" test as applied to Caras and Costas's photographs of the New York City Ballet's presentation of Balanchine's *Nutcracker* choreography.[210] In the next section, we shall see that, unlike Balanchine's estate, Graham's estate failed to maintain control over Graham's choreographic works.

IV. GRAHAM'S ARTISTIC IMMORTALITY

A. Graham's "Exotic" Whiteness

That Martha Graham rivaled Balanchine in reputational capital is not debatable. Her influence on modern dance has been compared to "Picasso's on painting, Stravinsky's on modern music, and Frank Lloyd Wright's on architecture."[211] The list of her students reads like a "Who's Who" of modern dance; to name a few, Alvin Ailey, Twyla Tharp, Paul Taylor, Merce Cunningham.[212] She collaborated with equally successful contemporary artists, such as composer Aaron Copland, sculptor Isamu Noguchi[213] and ballet choreographer, George Balanchine.[214]

Like Balanchine, at the height of her powers Graham had incredible control over her dancers. Actress Bette Davis, one of her former students, never forgot the incredible presence of her teacher: "I worshipped her. She was all tension—lightning. Her burning dedication gave her spare body the power of ten men."[215] Jane Dudley, another of her dancers, spoke of Graham as if she were an untiring army drill sergeant: "Martha was absolutely merciless. I never 'walked' [expended less than what is required for full performance] anything."[216] Yet Graham was also

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209 *Id.*

210 *See* Horgan v. MacMillan, Inc., 621 F. Supp. 1169 (S.D.N.Y. 1985); *Horgan*, 789 F.2d at 157.

211 *See Martha Graham: About the Dancer*, PBS.ORG (Sept. 16, 2005), http://www.pbs.org/wnet/americanmasters/episodes/martha-graham/about-the-dancer/497.

212 *Id.*

213 *Id.*

214 TAPER, *supra* note 20, at 15.

215 DON MCDONAGH, MARTHA GRAHAM 53 (1973).

216 *Id.* at 75.

known for using shock tactics to achieve the effects she wanted, often using sexual sentences, sometimes charged with cruelty, to make a point:

> With one girl who was not doing one of the floor exercises correctly, she spread the girl's legs and said, "Some day a man will do this to you and you'll remember it." The girl was shattered and stayed away from class for some time. To another girl, who never seemed able to do as well onstage as she did in the studio, Graham said, "I won't have virgins in my Company. I don't care if you have to stand on a street corner to get a man.[217]

Whether or not one agreed with Graham's teaching methods, what was clear was that Graham disciplined and rigorously trained her dancers enough to become soloists, yet she ironically kept them in tightly-bound formations that "ignored an individual dancer's special qualities."[218] In her ideal world, they were the tableau of highly ordered bodies that supported, surrounded, and showcased her genius and stardom.

Martha Graham was born in Allegheny, Pennsylvania in 1894;[219] she was the eldest daughter of George Greenfield Graham, a family doctor who had worked in a mental hospital, and taught his daughter that "movement never lies."[220] Graham was to take her father's insight regarding primeval emotions manifesting themselves through involuntary movement into an entirely new way of dancing—one radically opposed to the conventions of classical ballet. Unlike Balanchine's ballerinas who soared and defied gravity, Graham's dancers embraced the pull of gravity.[221] Ballerinas wore tight toe-shoes to keep them elevated, enhancing the illusion of their ethereality and weightlessness. In contrast, Graham's dancers danced barefoot and did not conceal their corporeality or the effort of movement; falling was simply one direction of movement for them.[222] Like her father, Graham was fascinated by the inner emotional landscape, which she sought to portray through angular, explicitly sexual, and even violently disjunctive movements. At the heart of her choreography were the principles of "contraction" and "release"—an enhanced study of the mechanics of breathing.[223]

Yet to understand why Graham became a legend, and how whiteness as status property functioned refractorily in the establishment of her legacy, one has to return to her roots as a dancer. Graham auditioned at the Denishawn School of Dance when she was twenty-two—impossibly "old" for an aspiring dancer, especially one untrained in ballet. Outwardly, she did not seem destined for greatness: she was

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217 *Id.* at 225.
218 *Id.* at 69.
219 FREEDMAN, *supra* note 85, at 8.
220 *Id.* at 15.
221 *Id.* at 56.
222 *Id.* at 58.
223 *Id.* at 56-57.

short, serious-looking, and slightly plump.[224] Her idol, Ruth St. Denis, one of the founders of Denishawn, agreed to her enrollment purely for pecuniary purposes, and relegated her tutelage to her husband, Ted Shawn.[225]

Fortunately, Shawn noticed and appreciated what St. Denis did not: not only Graham's fierce determination to succeed, but also her adeptness at mastering difficult choreographic sequences.[226] Shawn also helped cement Graham's reputation as an "exotic" white woman—that is, a white woman who could effectively masquerade as an "exotic" woman while remaining recognizably white.[227] "Shawn thought of Graham as a 'beautiful but untamed little black panther;'"[228] thus, Shawn cast Graham as Xochitl, an Aztec maiden whom a drunken emperor—Shawn—tried to rape.[229] Graham's ferocious and impassioned performance was a success and often led to bruised and bleeding lips for her leading men;[230] a star was born, and Graham's appetite for violently physical performances became part of her artistic identity.

In 1923, eight years after she had joined Denishawn, Graham was ready to leave the company, partly because St. Denis, the woman she idolized, had begun to view Graham as a competitor and had begun to, for a while, appropriate Graham's successful numbers for herself—even the part of Xochitl.[231] In 1923, Graham accepted a job with the Greenwich Village Follies, and began to design and choreograph her own dances; she became a Broadway star overnight and earned $350 a week, which was a high salary at that time.[232] Nevertheless, Graham was unsatisfied by the constraints of the entertainer's route, and she longed for greater independence; she accepted a position with the Eastman School of Music, which left her free to begin her experimentations in dance choreography with selected students.[233] Beginning with her Eastman students, Graham eventually founded the now famous Martha Graham School for Contemporary Dance in New York.[234]

Although Graham was eventually to rebel against her Denishawn roots, many of her later choreographic creations still drew from Denishawn's fascination with the exotic, and its colonial imagination of the "mysterious" cultures of the Near and Far East, ancient India, and the Americas.[235] Nevertheless, this obsession with the East had nothing to do with what those ancient cultures were actually like, and was

224 *Id.* at 27.
225 *Id.* at 27-28.
226 *Id.* at 30.
227 *See* MCDONAGH, *supra* note 215, at 26.
228 *Id.*
229 *Id.* at 26.
230 *Id.* at 26, 28.
231 *See* AGNES DE MILLE, MARTHA: THE LIFE AND WORK OF MARTHA GRAHAM 67 (2d ed. 1991).
232 FREEDMAN, *supra* note 85, at 38.
233 *Id.* at 41.
234 *Id.* at 42.
235 *See* MCDONAGH, *supra* note 215, at 37.

a Romanticized mirage—one "[s]umptuously costumed, bedecked, and bejeweled . . . [drawing] on the 'lore of the ancients' and wrapped . . . in clouds of sexy secrets."[236] Particularly as embodied in its central icon, Ruth St. Denis, the Denishawn style appropriated the mysterious but highly sexualized allure of the "exotic" and combined it with a hyper-whitened aesthetic similar to Balanchine's ideal. However, because Graham did not have St. Denis's "Northern European, peaches-and-cream blonde" looks, and her high cheekbones made her look, to Shawn, "exotic,"[237] Graham was the perfect vessel for the more primal, emotionally ferocious, physically demanding roles Shawn cast her in.

It is that hybrid identity of the "exotic" and "white" that Graham carried into her future roles as both performer and choreographer. Indeed, Graham's later creations drew from her interpretations of Native American, Egyptian, Cambodian, Indian, and Japanese dances.[238] And when she chose to cast herself in "non-exotic" roles, she composed with herself at the center of the stage; as she began to struggle with aging, she reluctantly decided she could no longer hold center stage without the support of a surrounding cast of dancers, as in *The Triumph of St. Joan*, staged in 1951.[239] Like Balanchine, Graham fought ferociously against her mortality; it took a rebellion from her own dancers, demanding the right to perform without her, to finally begin to accept that her performing days were over.[240] In 1969, at the age of seventy-five, Graham performed for the last time and "reluctantly announced her retirement."[241] After that, her dances no longer had a strong central figure; Graham found it unbearable "to place in the body of another dancer the same movements and roles she once would have brought to life herself."[242] Yet she knew that to attain the legacy she desired and to ensure the survival of her work, she would need to release her choreography to younger dancers.

The toll of giving up dancing, combined with her abandonment by her former husband and dance partner, Erick Hawkins[243] and years of alcoholism, made Graham sink into severe depression.[244] It was during this period of recovery from illness and depression, involving a series of relapses, that Ron Protas, a former Columbia University law student, with no theatrical or dance background, became indispensable to Martha.[245]

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236 *Id.*

237 *Id.* at 26.

238 Deborah Jowitt, *Monumental Martha*, *in* WHAT IS DANCE? 456-58 (Roger Copeland & Marshall Cohen eds., 1983).

239 FREEDMAN, *supra* note 85, at 120.

240 *Id.* at 135.

241 *Id.*

242 *Id.* at 141.

243 *Id.* at 120.

244 *Id.* at 137.

245 *See* DE MILLE, *supra* note 231, at 382-83 ("From the day of the oxygen salvation, Protas made it his business to become indispensable to Martha, life-giving, life-sustaining, . . . to be everything to

In 1972, three years following her last public performance, Graham announced that she was re-emerging as director of her company.[246] Sadly, in her new reincarnation, Graham trusted no one but Protas, who proceeded to further isolate her from anyone who might have any influence on her.[247] Because of Protas's dedication to her, Graham decided to name him as her heir. She bequeathed to Protas the rights and interests to her "dance works, musical scores, scenery sets, [Graham's] personal papers and the use of [Graham's] name."[248] And this is where a three-year legal battle over ownership of Graham's works began. But such a battle was not possible without Graham's choreographic works being converted and fixed into valuable intellectual property, buttressed by her star power as a white "exotic" woman.

B. Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.: The Work for Hire Doctrine

1. Graham's Dilemma: Funding Creativity

Graham, much like her teachers, Ruth St. Denis and Ted Shawn, found that artistic creativity needs a financial base. In 1930, Graham opened a dance school, which she operated as a sole proprietorship until 1956.[249] Yet opening the school did not prove a lasting solution; Graham still found herself trapped by the dilemma of whether to spend her time on financial and administrative affairs or on creative artistic experimentation. Graham turned to what must have seemed an ideal solution: she chose to seek funding from non-profit corporations in the 1940's, thus freeing her from the worries of financing her art.[250] In 1948, the Martha Graham Center of Contemporary Dance ("the Center"), which was initially called the Martha Graham Foundation for Contemporary Dance, was incorporated.[251] Shortly thereafter, the Martha Graham School of Dance ("the School") was also incorporated, in 1956.[252] The Center and the School were essentially the same entity because they had the same board of directors, used the same facilities, shared bank accounts, and combined tax statements.[253] Simultaneously, both the Center and other non-profits financed Graham's activities by "promoting and

her—her nurse, her dresser, her housekeeper. . . . He became her business manager, her adviser, her counselor, her advocate. . . . Protas was all.").

246 FREEDMAN, *supra* note 85, at 137.

247 *Id.* at 140-41.

248 Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 629 (2d Cir. 2004).

249 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).

250 *Graham*, 380 F.3d at 629.

251 *Id.*

252 *Id.*

253 *Graham*, 224 F.Supp. 2d at 572.

disseminating her technique and by raising and managing funds for performances."[254]

In 1956, Graham sold her sole proprietorship to the School;[255] simultaneously, she signed a ten-year part-time employment contract to serve as the Program Director of the School.[256] The contract required that Graham simply provide the School with "one-third of her professional time,"[257] and specified teaching and administrative duties,[258] but not choreography. Because of additional subsidy from other non-profit organizations, Graham was able to both teach and choreograph.[259] In 1966, the School renewed its ten-year contract with Graham, but this time, changed her appointment to Artistic Director, and due to financial contingencies, added new duties, such as choreographing new work, overseeing the repertory, rehearsing the company, and supervising the school.[260] The Center credibly testified that it is during this period that there was a tacit agreement between Graham and the board of directors that the Center owned any new choreographed pieces Graham produced, since choreography was listed as one of the duties specified by the contract; furthermore, Graham received a regular salary, with tax deductions withheld, as a regular employee.[261] Because her contract was renewed indefinitely in 1976, Graham remained the Artistic Director and Chief Executive of both the School and the Center until she passed away in 1991.[262]

2. The Effect of Graham's Death: The Battle Over Ownership of Graham's Choreographic Works

After Graham's death in 1991, Protas was promoted from Co-Associate Artistic Director to Artistic Director of the Center, replacing Graham at the helm.[263] Seven years later, in 1998, Protas created the Martha Graham Trust ("the Trust"), to which he transferred the copyrights to Graham's choreographic works; the board did not contest the transfer though donors applied pressure on the board to dislodge Protas from his post.[264] Not long after, "Protas, . . . through the Trust, founded the [non-profit] Martha Graham School and Dance Foundation ('S&D

254 Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 637 (2d Cir. 2004).

255 *Id.* at 629.

256 *Id.* at 637.

257 *Id.* at 637-38.

258 *Id.* at 638.

259 *Id.* at 638.

260 Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 224 F. Supp. 2d 567, 572-73 (S.D.N.Y. 2002).

261 *Id.*

262 Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 639 (2d Cir. 2004).

263 *Id.* at 630.

264 *Id.*

Foundation')."[265] The Trust licensed many of Graham's dances; in 1999, it granted the Center "an exclusive license to teach the Martha Graham technique, and a non-exclusive license to present live performances"[266] of Graham's choreographic works. As a condition of this agreement, Protas would step down from being the Artistic Director but remain a salaried employee, as Artistic Consultant, of the Center.[267] In 2000, Protas and the board vehemently disagreed regarding the viability of a new Artistic Director; the Center's financial troubles deepened, forcing them to suspend operations.[268]

From 2000 to 2001, both Protas and the Center independently got copyright certificates of registration for Martha Graham's thirty choreographed works.[269] However, the S&D Foundation, controlled by Protas, was the exclusive American licensee for performances of Graham's choreography and the exploitation of the Martha Graham trademark.[270] Nevertheless, in 2001, the Center was able to reopen due to financial support.[271] Protas now launched a legal attack against his competitor for ownership over Graham's intellectual property. Based on Graham's will, he sought to enjoin the Center and the School from exploiting the Martha Graham trademark, using her dance techniques, and performing her choreography; even more emphatically, Protas sought a declaratory judgment that the Trust owned all the rights to Graham's dances, and the sets and jewelry associated with the performances of Graham's choreography.[272]

Briefly summarized, the central issue before the Southern District of New York was whether the Center owned any legitimate copyright to Graham's choreographic pieces.[273] Crucially, the court found that Protas had violated his "fiduciary duty of undivided loyalty to the Center and the School."[274] Yet most of

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[265] *Id.*

[266] *Id.*

[267] *Id.*; *see also* Jennifer Dunning, *Martha Graham's Legacy: How the Dances Will Now Be Danced*, N.Y. TIMES (Sept. 8, 1999), http://partners.nytimes.com/library/dance/090899dance-graham.html; Jennifer Dunning, *Martha Graham Board Seeks to Remove Director*, N.Y. TIMES (Mar. 25, 2000), http://www.nytimes.com/2000/03/25/arts/martha-graham-board-seeks-to-remove-director.html?src=pm.

[268] Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 630 (2d Cir. 2004); *see also* Jennifer Dunning, *Performances Are Suspended In Dance Group Graham Started*, N.Y. TIMES (May 26, 2000), http://www.nytimes.com/2000/05/26/nyregion/performances-are-suspended-in-dance-group-graham-started.html.

[269] *See Graham*, 380 F.3d at 630.

[270] *Id.*

[271] *Id.*

[272] *Id.* at 631; *see also* Doreen Carvajal, *Bitter Standoff Imperils A Cherished Dance Legacy*, N.Y. TIMES (July 6, 2000), http://www.nytimes.com/2000/07/06/arts/bitter-standoff-imperils-a-cherished-dance-legacy.html; Jennifer Dunning, *Challenging Graham Board, Director Reveals A Rival Plan*, N.Y. TIMES (Nov. 1, 2000), http://www.nytimes.com/2000/11/01/arts/challenging-graham-board-director-reveals-a-rival-plan.html.

[273] *See* Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 224 F. Supp. 2d 567, 607-09 (S.D.N.Y. 2002); *see generally* Joseph Carman, *Dance; Who Owns A Dance? It Depends on the Maker*, N.Y. TIMES (Dec. 23, 2001), http://query.nytimes.com/gst/fullpage.html?res=9D0DEFDC153EF930A15751C1A9679C8B63.

[274] *Graham*, 224 F. Supp. 2d at 610.

the court's opinion hinged on whether Graham actually owned the copyright to her choreographic creations, and thus, could pass her ownership of these rights to her chosen heir, Protas. Ultimately, the district court ruled that by virtue of the contracts Graham had signed, the Center owned the copyright to forty-five dances, while Protas's S&D Foundation owned the copyright to only one dance.[275] Regarding the remaining work, the court ruled that ten of the dances were in public domain and that nine were not yet published with the required notice; finally, for five works, the court found that neither side had met the burden of proving the commissioner of the work had intended that Graham reserve her copyright.[276]

On appeal, Protas claimed that the district court's decision was erroneous because none of Graham's dances were work for hire.[277] However, the Second Circuit affirmed most of the district court's opinion, finding that because the majority of Graham's choreographic creations were works for hire, the Center, and not Protas, owned the copyright to these works.[278] Nevertheless, the court reversed the district court's decision regarding the works Graham created from 1956-1965, finding that because Graham had simply been a part-time employee, these particular pieces were not works for hire.[279] Additionally, the court reversed the ownership of one dance, *Acrobats of God*, granting that to Protas because he owned the renewal term of the copyright.[280] Ultimately, the court remanded the issue of determining ownership of seven dances published between 1956 and 1965 because two had been erroneously cited as unpublished.[281]

To determine whether Graham's choreographic pieces were works for hire, the Second Circuit applied the instance and expense test; in brief, the court held that Graham's status change from part-time to full-time employee rendered the choreography she produced from 1966 to 1977 works for hire.[282] By the same token, the dances created when Graham was Program Director, a part-time position,

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[275] *See id.* at 570*; see also* Jennifer Dunning, *In Ruling, Dance Center May Use Graham Name*, N.Y. TIMES (Aug. 8, 2001), http://www.nytimes.com/2001/08/08/nyregion/in-ruling-dance-center-may-use-the-graham-name.html.

[276] *Graham*, 224 F. Supp. 2d at 570.

[277] Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 632 (2d Cir. 2004).

[278] *Id.* at 637-42; *see also* Jennifer Dunning, *Metro Briefing: New York: Manhattan: Martha Graham Center Wins Dance Rights*, N.Y. TIMES (Aug. 19, 2004), http://query.nytimes.com/gst/fullpage.html?res=9E0CE3D91E3FF93AA2575BC0A9629C8B63; Felicia R. Lee, *Graham Legacy, On the Stage Again*, N.Y. TIMES (Sept. 29, 2004), http://www.nytimes.com/2004/09/29/arts/dance/29grah.html?_r=1&ref=ronprotas; John Rockwell, *Arts, Briefly; Martha Graham Center Wins Court Ruling*, N.Y. TIMES (July 14, 2006), http://query.nytimes.com/gst/fullpage.html?res=9D05EED71E30F937A25754C0A9609C8B63&ref=ronprotas.

[279] *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 enumerated instances).

[280] *Graham*, 380 F.3d at 647.

[281] *Id.*

[282] *Id.* at 639-40.

were not works for hire.[283] Although the court's reasoning seems logical, the court clearly had to struggle with justifying how the shift from part-time to full-time status pragmatically changed anything in terms of the "expense" prong—who had invested in and financed the development of the choreography—; in both positions, Graham had access to the same dancers and rehearsal space.[284] Even more difficult to justify was the "instance" prong—who initiated or provided the impetus for the development of the choreographic works—which would require that the Center be the one that had insisted that the work be performed, and not Graham;[285] given Graham's leadership at the Center and her passion for choreography as an end in itself, that was a position difficult to uphold.

It is striking that many of the arguments that wrested control over Graham's works away from her estate to the Center could equally have applied to Balanchine's estate in its battle with the New York Ballet Company. Such arguments, based on the thirteen *Reid* factors—factors that help determine whether the person hired was an "employee" or an "independent contractor"[286] —specified by the 1976 Copyright Act and upheld by case law,[287] focused on the degree of control the hiring party had over the "manner and means of creation"[288] of the work. The court's justification, that this is a situation where the employer would not "normally exercise control over the details,"[289] and that if any control exists, it "may be very attenuated,"[290] seems problematic. It is also difficult to imagine, given Graham's dominance—similar to Balanchine's—that at the time the contracts were signed, Graham and the Center intended to establish a clear master-servant relationship. Notwithstanding these issues, because of the court's interpretation of the work for hire doctrine, where Graham's estate failed to

283 Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 637-39 (2d Cir. 2004).

284 *See id.* at 638.

285 *Id.* at 640.

286 For detailed examinations of the history of the work for hire doctrine leading up to *Reid*, *see* Katherine B. Marik, Note, Community For Creative Non-Violence v. Reid: *New Certainty for the Copyright Work for Hire Doctrine*, 18 PEPP. L. REV. 589, 591-608 (1991); Christine Leahy Weinberg, Note, Community For Creative Non-Violence v. Reid: *A Specious Solution to the "Works Made for Hire" Problem*, 32 B.C. L. REV. 663, 666 (1991).

287 The *Reid* factors to be considered include: the skill required; the source of the instrumentalities and tools used in creating the work; where the work was created; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the method of payment; the extent of the hired party's discretion over when and how long to work; the hired party's role in hiring and paying assistants; whether the hiring party is in business and whether the work is part of the regular business of the hiring party; the provision of employee benefits; and the tax treatment of the hired party. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989).

288 *See* Aymes v. Bonelli, 980 F.2d 857, 861 (2d Cir. 1992) (holding that the Second Circuit pays special 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.").

289 Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 642 (2d Cir. 2004)

290 *Id.*

maintain control over her choreographic works, Balanchine's triumphed. Rhetorically, although the court acknowledged that Graham was "extremely talented,"[291] it did not describe Graham's artistic stature as a choreographer in the same hyperbolic terms as they did when describing Balanchine in *Horgan II*.[292] Nevertheless, crucial to the delimitation of both Balanchine's and Graham's choreographic works as intellectual property was their possession of whiteness as status property.

V. BEFORE AND AFTER BALANCHINE: THE CONTINUING TANGO BETWEEN COPYRIGHT AND CHOREOGRAPHY

To conclude, a brief look at Loïe Fuller's, George Balanchine's and Martha Graham's portraits as pioneers of American dance and the history of dance choreography is instructive, in relation to sketching how whiteness as property has evolved in the continuing metaphorical tango between copyright and choreography. Fuller initially struggled to create an identity for herself as the creator of the skirt dance and to gain adequate financial compensation.[293] Fuller also had to fill a variety of roles, in addition to choreographer and dancer; she created her own costumes, designed and patented the lights, planned the staging of the movements onstage, did her own self-promotions.[294] Fuller attempted to gain copyright protection, only to have her work dismissed as mere spectacle, devoid of any moral purpose that could further science or the arts.[295]

In contrast, Balanchine, with his classical Russian training, had the financial support of Kerstein,[296] and as such, skipped over many of the steps Fuller struggled through, to gain reputability.[297] From the start of his move to America in 1933, Balanchine had a school of pliant young dancers whose flesh and spirits he could shape to his choreographic designs without fear of them becoming his competitors,[298] and a support staff who could take care of the other production-related tasks, such as lighting, costuming, and publicity.[299] In addition, ballet, unlike skirt dancing, had a long-established tradition of being a dance form of the

[291] *Id.* at 642; *see generally* Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 224 F. Supp. 2d 567, 569 (S.D.N.Y. 2002).

[292] *See generally Horgan*, 789 F.2d at 158.

[293] FULLER, *supra* note 23, at 27-28.

[294] ALBRIGHT, *supra* note 24, at 20-21, 61.

[295] Fuller v. Bemis, 50 F. 926, 929 (C.C.S.D.N.Y. 1892).

[296] TAPER, *supra* note 20, at 152.

[297] Krystina Lopez de Quintana posits that copyright law often proves ineffective in protecting lesser-known choreographers (unlike Balanchine) who don't have the financial backing or time of large companies. *See* Krystina Lopez de Quintana, Comment, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies Over Pioneering Choreographers*, 11 VILL. SPORTS & ENT. LJ. 139, 152 (2004).

[298] *See* TAPER, *supra* note 20, at 13.

[299] Barbara Horgan, Balanchine's personal assistant, managed many pragmatic tasks, freeing Balanchine to pursue his choreographic passion. *Id.* at 329.

higher classes, regarded as a "classic" art form.[300] Ballet also, again unlike skirt dancing, had a long-established tradition of having a dominant, tyrannical, male ballet-master, which further cemented Balanchine's authoritative position.[301]

Martha Graham, partly because of the force of her personality, probably exercised as much control over her dancers, both male and female, as Balanchine did.[302] And even as she surrounded herself with the antithesis of Balanchine's hyper-whitened hyper-feminized ideal—non-professional ballerinas,[303] and non-white dancers[304]—her dances were designed to showcase her stardom as a white woman choreographer—a "woman who could do her own work."[305] And even as she costumed herself in the look of the "exotic," her dances were always premised on her recognizability as "the" Martha Graham—a white woman masking herself as "exotic."[306] Graham appears to have turned to the exotic because she could never be the hyper-whitened beauty her idol, Ruth St. Denis, was;[307] unable to compete for stardom on those terms, Graham turned to its opposite, to forge her own artistic identity.[308] At the heart of her choreography thus still lies a frustrated longing to be what she cannot be, which is essentially still Balanchine's ideal, even if costumed in the "exotic" trappings of St. Denis's dances.[309] Nevertheless, for all Graham's "genius," when it came down to deciding who maintained control over her choreographic pieces, in contrast with Balanchine, the Second Circuit decided that because of the work for hire doctrine, that Graham was simply an "employee" and her choreographic pieces were simply works for hire, whose ownership she had contracted away in exchange for funding and financial stability.[310]

This is not to say Balanchine did not undergo difficulty; his life appears to have been composed of successive seasons of feast and famine, with ballet companies ephemerally rising and expiring around him.[311] Balanchine, unlike

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300 J.E. Crawford Flitch characterized the skirt dance as a "compromise between the academical method of the ballet and the grotesque step-dancing which appealed to the popular taste of the time." *See* J.E. CRAWFORD FLITCH, MODERN DANCING AND DANCERS 72 (2010).

301 For descriptions of Balanchine's authoritativeness, *see* TAPER, *supra* note 20, at 19, 23.

302 For examples of how much control Graham had over her dancers, *see* MCDONAGH, *supra* note 216, at 224-225.

303 Graham's first students, when she had broken away from the Denishawn Company, were salesclerks, waitresses, artists'models, and secretaries by day. FREEDMAN, *supra* note 85, at 50.

304 *Martha Graham*, ENCYCLOPEDIA OF WORLD BIOGRAPHY, http://www.notablebiographies.com/Gi-He/Graham-Martha.html (last visited Feb. 16, 2011).

305 MARTHA GRAHAM, BLOOD MEMORY: AN AUTOBIOGRAPHY 110 (1991).

306 *See, e.g.*, FREEDMAN, *supra* note 85, at 68-69 (Martha as the central figure, dressed completely in white, surrounded by twelve women in blue in *Primitive Mysteries*).

307 For the depth of adoration Graham had for St. Denis, *see* MCDONAGH, *supra* note 215, at 126.

308 As Ted Shawn observed, Graham was "not 'the Northern European, peaches-and-cream blonde,' and her high cheekbones made her exotic." *Id.* at 26.

309 For a description of St. Denis's performance that convinced Graham that her "fate was sealed. [She] couldn't wait to learn to dance as the goddess [St. Denis] did." FREEDMAN, *supra* note 85, at 21-22.

310 Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 628 (2d Cir. 2004).

311 For an account of the failure of Balanchine's collaboration with the Metropolitan Opera in

Fuller and Graham, lived for the present and was not bothered by the thought of his ballets passing into obscurity, much like beautiful butterflies that were spectacular at the height of their glory, but swiftly passed away. In contrast, Fuller's and Graham's every act seemed focused on creating a memorial for themselves that would withstand the test of time. In particular, Fuller's savviness in negotiating legal hurdles, even submitting a detailed description of the skirt dance in her failed infringement claim, ironically, did nothing to ensure her success at acquiring copyright protection.[312] Neither did Graham's hard-earned status as a "genius," comparable to Picasso and Wagner,[313] protect her from being relegated to the status of an "employee" when it came to deciding who had control of her choreographic works past her death.[314]

Given these differences in personality, it is ironic that it is Balanchine who succeeded where Fuller failed, in acquiring copyright protection, and where Graham failed, in maintaining control over her choreographic creations. Nevertheless, Fuller, Balanchine, and Graham were "stars," and part of the creation of their celebrity was their integration of a hyper-whitened aesthetic into their choreography. Fuller accomplished this through making her less-than-perfect body invisible, through the use of extended wooden wands, yards and yards of white silk, and the magic of lights.[315] Balanchine accomplished the same task through hyper-disciplining his dancers' bodies, whom he carefully chose, to become the vessels of his artistic ideal: the embodiments of the all too Romantic vision of the feminine-as-eternally-fleeing; young women chiseled down to such thinness so as to become virtually evanescent; marble princesses, with skins like "peeled apples," devoid of aging and infirmity. Graham accomplished this through appropriating unto herself various forms of the "exotic" and surrounding herself with "non-standard" bodies, including black and Asian dancers,[316] while maintaining her status as a white woman choreographer. While Fuller produced no heir and until recently, was not recognized as a pioneer of modern dance, Balanchine's and Graham's cultural legacies are now very well entrenched. However, where Graham's estate lost control of most of her ballets, Balanchine's estate not only commands the royalties to choreographic productions licensed to 150 ballet companies worldwide,[317] but now also possesses the trademarks of Balanchine's style, technique, and even his name.[318]

March, 1938, *see* TAPER, *supra* note 20, at 175.

312 *See* Fuller v. Bemis, 50 F. 926, 926 (S.D.N.Y. 1892).

313 DE MILLE, *supra* note 231, at vii-viii.

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

315 For an example of an ecstatic review of Fuller's surreal performances, *see* Sperling, *supra* note 28, at 53.

316 FREEDMAN, *supra* note 85, at 112.

317 TAPER, *supra* note 20, at 409.

318 *Id.* at 410.

To be able to perform a ballet, a company representative has to have a consultation with the particular ballet's legatee concerning consent, terms, who should be recommended to do the staging, and any other special conditions; if the recommended stager does not think the company can do the work justice, the company will not acquire the license to perform it.[319] Finally, so absolute is Balanchine's estate's control over his choreography and even name that it can now also compel companies who perform Balanchine's ballets to include a trademark and licensing notice in their programs.[320] Crucial to that establishment of absolute control over his choreographic creations were Balanchine's aesthetic pursuit to an ideal of hyper-feminized whiteness and his confident possession of—masculine—whiteness as status property. Although both Fuller and Graham had some access to whiteness as status property, their stories as women choreographers are more complex. Nevertheless, the metaphorical tango between copyright and choreography continues even today.

319 *Id.*
320 *Id.*