

# Cultural Property: The Hero of Dance's Drama

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*The importance, if any, of art in society has long been debated. Aristotle believed music presented individuals with three benefits: pleasure and amusement, moral training and cultivation of the mind.<sup>1</sup> One could argue that many believe art generally provides at least one of these benefits to the public. As a matter of law, there are various statutory regimes intended to safeguard and promote artistic expression. Yet these laws overlook the vulnerability of certain types of art, including dance. This Note explains how a gap in the law has formed so that there is a risk that important dance choreography will be lost to our future generations without appropriate legal action. Part II illustrates the important economic and preservation functions of arts organizations, along with the existential obstacles they face due to their nonprofit status. Part III discusses the two main legal paradigms, nonprofit organizational law and copyright law, that touch on dance preservation and how they fail to adequately preserve dance choreography. Finally, Part IV proposes a new avenue for legislation to address dance preservation according to its intangible attributes.*

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1. Aristotle, POLITICS 305 (1998).

## I. INTRODUCTION

Over the course of his presidency, President Donald Trump has proposed national budgets for 2018 and 2019, each with substantial increases in military and infrastructure spending offset by eliminating trillions of dollars from domestic programs, including the complete elimination of the National Endowment for the Arts (NEA).<sup>2</sup> The NEA was created by federal legislation<sup>3</sup> in 1965 during a time of increased governmental and private investment in the arts, intended to sharpen art as a diplomatic tool to sow the seeds of democracy against the backdrop of the Cold War.<sup>4</sup> The NEA disperses life-line financing and highly prestigious grants to cultural arts organizations and artists across the United States.<sup>5</sup> Through its financing, the NEA provides “a kind of seal of approval that can give [arts organizations and artists] the recognition and prestige that helps in attracting support from other donors.”<sup>6</sup> This is especially important for smaller organiza-

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2. Julie Hirschfeld Davis, *White House Proposes \$4.4 Trillion Budget That Adds \$7 Billion to Deficits*, N.Y. TIMES (Feb. 12, 2018), <https://www.nytimes.com/2018/02/12/us/politics/white-house-budget-congress.html> [<https://perma.cc/V5R8-6QQ7>]; Brian Boucher, *Trump’s 2019 Budget Aims to Zero Out Funding for the NEA and NEH — Again*, ARTNET NEWS (Feb. 12, 2018), <https://news.artnet.com/art-world/trump-2019-budget-nea-neh-1222685> [<https://perma.cc/65QN-4LU4>]; *The Key Spending Cuts and Increases in Trump’s Budget*, N.Y. TIMES (May 22, 2017), <https://www.nytimes.com/2017/05/22/us/politics/trump-budget-winners-losers.html> [<https://perma.cc/CQ56-GXSK>].

3. 20 U.S.C.A. §§ 954–954a (2014).

4. JENNIFER HOMANS, APOLLO’S ANGELS: A HISTORY OF BALLET 453 (2010). The desire to use art as a means of “soft diplomacy” is also reflected with the passage of the John F. Kennedy Act (also known as the National Cultural Center Act) which established the John F. Kennedy Center of the Performing Arts. The text explicitly identifies art as a weapon against Communism. “This is particularly necessary at this time when the Soviet Union and other totalitarian nations are spending vast sums for the arts in an attempt to lead the peoples of the world to believe those countries produced civilization’s best efforts in the fine arts. *It is demonstrably true that wars begin in the minds of men and that it is in the minds of men that the defenses of peace must be constructed.*” See 20 U.S.C. §§ 76h–76m, 76p–s (2012) (emphasis added).

5. Sopan Deb, *Trump Proposes Eliminating the Arts and Humanities Endowment*, N.Y. TIMES (Mar. 15, 2017), [https://www.nytimes.com/2017/03/15/arts/nea-neh-endowments-trump.html?\\_r=0](https://www.nytimes.com/2017/03/15/arts/nea-neh-endowments-trump.html?_r=0) [<https://perma.cc/NV2B-XVYK>]; see also Eileen Kinsella, *Donald Trump’s Newly Released Budget Calls for Eliminating the NEA*, ARTNET NEWS (May 23, 2017), <https://news.artnet.com/art-world/trump-budget-proposes-steep-cuts-to-arts-funding-969641> [<https://perma.cc/4PUA-AKFK>]; Brian Naylor, *Trump’s Budget Plan Cuts Funding for Arts, Humanities And Public Media* (Mar. 16, 2017), <http://www.npr.org/2017/03/16/520401246/trumps-budget-plan-cuts-funding-for-arts-humanities-and-public-media> [<https://perma.cc/CV9K-QU7J>].

6. William Neuman, *New York Art Scene Anxiously Waits for Decision on N.E.A.’s Fate*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/nyregion/national-endowment-for-the-arts-new-york.html> [<https://perma.cc/22ZA-N4LE>]. “The cost of the NEA is less than one dollar a year for every American. But because it is so successful and

tions.<sup>7</sup> Moreover, the NEA, and other similar government financial support, often represent the only reliable, significant source of funding for many recipients to utilize to plan their future.<sup>8</sup>

Given that Americans overall became more comfortable with increased government involvement in society and in the art world since the New Deal<sup>9</sup> — it is unsurprising that President Trump’s repeated proposal to eliminate the NEA has gone nowhere. In fact, in a direct response to the President, Congress decided in a bipartisan spending bill to defiantly *increase* the NEA’s budget by 2 million dollars in 2017, to \$150 million dollars.<sup>10</sup> There is no

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*its imprimatur so prestigious, every dollar the NEA contributes leads to nine additional dollars being donated by other resources.” Save the National Endowment for the Arts, THE SCORE (Feb. 28, 2017), <https://www.lincolncenter.org/article/save-the-national-endowment-for-the-arts> [https://perma.cc/7D39-WJCE] (emphasis added); see also Jim Bennet, *Finding Common Ground on the National Endowment for the Arts*, DESERET NEWS (Mar. 28, 2017), <https://www.deseretnews.com/article/865676574/Finding-common-ground-on-the-National-Endowment-for-the-Arts.html> [https://perma.cc/QV3A-S57P].*

7. William Neuman, *New York Art Scene Anxiously Waits for Decision on N.E.A.’s Fate*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/nyregion/national-endowment-for-the-arts-new-york.html> [https://perma.cc/28AP-SCLY].

8. *Id.*; see also Sophie Gilbert, *The Real Cost of Abolishing the National Endowment of the Arts*, THE ATLANTIC (Mar. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/03/what-eliminating-the-arts-and-humanities-endowments-would-really-mean/519774/> [https://perma.cc/AEF5-48E4].

9. The Public Works of Art Project was the first federal arts program established in 1933 to provide employment for artists all over the country, while promoting the spirit of the “American scene.” Although the program ended in 1934, other art projects were funded during the New Deal era by the Federal Emergency Relief Administration and the Works Progress Administration Federal Art Project. PUBLIC WORKS OF ART PROJECT, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Public-Works-of-Art-Project> [https://perma.cc/2PXU-KLGE] (last visited May 21, 2018). In addition, the idea of employing art as a defensive mechanism in international diplomacy was “part of a larger sense, deepened by the experience of state involvement in society during the war, that government could and should play a role in building a cohesive society.” HOMANS, *supra* note 4 at 452–53. Even after World War II, government involvement in the arts continued. Founded in 1950, the Congress for Cultural Freedom was formed to combat Soviet culture influence. With financial backing from the CIA, exhibitions and performances abroad were sponsored by the government to show the literary and artistic superiority of the West. *Id.*

10. David Lauter, *Spending bill includes \$2 million increase for NEA after Trump proposed eliminating funds*, L.A. TIMES (May 1, 2017), <http://www.latimes.com/entertainment/la-et-entertainment-news-updates-may-spending-bill-includes-increase-of-nea-1493658893-htlmstory.html> [https://perma.cc/7DD5-5DT9]; Isaac Brown, *FY2017 Funding Secured, with \$2 Million NEA Increase*, NAT’L ASSEMBLY OF ST. ART AGENCIES, (May 5, 2017), [https://nasaa-arts.org/legislative\\_update/fy2017-funding-secured-2-million-nea-increase/](https://nasaa-arts.org/legislative_update/fy2017-funding-secured-2-million-nea-increase/) [https://perma.cc/2AS8-D3MK]; Jillian Steinhauer, *Bipartisan Bill Would Boost NEA and NEH Budgets by \$1.9 Million Each*, HYPERALLERGIC (May 1, 2017), <https://hyperallergic.com/376005/bipartisan-bill-would-boost-nea-and-neh-budgets-by-1-9-million-each/> [https://perma.cc/539B-KE4J].

expectation that the recently released 2019 budget proposal will be passed in its original form by Congress.<sup>11</sup>

Yet President Trump's threat to the NEA's funding brought discussion of two overlapping questions to the surface in public discourse.<sup>12</sup> The first and most immediate question was whether there should be any more government funding provided for promulgation of the arts in a post-Cold War era. There are some that see government arts funding as a "waste."<sup>13</sup> Others are confident that the arts will continue to thrive regardless because of the high rate of private charitable giving, which totaled \$18.21 billion in 2016 for the arts and culture sector specifically.<sup>14</sup> Notwithstanding robust arguments against and in favor of government spending, it seems Congress has had the last word in this debate, for now.

The second question lurking in this budgetary debate, while less immediately obvious in comparison with the first, is even more broad and fundamental to our society. Beneath any stance for or against providing government funding, there are assumptions regarding the role art plays and the value, if any, it contributes to society.<sup>15</sup> There is suggestive evidence that Americans believe the arts are valuable for the public good.<sup>16</sup> From a legal

11. Davis, *supra* note 2; Boucher, *supra* note 2.

12. See Alexander Bolton, *Trump team prepares dramatic cuts*, THE HILL (Jan. 17, 2017), <https://perma.cc/H3TX-EDEA>; Graham Bowley, *What if Trump Really Does End Money for the Arts?*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/arts/design/donald-trump-arts-humanities-public-television.html?action=click&contentCollection=Arts&module=RelatedCoverage&region=EndOfArticle&pgtype=article> [<https://perma.cc/4BHW-FMCG>]. Compare Thomas P. Campbell, Editorial, *The Folly of Abolishing the N.E.A.*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/opinion/why-art-matters-to-america.html> [<https://perma.cc/5WJ4-MT78>], with Jeff Jacoby, Editorial, *Scrap the NEA and America's art scene will thrive*, BOS. GLOBE (Feb. 28, 2017), <http://www.bostonglobe.com/opinion/2017/02/28/scrap-nea-and-america-arts-scene-will-thrive/FIUUzXoTbG6sOzwK0QdMQL/story.html> [<https://perma.cc/9G5Y-H57W>].

13. Bolton, *supra* note 12.

14. *Recent Trends in Philanthropic Giving*, ARTS INSIGHTS (Nov. 2017), <http://artsconsulting.com/arts-insights/recent-trends-in-philanthropic-giving-2017/> [<https://perma.cc/XGT4-4QUS>].

15. There is a well-developed area of scholarship and argumentation regarding the social impact of the arts. See generally JOLI JENSEN, IS ART GOOD FOR US? BELIEFS ABOUT HIGH CULTURE IN AMERICAN LIFE (2002); Eleonora Belfiore, *'Impact,' 'value' and 'bad economics': Making sense of the problem of value in the arts and humanities*, 14 ARTS & HUMAN. IN HIGHER EDUC. 95 (2015); Beth Juncker & Gitte Balling, *The Value of Art and Culture in Everyday Life: Towards an Expressive Cultural Democracy*, 46 J. ARTS MGMT L. & SOC'Y 231 (2016); Erwin Dekker, *Two approaches to study the value of art and culture, and the emergence of a third*, 39 J. CULTURAL ECON. 309 (2015).

16. See Jacoby, *supra* note 12.

and policy standpoint, this belief is reflected in the volume of statutory frameworks on the federal, state and local level that provide economic incentives to support and encourage artistic development,<sup>17</sup> protect the integrity of artistic creations,<sup>18</sup> and preserve art for future generations.<sup>19</sup> The widespread proliferation of these laws suggests that art provides a public benefit.<sup>20</sup>

This Note has three goals, each represented by one of its parts. Part II demonstrates the role of non-profit<sup>21</sup> arts organizations, such as museums, theaters, orchestras, and dance companies, which are most often thought of as “the arts,”<sup>22</sup> in the American and New York economy. In addition, Part II addresses the obstacles to performing arts organizations specifically, caused by changes in society and the economy, and the risks to certain cultural property<sup>23</sup> as a result of these obstacles. Singling out dance as the subsector within the performing arts most at risk of cultural property loss, this Part explores the legal framework around dance institutions and the ways in which the law hinders dance’s preservation. Part III discusses the key laws that govern artistic creation and performing arts institutions’ existence and

17. *E.g.*, 26 U.S.C. § 501(c)(3) (2012); N.Y. NOT-FOR-PROFIT CORP. LAW § 101 (McKinney 1969).

18. Copyright Act of 1976, 17 U.S.C. §§ 101-810 (2012).

19. *E.g.*, The American Antiquities Act, now incorporated under revised title under 54 U.S.C.A. §§ 320301–03 (West 2014); The Historic Sites, Building and Antiquities Act, repealed and restated as 18 U.S.C.A. § 1866(a) (West 2014), 54 U.S.C.A. §§ 102303–04 (West 2014), and 54 U.S.C.A. § 320101 (West 2014); the National Historic Preservation Act, now incorporated under revised title under 54 U.S.C.A. § 300301–§ 307108 (West 2014); The Archaeological Protection Act, 16 U.S.C.A §§ 470aa–470mm (West 2014).

20. As Thomas Campbell, former Director and Chief Executive Officer of the Metropolitan Museum of Art stated, art organizations are expected to provide the public with a return on the benefits and protections granted by the law, in addition to private investment by contributing to the societal “curiosity and intelligence of its citizens.” Thomas P. Campbell, *The Folly of Abolishing the N.E.A.*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/opinion/why-art-matters-to-america.html> [<https://perma.cc/FSG5-AJ68>].

21. Arts and culture is made up of for-profit and nonprofit entities. The commercial business portion includes mainly the broadcasting and cinema industries. Whereas, the entities most commonly representative of the nonprofit sector include performing arts and museums. Nonprofit performing art companies made up 40 percent of the total value contributed by all performing arts companies to the U.S. economy in 2012. Bonnie Nichols, *Taking Note: The Worth of Nonprofit Performing Arts & Museums*, ART WORKS BLOG (Feb. 5, 2015), <https://www.arts.gov/art-works/2015/taking-note-worth-nonprofit-performing-arts-museums> [<https://perma.cc/BKY3-SQVF>].

22. *Id.*

23. “[P]roperty which, on religious or secular grounds, is specifically designated . . . as being of importance for archeology, prehistory, history, literature, art or science.” Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 1, Nov. 14, 1970, 823 U.N.T.S 231.

that indirectly protect and promote dance. Part III begins by explaining the laws governing how nonprofit organizations form,<sup>24</sup> what benefits these nonprofits enjoy,<sup>25</sup> and the laws that regulate the type of materials that can be protected by copyright.<sup>26</sup> Because of its importance in the arts world, the applicability of New York State statutes and common law doctrine is the focus of discussion. The Part will end with an examination of the inadequacies of these laws, rooted in dance's special characteristic as an intangible art form.<sup>27</sup> Finally, Part IV will suggest a new and different legal framework to address the issues for the dance community identified in Parts II and III.<sup>28</sup> To better safeguard the public value that the arts provide, this Note advocates for a more comprehensive legal strategy through the adoption of a new law that would define and protect intangible cultural property.

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24. This will first be explained from a general perspective, as described in the American Legal Institute's most recent drafts of the Restatement of the Law of Charitable Nonprofit Organizations (hereafter "Restatement"). RESTATEMENT §§ 1–3 (AM. L. INST., Tentative Council Draft No. 2., Dec. 21, 2015). RESTATEMENT §§ 4–6 (AM. L. INST., Preliminary Draft No. 3, Oct. 21, 2016). These drafts represent the output of an ongoing, current project of the American Legal Institute to synthesize and compile a summary of state, federal and private regulation for the nonprofit sector. The Restatement drafts are neither final nor binding law.

25. *Supra* note 17.

26. *Supra* note 18.

27. "Intangible cultural heritage" is defined as any one of the following: "(a) oral traditions and expressions . . . (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship." Convention for Safeguarding of the Intangible Cultural Heritage, art. 1, Oct. 17, 2003, in force 20 April 2006, 2368 UNTS 1.

28. Solutions for choreographic preservation in the dance community have been discussed in various journal articles, however none of them take the position that dance is intangible cultural property. See, e.g., Barbara Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives v. the Custom of the Dance Community*, 38 U. MIAMI L. REV. 238 (1984); Shanti Sadler, *Preservation and Protection in Dance Licensing: How Choreographers Use Contract to Fill in Gaps of Copyright and Custom*, 35 COLUM. J. L. & ARTS 253 (2012); Krystina Lopez de Quintana, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies Over Pioneering Choreographers*, 11 VILL. SPORTS & ENT. L.J. 139 (2004); Sharon Connelly, *Authorship, Ownership, and Control: Balancing the Economic and Artistic Issues Raised by the Martha Graham Copyright Case*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 837 (2005).

## II. THE REALITY OF THE NONPROFIT ARTS ORGANIZATION

There are over 1.5 million nonprofit organizations that play a crucial role in the U.S economy and culture.<sup>29</sup> As of 2015, there are over 97,000 nonprofits in New York State, generating \$179.5 billion dollars in total revenue.<sup>30</sup> These organizations fall into various categories: education, healthcare, employment, science, community improvement, philanthropy and volunteerism and faith-based groups.<sup>31</sup> New York has been ranked first nationwide in nonprofit jobs and organizations, providing employment for 1.3 million people, representing eighteen percent of private-sector jobs in the state.<sup>32</sup> Almost nine percent of these organizations are devoted to the Arts, Culture and Humanities. This sector is among the top five largest nonprofit industries in New York State and nationally.<sup>33</sup>

In addition to playing an economic role in New York State, many of these organizations hold prominent positions in their specialties, with reputations as unmatched stages for the very best in the visual and performing arts.<sup>34</sup> These organizations contribute an important component to the special character of New York State — and to the fame of its largest urban center, New York City — by providing a social space devoted to standard-setting works of art and culture.<sup>35</sup> Indeed, lawmakers were

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29. *Quick Facts About Nonprofits*, NAT'L CTR. FOR CHARITABLE STATISTICS (last visited May 21, 2018), <http://nccs.urban.org/data-statistics/quick-facts-about-nonprofits> [<https://perma.cc/VT4R-9K9G>].

30. *The Truth About Nonprofits*, N.Y. COUNCIL OF NONPROFITS, INC. 1 (2015), [http://nycon.org/files/7814/2653/2398/Palm\\_Card\\_Template\\_2015.pdf](http://nycon.org/files/7814/2653/2398/Palm_Card_Template_2015.pdf) [<https://perma.cc/Z284-YQ9Q>].

31. *Id.* at 2.

32. N.Y. COUNCIL OF NONPROFITS, INC., REPORT: NYS RANKED FIRST NATIONWIDE IN NONPROFIT JOBS AND ORGANIZATIONS (2016), <http://nycon.org/latest-news/news/report-nys-ranked-first-nationwide-nonprofit-jobs-and-organizations/#.WHZBI7GZPsE> [<https://perma.cc/3DED-NT5A>].

33. OFFICE N.Y. STATE COMPTROLLER, PROFILE OF NONPROFIT ORGANIZATIONS IN NEW YORK STATE 8 (2016), [https://www.osc.state.ny.us/reports/economic/nonprofits\\_in\\_nys.pdf](https://www.osc.state.ny.us/reports/economic/nonprofits_in_nys.pdf) [<https://perma.cc/D3E9-SHLE>].

34. A few examples are the Metropolitan Opera, The New York City Ballet, The New York Philharmonic, Brooklyn Academy of Music, Joyce Theater, Alvin Ailey Dance Theater, and The New York City Opera.

35. “And yet, for the better of the twentieth century, and well before, New York City has been considered the world’s authority on art and culture. Beginning with its position as the central port on the Atlantic Ocean, New York has been able to export and import culture to and from all parts of the globe. By the middle of the twentieth century, New York was the great home of the bohemian scene, beat writers, and abstract expressionists and later, to new wave and folk music, hip-hop DJs and Bryant Park’s Fashion Week.”

likely aware of the impact of the city's real property in cultivating creativity in the past and its promise to do so in future when they passed a law that protects and preserves buildings that contribute to the aesthetic, cultural and historical character of New York City against demolition and drastic alteration.<sup>36</sup> However, lawmakers have yet to acknowledge through legislation that it is not physical space alone that contributes to the maintenance of robust business and cultural economies to nurture a global center of creativity. Culture is about things that are worth having, doing and seeing. These objects and activities are given value by "gatekeepers" in the cultural industry, namely by "someone or some people or some organization . . . that has the credibility to crown."<sup>37</sup> This Part endeavors to show, however, that the organizations which provide the experiences "worth having, doing, and seeing" are experiencing tremendous financial strain and societal pressures. As such, these gatekeepers' programming efforts to promote the performing arts are at risk of downsizing and weakening due to the factors discussed in this Part below. Therefore, lawmakers would be justified to take steps to preserve and protect the art which these gatekeeper cultural organizations were founded to maintain, especially because of the connection between art and extraordinary character of New York State and New York City.<sup>38</sup>

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ELIZABETH CURRID, *THE WARHOL ECONOMY: HOW FASHION, ART AND MUSIC DRIVE NEW YORK CITY* 3 (2007). Currid explains that there are two economies operating in cities: the economy of business and the economy of culture. The latter is dependent on the former. *Id.* at 4. As a result of its functioning, the business economy creates an informal, social atmosphere which is the "central force" for art and culture, and its strength dictates the potency of creative output. *See id.* "Creativity would not exist as successfully or efficiently without its social world — the social is not the by-product — it is the decisive mechanism by which cultural products and cultural producers are generated, evaluated and sent to the market." *Id.*

36. N.Y. Comp. Codes, R. & Regs. tit. 25 § 301 (2017).

37. CURRID, *supra* note 35 at 5.

38. In addition to its geography, New York's physical structure and social environment permits "perpetual creativity." *Id.* at 9. "The idea that creative people blindly arrive in New York City just because that is the historical tendency, completely overlooks the systemic understanding that creative people and firms have about how their economy operates and why they need to be in New York City as opposed to somewhere else . . . They know that creativity happens in New York City and they know why." *Id.*



## A. VARIATION IN FINANCIAL HEALTH AS CONTEXT

Museums, symphony orchestras, operas, performing arts presenters, theatre, dance, arts service, art education, and visual arts organizations are all subsectors that contribute to the diverse cultural and artistic resources in New York.<sup>39</sup> The Arts, Culture and Humanities sector in New York State generated over \$6 billion in total revenue, with total assets of \$21 billion collectively in 2015.<sup>40</sup> But these numbers do not necessarily indicate that the sector's organizations are in good financial health. On the contrary, nonprofits devoted to arts, culture and humanities lost the most revenue among nonprofits during the 2008 recession.<sup>41</sup> In addition, there is evidence that nonprofit arts institutions were the last to financially recover after the economy began to rebound in 2009.<sup>42</sup> Even before the impact of the recession, many arts organizations were undercapitalized without any funds to set aside and save in the event of a financial emergency or artistic failure.<sup>43</sup>

Moreover, the financial position of organizations in the nonprofit arts world varies depending on its product. For example, the Nonprofit Finance Fund reported that the national trend is for museums — entities with tangible cultural assets — to have more cash on hand than theaters and dance organizations — hereafter referred to collectively as performing arts organizations.<sup>44</sup> Indeed, one major reason for museums' advantageous position in liquidity is because of the lucrative art market in which they can routinely sell their artwork if they are in need of the cash to, for example, pay down debt or make new investments in future programming.<sup>45</sup> By contrast, a theater or a dance or-

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39. 2015 STATE OF THE NONPROFIT SECTOR SURVEY SPECIAL SUPPLEMENT: ARTS & CULTURE SECTOR, NONPROFIT FIN. FUND 4 (2015), <http://www.nonprofitfinancefund.org/sites/default/files/nff/docs/2015-arts-survey-results-summary.pdf> [https://perma.cc/ZQ9Z-CV58].

40. *Supra* note 30.

41. Eileen Cunniffe & Julie Hawkins, *Staging a Comeback: How the Nonprofit Arts Sector Has Evolved Since the Great Recession*, NONPROFIT Q. (Feb. 9, 2016), <https://nonprofitquarterly.org/2016/02/09/staging-a-comeback-how-the-nonprofit-arts-sector-has-evolved-since-the-great-recession-2/> [https://perma.cc/AAY3-MK5J].

42. *Id.*

43. *Id.* A cushion of funding allows organizations to take artistic risks and experiment with new initiatives and ideas.

44. *Supra* note 39 at 21.

45. See e.g. Eileen Kinsella, *In a Major Sale, MoMA Will Auction More than 400 Photographs from its Collection at Christie's*, ARTNET NEWS (Aug. 9, 2017),

ganization does not have the ability to sell off their intangible art. As discussed in Part III, even if a performing arts board wanted to acquire major tangible assets like a museum could, taking such action within the limits of its charter could prove difficult. A nonprofit entity can adjust its activities and mission only after a showing that its existence or its efficiency is threatened.<sup>46</sup>

## B. CHALLENGES FOR THE PERFORMING ARTS WORLD

In the performing arts context, there are additional challenges to organizational longevity that intensify the strain of weak financial health. The first is the mismatch between organizational financial ability and audience desires and expectations.<sup>47</sup> There are several forces behind the shift in audience behavior and demands. The first is the economics of performance attendance. There is now a preference for “a la carte” experiences — consumers have become less willing to commit to a subscription package of performances.<sup>48</sup> Moreover, the price of a ticket is often so high that only the wealthy can pay to attend.<sup>49</sup> The second factor is that with changing demographics and cultural values, there is less interest in some forms of traditional art that appear too exclusive, which puts pressure on certain arts organizations that have an aura of elitism, such as opera.<sup>50</sup> Finally, the proliferation and use of technology — particularly social networking applications like Facebook, Twitter and Instagram — as a publicity and marketing tool has increased competition among entertainment

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<https://news.artnet.com/market/christies-will-offer-400-moma-photos-1045301> [<https://perma.cc/23VM-73PW>]; Katya Kazakina, *MoMA Sells Rare Masterpiece, Reuniting Rockefeller Treasures in Houston*, BLOOMBERG (June 28, 2017), <https://www.bloomberg.com/news/articles/2017-06-28/moma-sells-rare-masterpiece-reuniting-rockefeller-treasures-in-houston> [<https://perma.cc/EN36-8TMX>]; Carol Vogel, *MoMA to Sell a Monet in London*, N.Y. TIMES (Jan. 13, 2015), [https://artsbeat.blogs.nytimes.com/2015/01/13/moma-to-sell-a-monet-in-london/?\\_r=1](https://artsbeat.blogs.nytimes.com/2015/01/13/moma-to-sell-a-monet-in-london/?_r=1) [<https://perma.cc/R44F-FPTD>]; *Property from the Metropolitan Museum of Art, Sold to Benefit the European Paintings Acquisitions Fund*, CHRISTIE'S (Jan. 2014), <https://www.christies.com/sales/old-masters-week-featuring-renaissance-january-2014/met-museum/> [<https://perma.cc/N27P-RSSU>]; Grace Glueck, *Guggenheim May Sell Artworks to Pay for a Major New Collection*, N.Y. TIMES (Mar. 5, 1990), <http://www.nytimes.com/1990/03/05/arts/guggenheim-may-sell-artworks-to-pay-for-a-major-new-collection.html?pagewanted=all> [<https://perma.cc/Y2ZT-EE6X>].

46. RESTATEMENT § 3.01 cmt. b.

47. *Supra* note 39 at 14.

48. *Supra* note 41.

49. *Id.*

50. HOMANS, *supra* note 4 at 548. *See also supra* note 41.

sources for audiences' free time and engagement.<sup>51</sup> Nonprofit organizations can succeed in generating greater community interest and attendance if they invest resources to use these tools effectively.<sup>52</sup> More than ever, social networking enables the public to feel a sense of community around niche, idiosyncratic interests rather than around long-enduring traditions of a single, treasured art form like dance or opera.<sup>53</sup> In response to these factors, budget adjustments and fundraising efforts would ideally be made for financial sustainability and survival, at the risk of otherwise losing current and future audiences.<sup>54</sup>

Partly as a result of these factors, financial sustainability remains one of the main concerns nonprofits in this sector have.<sup>55</sup> The law addressing nonprofits, their mission and their assets is one of the forces that make financial sustainability hard to maintain for performing arts organizations because it does not recognize the importance of intangible assets. Two doctrines act as constraints in this area of law: *cy pres* and deviation. When it is impossible, illegal or impractical to continue to use a charitable gift for its original given purpose, courts use *cy pres* as rule of construction to find a new purpose for the gift, while following "as near as possible" the original intent of the donor.<sup>56</sup> Similarly, under the theory of deviation, a court will allow a change of use or purpose behind a gift when circumstances arise that would have been unknown or unforeseeable by the donor. In this scenario, without changing the use of the charitable gift, the donation would "defeat or substantially impair the accomplishment of

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51. See *supra* note 41. See also WALLACE FOUND., THRIVING ARTS ORGANIZATIONS, THRIVING ARTS, 6–7 (2014) <http://www.wallacefoundation.org/knowledge-center/Documents/Update-Thriving-Arts-Organizations-Thriving-Arts.pdf> [https://perma.cc/SL36-3V9H].

52. "What little research that does exist on nonprofit Facebook utilization regards the heavy reliance on basic informational uses as a lost opportunity for furthering interactivity and dialogue with supporters." Kristen Lovejoy & Gregory D. Saxon, *Information, Community and Action: How Nonprofit Organizations Use Social Media*, 17 J. COMPUTER-MEDIATED COMM. 337, 337–53 (Apr. 1, 2012), <https://academic.oup.com/jcmc/article/17/3/337/4067685> [https://perma.cc/MQ94-6TEX].

53. See *supra* note 41.

54. For example, an organization could increase audience attendance by experimenting with more modern programming that appealed to current tastes and welcomed more than one demographic group. Devoting more of the budget to marketing efforts, particularly through the use of technology of social media, is another way audience volume could grow. *Id.*

55. *Id.*

56. 15 AM. JUR. 2D *Charities* § 144 (2018).

the intended purpose” in light of the unforeseen circumstances.<sup>57</sup> The policy behind both of these restrictive doctrines is to maintain the integrity of donor intent attached to organizational funds and track any change in ownership of physical cultural assets of a charitable organization. But these doctrines do not have application to the major intangible assets like cultural knowledge and abstractions, which are the driving forces behind the product that performing arts organizations provide to their audiences. Cultural abstractions require highly trained individuals, educated in the cultural tradition, to provide the product, in contrast to a modern art museum’s property.<sup>58</sup>

Across the country, organizations that produce live theatrical, dance, or musical performance — or in the case of opera, all three at once — have acutely struggled to remain in existence while faithful to their purpose and budget, due to changes in societal tastes and spending.<sup>59</sup> This has been especially true in New York City,<sup>60</sup> where audiences always demand “the best of the best”<sup>61</sup> at

57. 15 AM. JUR. 2D *Charities* § 149 (2018).

58. Erin K. Slattery, *Preserving the United States’ Intangible Cultural Heritage: An Evaluation of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage as a Means to Overcome the Problems Posed by Intellectual Property Law*, 16 DEPAUL J. ART, TECH & INTELL. PROP 201, 220 (2006).

59. Stephanie Strom, *Charities Now Seek Bankruptcy Protection*, N.Y. TIMES (Feb. 19, 2009), <http://www.nytimes.com/2009/02/20/us/20bankrupt.html> [https://perma.cc/VW3S-FAMS] (“Performing arts groups typically are the nonprofits hit first in economic downturns, as donors devote more of their giving to charities that address basic needs and consumers cut spending on entertainment”). An illustrative example of this struggle is the Paul Taylor Dance Company which is now known as Paul Taylor’s American Modern Dance. The change in its name reflects its change of activity. Previously a showcase for Paul Taylor’s choreographic work exclusively, the entity now commissions new works. This decision was made based on evidence that new works attract audiences in an organizational-sustaining volume. Marina Harss, *What is the Future For Modern-Dance Companies?* THE NEW YORKER (Feb. 14, 2015), <https://www.newyorker.com/culture/cultural-comment/future-modern-dance-companies-paul-taylor> [https://perma.cc/9ZWB-UQDW]. See also *infra* note 81.

60. One of the most recent noteworthy examples is the bankruptcy of the New York City Opera and its subsequent reemergence. See generally Michael Cooper, *New York City Opera Announces It Will Close*, N.Y. TIMES (Oct. 1, 2013), <https://artsbeat.blogs.nytimes.com/2013/10/01/new-york-city-opera-announces-it-will-close/> [https://perma.cc/A4L7-DUHR]; Michael Cooper, *New York City Opera Will Return, and Soon, Under Reorganization Plan*, N.Y. TIMES (Jan. 12, 2016), <https://www.nytimes.com/2016/01/13/arts/music/new-york-city-opera-will-return-and-soon-under-reorganization-plan.html> [http://nyti.ms/1000ofb]. While avoiding bankruptcy, other New York City performing arts institutions have had troubles too. See Michael Cooper, *The New York Philharmonic’s Challenges Go Beyond the Music*, N.Y. TIMES (Apr. 22, 2015), <https://www.nytimes.com/2015/04/23/arts/music/challenges-mount-for-the-new-york-philharmonic.html> [https://perma.cc/MN4S-LHUN]; Daniel J. Wakin, *City Ballet Cuts Corps as Deficit Widens*, N.Y. TIMES (Feb. 20, 2009), <http://www.nytimes.com/2009/02/21/arts/dance/21ball.html> [https://perma.cc/46WD-9MB6].

all price points. Even though the local New York City community is one of the most affluent in the country, and even though there is some evidence to suggest that an organization's fate is typically tied to its locality's fortunes, some of the most famous New York City performing arts organizations have been on the brink of bankruptcy for numerous years or have ceased to exist entirely in effort to satisfy audiences' demands while staying within budget.<sup>62</sup>

The second challenge specific to performing arts organizations is maintaining the specialized human capital necessary for the best performance production and thereby for execution of the organization's chartered mission. Small and midsize organizations cannot pay their employees and artists very much because their boards want to remain operational and within budget.<sup>63</sup> While this pressure to keep personnel costs low is well-intentioned, it makes the fulfillment of an organization's potential less likely.<sup>64</sup>

Large arts institutions have a similar problem with talent resources but on a different scale given that, in contrast to midsize and smaller organizations, they frequently pay their artists very well. In recent years, the Metropolitan Opera and the New York City Ballet have both grappled with cultivating the best talent on their payroll for this purpose against a diminishing return in revenue and in donation funds. In 2014, the Metropolitan Opera proposed decreasing labor costs by sixteen percent — including those of the orchestra, chorus and stagehands — to make ends meet in light of a steady increase in operating expenses and a

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61. James B. Stewart, *A Fight at the Opera*, THE NEW YORKER (Mar. 23, 2015), <http://www.newyorker.com/magazine/2015/03/23/a-fight-at-the-opera> [https://perma.cc/7AVY-GAXB].

62. For example, while the New York City Opera was founded with the intent to provide “cultural entertainment at popular prices,” it failed to fundraise enough to continue operation due to an ill-fitted business model. Cooper, *New York City Announces It Will Close*, note 60 *supra*. Orchestras are another example of organizations that must balance rising costs and decreased demand in a landscape where, for a variety of factors, communities do not have the resources to contribute financial support they once did. As such, this leads to tension between the employees and management, and further destabilizes the organization. Michael Cooper, *For Orchestras in the U.S., So Much Depends on Their Communities*, N.Y. TIMES (Oct. 1, 2016), <https://www.nytimes.com/2016/10/02/arts/music/philadelphia-orchestra-strike.html> [https://perma.cc/7PY9-KETD].

63. *Supra* note 41.

64. *Id.* (citing LESLIE R. CRUTCHFIELD & HEATHER MCLEOD GRANT, *FORCES FOR GOOD: THE SIX PRACTICES OF HIGH-IMPACT NONPROFITS* (rev. ed. 2012) and DAN PALLOTTA, *UNCHARITABLE: HOW RESTRAINTS ON NONPROFITS UNDERMINE THEIR POTENTIAL* (2008)).

dwindling endowment over several years.<sup>65</sup> This proposal was met with union resistance. The threat of a labor strike was a catalyst for a tumble in season subscribers.<sup>66</sup> During 2011, the New York City Ballet was similarly stalled in contentious union negotiations over proposed changes in policies governing overtime and sick pay, salary and dancer participation in off-season work.<sup>67</sup> These proposals reflected an effort to address the company's \$6 million dollar deficit stemming from a lessening rate of repeat audience attendance and stagnant fundraising.<sup>68</sup>

Even if efforts are made to address dwindling audiences, The Metropolitan Opera and New York City Ballet's labor issues highlight how shaky financial health puts these nonprofits at risk of not operating at the standard they once did. Diversion of public attention and funding makes competition fierce within industries for a limited amount of resources. In addition, critics point to managerial abuse of tax-exempt status through lobbying, investing, elevating executive salaries, and allocation of profits towards commercial ventures that exacerbate the lack of available cash for labor and other areas of investment closer aligned to the organizational mission.<sup>69</sup> These criticisms reflect the reality that context and circumstances have pushed many nonprofits to inch closer and closer to becoming quasi-business corporations, prioritizing the bottom line above effective execution of their charitable activities.<sup>70</sup> Nonprofit management has no safe route to survival and maintenance of charitable purpose because bringing audiences back to the theater to see the best talent in the world costs money.<sup>71</sup>

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65. Strom, *supra* note 59.

66. Michael Cooper, *Labor Struggles at the Metropolitan Opera Have a Past*, N.Y. TIMES, (July 29, 2014), <https://www.nytimes.com/2014/07/30/arts/music/labor-struggles-at-metropolitan-opera-have-a-past.html> [<https://perma.cc/F64G-CMFP>].

67. Robin Pogrebin, *Deficit Complicates City Ballet Labor Talks*, N.Y. TIMES (Apr. 27, 2011), <http://www.nytimes.com/2011/04/28/arts/dance/city-ballet-and-dancers-struggle-to-avert-contract-impasse.html> [<https://perma.cc/3GPE-7WTN>].

68. *Id.*

69. Christyne J. Vachon, *Blurring. Not Fading. Looking at the Duties of Care and Loyalty As Nonprofits Move Into Commercialism*, 12 TENN. J. BUS. L. 37, 40–42 (2011).

70. *Id.*

71. “[N]onprofits that do not focus on maximizing nonprofit efficiency by minimizing fundraising and administrative costs, while maximizing the amounts of funds directed toward program activities are at risk for decreased charitable revenue.” Kelly Krawczyk, Michelle Wooddell, & Ashley Dias, *Charitable Giving in Arts and Culture Nonprofits: The Impact of Organizational Characteristics*, 46 NONPROFIT & VOLUNTARY SECTOR Q. 817, 821 (2017). The skill with which a nonprofit organization operates in using its money to fundraise more is a metric called “fundraising efficiency.” CharityWatch, one of many

This strain between financial needs and fidelity to fulfilling the missions of performing arts organizations will likely continue to develop in the future due to continuing shifts in cultural tastes, donor retention and demographics. This could prompt nonprofit staff and leadership to become even more specialized, and organizations may make business model adaptations, partnering with for-profit institutions due to a decrease in volunteerism.<sup>72</sup> An alternative theory is that perhaps it is time for many of the performing arts to no longer be actively staged. Yet dance, such as ballet, has fallen into a “deep sleep” before.<sup>73</sup> The performing arts may just be waiting for the arrival of the next generation of fans, but if places to experience these arts disappear, we will not know if this is the case. Having outlined the interconnected hardships of performing arts institutions, this Note later introduces and demonstrates how an alternative approach is feasible that could keep these nonprofits distinct from business corporations but still better safeguard the performing arts in Part IV.

### III. LAW GOVERNING DANCE ORGANIZATIONS

By re-envisioning the public as the true stakeholder of the nonprofit, nonprofit management could plan programming and spending with their fiduciary duty to the public in mind. In the face of challenges described in Part II, there may be a more profound harm to the public stakeholder than simply organizational downsizing — or in the worst case, extinction. Like all arts institutions, performing arts organizations provide and protect cultural assets for the public. Having said that, some of these performing arts assets enjoy no legal status that results in their preservation outside the organization because of their intangibil-

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organizations that analyzes financial reporting and other relevant documentation to calculate fundraising efficiency for national charities, considers the ideal fundraising efficiency to be \$25 or less to raise each \$100. The less money it takes to fundraise \$100, the more favorably an organization will appear to its donors. *Criteria and Methodology*, CHARITYWATCH (last visited May. 22, 2018), <https://www.charitywatch.org/charitywatch-criteria-methodology> [<https://perma.cc/HH7A-C42K>].

72. Bridget Harnet, & Ron Matan, *What Will Nonprofits of the Future Look Like: What's Coming in the Next Decade*, SOBEL & CO. LLC (2015), <https://sobelcolle.com/sites/default/files/pdf/whitepapers/Nonprofits%20of%20the%20Future%20Fall%202015.pdf> [<https://perma.cc/5YAN-FSBE>].

73. “If we are lucky . . . classical ballet is not dying but falling instead into a deep sleep, to be reawakened-like the Sleeping Beauty-by a new generation. The history of ballet, after all, abounds in spirits and ghosts, in hundred-year silences.” HOMANS, *supra* note 4 at 550.

ity. This is particularly true of work created and performed by the dance community.

This Part demonstrates the legal blind-spot created among the laws that govern dance organizations and why current laws are not sufficient to protect the intangible art they honor. The first section discusses nonprofit law and state enforcement, which regulates the purposes for which monetary assets can be used. Because of the difficulties created by these laws, organizations have few options for nurturing the non-monetary assets at the center of their operations, such as dance performance. The second section discusses copyright law and its inadequacy with the protection it provides to dance. Because of the pressure and restraint imposed by the nonprofit laws, one would hope that the art itself would be protected by copyright law even without an organization to care for it. Unfortunately, that is not the case. Without changes to the law that require more governmental oversight of these assets, the intangible cultural property of the dance world could be lost due to programming decision-making aimed at maintaining financial survival at any cost, while engaging with an ever-changing world.

#### A. NONPROFIT LAW AND STATE ENFORCEMENT OF CHARITABLE PURPOSE

The United States legal system is widely considered the most generous toward charitable, nonprofit organizations.<sup>74</sup> Regardless of an entity's form, its purpose is key in determining its status as a nonprofit organization; an entity can obtain status as a charity if it exists for the good of some beneficiaries<sup>75</sup> and does not aim to provide private gain.<sup>76</sup> The main incentive for an entity to become a charity is tax benefits, such as a substantial state

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74. David Pozen, *Hidden Foreign Aid*, 8 FLA. TAX REV. 641, 647 (2007) (citing John Simon et al., *The Federal Tax Treatment of Charitable Organizations*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 267, 267 (Walter W. Powell & Richard Steinerg eds., 2d ed. 2006)).

75. The beneficiary "has the enjoyment of or ultimate right to the property" that the trustee manages for the duration of the trust. 90 C.J.S. *Trusts* § 4 (2018). A beneficiary may have present or future beneficial interest in the trust. *Id.* For the purposes of this Note, the trust is analogous to the charitable organization. The trustees are the individuals on the governing Board of Directors and the beneficiaries are members of the public. For charities, the beneficiaries are indefinite because no specific individuals of the public are singled out to enjoy the benefit. *See supra* Part I.

76. RESTATEMENT § 1.01(a).



and federal tax exemption on income, estate and gifts taxes under Internal Revenue Code § 501(c).<sup>77</sup> These exemptions work to enhance and maximize the entity's ability to pursue its mission.<sup>78</sup> The statute provides for a broad spectrum of altruistic purposes for which an entity can elect to be a charity, as long as the purpose is to provide a benefit to the community.<sup>79</sup> Most performing arts organizations, including those related to dance, are considered to have an educational purpose for the public's benefit and therefore fit into the nonprofit category.<sup>80</sup>

In addition, charities are in theory afforded considerable flexibility to adapt their purposes to changes in technology, science, politics, and society that may impact their originally-intended mission.<sup>81</sup> These adaptations can be minor, for example by changing their activities but remaining in the spirit of the original purpose, or they can be major, such as when a complete shift in scope of purpose occurs.<sup>82</sup> With this flexibility, one would expect that desperate performing arts institutions that cannot raise more capital would consider changing their activities as a last resort to drive audience attendance and funding.<sup>83</sup>

But there are roadblocks elsewhere in the law that make such a change practically difficult despite the important public service these organizations perform. This difficulty is rooted primarily in the differences of degree in flexibility available for charitable purpose on the state and federal level. Much more is required on the state level. On the federal level, under Internal Revenue Code § 501(c), there are specific examples of purposes for which

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77. 26 U.S.C. § 501 (2012).

78. RESTATEMENT § 1.01 cmt. i(1).

79. Such purposes include education, religious or governmental pursuits. *Id.* See 26 U.S.C. § 501.

80. "Educational" activity within the meaning of 501(c)(3) includes "[t]he instruction of the public on subjects useful to the individual and beneficial to the community." Examples of educational organizations include "museums, zoos, planetariums, symphony orchestras and *other similar organizations.*" 26 C.F.R. § 1.501(c)(3)-1 (West 2017) (emphasis added).

81. RESTATEMENT § 1.01 cmt. d.

82. See RESTATEMENT § 3.01 cmt. c.

83. An example is the Paul Taylor Dance Company in New York which recently changed its name to Paul Taylor's American Modern Dance to reflect its change in activity — going from a dance company to "a presenter of dance." Harss, *supra* note 59. "[I]n order to survive in an age of short attention spans," Paul Taylor, like Martha Graham and Jose Limon, decided to have the organization commission choreography from living artists, rather than continue to perform simply his own works. In addition, he decided to invite outside companies to perform with his on the same program, which is unheard of amongst his peers. *Id.*

an entity could be considered a charity. Any change to this purpose requires IRS notification.<sup>84</sup> However, if an entity does not fit into one of these categories, it is subject to individual review by the Internal Revenue Service.<sup>85</sup> In addition, an entity cannot provide any benefits to a shareholder or to an individual — for example, its founder — that are not commensurate with those provided to the public.<sup>86</sup> The entity must make a showing that it will continue to meet these conditions for recognition as a charity in the future and therefore must show that it both serves the public and that any private benefit is incidental.<sup>87</sup>

In many states, to maintain tax-exemption benefits, there are more stringent restraints on a charity's ability to change the purpose for which it uses its assets. Under the laws of these states, the entity's management has the discretion to internally monitor and adjust its mission. Common law has long dictated that a charity's activities, pursued in the spirit of its charitable purpose, should be balanced against their usefulness.<sup>88</sup> Continual monitoring is necessary due to the risk that as conditions in and outside the organization change, certain activities may cease to be a beneficial use of organizational assets. But this discretion to adjust organizational activities is not entirely unlocked: while the methods to achieve this balance are open, the charitable purpose itself is not.

As a matter of state law, in New York, a significant change in a charitable organization's purpose requires approval by either the Attorney General's Charities Bureau or the New York Supreme Court on notice to the Attorney General.<sup>89</sup> Permissible purposes for continued charitable status under the Not-For-Profit Corporation Law (N-PCL) are "charitable, educational, religious, scientific, literary, cultural or for the prevention of cruelty to children or animals."<sup>90</sup> As the following illustrations will show, New York's standard of review sets the bar very high for organizations that are struggling to leverage their assets for a different

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84. RESTATEMENT § 3.01 cmt. b.

85. *Id.* § 1.01 cmt. i(1), (2).

86. *Id.* § 1.01 cmt. i(3).

87. *Id.*

88. *Id.* § 3.01 cmt. b.

89. N.Y. NOT-FOR-PROFIT CORP. LAW § 804 (McKinney 2014); *see also* ATTORNEY GENERAL OF NEW YORK CHARITIES BUREAU, PROCEDURES FOR FORMING AND CHANGING NOT-FOR-PROFIT CORPORATIONS IN NEW YORK STATE, 13 (2015).

90. N.Y. NOT-FOR-PROFIT CORP. LAW § 402(a)(2-a) (McKinney 2014).

purpose or for a different use in order to survive. Change of purpose is reviewed under “quasi-*cy pres*” — a comparison of similarities between the organization’s new proposed purpose, its current activities, and the source and intent behind the receipt of its assets.<sup>91</sup> Court authorization is necessary to ensure fiduciaries are acting appropriately and that the public interest is protected.<sup>92</sup> Because the standard set in New York is so high for court authorization, it is not a viable solution to seek for performing arts institutions in financial trouble.

There are two scenarios where change of purpose is apparent because it inherently contravenes the stated purpose: a change to use of assets and dissolution of the organization. Likewise, two New York cases show the difficulty with which nonprofits have sought to manage their assets to the court’s satisfaction to either continue to operate or to shut down operation. The first, *Alco Gravure Inc. v. Knapp Foundation* is an illustration of the organization’s burden of proof when its purpose is no longer relevant or possible to achieve.<sup>93</sup> The case exemplifies the reach of quasi-*cy pres* review of changes to a nonprofit organization’s certificate of incorporation and its use in New York State.<sup>94</sup>

*Alco* involved the Knapp Foundation, which was set up in 1923 to receive and maintain funds to promote the “social, physical or economic welfare and efficiency” of the individuals and their families who had worked for the businesses and successor businesses of the Foundation’s founder, Joseph Palmer Knapp.<sup>95</sup> Over time, however, requests for financial assistance — usually in the form of a loan — decreased.<sup>96</sup> As such, in 1983 the Board

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91. RESTATEMENT § 3.01, Reporter’s Notes, cmt. f.

92. Editor Commentary, N.Y. NOT-FOR-PROFIT CORP. LAW § 510 (McKinney 2014).

93. *Alco Gravure Inc. v. Knapp Foundation*, 64 N.Y.2d 458 (N.Y. Gen. Term 1985). Courts defer to the nonprofit organization board and their exercise of business judgment regarding use of assets and whether they fall into the certificate of incorporation’s stated purpose. See e.g., *Dennis v. Buffalo Fine Arts Acad.*, 836 N.Y.S.2d 498 (N.Y. Gen. Term 2007) (overruling plaintiffs’ request for injunctive relief to stop the nonprofit organization’s sale of assets). It is a matter of judiciary discretion as to what constitutes a permissible sale of assets that is not equivalent to substantially all the assets of an organization, which would otherwise require court authorization.

94. “To permit the corporation by a charter amendment such as here adopted to change the purpose for which funds given to it are required to be held *would short-circuit completely* the limitations imposed by sections 513 and 522 and permit the Foundation trustees to exercise a power given *specifically and only to a Supreme Court Justice* as concerns property received by the corporation by inter vivos gift.” (emphasis added). *Alco Gravure Inc.*, 64 N.Y.2d at 466.

95. *Id.* at 462.

96. *Id.* at 463.

decided to amend its certificate of incorporation, granting itself authorization to apply the assets of the Foundation to any other charitable organization founded by Joseph Knapp, regardless of the Foundation's original purpose.<sup>97</sup> A successor corporation and two potential beneficiaries of the Foundation, employees of the successor business, sued under the N-PCL to invalidate the certificate's amendment and to enjoin the transfer of these assets to Knapp N.C.<sup>98</sup> The Court ruled in favor of the plaintiffs, stating that a charter amendment to essentially change the purpose of the Foundation, altering how the donated funds were used and held, is an attempt to side-step the limits of Section 513 of the N-PCL.<sup>99</sup>

In the context of nonprofit performing arts organizations, *Alco* is significant because it illustrates the impossibility of maneuvering the purpose behind monetary assets to support a new designated organization goal or use set by a board to safeguard intangible art and further the organization's "gatekeeping" role in its culture.<sup>100</sup> Therefore, an organization may have received funds from donors but it may not be able to employ it in the most efficient way to address the problems discussed in Part II. To a certain extent, the board is powerless in ensuring organizational efficiency. Only a New York Supreme Court judge can exercise power to find a restriction on assets received by the corporation as "obsolete, inappropriate or impracticable" even though it is the corporation that has full ownership of the asset."<sup>101</sup>

*In re Friends of Long Island's Heritage*<sup>102</sup> exhibits an alternative scenario: dissolution of the organization. The holding presents New York courts' standard of review of the disposition of assets when a charitable organization seeks this end because its purpose is no longer relevant or sustainable. Similar to the difficulty of changing the use towards which assets are employed in *Alco*, organizational dissolution is a complex undertaking because of restrictions attached to the non-profit entity's assets. Friends of Long Island's Heritage (Friends) was created to assist the Nassau County Historical Museum in the development of its histori-

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97. *Id.* at 471.

98. *Id.* at 464.

99. *Id.* at 468.

100. See CURRID, *supra* note 35.

101. *Alco Gravure Inc.*, 64 N.Y.2d at 468 n.7.

102. *In re Friends of Long Island's Heritage*, 80 A.D.3d 223 (N.Y. App. Div. 2010).

cal and educational programming by soliciting donations of historical materials and money to purchase objects for the Museum.<sup>103</sup> Friends later established a relationship to aid Suffolk County as well.<sup>104</sup> Over time, both the Counties of Nassau and Suffolk no longer wanted Friends' assistance with the Museum.<sup>105</sup> The Friends' Board then had two options: to (a) continue to exist by either amending its certificate of incorporation and/or petition the court to reroute all or substantially all of the organization's assets to a substantially similar use, or (b) dissolve.<sup>106</sup>

After voting to dissolve, the Friends trustees formulated a plan of action, including a sale of Friends' assets, museum objects, to pay its debts. There was no dispute that the unrestricted assets could be used to assist in the dissolution of the organization.<sup>107</sup> However, the use of the museum's restricted assets towards this purpose was an open question, given that by definition, restricted assets can be used only for a limited purpose that furthers the organization's mission.<sup>108</sup> It appears counterintuitive to think dissolution could be considered within the organization's mission.<sup>109</sup> Therefore, the Attorney General, among other parties, appealed the Supreme Court's approval of this plan to satisfy the organization's creditors because it believed restricted assets could not apply to the purpose of dissolution of a corporation.<sup>110</sup>

The Attorney General warned that allowing assets to be used to pay off creditors, instead of honoring the intent for which they were given, would chill charitable giving in the future because donors could not remain confident that their donative intent would be respected.<sup>111</sup> The appellees espoused a competing policy consideration: unless assets could be used to pay creditors, struggling nonprofits would not be able to get the credit they needed to

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103. *Id.* at 225.

104. *Id.* at 226.

105. *Id.* at 227.

106. N.Y. NOT-FOR-PROFIT CORP. LAW § 1102 (McKinney 2014).

107. *In re Friends*, 80 A.D.3d at 226–27.

108. *Id.* at 227.

109. Allowing donors to place restrictions on charitable gifts is an incentive to donate because it guarantees that their gift will only be used in the way they want. Ellis Carter, *Managing Donor Restricted Gifts*, CHARITYLAWYER (Apr. 14, 2014), <http://charitylawyerblog.com/2014/04/14/managing-donor-restricted-gifts/> [<https://perma.cc/F4N3-7FHN>]. Allowing restricted gifts to be for dissolution goes against this incentive.

110. *In re Friends*, 80 A.D.3d at 227.

111. *Id.* at 234.

continue to exist.<sup>112</sup> The court sided with the Attorney General, stating that “[e]ven in dissolution, the limitations on the use of such assets is required to be honored, and not necessarily to the less extent of quasi *cy pres*. The last sentence of N-PCL 1002-a(c)(1) extends the donor’s limitations on use of an asset to the receiving entity.”<sup>113</sup> Thus, while conceding that New York’s quasi *cy pres* standard in its application to charitable organizations is very relaxed in comparison with the original common law doctrine, which was “as near as possible,” the court here accented a counter-weight: the need to always honor what the donation of the asset symbolized to the donor and by extension to the public, rather than who has it.<sup>114</sup>

This holding, in conjunction with that of *Alco*, seems to acknowledge that the New York State legislature did not want to extinguish the purpose of charitable assets, even in the face of organizational financial difficulties and recent organizational activities. Indeed, the case law suggests that the purposes behind the organization and its money cannot be easily diverted to keep the doors open and that rigid adherence to initial intentions is preferred no matter how these intentions may clash with the economic and societal conditions the organization may find itself in. This is problematic because it almost ensures that a performing arts institution facing significant declines in revenue will reach its end, despite its important cultural “gatekeeping” function, unless it is saved by an infusion of donated money to keep it alive or it maintains a very broad mission in its organizational charter while maintaining unrestricted assets. The latter scenario is an impossible ideal — as the Attorney General in *In re Friends* argued, donors are incentivized to provide money when they know their intent will be honored.<sup>115</sup> That said, given the value we have attributed to art, there should be other means, with better odds, of ensuring that it remains safeguarded regardless of the decision-making of a nonprofit. The other key legal paradigm that comes into play to protect and encourage artistic creativity

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112. *Id.*

113. *Id.* at 235.

114. *Id.* See also Jacoby, *supra* note 12. See also *Giving USA: 2015 was America’s Most-Generous Year Ever*, GIVING USA (June 13, 2016), <https://givingusa.org/giving-usa-2016/> [<https://perma.cc/6B6X-R5CC>] (suggesting that the record increase in charitable giving is motivated by donors’ desire to make a difference and support efforts that have personal significance).

115. N.Y. NOT-FOR-PROFIT CORP. LAW § 1102 (McKinney 2014).

and expression is copyright. Yet this framework also exposes the performing arts, like dance, to vulnerability.

## B. COPYRIGHT LAW

In dance, irrespective of any support from a performing arts organization, a choreographer has two different avenues to choose from to ensure her work is protected: a legal option through copyright, or a non-legal option through custom.<sup>116</sup> Unfortunately, where copyright fails the choreographer, custom does not do much better. Without enormous sums of financial support from a large company, adequate protection for dance is not possible.<sup>117</sup> As discussed previously,<sup>118</sup> many performing institutions are struggling with changes to financing and revenue and are legally restricted from making adjustments to their activities without state approval.

In order to understand where these methods of protection fail in the dance community, the issues with the Copyright Act of 1976 must be explained first. This Note then endeavors to show in Part IV that because of this gap in the law, in addition to those created by the laws governing nonprofit organizations previously discussed, cultural property protection must be used to address protection and preservation concerns.

Like the laws of nonprofit organizations, the primary purpose of copyright law focuses on the public as the key benefactor.<sup>119</sup> The Act protects works that are choreographic, original, and fixed in tangible medium or expression.<sup>120</sup> These three criteria, however, are ambiguous terms in the statute when applied to choreography,<sup>121</sup> and courts have had trouble reviewing them when copyright protections for dance choreography have been challenged.<sup>122</sup> As such, the dance community has little confidence in courts' determination of whether a work merits copyright protection.<sup>123</sup>

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116. de Quintana, *supra* note 28 at 149.

117. *Id.* at 139.

118. *See supra* Part II.

119. Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

120. Copyright Act of 1976, 17 U.S.C. §§ 101-810 (2012).

121. *See de Quintana, supra* note 28 at 149.

122. For example, because originality is not defined for dance, courts have applied the same standard used with music; scrutinizing the rhythm, harmony and melody of the work, and whether it bears the author's personal stamp. *Id.* at 156. This standard is misapplied for dance because it overlooks use of space and movement.

123. *Id.* at 156-57.

Yet the ambiguity may appear advantageous in certain respects. For example, a piece can be abstract without any dramatic storyline, since there is no such requirement to be choreographic.<sup>124</sup> In addition, what is original is open to interpretation and subjective; this encourages artistic experimentation. With regards to fixation, a choreographer can choose whether to use film, computer software or a notation system to record her work.

But there are two problems with these open, statutory definitions in connection with rendering this intangible art form into a preserved work. The first is that methods of fixation are not widely used in the dance community. Most work is passed down through memory, and choreographers hope that this custom will ensure the work's integrity.<sup>125</sup> Moreover, some have argued that the fixation requirement is a burden to choreographers because the diverse forms of fixation all have major downsides. For example, the Laban Dance Notation system, while one of the most accurate methods of preservation, is extremely expensive and time consuming, particularly for lesser-known choreographers.<sup>126</sup> Hiring someone who is well-trained in this system of notation to help record a piece of work can cost thousands of dollars for a few minutes.<sup>127</sup> Furthermore, most choreographers and dance historians believe an "effective, serviceable notation, able to render the many faces of the dance, has yet to be created and universally applicable."<sup>128</sup>

Video recording is another method of fixation with different flaws. Restructuring a ballet from watching it on video is not very easy and somewhat depends on the skill of the dancer performing.<sup>129</sup> Furthermore, video fails to capture the choreographer's intent<sup>130</sup> while it also can be "disorienting and misleading" as a memory aid.<sup>131</sup> Another fixation method is using computer

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124. *Id.* at 156.

125. *Id.* at 150, 152.

126. *Id.* at 159.

127. *Id.*

128. *Id.* at 163 n.160 (citation omitted).

129. "A number of elements can go wrong: a dancer may miss a step, execute the movement at a different angle, miss the rhythm or beat of the music, or fail to capture an emotion. Furthermore, reconstructing a ballet from film is laborious because even a skilled observer has difficulty discerning the various movements on stage. Specifically, the person watching the video might have difficulty discerning where the dancers are on stage, depending on the angle of the recording. *Id.* at 160.

130. *Id.* See also HOMANS, *supra* note 4 at 547.

131. HOMANS, *supra* note 4 at 546-47.



software that allows the user to maneuver a three-dimensional figure. While not currently widely accessible to choreographers, software promises to be cheaper than video<sup>132</sup> or notation while very precise: you can see movement from every possible angle.<sup>133</sup> Computer software is still disfavored by the community because it is perceived as lacking the necessary emotional expression and simply makes the choreography an empty series of movements not imbued with expression.<sup>134</sup> All of this being said, in the eyes of the dance community, experience of the live performance is absolutely necessary to truly have knowledge of the choreography because the work of art is not simply in its movements but in the emotion expressed by the performer. Yet without a fixed medium, the work eschews copyright protection because all three elements — choreographic, original and fixed — must be fulfilled.

Putting aside the fact that it is widely believed artistically that no adequate method of notation is available to date,<sup>135</sup> even if a choreographer were to choose a method of fixation to preserve her work, it would be difficult to get judicial relief for infringement. Paralleling the community's lack of confidence in the courts' ability to predictably apply a standard of review for the three criteria to gain copyright protection,<sup>136</sup> the Copyright Act's standard for infringement is burdensome to prove and provides an inadequate remedy to the choreographer.<sup>137</sup>

The United States Supreme Court has never articulated a test for finding whether there was infringement of a copyright protection for a choreographic work.<sup>138</sup> There is only one case that provides guidance on the issue, *Horgan v. Macmillan Inc.*<sup>139</sup> The question was whether a photo of a ballet could infringe on the copyright of the choreography.<sup>140</sup> The Second Circuit concluded that even though the photo constituted only one moment of George Balanchine's *Nutcracker*, it was *qualitatively similar* to the entirety of his choreographic work of the *Nutcracker*.<sup>141</sup> Deciding this issue of fact, the court remanded back to the trial

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132. de Quintana, *supra* note 28 at 160.

133. *Id.*

134. *Id.* at 161.

135. *Id.* at 164.

136. *Id.* at 139.

137. *Id.* at 151–52.

138. *Id.* at 164.

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

140. *Id.* at 158.

141. *Id.* at 163.

court to determine whether they were substantially similar,<sup>142</sup> a standard which it defined as “whether the ordinary observer viewing the two works would be disposed to overlook their disparities and perceive their aesthetic appeal as essentially the same.”<sup>143</sup> From a choreographer’s point of view, the challenge with the substantially similar test is that it relies on the ordinary observer’s perspective, rather than the choreographer’s, and it does not distinguish between borrowing and infringement.<sup>144</sup> Given the sparse precedent and subjectivity of the standard, if a choreographer or company wanted to bring a case to court to allege copyright infringement, it would be very difficult and expensive.<sup>145</sup>

Moreover, even if a party wanted to bring a suit for infringement, choreographers often do not because the remedies for breach are not satisfactory for them. The Copyright Act protects economic rights, but not creative rights.<sup>146</sup> Some have argued that choreographers, like other artists, are concerned with “the right to have their work attributed to them in the form which it was created.”<sup>147</sup> “Money will not make the artist whole when their work is not properly executed.

A small community, the dance world follows its own “unwritten” rules.<sup>148</sup> The other option for a choreographer, outside of copyright, is to rely on the dance community’s custom of passing down dance through memory and on its means of enforcement. To preserve this memory, companies rehearse works obsessively to preserve the choreography with integrity.<sup>149</sup> In the long run, this method of preservation is flawed too. Should performing arts institutions cease to exist due to their financial trouble,<sup>150</sup> there would be little opportunity for these frequent and laborious rehearsals to occur. Additionally, it is customary for the creator to

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142. *Id.* Subsequent to the Second Circuit’s ruling, the parties settled out of court thereby leaving the issue of whether the photo and the work were substantially similar undecided.

143. de Quintana, *supra* note 28 at 165. *See also* Horgan, 789 F.2d at 162 (quoting Judge Learned Hand in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960)).

144. de Quintana, *supra* note 28 at 166.

145. *Id.* at 164.

146. *Id.* at 168.

147. *Id.*

148. *Id.* at 161; Singer, *supra* note 28 at 291–92.

149. de Quintana, *supra* note 28 at 164.

150. *See supra* Part II.

get credit for the work, even if it is created for a person or a company.<sup>151</sup> When dance companies want to perform the choreographer's work, they customarily enter into a licensing agreement. In the event there is a breach, the only enforcement is peer pressure and reputational damage. This type of deterrent is preferable to many choreographers, given their desire to preserve their creative and moral right, rather than their economic right.<sup>152</sup>

Given that custom is choreographers' preferred means of preserving their art because of the flaws in the alternatives discussed, the preservation of dance has no copyright protection and relies on an infrastructure supporting dance performance and dancers. Performance of dance is not dependent on the existence of performing arts organizations like the New York City Ballet or the American Ballet Theater.<sup>153</sup> But the level of devotion and study to be able to orally pass down a choreographic work is not usually found among amateurs but rather in environments, like those of performing arts organizations, that have a payroll for dancers to invest the hours of rehearsal time necessary. Nevertheless, as discussed in Part II, juggling employee compensation and other financial issues remains challenging for many performing arts organizations especially since the Great Recession. Moreover, as discussed, the laws around non-profit organizations' use of assets restricts the avenues through which an entity can manage financial pressures effectively. Between copyright's inability to account for the passage of choreography through custom, and non-profit law's inability to provide an exception to allocate assets towards uses sustaining survival of the organization, and therefore continued investment in dance training and teaching, it is not likely that important choreographic works are preserved by these existing laws.

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151. de Quintana, *supra* note 28 at 162; Singer, *supra* note 28 at 293–94.

152. de Quintana, *supra* note 28 at 168, 171. *See also* Connelly, *supra* note 28 at 855.

153. The authors of a study providing a comprehensive analysis of the performing arts industry concluded that “the structure of the performing arts system is undergoing a fundamental shift . . . while the commercial recorded and broadcast performing arts industry is growing more and more concentrated globally, live performances are proliferating at the local level, typically in very small organizations, with low operating budgets and a mix of paid and unpaid performers and staff.” *The Performing Arts: Trends and Their Implications*, RAND CORP. (2001), [https://www.rand.org/pubs/research\\_briefs/RB2504/index1.html](https://www.rand.org/pubs/research_briefs/RB2504/index1.html) [<https://perma.cc/7L77-B2L9>]. *See also* KEVIN MCCARTHY ET AL., *THE PERFORMING ARTS IN A NEW ERA* (2001) (*available at* [https://www.rand.org/pubs/monograph\\_reports/MR1367.html](https://www.rand.org/pubs/monograph_reports/MR1367.html)) (<https://perma.cc/N4TG-QW25>).

#### IV. ALTERNATIVE LEGAL FRAMEWORKS AND SUGGESTIONS FOR LEGISLATION

Artists are “inextricably tied to not-for-profit organizations”<sup>154</sup> partly because of the platform nonprofit organizations provide to the artist, outlined explicitly in their mission statements. Many famous choreographers founded their own dance companies to serve as vessels of preservation for their art.<sup>155</sup> These are non-profit, tax-exempt entities and without them, there would be no way to foster the transmission of the choreography for the public benefit.<sup>156</sup> The New York City Ballet, for example, was founded by and infused with the spirit of the legendary choreographer George Balanchine, and the longevity of his vision depends on his students and their progeny’s ability to train and perform his work.<sup>157</sup> Balanchine choreographed, either wholly or in part, most of the productions the company has introduced since its inception.<sup>158</sup> While his work can be performed elsewhere, the New York City Ballet is one of the most important engines, created by Balanchine himself, in promoting, investing in, and safeguarding Balanchine’s legacy.<sup>159</sup>

Despite the fact that choreography like Balanchine’s is both a performing art and an oral tradition, because the U.S. does not have any sort of protection for intangible cultural property — and because the dance community disfavors flawed notation systems such as video recording and computer notation software<sup>160</sup> — once the institutions promoting the choreography die, so too does the art itself. The custom of the dance community is to preserve and transmit dance through memory. Without the necessary environment for the customary preservation, what happens to the choreographic work? There is a great risk that a fundamental

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154. Connelly, *supra* note 28 at 848, quoting Brief for Amici Curiae American Dance Festival et al. as Amici Curiae in Support of Plaintiffs-Appellants, *Martha Graham Sch. & Dance Found. Inc. v. Martha Graham Ctr. Of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004) (No. 02-9451(L)) at 3.

155. For example, Isadora Duncan, Martha Graham, and Merce Cunningham. *Id.*

156. See Strom, *supra* note 59.

157. *Id.*

158. *George Balanchine*. N.Y.C. BALLET (last visited May 22, 2018), <https://www.nycballet.com/Explore/Our-History/George-Balanchine.aspx> [<https://perma.cc/62F7-YL8N>].

159. In addition to regular performances of his works, “the “Balanchine Technique” has been codified and enshrined: there are books and DVDs of his dancers detailing its principles and practices.” HOMANS, *supra* note 4 at 543.

160. See *supra* Part II.B.

part of the art form will be lost. In light of the inadequacies of nonprofit and copyright law discussed in Part III, intangible art forms like dance choreography are in danger without nonprofit organizations to safeguard them, given copyright's shortcomings previously discussed. This Part considers alternative legal frameworks from the US and the international community and expands upon such frameworks to formulate a solution.

### A. UNESCO CONVENTION

The United Nations Educational, Scientific and Cultural Organization (UNESCO) was established after World War II to achieve several international goals, including the “protection of heritage and support for cultural diversity,” with the ultimate objective of world peace.<sup>161</sup> The organization calls itself the intellectual agency of the United Nations, fostering new avenues for “dialogue and mutual understanding” as well as the “intellectual and moral solidarity of humanity.”<sup>162</sup> With these goals in mind, UNESCO has identified criteria to decipher when cultural heritage is of such significance to a culture that it warrants special protection memorialized and agreed upon by participating member countries. Because neither non-profit law nor copyright gives special treatment nor recognizes the risk inherent in the intangibility of dance, the framework that UNESCO offers for tangible property should be considered to address dance preservation efforts.

From its beginning, UNESCO focused on protection of physical objects that are manifestations of culture due to their vulnerability during times of conflict.<sup>163</sup> To that end, UNESCO pursues various endeavors, including prohibiting the import and export of tangible cultural property<sup>164</sup> and protecting cultural property

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161. *Our Vision*, UNESCO (last visited May 22, 2018), <http://en.unesco.org/about-us/introducing-unesco> [https://perma.cc/SQ6S-P5PD].

162. *Id.*

163. Slattery, *supra* note 58 at 210–14.

164. *Id.* Also known as tangible cultural heritage, examples include “movable cultural heritage (paintings, sculptures, coins, manuscripts), immovable cultural heritage (monuments, archeological sites and so on), underwater cultural heritage (shipwrecks, underwater ruins and cities),” in contrast with intangible cultural heritage like “oral traditions, performing arts and rituals.” *What is meant by “cultural heritage”?*, UNESCO (last visited May 22, 2018), <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/frequently-asked-questions/definition-of-the-cultural-heritage/> [https://perma.cc/8RZM-C3ZY].

through its World Heritage mission. World Heritage's purpose is to carry out the ideas embodied in the Convention Concerning the Protection of the World Cultural and Natural Heritage.<sup>165</sup> The international treaty encourages the protection and preservation of cultural and natural heritage of extraordinary value to humanity.<sup>166</sup> To be given such a designation, a site must fall into one of ten criteria — six cultural, four natural — for selection.<sup>167</sup> Real property can be designated as a World Heritage site based on cultural factors if, for example, it represents “a masterpiece of human creative genius,” exhibits “an important interchange of human values,” bears “a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared,” or “directly or tangibly associate[s] with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance.”<sup>168</sup> That said, while the cultural criterion's application is to real and tangible property, they seem broadly applicable to intellectual and intangible property as well.

Indeed, starting in the 1980s, UNESCO turned its attention to intangible cultural heritage.<sup>169</sup> But it was not until 2003 that the Convention for Safeguarding of Intangible Cultural Heritage was finalized. The Convention states four specific purposes: (1) “to provide protection for intangible culture,” (2) “to encourage respect for such heritage,” (3) “to make people aware of the importance of intangible heritage,” and (4) “to encourage countries to cooperate in their efforts to safeguard such heritage.”<sup>170</sup> The Convention's terms serve two interests: to address the imbalance

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165. Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T 37. Like all UNESCO agreements, the Convention is not self-executing. As a signatory, the United States enacted legislation to set domestic policy in the spirit of the Convention as well as the parameters of its activity in carrying out the Convention's objectives in 2014. See 54 U.S.C. § 307101 (West 2014).

166. *World Heritage*, UNESCO (last visited May 22, 2018), <http://whc.unesco.org/en/about/> [https://perma.cc/RR4M-EY68].

167. *The Criteria for Selection*, UNESCO (last visited May 22, 2018), <http://whc.unesco.org/en/criteria/> [https://perma.cc/4RDY-WC22]. Natural criterion are attributes that relate to the physical aspects of a site, such as “to be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals.”

168. *Id.*

169. Slattery, *supra* note 58 at 218.

170. Convention for Safeguarding of the Intangible Cultural Heritage, art. 1, Oct. 17, 2003, in force 20 April 2006, 2368 UNTS 1.

between laws for tangible versus intangible cultural property, and to provide the basis for safeguarding what is intangible. Prior to the adoption of the Convention, tangible and intangible cultural heritage were treated differently despite the fact that they are entirely interrelated. It is absolutely “impossible to study one type of culture without acknowledging the existence and importance of the other.”<sup>171</sup> The Convention and the changes it brings with it are therefore a welcome addition to UNESCO’s mission.

Enumerated in Article 2 of the Convention, the definition of intangible cultural heritage is broad, encompassing “oral traditions . . . social practices, rituals, festive events, knowledge and practices concerning nature and the universe,” “knowledge and skills to produce traditional crafts” and, most importantly for the purposes of this Note, the performing arts.<sup>172</sup> The performing arts are considered to be traditional music, dance, theatre and beyond.<sup>173</sup> Choreography is a prime example of a cultural medium that fits UNESCO’s definition of intangible cultural heritage. In harmony with the custom in the dance community discussed in Part III, UNESCO favors “transmission of knowledge and techniques . . . and strengthening the bond between master and apprentice” to be the primary means of safeguarding the performing arts.<sup>174</sup> While music and plays are recorded, dance has almost never had symbolic representation in its history, despite attempts to create a notation system.<sup>175</sup> A choreographer is “part creator,

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171. Slattery, *supra* note 58 at 208.

172. *What is Intangible Cultural Heritage?*, UNESCO (last visited May 22, 2018), <http://www.unesco.org/culture/ich/en/what-is-intangible-heritage-00003> [https://perma.cc/5MZR-U647].

173. *Performing Arts (such as traditional music, dance and theater)*, <http://www.unesco.org/culture/ich/en/performing-arts-00054> [https://perma.cc/KY6F-UY66] UNESCO (last visited May 22, 2018).

174. *Id.*

175. See *supra* notes 127–130. In Western culture, there have been numerous, unsuccessful attempts over time in the past three centuries to develop a standard, universal method of recording dance, using graphic symbols to represent human movement. This would have allowed a dance composition to be handed down on paper from one generation to the next. The issue is that notation systems would be formulated and then unadaptable for newer styles that came afterwards; the symbols were unable to describe the full range of movements imagined by choreographers. Without a notation system, unintentional changes to dance become the accepted version, and the original work loses its authentic value. Jane Fries, *Writing Dance Down: The Art of Notation at the Philadelphia Museum of Art*, DANCE J. (May 7, 2015), <http://philadelphiadance.org/dancejournal/2015/05/07/writing-dance-down-the-art-of-notation-at-the-philadelphia-museum-of-art/> [https://perma.cc/S4AB-9RR3]; Sean Rocha, *How’s Choreography Recorded?*, SLATE, (Mar.

part teacher” and thereby it is human capital that provides the link between concept and performance.<sup>176</sup> The Convention for Safeguarding of Intangible Cultural Heritage acknowledges this link and protects it, whereas neither copyright nor non-profit law do so directly.

Under the authority granted by the Convention, UNESCO acts with urgency in coordination with convention signatory nations, acknowledging that the various forms of performing arts are in peril because “as cultural practices are standardized, many traditional practices are abandoned.”<sup>177</sup> Globalization presents the most influential threat, but other factors such as migration, urbanization, and the consequences of mass tourism play a role in leading to cultural uniformity as well.<sup>178</sup> Indeed, one could see how in the United States, certain forms of performing arts staged by cultural institutions are imperiled due to the need to adapt to financial constraints, changes in technology and tastes in the nonprofit industry, and weak charitable purpose oversight. Furthermore, over time, these types of performing arts may fade, at least partly due to a lack of copyright protection. Copyright is applied to “fixed tangible mediums of expression”; it does not cover the transmission of knowledge through community custom that UNESCO recognizes is crucial for intangible art forms, like dance.<sup>179</sup> In addition, copyright focuses on the monetary concerns of an individual inventor, creator, or author. It does not address or honor the policy supporting cultural heritage preservation.<sup>180</sup>

## B. CURRENT U.S. LAW

On the local level, the New York City Landmarks Preservation Law is a prominent example of regulation that recognizes and was intended to protect and preserve tangible cultural property. Analogous to UNESCO’s World Heritage Site mission, the law authorizes the city to regulate “for the protection, enhancement, perpetuation and use of places, districts, sites, buildings, structures, works of art and other objects . . . having a special histori-

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5, 2004), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2004/03/how\\_choreography\\_recorded.html](http://www.slate.com/articles/news_and_politics/explainer/2004/03/how_choreography_recorded.html) [https://perma.cc/DK8B-HLBD].

176. Rocha, *supra* note 175.

177. *Supra* note 173.

178. Slattery, *supra* note 58 at 228.

179. *Id.* at 233.

180. *Id.* at 236.



cal, cultural or aesthetic interest or value.”<sup>181</sup> However, in effect, there are two impediments that have arisen from the execution of this law. The first is that arguably it has been underutilized and underfunded in its fifty years of existence.<sup>182</sup> While twenty-seven percent of the buildings in Manhattan are under the law’s protection, the Landmark Preservation Commission spends most of its time managing existing landmarks.<sup>183</sup> Operating with one of the smallest budgets and staffs among the city agencies, the Commission struggles with efficiency and with meeting the demands of an evolving, ever-changing city skyline.<sup>184</sup>

The second problem with the execution of New York City Preservation Law is that it cannot be nearly as effective as intended in safeguarding the cultural value of landmark physical sites without parallel protections for cultural value that is intangible. In the United States Supreme Court’s *Penn Central* opinion, which upheld the New York City Preservation Law as constitutional, the Preservation Commission is quoted, explaining the theory underpinning the regulation that “[l]andmarks cannot be divorced from their settings — particularly when the setting is a dramatic and integral part of the original concept.”<sup>185</sup> In the Commission’s view, Grand Central Terminal could not be removed from its original location because it would render the building’s landmark status meaningless. In the same way, it is illogical that New York City buildings connected with the performing arts, such as the Apollo Theater and the Beacon Theater, are landmarked and preserved physically by law, but that what substantively happens *inside* of these structures is divorced from its setting and has no legal protection.<sup>186</sup>

On the federal level, there are four sets of regulations that aim to preserve the Nation’s *tangible* cultural heritage: the American Antiquities Act,<sup>187</sup> the Historic Sites, Building and Antiquities

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181. N.Y. GEN. MUN. LAW § 119-dd(1) (McKinney 2016).

182. The Editorial Board, *New York City’s Landmark Law at 50*, N.Y. TIMES (Apr. 17, 2015), <https://www.nytimes.com/2015/04/18/opinion/new-york-citys-landmarks-law-at-50.html> [https://perma.cc/NP39-RD9B].

183. *Id.*

184. *Id.*

185. *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 118 (1978).

186. *Discover NYC Landmarks*, NYC LANDMARKS PRESERVATION COMM, <http://www1.nyc.gov/site/lpc/designations/maps.page> (last visited May 22, 2018) [https://perma.cc/4D45-EKLD].

187. Repealed and now incorporated under revised title under 54 U.S.C.A. §§ 320301-03 (West 2014).

Act,<sup>188</sup> the National Historic Preservation Act,<sup>189</sup> and the Archaeological Protection Act.<sup>190</sup> Of course, cultural structures and buildings can deteriorate and fall into disrepair. This is what these laws seek to prevent. However, because intangible property is in its essence without structure, it is at minimum just as fragile as tangible cultural heritage, if not more.<sup>191</sup> Because of this, United States law should act more affirmatively in protecting intangible property as it protects environmental and other social resources with a strong public trust doctrine.<sup>192</sup> Our society and legislatures recognize that diminishing our cultural “inheritance” diminishes our collective sense of self and quality of life.<sup>193</sup> This moral sentiment can be gleaned from the enthusiasm of the public itself, which is what prompted the New York City Landmarks Law to be passed in 1965.<sup>194</sup> Once property becomes symbolic or representative of our culture, it overrides individual ownership rights because it can be seen “as the property of an entire culture.”<sup>195</sup> Cultural heritage is an exception to the rule of individual property right privilege. In the case of New York City’s Preservation Law, preservation went from being an odd hobby of some, to a fundamental administrative arm of city government, now considered a societal and environmental necessity.<sup>196</sup>

The reasoning behind the protection of the nation’s resources is that there is a great respect for creative genius that “transcend[s] ownership; a caring about our history and a wish that *everyone* share in its meaning’ . . . This mentality assumes that [t]he sphere of individual sovereignty over resources will steadily

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188. Repealed and restated as 18 U.S.C.A. § 1866(A) (West 2014), 54 U.S.C.A. §§ 102303–04 (West 2014), 54 U.S.C.A. § 320101 (West 2014).

189. Repealed and now incorporated under revised title under 54 U.S.C.A. §§ 300301–§ 307108.

190. 16 U.S.C.A. §§ 470aa–mm (West 2014). *See also* Slattery, *supra* note 58 at 214–18.

191. *See* Slattery, *supra* note 58 at 227–228.

192. John Nivala, *Droit Patrimoine: The Barnes Collection, the Public Interest, and Protecting Our Cultural Inheritance*, 55 RUTGERS L. REV. 477, 541–44 (2003).

193. *Id.* at 537.

194. The Editorial Board, *supra* note 182.

195. Nivala, *supra* note 192 at 536 (quoting Jordana Hughes, *The Trend Toward Liberal Enforcement of Repatriation Claims in Cultural Property Disputes*, 33 GEO. WASH. INT’L L. REV. 131, 134 (2000) (footnote omitted)).

196. The Editorial Board, *supra* note 182.

recede, while the realm of collective sovereignty will expand.”<sup>197</sup> When property is representative of such significance to all people, as is the case with cultural property, there is an obligation to protect it on the public’s behalf which trumps the private rights of an individual or a nonprofit corporation. This is distinct from and clashes directly with the underpinning logic of 501(c)(3) tax-exempt status, which grants benefits to private organizations because they *provide* a public good. Instead, the theory of cultural preservation for the public trust comes from the idea that cultural property belongs to the collective, no matter the type of entity or individual who formally owns it. However, there is also an intersection between the public trust doctrine and the 501(c)(3) tax-exemption for charitable organizations. Nonprofit organizations exist and enjoy tax-exempt status because they provide something that the government cannot. Particularly in the performing arts context, what is provided by cultural nonprofits is an outlet for the creative genius of our society that would otherwise fall through the cracks. Given the instability of relying solely on board management<sup>198</sup> and the market to ensure the continued financial security of these entities, and given the fact that there are already laws in place that value tangible property of cultural significance, we should put in place similar protections for intangible property.

### C. SUGGESTED LEGISLATION

Seeking greater Attorney General involvement to strengthen the public trust doctrine and adopting an idea of intangible cultural property, distinct from intellectual property, would improve the protections of the intangible assets of cultural nonprofit cor-

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197. Nivala, *supra* note 192 at 529 (quoting Lee Bollinger, *Foreword to JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES*, at xiii (1999)).

198. See e.g. Robin Pogrebin, *Ballet Theater is Calm in the Face of Loss of Funds*, N.Y. TIMES (Nov. 13, 2003), <http://www.nytimes.com/2003/11/13/arts/ballet-theater-is-calm-in-face-of-loss-of-funds.html> [<https://perma.cc/NZD3-WDQL>] (principal sponsor Movado withdraws funding from the American Ballet Theater amidst claims of mismanagement); Robin Pogrebin, *Saratoga Center Cited for Mismanagement*, N.Y. TIMES (Nov. 23, 2004), <http://www.nytimes.com/2004/11/23/arts/saratoga-center-cited-for-mismanagement.html> [<https://perma.cc/SN6U-ZN2A>] (excessive executive payments); James B. Stewart, *A Ransacked Endowment at New York City Opera*, N.Y. TIMES (Oct. 11, 2013), <http://www.nytimes.com/2013/10/12/business/ransacking-the-endowment-at-new-york-city-opera.html> (mismanagement of endowment) [<https://perma.cc/569M-T4Z2>].

porations. This would not be a step too far removed from laws already in existence in the United States. On the international stage, due to political obstacles<sup>199</sup> and concern over its impact on intellectual property norms,<sup>200</sup> the United States did not sign the Convention for the Safeguarding of Intangible Cultural Heritage when it was finalized and voted upon in 2003. At the least, it is encouraging that domestic laws have been adopted reflecting United States lawmakers and society's understanding that there is an American national tradition that needs to be protected. These laws communicate prioritizing tangible cultural property preservation because it is valuable, special and in danger of loss. There is no reason why this policy cannot be extended to intangible cultural property.

## V. CONCLUSION

Nonprofit organizations are an important economic force nationally and in New York State but many, including performing arts organizations, face major challenges to staying financially viable due to societal and economic factors. An additional challenge nonprofit organizations face is the law. If major changes to an organization's use of assets is considered sound by its leaders, they will still need to seek court approval. Given the incentives to honor donor intent and restrictions on assets, the burden is

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199. By way of background, the United States has had an on-and-off relationship with UNESCO, although it was a founding member of the organization in the 1940s. In 1983, it withdrew from UNESCO membership, citing domestic budgetary restraints and disillusionment with organizational management. It was only after years of institutional reform that the United States decided to rejoin in 2003. *United States' Return to UNESCO*, 97 AM. J. INT'L LAW, 977-79 (2003). Simultaneously during 2003, member countries accepted and/or ratified the Convention. In 2013, the United States lost its voting rights in the organization after it ceased paying its dues for two years. This inaction was in response to the United Nation's recognition of the Palestinian State. Alissa J. Rubin, *U.S. Loses Voting Rights at Unesco*, N.Y. TIMES (Nov. 8, 2013), <http://www.nytimes.com/2013/11/09/us/politics/us-loses-voting-rights-at-unesco.html> [<https://perma.cc/T5EY-57V6>].

200. Discussing the United States' abstention against the Convention for the Safeguarding of Intangible Cultural Heritage, Michael Brown, Professor of Anthropology and Latin American Studies explains, "[a]s the world's biggest exporter of copyrighted media products, the U.S. opposes this approach to cultural preservation." Some may see the Convention as an attempt to push back against intellectual property law, by allowing states to restrict the exportation of knowledge as well as the importation of cultural content that may be threatening to the state's national traditions. Michael F. Brown, *Safeguarding the Intangible*, WILLIAMS COLLEGE (2003), [http://web.williams.edu/AnthSoc/native/Brown\\_SafeguardingIntangible2003.htm](http://web.williams.edu/AnthSoc/native/Brown_SafeguardingIntangible2003.htm) [<https://perma.cc/VHH7-CEK4>].

high — if not impossible — to persuade a court to approve major changes.

In the narrower context of nonprofit performing arts institutions, specifically those that promote dance, the challenges posed by the law in combination with financial pressures put dance preservation at risk, because dance is an intangible form of cultural heritage that requires time, people, and money that the non-profit organization setting provides. Outside the nonprofit organization, the law provides another avenue to preserve dance with copyright. But as discussed, copyright does not adequately address the idiosyncrasies of dance and its community. Dancers and choreographers place a premium on person-to-person transmission of the art above all other forms of conveying a record of the choreography.

Because nonprofit organizations do not have certainty in their longevity and copyright does not cover the way in which choreography is recorded in the dance community, this Note proposes consideration of legislation mirroring the ideas of the UNESCO Convention for Safeguarding Intangible Cultural Heritage. Such legislation would be in the spirit of laws already passed in the United States addressing American heritage and culture. It would also ensure that choreography would not depend on the continued existence of a certain nonprofit, perhaps the one founded by the choreographer himself, for its continued transmission. Ultimately, such legislation would promote the public good more directly than pre-existing laws by guaranteeing that the art, although intangible, would always be available for the public to learn from and enjoy.