

Statement on Orphan Works

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Members of the Dance Heritage Coalition

American Dance Festival
Lawrence & Lee Theatre Research Institute, Ohio State University
New York Public Library for the Performing Arts, Dance Division
San Francisco Performing Arts Library & Museum
Jacob's Pillow Dance Festival
Library of Congress
Harvard Theatre Collection, Harvard University
Dance Notation Bureau

In 2000, the Dance Heritage Coalition honored one hundred dance artists, companies, organizations, works, and genres with a place among "America's Irreplaceable Dance Treasures: The First 100." The DHC published a booklet commemorating the Treasures and distributed about 6,000 copies to dance libraries, college dance departments, dance companies, enthusiasts, and other supporters of dance nationwide. Each "Treasure" was documented with a short description encapsulating its significance and a representative photograph. While several photographs were "Orphan Works," the DHC's decision was to use them, based on an extensive paper trail that had been established in attempting to identify and/or contact the copyright holders.

However, these Orphan Works were not used when the DHC mounted the booklet online in 2002. The following narrative illustrates one example of the problems in providing a definition for an Orphan Work:

For the online version, we wished to use a photograph of famed African dancer Asadata Dafora, taken in the 1940s by photographer Eileen Darby. After an extensive search, entailing more than 20 hours of staff time, we located Ms. Darby. Ms. Darby, who was in her early 90s, lived alone in a remote area of New York State. A DHC staff member explained that we had a good copy of the photograph and wished to use it as part of the online presentation. Ms. Darby had never heard of the Internet and, understandably, was unable to comprehend what we wanted. She did give us verbal permission for the photograph's use. However, four certified-mail letters, each with a permission form, were never returned to the DHC. (Subsequent phone calls led us to believe she didn't remember receiving

them.) During the course of these conversations, Ms. Darby died, leaving no heir that we could locate. At which point would this photograph have been considered an “Orphan Work”? In the case of aging right’s holders, who have no apparent guardians, we can sometimes locate them, speak to them, even get their verbal approval, but if they are incapable of signing and returning a permission form, in actuality, we do not have permission to use the work.

Another project pursued by the DHC was to turn the *America’s Irreplaceable Dance Treasures: the First 100* into a touring exhibition that would travel to four venues: San Francisco Performing Arts Library & Museum; Jacob’s Pillow Dance Festival; Columbus (Ohio) Cultural Arts Center; and New York Public Library for the Performing Arts. None of the venues charge any kind of admission fee and consider this kind of exhibition to be part of their mission to provide access to America’s cultural heritage to everyone.

It is the opinion of DHC staff that a strong case could be made that the 75 visual and 75 moving images in this exhibition should be treated under the “fair use” exemption. However, in the absence of clear case law, the sponsors of the exhibition could not safely proceed under that interpretation.

Many times it took substantial staff time to discover that a film or photograph was, in fact, an “orphan.” In addition to staff hours, the timeline for exhibition preparations was also jeopardized when delays were caused by difficulties in identifying rights holders or by slow responses. Curatorial decisions were often made, based not on what would be best for the Exhibition, but what the DHC’s limited staff and time constraints could afford. Here are experiences in dealing with five Orphan Works for the Exhibition:

1. The curators wished to use a film clip of less than one minute of famed flamenco dancer, José Greco, but his heir, who we were able to identify, lives abroad and never responded to repeated requests.
2. The curators wished to use a 1929 photograph of Ruth St. Denis by photographer Soichi Sunami. (The photograph itself is in the collection of the New York Public Library of the Performing Arts.) Signed certified-mail receipts were returned by an heir, indicating receipt of our request, but signed permission forms were never returned. In this case, the DHC sent a final certified-mail letter, offering the heir one last opportunity to respond, but we said that by a certain date, we would assume—by the right’s holders silence—that approval was given as outlined in previous correspondence.
3. The curators wished to use a publicity poster of Bob Fosse’s Broadway musical *Dancin’* (1970s), which was designed by Bob Gill. Neither the Library of Congress, which has the Fosse archive nor the New York Public Library, which holds other Fosse materials, were unable to provide information on the location of Bob Gill nor did they have any knowledge about possible heirs. All known resources were pursued, which took approximately two weeks of staff time and yielded no information.

4. The curators wished to use less than one minute from a 1958 film clip of noted dancer/choreographer Helen Tamaris. The DHC obtained a copy of the film clip from the New York Public Library, but the contact information for the copyright holder that was provided by NYPL staff turned out to be incorrect. After much research, the DHC obtained the name of a possible right's holder, but we were never able to obtain an address.

5. Perhaps the most curious "Orphan Work" turned out to be a Hollywood movie. The curators wanted to use less than one minute of a clip from the Metro-Goldwyn-Mayer (MGM) film, *A Chorus Line* (1985) (Note: this movie is readily available for commercial sale in both VHS and DVD formats at Blockbuster and other outlets.) MGM said they did not own the copyright and sent the DHC to Warner Bros., who MGM claimed owned the rights. Warner Bros. said they did not own copyright and sent us back to MGM, who, according to Warner Bros., did own the rights. MGM then suggested that Canal Plus in England might be of help. Canal Plus did not own the copyright, nor did any other British film studio, and sent the staff back to MGM. In this case, the curators decided not to use the clip because of the possible ramifications, should MGM, Warner Bros., or any other Hollywood studio suddenly realize they were, in fact, the copyright holder. This exercise cost the DHC approximately nine weeks in time and staff salaries.

For a small field such as dance, the repercussions of complex copyright laws and processes to secure licenses are immense. Not only is there an additional burden to nonprofit organizations involving staff compensation and time, but there may be an impact on artistic decisions as well. True, Orphan Works, create more work for staff because of the time and money it takes to do these exhaustive searches. The DHC encourages the US Copyright Office to provide a very clear definition of an Orphan Work as well as some guidance on just what constitutes an "exhaustive search."