



STATEMENT OF **BEST PRACTICES IN FAIR USE OF DANCE-RELATED MATERIALS**

RECOMMENDATIONS FOR
LIBRARIANS, ARCHIVISTS, CURATORS,
AND OTHER COLLECTIONS STAFF

PRODUCED BY
DANCE HERITAGE COALITION
WASHINGTON, DC

ENDORSED BY
CONGRESS ON RESEARCH IN DANCE
DANCE CRITICS ASSOCIATION
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The **DANCE HERITAGE COALITION** (DHC) was founded in 1992 to address the problems that were identified by a study of the state of preservation and documentation of dance in America. Jointly commissioned by The Andrew W. Mellon Foundation and the National Endowment for the Arts, the resulting document *Images of American Dance* recommended the formation of an alliance of the nation's major dance collections (1) to facilitate communication; (2) to develop national standards, policies, and priorities; and (3) to implement collaborative activities and projects in the fields of dance preservation, documentation, and access. The DHC's mission is to make accessible, enhance, augment, and preserve the materials that document the artistic accomplishments in dance of the past, present, and future. The DHC also now serves as a think tank and a convener for the dance heritage field.

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RECOMMENDATIONS FOR LIBRARIANS, ARCHIVISTS, CURATORS, AND OTHER COLLECTIONS STAFF

THIS STATEMENT OF BEST PRACTICES IN FAIR USE clarifies what librarians, archivists, curators, and others working with dance-related materials currently regard as a reasonable application of the Copyright Act's fair use doctrine, where the use of copyrighted materials is essential to significant cultural missions and institutional goals.

**PRODUCED BY
DANCE HERITAGE COALITION
WASHINGTON, DC**

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I. PURPOSE OF THIS DOCUMENT

THIS STATEMENT OF BEST PRACTICES IN FAIR USE codifies the shared understanding of what librarians, archivists, curators, and others who work in collections with copyrighted dance-related materials (referred to as “Dance Collections” in this document) believe are reasonable principles in applying the Copyright Act’s fair use doctrine.

Dance Collections include many different kinds of organizations with a diverse range of materials. They may be free-standing, subject-specific collections, or they may be enmeshed within larger cultural or educational institutions. Some have a regional or local focus; others have materials of international significance. Sometimes a collection specializes in a specific genre of dance practice. Some have generalized collections of many media; others specialize, perhaps in written records or in moving images predominantly. Dance holdings include one-of-a-kind items, such as an artist’s personal papers and effects, unreleased documentary videotapes of performances, and professional and informal photography of performances and rehearsals. Some items may be exceedingly rare, such as dance sheet music no longer in print or obsolete-format videotapes that have not been reissued. Other collections may acquire commercially released dance materials in a range of media (books, journals, still and moving images), but even these may deserve special care because of the shorter market availability of dance materials. Some dance-related materials may hide within other collections, such as the records of a building where social dances had occurred or the papers of a notable citizen who supported the arts.

While the Dance Collections may have many different profiles, common to all is their mission to secure and promote dance legacy, a relatively new (and chronically underfunded) field of educational study and research. As cultural conservators and repositories, all Dance Collections preserve their holdings while also creating ways for the public and specialists to access them. Nowadays Dance Collections also embrace the broadened mandate of libraries, archives, and museums to actively initiate programming and exhibitions, document performances and presentations on their turf and make these available for study, devise ways to address the needs of marginalized or underserved populations, and respond to new kinds of requests from their patrons. Their enhanced role requires that Dance Collections now envision new applications of technologies and methods of information-exchange that have become central to contemporary culture.

As will be detailed below, copyright compliance practices sometimes stand between Dance Collections and the fulfillment of their mission. The long-established fair use doctrine offers a tool to resolve conflicts between the public good that is the constitutional goal of copyright and private rights holders’ control of important cultural materials. Fair use aims to further the core values of copyright law – the promotion of cultural progress and free expression. Clarification of the legal doctrine underlying fair use will help Dance Collections staff apply it with confidence to recurring situations where copyrighted materials are essential to their institutional goals.

This statement was developed by the Dance Heritage Coalition (DHC) from interviews and focus groups of librarians, archivists, curators, technical staff, scholars, educators, and critics. (See below, “How Was the DHC Fair Use Statement Developed?”)

A. THE NEED TO CLARIFY FAIR USE

A BELIEF THAT ALL USES OF COPYRIGHTED MATERIALS must be affirmatively licensed has negative effects on the preservation of materials documenting dance legacy as well as the public’s access to this part of their cultural history. Librarians, archivists, and curators in Dance Collections have told the DHC they are increasingly unable to employ copyrighted materials in ways they consider important. These problems affect Dance Collections whether large or small, public or private, of local or national importance, devoted to general acquisitions or to research.

Dance Collections today are faced with a patchwork of library-use policies, inconsistent and/or restrictive donor contracts, and unclear advice on copyright. Acquisition agreements from years ago failed to anticipate the challenges of digital technology. Some Dance Collections staff are unsure if they can collect and preserve materials of uncertain provenance. Rights holders can be uncooperative; others impossible to identify or locate. Copyright law has been amended and its term extended, sometimes protecting commercial interests at the expense of educational, cultural, or civic needs. Complex and time-consuming requirements for documenting permissions have developed, in part because of fear of legal repercussions. Sometimes, of course, permissions expectations are reasonable and legally appropriate. But on other occasions, they interfere unnecessarily with the accomplishment of the mission of Dance Collections.

THE MISSION OF DANCE COLLECTIONS IS NOT ONLY TO COLLECT AND PRESERVE MATERIALS, BUT ALSO TO MAKE THESE MATERIALS AVAILABLE TO A WIDE RANGE OF USERS. Ensuring access to holdings is especially critical because Dance Collections represent the only source for much dance-related material. The need for access comes from researchers and documentary filmmakers, teachers and their students, creative artists, dance specialists, and the general public. Unfortunately, the complexity of the copyright issues often constrains a Dance Collection’s ability to meet its institutional needs and those of its users.

The fair use doctrine described in the Copyright Act is intended to provide a basis on which individuals and organizations can access copyrighted materials for important cultural, educational, or civic activities. In the past fifteen or so years, this tool has been useful to a number of groups that have found ubiquitous copyright clearance requirements frustrating their creative and scholarly goals. These groups, or “practice communities,” have included research libraries, documentary filmmakers, cinema studies teachers, and media literacy educators. Following their lead, through conversations and focus groups across the country, the DHC asked individuals who work in Dance Collections to define the specific challenges that copyright poses for them and the ways in which fair use might help. **The resulting statement on fair use is occasioned by the critical need of Dance Collections to carry out their significant cultural missions, balanced by their knowledge of, and sympathy toward, the rights holders’ stake in the creative work.**

B. CRITERIA FOR DETERMINING FAIR USE

THE FAIR USE DOCTRINE may in some circumstances permit a Dance Collection to make its holdings available for preservation initiatives, programs, and other uses that are essential to fulfill its significant cultural, educational, or civic mandate. Where it applies, **“FAIR USE” IS A RIGHT**, not a privilege. Fair use is available to any organization, whether commercial or non-profit, public or private, large or small.

Appropriate application of the fair use doctrine does not mean misappropriation or stealing. **FAIR USES ARE ONES THAT ADD VALUE** to the culture. The doctrine of fair use is a dynamic, flexible, and potentially powerful tool. The Copyright Act describes fair use in general terms, but in practice the doctrine operates in specific cases according to a “rule of reason” that takes account of all the facts and circumstances concerning the work in question and the proposed use.

Section 107 of the Copyright Act offers four factors that the courts apply to determine if an unauthorized use of copyrighted materials conforms to the doctrine of fair use. In practice, however, when evaluating unlicensed uses, courts return again and again to **TWO FUNDAMENTAL QUESTIONS**:

First is the issue of **“TRANSFORMATIVE” USE**. Does the unlicensed use put the material to a new purpose? Is there added value in the new use, whether by adding commentary or by contextualizing the material? Courts have looked favorably upon unlicensed uses where the new use repurposes or recasts the original. The second consideration concerns the **AMOUNT OF UNLICENSED MATERIAL** used, that is, the size of the quotation. Is the amount used appropriate for the purpose? Does the unlicensed selection meet, but not exceed, the needs of the new use? Where the answers are “yes,” courts are likely to find that the new use is fair. Cases where the amount of material used is appropriate

within the context of repurposing the material are rarely challenged formally.

Lawyers and judges, furthermore, take into account the professional consensus of the relevant field in determining what uses should be considered fair. The attitudes and **CUSTOMS OF THE “PRACTICE COMMUNITY”** show how the field balances the rights of copyright against that community’s need to use copyrighted material for culturally significant purposes. A fair use statement, such as this document, collects the prevailing practices and sentiments into a formal articulation on behalf of the field.

C. WHAT IS A STATEMENT OF BEST PRACTICES IN FAIR USE?

A STATEMENT OF BEST PRACTICES IN FAIR USE is a document that describes recurring situations where a practice community may need to make unlicensed use of copyrighted materials to fulfill its cultural and educational mandates. This statement on behalf of Dance Collections does two things: it identifies five such contexts in which presumptively copyrighted materials are essential to mission-critical needs and uses, and it defines how fair use may be applied in those situations. A fair use statement does not rewrite law. Rather, it harnesses an existing tool by allowing a practice community—in this case Dance Collections and their associates—to describe what seems to be a balanced application of the principle. Whether or not to rely on fair use in connection with any mission-related activity is always a choice. A fair use statement is not a directive or requirement; it offers an option or alternative and explicates the reasoning that has developed through the efforts of those in the community to apply fair use in a principled and fair way.

Fair use statements are a well-established and powerful tool. In 1993, the Society for Cinema Studies concluded that the publication of film stills to illustrate scholarly research studies qualified as a fair use. In the past few years, other practice groups with culturally significant mandates have looked to fair use as a way to navigate copyright restrictions. The 2005 Documentary Filmmakers’ Statement of Best Practices in Fair Use, endorsed by nationally recognized scholarly, nonprofit, and filmmaking organizations, has eased the process of obtaining broadcast and distribution opportunities for documentary films, and has assisted filmmakers in obtaining the “errors and omissions insurance” they need to offer their work to the public.

Because a fair use statement represents the field’s shared understanding of how fair use applies, it is expected that this document will encourage Dance Collections to invoke fair use with confidence as they take the actions necessary to preserve and disseminate the materials documenting dance legacy. And it is also hoped this statement will facilitate a more informed and open dialogue amongst rights holders, Dance Collections, and their users, so that policy and practice will develop in a way that benefits the entire dance field.

II. THE STATEMENT OF BEST PRACTICES IN FAIR USE OF DANCE-RELATED MATERIALS

A. RECURRING CONTEXTS

THIS STATEMENT FOCUSES ON FIVE CORE CONTEXTS for the cultural and educational missions of Dance Collections: **PRESERVATION, EXHIBITION, RECORDING, EDUCATIONAL SUPPORT, AND DIGITAL INFORMATION EXCHANGE**. For each context, a general principle about the applicability of fair use is asserted, accompanied by a description of the need and a list of limitations that may affect individual cases.

However, one singular qualification must be stressed: **THIS STATEMENT DOES NOT ATTEMPT TO EXHAUST ALL SITUATIONS IN WHICH FAIR USE MAY BE AVAILABLE TO DANCE COLLECTIONS**. As digital initiatives continue to evolve and as program innovations and needs present themselves, these principles can serve as models for defining the criteria under which fair use could be claimed in new circumstances.

For all contexts, Dance Collections staff generally concur that materials used should be identified and credited clearly insofar as possible. As collectors and cataloguers of texts and objects of culture, staff see attribution as the mark of good stewardship and good faith. But, of course, proper attribution is not, in itself, enough to qualify a use as a fair one.

1. Preservation: Transferring Holdings to New Formats

DESCRIPTION: Dance Collections collect and preserve materials documenting the creation and performance of dance and the relationship of dance to culture. Their holdings may include both unpublished items as well as formerly published resources that have become rare or unavailable.

New technologies for data storage, indexing, and access have become the preferred options for preservation practices in collections, just as these technologies have been widely embraced throughout other industries and businesses. For Dance Collections, these technologies are also opening new opportunities: new digital formats, for example, offer novel ways to index and “tag” textual materials or still and moving images. These innovations are expected to create new methodologies for access and research, once materials are transferred to the new format.

Currently, where copyright is not a consideration, Dance Collections conservators have prescribed standards for best practices for preservation: the production of the new master, the protection of the original artifact from overuse, and the fabrication of a copy for day-to-day needs. Good collections stewardship mandates that materials be proactively transferred to archival-quality (high quality, or “lossless” in the case of digital) formats when they are one-of-a-kind, irreplaceable, or at risk of degradation or obsolescence. Archivists recommend that, ideally, two archival-quality masters be held and stored in separate climate-controlled sites. The original artifact from which a new master is made must also continue to be safeguarded, because the original physical object (whether a letter, book, drawing or photo, musical score, 16mm film or VHS tape, or other media) holds value for some kinds of scholarship. And because the formats of digital masters are often not conducive to everyday use or public access, Dance Collections staff then feel comfortable making the item available in an easy-to-use or popularly available format, such as a photocopy for a piece of correspondence or a DVD (a “lossy” or compressed format) for a moving image.

But where copyrights may apply, Dance Collections staff are uncertain what steps they can take to preserve rare materials. For published materials, Section 108 of the Copyright Act acknowledges that libraries and other collections may need to make copies of their published materials for preservation and replacement. This section’s wording, however, limits its usefulness to Dance Collections, because it is not clear what kinds of institutions qualify. Many conditions are placed on the preservation of published works, no matter how rare. For example, reproduction is allowed if an original is “damaged, deteriorating, lost, or stolen” or if the equipment needed for accessing the copy is not reasonably available in the commercial marketplace. This language generally has been interpreted to mean that the library is legally required to delay preservation efforts until the materials show signs of wear-and-tear or other degradation or until there is no longer equipment available to play the moving image. As the commercial viability of many dance-related materials is short-lived compared to materials in other fields, waiting until rare or one-of-a-kind items are damaged or at immediate risk of being lost seems an unreasonable expectation. In other words, good preservation practice for dance materials sometime dictates intervening before the exception provided in Section 108 would apply.

Crucially, however, Section 108 itself does recognize explicitly that fair use may be an alternative legal basis on which to engage in good archival practice. The statute makes clear that, although its provisions create a “safe harbor” for certain kinds of preservation activities, they in no way limit the range of additional initiatives that may be undertaken on the basis of fair use.

PRINCIPLE: By means of preservation, what was originally an ephemeral cultural

phenomenon is made part of the permanent cultural record, and works originally produced to delight or entertain become potential objects of study and scholarship. Preservation copying is thus by its very nature a transformative activity. Proactive policies and practices in preservation therefore should qualify as fair use in some circumstances.

The study of dance is uniquely dependent on materials of many kinds: still and moving images, notation, musical scores, designs, and the like. Where otherwise applicable, fair use in preserving dance materials should be available without regard to the character of the materials or their sources. Preservation would ideally include making more than one copy, preferably in more than one format, and (especially for one-of-a-kind or out-of-print materials) for storage in more than one location. The number of copies should be limited to a number consistent with best preservation practices—currently considered to be two or three.

Because after preservation neither the at-risk originals nor the new masters in archival-quality formats will typically be available to students or scholars, the creation of access copies in accessible formats is an essential component of preservation practice. Creation of a limited number of such copies, as necessary in the curator's reasonable judgment to satisfy immediate user needs, should also be an eligible fair use where other applicable conditions are satisfied. This principle should apply to still images and text materials, as well as moving images.

LIMITATIONS: Assertions of fair use in preservation programs can be better justified by observing the following limitations:

- ▶ the number of preservation or access copies produced should be appropriate to the current and reasonably projected needs of the institution;
- ▶ where replacement copies are commercially available, a Dance Collection might be expected to purchase the replacement; however, if the available commercial replacement is of inferior quality (for example, a “lossy” digital format) compared to the item held by the Collection, it is fair to create and house archival-quality master copies from the better visual image.

2. Exhibition: Using Copyrighted Material in a Public Exhibition

DESCRIPTION: Libraries and archives actively engage in presenting their materials to the public. As part of their mission to create and facilitate access to dance-related holdings, Dance Collections often assemble displays or exhibitions. Exhibits and displays are a significant cultural and educational tool to reach people otherwise unacquainted with the richness of dance legacy; they also offer the opportunity of presenting materials in new ways. Sometimes, they may simply display representative samples, intended to

inform audiences about the breadth of holdings. Or, they may be designed around a special theme, topic, dance company or artist, location, or other unifying factor.

A curator or other designated expert chooses items for public display and assembles ancillary materials (such as exhibition catalogues, advertising postcards or posters, program notes, study guides) that add indispensable contextual information and recast materials for a variety of spectators. Still and moving images are essential to illustrate the essential features of dance practice, dance history, and dance aesthetics in a strongly interpretative exhibition.

Collections staff generally feel they should be free to exhibit materials (whether the original object or a digitized replica) from their holdings. In practice, however, many institutions require that formal permissions be sought and obtained. Many Dance Collections staff say that curators have been advised by their own in-house lawyers or administrators to choose public-domain items or those for which permissions are easily obtained. This policy results in a troubling constriction of eligible materials, with less effective—even incomplete—programming as the result.

Often primary rights holders are known to exhibition curators: Dance Collections staff agree that in general it is appropriate to ask permission out of courtesy or respect. In most cases, permission is generously and even gratefully bestowed. But in cases where permission is unreasonably refused or otherwise unattainable, the fair use doctrine offers options.

PRINCIPLE: Curatorial decision-making should be protected through the fair use doctrine. Given the significant cultural and educational function provided by Dance Collection exhibitions and displays, fair use should apply in instances of this kind, both for the materials on display and for the items used for ancillary materials. By their very nature, exhibitions are transformative: for example, a dance poster shown in an exhibition about the history of a dance company serves a very different purpose from its original function as an advertisement, and it is presented alongside a range of value-added material.

Generally, fair use will apply to exhibits and displays that feature significant parts of larger works (or reproductions thereof). Sometimes, presenting entire works within an exhibition may be considered a fair use, either where the work is of limited scope (such as the poster example above) or where a more extensive work is repurposed by its context. For example, in connection with an exhibition, a Dance Collection may engage a scholar or critic to provide historical background or critical commentary at a video screening. In this and other cases, where the exhibition context itself and/or the addition of the scholarly input provide additional information, fair use may apply.

Often, an exhibition will tour to additional sites. Dance Collections should feel

free to explore the possibilities of contributing materials to traveling exhibitions under the rubric of fair use.

Exhibitions, displays, and educational ancillary materials often entail a significant investment of an institution's financial and staff resources. Charging admission to cover the costs of assembling the exhibition does not invalidate a fair use claim.

LIMITATIONS: Not all exhibition or display uses will be fair use. Thus, for example, showing a commercial dance video for general entertainment purposes would not qualify, even if it occurred on the premises of a Dance Collection. The burden rests with the Dance Collection to demonstrate how a given exhibition or display use adds value beyond the entertainment or documentary purpose for which the original work was created, whether by means of a critique, commentary, contextualization, or other curatorial choice. As already suggested, where a full-length work continues to be commercially viable or available, either through purchase or rental, this caveat is especially important. Curators will be best positioned to claim fair use of materials if they assure that:

- ▶ the items are properly attributed in the exhibit and in any ancillary materials;
- ▶ to the extent possible and appropriate, an exhibition and its ancillary materials (including exhibition catalogues) should not rely unduly or unreasonably on a single source or narrow range of materials for which permissions could not be obtained;
- ▶ the number of and the length of quotations (whether text, 2D/3D, or moving image) do not exceed the amount required to meet curatorial objectives;
- ▶ admission fees or charges for ancillary materials are reasonably related to the institution's costs, and do not constitute a source of unrelated revenue or invade established commercial markets belonging to the rights holder.

3. Recording: Capturing Copyrighted Media when Recording Presentations

DESCRIPTION: As part of their public and educational programs related to their holdings, Dance Collections sponsor presentations at which scholars, critics, or Dance Collections staff use copyrighted items as essential components. By organizing and hosting these events, Dance Collections contribute substantially to the value of the end product, and by recording these sessions for inclusion amongst their holdings, they ensure that these valuable sessions are preserved and accessible for future scrutiny and response.

The right of scholars and critics to reframe and repurpose copyrighted text and visual

materials as "quotations" within their research and public presentations is widely accepted, and Dance Collections that host these sorts of events need similarly to be free to include illustrative materials as part of any documentation of educational or scholarly programming on their premises. If a recording of a presentation is to be understood by future viewers, it must capture the integrated audio and visual quotations.

Although rights holders may grant permissions or licenses for the use of their materials in programs and exhibitions sponsored by Dance Collections, sometimes they balk at having these items appear in recordings of these presentations. Sometimes, too, there are cases where obtaining formal permission may break down for other reasons, as in the cases where rights cannot be traced.

PRINCIPLE: Critical and scholarly use of copyrighted material in a presentation qualifies as fair use under copyright law, as long as the material used is essential to the project. The act of preserving the presentation itself adds value to the material by fixing it within the new critical context and making it available for future study, so fair use should apply in cases of this kind. This principle may be asserted whether the recording of the copyrighted material within the Dance Collection's event captures moving or still images, sound clips, text quotations, or other media used as quotations in a scholarly presentation or critique.

LIMITATIONS: Dance Collections and scholars will be best positioned to assert fair use claims if they ensure:

- ▶ the length, number, and purpose of any quotations from copyrighted material qualify them as fair use illustrations in the original context of the program being recorded (as explained in the Principle above). Thus, recording a program in which quotations were used for their entertainment value only would not qualify as fair use in its own right;
- ▶ the quoted material is identified and credited fully;
- ▶ the resulting recording (including fair use quotations) is made available only in its entirety, to ensure that the quoted passages appear within the transformed context.

4. Education Support: Using Copyrighted Materials for Academic Support

DESCRIPTION: Supporting academic inquiry at all levels is a prime duty of collections. Libraries and archives typically offer the tools for finding materials as well as the materials themselves. In practice, libraries and archives respond directly to their patrons (such as researchers, teachers, and their students) but also act cooperatively with other collections through models of interlibrary loan or sharing.

Changes in pedagogy and publishing, many of them attributable to new applications of digital technologies, have precipitated changes in the way collections serve their users. Searchable databases have replaced card catalogues; patrons often prefer electronic files and email attachments to physical copies of journals and other printed material. Faculty and scholars make their own copies of broadcasts needed for their teaching and research, and they want to make these available to their students through libraries or online software. Technology literacy is also expected of students in their class projects, and university libraries “publish” student theses online, often with quotations from or appendices of copyrighted materials. Models of interlibrary support now extend beyond text to include visual and moving images, and Dance Collections are exploring digital delivery methods for offering their unique materials in a secure environment within other collections whose users would benefit from the enriched scholarly resources.

The pervasiveness of digital culture has understandably created demands from researchers, faculty, and students for help in getting access to needed files and resources. But while signing out a book for home use is standard procedure, providing a digital file for home use creates serious concern for Dance Collections staff, primarily because the new formats are so easily reproduced, transmitted, or otherwise misused. As custodians of their collections, Dance Collections staff articulate a deep respect for artists and their work, a deference that sometimes leads them to adopt a strongly protective stance.

Certain exceptions to copyrights have been clearly specified, in Sections 110(1) and (2) of the Copyright Act, for face-to-face classroom and distance-learning educational contexts. These provisions, however, are insufficient for guiding Dance Collections for a number of reasons. The exemptions do not address the kinds of widespread support that collections within educational institutions typically provide directly and in parallel to classroom teaching. Furthermore, many dance holdings are housed in institutions that do not qualify for the Section 110 exemptions, and Section 110 is silent on any exemption for scholarship. These ambiguities and omissions create confusion over whether a use or practice is copyright compliant. As a result, Dance Collections staff are often paralyzed as to how to proceed. Principles of fair use offer a way to develop a reasonable approach to evaluating academic needs against copyright privileges.

THE PRINCIPLE: Educational and scholarly uses are inherently transformative. Through them, our shared cultural legacy becomes a source of illustrations for discoveries and insights about the process of culture-making itself. Dance Collections must have latitude to claim fair use in connection with their core mission of supporting academic work. Dance Collections are exhorted to support academic inquiry and learning: acquiring and providing the raw materials (whatever the media) for study and new scholarship are appropriate and mandated roles. Furthermore, where Dance Collections can assist academic efforts from afar by making scarce, one-of-a-kind, or out-of-print resources

available through secure electronic, streamed, or other digital technology, or conventional models of information delivery, these efforts fall within fair use.

Dance Collections have expressed concern that by making material available to qualified teachers and students, they might open themselves up to liability in connection with downstream abuse (such as commercial use) by others. Where the original choice to make the material available is justified by fair use, this should not be a concern. In such cases, liability rests with the end user, not with the institution that provided the material. However, as suggested below, Dance Collections should avoid any steps that might be seen as encouraging such abuse.

LIMITATIONS: Dance Collections will be in the best position to claim fair use in connection with providing materials (whether digital or any other media) for educational support or academic research if:

- ▶ they provide users with information about copyright infringement and fair use and indicate that the materials provided are for educational or scholarly use only;
- ▶ they ensure that requests from users of digital files (as with any media) are justified in relation to their purpose, and appear reasonable in size and scope;
- ▶ they make all reasonable efforts to assure that materials derived from Dance Collections are properly attributed, including – where feasible and appropriate – embedding permanent information about the authorship and ownership of those materials (as, for example, through watermarking).

5. Digital Information Exchange: Using Copyrighted Materials on a Website

DESCRIPTION: Digital information exchange through web access is transforming the way that society and culture function. Digital delivery offers the potential of barrier-free, even universal, access, which seems to be a contemporary goal of information exchange. Online access enables scholars or specialists to preview materials offsite so they can more easily pre-select original documents or high-resolution files for their valuable onsite visits. It also increases the possibility that users less familiar with dance cultures will discover information of value.

Dance Collections staff attest to the importance of the Internet as an essential tool for accessing their holdings. They are posting materials on their websites where materials are in the public domain or the Dance Collection itself holds the rights. Still images are regularly indexed online with a thumbnail digital file, and it is expected that moving-image clips may soon function as online indices. Dance Collections are creating online

exhibitions augmented by educational materials or critical commentary. And, just as dance artists now use the web and digital technologies to create choreographies, Dance Collections staff recognize they must find a suitable way to preserve and create access to this new creative material.

The prospect of strengthening the dance field through web-based information exchange is an appropriate step for Dance Collections in updating their methods for serving the public. Some Dance Collections want to post all their holdings, so users can select according to their needs. Others prefer a curatorial approach, even working with an artist or critic to select from large collections. How a Dance Collection opts to integrate materials is influenced by the kind of collection it houses and the kinds of users it seeks to serve. But staff are reluctant to pursue their plans without advice on what they legally can or cannot offer.

In this environment of uncertainty, institutional lawyers and administrators often prescribe conservative policies, specifying rules for amounts of material, quality of resolution, and other prescriptions that do not apply well to dance materials. Or, they simply prohibit any publicly accessible online use of copyrighted materials. Policies may even require staff to seek permissions from lists of individuals and organizations associated with the texts or images, many of whom hold no actual rights to the materials or images. And some Dance Collections staff are simply too concerned about copyright infringement to proceed.

Dance Collections staff feel that making artistic work and scholarly resources publicly accessible through responsible website applications contributes both to audience-building for the dance field and to richer scholarship. Artists and other rights holders, however, are particularly leery of unrestricted online delivery. Where rights holders object to online use or where the licensing system breaks down, the feasibility of otherwise desirable web-based uses is thrown into doubt.

Dance Collections must refer to the principles of fair use to guide them in using new technologies to accomplish their historic institutional missions. It is reasonably clear that some web-based activities by Dance Collections would qualify as fair use: for example, online collection indices (using thumbnail images and/or descriptions of collection holdings) and curated virtual exhibitions and displays that would satisfy the criteria detailed in the Exhibition Principle, above.

How far fair use may extend to other, more far-reaching, mission-related programs to expand web access to collection materials remains to be determined. Before deciding whether to undertake such activities in reliance on fair use, Dance Collections should take the following considerations into account.

PRINCIPLE: Creating web-based resources and engaging in digital delivery of selected

materials can be an appropriate way to extend the Dance Collections' mandate to deliver their culturally valuable materials. There are persuasive arguments by which at least some such uses of copyrighted material can be characterized as strongly transformative, since they provide the materials to users in contexts dramatically different from those in which they originated, and may be accompanied by extensive value-added support (including commentary, the addition of search tools, and so forth). In general, the Dance Collection's selection and organization of materials for perusal online, especially when coupled with its augmentation of the materials with contextualizing information, adds value that the items lack on their own. Thus, in appropriate circumstances, such online activities should be considered fair use. However, the less extensive the indications of significant added value are, the weaker the fair use claim will be.

LIMITATIONS: Dance Collections and their technical staff who make materials available online will be best positioned to assert fair use if:

- ▶ they take reasonable precautions that textual and visual materials (including digitized moving images, photographs, posters, programs, and dance music covers) are fully identified and attributed;
- ▶ they devise an internal policy or rationale for their choices: amount of materials used without permissions and the formats by which online access is offered should derive from the purpose of the online use rather than a simplified quantitative measure. In other words, the choices should correspond to the purpose to which the material is being put;
- ▶ they offer significant contextual information that completes the repurposing of the materials within a new educational, historical, or critical framework;
- ▶ where feasible and appropriate, they provide technological safeguards against the downloading of streamed material or other digitally delivered material, and embed materials with permanent indicators of their source.

In addition, curators of Dance Collections believe strongly that any online use of collection material should occur only pursuant to an internal policy or rationale for identifying sensitive material (of a personal or financial nature, for example) that should not be displayed. This consideration is not relevant to a legal analysis of fair use, as such, but it is nevertheless a value strongly shared by professionals in the field.

B. FINAL OBSERVATIONS

1. What the DHC Fair Use Statement Does Not Cover

This statement does not solve the problem of “**ORPHAN WORKS**,” materials presumably copyrighted but whose owners either cannot be located or cannot be identified with reasonable efforts. A comprehensive solution to this problem requires special legislation. However, orphan works should be eligible for fair use claims on the same basis as clearly sourced ones. That is, users should subject their use of orphan works to the same considerations that are used for any materials under the fair use doctrine: the amount of material quoted from the orphan work and the extent to which the material is necessary and repurposed in the new use.

This statement does not address the situation in which a Dance Collection cannot obtain a **USABLE COPY** or original of material that it needs. Copyright holders are not obligated to make their originals or copies available, nor are collections. Models of interlibrary cooperation do exist, notably through electronic databases and Interlibrary Loan, and this statement may encourage Dance Collections to collaborate more readily in delivering materials that are needed for programs or users.

Currently, the Digital Millennium Copyright Act generally prohibits breaking **ENCRYPTION** on digital video recordings for most purposes, including the fulfillment of libraries’ cultural missions. The fair use doctrine carries no weight against the DMCA prohibitions.

The principles announced in this statement do not override contractual limitations on access spelled out in **DONOR AGREEMENTS**. When a Dance Collection enters into a contract or agreement with a donor (whether an individual, estate, or organization), the additional stipulations placed on access to or care of a collection, which are contractual in nature, supersede the copyright law’s fair use doctrine. Dance Collections that find the use of their materials is encumbered by the terms of donor contracts may wish to revisit their practices of collection acquisition or seek to renegotiate the donor contract in any given instance. This conclusion is developed in paragraphs that follow.

2. Acquisition Agreements

As already noted, fair use principles can only partly free materials for Dance Collections’ use in meeting their cultural or educational mandates. In particular, contractual obligations spelled out in outdated acquisition agreements cannot be avoided via a claim of fair use. It seems clear, as continued technical and digital innovations change the nature of collections conservatorship and information delivery, that libraries and archives need to create new acquisition practices and donor agreements that support their work.

As this document goes to press, the Dance Heritage Coalition is affirmatively working with its board members and leadership in the professional library associations to create model acquisition agreements that will protect current Dance Collections’ practices and anticipate their future needs. Such documents need to be flexible, so they can be responsive to needs for proactive preservation, unforeseen methods of information delivery and collection access, and new models of cultural programming. This new DHC initiative constitutes a second “best practices” project, one addressing the **BEST PRACTICES IN ACQUISITION**.

III. HOW WAS THE DHC FAIR USE STATEMENT DEVELOPED?

The DHC fair use project modeled its process on that undertaken by documentary filmmakers for their 2005 Documentary Filmmakers' Statement on Best Practices in Fair Use. Professor Peter Jaszi, an expert in intellectual property rights who had guided the filmmakers' project, actively advised the DHC process.

A. INTERVIEWS AND FOCUS GROUPS

THE DANCE HERITAGE COALITION FORMALLY BEGAN its fair use project in June 2007. The first objective was to define the recurring situations where Dance Collections needed copyrighted material to fulfill their cultural missions. The DHC's executive director (Barbara Drazin) and project director (Libby Smigel) conducted individual interviews with the DHC board members, each of whom represents a major dance archive or collection. Each board member responded to a set of questions that identified the content of the member's collection; obstacles copyright posed to their work and their users' needs; and recommendations for the scope of the project.

These initial conversations revealed that certain kinds of copyright issues recurred. In some cases, identifying and contacting owners was the problem. These cases included orphan works (where rights holders were unknown or untraceable or where estate disposition was contested), artwork or design on covers of dance sheet music, publicity materials (including poster art, programs, and photographs), scrapbook materials, and other items lacking clear provenance. In other cases, rights holders claimed what appeared to be unreasonable, even frivolous, levels of control over materials, whether by asserting dubious claims, setting excessive licensing fees, insisting on other stipulations, or simply by categorically refusing permission for customary Dance Collections' uses and programs. These assertive rights holders ranged from individuals and dance company archives to public broadcast stations and major film studios. A collateral difficulty was also revealed: acquisition agreements created another kind of obstacle to using materials because of restrictions spelled out in these contracts.

Eight focus groups in major cities brought together librarians, archivists, and library technical staff from different types of collections and different kinds of users, so that a broad set of perspectives and experiences could be shared. Cities were selected from across the continental United States: Chicago, Denver, Los Angeles, New York,

Philadelphia, San Francisco, Tallahassee, and Washington, DC. Participants represented public and private collections of various sizes and purposes, with general and special collections. Some collections were within educational settings (including research institutions and universities, four-year colleges, and community colleges); a few were housed in historical societies, performing arts conservatories, and museums. At each of the focus groups, one scholar-educator or scholar-critic participated as the voice of collections users. An attempt was made to include members of dance scholarly organizations and library/archive professional associations. A full list of participants is included below.

To ensure a free exchange of perspectives, especially where a participant's opinion diverged from the policies of his/her institution, discussions and interviews were governed by the Chatham House Rule, under which perspectives are shared but not attributed to a specific person or institution.

B. FINDINGS

FOCUS GROUP DISCUSSIONS BORE OUT THE PRELIMINARY FINDING that the complex patterns of copyright ownership associated with dance materials along with conservative interpretations of copyright clearance requirements created obstacles to preserving, using, and creating access to dance materials held by Dance Collections. The participants shared situations and contexts in which they felt they had a responsibility to implement new ways of carrying out their responsibilities: in locating resources; sharing information with users; assisting populations who had special needs or who were marginalized; proactively preserving and protecting rare or at-risk materials; offering support to users' projects in teaching and research; and creating innovative and engaging programs that would awaken and enhance the public's appetite for its cultural and artistic histories. Copyright and the misinformation surrounding it, however, had created a chilling, even paralyzing, effect upon Dance Collections' ability to address their mandates.

The focus groups documented a clear divergence between what Dance Collections caretakers thought they should do to serve the dance field and what they felt free to do. Curators at ease with displaying their books or 2D images publicly wanted to feel the same confidence in using those materials for exhibit guides and in showing video clips within an exhibition. As digital technologies have become widely accepted as the preferred ways to preserve and disseminate information and resources, Dance Collections staff have found that the public expects these new delivery methods to be available. Archivists in special collections wanted to feel free to use a selection of text excerpts or thumbnail images that could be discovered by search engines. Some Dance Collections staff wanted to digitize performance posters and programs into accessible digital files so that scholars and students across disciplines could discover these cultural

artifacts. Furthermore, many expressed this dire observation: the popular assumption that research and information-gathering can be done successfully through the Internet hurts teaching and scholarship because there is such a narrow range of online scholarly resources for dance; and even worse, unexamined websites (often created by dance enthusiasts) perpetuate errors and contribute to an understanding of the field that belies its vast cultural richness.

The presence of a scholar-educator-critic at each focus group meeting ensured that the discussion included the protected fair use categories of teaching and research, and other user-oriented services. Research projects in dance, even for university-affiliated professors, are rarely funded well, and dance resources (whether books or images) typically do not command wide distribution in commercial markets. The voices for scholarship, criticism, and teaching were frustrated that conservative interpretations of copyright laws within Dance Collections constricted their cultural work, an apparent contradiction of the law's constitutional purpose to ensure creativity and innovation.

Dance Collections staff shared their confusion over copyright, outlined essential needs, and together developed parameters for using copyrighted materials without permission. From these discussions, five significant contexts where copyrighted materials are essential to Dance Collections' missions were identified (described in Recurring Contexts, above). The documentary filmmakers' statement served as a model for constructing sample scenarios for each of the contexts, from which the participants could move toward defining the scope and limitations of fair use. Paramount to the discussions was weighing the need to preserve and share America's dance legacy against potential adverse impact on the copyright holder and contributors to the creative content. In every discussion, the facilitators were impressed with the respect that the participants held for the dance community and their desire to earn the field's confidence.

C. ENDORSEMENTS

BASED UPON THE INTERVIEWS AND DISCUSSIONS, a draft statement on best practices was created. This version underwent review by the DHC board members, the boards of performing arts and library/archival professional associations, and a circle of independent legal scholars and lawyers. The DHC began to approach dance-related scholarly and professional associations for endorsements of the statement in June 2008. At the time this statement went to first printing, endorsement of the "Statement of Best Practices in Fair Use of Dance-related Materials" had been conferred by six organizations, including the Congress on Research in Dance, the Dance Critics Association, the Dance Films Association, the National Dance Education Organization, the Society of Dance History Scholars, and the Theatre Library Association, which are professional membership organizations of scholars, critics, filmmakers, educators, and collections staff in the dance field.

Artists' participation was actively sought so that the project would be informed by concerns about copyright from the community who are stakeholders in much of the materials in Dance Collections. In September 2008, hosted by the New York Public Library for the Performing Arts Dance Division, the DHC convened a special forum to receive feedback from the artistic community on the fair use project. This pilot event with the artistic community will provide a model for future discussions with artists and their executive staff about the DHC fair use project.

D. IMPACT OF OTHER FAIR USE STATEMENTS

TO CREATE A FAIR USE STATEMENT, A PRACTICE COMMUNITY defines its own needs and the reasonable application of fair use in meeting those needs. For Dance Collections staff, fair use statements of researchers, teachers, or other collections users assist in framing how Dance Collections could and should use fair use in support of these academic and civic mandates. For example, when documentary filmmakers collectively articulate their need to have access to copyrighted materials on the subjects of their films, Dance Collections staff better understand how the materials they hold can contribute to significant historical and critical projects in the field of dance legacy. Similarly, other practice communities (such as cinema scholars and media educators) have issued statements on how fair use can serve their significant educational or cultural missions, all of which can be used by Dance Collections as they evaluate how to ensure access to their holdings. It is expected that this fair use statement on dance-related materials may be valuable to archivists, librarians, and curators working with materials in other performing, visual, and media arts, because of similarities in their missions and patrons. Full citations of fair use statements created by other practice communities are listed amongst the Resources, page 32.

IV. CONTRIBUTORS TO THIS REPORT

THIS DOCUMENT WAS INFORMED AND ENRICHED by many individuals who contributed their perspectives on this complex issue in lively discussions and interviews. The recommendations on fair use in this document, however, should not be ascribed to any particular individual or his/her institution. The lists of focus groups and meetings include all people present, with the exception of the DHC fair use project staff.

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VI. Q&A: MISCONCEPTIONS ABOUT COPYRIGHT AND FAIR USE

If you are denied permission from a rights holder, have you forfeited your right to invoke Fair Use principles?

No. Asking a rights holder for a license or other permission does not disqualify a Dance Collection or other user from invoking fair use when an agreement cannot be reached. Oftentimes librarians or others approach rights holders out of courtesy. In general, it never hurts to ask permission, and asking may demonstrate the Dance Collection's or other user's good faith. If the material needed satisfies the tests of proportionality, transformative use, repurposing, and the other considerations identified in the discussions above, fair use applies. It is precisely where requests are denied that fair use may provide a legal remedy in support of free speech and information.

If a Dance Collection's program, publication, or other use of materials involves a fee, is the fair use doctrine forfeited?

No. In fact, even outright commercial uses sometimes qualify for fair use. In particular, quantitatively and qualitatively reasonable "transformative" uses may be fair even though they make a profit. In the context of non-profit institutions, however, it is advisable to

set fees for services or goods to achieve cost recovery only.

Does copyright affect what collections may acquire? Are libraries and archives permitted to accept items that have questionable or unknown provenance?

Copyright law does not regulate "acquisition" as such. So, yes, a collection can accept materials of all mediums even when they lack clear provenance. Preservation or use, once these items are acquired, however, may be subject to fair use or other regulations.

If a Dance Collection wants to screen a film or videotape on its own premises, without admission charge, is this still considered a "public performance"? If so, does such an event require a special license or permission?

Yes, a screening for a group would be considered a "performance." However, not every screening requires a license. Copyright law allows for screenings for educational purposes such as classroom teaching, which can take place in a library. Also, it is possible that a screening of a whole work for the public may qualify as a fair use if it is accompanied by commentary or discussion.

Dance companies, broadcast stations, and film companies have required us to get permissions from individual dancers, composers, and an array of participants for use of photos, clips, and other materials. Am I required to clear these secondary permissions?

It depends. If a Dance Collection has entered into a contract with a donor or other source of copyrighted material that stipulates that secondary permissions must be secured, then yes, the requirements of that contract trump any fair use claims. But sometimes a dance company, film studio, or broadcast station has special contractual agreements (for example, with unions) that restrict their ability to distribute materials: these contractual obligations to other parties do *not* automatically transfer to Dance Collections. So if you are making a fair use claim and if you already have access to the item (for example, it is in your collection), then, no, you do not need to pursue permissions if your use fits the contexts described above.

Do libraries have an obligation under copyright law to exact promises from patrons on how their materials will be used?

No. The primary obligation for compliance with copyright law rests with the user, not with the collection. In the absence of any other contractual agreement with a donor or rights holder, a collection need not take on the role of policeman or gatekeeper with its users. As a service to their users, however,

some collections may decide to offer information to users about copyrights, fair use, and the process of seeking permissions.

Does any educational use qualify as a transformative use of dance-related materials?

Not necessarily. Care must be taken not to take advantage of, or duplicate the purpose of, materials whose original intentions were educational uses. So photocopying large portions of a textbook for instructional use is considered copyright infringement. Similarly, a Dance Collection might want to show an existing dance documentary video as part of its educational program or exhibit. But because the documentary was prepared for educational purposes, the collection's use cannot necessarily be characterized as "transformative." The collection would have to consider whether its use added additional value to justify it within the fair use principles.

Is a documented "best effort" to obtain permission the same as "fair use"?

No. Fair use does not require permission, and thus does not depend on documenting attempts to obtain permission. By the same token, however, documenting unsuccessful efforts to gain permission does not, in itself, demonstrate that an unlicensed use is fair.

VII. ACKNOWLEDGMENTS

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VIII. RESOURCES

The Code of Best Practices in Fair Use for Media Literacy Education. November 2008. www.centerforsocialmedia.org/files/pdf/Media_literacy_txt.pdf

Code of Best Practices in Fair Use for Online Video. July 2008. www.centerforsocialmedia.org/files/pdf/online_best_practices_in_fair_use.pdf

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ENDORISING ORGANIZATIONS

CONGRESS ON RESEARCH IN DANCE

The Congress on Research in Dance (CORD) provides opportunities for dance professionals from a broad range of specialties to exchange ideas, resources, and methodologies through publication, international and regional conferences, and workshops. CORD encourages research in all aspects of dance and related fields and promotes the accessibility of research materials.

www.cordance.org

DANCE CRITICS ASSOCIATION

The Dance Critics Association (DCA) consists of professional practitioners of dance criticism. DCA seeks to further the identity of dance criticism as a profession; to offer its members solidarity; and to provide the means for exchanging information and exploring fresh approaches to critical writing. DCA sponsors national and regional conferences, publishes a quarterly newsletter and other publications, and explores outside projects that might use DCA as a resource.

www.dancecritics.org

DANCE FILMS ASSOCIATION, INC.

Dance Films Association, Inc. (DFA), a member-supported service organization, promotes excellence in dance on camera and public awareness of the art form through its annual Dance on Camera Festival, Dance Film Lab, publications, grants, and workshops. Dance on Camera is a collaborative art and DFA aims to impart that spirit of collaboration to the world.

www.dancefilms.org

NATIONAL DANCE EDUCATION ORGANIZATION

The National Dance Education Organization (NDEO) is dedicated to promoting standards of excellence in dance education. NDEO provides the dance artist, educator, and administrator a network of resources and support, a base for advocacy, and access to programs and projects that focus on the importance of dance in the human experience.

www.ndeo.org

SOCIETY OF DANCE HISTORY SCHOLARS

Society of Dance History Scholars (SDHS) advances the field of dance through research, publication, performance, and outreach. SDHS holds wide-ranging annual conferences, publishes new scholarship through its proceedings and book series, and collaborates regularly with peer organizations in the United States and abroad.

www.sdhs.org

THEATRE LIBRARY ASSOCIATION

The Theatre Library Association (TLA) supports librarians and archivists affiliated with theatre, dance, performance studies, popular entertainment, motion picture, and broadcasting collections. TLA promotes professional best practices in acquisition, organization, access, and preservation of performing arts resources in libraries, archives, museums, private collections, and the digital environment.

tla.library.unt.edu

The logo features the words "DANCE HERITAGE" in a serif font, with "DANCE" on the top line and "HERITAGE" on the bottom line. A thick, grey, curved brushstroke underline starts under "HERITAGE" and sweeps upwards and to the right, ending under "DANCE". Below this graphic, the word "COALITION" is written in a bold, sans-serif font.

DANCE
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