

SAVING THE LAST DANCE: MEDIATION THROUGH UNDERSTANDING

Teaching Materials For Use With Video

Attached you will find the role play teaching materials for the “Saving the Last Dance: Mediation through Understanding” and a full transcript of the video.

Please note the following:

1. We have tried to use gender neutral names rather than those in the video:

Jackie, the discharged Artistic Director for Dance Innovation -- remains *Jackie*.

Mike, the Chairman and Executive Director for Dance Innovation -- becomes *Mickey*.

Conrad, the attorney for Jackie -- becomes *Connie*.

Joan, the attorney for Mickey -- becomes *Joe* (increasingly used for both genders).

The user is, of course, free to adopt variations on these names.

2. Attached to the instructions for each party are the original contract and the letter of discharge.

Please note: the letter and contract are dated consistent with the use of the role play in August 2001. They should be updated when the role play is used at a later time. As a rule of thumb, the contract should be dated 19 months before the role play takes place and the discharge letter dated approximately 1 month before the role play takes place.

3. In the instructions, the setting for the dispute is Boston, Massachusetts (since the role play was last used at a training conducted for the Harvard Program of Instruction for Lawyers). The locale can be easily changed.

4. Attached to the instructions for the lawyers are memoranda of law which interpret the law (as it existed in June 2001) from the point of view of the attorney for that particular client. We gave focused these memoranda on what we believed were the most salient points to emphasize in a training program that would run several days. There are additional issues that could conceivably be developed for a longer educational training for law students or lawyers.

5. A full transcript of the video is attached to enable the user to select specific portions of the video for teaching purposes as needed.

DANCE INNOVATION

Mediator's Instructions

You had a short conference call with the two lawyers, Joe and Connie, in which you learned the following information prior to your first mediation session. Two years ago, Jackie (who had initially been a dancer and then a choreographer) was working as an Assistant Artistic Director for a large New York Dance Company. At that point, Dance Innovation, a smaller Boston Company, hired her/him to become its Artistic Director and resident choreographer (when its founder and previous Artistic Director, Peter George, died suddenly). The three-year contract provided that any works Jackie produced as part of her/his employment were to be considered "work for hire" and be owned by the company. S/he could be fired with six months' notice.

The mission of Dance Innovation is to support the work of new choreographers. Jackie brought with her/him a work in progress that s/he had been creating (on the side) while at (and with the permission of) her/his former employer. S/he completed that work, MOTIF, while at Dance Innovation (and the company produced it). S/he created a second work, CHORALE, during her/his first year at Dance Innovation (and the company produced it). Both works were well received. S/he was working on a third major work, ENSEMBLE, (which was to be produced in the upcoming season) when s/he was dismissed.

Mickey, Dance Innovation's Chairman and Executive Director, sent Jackie a letter notifying her/him of her/his dismissal on the grounds that s/he focused almost exclusively on the creation of her/his own work (rather than devoting attention to her/his own work and supporting the work of new choreographers) and because s/he was consistently over budget. Mickey also informed Jackie that he/she considered ENSEMBLE virtually complete when Jackie left, needing at most a little final polishing and refinement and that the company was going forward with completing ENSEMBLE, which will be the centerpiece of its upcoming season. Mickey further maintained that any works completed by Jackie or that s/he was working on while employed are exclusively the property of Dance Innovation.

The Company views all the works as owned by the company under the contract language and the work-for-hire doctrine. Connie and Jackie view the works as belonging to Jackie as the creator and threaten to enjoin the upcoming season of Dance Innovation, which has ENSEMBLE as its centerpiece.

The lawyers and clients have agreed to come into mediation.

DANCE INNOVATION

Jackie's Instructions

Two years ago, you (who had initially been a dancer and then a choreographer) were working as an assistant Director for a large New York Dance Company. At that point, Dance Innovation, a smaller, highly respected Boston Company, hired you to become its Artistic Director and resident choreographer (when its founder and previous artistic director, Peter George, died suddenly). You were very excited by the opportunity to have artistic control even though it meant working for a less renowned company and at a somewhat lower salary. The new position allowed you to produce and perform works of your own (at the New York company any work on your own dances had to be outside your employ) as well as those of other choreographers. The position specifically presented the opportunity, unusual in today's dance world, to give new choreographers the opportunity to have their pieces shown, since supporting their work is central to the company's mission. You supported that goal (and still do).

The three-year contract provided you with compensation during the three years for \$70,000 for the first year, \$80,000 for the second and \$90,000 for the third, with fringe benefits (amounting to approximately an additional one-third of your salary). Your duties included serving the company's mission and operating within budget. The contract specifically provided (consistent with copyright law) that any works you produced as part of your employment were to be considered 'work for hire' (and therefore belong to the company). You could be dismissed with six months' notice.

You brought with you a work in progress that you had been creating (on the side) while at (and with permission of) your former employer. You completed that work, MOTIF, while at Dance Innovation, and it was produced by the company. You created a second work, CHORALE, during your first year at Dance Innovation, and it was also produced by the company. Both were well-received, and your first review at the end of the first year was very favorable even though the board reiterated its concern for inclusion of works by others.

Early in your second year, you were working on a third major work, ENSEMBLE, (which was to be produced in the upcoming season) when Mickey, Dance Innovation's Chairman and Executive Director, told you, to your surprise, that s/he was unhappy with your performance. S/he said that you focused almost exclusively on the creation of your own work rather than devoting attention to your own work and supporting the work of new choreographers. S/he said he/she was also upset because you were "consistently over budget".

You told him you were disappointed that you could not find many new qualified

choreographers, but good ones were hard to find. In fact, you did choose one that didn't work out very well. You tried to operate within the budget, but you felt that the artistic sacrifices were enormous, particularly with respect to the sets for CHORALE.

While it is true that ENSEMBLE cost more and took more time than you had originally anticipated, you still felt that you made many efforts to find other choreographers and dances, but you did not want to sacrifice the quality of the work. As you viewed it, Mickey's continual concern with the bottom line undermined your efforts to maintain the quality of the dances produced and ended up costing the company in time, energy, money and, most importantly, excellence.

You always felt that Mickey was micromanaging everything, which made it hard to keep to the artistic priorities and responsibilities of your role. Indeed, Mickey began to make increasing demands that you be involved in fundraising, which felt to you to be an inappropriate responsibility for an artistic director.

While tensions with Mickey mounted over these matters and the two of you had several difficult confrontations, you were shocked when s/he sent you a letter a month ago informing you that you were dismissed. You had a heated meeting where you reminded him/her of the "six month" provision, and he/she replied that you should have considered yourself on notice for months.

You were additionally shocked when s/he told you that ENSEMBLE was virtually completed, needing at most a little final polishing and refinement. You feel strongly that the dance is not complete and requires substantial additional creative work. Despite the fact that it is your creation, the company is going forward with completing ENSEMBLE without your agreement and plans to make it the centerpiece of the upcoming season.

You initially did not want to make waves, but the injury to you as a person and an artist was just too great. At the urging of a friend, you consulted a lawyer, Connie. S/he told you that you have the right to enjoin the company from putting on ENSEMBLE on the basis that the work belongs to you and cannot be considered complete unless you complete it. Connie also told you that you might well be entitled to damages for salary and benefits for the balance of your contract term.

What you really care about most in all of this is to protect the integrity of the work you have produced and your reputation in the dance community. You realize that your reputation could be damaged by a lawsuit with all of the attendant publicity that would surround it, although you think that the publicity would be worse for the company than it would for you. While you take some satisfaction from that, you would also like the company to be able to succeed because you think that its goals are important for the entire dance community.

You are particularly galled by the thought that the company could consider

putting on ENSEMBLE in its present state or trying to complete it without you. You want to be able to complete that work and be fairly compensated for it. The best way to do that would be to restore your position as artistic director and allow you to finish out the time on your contract.

You are personally in a difficult financial position. You were long resigned to living a life where you were always a couple of steps ahead of your creditors. That is the life of an artist. But in the long run you would like to be able to create a more viable financial existence for yourself. You have lived very frugally, never beyond your means and pride yourself on being debt free. You have spent about \$40,000 a year, which allowed you to save about \$5,000 the first year with DI. With the increase in your income this second year, you had hoped to save more. And with the further increase that was to come in the third year of the contract, you had hoped to be able to live alone. While you get along with your roommate who shares your apartment, you need to feel that your place is your own.

You have no outstanding job offers as artistic director (there are not many positions like that), although you have some friends in the dance world who are looking for opportunities for you and who tell you they are optimistic that something will turn up soon. That will not pay next month's rent, which is \$3500, which you share equally with your roommate. And you are not ready to move in with your significant other just to be able to reduce your living costs. That relationship works because you each have your own place and have some breathing space of your own. The health insurance coverage was also important to you, not just because of the fact that DI paid it, but also to be sure that your pre-existing condition of colitis would be covered.

As to ownership of the dance works, the primary economic value to you would be to negotiate some payment from companies that would like to perform them. But, more importantly, the recognition that these are your works would attract future employers who would be interested in hiring you for a similar position. Proven successful works attest to your ability and independence as an artist and are also a valuable asset that you could bring to an interested company for their repertoire. And, from an artistic perspective, they are yours.

You believe that Dance Innovation is in a good economic position to fairly compensate you. With a total annual income of close to three million dollars and a budget that is projected to pay over one-third of its annual income for administrative salaries and performer compensation, there ought to be enough money for them to honor their financial commitment to you and to adequately help you meet your financial obligations.

Your financial arrangement with your attorney is that s/he will be paid on a contingency basis of one-third of any actual financial recovery from DI plus expenses.

EMPLOYMENT CONTRACT BETWEEN DANCE INNOVATION AND JACKIE GRANT

Agreement made on [January 2, 2000] between Dance Innovation (Employer) and Jackie Grant (Employee). In consideration of the mutual covenants and agreements set forth below, and intending to be legally bound, the parties agree as follows.

1. Jackie is employed as artistic director and resident choreographer and shall work at the principal office of Dance Innovation for the term of three years, commencing on [January 2, 2000] and terminating on [December 31, 2002]. Jackie shall be responsible for carrying out the overall vision and mission of Dance Innovation to encourage the work of a range of new choreographers and dances and operating within the annual budget set by the Board of Directors. Jackie shall have the right to create her/his own works to the extent that doing so does not interfere with the overall mission. Any works created by Jackie while at the Company are to be considered “work-for-hire” (consistent with copyright law) and shall be owned by Dance Innovation.
2. Jackie shall work a minimum of eight hours per day during at least five days per week for a total of 40 hours per week. Jackie shall devote his/her entire time and attention to the business of Dance Innovation for the term of this contract. Jackie shall not directly or indirectly render any services of a business or artistic nature to any other person or organization without the prior written consent of Dance Innovation.
3. As compensation for services rendered under this contract, Jackie shall be entitled to receive from Dance Innovation a salary of \$70,000 for the first year, \$80,000 for the second year, and \$90,000 for the third year, in addition to fringe benefits during the period of employment, including health insurance and disability coverage. The salary shall be payable in equal weekly installments.
4. If Jackie becomes disabled during the employment term because of sickness, physical or mental disability or any other reason, so that she/he is unable to perform his/her duties under this contract, Dance Innovation agrees to pay her/him full salary and benefits during the term of disability (which may be covered by disability insurance as provided in #3 above), but not beyond the date specified in this contract for the end of the employment term.

5. Jackie's performance of these duties shall be reviewed annually during the term of the contract. This contract may be terminated at the discretion of Dance Innovation by providing six months' notice of termination to Jackie. If this contract is terminated by Dance Innovation prior to completion of the term of employment specified in this contract, Jackie shall be entitled to compensation earned prior to the date of termination and for the six months succeeding said date.

EMPLOYER

EMPLOYEE

DANCE INNOVATION

BY:

MICKEY BRENMAN

JACKIE GRANT

DANCE INNOVATION

300 Beacon St.
Boston, MA, 02147

[July 12, 2001]

Jackie Grant
21 Fenton St.
Boston, MA, 02125

Dear Jackie,

I am sorry to inform you that consistent with the terms of the [January 2000] contract between Dance Innovation and yourself, your position as Artistic Director has been terminated and your employment with Dance Innovation ended.

I regret that you were not able to find a way to address the serious concerns that I have repeatedly brought to your attention for the last several months. You know that the mission of the company is to produce the work of new choreographers and thereby support their development. Serving that goal was central to your role, but your efforts in that direction have been totally inadequate. Rather, despite my attempts to caution you to the contrary, your principal focus has been on the production of your own works. Your almost exclusive focus on ENSEMBLE, to the exclusion of your other responsibilities, glaringly demonstrates that the problem is irremediable.

So, too, your responsibilities have been to operate within budget, and you have consistently failed to do that, again despite my urgings and warnings. I therefore have no alternative but to effectuate your dismissal.

As provided in your contract, any works that you created while you have been at the company, including MOTIF, CHORALE, and ENSEMBLE, are owned by the company.

You are a talented artist, and I wish you well in your career.

Yours truly,

Mickey Brenman
Executive Director

DANCE INNOVATION

Mickey's Instructions

You are the Chairman of the Board and Executive Director for Dance Innovation, a small highly respected Boston Dance Company. You come to mediation under the threat of a lawsuit by Jackie, the Artistic Director of the company whom you dismissed last month. Nearly two years ago, Jackie (who had initially been a dancer and then a choreographer) was working as an Assistant Director for a large New York Dance Company. At that point, your company hired Jackie to become its Artistic Director and resident choreographer when its founder and previous artistic director, Peter George, died suddenly. Peter George was a creative genius and very charismatic. While the company was successful under his tutelage, it had drifted from its purpose. The mission of Dance Innovation is to support the work of new choreographers, and for the last several years it had been producing mostly Peter George's dances.

The mission of the company is to encourage the work of a range of new choreographers and the development of new dances. Jackie's duties included serving that mission and operating within budget. There was an understanding that also allowed Jackie to produce her/his own works to the extent it did not interfere with the overall mission. The three-year contract provided (consistent with copyright law) that any works Jackie produced as part of the employment were to be considered 'work for hire' and therefore owned by the company. The contract set compensation at \$70,000 for the first year, \$80,000 for the second and \$90,000 for the third with fringe benefits (amounting to approximately an additional one-third of salary). Jackie could be dismissed with six months' notice.

Jackie brought with her/him a work in progress that s/he had been creating (on the side) while at (and with permission of) her/his former employer. S/he completed that work, MOTIF, while at Dance Innovation (and the company produced it, and it was well received). S/he created a second work, CHORALE, during her/his first year at Dance Innovation (and the company produced it, and it was also well received). Jackie received a favorable review from the artistic committee at the end of her first year, but with the admonition that the development of new choreographers needed to be a clear priority. Early in her/his second year, things started to go downhill.

Jackie increasingly turned her/his attention to her/his third major work, ENSEMBLE (which the company planned as the centerpiece of the upcoming season). Although you were pleased with the development of ENSEMBLE, and you respect Jackie as a choreographer, s/he was hired as the overall Artistic Director. You expected the artistic director to be directing the company's artistic

vision as a whole and be responsible for doing so within budget. In particular, s/he needed to be participating in the development of other choreographers and the production of their works. You made this very clear to Jackie, but to no avail.

You became increasingly disturbed that Jackie's focus on her/his own dances prevented the use of the financial and human resources of the company for other choreographers and other dances (repeating what had happened with Peter George). Because of the limitation of the resources of Dance Innovation, you needed to be sure that they were used to support the vision of the company. Jackie was also consistently over budget. You had kept emphasizing these problems to her/him in several difficult discussions, but to no effect. Increasingly, Jackie's vision and yours diverged to the point where you and the artistic review committee felt that her/his performance was not responsive to the mandate of the organization.

At the start of her second year, the preparation of ENSEMBLE, as it came closer to production, brought things to a head. While ENSEMBLE promised much for the new season, Jackie was reworking it again and again even though it was substantially completed. This served Jackie's own ends rather than those of the company and put a severe strain on the company's resources. After repeated warnings and some heated exchanges, you reluctantly felt that the only solution was to part ways. Last month you sent Jackie a letter dismissing her/him for the stated reasons that s/he focused almost exclusively on the creation of her/his own work (rather than devoting attention to her/his own work and supporting the work of new choreographers) and was consistently over budget.

You then met with Jackie at her/his request, and the meeting again became very heated. When s/he asked about ENSEMBLE, you informed her/him that you and others believed that ENSEMBLE was virtually completed when Jackie left, needing at most a little final polishing and refinement. The company was going forward with completing ENSEMBLE, and producing it as the centerpiece of its upcoming season. (The piece has already been described in the program description of the company's new season.) When Jackie said that s/he was entitled to six months' notice, and you replied that you had been warning her/him for months.

The company lawyer, Joe, has advised you that if the company had met the six-month notice requirement, the company would not owe her/him any further compensation under the contract. He/she also said that any works completed by Jackie or that Jackie was working on while employed are exclusively the property of Dance Innovation under the "work for hire" doctrine. Since CHORALE fell clearly within the doctrine of a "work for hire," Jackie has no ownership rights to it. Since MOTIF was finished and completed while Jackie was working for Dance Innovation, the company owns that work as well, although Jackie could try to make an argument to the contrary. (Although you will continue to assert your rights to Motif as a matter of principle, it is a short work and would never be that important to the company in the future.)

ENSEMBLE is clearly the most important piece and is critical to the upcoming season. Joe has advised that since ENSEMBLE was substantially completed during the term of employment with the company, the copyright belongs to the company. As the owner, the company is entitled to make changes as needed. Joe further advised that the company could proceed with the program as announced. Jackie conceivably might try to enjoin the company from performing ENSEMBLE or sue for damages, but it was an effort unlikely to succeed in court as a matter of law. Since you and the artistic committee feel that the work is complete enough to be presented, and you don't want to get bogged down in expensive and endless reworking of the dance (as Jackie did), you plan to stick to the schedule for performing that work.

For both financial and reputation reasons, it is essential that the upcoming season include ENSEMBLE. It is the only full-length piece that would be performed this season, and the new season has already been announced. If ENSEMBLE were cancelled, it would probably be too late to substitute another piece for the upcoming season. This would mean that the revenues from the season would be lost, which would constitute a catastrophe for the company.

There are six weeks of performances scheduled locally with expected gate receipts of \$940,000, 10 weeks of a national tour that is projected to bring in an additional \$500,000, and a scheduled 10-week foreign tour projected to bring in \$600,000 in addition to another \$10,000 per year expected from royalties for licensing of choreography. The projected grand total of earned income and related activities is just under two million dollars, representing two-thirds of the projected annual income with approximately another one million dollars expected from existing commitments for contributions and grants.

Your total annual budget is \$3,000,000 per year, over one third of which is for administrative salaries and performer compensation. Your present reserves are in excess of \$200,000.

While the financial situation of the company has always been precarious, you have recently been advised that you are about to receive a significant new grant of \$300,000 from the National Endowment of the Arts for the production of new works, with more to come if the agency is satisfied that new quality works are developed and performed. While this reduces the immediate financial pressure, you wanted to be sure that this money was not squandered, so you never even told Joe about this yet.

You have found a more than adequate replacement for Jackie as artistic director. You will be able to hire the new person at a beginning annual salary of \$50,000 with a promise of annual review. This would allow you to save at least \$30,000 per year off the present budget, and this person does not seem to have the ambition to be creating her own works.

Your highest priorities are to safeguard the reputation of the company and to be able to achieve the original vision of the company as a place that supports the creation of and exposure to the public of new choreographers and dances.

While you appreciate Jackie's qualities as a choreographer, her/his excessive focus on her/his own dances and consequent failure to produce more dances from other choreographers, the lack of interest in fund-raising and inability to operate within budget constraints leave you clear that you made the right decision. You would like the company to continue to have a relationship with Jackie in the future because of her/his talent and reputation as a choreographer and because you believe that Jackie will be able to help the company find and reach out to new choreographers if associated with the company in a way that did not involve the production of her/his own works and free of any administrative responsibilities. (Her/his artistic integrity could be a virtue if s/he didn't have any control over the company's purse strings.) This could be particularly important to meet the expectation of the NEA grant and obtain future grants.

You also want to be sure that going forward you protect managerial prerogatives to run the company as the board and management see fit, particularly with respect to insuring the future financial viability of the company, which depends on contributions and grants as well as income from the performance of the dances it puts on.

You are interested in mediating because you hope that a mediator will help Jackie see the realities s/he has been missing and because you would like to control the damage that could result from a lawsuit. If Jackie will be reasonable the process should work.

EMPLOYMENT CONTRACT BETWEEN DANCE INNOVATION AND JACKIE GRANT

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1. Jackie is employed as artistic director and resident choreographer and shall work at the principal office of Dance Innovation for the term of three years, commencing on [January 2, 2000] and terminating on [December 31, 2002]. Jackie shall be responsible for carrying out the overall vision and mission of Dance Innovation to encourage the work of a range of new choreographers and dances and operating within the annual budget set by the Board of Directors. Jackie shall have the right to create her/his own works to the extent that doing so does not interfere with the overall mission. Any works created by Jackie while at the Company are to be considered "work-for-hire" (consistent with copyright law) and shall be owned by Dance Innovation.
2. Jackie shall work a minimum of eight hours per day during at least five days per week for a total of 40 hours per week. Jackie shall devote his/her entire time and attention to the business of Dance Innovation for the term of this contract. Jackie shall not directly or indirectly render any services of a business or artistic nature to any other person or organization without the prior written consent of Dance Innovation.
3. As compensation for services rendered under this contract, Jackie shall be entitled to receive from Dance Innovation a salary of \$70,000 for the first year, \$80,000 for the second year, and \$90,000 for the third year, in addition to fringe benefits during the period of employment, including health insurance and disability coverage. The salary shall be payable in equal weekly installments.
4. If Jackie becomes disabled during the employment term because of sickness, physical or mental disability or any other reason, so that she/he is unable to perform his/her duties under this contract, Dance Innovation agrees to pay her/him full salary and benefits during the term of disability (which may be covered by disability insurance as provided in #3 above), but not beyond the date specified in this contract for the end of the employment term.
5. Jackie's performance of these duties shall be reviewed annually during the term of the contract. This contract may be terminated at the discretion of Dance Innovation by providing six months' notice of termination to Jackie. If

this contract is terminated by Dance Innovation prior to completion of the term of employment specified in this contract, Jackie shall be entitled to compensation earned prior to the date of termination and for the six months succeeding said date.

EMPLOYER

EMPLOYEE

DANCE INNOVATION

BY:

MICKEY BRENMAN

JACKIE GRANT

DANCE INNOVATION

300 Beacon St.
Boston, MA, 02147

[July 12, 2001]

Jackie Grant
21 Fenton St.
Boston, MA, 02125

Dear Jackie,

I am sorry to inform you that consistent with the terms of the November 1999 contract between Dance Innovation and yourself, your position as Artistic Director has been terminated and your employment with Dance Innovation ended.

I regret that you were not able to find a way to address the serious concerns that I have repeatedly brought to your attention for the last several months. You know that the mission of the company is to produce the work of new choreographers and thereby support their development. Serving that goal was central to your role, but your efforts in that direction have been totally inadequate. Rather, despite my attempts to caution you to the contrary, your principal focus has been on the production of your own works. Your almost exclusive focus on ENSEMBLE, to the exclusion of your other responsibilities, glaringly demonstrates that the problem is irremediable.

So, too, your responsibilities have been to operate within budget, and you have consistently failed to do that, again despite my urgings and warnings. I therefore have no alternative but to effectuate your dismissal.

As provided in your contract, any works that you created while you have been at the company, including MOTIF, CHORALE, and ENSEMBLE, are owned by the company.

You are a talented artist, and I wish you well in your career.

Yours truly,

Mickey Brenman
Executive Director

DANCE INNOVATION'S CURRENT ANNUAL BUDGET

REVENUE

EARNED INCOME

Performances	
6 weeks at home:	
Subscriptions @ \$ 20,000/week	\$ 120,000
Non-sub tkts @ \$120,000/week	720,000
10 weeks US tour @ \$ 50,000/week	500,000
10 weeks foreign tour @ \$ 60,000/week	600,000
Choreographic royalties/fees	<u>60,000</u>
TOTAL EARNED REVENUE	\$ 2,000,000

CONTRIBUTED INCOME

Board members	\$ 50,000
Individual contributions	100,000
Foundations	300,000
Corporations	200,000
Fundraising events	210,000
Federal funding	100,000
State/local funding	<u>40,000</u>
TOTAL CONTRIBUTED REVENUE	\$1,000,000
TOTAL REVENUE	\$3,000,000

EXPENSES

PERSONNEL

Dancers (15@ \$850/week for 40 weeks)	\$ 510,000
Artistic director	85,000
Executive director	80,000
Musicians (class accompanist; some live perf.)	25,000
Administration (5 people)	250,000
Technical/Production (lighting designer, stage manager, assistants)	200,000
Fringe Benefits	<u>200,000</u>
TOTAL PERSONNEL	\$1,350,000

NONPERSONNEL

New work production	
Choreographic commissions @ \$5-15,000	\$ 45,000
Composers	25,000
Designers (set, costumes)	15,000
Other expenses (e.g. set, costumes, construct.)	15,000
General operating expenses (rent, utilities, etc.)	200,000
Marketing	150,000
Theater rental; related expenses	250,000
Touring expenses	
U.S.	25,000
Foreign	300,000
General administration	225,000
Fundraising	<u>100,000</u>
TOTAL NONPERSONNEL	\$ 1,650,000
TOTAL EXPENSES	\$ 3,000,000

DANCE INNOVATION

Connie's Instructions

Two years ago, Jackie (who had initially been a dancer and then a choreographer) was working as an assistant Director for a large New York Dance Company. At that point, Dance Innovation, a smaller highly respected Boston Company, hired her/him to become its Artistic Director and resident choreographer (when its founder and previous artistic director, Peter George, died suddenly). The mission of Dance Innovation was to support the work of new choreographers.

The three-year contract provided Jackie with compensation during the three years for \$70,000 for the first year, \$80,000 for the second and \$90,000 for the third with fringe benefits (amounting to approximately an additional one-third of salary). Jackie's duties included serving the company's mission, providing overall artistic direction for the company and operating within budget. There was an understanding that also allowed Jackie to produce her/his own works to the extent it did not interfere with her/his overall responsibilities. The contract specifically provided (consistent with copyright law) that any works Jackie produced, as part of the employment, were to be considered 'work-for-hire' (and therefore belong to the company). It also provided that Jackie could be dismissed with six months' notice.

Jackie brought with her/him a work in progress that s/he had been creating (on the side) while at (and with permission of) her/his former employer. S/he completed that work, MOTIF, while at Dance Innovation (and the company produced it). S/he created a second work, CHORALE, during her/his first year at Dance Innovation (and the company produced it). Both works were well received, and at the end of the first year, s/he received a favorable review from the artistic committee. In the middle of the second year, s/he was working on a third major work, ENSEMBLE, (which was to be produced in the upcoming season) when s/he was fired.

Mickey, Dance Innovation's Chairman and Executive Director, sent Jackie a letter notifying her/him of the dismissal because, according to Mickey, s/he focused almost exclusively on the creation of her/his own work (rather than devoting attention to her/his own work and supporting the work of new choreographers) and was consistently over budget. Mickey also informed Jackie that as he/she and others viewed it, ENSEMBLE was virtually completed when Jackie left, needing at most a little final polishing and refinement and that the company was going forward with completing ENSEMBLE, which will be the

centerpiece of its upcoming season. Mickey further maintained that any works completed by Jackie or that s/he was working on while employed are exclusively the property of Dance Innovation under the 'work-for-hire' doctrine.

You advised Jackie that s/he had a possible suit for damages for salary and benefits for the balance of her/his contract term. Your legal position is first that Dance Innovation terminated Jackie without notice, so that at the very least s/he is entitled to the six months of salary and benefits s/he would have received. Mickey's view that his/her complaints about Jackie's recent performance amounted, in effect, to constructive notice is groundless.

You would also argue that Dance Innovation breached the entire contract by discharging her/him without cause and without fulfilling the conditions of the contract (which called for an artistic review of her/his performance after each year of the contract) entitling Jackie to the remainder of compensation for both salary and benefits for the remaining term of the contract. Additionally, there is a possible claim for fraud in the inducement and reliance on the fraud in that Jackie was lured away from her/his position with the other company where s/he was being compensated at a higher rate than with Dance Innovation because s/he relied on being with Dance Innovation for at least three years (although the underpinnings of this claim could be hard to establish). You think that the six months notice agreement is very strong but recognize that the others might not fly.

The crux of the legal controversy and the real threat to Dance Innovation comes down, however, to who owns Ensemble. While you think you have strong arguments for Jackie's ownership of each piece, the case stands or falls principally on the issue of ENSEMBLE at least as far as injunctive relief for the upcoming season. You advised Jackie that you could enjoin the company from putting on ENSEMBLE on the basis that s/he owns the work, and it cannot be considered complete unless s/he herself/himself completes it. Even if s/he were not viewed as owning the work, you believe that s/he retains artistic control over it.

For MOTIF, the work was substantially created by Jackie outside her/his employment. It therefore cannot be considered a work-for-hire. For MOTIF to belong to the company, Joe would have to argue that Jackie assigned ownership and that the contract language ("any work created while at the company will be considered a work-for-hire and shall be owned by Dance Innovation") constituted a clear assignment. Given the increasing practice to require specific language of assignment, you feel you are on strong grounds.

Conversely, CHORALE, created entirely while Jackie was an employee, presumptively belongs to the company. The best argument you could make is that to the extent that the employment relationship itself was tainted by fraud as evidenced by the dismissal, then the work-for-hire link would similarly be tainted.

With respect to ENSEMBLE, you are on firmer ground. (See Memo from Kim.) Note the anomaly of Joe's position. He/she claims that MOTIF should belong to the company because it was finished at the company, and ENSEMBLE should belong to the company even though it was not.

You are willing to give mediation a chance because Jackie feels so strongly that s/he would like to be able to work out an agreement with Dance Innovation. But frankly you are not very hopeful that the company will reach any agreement that is fair to Jackie because of the way that they have treated her/him so far.

Your fee arrangement with Jackie is that you will represent her/him on a contingency basis of one-third of any financial recovery plus expenses.

INTEROFFICE MEMORANDUM

TO: CONNIE
FROM: KIM
SUBJECT: RESEARCH RE APPLICATION OF “WORK FOR HIRE”
DOCTRINE TO UNFINISHED WORKS

Issue Researched

You asked me to research our client Jackie’s potential defenses against her former employer’s copyright claim to Jackie’s unfinished choreographic piece, ENSEMBLE.

Short Answer

While the law is not clear regarding the applicability of the work-for-hire doctrine to unfinished works, Jackie can certainly make a credible argument with strong equitable appeal that there is no dance to copyright until the artist has finished it. Moreover, Jackie has a solid defense to her former employer’s copyright claim based on the fact that she never fixed ENSEMBLE in tangible form during the course of her employment, and that the piece therefore was never copyrightable subject matter prior to Jackie’s termination.

Analysis

Presumptively, the author of a work of art is the owner of the copyright. The “work-for-hire” doctrine is an exception to this rule. The Copyright Act of 1976 defines a work-for-hire as:

a work prepared by an employee within the scope of his or her employment; or
a work specifically ordered or commissioned [text omitted]

17 U.S.C. §101. Only the first definition is relevant to this case. Under the criteria set forth in Community for Creative Non-Violence v. Reid, 490 U.S. 730, 109 S. Ct. 2166, 104 L.Ed. 2d 811 (1989), Jackie was clearly an employee during her tenure of employment.

Jackie’s former employer, Dance Innovation (“DI”), does not dispute the fact that Jackie developed ENSEMBLE herself. As Jackie has not assigned or otherwise transferred ENSEMBLE to DI, DI’s only copyright claim to ENSEMBLE would be based on the work-for-hire doctrine. The Copyright Act provides that:

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

17 U.S.C. §201(b).

While Jackie began working on ENSEMBLE during her employment with DI, she had not finished it by the time DI terminated her. It is not clear whether an unfinished work should be considered a work “prepared by an employee within the scope of his or her employment.”

I have found only one work-for-hire decision involving an unfinished work, but that case does not seem particularly applicable here. In that case, *Woods Hole Oceanographic Institute v. Goldman*, 228 U.S.P.Q. 874 (S.D.N.Y. 1985), *disapproved on other grounds*, *Kregos v. Associated Press*, 3 F.3d 656 (2d Cir. 1993), *cert. denied*, 510 U.S. 1112 (1994), defendant Goldman was hired by plaintiff Woods Hole Oceanographic Institute (WHOI) to produce a documentary film. Goldman produced a “rough cut master” of the film but did not complete it before WHOI terminated him. Goldman subsequently claimed copyright in the film, and WHOI sued. The court granted summary judgment in favor of WHOI, finding that WHOI owned the copyright in the film under the work-for-hire doctrine. Goldman did not raise the incompleteness of the film as a defense, however, and the court did not explicitly consider that issue. Moreover, the “rough cut master” in *Woods Hole* was a tangible video recording. Jackie did not fix ENSEMBLE in any tangible format (such as dance notation or videotape) during her employment with DI.

The Copyright Act does not define a “work,” nor does it specify what it means for a work to be “prepared.” It does, however, state that:

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

17 U.S.C. § 101. Under this definition, a work is only copyrightable when it has been *fixed*, in whole or in part. Even though Jackie had a preliminary version of ENSEMBLE in her head and in her muscle memory before DI terminated her, the fact that she did not fix ENSEMBLE in tangible format before her termination suggests that, for copyright purposes, it was neither “created” nor “prepared” during her employment. *See Baltimore Orioles, Inc. v. Major League Baseball Players Association*, 805 F.2d 663 (7th Cir. 1986), *cert. denied*, *Major League Baseball Players Association v. Baltimore Orioles, Inc.*, 480 U.S. 941 (1987) (“It is, of course, true that unrecorded performances *per se* are not fixed in tangible form. Among the many such works not fixed in tangible form are ‘choreography that has never been filmed or notated’ . . .”) (*citing* H.R.Rep. No. 1476, 94th Cong., 2d Sess. 131, *reprinted in* 1976 U.S.Code Cong. & Ad.News at 5747).¹

1. This quote is merely dicta. The issue on appeal in *Baltimore Orioles* was whether major league baseball clubs own exclusive rights to the televised performances of their baseball players during major league baseball games. Since the telecasts at issue were videotaped (and therefore “fixed”) simultaneously with the broadcasts, the court did not address the question of whether unfixed works could be works-for-hire.

While I did not find any case law or commentary explicitly addressing whether a piece begun but not completed within the scope of the author's employment would fall within the work-for-hire definition, at least one court has stated (consistently with 17 U.S.C. §101) that "[a] work is only created when it is fixed in a final work product." *Fred Riley Home Building Corp. v. Cosgrove*, 864 F. Supp. 1034 (D. Kan. 1994). Although the court in that case was considering a builder's claim of co-authorship in some architectural drawings, rather than a work-for-hire claim, the principle logically applies to our situation as well. ENSEMBLE was not fixed in a final work product before Jackie's termination – indeed, it was not fixed at all – and therefore was not "created" or "prepared" within the scope of her employment.

Thus, Jackie's best defense that ENSEMBLE was not a work for hire is not that she did not finish the piece during her employment with DI (although that is an argument worth making), but that she did not fix the piece in tangible format during her employment with DI, which would have rendered it copyrightable subject matter. If Jackie has created a fixed copy of ENSEMBLE since her departure from DI, then the piece should be considered "prepared" or "created" as of the time that it was fixed – which clearly was not during the scope of her employment with DI.²

I recognize that there is not much clear legal authority to support our arguments in this matter. Given the irreparable harm that Jackie would suffer as an artist if the ENSEMBLE premiere is not enjoined, however, we may be able to show a sufficient chance of success on the merits to obtain a preliminary injunction. Indeed, given that both a judge and the court of public opinion are likely to be sympathetic to Jackie as an individual artist, DI may be unwilling to take the chance of fighting this out in court. And significantly, DI will simply look bad publicly if it insists on taking Jackie's work – which she as the artist considers unfinished – and performs it against her will, particularly after DI said that it terminated Jackie for spending too much time on her own pieces (such as ENSEMBLE). If a judge does not see DI's hypocrisy and inequity, the ticket-buying public surely will.

2. If Jackie has not created a fixed copy of ENSEMBLE since her departure from DI, DI conceivably could create its own fixed copy through notation or videotape and claim the copyright as an original author, on the ground that it was the first to fix the work. While DI might have a copyright law justification for such an act, it surely would run afoul of equitable principles. Jackie would have a strong equitable complaint against DI for trying to "steal" her work in this manner, whether the claim were framed as unfair competition, unjust enrichment, fraud, or something else.

EMPLOYMENT CONTRACT BETWEEN DANCE INNOVATION AND JACKIE GRANT

Agreement made on [January 2, 2000] between Dance Innovation (Employer) and Jackie Grant (Employee). In consideration of the mutual covenants and agreements set forth below, and intending to be legally bound, the parties agree as follows.

1. Jackie is employed as artistic director and resident choreographer and shall work at the principal office of Dance Innovation for the term of three years, commencing on [January 2, 2000] and terminating on [December 31, 2002]. Jackie shall be responsible for carrying out the overall vision and mission of Dance Innovation to encourage the work of a range of new choreographers and dances and operating within the annual budget set by the Board of Directors. Jackie shall have the right to create her/his own works to the extent that doing so does not interfere with the overall mission. Any works created by Jackie while at the Company are to be considered "work-for-hire" (consistent with copyright law) and shall be owned by Dance Innovation.
2. Jackie shall work a minimum of eight hours per day during at least five days per week for a total of 40 hours per week. Jackie shall devote his/her entire time and attention to the business of Dance Innovation for the term of this contract. Jackie shall not directly or indirectly render any services of a business or artistic nature to any other person or organization without the prior written consent of Dance Innovation.
3. As compensation for services rendered under this contract, Jackie shall be entitled to receive from Dance Innovation a salary of \$70,000 for the first year, \$80,000 for the second year, and \$90,000 for the third year, in addition to fringe benefits during the period of employment, including health insurance and disability coverage. The salary shall be payable in equal weekly installments.
4. If Jackie becomes disabled during the employment term because of sickness, physical or mental disability or any other reason, so that she/he is unable to perform his/her duties under this contract, Dance Innovation agrees to pay her/him full salary and benefits during the term of disability (which may be covered by disability insurance as provided in #3 above), but not beyond the date specified in this contract for the end of the employment term.
5. Jackie's performance of these duties shall be reviewed annually during the term of the contract. This contract may be terminated at the discretion of Dance Innovation by providing six months' notice of termination to Jackie. If this contract is terminated by Dance Innovation prior to completion of the term of employment specified in this contract, Jackie shall be entitled to

compensation earned prior to the date of termination and for the six months succeeding said date.

EMPLOYER

EMPLOYEE

DANCE INNOVATION

BY:

MICKEY BRENNAN

JACKIE GRANT

DANCE INNOVATION

300 Beacon St.
Boston, MA, 02147

[July 12, 2001]

Jackie Grant
21 Fenton St.
Boston, MA, 02125

Dear Jackie,

I am sorry to inform you that consistent with the terms of the November 1999 contract between Dance Innovation and yourself, your position as Artistic Director has been terminated and your employment with Dance Innovation ended.

I regret that you were not able to find a way to address the serious concerns that I have repeatedly brought to your attention for the last several months. You know that the mission of the company is to produce the work of new choreographers and thereby support their development. Serving that goal was central to your role, but your efforts in that direction have been totally inadequate. Rather, despite my attempts to caution you to the contrary, your principal focus has been on the production of your own works. Your almost exclusive focus on ENSEMBLE, to the exclusion of your other responsibilities, glaringly demonstrates that the problem is irremediable.

So, too, your responsibilities have been to operate within budget, and you have consistently failed to do that, again despite my urgings and warnings. I therefore have no alternative but to effectuate your dismissal.

As provided in your contract, any works that you created while you have been at the company, including MOTIF, CHORALE, and ENSEMBLE, are owned by the company.

You are a talented artist, and I wish you well in your career.

Yours truly,

Mickey Brenman
Executive Director

DANCE INNOVATION

Joe's Instructions

You are the lawyer for Dance Innovation, a small highly respected Boston Dance Company that has been threatened with a lawsuit by Jackie, the former artistic director of the company who was fired last month by your client Mickey, the Chairman of the Board and Executive Director of the company. Two years ago, Jackie (who had initially been a dancer and then a choreographer) was working as an assistant Director for a large New York Dance Company. At that point, Dance Innovation hired Jackie to become its Artistic Director and resident choreographer (when its founder and previous artistic director, Peter George, died suddenly). According to Mickey, Peter George was a creative genius and very charismatic. While the company was successful under his tutelage, it had drifted from its purpose. The mission of Dance Innovation is to support the work of new choreographers, and for the last several years it had been producing mostly Peter George's dances.

The three-year contract with Jackie provided compensation of \$70,000 for the first year, \$80,000 for the second, and \$90,000 for the third with fringe benefits (amounting to approximately) an additional one-third of salary. Jackie's duties included serving the company's mission, providing overall artistic direction for the company, and operating within budget. There was an understanding that also allowed Jackie to produce her/his own works to the extent it did not interfere with the overall responsibilities. The contract specifically provided (consistent with copyright law) that any works Jackie produced as part of the employment were to be considered 'work for hire' (and therefore belong to the company). It also provided that Jackie could be dismissed with six months' notice.

Jackie brought with her/him a work in progress that s/he had been creating (on the side) while at (and with permission of) her/his former employer. S/he completed that work, MOTIF, while at Dance Innovation (and the company produced it). Jackie created a second work, CHORALE, during her/his first year at Dance Innovation (and the company produced it). S/he was working on a third major work, ENSEMBLE, (which was to be produced in the upcoming season) when s/he was fired.

Mickey sent Jackie a letter notifying her/him of her/his dismissal on the grounds that s/he focused almost exclusively on the creation of her/his own work (rather than devoting attention to her/his own work and supporting the work of new

choreographers) and was consistently over budget. He/she also informed Jackie that, in Mickey's and others' minds, ENSEMBLE was virtually completed when

Jackie left, needing at most a little final polishing and refinement and that the company is going forward with completing it. ENSEMBLE will be the centerpiece of its upcoming season and has already been described in the program description for that season. You advised Mickey that if the company had met the six-month notice requirement (which is open to question), and there was a reasonable cause for discharge (which clearly there was), the company would not owe Jackie any further compensation under the contract.

The only possible legal problem for the company, as you view it, comes from Jackie's lawyer, Connie, who has threatened to enjoin the performance of Ensemble in the upcoming season. It is your client's position that ENSEMBLE was finished (except for Jackie's endless revisions), but even if it were not, the company owns whatever was finished. (See Memo from Shaun.)

CHORALE, started and completed at the company, obviously belongs to the company. The argument for MOTIF is not quite as solid as that for ENSEMBLE or CHORALE, but still fairly strong. (Note that MOTIF is not nearly so important to the Company as ENSEMBLE, which is central to the imminent season. And MOTIF would be irrelevant to any action for injunctive relief, which Connie threatens.) For MOTIF, DI owns it because it was a work for hire, as above, and was completed at the company. But the company owns it also because the work-for-hire language was used in the contract and the parties contemplated that Jackie would bring with her/him the work s/he had done on MOTIF and would complete it at the company, which is exactly what happened. To the extent that the courts would want to see a clear assignment of the piece from the artist to the company as it would for a piece created entirely outside the scope of employment, it is an open question whether the contract language ("any work created while at the company will be considered a work-for-hire and shall be owned by Dance Innovation") would be considered adequate to constitute an assignment.

Note that to the extent that Connie argues that MOTIF does not belong to the company because it was substantially created outside the employment relationship and only finished while Jackie was employed, he/she undercuts his/her argument that ENSEMBLE cannot belong to the company because it was not finished while Jackie was employed.

You advised Mickey that the company could proceed with the program as announced although Jackie might try to enjoin the company from performing ENSEMBLE or sue for damages. Your position is that since there is an adequate remedy at law and because Connie's argument that Jackie owns Ensemble is a tenuous one, you think it is highly unlikely that the performance would be enjoined.

Additionally, Connie has signaled you that there is a possible claim for fraud in

the inducement and reliance on fraud in that Jackie was lured away from her/his position with the other company where s/he was being compensated at a higher rate than with Dance Innovation because s/he relied on being with Dance Innovation for at least three years. This claim seems quite far-fetched to you.

With respect to the claim that Jackie wasn't given six months' notice, you recognize that you have some significant risk here, although according to Mickey, ongoing warnings to Jackie about the changes s/he needed to make in her/his performance certainly go back at least six months.

Given Connie's rather belligerent position, you are not optimistic that mediation can work, but Mickey feels strongly that the company could be damaged by the publicity surrounding a lawsuit and that if an injunction were to be issued on ENSEMBLE (which you have explained is highly remote), the success of the upcoming season would be significantly jeopardized.

You have told Mickey that you estimate your legal fees to defend the company on a temporary restraining order proceeding to be approximately \$20,000, and another \$20,000 for a full trial at your usual billing rate of \$300 per hour.

INTEROFFICE MEMORANDUM

TO: JOE
FROM: SHAUN
SUBJECT: RESEARCH RE APPLICABILITY OF “WORK FOR HIRE”
DOCTRINE TO UNFINISHED WORKS

Issue Researched

You asked me to research whether our client Dance Innovation is entitled to the copyright in ENSEMBLE under the work-for-hire doctrine if we assume that Jackie did not consider the piece “complete” before her departure. (Of course, we will argue that Dance Innovation owns the copyright in “Motif” and “Chorale” as well, but you have asked me to focus on the facts surrounding ENSEMBLE because that would be the only piece at issue in a preliminary injunction motion).

Short Answer

While I have not found any binding law directly on point, I have found a number of cases that support the position that a work is copyrightable (including as a work for hire) even if it is unfinished.

Analysis

The Copyright Act of 1976 provides that:

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

17 U.S.C. §201(b). The relevant portion of 17 U.S.C. §101 defines a “work made for hire” as “a work prepared by an employee within the scope of his or her employment.” Under the criteria set forth in Community for Creative Non-Violence v. Reid, 490 U.S. 730, 109 S. Ct. 2166, 104 L.Ed. 2d 811 (1989), Jackie was clearly an employee of DI during her tenure there.

There is no question that Jackie began working on ENSEMBLE while employed with DI, and that she developed the piece during the course of her employment. There is also no question that the piece that she developed while at DI was “within the scope of . . . her employment.” Jackie’s attorney has suggested that ENSEMBLE is not a work for hire because the work-for-hire doctrine only applies to works that are *fully completed* within the scope of the employment. I have found no statutes or case law to support such an argument.

To the contrary, the Copyright Act does not “warrant any limitation on copyrighting of a work merely because it may subsequently achieve more perfect or final

form.” *American Visuals v. Holland*, 239 F.2d 740 (2d Cir. 1956).³ Indeed, at least one court has held that an unfinished work was nevertheless a work for hire. In *Woods Hole Oceanographic Institute v. Goldman*, 228 U.S.P.Q. 874 (S.D.N.Y. 1985), *disapproved on other grounds*, *Kregos v. Associated Press*, 3 F.3d 656 (2d Cir. 1993), *cert. denied*, 510 U.S. 1112 (1994), defendant Goldman was hired by plaintiff Woods Hole Oceanographic Institute (WHOI) to produce a documentary film about the voyage of a research vessel participating in a multinational project to study the interaction between the atmosphere and the ocean. Goldman produced a “rough cut master” of the film but did not complete it before he was terminated by WHOI. Goldman subsequently claimed copyright in the film, and WHOI sued. The court granted summary judgment in favor of WHOI, finding that WHOI owned the copyright in the film under the work-for-hire doctrine.⁴

It is quite clear that unfinished works fall within the “work-for-hire” doctrine. Otherwise, the artist could always keep it outside by claiming it is not quite fully finished as minor changes (which always occur) go on and on. That is, in fact, exactly what Jackie (whatever her intent) is doing with DI.

Other courts have held that a work is a “work made for hire” if its preparation occurs “substantially” within the authorized time and space limits. *See, e.g., Quinn v. City of Detroit*, 988 F.Supp. 1044 (E.D.Mich. 1997); *Roeslin v. D.C.*, 921 F.Supp. 793 (D.D.C. 1995); *Miller v. CP Chemicals*, 808 F.Supp. 1238 (D.S.C. 1992). Though these cases addressed the issue in the context of whether the work’s creator was an employee or an independent contractor, there seems to be no reason not to extrapolate the “substantial preparation” principle to our situation, where ENSEMBLE was substantially prepared during Jackie’s employment.

In sum, although there is not much law addressing the applicability of the work-for-hire doctrine to unfinished works, the existing law supports our client’s position that it owns ENSEMBLE in the form in which it existed at the time of Jackie’s departure. However emotionally attached Jackie may feel to ENSEMBLE as an artist, legally the piece belongs to DI as a work for hire.⁵

With regard to the issue of fixation, to DI’s knowledge the piece was never fixed on video or by dance notation. If Connie were to argue that the piece could not be copyrightable because of that, we could easily make a video of the next rehearsal which would take the air out of any such argument.

3. In *American Visuals*, the relevant issue was whether an artist could claim the copyright in pencil drawings which he distributed in an effort to find a company interested in using the drawings for an advertising campaign – even though the drawings would be traced in ink prior to their use in advertisements.

4. Although the incompleteness of the film was not raised as a defense and not explicitly considered by the court, the fact that the court ruled that an incomplete piece was a work made for hire still works strongly in our favor.

5. Given the weakness of Jackie’s legal position, she may try to frame this dispute as a David-and-Goliath scenario and play to the sympathies of a judge or the press. If so, we should remind her that DI is a small dance company – not a Goliath-like corporation – and that any efforts to “spin” this publicly might backfire, particularly if she’s now looking for work as an independent contractor.

EMPLOYMENT CONTRACT BETWEEN DANCE INNOVATION AND JACKIE GRANT

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1. Jackie is employed as artistic director and resident choreographer and shall work at the principal office of Dance Innovation for the term of three years, commencing on [January 2, 2000] and terminating on [December 31, 2002]. Jackie shall be responsible for carrying out the overall vision and mission of Dance Innovation to encourage the work of a range of new choreographers and dances and operating within the annual budget set by the Board of Directors. Jackie shall have the right to create her/his own works to the extent that doing so does not interfere with the overall mission. Any works created by Jackie while at the Company are to be considered "work-for-hire" (consistent with copyright law) and shall be owned by Dance Innovation.
2. Jackie shall work a minimum of eight hours per day during at least five days per week for a total of 40 hours per week. Jackie shall devote his/her entire time and attention to the business of Dance Innovation for the term of this contract. Jackie shall not directly or indirectly render any services of a business or artistic nature to any other person or organization without the prior written consent of Dance Innovation.
3. As compensation for services rendered under this contract, Jackie shall be entitled to receive from Dance Innovation a salary of \$70,000 for the first year, \$80,000 for the second year, and \$90,000 for the third year, in addition to fringe benefits during the period of employment, including health insurance and disability coverage. The salary shall be payable in equal weekly installments.
4. If Jackie becomes disabled during the employment term because of sickness, physical or mental disability or any other reason, so that she/he is unable to perform his/her duties under this contract, Dance Innovation agrees to pay her/him full salary and benefits during the term of disability (which may be covered by disability insurance as provided in #3 above), but not beyond the date specified in this contract for the end of the employment term.
5. Jackie's performance of these duties shall be reviewed annually during the term of the contract. This contract may be terminated at the discretion of Dance Innovation by providing six months' notice of termination to Jackie. If this contract is terminated by Dance Innovation prior to completion of the term

of employment specified in this contract, Jackie shall be entitled to compensation earned prior to the date of termination and for the six months succeeding said date.

EMPLOYER

EMPLOYEE

DANCE INNOVATION
BY:

MICKEY BRENMAN

JACKIE GRANT

DANCE INNOVATION

300 Beacon St.
Boston, MA, 02147

[July 12, 2001]

Jackie Grant
21 Fenton St.
Boston, MA, 02125

Dear Jackie,

I am sorry to inform you that consistent with the terms of the November 1999 contract between Dance Innovation and yourself, your position as Artistic Director has been terminated and your employment with Dance Innovation ended.

I regret that you were not able to find a way to address the serious concerns that I have repeatedly brought to your attention for the last several months. You know that the mission of the company is to produce the work of new choreographers and thereby support their development. Serving that goal was central to your role, but your efforts in that direction have been totally inadequate. Rather, despite my attempts to caution you to the contrary, your principal focus has been on the production of your own works. Your almost exclusive focus on ENSEMBLE, to the exclusion of your other responsibilities, glaringly demonstrates that the problem is irremediable.

So, too, your responsibilities have been to operate within budget, and you have consistently failed to do that, again despite my urgings and warnings. I therefore have no alternative but to effectuate your dismissal.

As provided in your contract, any works that you created while you have been at the company, including MOTIF, CHORALE, and ENSEMBLE, are owned by the company.

You are a talented artist, and I wish you well in your career.

Yours truly,

Mickey Brenman
Executive Director

DANCE INNOVATION'S CURRENT ANNUAL BUDGET

REVENUE

EARNED INCOME

Performances

6 weeks at home:

Subscriptions @ \$ 20,000/week	\$ 120,000
Non-sub tkts @ \$120,000/week	720,000
10 weeks US tour @ \$ 50,000/week	500,000
10 weeks foreign tour @ \$ 60,000/week	600,000
Choreographic royalties/fees	<u>60,000</u>
TOTAL EARNED REVENUE	\$ 2,000,000

CONTRIBUTED INCOME

Board members	\$ 50,000
Individual contributions	100,000
Foundations	300,000
Corporations	200,000
Fundraising events	210,000
Federal funding	100,000
State/local funding	<u>40,000</u>

TOTAL CONTRIBUTED REVENUE \$1,000,000

TOTAL REVENUE \$3,000,000

EXPENSES

PERSONNEL

Dancers (15@ \$850/week for 40 weeks)	\$ 510,000
Artistic director	85,000
Executive director	80,000
Musicians (class accompanist; some live perf.)	25,000
Administration (5 people)	250,000
Technical/Production (lighting designer, stage manager, assistants)	200,000
Fringe Benefits	<u>200,000</u>

TOTAL PERSONNEL \$1,350,000

NONPERSONNEL

New work production	
Choreographic commissions @ \$5-15,000	\$ 45,000
Composers	25,000
Designers (set, costumes)	15,000
Other expenses (e.g. set, costumes, construct.)	15,000
General operating expenses (rent, utilities, etc.)	200,000
Marketing	150,000
Theater rental; related expenses	250,000
Touring expenses	
U.S.	25,000
Foreign	300,000
General administration	225,000
Fundraising	<u>100,000</u>

TOTAL NONPERSONNEL \$ 1,650,000

TOTAL EXPENSES \$ 3,000,000