

FALL 2005

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copywrite



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OPENING OFFER

BY LISA MOORE
KINCHELOE



WITH autumn approaching, memories of summer's slower days are receding in the distance. For many of you, September is bustling. Whether you're forming an LLC for a production company, optioning life story rights for a new feature, closing a book deal, licensing an image for reproduction, or pursuing a potential copyright infringer, it seems all our clients have decided it's time to get serious.

Perhaps it's the eternal student in me, but the return of fall has always felt more like the beginning of a new year than January 1. More than anticipating the arrival of football weekends and cooler weather, this season somehow causes me to stop and take stock of the past year.

Since last August, I have had the honor and pleasure of serving on the executive board with five of the most personable, motivated, and inspiring attorneys I have ever met. Alan, Bruce, J, Uwonda, and Mark have worked diligently to bring you timely, informative, and interesting programming.

Last fall, J Lett organized an outstanding luncheon on nontraditional revenue streams in the music industry, including ring tones and licensing music for video games. At the Georgia Bar's midyear meeting, section members heard the always enlightening Bobby Rosenblum address new delivery platforms in the music industry, along with the attendant stresses associated with how content is created and distributed.

One highlight of spring was the sports half-day program led by Bruce Siegal, which examined sports licensing, sponsorships, and celebrity endorsements. And who could forget the insightful, if not titillating, porn law lunch we held last month at The Food Studio?

Looking forward, the executive board has much in store for you. On September 28, 2005, we will host a luncheon at The Clubhouse at Lenox Square with a panel of experts discussing mediation and dispute resolution in entertainment law cases. You can also register now for our annual "Entertainment Law Basics Boot Camp," October 21, 2005, at the Grand Hyatt in Buckhead. Topics will include cable television acquisition rights, DVD deals, and book publishing. With Uwonda Carter at the helm, you will want to enlist.

Finally, don't forget to sign up now, or you just might miss out on, the fabulous Southeastern Entertainment & Sports Law Conference, November 10-14, 2005, at The Ritz-Carlton, San Juan Hotel, Spa & Casino, in Puerto Rico. With Darryl Cohen and Scott

Keniley in charge of this party—not to mention an entire year's worth of CLE, a state of the art spa, a 24-hour casino, and the chance to mix and mingle with our Intellectual Property Law Section colleagues—you won't want to get left behind.

For those of us in Georgia, we have much to be excited about in the coming months. If you love music like I do, several great tours are coming to town: U2, Keane, Coldplay, Bloc Party, Son Volt, The New Pornographers, Metric, Clap Your Hands and Say Yeah, Death Cab for Cutie, and Nickel Creek.

Let's not forget exciting things around the bend in the visual arts world—the unveiling of the expanded High Museum, the much loved "Atlanta Celebrates Photography" with exhibitions of some of my personal favorites like Chris Verene ("Galesberg: The New Chapters" on view at the Marcia Wood Gallery), and the iconoclastic images of Annie Leibovitz at the Jackson Fine Art gallery.

Atlanta is also a town with terrific community theater. I anxiously await the Actor's Express premiere of "Bug." And, as an art house movie junkie, I am most excited about the return of cerebral Oscar hopefuls such as "V for Vendetta," "A History of Violence," "Everything Is Illuminated," and "Walk the Line," particularly after this summer's supposed "blockbusters" like the "Dukes of Hazard."

As you start to think more about your fall calendar, I hope you will consider getting more involved in the section and the community. Whether it's "The Artists' Wills Project," Georgia Lawyers for the Arts, or assisting the relief effort in the aftermath of Hurricane Katrina, I encourage you to find a place to make a difference.

Finally, I hope you find this issue of Copywrite both informative and entertaining. Special thanks to Mark Lindsay, our editor. Don't hesitate to contact me or any of the other board members if we can be of assistance. May the coming months be prosperous, productive, and peaceful.

Lisa Moore Kincheloe is an entertainment attorney and the principal of The Kincheloe Firm LLC. Ms. Kincheloe is chair of the Entertainment & Sports Law Section of the State Bar of Georgia and executive director of the Georgia Lawyers for the Arts. She is also an adjunct professor at the University of Georgia School of Law. Ms. Kincheloe's e-mail is lisa@gjarts.org

PROTECTING THEIR VALUABLE BRANDS

WITH the start of the college football season, many collegiate licensors have concluded preseason training in preparation for the kick-off of the trademark enforcement season. Collegiate institutions and/or their licensing agents plan and practice their game-day enforcement efforts early so as to be in shape to tackle any infringements that come their way during the season. Early planning ensures that there is ample time to develop the appropriate strategies and formations to protect against losing ground to infringers on the playing field called the marketplace.

There is much for licensors to consider when preparing an enforcement game plan, and this column will address several key points that should assist colleges, universities and other licensors in protecting their valuable brands.

Best Defense: Team Up With Law Enforcement/Private Investigators

An essential component of any successful enforcement program is developing the means to block the sales of infringing merchandise wherever they might occur. To conduct enforcement at game-day venues and surrounding areas, it is essential to have established strong working relationships with the law enforcement players that will assist in enforcing rights against infringers selling unlicensed merchandise. Collegiate institutions may be able to use the campus police department to enforce trademark rights, but may have to also look to off-campus agencies such as sheriff's departments, city/town police departments, and even state police departments.

The key is determining which agencies are necessary and available to enforce rights

in the marketplace and developing relationships with key personnel in those agencies. Educating them about the licensing program, scope of trademark rights, how to identify licensed and unlicensed merchandise, and expectations from them as the law enforcement arm will all clear the way for a successful enforcement program year in and year out. Developing these relationships takes time, and continual communication will ensure development of a strong partnership.

In addition, relationships with private investigators can assist in maximizing enforcement efforts at athletic events and otherwise in the marketplace. Private investigators can be a great team member of an enforcement program because, when trained properly, they provide additional eyes and ears. Investigators focus on finding and intercepting infringements and building cases against those found producing and selling unlicensed merchandise. Investigators, in the course of their business, typically have excellent relationships with law enforcement agencies, which facilitates vigilant enforcement.

Establishing the Game Plan: Civil or Criminal Enforcement

Collegiate licensors have several different enforcement options available to them. Civil enforcement involves seeking a "John Doe" court order that will enable the licensor to serve a lawsuit on individuals found selling unlicensed merchandise, and seize the unlicensed merchandise on the spot. Counsel can prepare and seek the court order, and law enforcement officers serve the lawsuit and seize the product. As this is a lawsuit, maintaining detailed records of each seizure and having a proper chain of custody of

PRESEASON TRAINING

ENFORCING COLLEGIATE TRADEMARKS
BY BRUCE B. SIEGAL

CIVIL
ENFORCEMENT
INVOLVES
SEEKING A
"JOHN DOE"
COURT
ORDER
THAT WILL
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LICENSOR
TO SERVE
A LAWSUIT

the seized product is paramount. It is also important to be prepared to move forward with each lawsuit so that the licensor sees the enforcement action through to the end, and to send the message to infringers that the licensor is serious about enforcing its rights.

In recent years, collegiate licensors have also enforced their rights pursuant to state criminal counterfeiting statutes that are available in most states. Utilizing a criminal counterfeiting statute can be a successful tool where law enforcement agencies are willing to use it, and if the local prosecutors are willing to follow through with the cases brought forward. Criminal enforcement provides a formidable enforcement mechanism—it enables the licensor to achieve the result of removing unlicensed merchandise from the marketplace in a very cost-effective manner, and few infringers desire to take on the criminal justice system.

While many law enforcement agencies are increasingly willing to assist with criminal enforcement, it is essential that licensors demonstrate a willingness to go the distance and stand by their side when the cases move forward. This includes being willing to testify at trial, if necessary, and supporting every facet of the prosecution.

There are several other remedies available to colleges and universities that can be added to the enforcement playbook. One is the voluntary surrender, which is a civil remedy that involves seeking to have the individual selling unlicensed merchandise sign a form in which he or she acknowledges the infringement and gives up the infringing products. In exchange for voluntarily surrendering the merchandise, the licensor agrees not to take any further action against the vendor regarding the product at issue. At the same time, if the licensor can obtain information as to the actual source of the infringing merchandise, the licensor will want to reserve rights to take action against such source.

Another remedy available in enforcing rights is citing individuals for trespassing if they are found selling on private property without permission. In addition, most jurisdictions require vendors to secure proper permits to sell merchandise. Since most infringers do not follow this protocol, they can often be cited for selling without a vending permit. These two additional remedies can

be useful in conducting actions to remove infringing products from the street.

Schedule

Developing a schedule of the events and locations at which enforcement operations will be conducted is a good practice to maintain organization. Enforcement may be conducted at certain home football games, away games, pep rallies leading up to the games, other university events, and at flea markets near the campus. The key is to set the schedule based upon a solid scouting report gleaned from knowledge gathered about the respective venues. This includes taking special note of venues where problems have occurred in the past.

Licensors need to be strategic in developing an enforcement schedule so as to allocate resources effectively and efficiently to cover events and locations that tend to attract a large amount of people or are notorious locations for sales of unlicensed merchandise.

Media Coverage

Developing relationships with media outlets can also provide colleges and universities with a useful tool in thwarting the sale of unlicensed merchandise. Television, radio, and print media can be a wonderful asset to educate consumers about the licensing program and how to identify licensed and unlicensed merchandise.

Good media coverage will go a long way in helping to curb the sale of unlicensed merchandise. The media can assist in providing recaps and highlights of past enforcement actions so consumers can get a clear view of the hazards of infringing merchandise, including awareness of the poor product quality and outright mistakes made by the careless infringers. Through heightened awareness, consumers can be made to realize that trademark enforcement is important to the collegiate institution and its funding, and that it benefits consumers by helping them locate and identify quality merchandise that commemorates the event they are attending.

Wrap-Up

Now is the time to have an enforcement strategy and game plan in place for the football season. The items mentioned are ►►

► some of the key factors that will provide a solid foundation for enforcement efforts moving forward.

Developing relationships with law enforcement agencies and private investigators will prove to be invaluable over time so that the university's rights are effectively protected in the marketplace, and the infringers are continually thrown for a loss. Establishing an enforcement strategy and game plan now will go a long way toward creating a winning season for licensed products and protecting valuable brand equity. CW

Bruce Siegal is senior vice president and general counsel of the Collegiate Licensing Company, the nation's leading collegiate licensing and marketing representative. His e-mail is bsiegal@clc.com.

MASTERS OF ARTS

IN EDUCATION BY LESLIE MELLARD

GEORGIA Lawyers for the Arts (GLA) is a nonprofit organization dedicated to providing legal assistance and education to artists and arts organizations in Georgia. GLA's vast network of attorneys provides legal assistance to musicians, songwriters, photographers, filmmakers, painters, graphic designers, actors, dancers, and other artists. And, in addition to providing pro bono legal services to limited-income artists and nonprofit arts organizations with budgets under \$650,000, GLA makes referrals to

experienced attorneys for artists that can afford to pay for legal services.

GLA also offers regular walk-in clinics where artists meet with volunteer attorneys to discuss legal questions. GLA even provides free or low-cost mediation services to resolve artists' disputes.

Education is central to GLA's mission. GLA conducts 50-60 educational workshops, seminars, and CLE programs for artists, arts organizations, and attorneys on legal and business topics each year. One of GLA's most valuable tools is its extensive resource library which contains more than 250 volumes, U.S. Copyright Office information, and other materials. Thanks to the

generosity of the Entertainment & Sports Law Section, the library includes the Matthew Bender "Entertainment Industry Contracts" CD-ROM, which contains sample contracts, explanations, and discussions of many aspects of entertainment law. Attorneys as well as artists and arts organizations use the library and are always welcome.

Further, all attorneys, arts organizations, and artists who join GLA receive monthly mailings of upcoming seminars and CLEs, discounts on workshops and publications, and invitations to social events, which are a terrific way to network with other lawyers and entertainment industry professionals. Member attorneys are also eligible to receive referrals for paying artists and arts organizations that do not qualify for free legal services. GLA provides a critical link between members of the legal and arts communities.

This year GLA will provide over \$1,000,000 in free legal services and programming to artists and arts organizations in Georgia. GLA serves thousands of artists and arts organizations. As GLA's call volume and demand for programming continues to rapidly escalate, please consider sharing your experience and expertise with artists who so desperately need it.

GLA's pro bono work covers the entire legal spectrum—intellectual property, contract negotiation, corporate, tax, real estate, immigration, and even estate planning. No matter what your practice area, GLA can use your assistance. If you are interested in taking on pro bono cases, serving as a panelist, or becoming a member attorney, please contact us. And don't forget, contributions to GLA are tax-deductible and always appreciated. CW

Leslie Mellard is director of volunteer services at GLA and a law student at the Georgia State University College of Law. Lisa Moore Kincheloe is executive director of GLA. To contact GLA, call 404-873-3911 or send an e-mail message to gla@garts.org.

RRI

FOCUS

September 29,
2004

LAST September at The Food Studio, the section hosted "Making Money the New-Fashioned Way," a well-attended and tre-

mendously informative luncheon on alternative ways to make money in the music business. As a supplement to the traditional income streams of record sales, music publishing, touring, and merchandising, our panelists—Noni Ellison-Southall (Turner Entertainment), Bernie Lawrence-Watkins (private practice), and Natasha Brison (private practice)—spoke about the submission and licensing of music for television, ring tones, and video games.

The panel covered Turner Entertainment's music acquisition and clearance process; the distinction between ring tones (monophonic and polyphonic), master tones, and ring back tones, and the clearance requirements for each; and how to establish and maintain relationships with creative directors and music supervisors in the video game industry. In addition to the enlightening discussion, attendees enjoyed a great lunch menu prepared by The Food Studio.

By J. Martin Lett. Mr. Lett is a partner with Register Lett LLP and vice chair of entertainment for the Entertainment & Sports Law Section of the State Bar of Georgia. His e-mail is jllett@nljlawfirm.com.

January 14,
2005

DURING the Georgia Bar's midyear meeting, the section hosted "A Discussion of Entertainment and Technology With Bobby Rosenbloum," a CLE luncheon at the Omni Hotel.

Bobby Rosenbloum, a partner in the entertainment, intellectual property, and technology practice groups at Greenberg Traurig, LLP, shared his experience negotiating transactions and highlighted industry, legislative, and case law developments on how technology is changing the way entertainment media is created, distributed, and experienced.

It was another exceptional discussion on a topic that is very relevant and in the headlines.

By J. Martin Lett. Mr. Lett is vice chair of entertainment for the Entertainment & Sports Law Section of the State Bar of Georgia. His e-mail is jllett@nljlawfirm.com.



ON LOCATION BY ALAN S. CLARKE

THE annual Southeastern Entertainment & Sports Law Conference will be held November 10–14, 2005, at The Ritz-Carlton, San Juan Hotel, Spa & Casino. This gorgeous property is ideally located on eight acres of prime beachfront property in Isla Verde, within 5 minutes of the airport, 12 minutes from the main business and financial district, and 15 ▶▶

April 22, 2005

THE section presented a sports program entitled "Hot Topics and Trends in Sports Licensing, Sponsorships and Athlete Endorsements." The program was held at ESPN Zone in Buckhead and attracted 60 attendees interested in learning more about protecting and licensing sports brands and maximizing corporate sponsorships with sports properties. Bruce Siegal, senior vice president and general counsel of the Collegiate Licensing Company, chaired the program. Speakers included attorneys from both private practice and in-house who specialize in trademark and copyright protection, licensing, branding, athlete deals, and corporate sponsorships.

The first panel, led by Bill Brewster (managing partner of Kilpatrick Stockton LLP), included attorneys from Kilpatrick Stockton as well as New York-based counsel for NBA Properties, Inc. The group discussed trends in protecting trademark and copyright rights in licensing arrangements and in connection with Internet use. They also discussed cutting edge issues in digital file sharing, including the *Grokster* case.

The next panel, moderated by Lisa Rovinsky from Alston & Bird LLP, included counsel from the Coca-Cola Company as well as attorneys from Troutman Sanders LLP and Click & Null PC. They covered all aspects of developing and maximizing corporate sponsorships, athlete endorsements, and steps for thwarting ambush marketing at key sporting events. ▶▶

► minutes from historic Old San Juan. The elegant resort includes four incredible restaurants, a state-of-the-art spa, and a 24-hour casino.

Our master negotiator, Darryl Cohen, founder of the seminar, has negotiated many “extras” for this year’s trip. It promises our usual outstanding, nationally acclaimed speakers, and the opportunity to receive an entire year’s worth of CLE.

Seminars will be held each morning, with afternoons free to explore or just relax at the Ritz. Additionally, we will have the cocktail parties, dinners, and networking events that the conference is known for. Darryl has negotiated a tremendous room rate, which will also be available for attendees three days before and three days after the conference.

Once again, we will hold the event in conjunction with the Intellectual Property Law Section, Intellectual Property Institute. There will be opportunities to attend their seminars on copyright, patent, and trademark law, as well as joint panels on topics such as professionalism, ethics, and litigation.

Plan now to attend. This is one event you do not want to miss. CW

Alan S. Clarke is an entertainment attorney who represents recording artists, athletes, and others in the entertainment industry. Mr. Clarke is a past chair of the Southern Regional Entertainment & Sports Law Conference. His e-mail is alan-sclarke@bellsouth.net.

April 22, 2005

►To top it off, Stan Kasten (former executive of the Atlanta Braves, Hawks, and Thrashers), one of the most experienced and highly regarded executives in professional sports, was on hand to give his unique take on current issues and trends in sports. He spoke his mind on hot topics, including current labor disputes in hockey and other professional sports and the role of agents in the ever-increasing compensation of pro athletes.

Breakfast and lunch were sponsored by Kilpatrick Stockton and Alston & Bird.

By Bruce B. Siegal. Mr. Siegal is senior vice president and general counsel of the Collegiate Licensing Company. He is vice chair of sports for the Entertainment & Sports Law Section of the State Bar of Georgia. Mr. Siegal’s e-mail is bsiegal@clc.com.

August, 17 2005

ON AUGUST 17 more than 30 Section members were treated to an atypical CLE session which addressed legal issues in the representation of adult entertainment clients.

Panelists included Alan Begner, of Begner & Begner, who has more than 30 years of experience representing adult nightclubs and stores in and around Atlanta on various First Amendment and licensing issues; Cary Wiggins, of Cook, Youngleson & Wiggins, who has experience defending adult venues statewide since 1997; attorney Rich Merritt, who was terminated from Powell, Goldstein, Frazer & Murphy

LLP after revealing to partners that his book “Secrets of a Gay Marine Porn Star” would soon be released; and moderator Joe Habachy, whose practice includes representation of adult entertainers on criminal matters in metropolitan Atlanta.

Subjects ranged from updates in the law, both Eleventh Circuit and beyond, to the battle ahead for the industry. Panelists Alan Begner and Cary Wiggins agreed that though the case law has come a long way, it left much to be desired in giving adult establishments the freedom and flexibility warranted under the First Amendment, while panelist Rich Merritt approached the subject of the adult film industry with an insight based on a personal experience as an adult actor in the mid-1990s.

Attorney Joe Habachy concluded by discussing the distinctive concerns relevant to criminal representation of these types of entertainers. At its conclusion, the floor was opened up for questions, and the sheer number of hands that went up was an instant indication that the subject was one of great interest to the audience. Expect more like this in the future.

By Joe S. Habachy. Mr. Habachy is a solo practitioner who represents music artists, managers, and producers. His e-mail is habachy@hotmail.com.

BOOT CAMP CLICK

BY UWONDA S.
CARTER

MARK your calendar. It’s enlistment time again. The Entertainment & Sports Law Section and the State Bar of Georgia will sponsor the annual “Entertainment Law Basics Boot Camp” on October 21, 2005, at the Grand Hyatt Atlanta hotel in Buckhead. This CLE program will cover cable television acquisition rights, film and DVD deals, and book publishing. The section will provide program details in the next few weeks. This promises to be another successful event.

Uwonda Carter is an entertainment and business attorney in Atlanta. Ms. Carter is area chair of the Law Department at the University of Phoenix. Her e-mail is uscater@thecarterlawfirm.net

BE WILL ING

BY LISA MOORE
KINCHELOE

THE Entertainment & Sports Law Section and the Georgia Lawyers for the Arts (GLA) are proud to announce "The Artists' Wills Project." The project is an exciting collaboration where entertainment attorneys draft wills for artists who qualify for pro bono legal assistance through GLA.

The section and GLA will host a free workshop to teach you, the attorneys, estate planning for artists.

You don't need prior expertise in wills and estates to participate.

Estate planning is a service that few struggling artists can afford, yet it is profoundly important to them. You are a key part of the success of "The Artists' Wills Project," and we will need your support. Artists and entertainers often own several copyrights that last for essentially a lifetime after their death. Estate planning enables these artists to specify whom they wish to keep, maintain, or otherwise administer the rights in these works.

Get in on the project. It's a great opportunity to give back to the community and expand your practice. CW

For more information and to participate in "The Artists' Wills Project," call GLA at 404-873-3911 or send an e-mail message to gla@glarts.org.

BRIDGE PORT

THE SIXTH CIRCUIT
DELIVERS A BLOW
TO HIP-HOP ARTISTS IN
BRIDGEPORT MUSIC, INC. V.
DIMENSION FILMS
BY W. ANDREW
PEQUIGNOT

“THOU shalt not steal.” Those were the words of the court in *Grand Upright Music Ltd. v. Warner Brothers Records, Inc.*, a significant sampling case decided in 1991.¹ The decision was important because few sampling cases make it to trial.² Most parties either acquire licenses beforehand or settle the disputes out of court.³ Additionally, the industry has a habit of “turning the other way” because the infringer is often also an infringer.⁴

Unfortunately (or fortunately, depending on your position), the decision in *Grand Upright Music* holds very little precedential value. First, the case never made it pass the district court level. Second, the court provided sparse support for finding copyright infringement. Finally, the facts in the case are unique, so the case is readily distinguishable.⁵

Although the case provides limited value to jurists, it did spark a series of lawsuits from artists hoping to benefit from the ruling.⁶ One of those cases, *Bridgeport Music, Inc. v. Dimension Films*, could have significant ramifications on the practice of sampling.

I. Digital Sampling

Sampling is the act of incorporating previously recorded music into a new recording and was previously only attainable by us-

ing turntables.⁷ Even then, highly skilled disc jockeys were necessary to acquire the desired effect.⁸ With the development of digital technology, turntables are no longer necessary.⁹ The same effect can be recreated digitally, and as a result, sampling has become more prevalent because it is cheaper and more attainable.¹⁰

Although sampling presents numerous benefits to artists, the act itself faces several legal hurdles. The artist must pay careful attention to copyright protection in both the musical composition and the sound recording. Unfortunately, this segment of the law is not well defined, in large part because few sampling decisions make it to court.

The lack of clarity in this field requires an artist to acquire a license to completely avoid litigation. The licensing fee is usually considerable, typically garnering fifteen percent of the money made from the new composition.¹¹ The result is that many artists may refrain from sampling copyrighted work.¹² Many longtime fans of hip-hop music, a genre closely linked to sampling, assert that “the increasing costs involved with clearing samples has led to a dearth of artistically compelling releases . . . as new acts churn out songs that often lack a distinctive bass line, keyboard melody, rhythm, or most importantly, a ‘hook.’”¹³

MANY
LONGTIME
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II. Copyright Infringement

Although a full explanation of copyright infringement is beyond the scope of this article, it may help to briefly review the standard that is applied in most of the sampling decisions.

To constitute copyright infringement, the person alleging infringement must show copying, either through direct or circumstantial evidence, as well as improper appropriation.¹⁴ Improper appropriation is established by showing substantial similarity between the works.¹⁵ If an unsubstantial portion of the copyrighted work is copied, a defendant will often argue that the use was *de minimis*.¹⁶ The basis of the *de minimis* argument is that the copying is trivial and that substantial similarity does not exist as a matter of law.¹⁷ Under the *de minimis* analysis, the court will analyze whether the copied portion was quantitatively and qualitatively significant in relation to the whole.¹⁸

In the case of sampling, the use is sometimes referred to as “fragmented literal similarity.”¹⁹ Professor Nimmer coined this term in his analysis on substantial similarity.²⁰ It refers to use that is literally the same, but “not comprehensive—that is, the fundamental substance, or skeleton or overall scheme, of the plaintiff’s work has not been copied: no more than a line, or a paragraph, or a page or chapter of the copyrighted work has been appropriated.”²¹ Professor Nimmer suggests that

[t]he question in each case is whether the similarity relates to matter that constitutes a substantial portion of plaintiff’s work—not whether such material constitutes a substantial portion of defendant’s work. . . . The quantitative relation of the similar material to the total material contained in plaintiff’s work is certainly of importance. However, even if the similar material is quantitatively small, if it is qualitatively important, the trier of fact may properly find substantial similarity. . . . In general . . . , the defendant may not claim immunity on the grounds that the infringement “is such a little one.” If, however, the similarity is only as to nonessential matters, then a finding of no substantial similarity should result.²²

III. Bridgeport Music

A. *Background.* The plaintiffs in this case, Bridgeport Music, Inc. and Westbound Records, Inc., own copyrights in the composition and sound recording of “Get Off Your Ass and Jam” by George Clinton, Jr. and the Funkadelics. The song was digitally sampled on the track “100 Miles,” which was included on the soundtrack for “I Got the Hook Up.” More specifically, two seconds from “Get Off Your Ass and Jam” were repeated in succession, resulting in the sample being extended to 16 beats. This segment appeared in five places.

Bridgeport Music and Westbound Records claimed copyright infringement against the producers of the film, Dimension Films, Miramax Film Corp., and No Limit Films LLC, based on the unauthorized use. Bridgeport’s claim was dismissed because it had signed a release agreement with No Limit Films. The claims against Dimension Films and Miramax Film Corp. were settled out of court.

B. *The District Court Decision.* The district court examined the unauthorized sampling of the musical composition and sound recording under the *de minimis*, quantitative/qualitative test.²³ Regarding the quantitative factor, the court found that the use constituted “a mere fraction of the whole.”²⁴ As to the qualitative aspects, the court found that the

looped segment bear[ed] only passing resemblance to the original chord that was copied. The looped segment ha[d] been slowed down to match the tempo of the rest of “100 Miles,” which also result[ed] in a lowering of the pitch of the notes. Instead of producing a rising sense of anticipation, the effect of the sample [was] to create tension and apprehension at the sound of pursuing law enforcement.²⁵

Furthermore, the court stated that “[t]he siren sounds in “100 Miles” are in the background, appear at irregular intervals, and their similarity to the guitar introduction to “Get Off” is only apparent if one is made aware of the attribution before hearing the sample.”²⁶ Therefore, the court granted summary judgment in favor of No Limit ▶▶

► Films because it found that no reasonable jury could find substantial similarity.²⁷

C. The Appellate Court Decision. While the appellate court upheld the district court's decision regarding the musical composition, it refused to apply the *de minimis* test to the sound recording. In essence, the appellate court has set forth a *per se* rule for copyright infringement in cases involving the sampling of sound recordings. If an artist fails to acquire a license before publishing a song that includes samples, he or she is liable for infringement of the sampled sound recording.

The appellate court relied almost entirely on statutory arguments. Section 114(b) of the Copyright Act provides that “the exclusive right of the owner of copyright in a sound recording [to prepare a derivative work] is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.”²⁸ According to the court, this grants the copyright owner the “exclusive right to ‘sample’ his own recording.”²⁹ The court is correct; the owner of a sound recording *does* have the exclusive right to create derivative works (subject to the limitations in Section 114(b)). But so does the owner of every other copyrightable medium. The court's argument is even less convincing when one considers that Section 114 actually *limits* the rights of an owner of a copyright in a sound recording.³⁰

The court also cited Kohn on Music Licensing in support of its statutory contentions.³¹ Kohn points out that “the exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.”³² Kohn claims that by using the word *entirely*, Congress may have implicitly intended for anything less than *entirely* to constitute copyright infringement.³³ The problem with this line of reasoning is that it also requires a logical step not supported by the statutory text. Although copyright infringement might exist, it does not necessarily suggest that copyright infringement should exist without substantial similarity.

The court also tried to distinguish sound recordings from musical compositions by la-

beling the sampling of a sound recording as a “physical taking rather than an intellectual one.”³⁴ In other words, “even when a small part of a sound recording is sampled, the part taken is something of value.”³⁵ However, the court provides nothing to support its opinion that sound recordings should be treated differently than every other copyrightable medium. It seems tenuous to claim that a small portion of a sound recording represents something of value while a small portion of a painting, film or even a musical composition does not.

Finally, the court made several policy arguments to support its holding. The court focused on the goals of judicial economy and ease of enforcement, two concepts that are not mutually exclusive.³⁶ According to the court, the music industry and the judicial system would be best served if a bright-line test were established.³⁷ Because “there is no Rosetta stone for the interpretation of the copyright statute,” the court contended that it was taking a “literal reading” approach absent any guidance from legislative history (“legislative history is of little help because digital sampling wasn't being done in 1971”).³⁸ The court then goes on to state that

[i]f this is not what Congress intended or is not what they would intend now, it is easy enough for the record industry, as they have done in the past, to go back to Congress for a clarification or change in the law. This is the best place for the change to be made, rather than in the courts, because as this case demonstrates, the court is never aware of much more than the tip of the iceberg. To properly sort out this type of problem with its complex technical and business overtones, one needs the type of investigative resources as well as the ability to hold hearings that is possessed by Congress.³⁹

The irony in these statements should be clear. First, as established above, the court is not taking a “literal reading” approach because the text does not support the decision. Second, although judicial economy and ease of enforcement may support the outcome of this case (in fact, many may argue that this case produced a good result), the court correctly points out that decisions to stray from long established copyright prin-

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ciples are best left to Congress.

IV. The Fallout

The appellate court in *Bridgeport Music* provided “no existing judicial precedent” to support its decision.⁴⁰ In addition, the court’s interpretation of the Copyright Act is unconvincing. However, the decision now represents the law in the Sixth Circuit.

The implications from this decision are speculative. The decision will likely encourage others to file suit, similar to what happened after *Grand Upright Music*. However, it remains to be seen whether any other Circuit will adopt the reasoning of this court. Considering the possible ramifications, the Supreme Court may decide to settle the dispute. Congress is also likely to feel pressure from entertainment lobbyists to adopt new legislation.

Moreover, it remains to be seen how the defense of fair use will affect the landscape. Although the appellate decision in *Bridgeport Music* did not address fair use, it is unfathomable that it was not raised. But while the court implicitly rejected the fair use defense, there is no language in the opinion that purports to reject or limit the defense. Future plaintiffs may even argue that the use was “transformative,” a term which is still largely indefinable.

Lastly, on a more philosophical level, it remains to be seen whether this *per se* rule of infringement will stifle creativity as many opponents of this decision have argued. The court went to great lengths to justify why the holding would not stifle creativity. First, the court noted that many artists and record labels have already started acquiring licenses as a standard practice.⁴¹ Second, the court argued that market forces would keep licensing fees in check and that the recording industry was free to establish fixed schedules for licensing fees.⁴² Lastly, the court posited that an artist is free to recreate the sampled portion in the studio.⁴³

Regardless of how one feels about the ultimate proposition, the court’s arguments are unpersuasive. Although it is hard to predict the ultimate effect of this decision on current industry practices and licensing fees, it is unconvincing to conjecture that increasing the number of artists who are required to acquire a license will do anything but reduce the number of artists who sample. Also,

even though basic economics suggests that market forces would eventually level the licensing fees, this equilibrium does little to address the difficult situation where a sound recording owner refuses to license the song to be sampled.

Furthermore, it is disingenuous to suggest that artists are completely free to recreate a segment of a sound recording. The court fails to consider non-copyright causes of action such as Lanham Act and state/common law misappropriation and right of publicity claims. And, although admittedly rare, there may be cases where the sound recording is extremely difficult to reproduce.

Although the ramifications of this decision are all speculative, one thing remains clear. An attorney representing an artist, record label, etc. should safeguard his or her client against litigation by acquiring a license for the musical composition and the sound recording of the sample before releasing the song. CW

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Endnotes

¹*Grand Upright Music Ltd. v. Warner Brothers Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

²*Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 659 (6th Cir. 2004).

³*Id.*

⁴*Id.*

⁵In *Grand Upright Music*, the defendant requested a license from the plaintiff but then inexplicably released the song before receiving a reply. The court highlighted the bad faith of the defendant.

⁶See Carl A. Falstrom, *Thou Shalt Not Steal: Grand Upright Music Ltd. v. Warner Bros. Records, Inc. and the Future of Digital Sound Sampling in Popular Music*, 45 HASTINGS L.J. 359, 367 (1994).

⁷Susan J. Latham, *Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling – A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 122 (2003).

⁸*Id.*

⁹*Id.* at 123.

¹⁰*Id.*

¹¹Josh Norek, “*You Can’t Sing Without the Bling*”: *The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording* ►►

► *Sample License System*, 11 UCLA ENT. L. REV. 83, 90 (2004).

¹²*Id.* at 84.

¹³*Id.*

¹⁴ NIMMER ON COPYRIGHT § 13.01[B] (2005).

¹⁵*Id.*

¹⁶The reader should not confuse “substantial similarity” in this context with the analysis used to establish factual copying by circumstantial evidence. Even if plaintiff can establish the defendant copied through direct evidence, “substantial similarity remains an indispensable element of plaintiff’s proof” of copying as a legal proposition.

¹⁷See *id.*

¹⁸*Id.* at 841.

¹⁹ NIMMER ON COPYRIGHT § 13.03[A][2] (2005).

²⁰*Id.*

²¹*Id.*

²²*Id.*

²³See *Bridgeport Music, Inc.*, 230 F. Supp. 2d at 839-42.

²⁴*Id.* at 841.

²⁵*Id.*

²⁶*Id.* at 842.

²⁷*Id.*

²⁸17 U.S.C. § 114(b) (2005).

²⁹*Bridgeport Music, Inc.*, 401 F.3d at 657.

³⁰See 17 U.S.C. § 114(b) (2005).

³¹*Bridgeport Music, Inc.*, 401 F.3d at 660, n.14.

³²*Id.* (quoting AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1486-87 (3d ed. 2002)).

³³*Id.*

³⁴*Id.*

³⁵*Id.* at 658.

³⁶*Id.*

³⁷*Bridgeport Music, Inc.*, 401 F.3d at 655.

³⁸*Id.* at 661.

³⁹*Id.*

⁴⁰*Id.* at 659.

⁴¹*Id.* at 660.

⁴²*Id.* at 657-58.

⁴³*Bridgeport Music, Inc.*, 401 F.3d at 657.

IN RED LINE

MUSIC PRODUCER AGREEMENT BETWEEN ARTIST AND PRODUCER ROYALTIES AND ACCOUNTING PRODUCER’S REDLINE BY BERNIE LAWRENCE-WATKINS

Editor’s note: Hyphenation is not in the original agreement.

5. Royalties

In consideration of the rights granted to Artist and all services to be rendered by Producer in connection with the Master, and conditioned upon your and Producer’s full performance of all of the material terms and conditions of this Agreement, you shall be entitled to be paid royalties as follows:

(a) With respect to net sales through normal retail channels in the United States (“USNRC Net Sales”) of Albums containing the Master recorded hereunder, a royalty of three percent (3%) of the Suggested Retail List Price (“SRLP”) as such term is defined in the Artist Agreement (as defined below) (the “basic royalty rate”) or the wholesale equivalent. If USNRC Net Sales of the Album embodying the Masters exceed Five Hundred Thousand (500,000) units (as determined in accordance with Artist’s standard accounting procedure and as reflected on statements rendered by Artist to Producer), then in lieu of anything to the contrary contained in this subparagraph 5(a), the royalty payable with respect to such excess sales of said Album shall be your basic royalty rate above plus one-half percent (1/2%). If USNRC Net Sales of the Album embodying the Masters exceed One Million (1,000,000) units (as determined in accordance with Artist’s standard accounting procedure and as reflected on statements rendered by Artist to Producer), then in lieu of anything to the contrary contained in this subparagraph 5(a), the royalty payable with respect to such excess sales of said Album shall be your basic royalty rate above plus one percent (1%).

(b) The royalty payable to you for singles, foreign sales, budget records, compact

discs, club sales and other sales or uses of the Master shall be reduced in the same proportion that the basic royalty rate payable by Distributor to Artist for net sales of Albums through normal retail channels in the particular territory in respect of the Master is reduced pursuant to Artist’s agreement with Distributor in effect as of the date hereof with respect to the Master, as same may be amended from time to time (the “Artist Agreement”; any other agreement pursuant to which Artist’s royalties for sales and uses of the Master are calculated is also sometimes referred to herein as the “Artist Agreement”). PLEASE PROVIDE REDACTED RELEVANT PROVISIONS OF THE ARTIST AGREEMENT However, with respect to Sales or uses of the Master for which Artist receives a royalty which is computed as a percentage of Distributor’s net receipts, net monies, net advances or the like, your royalty hereunder in respect of such sale(s) or use(s) shall be equal to Artist’s royalty therefore multiplied by a fraction (the “Fraction”), the numerator of which is equal to your basic royalty rate as set forth in paragraph 5(a) above, and the denominator of which is equal to Artist’s basic royalty rate for net sales of Albums through normal retail channels in the United States as set forth in the Artist Agreement.

(c) (i) All royalties payable to you under this Paragraph 5 shall be computed, determined, reduced (but not escalated) and paid in the same manner (e.g., compact discs, digital downloads, new technologies, container charges, free goods, and other deductions from retail list price, suggested retail list price, definition of net sales, reserves, etc.) as royalties payable to Artist by Distributor are computed, determined, reduced (but not escalated) and paid pursuant to the

Artist Agreement. A redacted copy of the relevant royalty calculation provisions of the Artist Agreement is attached hereto, as an exhibit and incorporated herein by this reference.

(ii) With respect to audiovisual recordings ("Videos") embodying a Master produced hereunder, your royalty shall be an amount equal to fifty (50%) percent of the amount determined by multiplying Artist's royalty for such Video by a fraction, the numerator of which is equal to your basic royalty rate pursuant to paragraph 5(a) above and the denominator of which is equal to Artist's basic royalty rate for net sales of the Album in the United States as set forth in the Artist Agreement, and your royalty shall be pro-rated as provided in paragraph 5(d) below. Notwithstanding anything to the contrary contained herein, you shall not be credited with any royalty in respect of a Video unless and until Distributor has recouped all costs incurred in the production of such Video from its net receipts in respect of such Video (as net receipts are determined pursuant to the Artist Agreement), and following such recoupment your royalty for such Video shall be credited to your account on a prospective basis only.

(d) As to records not consisting entirely of the Master produced hereunder, the royalty rate otherwise payable to you hereunder with respect to sales of any such record shall be pro-rated by multiplying such royalty rate by a fraction, the numerator of which is the number of Masters produced hereunder and embodied on such record, and the denominator

of which is the total number of royalty-bearing master recordings (including the Master) embodied thereon. Notwithstanding the foregoing, if Artist or the Distributor releases a Master as the "A" side of a Single commercially released in connection with the Album coupled with a master recording not produced by Producer on the "B" side, then your royalty shall not be pro-rated pursuant to the preceding sentence with respect to such Single.

(e) In the event a Master is produced by Producer with another producer to whom Artist or Distributor shall be obligated to pay a royalty, then the royalty payable to you hereunder with respect to such Master shall not be reduced in any manner by the royalty payable by Artist or Distributor to such other producer(s) or individual(s). In the event a third party is engaged by Artist to produce, co-produce, edit, mix or remix any Master or perform additional services with respect to the Master produced hereunder, then the royalty payable to you hereunder with respect to such Master shall not be reduced in any manner. Producer shall be afforded the first opportunity to remix the Master by the royalty payable by Artist or Distributor or such other producer(s) or individual(s).

6. Accountings

(a) Artist shall, pursuant to an irrevocable letter of direction in Distributor's customary form (a copy of which is attached hereto as Exhibit "A"), direct that Distributor account and pay royalties directly to you at the same times as Distributor accounts and pays royalties to Artist under the Artist Agreement. If Distributor fails or refuses to so account to you, then Artist shall render accountings, and pay any royalties due you, within thirty (30) forty five (45) days after Artist receives the applicable statement and payment from Distributor. All royalty statements and all other accounts rendered to you shall be binding upon you and not subject to any objection by you for any reason unless a specific objection in writing, stating the basis thereof, is given to Artist within thirty (30) twenty-four (24) months after the date such statement or accounting is ~~received~~ rendered. You shall be foreclosed from maintaining any action, claim or proceeding against Artist in any forum or tribunal with respect to any statement or accounting due hereunder unless such action, claim or proceeding

is commenced against Artist in a court of competent jurisdiction within thirty-six (36) (30) months after the date such statement or accounting is ~~received~~ rendered. You shall have the right to appoint a Certified Public Accountant or duly licensed attorney (each, an "Examiner"), who is not then currently engaged in an outstanding audit of Artist to examine Artist's books and records relating to the exploitation of the Master, hereunder provided that such examination shall take place at Artist's offices during normal business hours, on reasonable written notice, at your sole cost and expense. Such examination may be conducted only once with respect to any particular statement, and not more frequently than once in any calendar year, unless an inconsistency is discovered during such audit. You shall cause the Examiner to deliver a copy of its audit report to Artist within three (3) months after the completion of said accountant's examination of Artist's books and records. Notwithstanding the foregoing, if Artist notifies you that the Examiner is engaged in an outstanding audit of Artist on behalf of another individual or entity ("Other Examination"), you may nevertheless have your audit conducted by such Examiner, and the running of the time within which such audit may be made shall be suspended until such examiner has completed the Other Examination, subject to the following conditions: (i) you shall notify Artist of your election to that effect within fifteen (15) days after the date of Artist's said notice to you; (ii) the Examiner shall proceed in a reasonably continuous and expeditious manner to complete the Other Examination and render the final report thereon to the client and Artist and; (iii) your examination shall not be commenced by the Examiner before the delivery to Artist of the final report of the Other Examination, shall be commenced within thirty (30) days thereafter, and shall be conducted in a reasonably continuous manner. Artist shall notify you in the event that Artist conducts an audit of Distributor's books and records and/or brings suit, and if as a result of any statement or judgment additional monies are paid in respect of the Master(s), then you shall be credited with your pro-rata share thereof "off the top." The rights granted herein to you constitute your sole right to examine Artist's books and records. CW

Bernie Lawrence-Watkins is an entertainment attorney and the principal of B. Lawrence Watkins & Associates, PC. Ms. Lawrence-Watkins was a guest speaker at the 2005 Harvard Black Law Students Association Spring Conference. Her e-mail is blwpc@bellsouth.net.

KATRINA AFTERMATH

HOW LAWYERS CAN HELP BY THE STATE BAR OF GEORGIA

HURRICANE KATRINA HAS TRAGICALLY DISPLACED COUNTLESS RESIDENTS

HURRICANE Katrina has tragically displaced countless residents of our neighboring states. Many are seeking refuge in Georgia and may be unable to return to their home states for an undetermined period of time. Some of these people are our colleagues who have clients with urgent legal matters.

The State Bar of Georgia will assist these lawyers and their clients by providing office space, conference

rooms, legal research materials, telephones, and office equipment at the State Bar Building in downtown Atlanta. Displaced lawyers may contact Faye First, the Bar's conference center manager, at 404-419-0155 or fayef@gabar.org.

In the aftermath of the hurricane, the State Bar has received many questions concerning the ethical and unlicensed practice of law implications of Georgia lawyers giving assistance by tempo-

rarily hosting lawyers from these jurisdictions. This message is to advise you that neither the ethics rules nor the UPL rules create a serious impediment to our ability to extend help to our colleagues and their clients in this time of need. Last year our Supreme Court adopted Rule 5.5 dealing with multi-jurisdictional practice. It authorizes lawyers from other jurisdictions to engage in temporary practice in Georgia under certain circumstances. A fair reading leads us to the conclusion that most situations will be covered by this Rule when coupled with appropriate precautions.

Many of you may have questions concerning the appropriate precautions, general compliance with Rule 5.5, the joint use of systems, conflict of interest, confidentiality, and other issues. Help is available through the help line at the Office of General Counsel (OGC), 404-537-8741 or 1-800-682-9806. The OGC attorneys can help you resolve issues and monitor

STUDENTS OF OUR NEIGHBORING STATES. MANY ARE SEEKING REFUGE.

the need for any specific or special considerations.

We have also received questions from displaced attorneys concerning the possibility of establishing a permanent presence in Georgia. Permanent presence raises bar admission questions which should be addressed to the Office of Bar Admissions, 404-656-3490. If you know of an attorney who is interested in being admitted in Georgia and in taking the February

2006 bar exam, they should contact the Office of Bar Admissions no later than October 1, 2005.

The State Bar of Georgia, the YLD and its Disaster Legal Assistance and Community Service committees are encouraging all Georgia lawyers to donate to the hurricane relief fund of their choice, such as the American Red Cross Disaster Relief Fund at 1-800-HELP-NOW or www.redcross.org or to the Louisiana State

Bar Association's Hurricane Katrina Legal Community Relief Fund, which was established specifically to assist lawyers who lost their homes and offices in the storm, by mailing donations to:

*Hurricane Katrina Legal Community Relief Fund c/o Baton Rouge Bar Foundation 544 Main Street
Baton Rouge, LA 70802*

The Mississippi Bar and Mississippi Bar Foundation have also established the Hurricane Katrina Lawyer Relief Fund to assist lawyers who have lost their offices in the storm. Funds collected will be used to assist lawyers with re-establishing their law offices. Donations should be made payable to the Mississippi Bar Foundation and mailed to: ►►

THE BAR ALSO COMMENDS ITS 37,000 GEORGIA LAWYERS.

►► *Hurricane Katrina Lawyer Relief Fund c/o Mississippi Bar Foundation P.O. Box 2168 Jackson, MS 39225-2168*

The Alabama Bar and Alabama Law Foundation have also established the Hurricane Katrina Lawyer Relief Fund to assist lawyers who have suffered losses because of the storm. Donations should be made payable to the Alabama Law Foundation and sent to:

Alabama Law Foundation, Inc. Post Office Box 671 Montgomery, Alabama 36101

The Bar also commends its 37,000 Georgia lawyers for their many individual contributions to the relief efforts for the victims of this catastrophic, unprecedented natural disaster. Our hearts go out to these fellow Americans. Following is a list of other information resources:

www.abanet.org/katrina—The ABA provides information and resources for victims and lawyers affected by Hurricane Katrina.

www.lsba.org/home1—Information from the Louisiana State Bar Association.

www.msnbar.org—Information from the Mississippi Bar.

www.alabar.org—Information from the Alabama State Bar.

www.katrinalegalaid.org—This site seeks to coordinate the efforts of the many lawyers who have come to the fore to help in this crisis to assist those who need help. CW

Uwonda S. Carter

Jodeci—"Back to the Future: The Very Best of Jodeci"
Kanye West—"Late Registration"
Gretchen Wilson—"Here for the Party"

Book: "Bling" by Erica Kennedy

Lisa Moore Kincheloe

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Book: "A Long Way Down" by Nick Hornby

B

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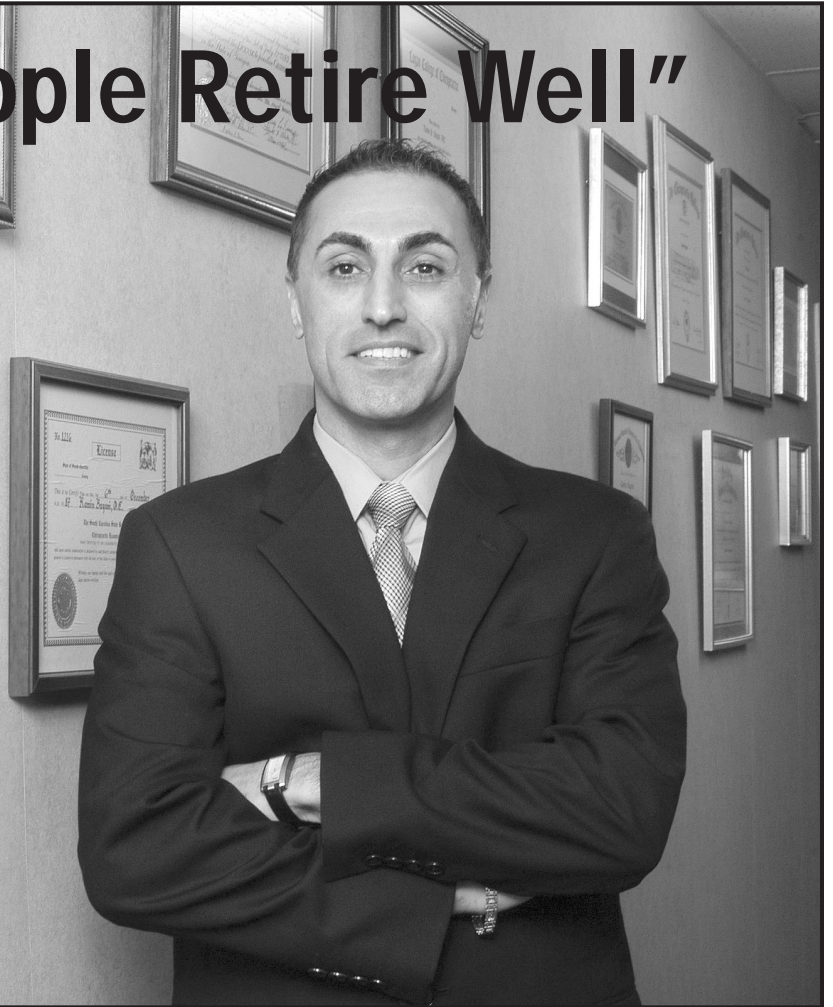
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