

WINTER 2005

DASTAR⁵
THE CONFERENCE
JET SET¹⁰
THE BLOG¹¹
MANAGING
THE
MANAGER¹²
COPYRIGHT
OWNERSHIP
IN LOGOS¹⁴
THE GLA
GALA¹⁶
ME AND YOU
AND EVERYONE
WE KNOW¹⁸

copywrite



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Copywrite provides
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OPENING OFFER

BY KENDALL A.
MINTER

EACH year we seem to find ourselves thrust into the work, pressure to close and billing “feeding frenzy” of the fourth quarter. It’s almost like an annual ritual of professional self- and client-inflicted emotional distress that grips us as we realize that another year is coming to a close—the holidays are quickly approaching, the entertainment industry is going into autopilot shutdown for 3 weeks, and the December collections must stretch until late January, when the checkbooks spring back into life. Nonetheless, the winter months are an active and productive period to get deals closed before the unwritten holiday deadline, to sew seeds for new business in the new year, to make year-end resolutions intended to improve everything that we feel we could or should have done better, and to pause for reflection.

Despite the fact that the music industry has experienced several years of economic decline—layoffs, piracy, market share erosion to new technologies, corporate consolidations, and mergers—the landscape ahead holds much promise and opportunity. Even the motion picture industry has begun to shudder in 2005 due to declining box office revenues and the introduction of new technology that will enable savvy tech-heads to download onto their home computers their favorite films with greater ease and speed.

All of these developments create opportunity for those poised to seize the moment. Lawyers, too, can be entrepreneurs, not necessarily in the corporate maverick sense, but in the nature of being professional, proactive advisors. Toward that end, continuing legal education plays a significant role, one that I have always been a strong advocate of. The Entertainment & Sports Law Section of the State Bar of Georgia, the ABA’s Forum Committee on Entertainment and Sports Law, The Black Entertainment and Sports Lawyers Association (of which I am proud to be a founding director and which is now celebrating its 25th anniversary), the Practicing Law Institute, the Southern Regional Sports & Entertainment Law Conference, and this publication all offer participants and readers numerous opportunities to stay current and knowledgeable about recent developments in the law and industry, to expand professional networks, and to become more effective lawyers. It’s vital to read, on a regular basis, industry specific periodicals, trade ▶▶

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IN 2005

Kendall A. Minter is one of the nation's leading entertainment lawyers. A graduate of Cornell Law School and Cornell University, Mr. Minter's past and present client roster includes Ashanti, Kirk Franklin, Evander Holyfield, Roy Ayers, Lena Horne, the Backstreet Boys, Jagged Edge, Musiq, Shabba Ranks, Third World, Peter Tosh, JadaKiss, Cassandra Wilson, Archbishop Desmond Tutu, and the government of Jamaica. A founding trustee of the Rhythm & Blues Foundation (and currently its chairman) and a director of the Living Legends Foundation, Mr. Minter's renowned practice represents a diverse array of artists, producers, songwriters, executives, record companies, managers, film producers, authors, entrepreneurs, and athletes.

► magazines/newsletters, Internet websites devoted to current events, and bar association journals. A well-informed, well-connected, experienced advocate is a prize for any client.

The current business climate has created a ripe breeding ground for entrepreneurs launching new businesses, particularly in the music, film, and Internet industries. As the number of major music industry conglomerates shrinks due to mergers and acquisitions, there is new opportunity for independent labels, distributors, and production companies. With the explosion of the Internet, music entrepreneurs and creative types can now record, release, and promote product very economically, while maintaining full ownership of the work, control over the methods of exploitation, and a larger share of the revenues. Behind each of these ventures are contracts, corporate formations, counseling, trademark and copyright work, tax advice, office leases, real estate acquisitions, investor agreements, and numerous other opportunities for meaningful lawyer involvement.

The same holds true for independent filmmakers, who can now shoot their work in digital and go direct to home video; theatrical producers, who can finance and mount independent stage plays and take the shows on the road (à la Tyler Perry and others); and start-up Internet entrepreneurs, who can launch new websites designed to meet a niche market demand and in a matter of 2-5 years grow those companies into multimillion dollar operations. There is opportunity for each of us in this myriad of new business ventures.

In truth, there is unlimited potential for each of us to realize our own personal and professional goals, whether measured by income, client roster, power and prestige, admission to partnership, corporate promotions, early retirement, or otherwise. Atlanta has become the new frontier for opportunity. Over the past 10 years, the city has become recognized worldwide for its successes in R&B, hip hop, and crunk music. More recently it has become a hot spot for film production (and most recently, "The Gospel" and the Tyler Perry/Medea films). It continues to be a home for successful (and sometimes not so successful) sports franchises and the place of residence for scores of professional athletes (each of whom has a lawyer and/or agent).

So, as we transition from 2005 to 2006, I encourage each of you to be proactive and grab the brass ring. We will all be better for the effort. I hope you enjoy and are informed and inspired by the articles in this issue of Copywrite. CW

Mr. Minter has over 25 years of experience in entertainment transactions, intellectual property, international licensing, independent film production, corporate organization, and new media. He is a founding director of the Black Entertainment & Sports Lawyers Association (and its first executive director), a former director of American Youth Hostels, and is listed in *Who's Who In The World*, *Who's Who Among Black Americans*, *Who's Who In American Law*, and *Who's Who in Entertainment*. Mr. Minter's e-mail is kamlaw@aol.com.

ATLANTA
HAS
BECOME
THE NEW
FRONTIER
FOR
OPPORTUNITY.
OVER THE
PAST 10
YEARS,
THE CITY
HAS
BECOME
RECOGNIZED
WORLDWIDE
FOR ITS
SUCCESSSES
IN R&B,
HIP HOP,
AND
CRUNK
MUSIC.

AFTER DASTAR

THOUGHTS ON MORAL RIGHTS AFTER *DASTAR*

BY JOSEPH M. BECK

I. Overview

AS recognized in the Berne Convention, moral rights—at least in theory—are distinct from the author’s copyright rights: moral rights protect an author’s “honor and reputation,” while copyrights typically relate to the author’s ability to control the economic exploitation of a work. Specifically, moral rights include the right of attribution (the right to claim or disclaim authorship) and the right of integrity (the right to object to any distortion, mutilation or other derogatory modification of a work).

The vitality of moral rights in the United States (outside those conferred by the Visual Artists Rights Act (“VARA”), 17 U.S.C. § 106(a)) was brought into question, however, by the Supreme Court decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). In *Dastar*, the Court rejected a claim for reverse passing off under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), for the defendants’ failure to give attribution credit to one or more producers of a “public domain” TV show. As discussed later in this article, lower court cases decided since *Dastar* have applied its reasoning in dismissing attribution cases involving copyrighted as well as public domain works. Moreover, the reasoning of *Dastar* may affect not only the right of attribution but also the right of integrity established in *Gilliam v. American Broadcasting Co.*, 528 F.2d 14 (2nd Cir. 1976). Indeed, even before *Dastar*, at least one article argued for preemption of the moral rights of attribution and integrity (other than those explicitly set forth in VARA), if not under the express preemption language of 17 U.S.C. § 301, then by reason of inconsistency with other copyright limitations on the ability of authors to control the copying and modification of their works.¹ The same article also challenged certain moral rights laws as violative of the First Amendment.

II. The *Dastar* Opinion

The case involved the use by *Dastar* of public domain footage of a 1949 Twentieth Century Fox television series about General Eisenhower’s campaign in Europe during World War II. Anticipating renewed interest in World War II on the 50th anniversary of the War’s end, *Dastar* purchased the footage, made relatively modest changes to it, gave its version a new title and made no reference to the original television series or the copyrighted book in its promotions. Instead, it emphasized *Dastar* as the presenter and its affiliate as the author. Fox and its licensees sued for infringement of Double Day’s copyright in the book—and, thus, their exclusive television rights in the book—and alleged in the amended complaint that *Dastar*’s sale “without proper credit” to the Fox television series constituted “reverse passing off” in violation of § 43(a) of the Lanham Act. The district court granted summary judgment to Fox on all three counts and the Ninth Circuit affirmed on the Lanham Act claim because “*Dastar* copied substantially the entire *Crusade In Europe* series created by Twentieth Century Fox, labeled the resulting product with a different name and marketed it without attribution to Fox[, and] therefore committed a ‘bodily appropriation.’”²

The Supreme Court reversed, in an opinion by Justice Scalia, reasoning that because *Dastar* was the “origin” of the products it sold as its own, it could not be guilty of a false designation of origin. Although the Court cited Webster’s New International Dictionary in support of its interpretation of the word “origin,” it seems clear that the Court was influenced by copyright principles, including the following: ►►

DASTAR
PURCHASED
THE
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CHANGES
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GAVE ITS
VERSION
A NEW TITLE
AND MADE NO
REFERENCE
TO THE
ORIGINAL
TELEVISION
SERIES
OR THE
COPYRIGHTED
BOOK IN ITS
PROMOTIONS

WHILE THE COURT IN DASTAR SEEMED PARTICULARLY INTERESTED IN THE FACT THAT THE VIDEOTAPES WERE IN THE PUBLIC DOMAIN, CASES SINCE DASTAR SUGGEST THAT THE LAPSING OF COPYRIGHT MAY NOT BE AS DISPOSITIVE AS IT SEEMED

- a. First, Dastar's alleged wrongdoing involved taking "a creative work in the public domain,"³ something well within Dastar's rights.
- b. The Court focused on the Lanham Act's use of the phrase "origin of goods"—a phrase "incapable of connoting the person or entity that originated the ideas or communications that 'goods' embody . . ."⁴
- c. Referring to a consumer choosing between Coca Cola and Pepsi, the Court observed that such a consumer "does not automatically assume that the brand name company is the same entity that came up with the idea for the product. . . ."⁵
- d. The Court conceded that "it could be argued, perhaps" that the purchaser of a "communicative" product—we can read a "copyrightable" product—cares more about the author (e.g., Phillip Roth) than the publisher (e.g., Houghton Mifflin) and that such an author had "at least as much interest in avoiding passing off (or reverse passing off) of his creation as does the publisher."⁶ Such an "argument," the Court further conceded, would support treating "origin of goods" in § 43(a) as including not only the producer of the novel (e.g., Houghton Mifflin) but also the creator of the content (the author, Phillip Roth).

Having set up the argument, Justice Scalia lowered the boom:

The problem with this argument according special treatment to communicative products is that it causes the Lanham Act to conflict with the law of copyright. . . . The right to copy, and to copy without attribution, once a copyright has expired, like "the right to make [an article whose patent has expired]—including the right to make it in precisely the shape it carried when patented—passes to the public."⁷

Continuing, Justice Scalia observed: "The rights of a . . . copyright holder are part of a 'carefully crafted bargain' under which, once the . . . copyright monopoly has expired, the public may use the invention or work at will

and without attribution." To allow a § 43(a) claim for Dastar's representation of itself as the "producer" of its videos would "create a species of mutant copyright law that limits the public's 'federal right' to 'copy and use[,] expired copyrights.'"⁸ Noting that, "[w]hen Congress has wished to create such an addition to the law of copyright, it has done so with much more specificity than the Lanham Act's ambiguous use of 'origin,'" the Court concluded that to recognize a § 43(a) claim for misrepresentation of authorship of a non-copyrighted work "visual or otherwise" would render those carefully drawn VARA limitations superfluous, a result to be avoided.⁹

In sum, while the Court cited both the dictionary and "practical" reasons to support limiting the interpretation of "origin" in § 43(a) (referring to the difficulty of tracing authorial credit in works exploited in various media) and while the Court alluded to the difficulty of squaring a broad reading of "origin" with other Supreme Court decisions, it is clear that copyright principles informed much of the Court's thinking. The question now is whether those (and other) copyright principles will further delimit "moral rights" claims—not only these brought under the cover of § 43(a) but also those filed under state statutory or common law.

III. Case Law After Dastar

While the Court in *Dastar* seemed particularly interested in the fact that the videotapes were in the public domain, cases since *Dastar* suggest that the lapsing of copyright may not be as dispositive as it seemed. In *Zila v. Wadsworth*, 360 F.3d 243 (1st Cir. 2004), the plaintiff alleged that the defendants published a fourth edition of a copyrighted textbook without granting the proper credit to her as coauthor of the third edition. Relying on the *Dastar* interpretation of the word "origin" in § 43(a) as only meaning the producer of the tangible goods involved, the First Circuit affirmed the district court's summary judgment for the defendant because the plaintiff's claims advanced a theory of false authorship that sounded in copyright rather than unfair competition law.

Moreover, in *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F.Supp. 2d 409 (S.D.N.Y. 2004), the plaintiff's spontaneous countermelody was incorporated into a song released by the defendants. The plaintiff sued under a variety of theories, including

that the defendant had made a false attribution of origin. Reasoning that because the plaintiff's false representation allegation was based "entirely on the fact that the defendants made unauthorized use of her sound recording without compensating her or recognizing her in the credits to the album," the court dismissed the claim—interestingly, without reference to *Dastar*.

In *Carroll v. Kahn*, 68 U.S.P.Q. 2d 1357 (N.D.N.Y. 2003), the plaintiff claimed that the defendant engaged in a false designation of origin when it failed to credit the plaintiff for his contributions to a film. The court made short shrift of the argument, finding that *Dastar* made clear that failure to credit was actionable only where the defendant literally repackaged the plaintiff's goods and sold them as the defendant's own.

IV. If "Attribution" is Gone, Can "Integrity" be far Behind?

Gilliam v. American Broadcasting Co., 528 F.2d 14 (2d. Cir. 1976) involved a claim by British writers known as "Monty Python" for copyright infringement, breach of contract and mutilation or misrepresentation of their work in view of its truncation by ABC to fit within the dictates of commercial television. Despite the fact that deletion of portions of the BBC recording constituted a breach of contract as well as an infringement of a common law copyright in the original work and that therefore there was no need to discuss whether plaintiffs also had a claim for relief under the Lanham Act, the Second Circuit, in an opinion by Judge Lumbard, construed § 43(a) as affording just such relief. "Thus, an allegation that a defendant has presented to the public a 'garbled[,] distorted version of plaintiff's work seeks

IF A CLAIM FOR A VIOLATION OF THE RIGHT OF INTEGRITY, SUCH AS IN *GILLIAM*, REACHES THE SUPREME COURT, WILL IT SURVIVE AFTER *DASTAR*?

Finally, in *Williams v. UMG Recordings, Inc.*, 281 F.Supp. 2d 1177 (C.D. Cal. 2003), the plaintiff, claiming he had re-edited and re-scored a copyrighted film, sued on a variety of theories when his name was dropped from the credits, including misrepresentation of the source of the services. Unimpressed with the plaintiff's argument that *Dastar* extended only to misrepresentation of the origin of goods and not services, the court stated: "Dastar makes clear that a claim for the defendant's failure to credit the plaintiff on the defendant's goods is actionable only where the defendant literally repackages the plaintiff's goods and sells them as the defendant's own—not where, as here, defendant's are accused only of failing to identify someone who contributed not goods, but ideas or communications (or, for that matter, 'services') to [d]efendant's product."¹⁰

In sum, claims for failure to attribute under § 43(a)—whether for works in or out of copyright—no longer appear to be available.

to address the very rights sought to be protected by the Lanham Act . . . and should be recognized as stating a cause of action under that statute."¹¹ Compare what appears in retrospect to be the prescient reasoning of Judge Gurfein, concurring in *Gilliam*: "The Lanham Act does not deal with artistic integrity. It only goes to misdescription of origin and the like."¹² For Judge Gurfein, misdescription of origin could have been dealt with through an appropriate legend indicating that the plaintiff did not approve of the editing of the ABC version. "As long as it is made clear that the ABC version is not approved by the Monty Python group, there is no misdescription of origin so far as the content of the broadcast itself is concerned."¹³

If a claim for a violation of the right of integrity, such as in *Gilliam*, reaches the Supreme Court, will it survive after *Dastar*?

V. Moral Rights, Legal Wrongs

Several months before *Dastar* the author represented a client charged with violating the equivalent of a right of integrity of a songwriter in Puerto Rico. The client, a

AFTER *DASTAR*, IS THERE ROOM
FOR AN ARGUMENT UNDER
§ 301(A) FOR PREEMPTION OF MORAL
RIGHTS IN MUSIC, BOOKS,
AND MOVIES?

major record label, had secured copyright permission to record the song but not—according to the plaintiff—permission to change the words. Relying on the decision of *Monroig v. RMM Records & Video Corp.*, 196 F.R.D. 214 (D.P.R. 2000) (awarding more than 6 million dollars to a songwriter under similar circumstances), the songwriter threatened our client with a similar ▶▶ claim (the songwriter was represented by the same lawyer who won in *Monroig*). After reviewing the facts—and three Puerto Rican Supreme Court decisions finding that the Puerto Rican right of integrity was not preempted by the Copyright Act—we filed a declaratory judgment action in Miami, arguing express preemption under § 301; preemption by reason of inconsistency with Copyright Act limitations on the ability of authors to control the copying and modifying of their work; and unenforceability under the First Amendment (because the right amounted to content regulation on an expressive work and was unconstitutionally vague, leaving subsequent authors such as our client, with no guidance as to the kinds of uses that could be made, a situation that inevitably would chill speech).¹⁴

An understanding of the argument requires careful consideration of the language of § 301 of the Copyright Act. Section 301 addresses moral rights preemption as follows:

- a. Section 301(f)(i) provides that after the effective date of VARA “all legal or equitable rights that are equivalent to any of the rights conferred by [VARA] with respect to works of visual art to which the rights conferred by [VARA] apply are governed exclusively by [VARA] and § 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any state.”
- b. Section 301(f)(ii)(B) provides that nothing in the preceding subsection preempts common law or state law with respect to “activities violating legal or equitable rights that are not equivalent to any of the rights conferred by [VARA] with respect to works of visual art.”

Will the court find that § 301(f)(ii)(B) means no preemption of legal or equitable rights in

works of visual art “that are not equivalent” to rights conferred by § 106(A)? That would seem to be the intent of § 301(f)(ii)(B). Then what about copyrightable works other than those protected under VARA? Section 301(a)—the general preemption section—provides:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title.

After *Dastar*, is there room for an argument under § 301(a) for preemption of moral rights in music, books and movies? For example, is a “mutant” copyright right (e.g., a right of attribution or integrity) so “equivalent” to a § 106 right that it is now preempted? Otherwise unenforceable under the sweep of *Dastar*?

Even assuming § 301 does not preempt rights of attribution or integrity with respect to works other than works of visual art, it is not hard to imagine conflicts, especially after *Dastar*, between other copyright principles and claims to rights of integrity. For example, the compulsory license provision of § 115 provides that after initial distribution of phonorecords to the public, any person complying with the notice and royalty payment provisions has the statutory “privilege of making a musical arrangement of the work to the extent necessary to conform to the style or manner of interpretation of the performance involved” as long as the arrangement does not “change the basic melody or fundamental character of the work.”¹⁵ As an example of such a conflict, assume a grunge band learns that a new age record label has begun selling CDs containing a harp and pan flute led recording of the band’s hit song. The band’s claim for violation of its right of integrity arguably collides with the new age label’s assertion that the Copyright Act grants it the privilege to do exactly what it had done—distribute an arrangement that conformed with the style and manner and interpretation of the performance involved and that did not



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An adjunct professor of both intellectual property law and communications law at Emory University, Mr. Beck served as lead counsel for Outkast and other defendants in *Rosa Parks v. LaFace Records* and lead counsel for the Houghton Mifflin Company in *SunTrust Bank v. Houghton Mifflin* (the *Gone with the Wind v. The Wind Done Gone* case). He currently is lead counsel for Google Inc. in copyright litigation in New York brought by authors and publishers. His e-mail is jbeck@kilpatrickstockton.com.

change either the melody or words of the original musical work.

Even rights of integrity with respect to a work once under VARA may conflict with other copyright principles. For example, assume an art history professor creates a slide show of details from various paintings in which the details had been magnified to demonstrate superlative or abysmal uses of various brush techniques used by 20th Century American artists. After the death of the artist (which terminates his rights under VARA), his daughter brings a state moral rights claim on the grounds that the enlarged detail constitutes a “mutilation” of her father’s painting in violation of his right of artistic integrity. On the other hand, there is no preemption of common law or state statutes with respect to “activities violating legal or equitable rights which extend beyond the life of the author.”¹⁶ But the scenario arguably presents a classic example of fair use under 17 U.S.C. § 107. Will the federal law copyright principle of fair use trump the (arguably) Congressionally sanctioned state law moral rights claim?

VI. The First Amendment

A prior restraint injunction of a “piratically” infringing book would violate the First Amendment.¹⁷ Will First Amendment considerations delimit copyright protection after the publication of expressive works? Space limitations do not provide an opportunity for more than a passing reference to the First Amendment. But First Amendment considerations increasingly inform copyright remedies.¹⁸

If First Amendment considerations curtail—if not exactly checkmate—copyright

claims, which have their own constitutional underpinnings, then surely First Amendment interests must be considered when assessing vague claims to violations of a right of integrity in expressive work such as books, movies and music. CW

Endnotes

¹ See Joseph M. Beck, Alex S. Fonoroff & Robin Wharton, *Moral Rights, Legal Wrongs*, 2003 *COPYRIGHT WORLD* 17 [hereinafter “Beck, et al.”].

² *Twentieth Century Fox Film Corp. v. Entertainment Distrib.*, 34 F. App’x 312, 314 (9th Cir. 2002) (quoting *Cleary v. News Corp.*, 30 F.3d 1255, 1261 (9th Cir. 1994).

³ *Id.* at 2046.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 2048 (emphasis added).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 1184.

¹¹ *Id.* at 24-25.

¹² *Id.* at 26.

¹³ *Id.*

¹⁴ See Beck, et al. (describing the litigation and the above arguments).

¹⁵ 17 U.S.C. § 115(a)(ii) (2000).

¹⁶ 17 U.S.C. § 301(f)(ii)(C) (2000).

¹⁷ See *SunTrust v. Houghton Mifflin*, 252 F.3d 1165 (11th Cir. 2001) (lifting a prior restraint injunction barring publication of *The Wind Done Gone*, even if it infringed copyrights in the book and movie *Gone With the Wind*).

¹⁸ See *New York Times Co., Inc. v. Tasini*, 533 U.S. 483 (2001); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Greenberg v. Nat’l Geographic*, 244 F.3d 1267 (11th Cir. 2001).

EVEN RIGHTS OF
INTEGRITY WITH
RESPECT TO A WORK
ONCE UNDER VARA
MAY CONFLICT WITH
OTHER COPYRIGHT
PRINCIPLES

JET SET SUN AND CLE: NEWS FOR THE CONFERENCE JET SET

Frequent Flyer Programs

AMERICA West and US Airways have announced immediate changes to their joint frequent flyer programs, FlightFund and Dividend Miles. A new program, which will launch in spring of 2006, will retain the name Dividend Miles. Members of America West's FlightFund and US Airway's Dividend Miles will be able to redeem and earn miles on flights operated by either airline starting immediately. Any outstanding mileage balance will be automatically combined and integrated into the new Dividend Miles program in spring of 2006.

Both airlines continue to offer a 500-mile bonus for booking online at either americawest.com or usairways.com. The combined program will offer award travel for redemption levels starting at 25,000 miles. And rewards will no longer require a minimum Saturday night stay.

Miles and segments flown on flights operated by both America West and US Airways for all of 2005 will count toward Preferred or Elite status, and America West Platinum Elite members will be elevated to

Chairman's Elite status through February 28. Preferred and Elite programs combine the best of advance upgrade options from both programs by retaining the Dividend Miles seven-day window for Chairman's Preferred level and the FlightFund two-day window for the Silver Preferred level.

Business Travel

Companies next year will spend more on corporate travel as rates offered by all types of suppliers—coupled with the overall number of business trips—are expected to grow, according to the National Business Travel Association's (NBTA) 2006 forecast. Based on 130 travel manager respondents, NBTA said that overall travel management costs should jump 9 percent next year.

Hotel rates are forecasted to make the largest jump in 2006, increasing by 9 percent from this year's levels, while corporate airfares are expected to grow 6 percent and rental car rates are pegged for a 5 percent spike. Of the respondents, only about 4 percent said they will cut back on air travel in the next year, while 50 percent said 2006 will bring more trips and 31 percent said there would be more travelers to manage.

Despite the anticipated airfare increase, "year-to-date airfares have increased marginally," NBTA said. "However, the average fare paid today is still likely to be lower than last year and well below previous years. Average domestic fares are 18 percent below what they were in 2000." Although airfares should grow by 6 percent, NBTA said, "Low-cost carriers will keep prices competitive despite rising operating costs, especially related to fuel."

Meanwhile, the laws of supply and demand continue to dictate lodging industry pricing, as demand continues its upward trajectory in the face of limited room supply growth. "About 73 percent indicated they expected to spend more because room rates were going up, while almost 41 percent indicated that they expected to spend more because more trips would be taken in 2006," NBTA said. "Another 28 percent indicated that more traveling employees would increase their hotel budgets." To temper cost increases, many companies continue to favor midprice properties over their luxury counterparts. Ninety-three percent said the shift to midprice hotels continues.

NBTA cited higher fuel costs, increased pricing pressure from auto manufacturers, and the surge in local taxes as primary contributors to an expected 5 percent increase in car rental rates.

In addition to rising travel costs, managers and senior management continually tighten travel policies. Nearly 90 percent of the respondents said they mandate their travel programs, 37 percent said they have enacted a soft mandate, and almost 52 percent claim to mandate the entire travel policy. CW

Travel Information compliments of Age of Travel, Inc.

September 28,
2005

Atlanta, GA

THE section hosted “Let’s Talk This Out: Entertainment Mediation and Dispute Resolution,” a luncheon, at The Clubhouse at Lenox. The distinguished panelists for the event were Monica Ewing (Fulton County magistrate judge and entertainment law partner with the firm of Register|Lett LLP), Hank Kimmel (attorney, mediator, and theater production company owner), and R. Wayne Thorpe (mediator, arbitrator, and Atlanta office director for JAMS/Endispute).

The panelists shared a great deal of experience and, at times, differences of opinion regarding the role mediation and alternative dispute resolution can play in entertainment disputes. They also discussed how to choose a qualified mediator and when mediation is appropriate and most effective. It was another informative and provocative panel presented by the section.

By J Martin Lett. Mr. Lett is a partner with Register|Lett LLP, an entertainment, media, and intellectual property firm, where he practices in the areas of transactional and corporate law, with a primary focus on entertainment and media law. Mr. Lett is vice chair of entertainment for the Entertainment & Sports Law Section of the State Bar of Georgia. He is married to Katina Lett, in-house counsel for Infinity Insurance. They have two sons: Jason, age 5, and Justin, 1 year old. Dad and the two sons regularly don their secret identities and fight crime as the enigmatic superheroes The J Team. His e-mail is jllett@nljlawfirm.com.

October 21,
2005

Atlanta, GA

THE section hosted its annual “Entertainment Law Basics Boot Camp,” at the Grand Hyatt Hotel in Buckhead. This year’s boot camp focused on book publishing, cable television acquisition rights, and DVD distribution/financing.

The book publishing panel featured Anthony Morris (McKenna, Long & Aldridge LLP) and James Randolph Smith (private practice). Mr. Morris discussed the major deal points in book publishing agreements, while Mr. Smith provided an insightful look at how books are turned into films. For the cable TV acquisition rights panel, Gina Henschen (The Weather Channel) and Tamera Alexander (Turner Entertainment Co.) spoke about contract deal points as well as practices and procedures for licensing rights in cable TV.

Lastly, the DVD distribution/financing panel—moderated by Michell Davis (Register|Lett LLP) and with featured panelists Kristen McGary (CineVita Productions), Brian Poe (private practice), and Greg Torre (Georgia Film, Video & Music Office)—provided first-hand

knowledge on film financing and distribution. Ms. McGary and Mr. Poe candidly detailed their experiences with their recent films, “The Adventures of Ociece Nash” and “Big Ain’t Bad” respectively, while Mr. Torre provided an update on the Georgia Entertainment Industry Investment Act for films and videos made in Georgia.

By Uwonda Carter. Ms. Carter is an entertainment and business attorney in Atlanta. She is on faculty at the Atlanta campus of the University of Phoenix. Her e-mail is uscarter@thecarterlawfirm.net

BLOG
THE
LET'S TALK
THIS OUT

MANAGEMENT AGREEMENT BETWEEN ARTIST AND MANAGER AUTHORITY AND COMMISSIONS ARTIST'S REDLINE

3. Authority of Manager

(a) Artist hereby irrevocably appoints Manager for the Term (including any extensions hereof) as Artist's true and lawful attorney-in-fact, and as such Manager is authorized and empowered for Artist and on Artist's behalf, in Manager's discretion, to do the following during the Term:

(i) approve and authorize any and all publicity and advertising concerning Artist, subject to Artist's prior approval;

(ii) approve and authorize the use of Artist's name, photograph, likeness, voice, sound effects, caricatures, and literary, artistic and musical materials for the purpose of advertising and publicity, subject to Artist's prior approval;

(iii) execute and deliver for Artist, in Artist's name or on Artist's behalf, agreements or other documents for personal appearances, not to exceed three (3) nights' duration and to be performed during the next 6 weeks, but only when Artist is not reasonably available to execute same and only if Manager has previously received verbal approval from Artist (it being understood that Artist shall have the sole right to execute any agreements other than with respect to those enumerated above);

(iv) engage, as well as discharge and/or direct for Artist, and in Artist's name, theatrical agents and booking agents and all other persons and entities who may be retained to obtain engagements and employment for Artist; provided, however, that neither this subsection, nor any other section hereof, shall be construed so as to authorize Manager to hire, engage, discharge or direct Artist's legal, tax or accounting counselors or booking agents without obtaining Artist's prior express consent; and

(v) until such time as a business manager has been retained by Artist, collect and receive sums, as well

as endorse Artist's name on all checks, payable to Artist for Artist's musical services and, talents, and ~~literary, artistic~~ and musical materials and retain therefrom all sums owing to Manager.

(b) Artist agrees and understands that the power of attorney granted herein to Manager is irrevocable during the Term and coupled with an interest in the products of Artist's career and talents and the earnings therefrom.

4. Commissions

(a) Since the nature and extent of the success or failure of Artist's career cannot be predetermined, it is the desire of the parties hereto that Manager's compensation shall be determined in such a manner as will permit Manager to accept the risk of failure as well as the benefit of Artist's success. Therefore, as compensation for Manager's services, Artist shall pay Manager twenty-five percent (~~20~~15%) of Artist's gross earnings as and when collected by Artist (hereinafter referred to as the "Manager's Commission") on the terms and conditions more particularly set forth herein.

(b) For the purposes of this Agreement, the term "gross earnings" shall mean the total of all earnings, whether in the form of salary, bonuses, royalties (or advances against royalties), settlements, payments, fees, interests, property, percentages, shares of profits, stock, merchandise or any other kind or type of income or remuneration, related to Artist's career in the music industry in which Artist's musical talents or services are exploited ("Covered Activities") that is received at any time by Artist, or by any person or entity (including Manager) on Artist's behalf. Should Artist be required to make any payment for any such interest, property or stock, Manager will pay Manager's percentage share of such payment; in the event Manager elects not to acquire Manager's percentage thereof, Manager shall be deemed

IN RED
LINE BY LISA MOORE
KINCHELOE

to have waived any commissions payable thereon. Without in any manner limiting the foregoing, the matters on which Manager's compensation shall be computed shall include any and all of Artist's activities in connection with the following matters: radio, music, records and recordings, songwriting and music publishing, personal appearances, public appearances in places of amusement and entertainment, motion pictures (to the extent that Artist appears as a musical artist or songwriter), television (to the extent that Artist appears as a musical artist or songwriter), literary, theatrical engagements, other publications, and in the use of Artist's name, likeness and talents for the purposes of merchandising, advertising and trade, but only to the extent Artist appears as a musical artist or songwriter. Moreover, it is expressly agreed by the Parties that any amounts credited to Artist's royalty accounts and/or statements but which are not paid to Artist (including, but not limited to, by virtue of Artist being unrecouped) shall not be deemed "Gross Earnings" for any purposes hereunder, including, without limitation, calculation of "Gross Earnings" under Section 1(d).

(c) It is understood that for the purposes hereof, no expense, cost or disbursement incurred by Artist in connection with gross earnings shall be deducted therefrom prior to the calculation of the amount of Manager's Commission. Notwithstanding the foregoing, the items listed in Exhibit "A" attached hereto, and by this reference made a part hereof, shall not be included in "gross earnings" and shall be deducted from Gross Earnings prior to the calculation of the amount of Manager's Commission."

(d) Subject to the limitations set forth in Section 4(g) hereof, Manager's Commission shall be based on gross earnings of Artist accruing to or received by Artist during or subject to Section 4(g) below, after the Term as a result of: (i) any contract or engagement of Artist entered into during the Term, or negotiated during the Term and executed within ~~six-three (63)~~ months after the Term, for the full term of such contract or engagement and any renewals, extensions or modifications of, or substitutions for, any such contract or engagement (but excluding, however, any gross earnings resulting from improved terms or conditions in any such contract or engagement which are not executed or substantially negotiated during the Term), (ii) Artist's rendering of services or talents during the Term, (iii) any ~~artistic or~~ musical materials, including, but not limited to, musical works, created by Artist and released during the Term, or (iv) any exploitation during the Term of any ~~artistic or~~ musical materials, including, but not limited to, musical works and sound recordings, created by Artist prior to the Term.

(e) In the event that any corporation, partnership, trust, joint venture, association or proprietorship, or other business entity in which Artist has a direct or indirect interest shall receive any compensation for permitting or contracting for the use of Artist's services in any aspect of the music industry or Artist's name, likeness or endorsement or any artistic or musical materials produced by Artist, then such compensation shall be deemed to be "gross earnings" of Artist for the purposes of this Agreement; provided, how-

ever, that any subsequent distribution of monies to Artist as a result of such compensation shall not be subject to Manager's Commission.

(f) Artist agrees that, until Artist hires a business manager to collect and manage Artist's earnings, all gross earnings shall be paid directly to Manager by all persons and entities and shall not be paid to Artist, and that Manager may withhold Manager's compensation therefrom and may reimburse itself therefrom for any fees, costs or expenses advanced or incurred by Manager pursuant to this Agreement and as delineated in Section 5(b), and shall pay the remainder to Artist within ten (10) days after the close of the calendar month during which such earnings were received by Manager. Manager agrees to deposit all funds received on Artist's account into a separate account for Artist in a bank or savings and loan association and shall not commingle funds of Artist with the personal funds of Manager or the funds of any other client of Manager. If Artist nevertheless receives any gross earnings directly, Artist shall be deemed to hold in trust for Manager that portion of Artist's gross earnings equal to Manager's compensation on behalf of Artist and shall promptly remit same to Manager.

(g) Notwithstanding any other provisions of this Agreement to the contrary, Manager's Commission on gross earnings collected by Artist after the expiration of the Term shall be limited as follows:

(i) _____ With respect to gross earnings from master recordings (including, but not limited to, gross earnings from mechanical and/or public performance royalties in respect of the music compositions embodied on such master recordings) created by Artist prior to ~~or~~ during ~~or~~ after the Term and first commercially released during ~~or~~ after the Term, or services of Artist rendered during ~~or~~ after the Term, Manager's Commission shall be limited to gross earnings collected by Artist within ~~ten~~~~six~~(~~6~~~~10~~) years after the expiration of the Term, after which time no further Manager's Commission shall be payable; and shall be as follows:

Post Term Years	Manager's Commission
<u>1-3</u>	<u>10%</u>
<u>4-6</u>	<u>5%</u>
<u>Thereafter</u>	<u>0%</u>

(ii) _____ With respect to Gross Earnings from all other musical materials created after the Term or created during the Term and first exploited after the Term, or services of Artist rendered after the Term, no Manager's Commission shall be payable.

Lisa Moore Kincheloe is an entertainment attorney and 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. Her e-mail is lisa@glarts.org.

LOGO

COPYRIGHT OWNERSHIP IN LOGOS BY BRUCE B. SIEGAL

AS intellectual property owners create new logos or revise old ones, they should, of course, take care to ensure that they own all the applicable rights in the new works. In addition to obtaining trademark clearance and beginning the trademark registration process, IP owners should pay attention to copyright issues for marks that contain original designs. This column presents a brief overview of copyright law and how IP owners can ensure that they own the copyright in works created by third parties where this is intended. As the author works with collegiate institutions and other sports properties, this article is written from the perspective of protecting sports logos.

Background

Copyright Definition. As a brief reminder, a copyright is a property right in an “original work of authorship” that is fixed in a tangible form. Examples of copyrightable works include literary works, musical and dramatic works, choreographic works, pictorial and graphic works, motion pictures and audiovisual works, sound recordings, computer programs, architectural works, compilation works, and derivative works. A copyright owner has the exclusive right to reproduce the work, distribute the work, display and perform the work, and authorize third parties to do any of these things. It is important to note that copyright only protects the expression of an idea in a tangible form, not the idea itself.

A copyright owner may prevent the unauthorized use or copying of the work. The copyright owner seeks to prove that the alleged infringer had “access” to the work and that the two works have “substantial similarity” from the perspective of an ordinary observer. Criminal penalties and civil remedies are provided under federal copyright law.

International treaties are also important in the copyright area. The United States and many other commercially important countries have signed on to treaties designed to harmonize standards and reduce formalities such as the copyright notice requirements.

Copyright Ownership and Works Made for Hire. As you will recall, copyright ownership vests from the time that the work is created and fixed in a tangible form. The copyright in the work vests immediately with the author of the work. However, an employer or a party commissioning a work is deemed to be the author of a “work made for hire” if the work was (i) prepared by an employee within the scope of employment or (ii) specially ordered or commissioned, covered by one of the nine specific types of work set forth in the Copyright Act, and expressly agreed—in a written agreement signed by both parties—to be a “work made for hire.” If the work falls outside the nine categories—and collegiate institutions and others should understand that pictorial and graphic works in some instances fall outside of the statutory definition—the party that ordered or commissioned the work should ensure that the author of the work (i.e., the initial copyright owner) assigns all of his rights in the work to the party that ordered or commissioned the work.

One of the issues raised as a result of the “work made for hire” concept is that the Copyright Act does not define the terms “employee” and “within the scope of employment.” The U.S. Supreme Court resolved this issue in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), where the Court stated that these terms should be understood in relation to the common law of agency. The Restatement (Second) of Agency defines an employee as a person employed to perform services for another who with respect to the actual

COPYRIGHTS
AND THE
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SURROUND-
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OWNERSHIP
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PART
OF THE
DISCUSSION
FROM THE
OUTSET



Bruce B. Siegal is senior vice president and general counsel of the Collegiate Licensing Company (CLC). Mr. Siegal manages and oversees all legal and enforcement activities for CLC, which administers trademark licensing programs for over 180 colleges, universities, conferences, bowl games and the NCAA, as well as for Licensing Partners International (LPI), a related company which handles licensing for properties including the PGA Tour, the Canadian Football League, and other sports and entertainment clients. His e-mail is bsiegal@clc.com.

conduct of the performance is subject to the other's control. The Restatement contains a list of factors, with no one factor being determinative, to be used in determining whether or not an individual is an employee or an independent contractor.

Those factors include, but are not limited to: the hiring party's right to control the manner and means by which the finished work is created; the hiring party's right to assign additional duties; the skill level required to complete the work; the location where the work is performed; the duration of the relationship between the parties; the method of payment; and the tax treatment of the hired party. Collegiate institutions and other intellectual property owners should weigh these factors to determine if the individual creating the work will be considered an employee or an independent contractor. Depending upon the answer, certain actions may have to be taken to ensure that the employer owns the copyright in the work.

Best Practices

In the aftermath of *Reid*, a number of artists and designers came forward to claim that they owned copyright in works previously created for third parties but for which no written agreement existed. Needless to say, this created tense situations for commissioning parties that believed they had bought and owned all rights in a particular work which they may have even used as a trademark. In fact, several collegiate institutions were confronted by people who claimed that they had drawn the team logo or mascot years ago and were now looking for compensation. Fortunately, virtually all of these disputes were ultimately resolved amicably, but only after intense settlement negotiations.

Accordingly, collegiate institutions and other intellectual property owners are well-advised to address authorship and ownership issues involving specially ordered or commissioned works at the outset of the relationship. This involves executing a written agreement, often known as a "work made for hire/assignment agreement." The agreement should ensure that authorship and copyright ownership rests with the hiring party. Such agreements typically designate the work as a "work made for hire" if the work falls into one of the nine specific types of works discussed above. As a fallback measure, such a written agreement should also provide

that the hired party assigns all rights in the work, including copyright, to the hiring party. The agreement should also require the hired party to appoint the hiring party as its agent and attorney-in-fact to execute and deliver such assignments, instruments, or documents as the hired party may fail or refuse to execute and deliver.

In terms of operating a licensing program, collegiate institutions and other IP owners should consider including language in their license agreements that requires licensees to acknowledge that any designs or artwork created by the licensees pursuant to the license agreement will be considered specially ordered or commissioned by the institution, and that such artwork or designs shall be considered "works made for hire" as defined in the Copyright Act. Furthermore, the license agreement should require licensees to assign all rights in the artwork or designs, including copyright, to the institutions. Collegiate institutions and other IP owners will find that these provisions provide them with greater flexibility to protect their intellectual property interests and capitalize on the marketability of their licensing programs.

In addition, institutions and other IP owners should consider obtaining copyright registrations for newly created works. By timely filing a simple application with the Copyright Office and paying a small fee, the copyright owner may take advantage of the possible recovery of statutory damages, the presumption as to the validity of the copyright, and the ability to record the copyright certificate with the U.S. Customs Service to protect against the importation of infringing works, among other benefits.

Conclusion

In this day and age where it is a common practice for collegiate institutions and other intellectual property owners to have third parties create works for them, copyrights and the issues surrounding copyright ownership should be a part of the discussion from the outset. If the proper steps are taken, an institution can be comfortable in knowing that a third party will not be able to claim any rights in the works. If the proper steps are not taken, the institutions could find themselves on the wrong side of a copyright dispute. Institutions should take the time to put the proper procedures in place to ensure that their ownership rights are protected. CW

THIS year's Georgia Lawyers
for the Arts (GLA) Gala
will take place on Friday,
November 4, at the beautiful
Lowe Gallery, on Bennett
Street, in Buckhead, from
7:00-10:00 p.m.



The Gala is GLA's primary fundraising event. We are expecting an evening with all the makings of a fabulous party: great art, live music, delicious food, an open bar, a silent auction of fine art, theater tickets, music memorabilia, and much more. Tickets to the event are \$75 and can be purchased by calling 404-873-3911 or at the door. Please feel free to contact us with any questions. We hope you join us for a wonderful evening that supports a very worthy

GLA is the only nonprofit organization dedicated to providing legal assistance and educational programming to artists and arts organizations in Georgia. Last year GLA conducted more than 65 educational programs and

provided more than \$1 million in free legal services to low-income artists and nonprofit arts organizations across the state. GLA also has an extensive resource library that contains sample contracts, copyright information, and more than 250 volumes, which artists, arts agencies, museums, galleries, attorneys, and other members of the public can use.

END NOTE

BY LISA MOORE
KINCHELOE



CHASING MY
DAUGHTER
THROUGH
A PUMPKIN
PATCH ONE
RECENT
AFTERNOON,
IN SEARCH
OF THE
PERFECT
JACK-O-
LANTERN,
MADE ME
STOP AND
REMEMBER...

“How is it that Christmas decorations are already in the stores?” I asked myself, as I was shopping the other day. Can Thanksgiving really be less than a month away? Without fail, this time of year is always unusually hectic for me. Between deals closing before year’s end and litigation matters heating up after summer’s more relaxed pace, autumn seems to rush by in a nanosecond. Inevitably, I look up from my desk on December 23 and think: “Great, now I have time to *start* my holiday shopping.”

Chasing my daughter through a pumpkin patch one recent afternoon, in search of the perfect jack-o-lantern, made me stop and remember how important it is to treasure these fleeting weeks of autumn. The beautiful crimson and gold leaves, an invigorating chill in the air, and the sound of tiny ghosts and goblins yelling “trick or treat” are all meant to be savored, not squandered. So I encourage all of you to take some time away from your equally busy schedules to reconnect with friends and family or maybe just to find some quiet time to yourself.

Speaking of reconnecting, there is certainly no better opportunity to catch up with colleagues and reunite with old acquaintances than the Southern Regional Entertainment & Intellectual Property Institute, November 10-14, at the lovely Ritz Carlton in San Juan, Puerto Rico. Its not too late to join us for outstanding panels (an entire year’s worth of CLE), and fabulous dinners and entertainment (would you expect anything less from Darryl Cohen?), not to mention a 24-hour casino and spa.

As we wrap up 2005, I hope you will consider becoming more involved in the coming months. Whether it’s with Copywrite, social events, or community outreach, we certainly have a place for you. Best wishes for a joyous and peaceful holiday season.

Lisa Moore Kincheloe is an entertainment attorney and 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. Her e-mail is lisa@glarts.org.

...HOW
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AUTUMN.

ME & YOU & EVERYONE WE KNOW

FOUR PLAYERS IN THE FILM INDUSTRY
RECOMMEND THREE FILMS AND
A STAGE PRODUCTION

Greg Torre
Georgia Film, Video & Music Office

Capote
House of Sand and Fog
Fantastic Four
Hairspray

Brian D. Poe
Brian Poe & Associates

The Untold Story of Emmett Till
Big Ain't Bad
Diary of a Mad Black Woman
The Color Purple

Kristin McGary
CineVita Productions

The Constant Gardener
Me and You and Everyone We Know
The History of Violence
Bug

Michell L. Davis
Register | Lett LLP

The Gospel
Four Brothers
Hustle and Flow
Fences

"We Help People Retire Well"

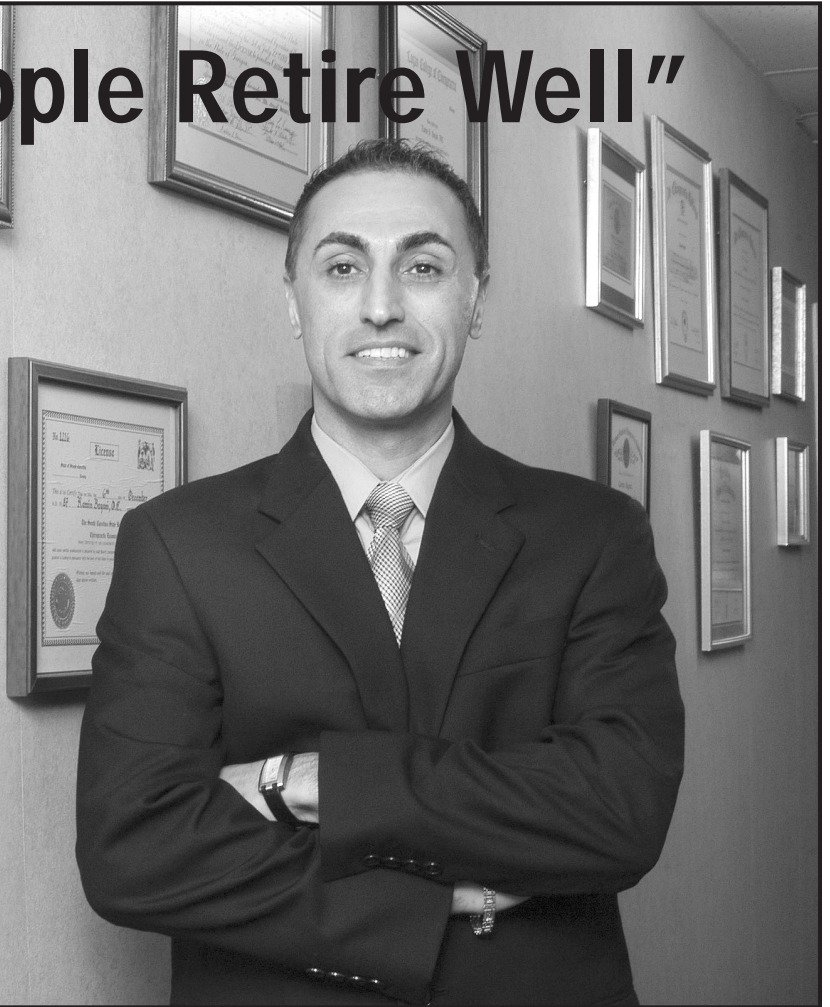
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Financial Representative

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