



involved in legal matters.

4. Milazzo is a registered nurse who holds bachelor's and master's degrees in nursing.
5. Milazzo earned a juris doctor degree in 1978 and is admitted to the Bar of the state of Texas, but has never actively practiced law.
6. From 1976 through 1983 Milazzo worked as a nurse in Houston.
7. Prior to 1983, Milazzo began doing consulting work on medical-legal issues for attorneys and insurance companies in the Houston area.
8. In 1983 Milazzo began working full-time as a legal nurse consultant.
9. In 1985 Milazzo, as sole proprietor of Medical-Legal's predecessor, presented her first seminar on legal nurse consulting.
10. Defendant Melanie Osley ("Osley") earned a bachelor's degree in law enforcement from the University of Evansville in 1977, an associate degree in nursing from the University of Evansville in 1983, a bachelor's degree in nursing from the University of Maryland in 1987, a Small Business Certificate from Manchester Community/Technical College in 1992, a paralegal certificate from Professional Career Institute in 1993 and is presently taking courses towards a master's degree in business administration.
11. Defendant Osley has worked in clinical nursing from 1982 through the present and is currently licensed as a registered nurse in the states of Indiana and Connecticut. She is presently a Certified Emergency Nurse, a designation held since 1987, and was a Critical Care Nurse from 1987 through 1996.
12. Defendant Osley worked as a legal nurse consultant for the law firm of Howard,

Kohn, Sprague & Fitzgerald in Hartford, Connecticut from February, 1990 through April, 1991 and as an independent nurse-consultant from April, 1991 through November, 1994.

13. Defendant Osley also worked as a communications officer for the Indiana State Police from October, 1977 until April, 1980, and thereafter as an evidence security specialist for the same until May, 1981. She has also worked as a legal assistant in the Vanderburgh Prosecutor's Office in Evansville, Indiana and was a probation officer in the Vanderburgh Circuit Court.

14. As a legal nurse consultant at all relevant times hereto, defendant Osley was familiar through experience with medical malpractice, personal injury, products liability, worker's compensation, toxic tort, trusts and estates, and other types of cases involving health issues.

15. From November, 1994 through the present, defendant Osley has been employed as a senior claims representative with Connecticut Medical Insurance Company, a medical malpractice insurance carrier. In her present position, she works with physician insureds and defense attorneys in handling medical malpractice claims. Her duties include attending depositions and trials and monitoring the progress of litigation.

16. Defendant Osley has served on the Board of Directors of AALNC, and from 1990 through 1995 was president of the Connecticut chapter of AALNC.

17. Defendant Janice Ouimette ("Ouimette") earned a bachelor's degree in nursing from the University of Rhode Island in 1971 and a master's degree in nursing from Boston University in 1976.

18. Defendant Ouimette is licensed as a registered nurse in the states of Rhode

Island and Florida and is a full-time practicing obstetrics nurse in Florida. She has practiced nursing in the field of obstetrics full-time from 1971 through 1987 and from 1996 through the present.

19. Defendant Ouimette completed eight of the ten required courses towards a paralegal certificate between 1987 and 1992.

20. Defendant Ouimette worked as a legal nurse consultant for approximately five years for Tate & Elias in Providence, Rhode Island, from 1987 through 1992. During that time, she worked primarily on medical malpractice and personal injury cases on the defense side. From 1992 through 1996, she worked full-time as an independent nurse consultant, doing work for private attorneys.

21. As a legal nurse consultant at all times relevant hereto, Ouimette was familiar through experience with medical malpractice and personal injury, among other types of cases.

22. From 1981 through 1984 Ouimette was a clinical nursing instructor at Rhode Island College.

23. Defendant Ouimette was founder and president of the Rhode Island chapter of AALNC in 1989 and was actively involved through about 1995. In that capacity, she organized more than 100 seminars for nurses in Rhode Island, primarily on legal topics.

24. Defendant Ouimette edited a textbook on perinatal nursing in 1986.

25. Defendant Joette McHugh ("McHugh") earned a diploma in nursing from Highland Hospital School of Nursing, Rochester, New York, in 1975 and an associate degree in liberal arts from Monroe Community College in Rochester, New York in 1975.

26. Defendant McHugh is licensed as a registered nurse in the state of New York

and has been certified as an emergency nurse. She has been a member of American Association of Critical Care Nurses and the Emergency Nurses Association and is a member of the International Association of Forensic Nurses.

27. Defendant McHugh has worked in critical care, emergency room, and trauma nursing at Arnold Gregory Memorial Hospital, Albion, New York, from 1975 through 1988. In that position she was involved in risk management and development of policies and procedures.

28. Defendant McHugh has worked as a nurse consultant for the law firm of Harris, Beach & Wilcox in Rochester, New York, for the past ten years. In that capacity she has worked on medical malpractice and personal injury cases. Her duties include obtaining and summarizing medical records, obtaining and working with medical experts, performing computerized medical literature searches, attending medical-related depositions and educating attorneys on medical issues.

29. Defendant McHugh has been a member of AALNC and served on its Board of Directors from 1992 through 1994, as well as various committees.

30. Defendant McHugh is a member of the Paralegal Division of ATLA and is a member of the New State Trial Lawyers Association.

31. Defendant McHugh has taught courses in advanced cardiac life support, advanced trauma life support and other subjects. She has given presentations to legal nurse consultants on networking and criminal law.

32. Defendant McHugh has published various articles on legal nurse consulting on topics including career options, forensic nursing practice, and criminal law. Her most recent article, entitled *The LNC as a Member of the Litigation Team*, was published in

the National Paralegal Reporter in the spring of 1994 and discussed the profession of legal nurse consulting including practice parameters, cases LNC's evaluate and services the LNC can provide to attorneys.

33. As a legal nurse-consultant at all times relevant hereto, defendant McHugh was familiar through experience with criminal, medical malpractice, and personal injury, among other types of cases.

**b. The Protected Works**

34. The eleven works which are the subject of this action are as follows:

a. *How to Become a Prosperous Medical-Legal Consultant - A Seminar for Nurses Seeking New Adventure*, registration no. TX2-737-316, 12/22/89

b. *How to Quickly Become a Prosperous Medical-Legal Consultant - A Seminar for Nurses Seeking New Adventures and Opportunities*, registration no. PA 455-615, 12/22/89

c. *Medical Legal Consulting - An Exciting New Career Opportunity For Nurses*, registration no. TX3-582-166, 09/14/93

d. *National Medical-Legal Journal*, Vol. 2, No. 2, 2nd Quarter, 1991, registration no. TX-689-012, 11/29/93

e. *How to Easily Avoid Lawyer's Traps - Master the Witness Stand as a Nurse Witness or Testifying Expert*, registration no. TX3-685-285, 11/29/93

f. *How to Detect Tampering in a Medical Record*, registration no. TX-830-884, 05/03/94

g. *How to Screen Medical Malpractice Cases Efficiently and Effectively*, registration no. TX3-833-531, 05/03/94

h. *Developing Your Market Strategy*, registration no. TX3-830-885, 05/03/94

i. *Core Curriculum for Legal Nurse Consulting*, registration no. TX4-140-905, 09/05/95

j. *Intensive Training Institute in medical-Legal Consulting*, registration no.

TX3-663-112, 09/05/95

k. *Medical Library Research - A Down and Dirty Approach*, registration no. TX3-663-153, 09/05/95

35. Each of the subject works listed above was created by Milazzo and is owned by Medical-Legal. Each of the subject works was registered with the United States Copyright Office on the date indicated.

36. The last three subject works, listed above as works “i,” “j,” and “k” were not registered until after the alleged infringement.

37. The subject works created by Milazzo evolved over a period of time, and most took six to twelve months to complete.

38. In creating the works, Milazzo drew on common knowledge obtained during her training and experience as a nurse, her consulting for attorneys, actual cases on which she worked, questions from persons who attended her seminars, and periodicals she received from nursing and legal organizations.

39. Prior to creating the subject works, Milazzo was a member of the American Trial Lawyers Association (“ATLA”), American Association of Legal Nurse Consultants (“AALNC”) and the National Nurses in Business. As such, she received numerous publications on medical and legal topics from these organizations.

40. Much of the training, experience, and knowledge on which Milazzo based her writings was the same training, experience and knowledge possessed by the defendants.

**c. The Accused Work**

41. In July, 1994, defendants Osley and McHugh met in Albany, New York for the

purpose of planning one or more seminars in the field of legal nurse consulting.

42. Planning for the seminar or seminars included the drafting of the written materials to be distributed at such seminars.

43. Although defendants Osley and McHugh each attended not more than two of plaintiff's seminars, this attendance was several years before they created the LNC materials.

44. Both defendants Osley and McHugh admit having had access to the plaintiff's subject works.

45. Both defendants Osley and McHugh had discarded any materials they had received at plaintiff's seminars before they began planning LNC's first seminar.

46. Defendants Osley and McHugh prepared the materials for the Langhorne seminar using information, facts, and data gained through their years of experience serving in the medical and legal professions as nurses, paralegals, and legal nurse consultants.

47. LNC's first seminar was presented March 17 & 18, 1995 in Langhorne, Pennsylvania.

48. Although defendant Ouimette was invited to work with defendants McHugh and Osley in preparing the materials for the Langhorne seminar, family reasons prevented her from doing so.

49. The materials for the Langhorne seminar were written, prepared, edited, and distributed solely by defendants Osley and McHugh. After the initial meeting in Albany, New York in July of 1994, the materials were circulated and discussed back and forth by phone and fax.

50. Defendant Ouimette took no part in the writing, editing, distribution, or planning of any written or other materials for the Langhorne seminar.
51. Defendant Ouimette did not attend the Langhorne seminar.
52. The only connection Ouimette had with LNC before the Langhorne seminar was to advise the other two on their application to the Connecticut Nurses Association to approve the seminar for continuing education requirements in that state.
53. Prior to April, 1995, defendant Ouimette had no expectation of any income from LNC.
54. After April, 1995, defendant Ouimette expected to share in any profits realized by LNC.
55. After the Langhorne seminar, defendant Ouimette's sole involvement in the planning of a second seminar in Fairfax, Virginia was editing certain materials to be used at that seminar.
56. The Fairfax seminar was scheduled for September 16 & 17, 1995.
57. Due to low attendance, the Fairfax seminar ended after the first day, and LNC ceased doing business immediately afterward.
58. During its existence, LNC never made a profit.
59. Although no partnership agreement was ever signed, at all times relevant hereto LNC Education Associates ("LNC") operated as a partnership, based on verbal agreements, between defendants Osley and McHugh through March, 1995, and after April, 1995, between defendants Osley, McHugh, and Ouimette, with each individual anticipating an equal share of any profits realized.
60. Neither defendants Osley nor McHugh nor Ouimette ever worked full-time for

LNC. All three defendants maintained regular full-time jobs while doing any work for LNC.

61. Defendant Ouimette did not distribute or assist in the distribution of any materials at the Fairfax seminar, nor did she attend the Fairfax seminar.

62. Defendant Ouimette did not have access to plaintiff's protected works when she revised or edited any LNC materials.

63. Though defendant Ouimette assisted in the planning of the Fairfax seminar by editing written materials, she never possessed the right and ability to control or supervise any of the activities of LNC.

64. The majority of the written material comprising both the protected works and the accused work is a compilation of facts, data, and information generic and common to the legal and medical professions, and presented in a basic outline form.

## **II Conclusions of Law**

### **a. Liability**

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1338(a).

Venue is proper in this district pursuant to 28 U.S.C. § 1400(a).

2. The Copyright Act grants the owner of a copyright the exclusive rights to the copyrighted work. 17 U.S.C. § 106.

3. Relevant to this case, under the Copyright Act, the copyright owner has the exclusive rights to do and authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending . . .

17 U.S.C. § 106.

4. A work must be registered with the Register of Copyrights before the copyright owner can recover statutory damages or counsel fees. 17 U.S.C. § 412(2).

5. The elements of a cause of action for copyright infringement are 1) that the plaintiff owned the copyrighted material, and 2) that the defendants copied the copyrighted material. Ford Motor Company v. Summit Motor Products, Inc., 930 F.2d 277, 290 (3d. Cir.), cert denied, 502 U.S. 939, 112 S. Ct. 373 (1991).

6. The copyright registration, made within five years after first publication, is prima facie evidence of the validity of a copyright and the facts stated in the certificate. 17 U.S.C. § 410(c). It is the defendants' burden to rebut a prima facie case presented by registrations. Nimmer on Copyrights §12.11(B)(1) (1996). In this case, plaintiff has established the validity of the copyrights, with respect to the accused work, of eight of the eleven subject publications.

7. In order to prevail in a copyright infringement suit, the plaintiff must prove that there was copying of constituent elements of the work that are original. Feist Publications, Inc. v. Rural Telephone Service Company, 499 U.S. 340, 361, 111 S. Ct. 1282, 1295-96 (1991).

8. Because there is rarely direct evidence of copying, it may be proven inferentially with a showing that the defendant had access to the copyrighted material and the allegedly infringing item is substantially similar to the copyrighted material. Whelan

Assocs., Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222, 1232 (3d Cir. 1986),  
cert. denied, 479 U.S. 1031, 107 S. Ct. 877 (1987).

9. The sine qua non of copyright is originality. Feist, 499 U.S. at 345, 111 S. Ct. at 1287. Copyright protection may extend only to those components of a work that are original to the author. Id. at 348, 111 S. Ct. at 1289. “Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.” Id. at 345, 111 S. Ct. at 1287.

10. “A copyright of a compilation does not lead automatically to a conclusion that all materials therein are copyrighted. The owner must prove that the alleged infringer appropriated a protectable element of the compilation consisting of the owner’s original selection, coordination or arrangement.” Feist Publications, Inc., 499 U.S. 340, 111 S. Ct. 1282.

11. This inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another’s publications to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.

Feist, 499 U.S. at 349, 111 S. Ct. at 1289.

12. Even if it is determined that the allegedly infringed materials were the original work of the copyright holder, the trier of fact still must determine whether or not there is “substantial similarity” between the works of the plaintiff copyright holder and the defendants’ accused works. Ford Motor Company, 930 F.2d at 291.

13. Substantial Similarity can be broken into two tests, both of which must be met. One is the “extrinsic test,” which is “whether there is sufficient similarity between the two

works in question to conclude that the defendant used the copyrighted work in making her own.” Id. A second test is called the “intrinsic test” and is “whether, from a lay perspective, the copying was an unlawful appropriation of the copyrighted work.” Id. “‘Unlawful appropriation’ has been defined as ‘taking of the independent work of a copyright owner which is entitled to the statutory protection.’” Id. (quoting Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 908 (3d Cir. 1975)).

14. Several factors should be considered when determining if an appropriation occurred, including the reciprocal relationship between creativity and independent effort, the nature of the protected material, and the setting in which it appeared. In short, copying is demonstrated when someone who has access to a copyrighted work uses materials substantially similar to the copyrighted work in a manner which interferes with a right protected by 17 U.S.C. § 106. Ford Motor Company, 930 F.2d at 291.

15. “Because both evaluations require scrutiny of the items, the determination of substantial similarity is exceedingly fact intensive.” Fyk v. Roth, 1995 WL 321803, No. 94-cv-3826, at \*2 (E.D. Pa. May 25, 1995).

16. The law imposes no prohibition upon those who, “without copying, independently arrive at the precise combination of words or notes which have been copyrighted.” Whelan Associates v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222, 1227 (3d Cir. 1986).

17. In this case, the majority of the accused material created by defendants Osley and McHugh was independently created by defendants Osley and/or McHugh based on their extensive background, training and experience in the legal and medical professions.

18. Moreover, in this case, many of the plaintiff's subject works are lists of facts, information, or concepts which are generic and common to the medical and/or legal professions, and which do not bear a minimum spark of creativity or originality necessary to subject them to copyright protection.

19. Nonetheless, a portion of one of the defendants' accused works is substantially similar to one portion of one of the plaintiff's protected subject works. In particular, the third page of the accused LNC work (Pl.'s Trial Ex. 23, at 3) is substantially similar to the second page of plaintiff's *How to Quickly Become a Prosperous Medical-Legal Consultant - A Seminar for Nurses Seeking New Adventures and Opportunities*, registration no. PA 455-615, 12/22/89. (Pl.'s Trial Ex. 14, at 2).

20. Viewing the above-referenced pages in a side by side comparison, the Court finds that the accused work satisfies the "extrinsic test" in that there is "sufficient similarity between the two works in question to conclude that the defendant used the copyrighted work in making her own." Ford Motor Company, 930 F.2d at 291.

21. Specifically, the title of the accused LNC above-referenced page states: "Tips In Enjoying Your Seminar." (Pl.'s Trial Ex. 23, at 3.) The protected works' page is entitled, "Enhance Your Seminar Enjoyment." (Pl.'s Trial Ex. 14, at 2.) The protected work then states, "What you gain from this seminar depends as much on you as it does on the staff of Medical-Legal Consulting Institute, Inc. We would like to recommend some ideas which will successfully increase your enjoyment of this seminar." (Id.) The accused work states: "What you take home with you depends not only on your instructors, but also on YOU. Here are some thoughts to assist you in increasing your enjoyment of this seminar." (Pl.'s Trial Ex. 23, at 3.)

22. The protected work then states:

1. Know why you're here. Recognize the importance of your role today. Be prepared to work and concentrate. Your active participation is vital to the outcome. Be open to new challenges and opportunities and to different viewpoints.
  2. If there is something that will make you more comfortable, please tell a staff member. They are here for you.
  3. Network with your colleagues. Each of you has very diverse talents which are great future resources.
  4. Be respectful of your colleagues at all times. Please DO NOT TALK unless it is to the group as a whole.
  - . . . .
  7. Set target dates for applying the concepts you have learned here today. Apply as many concepts as possible to your professional practice.
  8. Write a thank-you note to the person who made your attendance possible -- even if that person is you. . . .
- This is a day away from your daily routine. Enjoy the luxury. It is an opportunity to regroup, to increase your motivation, to learn new ideas, and to set new goals for yourself. We have worked hard to make this day your day. We hope you enjoy it.

(Pl.'s Trial Ex. 14, at 2.)

23. The substantially similar accused work states:

- Know why you are here. When you understand your own objectives, you will enhance your ability to use the information you will learn.
  - Be prepared to work and concentrate. Your active participation is vital to your success in attending this seminar.
  - Be open to new challenges and opportunities and most important [sic], to different and new viewpoints.
  - If there is something that will make you more comfortable, please let us know.
  - Network with other participants. Each of us has unique and diverse talents that can be great resources to you as you pursue your career in legal nurse consulting.
  - Respect those around you. Please do not talk unless it is to the entire group.
  - Set target dates for yourself for applying the concepts you have learned.
  - Thank the person who made your attendance possible, even if that person is YOU.
- This is a seminar for you to enjoy away from the hustle and bustle of everyday life as a nurse. It offers you opportunities beyond imagination,

chances to motivate yourself, chances to learn new ideas and to set new goals for yourself. We sincerely hope you enjoy it!

(Pl.'s Trial Ex. 23, at 3.)

24. Comparing the two works, the protected work states, "Know why you're here." The accused work states, "Know why you are here." The protected work states, "Be prepared to work and concentrate. Your active participation is vital to the outcome." The accused work states, "Be prepared to work and concentrate. Your active participation is vital to your success in attending this seminar." The protected work states, "Be open to new challenges and opportunities and to different viewpoints." The accused work states, "Be open to new challenges and opportunities and most important [sic] to different and new viewpoints." The protected work states, "If there is something that will make you more comfortable, please tell a staff member. They are here for you." The accused work states, "If there is something that will make you more comfortable, please let us know." The protected work states, "Network with your colleagues. Each of you has very diverse talents which are great future resources." The accused work states, "Network with other participants. Each of us has unique and diverse talents that can be great resources to you as you pursue your career in legal nurse consulting." The protected work states, "Be respectful of your colleagues at all times. Please DO NOT TALK unless it is to the group as a whole." The accused work states, "Respect those around you. Please do talk unless it is to the entire group." The protected work states, "Set target dates for applying the concepts you have learned here today." The accused work states, "Set target dates for yourself for applying the concepts you have learned." The protected work states, "Write a thank-you note to the

person who made your attendance possible -- even if that person is you.” The accused work states, “Thank the person who made your attendance possible, even if that person is YOU.” The protected work states, “This is a day away from your daily routine. Enjoy the luxury. It is an opportunity to regroup, to increase your motivation, to learn new ideas, and to set new goals for yourself.” The accused work states, “This is a seminar for you to enjoy away from the hustle and bustle of everyday life as a nurse. It offers you opportunities beyond imagination, chances to motivate yourself, chances to learn new ideas and to set new goals for yourself.” Finally, the protected work ends, “We hope you enjoy it,” while the accused work ends, “We sincerely hope you enjoy it!”

25. In addition, the above-excerpted portion of the defendants’ accused work satisfies the “intrinsic test” in that, “from a lay perspective, the copying was an unlawful appropriation of the copyrighted work.” Ford Motor Company, 930 F.2d at 291. In particular, referencing the above-excerpted portion, not only does the accused work use substantially similar, and sometimes identical language as the protected work, but it also is laid-out on the page in the same order and in an almost identical manner as the protected work such that, from a lay perspective, the accused work appears to be an unlawful appropriation.

26. Furthermore, the above-referenced page of the plaintiff’s protected work (Pl.’s Trial Ex. 14, at 2), unlike the majority of the other protected works, is not merely a compilation of facts and information generic and common to the medical and legal professions, but rather, consists of Milazzo’s original thoughts and subjective ideas on how to derive the maximum benefit from her seminar presentations.

27. Thus, defendants Osley and McHugh are liable to plaintiff for copyright

infringement as to one of the protected works. (Pl.'s Trial Ex. 14, at 2.)

28. One who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing activity of another, may be held liable as a contributory infringer. Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 749 F.2d 154, 160 (3d Cir. 1984).

29. A defendant is vicariously liable for copyright for the infringing acts of others if the defendant had the right and ability to supervise the infringing activity and also has a direct financial interest in such activities. American Telephone and Telegraph Company v. Winback and Conserve Program, Inc., 42 F.3d 1421, 1441 (3d Cir. 1994), cert. denied, 514 U.S. 1103, 115 S. Ct. 1838 (1995). Thus, the dispositive factors in a determination of vicarious liability are whether the defendant had the right and ability to supervise the infringing activities, and had a direct financial interest in such activities. 18 Am. Jur. 2d Copyright and Literary Property § 198 (1985).

30. In this case, defendant Ouimette merely edited some of the accused work after April 19, 1995 and never had the right or ability to control or supervise the infringing activity.

31. Moreover, in this case, defendant Ouimette's editing did not contribute to, or induce the other two defendants in infringing on the protected works, nor did defendant Ouimette have knowledge that her editing might aid the other two defendants in infringing on the protected works.

32. In this case, plaintiff has not presented any evidence to suggest that defendant Ouimette edited the specific portion of LNC's accused work found to be infringing.

33. Defendant Ouimette, however, had a direct financial interest in the activities of

LNC.

34. Nonetheless, as defendant Ouimette did not induce, cause, or contribute to the infringing activity, and as she did not possess the right and ability to supervise the infringing activity, she is not liable for copyright infringement either directly or vicariously, or through contributory infringement, and she is, therefore, entitled to judgment in her favor.

**b. Damages**

35. Under the statute, an infringer of copyright is liable for either actual damages as defined at 17 U.S.C. § 504(b), or for statutory damages as defined at 17 U.S.C. § 504(c). See 17 U.S.C. § 504(a).

36. In this case, plaintiff has sued for statutory damages as well as a permanent injunction against further infringement, and attorney's fees and costs.

37. Statutory damages for each infringement may be assessed in a sum of not less than \$500 or more than \$20,000 as the court considers just. 17 U.S.C. § 504(c).

38. In this case, the parties have stipulated that the minimum statutory damages of \$500 per infringement shall apply.<sup>1</sup>

39. For the above-mentioned infringement, the total amount of statutory damages is \$500.

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<sup>1</sup> Notwithstanding the existence of the stipulation, the statutory damages in this case would still be at or about the minimum based on 1) the expenses saved and profits reaped by the defendants in connection with the infringement, 2) the revenues lost by the plaintiff as a result of the defendants' conduct, and 3) the infringer's state of mind - whether wilful, knowing, or merely innocent. Nick-O-Val Music Co., Inc. v. P.O.S. Radio, Inc., 656 F. Supp. 826, 828 (M.D. Fla. 1987). In this case, the defendants made no profit, and ceased doing business halfway through their second seminar. Moreover, though there was no evidence presented as to plaintiff's lost revenues, the poor attendance at the defendants' seminars suggests that they did not steal very many of the plaintiff's potential clients. Finally, there was little or no evidence presented at trial as to the defendants' states of mind.

40. Defendants McHugh and Osley are jointly and severally liable for the above-mentioned infringement. 17 U.S.C. § 504(c).

41. Defendants McHugh and Osley also will be permanently enjoined from infringing, in any manner, upon all copyrighted materials produced, created, or owned by the plaintiff, Medical-Legal Consulting Institute, Inc.

**c. Attorneys' Fees**

42. The parties in this case have moved for attorneys' fees.

43. The Copyright Act, at 17 U.S.C. § 505, provides that the Court, "in its discretion may allow the recovery of full costs" including an award of "reasonable attorney's fee to the prevailing party as part of the costs." *Id.* See also Fogerty v. Fantasy, Inc., 510 U.S. 517, 533, 114 S. Ct. 1023, 1033 (1994).

44. Although fees and costs are discretionary, ". . . they are the rule rather than the exception and should be awarded routinely." Micromanipulator Co. v. Bough, 779 F.2d 255, 259 (5th Cir. 1985). Bad faith is not required for an award of attorneys' fees and costs. Lieb v. Topstone Industries, Inc., 788 F.2d 151, 155-56 (3d Cir. 1986).

45. Factors to be considered in whether fees should be awarded include frivolousness, motivation, objective unreasonableness and the need in particular circumstances to advance considerations of compensation and deterrent. Lieb, 788 F.2d at 155.

46. In this case, plaintiff has not brought a frivolous claim. The accused work and protected works are similar in many respects. It is only because of the very minimal

level of creativity and originality of the subject protected works, and the fact that they are basically comprised of compilations of facts, data, and information generic and common to the medical and legal professions, that the majority of the accused work does not infringe. Thus, in this case, there was an honest dispute over whether there was an infringement.

47. Nor was the plaintiff improperly motivated in bringing the instant infringement suit against these specific defendants. The plaintiff had made it clear to the AALNC that it would aggressively protect its copyrights against any infringer, and has previously acted to protect its rights with respect to its copyrighted works. (See Pl.'s Exs. 33, 36 & 50.)

48. This Court thus finds that an award of reasonable plaintiff's counsel fees is appropriate in this case as to the liable defendants, Osley and McHugh. Furthermore, as a prevailing party, defendant Ouimette is entitled to reasonable attorney's fees and costs as well.

49. Once the Court determines that attorney's fees should be awarded, it must determine "what amount is reasonable under the circumstances." Lieb, 788 F.2d at 156. The relevant factors for the court to consider include 1) the relative complexity of the litigation, 2) the amount that the client has been charged,<sup>2</sup> 3) the relative financial strength of the parties, 4) the damages, and 5) bad faith, if present. Id.

50. The Court should also consider in this case whether the retention of out-of-town counsel with the accompanying increased expense was necessary. Id. Moreover, the Lieb Court noted that the attorney's fees requested by the prevailing party in that case

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<sup>2</sup> Attorney's fees greater than what the client has been charged may not be assessed under the Copyright Act, but the award need not be that large either. 17 U.S.C. § 505; Lieb, 788 F.2d at 156.

were large and might have been both “disproportionate to the amount at stake and excessive in light of the [losing party’s] resources. Id. The Lieb Court emphasized “that the aims of the statute are compensation and deterrence where appropriate, but not ruination.

51. In this case, the defendants do not challenge the reasonableness of the hourly rate charged by plaintiff’s attorneys or paralegals.<sup>3</sup> However they dispute the number of hours charged. (Post-Trial Brief of Defendants Osley and Ouimette, at 11.)

52. In this case, the litigation was not particularly complex, however whether the accused work was substantially similar to the plaintiff’s protected works was a very close call, and required significant factually intensive side-by-side comparison.

53. In this case, none of the attorneys are requesting fees and costs amounting to more than their respective clients were charged. In addition, in this case, the financial strength of the liable defendants is not part of the record.

54. In this case the damages are minimal, and there was no bad faith either on the part of the defendants in creating their work, or on the part of the plaintiff in asserting their rights under the Copyright Act against the defendants.

55. Moreover, as the plaintiff Institute and its principal, Milazzo, are respectively located and reside in Houston, Texas, their use of Houston-based counsel to protect their copyrights is reasonable. Moreover, as the defendants were represented by Philadelphia-based counsel, and as the case was tried in the Eastern District of

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<sup>3</sup> This fact is noteworthy because plaintiff’s Petition for Attorney’s Fees does not appear to include any affidavits from other local practicing attorneys which are customarily used in this District to establish that the requested hourly rates are in accord with the prevailing market rates in the community. See Washington v. Philadelphia Cty. Ct. Of Common Pleas, 89 F.3d 1031, 1035 (3d. Cir. 1986).

Pennsylvania in Philadelphia, the plaintiff's use of local counsel to assist in the litigation was also reasonable.

56. However, the amount of attorney's fees requested by plaintiff is highly disproportionate to the amount at stake, where the plaintiff requests \$70,014.37 in costs and fees and where they had stipulated to statutory damages amounting to not more than \$4,000.

57. Accordingly, the plaintiff's request for attorney's fees will be granted in part and reduced by an amount which the Court finds appropriate.

58. Defendant Ouimette's request for attorney's fees and costs is reasonable as presented and will be granted.

An appropriate Order of Judgment follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MEDICAL-LEGAL CONSULTING :  
INSTITUTE, INC. :  
:  
Plaintiff, :

	:	
	:	CIVIL ACTION
	:	
v.	:	NO. 95-7824
	:	
	:	
JOETTE MCHUGH, MELANIE OSLEY,	:	
JANICE OUIMETTE, d/b/a LNC	:	
EDUCATION ASSOCIATES	:	
	:	
Defendants.	:	

**JUDGMENT**

AND NOW on this 11th Day of June, 1998, for all of the reasons set forth in my accompanying Findings of Fact and Conclusions of Law, I HEREBY ENTER JUDGMENT as follows:

1) Judgment SHALL BE ENTERED in favor of defendant Ouimette and against plaintiff as to defendant Ouimette. Defendant Ouimette is HEREBY AWARDED counsel fees in the amount of **\$1,440.00**, and costs in the amount of **\$931.67**.

2) Judgment SHALL BE ENTERED in favor of plaintiff and against defendants Osley and McHugh, jointly and severally, for one violation of 17 U.S.C. § 106. Statutory damages pursuant to 17 U.S.C. § 504(c) in the amount of **\$500.00**, plus post judgment interest in accordance with 28 U.S.C. § 1961 are HEREBY ASSESSED against defendants McHugh and Osley.

3) Plaintiff is HEREBY AWARDED counsel fees in the amount of **\$35,000.00**, plus costs in the amount of **\$7,323.76**. It is further ORDERED that all other counsel fees and costs SHALL BE the responsibility of the respective parties.

4) Defendants McHugh and Osley, as well as LNC Education Associates and any successors thereto, are PERMANENTLY ENJOINED from infringing, in any manner, upon all copyrighted materials produced, created, or owned by the plaintiff, Medical-Legal Consulting Institute, Inc.

BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.