

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

**American Board of Internal Medicine
(ABIM),**

Plaintiff,

vs.

Jaime A. “Jimmy” Salas Rushford, M.D.,

Defendant

CASE No. 14-cv-06428-KSH-CLW

Return Date: April 4, 2016

MEMORANDUM OF LAW
in support of Rule 12(c)
Motion Requesting Dismissal
for Failure to State a Claim
upon which relief can be granted

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Defendant Jaime A. “Jimmy” Salas Rushford, M.D., submits this memorandum in support of his motion to dismiss with prejudice the Complaint [Dkt. 1] by Plaintiff American Board of Internal Medicine (“ABIM”) on the grounds that it fails to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(h)(2)(B) and 12(c). This motion relates only to Plaintiff’s Complaint against Defendant for which we believe the pleadings to be closed for purposes of Rule 12(c).

1. Statement of Facts

Defendant Salas Rushford was one of many students in a popular review course eligible for continuing medical education credits and offered on May 2009 by renowned Board-certified internist Dr. Rajender K. Arora in the Graduate Center of the City University of New York (CUNY), in order to prepare for a board certification examination in Internal Medicine given in Puerto Rico on August 20, 2009.

Plaintiff ABIM’s allegations against Defendant Salas Rushford are based entirely on his communications with his instructor prior to taking the examination. ABIM does not allege that Defendant Salas Rushford repeated any questions that he saw taking the examination, or that Salas Rushford profited from or sold any questions at any time. Instead, ABIM bases its entire case on alleged communications by Defendant Salas Rushford as a student with his instructor, Dr. Arora, more than six years ago prior to Salas Rushford taking the examination.

Defendant Salas Rushford took and passed Plaintiff ABIM’s test on August 20, 2009. (Complaint ¶¶47-48) Over three (3) months later, on December 2009, Plaintiff ABIM sued Dr. Arora and others alleging that the content of the May 2009 course included material protected by Plaintiff under copyright law. (Complaint ¶49, and see *ABIM v. Arora*, No. 2:09-cv-05707-JCJ (E.D. Pa.)). Plaintiff obtained all its alleged evidence against Defendant on December 2009 –

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more than four years prior to its filing this lawsuit – as a result of a seizure order in that suit against Dr. Arora (Complaint ¶¶49-50).

Plaintiff, the American Board of Internal Medicine (ABIM), alleges that it is the registered owner of the copyrights over a total of fifty (50) separate secure tests, as defined by 37 C.F.R. §202.20(b)(4), which were independently registered between 1986 and 2009.¹ (Complaint ¶¶29 [Dkt. 1]). Plaintiff here alleges that the content of four (4) emails sent by Defendant to Dr. Arora, as part of Defendant's preparation prior to taking the test, infringed upon Plaintiff's copyrights over its fifty separate and distinct works. Two of those emails are dated August 12, 2009 (Complaint ¶¶36-40), one is dated August 13, 2009 (Complaint ¶¶41-42), and a final one is dated August 16, 2009 (Complaint ¶44). (See Plaintiff's Exhibits B-D and F [Dkts. 1-2, 1-3, 1-4, 1-6]). Plaintiff further avers that Defendant received (but did not create) an e-mail sent by Dr. Arora dated August 13, 2009 the content of which also allegedly infringed on Plaintiff's copyrights over those same fifty works (Complaint ¶43). (See Plaintiff's Exhibit E [Dkt. 1-5]). Plaintiff additionally alleges other unspecified emails, all of which it admits were sent on or before August 19, 2009, before Defendant took the test on August 20, 2009 (Complaint ¶46). Plaintiff never formally included Defendant in its 2009 action against Dr. Arora. It instead filed this action almost five (5) years later.

Plaintiff's action is solely about copyright infringement. Plaintiff does not claim that Defendant sold the materials or that he sent them to anyone but his professor, Dr. Arora. Plaintiff does not offer any comparison between the content of any of its fifty copyrighted tests and the

¹ Plaintiff did not attach any proof of registration for any of the 16 works dated before 2000 in paragraph no. 29 of the Complaint. It did attach copies of the signed Certificates of Registration for the examinations dated on or after 2000 in paragraph no. 29 of the Complaint, except for TC 5-909-592, TX 5-909-593, TX 5-909-594, and TX 5-909-595 for which it attached a website printout which appears to be from the Copyright Catalog of the Library of Congress.

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content of Defendant's e-mails it alleges as evidence. Plaintiff also does not offer a comparison between the Arora course content—that Defendant and others may have acquired by simply taking notes in class—and Defendant's allegedly infringing material here, even though Plaintiff has alleged that Dr. Arora "disseminated approximately 1,000 of ABIM's secure copyrighted examination content to course attendees." (See paragraph no. 1 of the Complaint in the case of *ABIM v. Arora*, No. 2:09-cv-05707-JCJ (E.D. Pa.), which is explicitly relied upon in the Complaint here, ¶¶ 49-50.)

2. Standard for Motions to Dismiss for failure to state a claim

a. Motions for failure to state a claim under Rule 12(c), in general

For a pleading to be sufficient to sustain an action it must show that the pleader is entitled to relief. Fed.R.Civ.P. 8(a)(2). When the defense of failure to state a claim upon which relief can be granted is raised via Motion for Judgment on the Pleadings under Rule 12(c), the standard is the same as that for motions to dismiss under Rule 12(b)(6). *Revell v. Port Authority of New York & New Jersey*, 598 F.3d 128, 134 (3rd Cir. 2010).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To assess the merits of that motion, the Court first delineates the elements a plaintiff must plead to state a claim for relief. *Id.*, at 675. Then, it identifies and excludes conclusory pleadings because those are not entitled to the assumption that they are true. *Id.*, at 679. The Court then determines whether the remaining "well-pleaded factual allegations... plausibly give rise to an entitlement to relief." *Id.* Plausible means something more than possible. *Id.*, at 678. It requires more than just "facts that are merely consistent with a defendant's liability." *Id.* Determining plausibility is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*, at 679.

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b. When several copyright infringement claims are joined in one action

“A party asserting a claim... may join, as independent or alternative claims, as many claims as it has against an opposing party.” Fed.R.Civ.P. 18(a).

In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), the Supreme Court held that each potentially infringing act gives rise to a separate claim with its own separate limitations period and accrual date:

[T]he separate-accrual rule attends the copyright statute of limitations. Under that rule, when a defendant commits successive violations, the statute of limitations runs separately from each violation. **Each time an infringing work is reproduced or distributed, the infringer commits a new wrong. Each wrong gives rise to a discrete ‘claim’ that ‘accrue[s]’ at the time the wrong occurs.**

Petrella, 134 S. Ct. at 1969 (emphasis added). The Supreme Court stated this in the context of timeliness but, since it is a description of the contours of a copyright claim, we see no logical reason why it should not apply to all aspects of pleading copyright claims. After all, it is a tautology that a claim that can be dismissed independently of others, leaving those others intact, is an independent claim; and, all independent claims are individually subject to all the requirements of pleading. See for example, *King Fisher Marine Service, Inc. v. 21st Phoenix Corp.*, 893 F. 2d 1155, 1158, n.2 (10th Cir. 1990) (“a court may decide claims joined under rule 18(a) only if independent jurisdiction and venue requirements are satisfied”).

Plaintiff alleges that the content of four (4) emails sent by Defendant to Dr. Arora between August 12, 2009 and August 16, 2009 infringed upon Plaintiff's copyrights over a total of fifty separate and distinct works. Plaintiff further avers against Defendant an email sent by Dr. Arora on August 13, 2009 which also allegedly infringed on Plaintiff's copyrights over those same fifty works. Plaintiff also alleges other unspecified emails not attached to the Complaint, but all occurring on or before August 19, 2009. Therefore, since Plaintiff joined at least five (5)

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independent claims in a single action it must plausibly allege each individual claim separately as to timeliness, sufficiency/plausibility and jurisdiction.

3. All causes of action are time-barred by the three (3) year statute of limitations

The individual causes of action for each of the alleged infringements are time-barred pursuant to the statute of limitations of the Copyright Act which declares that “[n]o civil action shall be maintained under the provisions of this title unless it is **commenced within three years after the claim accrued.**” 17 U.S.C. §507(b) (emphasis added). All of Defendant’s allegedly infringing acts (the emails) occurred on or before August 19, 2009. (Complaint, ¶46). This action was filed on October 17, 2014. No prospective injunctive relief is requested.

a. Each claim accrued at the time each allegedly infringing act occurred

In *Petrella*, the Supreme Court stated that “[a] **copyright claim ... arises or ‘accrues’ when an infringing act occurs.**” 134 S. Ct., 1969. Although this was part of the *ratio decidendi* in that case, the Court invited further litigation of the issue by noting that the justices “have not passed on the question [of the ‘**discovery rule**’ that] nine (9) Courts of Appeals have adopted, as an alternative to the incident of injury rule, [and] which starts the limitations period when ‘the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.’” *Id.*, at n.4 (quoting *William A. Graham Co. v. Haughey*, 568 F.3d 425, 437 (3rd Cir. 2009) (hereinafter *Graham I*)).

The discovery rule was generally applied to Copyright cases without much debate or inquiry until 2004 because, as the Supreme Court has “observed... lower federal courts ‘generally apply a discovery accrual rule when a statute is silent on the issue’... [even though the Supreme Court has] not adopted that position as [its] own.” *TRW Inc. v. Andrews*, 534 U.S. 19, 28-34 (2001) (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). Since then, “an emerging consensus [in the

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Southern District of New York] had developed that the statute of limitations runs from the time of infringement (i.e. injury), not from discovery.” *Capitol Records, LLC v. Harrison Greenwich, LLC*, 44 Misc. 3rd 202, 984 N.Y.S.2d 274, 277-78 (Sup. Ct. NY 2014). Those following the incident of **injury rule**² have done so based on Judge Lewis A. Kaplan's analysis in the case of *Auscape Int'l v. Nat'l Geographic Soc'y*, 409 F. Supp. 2d 235, 243-47 (S.D.N.Y. 2004), which, in turn, applied to the Copyright Act the holding in *TRW* that if a statute is silent on when the moment of accrual occurs, applying the discovery rule requires that it be implied “from the structure or text of the particular statute.” *TRW*, 534 U.S. at 27-28.³

Copyright is certainly not the sort of “humane” legislation, *Id.*, at 37 (Scalia, J. concurring) (quoting *Urie v. Thompson*, 337 U.S. 163, 169-171 (1949)), that governs “an area of the law that cries out for application of a discovery rule,” *TRW*, 534 U.S., at 28, such as “latent disease or medical malpractice.” *Id.*, at 27 (citing *Rotella*, 528 U.S., 555). And copyright infringement rarely has to do with concealed fraud, and is certainly not inherently about concealed fraud, which is the only other area where the Supreme Court has authorized use of a discovery rule. *TRW*, 534 U.S., at 27 (quoting *Holmberg v. Armbrecht*, 327 U. S. 392, 397 (1946)); see also *Merck & Co. v. Reynolds*, 559 U.S. 633, 644 (2010) (“the [discovery] rule arose in fraud cases”).

Therefore, Judge Kaplan studied the structure and history of the Copyright Act and reasoned that the Congressional intent of the Copyright Act limitations period was “to remove the uncertainty concerning timeliness that had plagued the copyright bar”, *Auscape*, 409 F. Supp. 2d,

² See for example *John Wiley & Sons, Inc. v. DRK Photo*, 998 F. Supp. 2d 262, 286 (S.D.N.Y. 2014); *Urbont v. Sony Music Entertainment*, 863 F.Supp.2d 279 (S.D.N.Y. 2012); and see *CA, Inc. v. Rocket Software, Inc.*, 579 F. Supp. 2d 355, 360 (E.D.N.Y. 2008).

³ In his concurrence to Justice Ginsburg’s majority opinion in *TRW*, Justice Scalia called the discovery rule “a bad wine of recent vintage.” *TRW*, at 37 (Scalia, J. concurring). Note that Justice Ginsburg wrote for the Court in both *TRW* and *Petrella*.

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at 245; that Congress discussed the general rule that copyright infringement “by its very nature is not a secretive matter”, *Id.*; and that “Congress was aware that situations would arise in which a copyright owner might not know or have reason to know of an infringement within three years after its occurrence”, *Id.*; and therefore knowingly decided to enact a statute of limitations that “would not necessarily allow a remedy for every wrong.” *Id.*, at 246. Congress wanted to avoid turning infringements that draw little attention to themselves into federal cases many years after the fact.

As Judge Buchwald explained in *Urbont*,

If Congress had envisaged that a discovery rule would govern civil copyright claims, statutory exceptions for fraudulent concealment or other instances in which a plaintiff was justifiably ignorant of his claim would have been superfluous. ... [T]he possibility of equitable tolling, particularly for cases of fraudulent concealment, works in concert with the injury rule to create a sensible regime under which infringement claims accrue in a predictable and consistent manner and yet plaintiffs may be excused for ignorance of their claims if the defendants are culpable for intentionally concealing the existence of those claims. ... Thus, whereas the discovery rule does not ordinarily apply to non-fraud claims (as it is generally expected that a plaintiff will be able to discover the conduct underlying non-fraud claims), the fraudulent concealment doctrine may be used to toll the limitations period for non-fraud claims where the plaintiff is able to establish that the defendant took affirmative steps beyond the allegedly wrongful activity itself to conceal her activity from the plaintiff.

Urbont, 863 F.Supp.2d, at 285-86 & n.7 (2012).

Ten years after Judge Kaplan’s original decision, on April 4, 2014, in *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124 (2nd Cir. 2014), the Second Circuit decided against the emerging consensus on the incident of injury accrual rule and adopted the discovery accrual rule. A month later, the Supreme Court decided *Petrella* and reopened the question. See *Chicago Building Design, P.C. v. Mongolian House, Inc.*, 770 F.3d 610, 612, 614-16 (7th Cir. 2014) (recognizing that *Petrella* potentially abrogated the discovery rule in the copyrights context). The

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two Southern District of New York cases we could find that discuss the matter of the interplay between *Psihoyos* and *Petrella* grudgingly applied the holding in the first, noting they were bound by the recent Circuit Court precedent. One of them underlined the open question. *Lefkowitz v. John Wiley & Sons, Inc.*, 23 F. Supp. 3rd 344, 357 & n.11 (S.D.N.Y. 2014). The other one, by Judge Kaplan himself, reiterated his view that “an infringement claim — by virtue of 17 U.S.C. §507(b), properly construed — accrues on the date of each infringement rather than upon the date of actual or constructive discovery.” *Cooley v. Penguin Group (USA) Inc.*, 31 F. Supp. 3rd 599, 611 & n.76 (S.D.N.Y. 2014).

Meanwhile, in *Graham I* (2009), the Third Circuit had adopted the discovery rule noting that eight other circuits had done the same. However, in 2011 the Third Circuit admitted the confusion caused by its own prior language about the discovery rule, and that of several of its sister Circuits, and therefore declared all that language to be dicta. *William A. Graham Co. v. Haughey*, 646 F.3d 138, 148-149 (3rd Cir. 2011) (*Graham II*). *Graham II* went on to clarify that,

Accrual happens at the moment when events fulfilling all the elements of a cause of action have transpired.... In order to defer accrual, the discovery rule would have to add an additional component to the substantive definitions of the claims to which it applies. That simply cannot be right. Rules regarding limitations periods do not alter substantive causes of action. Accordingly we do not think the discovery rule should be read to alter the date on which a cause of action accrues. Since it cannot be an accrual doctrine, **the discovery rule must instead be one of those legal precepts that operate to toll the running of the limitations period** after a cause of action has accrued...

Graham II, *id.* at 149-50 (emphasis added).⁴ This holding is consistent with the injury rule as explained above.

⁴ See also *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418-19 (2005) (reiterating Supreme Court case law explaining the same thing); and see *Holland v. Florida*, 130 S. Ct. 2549, 2570, n.2 (2010) (same).

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b. Alternatively, as a tolling doctrine, the discovery rule must be applied sparingly and requires proof of diligence and extraordinary circumstances

The clarification in *Graham II* that the discovery rule is a tolling doctrine, *id.* at 149-50, is essential because equitable tolling is an extraordinary remedy that should be applied “only sparingly.” *Jenkins v. Superintendent*, 705 F.3d 80, 89 & n.16 (3rd Cir. 2013); *Credit Suisse Securities (USA) v. Simmonds*, 132 S. Ct. 1414, 1419-20 (2012); *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990) (citing examples from different practice areas in footnotes 3 and 4); *Hedges v. US*, 404 F.3d 744 (3rd Cir. 2005). So, if the discovery rule is an equitable tolling doctrine, as *Graham II* holds, instead of an accrual rule, its applicability must be severely curtailed in comparison to its historical application because many if not all cases that applied it in the past as an accrual rule did not impose on it the limitations inherent to all equitable tolling doctrines.

We are aware of the perplexing language in *Brownstein v. Lindsay*, 742 F.3d 55, 70-72 (3rd Cir. 2014), that cites *Graham I*'s adoption of the discovery accrual rule as still controlling without even mentioning *Graham II*. So, because *Brownstein* was decided before *Petrella*, we wish to be emphatic. If the discovery rule is a rule of tolling and not of accrual, then there is controlling precedent from the Supreme Court stating that it only applies in extraordinary cases.

And, despite *Graham II* stating in passing that the “distinction between the... concepts [of delaying the accrual of a cause and tolling the running of the limitations period] makes no difference for purposes of deciding whether a claim survives a statute-of-limitations defense,” *Id.*, at 148, it absolutely makes a difference. It must, because the Supreme Court has stated that while “it is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute,” *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014), the Court has only applied the discovery rule where it concerns areas of the law such as “latent disease and medical malpractice, where the cry for [such a] rule is

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loudest.” *TRW*, 534 U.S. at 27 (citations omitted); and see for example *Id.*, at 28 (stating that the Fair Credit Reporting Act “does not govern an area of the law that cries out for application of a discovery rule”).

And, the difference in the evidentiary burden is clear. While “[u]nder the discovery [accrual] rule, a cause of action accrues when the plaintiff... with due diligence should have discovered the injury that forms the basis for the claim,” *Graham I*, at 433, “[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). So, if the discovery rule is a rule of tolling, Plaintiff bears the burden of not only proving its due diligence as per traditional discovery rule precedent, it must also “satisf[y] the extraordinary circumstance test.” *Id.* We turn now to both prongs of that required showing.

c. When the extraordinary circumstance is fraudulent concealment, it must be pleaded with particularity and is incompatible with strict liability

When the extraordinary circumstance, the reason for lack of discovery, is an alleged disguise or concealment by the defendant, then fraudulent concealment must be pleaded with particularity. *Byrnes v. DeBolt Transfer, Inc.*, 741 F.2d 620, 626 (3rd Cir. 1984); Fed.R.Civ.P. 9(b). As the Fourth Circuit has stated, that means specifically pleading and proving “conduct... affirmatively directed at deflecting litigation,” *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 218-19 (4th Cir. 1987). Or as has also been held, “plaintiff [must] establish that the defendant took affirmative steps **beyond the allegedly wrongful activity itself** to conceal her activity from the plaintiff.” *Urbont*, 863 F.Supp.2d, at 286, n.7 (citing *SEC v. Gabelli*, 653 F.3d 49, 59-60 (2d Cir. 2011)) (emphasis added). That standard, of course, requires proof of intention to deflect litigation which in turn requires showing that the defendant knew for a fact two

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things, that he was committing an illegal act,⁵ and that there was a reasonable chance that Plaintiff would find out. Equitable tolling based on fraudulent concealment therefore precludes tolling the statute of limitations for claims based only on strict liability.⁶ So, any claims for innocent infringement simply cannot be tolled by fraudulent concealment, any and all tolled infringement claims require proof of specific intent.

The allegations in the Complaint cannot support a showing, for each separate claim, that Dr. Salas Rushford intended to commit infringement in each case and tried to hide it specifically from Plaintiff. The e-mails alleged in this case were sent by Defendant to Dr. Arora,⁷ who was the actual and intended recipient of the e-mails and who, plaintiff's allegations admit, readily corresponded with the owner of the *padrinojr@yahoo.com* account. If everyone in the conversation knew who he was, why should Defendant go to greater lengths to identify himself? Plaintiff's allegation of fraudulent concealment requires the Court to infer the Dr. Salas Rushford knew that ABIM would sue Dr. Arora months later and seize his e-mails. That simply cannot be. Furthermore, the act of sending the emails is the allegedly wrongful activity and is not an act beyond it intended to deflect litigation, so it is, per se, not fraudulent concealment.

d. Allegations of diligence must also be pleaded with particularity

Since a showing of diligence are an essential element of any tolling claim, Plaintiff must make plausible non-conclusory allegations of diligence. See *Iqbal*, 556 U.S., at 675, 679.

⁵ Which in turn requires knowing it is illegal (in this case, knowing that the material was copyrighted and believing that there was no fair use or merger); and (2) specific intent (intent to produce the result, intent to infringe on copyrights) not merely general intent (intent to act in some way, like sending an email in this case). It requires that Defendant predicted and tried to avoid a conclusions of law that had to necessarily follow his causation of that result.

⁶ See Sec. 4(b), *infra*, discussing proof of actual copying or the sufficient/probative similarity test, and Sec. 4(c), *infra*, discussing direct infringement, volition, strict liability and innocent infringement.

⁷ Except for the one that Dr. Arora sent Defendant and for which a finding of fraudulent concealment would simply be mindboggling.

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Furthermore, when the tolling is based on fraudulent concealment, diligence must also be pleaded with particularity. See *Gonzalez Bernal v. U.S.*, 907 F.2d 246, 250 (1st Cir. 1990) (plaintiffs "must plead with particularity the circumstances surrounding the concealment and state **facts showing ... due diligence** in trying to uncover the facts.")

Not a single factual allegation in the Complaint supports the *ipse dixit* allegation that Plaintiff "diligently investigated the identity of the person who corresponded with Dr. Arora using the e-mail address padrinojr@yahoo.com" (Complaint ¶50). Plaintiff's allegation of diligence is not even plausible because it is wholly conclusory; and particularity is a step beyond plausibility.

e. Summary

As we explained above, the Supreme Court held in *Petrella* that, "**Each time an infringing work is reproduced or distributed, the infringer commits a new wrong. Each wrong gives rise to a discrete 'claim' that 'accrue[s]' at the time the wrong occurs.**" *Petrella*, 134 S.Ct. at 1969 (emphasis added). The Court further held that "[u]nder the [Copyright] Act's three-year provision, **an infringement is actionable within three years, and only three years, of its occurrence.**" *Petrella*, 134 S. Ct., at 1969 (emphasis added) (again following the incident of injury accrual rule and not the discovery accrual rule). As the Seventh Circuit explained, "in light of *Petrella*, we now know that the right question to ask in copyright cases is whether the complaint contains allegations of infringing acts that occurred within the three-year look-back period from the date on which the suit was filed." *Chicago Building*, 770 F.3d at 616.

This action was filed on October 17, 2014. All the allegedly infringing acts (the emails) Plaintiff claims against Defendant occurred over five (5) years earlier, on or before August 19, 2009 (Complaint ¶46). No prospective injunctive relief is requested. Therefore, this action is facially time-barred by the three-year statute of limitations of 17 U.S.C. §507(b). Furthermore, tolling has not been adequately pleaded as to either concealment or diligence. Even assuming,

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arguendo, that emails are inherently concealed conduct for tolling purposes,⁸ Plaintiff admits it had copies of them by December 2009 (Complaint ¶¶49-50). That date is still well over four years prior to the Complaint's filing. This action is time-barred.

4. The Complaint fails to plausibly plead copyright infringement

a. Limits of Plaintiff's copyrights

Plaintiff's copyrighted works are a series of secret secure tests. 37 C.F.R. § 202.20(c)(2)(vi). "A *secure test* is a non-marketed test administered under supervision at specified centers on specific dates, all copies of which are accounted for and either destroyed or returned to restricted locked storage following each administration." 37 C.F.R. §202.20(b)(4). "The regulation suspends the requirement to deposit copies of the work, and requires instead that registrants of secure tests need only deposit a sufficient portion or a description of the test sufficient to identify it."⁹ *Educational Testing Services v. Katzman*, 793 F.2d 533, 538 (3rd Cir. 1986) (citing 37 C.F.R. § 202.20(c)(2)(vi)).¹⁰

Plaintiff's secure tests in particular attempt to examine the test taker's knowledge about non-copyrightable ideas and scientific data, specifically internal medicine. Plaintiff cannot claim copyright over the scientific facts of internal medicine, it can only claim copyright on the way it phrases its questions, unless the phrasing is merged with the underlying idea in which case it has no protection. *Katzman*, 793 F.2d. at 539-40. Unlike the situation in *Katzman* where the questions at issue were about general verbal and basic mathematical concepts, *Id.*, at 540, the potential way to phrase questions in a field as narrow as internal medicine is much more limited and prone to

⁸ A position we do not subscribe to because of its catastrophic potential social consequences and because they are not inherently fraudulent acts or acts beyond the allegedly wrongful act.

⁹ The particular portion of each test that Plaintiff deposited is unknown at this time.

¹⁰ See section G below for a discussion of the legality and constitutionality of this scheme.

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merger. Furthermore, despite what it implies in the Complaint, ¶¶17, 23-27, Plaintiff does not have copyright protection over the structure of the questions, only their wording. *Katzman*, 793 F.2d, at 542. Copyrights are, after all, matters of “artistic creativity.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

b. General requirements of a copyright infringement claim

“To establish a claim of copyright infringement, a plaintiff must establish: (1) ownership of a valid copyright; and (2) unauthorized copying of original elements of the plaintiff's work.” *Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 206 (3rd Cir. 2002).

Ownership of a valid copyright consists of: “(1) originality in the author; (2) copyrightability of the subject matter; (3) a national point of attachment of the work, such as to permit a claim of copyright; (4) compliance with applicable statutory formalities; and (5) (if the plaintiff is not the author) a transfer of rights or other relationship between the author and the plaintiff so as to constitute the plaintiff as the valid copyright claimant.” 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.01[A] (2011). A copyright registration certificate from the Register of Copyrights serves as *prima facie* evidence of the first four. 17 U.S.C. §410(c). That presumption of validity is rebuttable. *Katzman*, 793 F.2d, at 538. “[O]riginality requires independent creation plus a modicum of creativity [by] the author. [It] requir[es] an author who accuses another of infringement to prove the existence of those facts of originality, of intellectual production, of thought, and conception.” *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346-47 (1991). Subject matter copyrightability means that the owner is not attempting to claim the protection of the Copyright Act for “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in [the] work.” 17 U.S.C. §102(b). This is why, where, as here, the

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copyrighted work is a compilation, “copyright is not a tool by which a compilation author may keep others from using the facts or data he or she has collected.” *Feist*, 499 U.S., at 359; 17 U.S.C. §103. The national point of attachment is not at issue in this case. As to the compliance with statutory formalities, we have noted that Plaintiff did not include evidence of registration for all the alleged works as required by 17 U.S.C. §411(a), and that registration occurred after the alleged acts of infringement for at least two works (TX 7-116-588 and TX 7-116-625 [Dkt. 1-1]), which precludes statutory damages and the granting of attorney’s fees. 17 U.S.C. §412. We shall develop the issue of transfer of rights, if it were ever necessary, after discovery of the work for hire contracts is concluded.

“Not all copying ... is copyright infringement.” *Feist*, 499 U.S., at 361. To be unauthorized, the person copying must lack permission from the copyright owner (express, implied or equitable) and must not have legal authority. See, for example, 17 U.S.C. §107 (codifying fair use). Copying requires two things: (1) access to the copyrighted work by the person copying it, and (2) the actual use of an exact duplicate or substantially similar material to the protected elements of copyrighted work in a manner which interferes with a right protected by 17 U.S.C. §106. *Katzman*, 793 F.2d at 540-43; *Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 291 (3rd Cir.1991). A person with access has not copied for copyright purposes unless she produces at least a substantially similar work. Neither has a person who produces a substantially similar work copied unless she had prior or concurrent access to the copyrighted work. Both are essential. Access, however, can be unintentional and innocent, but if it is, it reduces potential statutory damages. 17 U.S.C. §504(c)(2).

The act of producing the new work with access to and based on the original can be proved using direct evidence (such as video of the person actually copying, admission or witness

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testimony) or indirect evidence by a test called actual copying or sufficient similarity.¹¹ *Dam Things From Denmark v. Russ Berrie & Co. Inc.*, 290 F.3d 548, 562 (3rd Cir. 2002). That test requires proof that the alleged infringer had access to the copyrighted work and comparing the two works using expert opinion to determine that the similarities between the two works are probative of the actual act of copying the copyrighted work to produce the new one. *Id.* Proof of this sort is usually requires a “facsimile” of the original, “an exact image... down to typeface and errors” or at least similarities so striking “as to lead to no other conclusion than that they were copied.” *Katzman*, 793 F.2d, at 541. The striking similarities test is where experts usually come in to discuss the similarities and the likelihood that they lead to a conclusive inference of copying because there is no other likely explanation to how they came to be. Notice that the actual copying test does not take into account whether the copying is of protected or of unprotected elements.

Unlike the actual copying test which usually relies on experts, the test for whether the new work is substantially similar enough to the protected elements of the copyrighted work to be actionable is done by the finder of fact as if through the eyes of a lay person. *Dam Things, supra.* This “actionable copying test” or “substantial similarity test”¹² requires that the finder of fact compare the copyrighted and the allegedly infringing work to determine if an ordinary observer would conclude that the copying was of protectable aspects of the copyrighted work. *Id.* The proper way to do this is by viewing them side by side. *Value Group, Inc. v. Mendham Lake Estates, L.P.*, 800 F. Supp. 1228, 1233 (D.N.J. 1992). Under this test, “artistic works are more likely to be protected than works of a more commercial nature,” more substantial similarity is required. *Ford*

¹¹ Sufficient similarity is also called ‘probative similarity’. Some cases have spoken of two different tests for substantial similarity instead of distinguishing them by using the word ‘sufficient’ for the first. See for example, *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 208 (3rd Cir. 2005). We distinguish the two to facilitate understanding.

¹² This is also called the unlawful appropriation test.

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Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 294 (3rd Cir.), *cert. denied*, 502 U.S. 939 (1991) (citing *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 908 (3rd Cir. 1975)).

In sum, in every type of copyright infringement claim a plaintiff has to prove that (1) she owns a valid copyright, (2) the extent or limits of that copyright, (3) that the person copying had access to the work prior or concurrently with the copying, (4) that the person actually copied the work (using direct evidence or the actual copying test), (5) that the resulting work is actionable because it copies the protectable aspects of the copyrighted work. However, proving those does not end the matter. There are three different types of copyright infringement (direct infringement, vicarious infringement and contributory infringement), *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005), and each requires more evidence in turn.

c. The Complaint explicitly forecloses knowingly direct infringement by Defendant and is conclusory as to innocent direct infringement

"The Copyright Act does not expressly render anyone liable for infringement committed by another," *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984), it only expressly authorizes actions for what is known as direct infringement.¹³ *Grokster*, 545 U.S., at 930. In other words, to allege direct infringement, the unauthorized copying, however proven, has to have been allegedly done by the defendant personally. *Leonard v. Stemtech Health Sciences, Inc.*, No. 08-067-LPS-CJB, 2011 U.S. Dist. LEXIS 139221 (D. Del. Dec. 5, 2011) (citing *Kunkel v. Jasin*, No. 10-4268, 420 F. App'x. 198, 199 (3rd Cir. 2011) (not precedential) (citing *Masquerade Novelty, Inc. v. Unique Industries, Inc.*, 912 F.2d 663, 667 (3rd Cir. 1990)), *adopted*, 2012 U.S. Dist. LEXIS 42743 (D. Del. Mar. 28, 2012). The proof of that personal involvement requirement has been called "a showing of volitional conduct — 'specifically, the act constituting

¹³ We discuss the vicarious liability doctrines that have developed in case-law in the sections below.

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infringement'— by the defendant himself.” *Star Pacific Corp. v. Star Atlantic Corp.*, 574 F. App'x 225, 230 (3rd Cir. 2014) (not precedential) (citing *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004)); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 497 (E.D. Pa. 2006), *aff'd*, 242 Fed. Appx. 833, 836-837, *cert. denied*, 128 S. Ct. 1101 (2008).

An allegation of knowingly direct infringement¹⁴ would mean in the instant case an allegation that Defendant personally copied from Plaintiff's secure test into a new work (the content of the allegedly infringing emails). Therefore, to allege actual copying done personally by Defendant, Plaintiff had to allege that Defendant had access to the secure test before or as he produced the allegedly infringing emails. *Dam Things*, 290 F.3d. However the Complaint concretely admits that the Defendant did not commit any supposedly infringing acts after having access to the exam when he took it, Complaint ¶46, so it forecloses any possibility that Defendant committed direct copyright infringement, at least knowingly. Still, we suspect this is, in their convoluted Complaint, Plaintiff's claim of infringement, one of direct copyright infringement, and their claim has no basis under the facts they present, and the law and applicable jurisprudence.

Regarding the sufficient similarity (or probative similarity) test to infer actual copying which could be used to show innocent direct infringement,¹⁵ the Complaint is silent except for conclusory statements. Page upon page of content emailed by the defendant are attached to the Complaint but not a single line from the original copyrighted work is included. It also lacks any reference to experts on any of the applicable similarities. The fact that the e-mails contain questions, notes, lists and other data related to the subject of internal medicine is not enough to

¹⁴ The kind proven in part by direct evidence of actual copying.

¹⁵ Of course, sufficient/probative similarity serves as proof of inferred access and copying only, not of intent or knowledge that the material was copyrighted (for example, if the access was to an unauthorized derivative work), because it presupposes strict liability under the Copyright Act.

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allow the Court to plausibly construe that the content is Plaintiff's copyrighted exam content related to the same subject.

Turning to the issue of volition, an alleged infringer shows no volition when it is engaged in "automatic copying, storage, and transmission of copyrighted materials . . . instigated by others." *CoStar*, 373 F.3d, at 555. The policy reason behind this holding is that "[a]lthough copyright is a strict liability statute, there should still be some element of volition or causation. . . . The court does not find workable a theory of infringement that would hold the entire Internet liable for activities that cannot reasonable be deterred." *Id.*, at 548 (citing *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F.Supp. 1361, 1370, 1372-73 (N.D.Cal. 1995)). While the volitional requirement usually refers to Internet Service Providers, it goes to the heart of strict liability and innocent infringement in general. Its relevance to the case at bar stems from a combination of the secrecy inherent in the content of ABIM's secure tests and the content of the Arora review course alleged in the Complaint. In any course, particularly one held at a university (see ABIM's Complaint against Dr. Arora, ¶44) which was eligible for Continuing Medical Education (CME) Credits,¹⁶ the normal, virtually automatic action is for the student to take down notes and to use those notes to study, even discussing them with the professor (using e-mail when it is the best available method). Plaintiff has repeatedly alleged that Dr. Arora provided his students with a thousand of Plaintiff's copyrighted questions (see Plaintiff's Complaint against Dr.

¹⁶ The Arora Course that Defendant took in Manhattan was approved by the Accreditation Council for Continuing Medical Education (hereinafter, ACCME) for "42 AMA/PRA™ (American Medical Association/Physicians' Recognition Award) Category 1 CME (Continuing Medical Education) Credits."

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Arora, ¶¶45, 54-5).¹⁷ Students had no way of comparing Dr. Arora's material with ABIM's.¹⁸ That cannot mean that all of the students who took notes and then created reviews and study lists based on those notes were direct infringers of Plaintiff's copyrights. Those students, including Defendant, had no volition.

d. The Complaint does not allege vicarious infringement by Defendant

In *Grokster*, the Supreme Court explained that a person "infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." 545 U.S., at 930. A claim of vicarious infringement requires proof "that the defendant 'has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.'" *Google*, 422 F. Supp. 2d, at 837 (quoting *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2nd Cir. 1971)). "[I]n general ... vicarious liability is based on the defendant's failure to cause a third-party to stop its directly infringing activities." *Stemtech* 2011 U.S. Dist. LEXIS 139221, at *17 (D. Del. Dec. 5, 2011) (quoting *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1175 (9th Cir. 2007)).

¹⁷ We point out that the dispute between ABIM and Dr. Arora was settled and that to our knowledge no court has ever found that Dr. Arora provided his students with any number whatsoever of Plaintiff's copyrighted questions. ABIM may not re-litigate this issue.

¹⁸ In *Katzman*, 793 F.2d 533, the Third Circuit rejected an educational fair use defense for a test-prep course by quoting a case that rejected it for a similar course because it did not qualify as teaching for purposes of the fair use defense. The rationale was that "[The test-prep's] students do not receive a degree, do not become qualified or certified in anything after taking the course, and may not use the course as a prerequisite for further education and training in any educational or vocational endeavor." *Id.*, at 543 (quoting *Association of American Medical Colleges v. Mikaelian*, 571 F.Supp. 144, 152 (E.D.Pa.1983)). In the case at bar however, the students were eligible for continuing medical education credits which are accredited by ACCME and acceptable by all state medical boards and the American Medical Association, so that rationale is inapplicable. And, both *Katzman* and *National Conference of Bar Examiners v. Multistate Legal Studies, Inc.*, 692 F.2d 478 (7th Cir. 1982), were decided respectively in 1986 and 1983, before Congress added an express provision to 17 U.S.C. § 107 in 1992 stating that "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." Pub. L. No. 102-492, 106 Stat. 3145 (Oct. 24, 1992).

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In the case at bar there is no allegation whatsoever about Defendant having had the right and ability to supervise and put a stop to the directly infringing ability of any third-party. Further there is no allegation of direct financial interest by Defendant in the direct infringements of any third party. As a result, vicarious infringement is simply not alleged.

e. The Complaint does not sufficiently allege and Plaintiff is estopped from alleging contributory infringement

In *Grokster*, 545 U.S. at 930, the Supreme Court explained that a person “infringes contributorily by intentionally inducing or encouraging direct infringement...” *Id.* Allegations of contributory infringement require allegation of “(1) direct copyright infringement of a third-party; (2) knowledge by the defendant that the third-party was directly infringing; and (3) material contribution to the infringement.” *Google*, 422 F. Supp. 2d; see also *Star Pacific*, 574 F. App'x at 230 (citing *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 160 (3rd Cir. 1984)).

The Complaint explicitly alleges the copyright infringement of only one specific third-party, Dr. Arora. The other allegations about nameless colleagues are too vague to link them to specific discrete acts of alleged direct infringement, with all their attending requirements of proof or plausibility. Plaintiff has given no indicia that it can even identify who that/those persons(s) may be, let alone that it can prove that they were committing direct infringement of its copyrights and that defendant knew this as to each. It has also not alleged that Defendant contributed to the infringement of those third-parties.

As to Dr. Arora the situation is different. Plaintiff stresses its investigation into Dr. Arora and his company and regales the Court with stories of unnamed secret spies and conclusory statements as to his supposedly infringing activities (See the Complaint in *ABIM v. Arora*, No. 2:09-cv-05707-JCJ, Dkt. 1, ¶¶43, 48 (E.D. Pa.), cited in paragraph 49 of the Complaint here). The problem is that Plaintiff cannot prove that Dr. Arora directly infringed on its copyrights because it

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settled its claims against him before any Court ever determined that he or his company committed direct infringement, or any other sort of infringement for that matter. Complaint, ¶49; and see *ABIM v. Arora*, No. 2:09-cv-05707-JCJ, Dkt. 24 (E.D. Pa. Jun. 11, 2010). ABIM has not revealed some details of the settlement yet, but the preclusive effect of a settlement agreement “should be measured by the intent of the parties.” 18A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* §4443 (2d ed. 2002); *Arizona v. California*, 530 U.S. 392, 414 (2000). Considering that the issue whose proof is required here (whether Dr. Arora committed direct copyright infringement) was a full claim there (and not just an issue of fact inside a claim), it is unlikely that the parties intended there not to be preclusion as to that. Therefore, if contributory infringement is alleged here, then ABIM is barred by *res judicata* and collateral estoppel from claiming Dr. Arora’s direct infringement against Dr. Salas Rushford. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-31 (1979).¹⁹ Since a determination of the direct copyright infringement of Dr. Arora is essential to any claim of contributory infringement against Dr. Salas Rushford, ABIM is precluded from making a claim of contributory infringement against him and the case should be dismissed.

Of course, even if *res judicata* or collateral estoppel didn’t apply, Plaintiff’s allegations would still be woefully lacking with regard to the directness of Dr. Arora’s infringement. Considering that Plaintiff alleges that Dr. Arora asked others to do the actual direct infringement by revealing the examination content to him once they took it,²⁰ then ABIM’s claim against him

¹⁹ We use the settlement as defensive collateral estoppel. If ABIM were to prove that the settlement agreement states that Dr. Arora did commit direct copyright infringement we would object to its use as an offensive collateral estoppel for the reasons explained by the Supreme Court in *Parklane Hosiery*. Regardless, that possibility is not plausible at this point so it should be irrelevant in terms of dismissal for failure to state a claim.

²⁰ Something that, we stress again, Plaintiff admits Defendant did not do.

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would be for either contributory infringement or vicarious infringement, or both. But neither of those done by Dr. Arora support a claim of contributory infringement against Defendant here. A claim of contributory infringement against Defendant requires that Dr. Arora be the direct infringer.

And even if Plaintiff's allegations were not lacking with regard to Dr. Arora's infringement they would most certainly be lacking with regard to Defendant's knowledge that Dr. Arora was directly infringing because knowledge of direct infringement implies knowledge of a conclusion of law, so it implies that Defendant must have had no good reason to believe Dr. Arora was making fair use or had authorization

Therefore, the Complaint does not sufficiently allege and/or is precluded from alleging contributory infringement.

f. The Complaint is insufficient with respect to substantial similarity

Actual copying and substantial similarity must both be proven in order to prove an infringement. *Dam Things*, 290 F.3d. For purposes of dismissal for lack of plausibility, the Complaint's vacuum with respect to substantial similarity is the same as the one with probative or sufficient similarity. Not a single question from the original secure test is included for *prima facie* comparative purposes even though according to ABIM's Complaint against Dr. Arora, ¶55, all the offending questions were permanently removed from the test so Plaintiff has no reason to keep them secret. The allegations in the Complaint are therefore conclusory with respect to substantial similarity and the Court cannot plausibly construe infringement from them.

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- g. The regulation for secure tests is illegal because it exceeds the delegation of powers granted in 17 U.S.C. §702 and/or is unconstitutional because it violates the due process clause, the free speech clause and/or the copyright clause²¹**

The Third Circuit has not ruled on the constitutionality of the secure test regulatory scheme contained in 37 C.F.R. §202.20(b)(4) and (c)(2)(vi). See *Katzman*, 793 F.2d. at 538. Its constitutionality regarding the limited issue of whether or not the public interest implied in the copyright clause requires complete deposit with the Register was upheld by the Seventh Circuit. *Id.* (citing *National Conference of Bar Examiners*, 692 F.2d, at 482-87, *cert. denied*, 464 U.S. 814 (1983)). Bearing in mind that secure tests are the only kind of “unpublished” copyrighted work to which thousands or even millions of persons unrelated to the author or copyright holder have actual access (think of students taking the SAT’s for example), and in particular when referring to tests which gauge knowledge of ideas in the public domain (as opposed to tests whose subject matter is also copyrightable such as tests about the content of a literary work), we believe the regulation to be unconstitutional in due process and freedom of speech terms because it not only lacks minimal guarantees of fair-warning to an innocent infringer, but it also fosters confusion about what material available from third-parties, even when bearing indicia of trustworthiness, is or is not copyrighted by another. Since it unduly exposes a reasonable law-abiding person to litigation and thus to deprivation of property, the fear that material might be copyrighted, and the total inability to determine so *a priori*, creates a chilling effect on protected free speech. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-48 (1974) (“a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.”); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (same). And see, Neil

²¹ This argument is short due to space limitations. Defendant would expand it in a separate brief if the Court so orders, or would ask the Court to allow an amendment to this brief with additional pages.

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Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 Stanford L. Rev. 1 (2001).

Furthermore, the denial of almost all fair use for secure tests, premised on the notion that revelation of the content destroys its value to the owner, turns the entire constitutional principle of copyrights on its head. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, at § II (1994). So, by extending copyrights to secure tests, the Register of Copyrights exceeded its delegation of power over copyrights in violation of the Copyright Act, 17 U.S.C. §702.

But, even if the regulation is consistent with the Act, then it is unconstitutional because, by creating a scheme which disallows fair use, secure tests are being regulated as if they were trade secrets, which as a matter of law fall under the Commerce Clause, not the Copyright Clause, and therefore the Register could not extend protection to all secure tests but only to those affecting interstate or foreign commerce. And, that is only if the Act intended to provide the Register with commercial regulatory authority, which appears unlikely from the purposes of the Act.

h. Summary

Plaintiff has lumped all the actions it claims are infringing into one joint count of infringement. However, copyright infringement acts are separate offenses and separate claims for each act. Plaintiff had to sufficiently plead each discrete claim.

In order to prove any claim for copyright infringement Plaintiff must prove substantial similarity between the works and has only offered conclusory allegations of the same. Furthermore Plaintiff has not sufficiently pleaded the only three types of copyright infringement against Defendant. The Complaint forecloses the possibility that Defendant directly infringed knowingly and is conclusory as to innocent infringement. Plaintiff has not pleaded vicarious infringement against Defendant. And Plaintiff has not sufficiently pleaded and is precluded from pleading

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contributory infringement against Defendant. Therefore, Plaintiff has failed to plead substantively plausible claims against Defendant and the Complaint should be dismissed.

5. The Complaint should be dismissed

Based on the above, Defendant, Dr. Salas Rushford, respectfully requests that the Court allow this Motion; that Plaintiff's Complaint be dismissed in its entirety with prejudice as time-barred by the three (3) year statute of limitations of the Copyright Act, 17 U.S.C. §507(b); and/or that the Court hold that Plaintiff failed to sufficiently and plausibility allege all or some of its claims. Defendant also respectfully requests any other remedy in his favor that may be derived from the facts and the law herein set forth.

Dated: March 11, 2016.

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