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**I. PRELIMINARY STATEMENT.**

Plaintiff/counterclaim defendant American Board of Internal Medicine (“ABIM”) opposes the motion of defendant/counterclaim plaintiff/third-party plaintiff Jaime Salas Rushford, M.D. (“defendant”), seeking judgment on the pleadings on ABIM’s copyright infringement claim. [D.E. No. 76.]

In October 2014, ABIM filed a straightforward, single-count Complaint for copyright infringement arising from defendant’s concerted efforts to obtain and copy hundreds of ABIM’s copyrighted examination questions, and to disseminate them to a New Jersey test-prep course. ABIM alleged that defendant’s infringement consisted of the following conduct:

- on August 12, 2009, defendant had a lengthy telephone conversation with a residency colleague who had taken the 2009 ABIM Examination in Internal Medicine exam that day [D.E. No. 1, at ¶ 38];
- during that conversation, defendant took ten pages of handwritten notes containing detailed questions from the examination his colleague had taken (*ibid.*);
- that same day, defendant e-mailed those notes to Rajender K. Arora, M.D., the proprietor of the Arora Board Review course (*id.* at ¶¶ 36-37); and
- over the next several days, defendant sent additional e-mails to Dr. Arora, containing additional copyrighted ABIM exam questions (*id.* at ¶¶ 41-46).

ABIM further alleged that when defendant sent infringing materials to Dr. Arora, he used an e-mail address that hid his identity, such that when ABIM obtained the documents in discovery from Dr. Arora in 2009, it was unable to identify defendant as the sender of those communications. Only in January 2012, after diligent investigation, was ABIM able to identify defendant as the sender. (*Id.* ¶¶ 35-37, 41, 43-46, 50.)

ABIM’s complaint states a valid claim for copyright infringement. For that reason, defendant had no basis for, and did not file, a Rule 12(b)(6) motion to dismiss.

Defendant’s answer did nothing to change that. Nearly six months after filing his answer and a

year after discovery commenced -- and with one motion to compel discovery purportedly related to his defense of ABIM's copyright claim pending, and with a request for leave to file another such motion pending [D.E. Nos. 75 & 81] -- defendant now seeks judgment on the pleadings on ABIM's copyright claim. That motion should be denied for any one of three separate reasons.

First, unable to make an argument for dismissal on the basis of ABIM's actual pleading, defendant conjures up different fact patterns and legal theories that he apparently believes would be more vulnerable to dismissal. In defendant's version of ABIM's complaint, for example, the factual bases for ABIM's copyright claim is that defendant copied questions from his exam and took notes during the Arora Board Review. [See D.E. No. 76-1 at 18-23.] But, that simply is not what ABIM alleges. Defendant also spends considerable effort arguing that ABIM's supposed theories of vicarious and contributory infringement fail. But, again, ABIM has asserted no such theory, and ABIM's counsel reiterated in a meet-and-confer discussion a week before defendant filed his motion that ABIM was not pursuing such theories.

Second, even if it were properly asserted in a motion for judgment on the pleadings (which it is not), defendant's statute of limitations argument also fails. The rule governing the timeliness of copyright infringement claims in this Circuit is clear: the statute of limitations does not begin to run until the plaintiff knew or reasonably should have known of the defendant's infringement. ABIM's claim was filed timely under that rule. Moreover, defendant's deliberate concealment of his identity in the infringing communications provides an additional basis for tolling.

And, third, defendant's argument that the Copyright Office's regulations applicable to "secure tests" are unconstitutional is specious. Putting aside defendant's failure to comply with Rule 5.1 of the Federal Rules of Civil Procedure governing constitutional



challenges, the cases defendant cites in support of this argument in fact *upheld* the regulations against constitutional challenges.

Defendant's motion should be denied.

## **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY.**

### **A. ABIM ADMINISTERS SECURE, CONFIDENTIAL, AND COPYRIGHTED EXAMINATIONS TO QUALIFIED CANDIDATES FOR BOARD CERTIFICATION.**

ABIM is an independent, not-for-profit evaluation organization dedicated to excellence in the field of internal medicine. (Compl ¶ 7.) While not required for the practice of medicine, Board Certification by ABIM is an internationally recognized marker of physician quality for patients and the medical profession, and means that the physician has demonstrated the clinical judgment, skills, ethics, and attitudes essential for the delivery of excellent patient care. (*Id.* ¶ 8.) To achieve Board Certification in Internal Medicine, a physician must satisfy certain educational, training, and professional requirements, including passing a secure, proctored, computer-based examination. (*Id.* ¶ 12.)

ABIM examinations are composed of confidential, copyrighted questions that are not disclosed to anyone except those taking the examinations and those involved in ABIM's rigorous and costly test development process. (*Id.* ¶¶ 16, 23-24.) Test committees, composed of physicians from across the United States who are leaders in their fields of medicine and medical education, develop the questions for each ABIM examination. (*Id.* ¶ 23.) Members of a test committee meet two or three times a year to write and evaluate new questions. (*Id.*) Test committees employ a "stepwise" procedure to create new questions:

- First, the committee defines a general examination blueprint of areas within internal medicine to be tested.
- Second, the committee identifies cognitive tasks (such as diagnosis or treatment) and cognitive abilities (such as clinical judgment) to be tested for each area.

- Third, Committee members write new questions and evaluate draft questions at a meeting in which the questions are read aloud, one by one.
- Fourth, the Committee decides by consensus to either (i) accept the questions for further consideration; (ii) revise them at the meeting; (iii) assign them to individual test Committee members for extensive revision; or (iv) reject them.
- Fifth, after a question is accepted, it is pre-tested (used in an examination but not counted) to assure that it has appropriate measurement characteristics.

(*Id.* ¶ 24.) All test committee members sign agreements with ABIM confirming that ABIM is the copyright owner of all works contributed to or created by the member. (*Id.* ¶ 23.)

The questions that appear on a particular ABIM examination are drawn from an “item bank” of “live” questions, some of which are reused and appear on multiple examinations, especially those that prove, through statistical analysis, to be effective assessors of medical knowledge and judgment. (*Id.* ¶ 25.) ABIM regularly must update and re-pretest questions in the live pool to keep them current, and it also must retire questions from its item bank on an ongoing basis when it determines, based on evolving scientific developments in the field of internal medicine, that the questions are no longer current, relevant, or fair and are not amenable to revision. (*Id.* ¶ 26.) ABIM strives to create or replace approximately 300 new questions each year to replenish its item bank and to ensure that its examination reflects current and evolving scientific developments in the field of internal medicine. (*Id.* ¶ 27.) ABIM must pretest more than 500 questions to be left with 300 usable questions at the end of the year that meet its rigorous criteria for inclusion as live examination questions.<sup>1</sup> (*Id.*)

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<sup>1</sup> ABIM’s exams are works made for hire within the meaning of Section 101 of the Copyright Act, 17 U.S.C. § 101, and ABIM has complied in all respects with the Copyright Act by making all necessary filings with the Register of Copyrights to secure the exclusive rights and privileges in and to the copyrights in the examinations. ABIM registers each annual examination with the United States Copyright Office in accordance with the procedures for secure tests, *see* 37 C.F.R. § 202.20, and has received Certificates of Registration from the Register of Copyrights for its secure examinations dating back to 1986. (Compl. at ¶¶ 28-29.)

For those reasons, advance knowledge by a candidate of an ABIM examination question -- such as knowledge of question fact patterns, specific question subject matter, or potential answers -- provides the candidate an unearned advantage that subverts the integrity of the examination and may permit an unqualified physician to achieve Board Certification. (*Id.* ¶ 17.) ABIM repeatedly advises and reminds candidates for Board Certification, both at registration for an examination and at the administration of an examination at a secure testing center, that ABIM examinations are copyrighted works owned by ABIM that may not be copied, reproduced, or disclosed. (*Id.* ¶¶ 18-21.) ABIM further requires that candidates agree to a confidentiality agreement, titled a “Pledge of Honesty,” in which they agree not to give or receive aid in their examination, and not to disclose, copy, or reproduce any of the materials in their examination. (*Id.* ¶¶ 19-21.)

**B. AS A CANDIDATE FOR BOARD CERTIFICATION, DEFENDANT ILLEGITIMATELY OBTAINED CONFIDENTIAL, COPYRIGHTED ABIM EXAMINATION CONTENT AND SYSTEMATICALLY DISSEMINATED IT TO A TEST-PREP COURSE IN NEW JERSEY.**

Defendant registered for the August 2009 ABIM Certifying Examination in Internal Medicine. (*Id.* ¶ 31.) He scheduled his exam for August 20, 2009, which was in the middle of the two-week “examination window” for that exam. (*Id.* ¶¶ 15, 31.)

In preparation for the exam, defendant attended a six-day prep course offered by Arora Board Review (“Arora”), a New Jersey-based test-prep course, in May 2009. (*Id.* ¶¶ 1, 32-34.) Both before and after the course, defendant sent a number of e-mails concerning the course to Arora’s proprietor, Dr. Arora, from an e-mail address that included his name (jsalasmd@yahoo.com), and he signed those e-mails with his name. (*Id.* ¶ 33.)

Defendant began communicating with Dr. Arora again immediately upon the opening of the examination window for the August 2009 Internal Medicine exam. For those e-mails, however, he used a pseudonym (“Jimmy R.”) rather than his real name, and an e-mail

address that disguised his actual identity (padrinojr@yahoo.com).<sup>2</sup> (*Id.* ¶ 35.) One such e-mail reveals that on August 12, 2009, he called Dr. Arora and told him that he had obtained from a colleague detailed information about the Internal Medicine examination given earlier that day:

Dr. Arora as per our conversation a few minute ago. . Here is the info. I will be sending you more info latter on when colleges forward me more input. [*Sic.*]

[(*Id.* ¶ 36 & Ex. B thereto.)]

Attached to the e-mail following up on defendant's telephone conversation with Dr. Arora are seven pages of defendant's handwritten notes containing detailed ABIM examination content. (*Id.* ¶ 36.) Later that same evening, he sent another e-mail to Dr. Arora with the subject line, "Dr. Arora A more complete list I have added 20+ questions." (*Id.* ¶ 37 & Ex. C thereto.) He attached the same seven pages of notes, along with three additional pages containing more ABIM examination content. (*Ibid.*) The ten pages of handwritten notes -- which defendant took during a lengthy telephone conversation with one of his residency colleagues after she sat for the ABIM examination earlier that day -- reveal specific, original, and memorable details of ABIM examination questions, including descriptions of pictures on the examination, wrong answer choices, and the specific states where patients live and travel (*e.g.*, "lady from Mississippi"). (*Id.* ¶¶ 38-39 & Ex. C thereto.)

Defendant continued to send e-mails to Dr. Arora with ABIM examination content the next day. On August 13, 2009, he sent an e-mail with a subject line that reflected the knowingly illicit nature of its contents: "Fw: DON'T DON'T DON'T DON'T FORWARD." Attached to that e-mail were nine typewritten files. (*Id.* ¶ 41 & Ex. D thereto.) Those files contain a compilation of ABIM examination questions that appear to have been collected over

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<sup>2</sup> In Spanish, "padrino" means "godfather," making defendant's email address "godfather junior." Nothing in the title "godfather" leads to defendant.

several years. (*Id.* ¶ 42 & Ex. D thereto.) The documents include telltale signs that they contain actual ABIM examination content, including statements like, “Questions repeated on Board 2008,” and, “At this moment I was burned out . . . my answer was (A), but I am not sure.” (*Id.*) Defendant continued to provide Dr. Arora with ABIM’s copyrighted examination content that defendant obtained from his residency colleagues, sending at least eight additional e-mails over the next several days, up through August 19, 2009, the day before he sat for the Internal Medicine examination. (*Id.* ¶¶ 44, 46 & Ex. F thereto.) One such e-mail, dated August 16, 2009, bears the subject line “164 question the one that repeated in every exam” and contains a list of specific testing points and examination questions titled “ABIM 2009 Learning Points.” (*Id.* ¶ 44 & Ex. F thereto.) Understanding what defendant had sent him, Dr. Arora replied:

AMAZING WORK!  
YOU WILL NOT HAVE ANY DIFFICULTY PASSING THIS  
EXAM.

WHEN YOU COME BACK FROM EXAM, SIMPLY TICK THE  
ONES THAT WERE THERE IN YOUR EXAM – TO SEE  
WHAT PERCENTAGE OF THESE ARE REALLY THERE IN  
ONE CANDIDATE’S PORTION.

DR. ARORA

[(*Id.* ¶ 45 & Ex. F thereto.)]

Dr. Arora also reciprocated by forwarding to defendant ABIM examination questions that another Arora course attendee had recently sent to Dr. Arora. (*Id.* ¶ 43 & Ex. E thereto.)

Defendant took the ABIM examination on August 20 and passed. (*Id.* ¶¶ 47-48.)

ABIM discovered defendant’s communications with Dr. Arora in New Jersey when, in the course of an action against Arora, ABIM obtained and executed an *ex parte* seizure order at Arora’s New Jersey office. (*Id.* ¶¶ 49-50.) ABIM spent months analyzing the documents and information obtained from Arora, and diligently investigated the identity of the

person who corresponded with Dr. Arora using the e-mail address padrinojr@yahoo.com and the pseudonym “Jimmy R.,” but was unable to concretely determine it was defendant until January 2012. (*Id.* ¶ 50.)

**C. THE PLEADINGS HAVE LONG BEEN CLOSED AND THE PARTIES HAVE ENGAGED IN EXTENSIVE DISCOVERY.**

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ABIM filed its one-count complaint on October 17, 2014. [D.E. No. 1.] On December 12, 2014, defendant filed a motion to dismiss for lack of personal jurisdiction; he did not make any substantive arguments for dismissal. [D.E. No. 8.]

In response, ABIM filed a protective action, substantially identical to this one, in the District of Puerto Rico. *See ABIM v. Salas-Rushford*, No. 3:15-cv-1016 (D.P.R.) (the “P.R. Action”). ABIM did not serve the Puerto Rico complaint, but defendant learned of it and filed several motions, including a motion to dismiss asserting the same statute of limitations and substantive copyright arguments that defendant has now asserted, almost a year and a half later, in his motion for judgment on the pleadings in this Court. [P.R. Action D.E. No. 4.] In any event, the Puerto Rico Action was dismissed in October 2015 [P.R. Action D.E. No. 55] after this Court denied defendant’s motion to dismiss for lack of personal jurisdiction [D.E. No. 27].

On September 22, 2015, defendant filed his answer to ABIM’s complaint, along with counterclaims. (D.E. No. 33.) ABIM’s motion to dismiss the counterclaims has been perfected and is pending. [D.E. No. 34-1; re-filed at D.E. No. 36.]

Discovery has been underway for a full year. [*See* D.E. No. 19 (Pretrial Scheduling Order).] ABIM has produced more than 2,000 pages of documents. Among the first documents ABIM produced were the examination questions that ABIM alleges defendant infringed. Defendant also deposed Dr. Arora, and had the opportunity to test various factual bases of his purported statute of limitations defense. [*See* D.E. No. 76-1 at 1-2 (suggesting,

without basis, that ABIM could have brought this action after obtaining documents from Dr. Arora in December 2009).]

Defendant filed this motion on March 11, 2016. Tellingly, defendant has chosen not to rely on any facts developed in discovery, but rather to attack ABIM's pleadings on a number of the same grounds he first asserted more than a year ago in the Puerto Rico Action.

This opposition followed.

### **III. ARGUMENT.**

#### **A. STANDARD OF REVIEW.**

A motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure directed to the sufficiency of the complaint is judged by the same standard as a motion to dismiss under Rule 12(b)(6). *Turbe v. Gov't of Virgin Islands*, 938 F.2d 427, 428 (3d Cir. 1991). The Court must accept factual allegations in the Complaint as true, with all reasonable inferences drawn in favor of ABIM, the non-moving party. *See ibid.* The question is whether those factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). They plainly do.

#### **B. ABIM HAS STATED A CLAIM FOR COPYRIGHT INFRINGEMENT.**

To state a claim for copyright infringement, ABIM must allege only two elements: (1) ownership of a valid copyright; and (2) that the defendant copied protected elements of the copyrighted work. *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 203 (3d Cir. 2005); *Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 206 (3d Cir. 2002). A copyright registration certificate is *prima facie* proof of ownership that shifts the burden to the accused infringer to show that the registration is somehow invalid.<sup>3</sup> 17 U.S.C.

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<sup>3</sup> Defendant incorrectly contends that a registration certificate does not constitute proof that ABIM is the author of the exams in light of ABIM's work made for hire agreements with its test

§ 410(c). Copying is shown by demonstrating that the accused infringer had access to the copyrighted work and produced something “substantially similar” to the copyrighted work. *Kay Berry, supra*, 421 F.3d at 207-08; *Damiano v. Sony Music Enter., Inc.*, 975 F. Supp. 623, 630 (D.N.J. 1996).

ABIM has pleaded facts sufficient to state a valid claim for copyright infringement. ABIM’s allegation that it owns a copyright registration for its examinations satisfies its burden under the first element: to allege ownership of a valid copyright. 17 U.S.C. § 410(c). And, in respect of the second element -- copying -- the complaint contains extensive allegations detailing defendant’s access to the copyrighted works and his reproduction of substantially similar works. ABIM alleges that defendant gained access to ABIM’s copyrighted examination questions through a discussion he had with a colleague shortly after his colleague took the ABIM Examination in Internal Medicine.<sup>4</sup> (Compl. ¶ 38.) ABIM further alleges that, from that colleague, defendant reproduced substantial, original materials from actual ABIM exam questions. (*Id.* ¶ 39.) For example, the handwritten questions defendant sent to Dr. Arora contain descriptions of pictures shown on the exam, wrong answer choices, and specific, identifiable details about the hypothetical patients described in the questions. (*Ibid.*)

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committee members. [See D.E. No. 76-1 at 14-15.] A registration certificate is *prima facie* proof in a judicial proceeding of all “facts stated in the certificate,” including that ABIM is the author and that the registered works are works made for hire. 17 U.S.C. § 410(c); *see also BancTraining Video Sys. v. First Am. Corp.*, 956 F.2d 268 (6th Cir. 1992) (holding that registration certificate creates presumption that plaintiff is author of copyrighted work either as joint author or through work made for hire agreement); 4-13 Nimmer on Copyright § 13.01[A].

<sup>4</sup> Access through an intermediary who views the work and transmits the content to the defendant is sufficient. *See Am. Registry of Radiologic Technologists v. Bennett*, 939 F. Supp. 2d 695, 705-07 (W.D. Tex. 2013) (holding that access shown where defendant solicited copyrighted exam questions from test preparation students who took exam); *Gemini Indus. v. Labtec Enters.*, 31 U.S.P.Q. 2d 1776, 1778 (W.D. Wash. 1993) (holding that fact finder may conclude defendant had access where third-party who viewed copyrighted packaging material consulted with defendant on defendant’s packaging material).



ABIM also alleges -- and demonstrates with the documents attached to the complaint -- both access and similarity in respect of the other e-mails defendant sent to Dr. Arora containing ABIM examination content. For example, ABIM alleges that:

- defendant received a document that “contained a list of specific testing points and ABIM Examination questions . . . from a residency colleague” (*id.* ¶ 44 & Ex. F); and
- defendant forwarded to Dr. Arora an additional email with a compilation of examination content that contained “telltale statements” indicating that they were copied from actual ABIM exams (*id.* ¶¶ 41-42 & Ex. D).

These allegations more than suffice to state a plausible claim for direct copyright infringement.

Rather than confront these allegations head on, defendant misrepresents the complaint and the law. First, he argues that ABIM has failed to allege any copying after defendant took his own examination on August 20, 2009. [D.E. No. 76-1 at 18.] That is true but irrelevant; that is not the theory of liability ABIM pled in its complaint. Second, defendant complains that ABIM did not attach its actual examination questions to the complaint or make any reference to “experts on any of the applicable similarities.” (*Ibid.*) But, a copyright infringement plaintiff need not attach its evidentiary proof of substantial similarity to its complaint. *See Broadcast Music, Inc. v. Bootlegger’s 4, LLC*, No. 2:14-cv-4201-NKL, 2014 WL 6879050, at \*2 (W.D. Mo. Dec. 5, 2014) (holding that plaintiff need not attach to complaint license agreement integral to right to recover because “Rule 8 . . . does not require a complaint to contain evidentiary proof of the allegations contained in it,” and plaintiff properly had alleged existence of license agreement). In any event, defendant’s argument lacks resonance in fact: more than three months ago, ABIM produced all of the copyrighted exam content it alleges defendant infringed.

Defendant also argues that he cannot be held liable for his copyright infringement because he acted without “volition.” According to defendant, in a board review course, “the

normal, virtually automatic action is for the student to take down notes.” [D.E. No. 76-1 at 19.] Defendant mischaracterizes the question. ABIM did not sue defendant because he took notes or because of anything else he did in a board review course. Rather, ABIM brought this action because defendant obtained and copied a vast amount of ABIM’s copyrighted examination content from colleagues, and then sent it to Dr. Arora. That is volitional conduct. ABIM’s allegations state a valid claim for copyright infringement.

Defendant’s volition argument not only disregards the facts alleged in ABIM’s complaint, but also fundamentally misstates the applicable law. As the cases defendant cites recognize, a claim for copyright infringement does require intent; a defendant can be held liable whether or not he knew his actions constituted infringement. *See CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004). The defense of “volition,” to the extent it is ever relevant, applies when the actual copying is done by an automated system, such as a computer server or a photocopier, in response to a user’s command. *See id.* at 550 (explaining that owner of photocopier is not liable when separate user actually makes copies, and internet service provider is not liable when it merely acts as automated conduit for user information). In those cases, it is the *users* of the systems who are direct copyright infringers, and not the owners of the systems. Put simply, volition is not an intent requirement; it is an analytical tool for determining whether a defendant committed an act of copyright infringement at all. *See id.* at 551 (stating that “volitional conduct” refers merely to “the act constituting infringement”). Thus, when an individual uses a DVR to record a copyrighted program, it is the individual who is liable for direct copyright infringement, not the manufacturer of the automated DVR system. *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008). Virtually any human involvement in the copying at all suffices to impose liability for direct infringement. *See id.* at

131-32 (stating that individual who made copies at instruction of customer would be liable for direct infringement). Defendant's copying of ABIM's examination content is plainly volitional conduct.<sup>5</sup>

**C. ABIM TIMELY ASSERTED ITS COPYRIGHT CLAIM.**

**1. Defendant's timeliness argument is misplaced.**

Defendant misapprehends the nature of a statute of limitations defense.

Affirmative defenses are appropriate for resolution on a motion for judgment on the pleadings only when "the time alleged in the statement of the claim shows that the cause of action has not been brought within the statute of limitations." *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir. 2002); *Ward v. Avaya, Inc.*, 487 F. Supp. 2d 467, 474-75 (D.N.J. 2007) (denying motion to dismiss based on statute of limitations where complaint did not allege that plaintiff knew of events giving rise to claim prior to statute of limitations date). Defendant does not point to any part of ABIM's complaint that possibly suggest that ABIM knew or reasonably should have known of its claims against defendant prior to October 17, 2011 (three years before ABIM filed its Complaint). Nor could he, because ABIM alleges precisely the opposite: "ABIM diligently investigated the identity of the person who corresponded with Dr. Arora using the e-mail address padrinojr@yahoo.com but was unable to concretely match the e-mail address to Dr. Salas until January 2012." Compl. ¶ 50. Because a time bar "is not apparent on the face of the complaint, . . . it may not afford the basis for a dismissal of the complaint." *Robinson, supra*, 313 F.3d at 135.

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<sup>5</sup> Defendant spends pages 20 to 23 of his brief arguing that ABIM's complaint does not state a claim for vicarious or contributory copyright infringement. ABIM agrees; the complaint states a claim for direct copyright infringement.

**2. ABIM's copyright claim is timely under the discovery rule.**

ABIM's claim was and is timely under the applicable law. The Copyright Act requires that a plaintiff bring a claim for copyright infringement "within three years after the claim accrued." 17 U.S.C. § 507(b). The law is clear in the Third Circuit as to when a copyright infringement claim accrues for purposes of the three-year statute of limitations: "'when the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.'" *William A. Graham Co. v. Haughey*, 568 F.3d 425, 438 (3d Cir. 2009) (quoting *Disabled in Action of PA v. SEPTA*, 539 F.3d 199, 209 (3d Cir. 2008)). That also is the law in every other Circuit that has considered the issue. *See Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124 (2d Cir. 2014). Courts uniformly have recognized that the text and structure of the Copyright Act reflect Congress's intent for courts to apply the well-understood discovery rule to civil actions for copyright infringement, *Graham*, 568 F.3d at 434, and that the discovery rule "reflects a sensible tradeoff – a policy decision that balances the important interests of repast against the substantial hardship that an inflexible statute of limitations might otherwise foster," *Warren Freedendfeld Associates, Inc. v. McTigue*, 531 F.3d 38, 46 (1st Cir. 2008). The discovery rule applies here, and under that rule, ABIM's claim is timely.

Importantly, under the discovery rule, the statute of limitations does not begin to run until the plaintiff knows or should have known "that the defendant was violating his rights." *Gaiman v. McFarlane*, 360 F.3d 644, 653 (7th Cir. 2004); *see also Gilmore v. Davis*, 185 Fed. Appx. 476, 483 (6th Cir. 2006) (applying Tennessee law and noting that under discovery rule plaintiff must "have discovered her claim . . . chiefly, the manner and means of the breach and the identities of the defendants") (emphasis added).

Defendant acknowledges the discovery rule, and does not argue that ABIM's claim was untimely under that rule. Instead, he suggests half-heartedly that *Petrella v. Metro-*

*Goldwyn-Meyer*, 134 S. Ct. 1962 (2014), called the discovery rule into question, and he urges that the Court apply the “injury” rule that briefly was employed in a handful of cases in the Southern District of New York. D.E. No. 76-1 at 5-8.] But defendant is forced to recognize that *Petrella* did not pass on the applicability of the injury rule; it expressly acknowledged that the “overwhelming majority of courts use discovery accrual in copyright cases.” *Supra*, 134 S. Ct. at 1969 n.4. And, defendant acknowledges, as he must, that the Southern District of New York cases on which he relies are not good law either, having been abrogated when the Second Circuit adopted the discovery rule in *Psihoyos*. What defendant fails to mention is that, since *Petrella* was decided, nearly a dozen courts have considered whether *Petrella* replaced the discovery rule with the injury rule, and every single one has rejected the argument.<sup>6</sup> This Court should do so as well, and employ the discovery rule -- as binding Third Circuit precedent requires -- to assess the timeliness of ABIM’s claim and to conclude that ABIM timely filed its claim.<sup>7</sup>

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<sup>6</sup> *Design Basics LLC v. J & V Roberts Investments, Inc.*, 2015 WL 5315680, at \*12-13 (E.D. Wis. Sept. 11, 2015); *Design Basics LLC v. CampbellSport Building Supply Inc.*, 99 F. Supp. 3d 899, 919 (E.D. Wis. 2015) (“Given the controlling case law of the Seventh Circuit Court of Appeals which is in accord with that of eight other courts of appeals, the Court declines the Defendants’ invitation to delve into statutory interpretation.”); *Panoramic Stock Images, Ltd. v. McGraw-Hill Global Educ. Holdings, LLC*, No. 12-9881, 2014 WL 6685454, at \*3 (N.D. Ill. Nov. 25, 2014), *clarified on other grounds*, 2015 WL 393381 (N.D. Ill. Jan. 27, 2015); *Panoramic Stock Images, Ltd. v. John Wiley & Sons, Inc.*, No. 12-10003, 2014 WL 4344095, at \*7 (N.D. Ill. Sept. 2, 2014) (“[W]ith the Seventh Circuit having held in *Gaiman* that the discovery rule applies, and with the Supreme Court explicitly not passing on the question, this court is bound by *Gaiman*.”); *Frerck v. Pearson Educ., Inc.*, No. 11-5319, 2014 WL 3906466, at \*3 n.3 (N.D. Ill. Aug. 11, 2014); *Beasley v. John Wiley & Sons, Inc.*, No. 12-8715, 2014 WL 3600519, at \*6 n.5 (N.D. Ill. July 21, 2014); *Cooley v. Penguin Grp. (USA) Inc.*, 31 F. Supp. 3d 599, 611 n.76 (S.D.N.Y. 2014); *Frerck v. John Wiley & Sons, Inc.*, No. 11-2727, 2014 WL 3512991, at \*6 n.5 (N.D. Ill. July 14, 2014); *Grant Heilman Photography, Inc. v. McGraw-Hill Cos.*, 28 F. Supp. 3d 399, 411 (E.D. Pa. 2014) (“[T]his Court cannot find that a comment in a footnote overrules the standard in nearly every circuit in the country.”); *Lefkowitz v. McGraw-Hill Educ. Holdings, LLC*, 23 F. Supp. 3d 344, 357 n.11 (S.D.N.Y. 2014); *Lefkowitz v. John Wiley & Sons, Inc.*, No. 13-6414(KPF), 2014 WL 2619815, at \*13 n.9 (S.D.N.Y. June 2, 2014).

<sup>7</sup> Defendant claims that the discovery rule requires that ABIM prove that it was diligent in investigating defendant’s identity and that an “extraordinary circumstance” stood in its way.

**3. Defendant's deliberate concealment of his identity provides an additional basis for tolling.**

Even if the discovery rule did not apply, ABIM's claim would be timely because defendant deliberately concealed his identity from ABIM when he disseminated the infringing materials to Dr. Arora. "[T]here is no doubt that the copyright statute of limitations is tolled by 'fraudulent concealment' of the infringement." *Taylor v. Meirick*, 712 F.2d 1112, 1118 (7th Cir. 1983); *see also Petrella, supra*, 134 S. Ct. at 1975 n.17 (listing fraudulent concealment as a potential basis for tolling statute of limitations under Copyright Act). Fraudulent concealment is a form of tolling that applies "when a plaintiff's cause of action has been obscured by the defendant's conduct," thus preventing the plaintiff from discovering its cause of action. *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 160 (3d Cir. 2002), *cert denied*, 538 U.S. 977 (2003).

In *Gomba Music, Inc. v. Avant*, \_\_\_ F. Supp. 3d \_\_\_, 2014 WL 6669182 (E.D. Mich. 2014), for example, the plaintiff asserted copyright infringement and related claims based on an exclusive agreement it had with an artist named Sixto Rodriguez. *Id.* at \*3-4. Under the agreement, all original compositions authored by Rodriguez were to belong to the plaintiff, but Rodriguez allegedly secretly wrote songs for another record label. *Ibid.* The plaintiff further alleged that the record label had concealed the fact that Rodriguez authored the songs by naming two other artists (one of whom was Rodriguez's brother) as the authors in the album credits. *Id.* at \*4. Even though the plaintiff sued more than 40 years after the songs were released commercially, the court held that the allegations that the record label had concealed the true

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Defendant, of course, dispenses with the need to cite to any authority applying the discovery rule that imposes this burden. Instead, he relies on cases invoking the distinct doctrine of equitable tolling. Whether considered a tolling doctrine or a rule of accrual, the requirements of the discovery rule are clear: the statute of limitations begins to run when a reasonably diligent plaintiff would have discovered its cause of action. *William A. Graham Co., supra*, 646 F.3d at 148 (stating that it "makes no difference for purposes of deciding whether a claim survives a statute-of-limitations defense" whether discovery rule is considered tolling or accrual doctrine).

identity of the author were sufficient to defeat a motion to dismiss based on the statute of limitations because they plausibly suggested that fraudulent concealment prevented the plaintiff from discovering his claims. *Id.* at \*16.

The same holds true here. ABIM alleges at length the deceptions defendant engaged in to conceal his identity in the communications that give rise to ABIM's claim. When defendant initially registered for Dr. Arora's review course, and in other e-mails about the course, he corresponded with Dr. Arora using an e-mail address ("jsalasm") that included his name and he signed those e-mails with his real name. (Compl. ¶¶ 32-34.) But, when he sent ABIM's copyrighted examination content to Dr. Arora, defendant switched to a disguised e-mail address, used a pseudonym, and did not sign any of his e-mails. (Compl. ¶ 35.) Defendant's tactics proved successful until January 2012, when ABIM was able to match the "padrinojr" e-mail address and "Jimmy R." pseudonym to defendant. (Compl. ¶ 50.) Such deliberate concealment of his identity provides an independent basis to reject defendant's statute of limitations defense, lest he be allowed to benefit from his deception. *See Robinson v. Morrow*, 99 P.3d 341, 346-47 (Utah Ct. App. 2004) ("[A] party who has intentionally cloaked its identity should not benefit from the concealment.").

**D. DEFENDANT'S CONSTITUTIONAL CHALLENGE OF THE SECURE TEST REGULATIONS IS PROCEDURALLY IMPROPER AND SUBSTANTIVELY SPECIOUS.**

In the ordinary case, an individual who registers the copyright in a work leaves at least one "complete copy" of the work with the Copyright Office (called a "deposit copy"). 17 U.S.C § 408(b). That requirement, however, is expressly qualified by subsection (c) of § 408, providing that the Copyright Office may establish various "administrative classes" for the registration of copyrighted works, and then "may require or permit, for particular classes, the deposit of identifying material instead of copies or phonorecords." 17 U.S.C. § 408(c)(1).

Consistent with that authority, the Copyright Office created an administrative class for “secure tests.” A “secure test” is defined as “a nonmarketed 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.”<sup>8</sup> 37 C.F.R. § 202.20(b)(4). Because such a test is not meant to be available publicly except under controlled conditions, the Copyright Office examines the entire test to determine whether it complies with the registration requirements, and then returns the deposit copy to the applicant. 37 C.F.R. § 202.20(c)(1)(vi). In place of the deposit copy, “sufficient portions, description, or the like are retained so as to constitute a sufficient archival record of the deposit.” *Ibid.* The archival record generally is a full copy of the title page of the examination, along with a mostly redacted copy of the last page on which questions appear. *See* Copyright Office, Copyright Registration of Secure Tests, September 2012, *available at* <http://copyright.gov/circs/circ64.pdf>.

The secure test regulations fall squarely within Congress’s express grant of authority to the Copyright Office to establish appropriate deposit requirements for certain types of materials. That is precisely what *National Conference of Bar Examiners v. Multistate Legal Studies, Inc.*, 692 F.2d 478, 484 (7th Cir. 1982), held, where the court concluded that “authority for the secure test regulation can be found in the clear terms of the statute alone.” Defendant offers no reasoned analysis as to why that decision was incorrect. That reasoning and conclusion should be followed here.<sup>9</sup>

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<sup>8</sup> A test need not be given for free in order to be considered “nonmarketed.” It is sufficient that “copies are not sold but it is distributed and used in such a manner that ownership and control of copies remain with the test sponsor or publisher.” 37 C.F.R. § 202.20(b)(4).

<sup>9</sup> Even if defendant’s argument somehow is correct, it does not follow [-- as defendant suggests -- that invalidation of the secure test regulations as beyond the Copyright Office’s authority would result in the invalidation of ABIM’s copyright registrations. In the same statute allowing the Copyright Office to create administrative classes and alternate deposit requirements,



Defendant also argues for invalidation of the secure test regulation on constitutional grounds, referring generally to “due process and freedom of speech terms.” Defendant does not explain what “due process” concerns are implicated by the deposit requirements for secure tests, nor does he explain how protected speech could be “chilled” given that a copyright infringement defendant cannot be sued without proof that the defendant copied the copyrighted work (as opposed to creating it independently). This failure to explain the basis for his challenges is reason enough to reject them. In addition, as the Seventh Circuit held in rejecting a constitutional challenge to the secure test regulations, all of defendant’s arguments are based on the mistaken premise that the deposit requirement is meant to allow the public access to copyrighted works and to prevent unconscious infringement. That is not so. *See Nat’l Conference of Bar Examiners, supra*, 692 F.2d at 485 (citing *Washingtonian Publ’g Co. v. Pearson*, 306 U.S. 30, 38-39 (1939)).

More fundamentally, defendant has failed to fulfill the procedural requirements for such a constitutional challenge. Rule 5.1 of the Federal Rules of Civil Procedure requires that a party “drawing into question the constitutionality of a federal . . . statute promptly” file a notice with the Court, and to serve that notice on the Attorney General of the United States. Fed. R. Civ. P. 5.1(a)(1)-(2). To give the government the opportunity to defend the statute, the Rules give the Attorney General 60 days to intervene in the case, and provide that the Court will not enter a final judgment of unconstitutionality during that time. Fed. R. Civ. P. 5.1(c). (The Court may, of course, reject the constitutional challenge at any time.) Consistent with this Rule, at least one court has refused to consider a constitutional challenge when, as in this case, the

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Congress made clear that “administrative classification of works has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title.” 17 U.S.C. § 408(c).

challenger failed to file the required notice. *See, e.g., Jones v. U-Haul Co. of Mass. & Ohio Inc.*, 16 F. Supp. 3d 922, 941 (S.D. Ohio 2014) (“Because Jones has not filed that notice, the Court will not consider Jones’s constitutional arguments or certify her questions regarding the FAA’s constitutionality to the Attorney General of the United States under Rule 5.1(b).”). Defendant’s constitutional challenge of the secure test regulations fails, both procedurally and substantively.

**III. CONCLUSION.**

For the foregoing authority, arguments and reasons, ABIM respectfully requests that defendant’s motion for judgment on the pleadings be denied.

Respectfully submitted,



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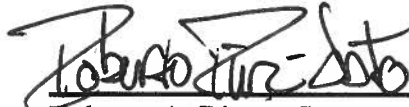
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party defendants the ABIM individuals*

**DATED:** April 4, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on April 4, 2016, I electronically filed the foregoing memorandum of plaintiff ABIM in opposition to the motion of defendant Jaime A. Salas Rushford, M.D., for judgment on the pleadings on ABIM's copyright claim using the CM/ECF system, and thereby served all counsel of record with a copy thereof.

**DATED:** April 4, 2016



Roberto A. Rivera-Soto