

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(NORTHERN DIVISION)**

WEPASSED LLC
3401 Dogwood Drive
Ellicott City, Maryland 21042

Plaintiff,

v.

DABR PHYSICS, INC.
14 Sycamore Avenue
Bethpage, New York 11714

Serve On:

Spiro Kartsonis
Radiation Oncology
23-22 30th Avenue
Astoria, New York 11102

SPIRO KARTSONIS
14 Sycamore Avenue
Bethpage, New York 11714

Defendants.

Civil Action No.: _____

COMPLAINT

Plaintiff, WePassed LLC, (hereafter, “Plaintiff” or “WePassed”), by and through its undersigned counsel, hereby files this Complaint against Defendants DABR Physics, Inc. (hereafter “DABR”) and Spiro Kartsonis (“Kartsonis”) (together, “Defendants”), for breach of contract, copyright infringement and unfair competition.

NATURE OF THE CASE

1. The Plaintiff, WePassed, offers limited subscription-based licenses for the online access of the Plaintiff’s copyrighted study and preparation materials related to an American Board of Radiology exam. This Action is against one of Plaintiff’s former subscribers, Mr.

Kartsonis, who wrongfully copied Plaintiff's copyrighted exam preparation materials and incorporated them in materials that he sells through his company, DABR. Mr. Kartsonis incorporated DABR in New York to compete with WePassed by selling the plagiarized materials.

2. In this Action, Plaintiff demands actual, statutory and punitive damages for Defendants' unlawful actions, an injunction that requires Defendants to destroy all of their infringing materials, and a permanent injunction that prohibits them from engaging in these wrongful actions in the future.

JURISDICTION AND VENUE

3. This Court has original jurisdiction over the subject matter of this action pursuant to: 28 U.S.C. §§1331 and 1338 because this Action asserts copyright infringement pursuant to 17 U.S.C. §§101 *et seq.* This Court should exercise supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367, because each such claim is so related to the copyright infringement claim that they form part of the same case or controversy under Article II of the United States Constitution.

4. This Court has personal jurisdiction over Defendant Kartsonis because he is a party to a valid and enforceable contract with Plaintiff that contains a forum selection clause providing that, "You agree to the exclusive jurisdiction of the courts of the State of Maryland for any claim or cause of action arising out of, or relating to or in connection with these Terms and Policies of this Website." For the reasons set forth below, the claims asserted in this Complaint arise out of or relate to the terms of the contract containing the forum selection clause.

5. This Court has personal jurisdiction over Defendant DABR pursuant to Md. Code. Ann., Cts. & Jud. Proc. §6-103(b)(1), (b)(2), (b)(3), and (b)(4) because the DABR, on

information and belief: transacts business and/or performs work or services in Maryland; contracts to supply goods, services or manufactured products in Maryland; has caused tortious injury in Maryland by an act or omission in this State; and has caused tortious injury in Maryland by an act or omission outside of this State, but Defendant transacts business and/or performs services in this State, regularly does or solicits business in this State, engages in a persistent course of conduct in this State and derives substantial revenue from goods, services or manufactured products used or consumed in this State. Defendant Kartsonis also acted as an authorized agent of DABR in wrongfully copying and creating derivative works from the Plaintiff's exam preparation materials, and DABR willfully and knowingly accepted the benefit of Kartsonis' wrongful actions.

6. This Court is a proper venue for this action pursuant to 28 U.S.C. § 1400(a) because each Defendant may be found in Maryland. Venue also is proper pursuant to 28 U.S.C. § 1391(b) because this action is not founded solely on diversity of citizenship, a substantial part of the property that is the subject of the action is situated in this State, and because Kartsonis, by virtue of being subject to personal jurisdiction in Maryland, is also deemed to reside in this State. *See* 28 U.S.C. § 1391(c).

THE PARTIES

7. WePassed is based out of Howard County, Maryland. It operates a website that provides limited, subscription-based, online access to a unique set of preparation and study materials related to the oral portion of an exam administered by the American Board of Radiology for board certification in the area of medical physics (hereinafter, "ABR Exam"). As explained below, the two individuals who founded WePassed authored the exam preparation materials and assigned their rights in the materials to WePassed. The materials are the subjects

of two current, valid United States copyright registrations.

8. Defendant Kartsonis is, upon information and belief, an individual who resides or is employed in or near Bethpage, New York. He purchased a subscription to the WePassed materials, and shortly after his subscription expired, began a competing ABR Exam preparation company, DABR, using course materials that were directly copied from the WePassed materials.

9. Defendant DABR is a New York limited liability company that was incorporated in or about July of 2010. Through its interactive website, www.dabrphysics.com, DABR sells the ABR Exam study and preparation materials that were wrongfully copied from the WePassed materials. Upon information and belief, DABR is owned and/or controlled by Defendant Kartsonis and has made sales to individuals in Maryland.

ALLEGATIONS OF FACT

A. WePassed, its Founders, Exam Preparation Materials and Business Model.

10. WePassed was founded in 2009 by two Johns Hopkins-trained, board-certified medical physicists, Dr. David Djajaputra and Dr. Dustin Simonson (together, the “Founders”). Their mission was to develop exam preparation materials to improve individuals’ chances of passing the oral portion of the ABR Exam, which has a lower pass rate than the written portions of the test.

11. At the time they formed WePassed, the Founders did not believe that any of the existing ABR Exam study and preparation materials adequately prepared students for the grueling, high-pressure and fast-paced oral portion of the exam. Seeking to fill the void and improve the pass rate for the oral portion of the ABR Exam, the Founders authored the materials that WePassed has copyrighted and continues to license today.

12. The Founders created the WePassed materials from scratch, relying on their own

experience taking the ABR Exam, the personal stories of others who had taken the exam, and on their combined fourteen years of actual clinical practice in the area of medical physics, which included teaching and mentoring experience in leading academic institutions.

13. The Founders' efforts produced a uniquely presented and arranged ABR Exam preparation course that is structured on the WePassed website in a question-and-answer format that is intended to simulate and anticipate the actual oral exam environment. The materials, which the Founders have continued to expand over the years, present a format, subject matters, follow-up questions and discussions that are the Founders' original expression.

14. The Founders first offered their ABR Exam online preparation materials to the general public in or about March of 2010, on the company's website, www.wepassed.com (the "Website").

15. WePassed makes a significant effort to prevent the copying or distribution of its materials, so that the materials are read-only accessible only during a subscriber's subscription period. For example, the Website requires students to affirmatively agree to certain terms and conditions as a prerequisite to purchasing a subscription to the exam preparation materials. These Terms and Policies ("T&Ps") have not been materially altered since they were first posted on the Website in 2009. A copy of the T&Ps are attached to this Complaint at **Exhibit 1**.

16. The T&Ps begin with the following introductory paragraph:

THIS IS A CONTRACT. PLEASE READ THESE TERMS AND POLICIES CAREFULLY BEFORE USING THIS WEBSITE. BY USING THIS WEBSITE AND ITS SERVICES AND PROGRAMS IN ANY WAY YOU GIVE YOUR ASSENT TO THESE TERMS AND POLICIES. IF YOU DO NOT AGREE AND ACCEPT THESE TERMS AND POLICIES, YOU HAVE NO RIGHT TO USE THIS WEBSITE AND ITS SERVICES AND PROGRAMS.

Id. (also stating, in the TERMS OF USE section, that “WePassed makes all information, graphics, documents, text, products and all other elements of the Website . . . available for your use subject to the terms and conditions set forth in this Agreement”).

17. The T&Ps also contain language that expressly and unambiguously prohibits the copying, reproduction or any use of the materials for any purpose other than the students own personal, non-commercial use:

You agree not to copy, republish, frame, download, transmit, modify, rent, lease, loan, sell, assign, distribute, license, sublicense, reverse engineer, or create derivative works based on the Website, its products or its Services except as expressly authorized herein. EXCEPT AS OTHERWISE PROVIDED, THE CONTENTS PUBLISHED ON THIS WEBSITE MAY BE REPRODUCED OR DISTRIBUTED IN UNMODIFIED FORM FOR PERSONAL NON-COMMERCIAL USE ONLY. Any other use of the contents, including without limitation distribution, reproduction, modification, display or transmission without the prior written consent of WEPASSED is strictly prohibited.

Id. (capitalization in original).

18. The WePassed Website also employs technical measures that prohibit users from copying, saving (onto a local disc or other user device), printing or otherwise downloading the materials.

19. Instead, the students pay for a subscription to log into a secure area of the Website and to use the materials as much and as often as the student desires during the period of time that the student’s subscription covers. After the student’s subscription expires, the student’s access to the secure area of the Website is terminated. To prevent subscribers from sharing access with other individuals, each subscription is technically set up to allow access from only one internet-connected device at a time.

20. The T&Ps contain a clause that selects Maryland law to govern its interpretation

and requires Maryland's courts (state or federal) to be the exclusive jurisdiction for "any claim or cause of action arising out of, or relating to or in connection with" the T&Ps or the Website. *See id.* ("Applicable Law" section).

21. Effective February 22, 2012, WePassed obtained a United States copyright registration (Registration No. TX0007528097) for the first edition of its ABR Exam preparation materials (the "First Edition Copyright").

22. WePassed continued to add material to its First Edition of materials and on February 22, 2012, after a substantial amount of new material had been added, WePassed obtained a copyright on a second edition of its exam preparation materials (Registration No. TX0007512393) (the "Second Edition Copyright").

B. Defendants' Copying and Use of Plaintiff's Copyrighted Materials.

23. Defendant Kartsonis, who upon information and belief holds a Master's Degree in Radiation Physics from Columbia University, purchased a three-month subscription to the WePassed Website on February 17, 2011, during which time he was granted a license to unlimited access to the WePassed copyrighted exam preparation materials related to radiation oncology physics.

24. Mr. Kartsonis agreed to the WePassed T&Ps as a condition to receiving his subscription.

25. Less than two months after Mr. Kartsonis' WePassed subscription expired on May 17, 2011, Mr. Kartsonis formed Defendant DABR. A short time later, DABR began offering competing ABR Exam materials.

26. In or about January of 2012, the Founders discovered that DABR's ABR Exam preparation materials were clearly not the product of independent creation, but rather, contained

dozens of direct copies from the materials that the Founders had created. Indeed, these materials were presented, sequenced and organized in the unique and original manner the Founders had created the WePassed materials.

27. After determining that Mr. Kartsonis owned DABR, WePassed, through its counsel, served Defendants with a cease and desist letter. DABR's attorney responded by letter dated January 26, 2012, that DABR, "has already deleted any and all of Mr. Djajaputra's materials from its website and expressly affirms that it will cease and desist from further dissemination of any materials copyrighted by Mr. David Djajaputra."¹ In or about the late spring or early summer of 2012, DABR began offering a new exam preparation book, a copy of which the Plaintiff was able to obtain.

28. Defendants' 'new' materials are, like the materials that they pledged to stop distributing, presented in the same format as, and also sequenced and organized in same unique and original manner as the WePassed materials. Many of the subjects, questions, follow-up answers and diagrams that appear throughout the Defendants' new materials are either direct duplicates of, or substantially similar to, the original, copyrighted materials authored by the Founders of WePassed.

29. Unlike the WePassed materials, DABR's exam preparation materials are provided to DABR's customers in paper format and mailed to students to keep.

30. Upon information and belief, Defendant Kartsonis engaged in, either exclusively or with the assistance of others whom he supervised, aided or abetted, the copying and plagiarizing of the WePassed copyrighted ABR Exam preparation materials. These actions were

¹ The letter from DABR's counsel incorrectly refers to the materials as being owned by one of the Founders, Mr. Djajaputra, when the cease & desist letter was sent with the reference line, "Wepassed.com Notice of Copyright Infringement."

performed for the benefit of Kartsonis and DABR.

31. Upon information and belief, DABR possessed the right and ability to supervise the infringing activities of Kartsonis and other employees or independent contractors of the company, and has had and maintains a direct financial interest in such activities.

32. To the extent that Kartsonis was employed by DABR during the period of time that he engaged in the wrongful copying of the WePassed materials, he induced or encouraged the infringement by DABR.

COUNT I
COPYRIGHT INFRINGEMENT
(Defendants DABR and Kartsonis)

33. Plaintiff WePassed incorporates by reference paragraphs 1 through 32 as if set forth in full herein.

34. WePassed is the exclusive legal and beneficial owner of all rights granted by the United States Copyright Act, 17 U.S.C. § 101, *et seq.*, with respect to the original works of authorship that are the subject of the Plaintiff's First Edition Copyright and Second Edition Copyright.

35. By their acts described above, Defendants have violated and continue to violate Plaintiff's exclusive rights in the First Edition Copyright and Second Edition Copyright, granted by Section 106 of the Copyright Act.

36. The foregoing, repeated acts of infringement by Defendants have been willful, intentional, and purposeful, and in disregard of and with indifference to Plaintiff's rights.

37. Defendants' conduct is causing and, unless enjoined and restrained by this Court, will continue to cause WePassed irreparable injury that cannot fully be compensated or measured in money, and for which WePassed has no adequate remedy at law.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor of against Defendants, jointly and severally, that awards the following relief:

- A. Pursuant to 17 U.S.C. § 502, a preliminary and/or permanent injunction on terms that the Court deems reasonable to prevent or restrain future infringement of the Plaintiff's copyright rights by Defendants, either individually or by or through any of their officers, agents, attorneys and employees, or any other person or entity acting in privity or concert with Defendants;
- B. Pursuant to 17 U.S.C. § 503, impoundment and destruction or other reasonable disposition of all copies and all derivative works of the Plaintiff's copyrighted materials in Defendants' possession, custody or control;
- C. Pursuant to 17 U.S.C. § 504, actual damages suffered by WePassed as a result of Defendants' infringement, and any of Defendants' profits that are attributable to the infringement that are not taken into account in computing Plaintiff's actual damages;
- D. Pursuant to 17 U.S.C. § 504(c)(1), statutory damages, as permitted by the Copyright Act and at the Plaintiff's election;
- E. Pursuant to 17 U.S.C. § 504(c)(2), enhanced damages because of Defendants' willful infringement;
- F. Pursuant to 17 U.S.C. § 505, Plaintiff's costs and attorneys' fees;
- G. Prejudgment and post judgment interest; and
- H. Any other relief that the Court deems just.

COUNT II
BREACH OF CONTRACT
(Defendant Kartsonis)

38. Plaintiff incorporates by reference paragraphs 1 through 37 as if set forth in full herein.

39. The WePassed T&Ps constitute a valid and binding contract between WePassed and Defendant Kartsonis.

40. By engaging in the conduct described above in this Complaint and incorporated in this Count II by reference, Kartsonis is in material breach of his contractual obligation not to copy, republish, frame, download, transmit, modify, rent, lease, loan, sell, assign, distribute, license, sublicense, reverse engineer, or create derivative works based on the WePassed materials or Website. Kartsonis also is in material breach of the contractual restriction against making commercial, non-personal use of the WePassed materials.

41. Kartsonis' material breaches have caused damage to WePassed.

WHEREFORE, Plaintiff respectfully request that the Court enter judgment against Defendant Kartsonis awarding Plaintiff actual, consequential and incidental damages, including lost profits, resulting from his breach of contract, plus prejudgment and post-judgment interest and any other relief that the Court deems just.

COUNT III
TORTIOUS INTERFERENCE WITH CONTRACT
(Defendant DABR)

42. Plaintiff incorporates by reference paragraphs 1 through 41 as if set forth in full herein.

43. Upon information and belief, and because Defendant Kartsonis formed and controlled DABR at all times relevant to this Action, DABR was aware of the terms of the

existing contract between Kartsonis and WePassed.

44. Nevertheless, DABR, without legal justification, intentionally and improperly interfered with Kartsonis' performance of his contract with WePassed by inducing him to breach said contract.

45. DABR acted with improper motive to injure WePassed and also to benefit its own business, by offering ABR Exam preparation materials that were substantially similar to, and an infringement of, Plaintiff's copyrighted exam preparation materials, to compete with Plaintiff's business.

46. As a result of DABR's inducements and actions, WePassed has and will continue to suffer actual damages, lost profits and other consequential damages.

47. DABR's unlawful actions were intentional and wonton, and performed with an evil or rancorous motive for the purpose of deliberately and willfully injuring the Plaintiff, which amounts to actual malice.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment against Defendant DABR awarding WePassed actual, consequential and incidental damages, including lost profits, and punitive damages related to and resulting from DABR's tortious interference with contract, as well as prejudgment and post-judgment interest, and an injunction that prohibits DABR from making any further use, transfer, license or sale of any materials that were derived or obtained in violation of the contractual obligations of Defendant Kartsonis.

COUNT IV
UNFAIR COMPETITION
(Defendants Kartsonis and DABR)

48. Plaintiff incorporates by reference paragraphs 1 through 47 as if set forth in full herein.

49. Defendants, by and through their actions described above, are unfairly competing with Plaintiff by taking advantage of the goodwill and business reputation that Plaintiff has lawfully developed. As a result of their deceptive actions, Defendants have gained a profit to which they are not equitably entitled.

50. Through deception, Defendants also copied, downloaded or otherwise unlawfully and wrongfully obtained and retained copies of Plaintiff's ABR Exam preparation materials, and then used those materials to create their own course materials to compete with Plaintiff for the same, limited group of prospective customers.

51. Defendants' conduct has caused actual and irreparable harm to Plaintiff, and will continue to do so, unless Defendants are enjoined from engaging any further such acts.

52. Defendants' unlawful actions were intentional and wonton, and were performed with an evil or rancorous motive for the purpose of deliberately and willfully injuring the Plaintiff, which amounts to actual malice.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment against Defendants Kartsonis and DABR, jointly and severally, awarding Plaintiff actual, consequential and incidental damages, including lost profits, and punitive damages, plus prejudgment and post-judgment interest. Plaintiff also requests an order enjoining Defendants from making further use, transfer, license or sale of any materials that copied from the WePassed materials.

Dated: September 19, 2012

Respectfully submitted,

/s/

Joshua A. Glikin (#26852)
glikin@bowie-jensen.com

/s/

Pamela K. Riewerts (#29423)
riewerts@bowie-jensen.com
BOWIE & JENSEN, LLC
29 W. Susquehanna Avenue
Suite 600
Towson, Maryland 21204
(410) 583-2400
(410) 583-2437 (facsimile)

Counsel for Plaintiff, WePassed LLC