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11 The American Registry of
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12

13 UNITED STATES DISTRICT COURT
14 FOR THE CENTRAL DISTRICT OF CALIFORNIA
15

16 THE AMERICAN REGISTRY OF
RADIOLOGIC TECHNOLOGISTS

Case No. CV07-06224-MMM (AGR_x)

17 Plaintiff,

**FINAL JUDGMENT AND
PERMANENT INJUNCTION**

18 v.

19 MCLANE J. HANSEN, TIFFINI
HANSEN, and
20 TMAC ENTERTAINMENT, LLC,

21 Defendants.
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1 Based on the parties' Joint Motion for Entry of Final Judgment and Permanent
2 Injunction, IT IS ORDERED, ADJUDGED AND DECREED that:

3 1. This Court has jurisdiction over the subject matter of this action and over
4 each of the parties thereto. The Court retains jurisdiction to interpret and enforce this
5 Final Judgment and Permanent Injunction.

6 2. The parties to this action intend by this Final Judgment and Permanent
7 Injunction to fully and finally adjudicate all legal issues in this action, including but not
8 limited to those of copyright ownership, validity, and infringement.

9 3. The Court has reviewed the Plaintiff's First Amended Complaint and the
10 related submissions of the parties, including a Joint Motion for Entry of Final Judgment
11 and Permanent Injunction, to which were attached illustrative side-by-side comparisons
12 of certain of Plaintiff's copyrighted materials and materials sold and offered for sale by
13 Defendants. Based upon the stipulated facts and the stipulated statement of applicable
14 legal principles set forth below, the Court hereby enters this Final Judgment and
15 Permanent Injunction.

16 **I. JURISDICTION**

17 4. This action arises in part under the Copyright Act, 17 U.S.C. § 101, et seq.
18 This Court has exclusive jurisdiction over the subject matter of copyright claims
19 pursuant to 28 U.S.C. §§ 1331 and 1338(a).

20 5. The Court has jurisdiction over the subject matter of Plaintiff's claim for
21 violation of California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200,
22 pursuant to 28 U.S.C. §§ 1338(b) and 1367.

23 6. The Court has jurisdiction over the subject matter of Plaintiff's breach of
24 contract and inducing breach of contract claims pursuant to 28 U.S.C. § 1367.

25 **II. VENUE**

26 7. Venue is properly laid in this district pursuant to 28 U.S.C. § 1391(b) and
27 1400(a). Defendants are doing business and transacting business within this district and
28 they or their agents may be found within this district.

1 **III. FACTS**

2
3 **A. The Parties**

4 8. Plaintiff The American Registry of Radiologic Technologists (“ARRT”) is
5 a Minnesota nonprofit corporation having its principal place of business in Saint Paul,
6 Minnesota.

7 9. Defendant McLane J. Hansen (“McLane Hansen”) is a citizen of the State
8 of California residing in Paso Robles, California.

9 10. Defendant TMAC Entertainment, LLC (“TMAC” and jointly with McLane
10 Hansen, “Defendants”) is a limited liability company organized under the laws of the
11 State of Nevada having its principal place of business in Paso Robles, California.

12 11. McLane Hansen is, and has at relevant times been, a member and manager
13 of Defendant TMAC.

14
15 **B. The Radiation Therapy Examination**

16 12. ARRT is an independent, nonprofit organization established in 1922 to
17 promote high standards of patient care by certifying qualified individuals in medical
18 imaging, interventional procedures and radiation therapy. ARRT offers certification to
19 individuals who meet specific educational and ethical requirements and successfully
20 complete an examination process.

21 13. ARRT offers an examination (the “Examination”), which assesses the
22 critical knowledge and cognitive skills underlying tasks typically required for the
23 practice of radiation therapy.

24 14. The Examination is used by more than 20 states, including California, as a
25 basis for issuing licenses to practice radiation therapy.

26 15. The Examination is computer-based and offered in more than 200 testing
27 centers throughout the United States and certain foreign countries. It consists of 200
28

1 questions in a multiple-choice format, plus an additional 20 unscored, pilot questions
2 being considered for inclusion in future exams.

3 16. The subjects covered in the Examination are determined according to a
4 content specification authored and published by ARRT.

5 17. The 200 scored questions used on each Examination are drawn from a pool
6 of confidential questions maintained by ARRT. As a result, numerous questions are
7 used repeatedly in successive years. This repeated use of questions serves two primary
8 purposes: (1) to ensure continuity in test difficulty and (2) to ensure comparability of
9 scores between candidates completing the Examination at different times.

10 18. Due to the year-to-year continuity of the Examination, any disclosure of
11 Examination questions threatens the fundamental ability of ARRT to administer the
12 Examination in the future. Such disclosure also threatens the public health by
13 increasing the likelihood that an unqualified candidate will have an unfair advantage in
14 taking the Examination.

15 19. In order to prevent disclosure, applications for the ARRT Examination
16 contain the following agreement:

17 I also understand and agree that . . . the examination and related
18 materials utilized in the ARRT's examinations are copyrighted as the
19 sole property of the ARRT and must not be removed from the test
20 area or reproduced in any way and that reproduction of copyrighted
21 material, in whole or in part, is a federal offense and may subject me
22 to the sanctions listed above

23
24 20. Candidates appearing for the Examination are presented with the Pearson
25 VUE Candidate Rules Agreement—ARRT and are required to indicate their consent to
26 the agreement before taking the Examination. The Agreement provides, in part:

27 I will not remove copies of the exam questions and answers from the
28 testing room, and I will not share the questions or answers seen in my

1 exam with other candidates. The exam and related materials utilized
2 in the ARRT's exams are copyrighted as the sole property of the
3 ARRT and must not be removed from the testing room or reproduced
4 in any way.

5 21. Before beginning the computerized exam, candidates are presented with an
6 on-screen Non-Disclosure Agreement. In order to proceed to the exam, candidates must
7 choose an on-screen option stating "I accept the terms of agreement." The Non-
8 Disclosure Agreement provides:

9 This exam is confidential and is protected by trade secret law. It is
10 made available to you, the examinee, solely for the purpose of
11 assessing qualifications in the discipline referenced in the title of this
12 exam. You are expressly prohibited from disclosing, publishing,
13 reproducing, or transmitting this exam, in whole or in part, in any
14 form or by any means, verbal or written, electronic or mechanical, for
15 any purpose, without the prior express written permission of ARRT.

16 22. At all times relevant to this action, ARRT has been the sole owner and
17 holder of title, all rights and interest in and to copyrights in (1) the test item bank from
18 which Examination questions are drawn and (2) the content specification for the
19 Examination.

20 23. Due to its sensitive nature, ARRT has registered its copyrights in the
21 Examination test item bank using the process specified at 37 C.F.R. § 202.20(c)(2)(vi)
22 for the registration of confidential examination materials.

23 **C. Defendants' Conduct**

24 24. At all times relevant to this action, McLane Hansen and TMAC have
25 maintained a website at <http://www.rtrreview.com> at which they offer for sale and sell
26 the "Radiation Therapy Registry Review ARRT Prep Notebook & On-Line Noteook
27 [sic]" ("RTRR"). The RTRR includes a PowerPoint CD and Podcast CD. This website
28

1 was accessible by any member of the public.

2 25. McLane Hansen personally sat for the 200-question Examination on
3 October 4, 2004, November 15, 2004, and December 29, 2005, and thereby gained
4 access to Examination questions.

5 26. McLane Hansen accepted and agreed to the terms of his application for
6 examination, the Pearson VUE Candidate Agreement—ARRT, and the Non-Disclosure
7 Agreement each time he sat for the examination.

8 27. Until this action was filed, the rtrreview.com website encouraged takers of
9 the Examination to disclose ARRT’s confidential questions to Defendants by making
10 the following offer:

11
12 Students if you would like to qualify (you must have bought a
13 notebook from RTRREVIEW in order to be eligible to
14 qualify) to receive up to \$10.00 (ten dollars) from
15 RTRREVIEW just send us questions that you can remember
16 from your exam (minimum of 10 questions) from your ARRT
17 Radiation Therapy Board Exam. All you need to do is click on
18 our email link below and submit the questions to us. We have
19 listed the required format for which the questions will need to
20 be submitted below. The \$\$\$ from RTRREVIEW will be paid
21 via your Pay Pal account.

22
23 28. At all relevant times, the RTRR has included a section which bears the
24 heading: “LISTED BELOW ARE QUESTIONS FROM STUDENTS WHO HAVE
25 TAKEN THEIR ARRT BOARD EXAM.”

26 29. ARRT’s content specification for the Examination is included in ARRT’s
27 Certification Handbook and Application for Radiation Therapy Exams Administered in
28 2005 and at ARRT’s website. The website and the certification handbook are publicly

1 available.

2 30. Rtrreview.com states that its “notebooks [*sic*] content is structured after the
3 ARRT’s 2005 newly updated specification guidelines.”

4 31. ARRT contends that portions of the RTRR are substantially similar to
5 ARRT’s Examination questions and content specification. Based upon side-by-side
6 comparisons provided by ARRT, the Court agrees that substantial similarity has been
7 shown.

8 32. ARRT contends, and the Court agrees, that Defendants have copied and
9 distributed Examination questions that ARRT had used on the confidential Examination,
10 had not released publicly, and planned to use on future forms of the ARRT examination.

11 33. ARRT contends, and the Court agrees, that Defendants have copied and
12 prepared a derivative work based upon ARRT’s content specification for the
13 Examination.

14 34. Because Defendants have distributed confidential questions copied from
15 the Examination, ARRT has stopped using all such questions. The necessity of
16 removing copied questions from its test item bank and the development of new
17 questions to replace them have caused ARRT to suffer significant expense.

18 19 **IV. STATEMENT OF APPLICABLE LEGAL PRINCIPLES**

20 21 **A. ARRT’s Copyright Claim**

22 35. To establish a successful copyright infringement claim, a plaintiff must
23 show that it owns the copyright and that the defendant copied protected elements of the
24 work. *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir. 1990).

25 26 **1. Copyright Ownership**

27 36. Under the Copyright Act, copyright ownership is automatic upon creation
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1 of an original work. 17 U.S.C. § 102(a). An entity, such as ARRT, automatically owns
2 copyright in all work created by its employees within the scope of their employment and
3 in all work created by contractors as “works-for-hire.” 17 U.S.C. §§ 101, 201(b).

4 37. The content specification and all of the Examination questions at issue in
5 this case were either created by ARRT employees or by its independent contractors as
6 works-for-hire. Accordingly, ARRT owns the copyright in the content specification, its
7 Examination test item bank, and in each of the Examination questions and
8 corresponding set of answer choices.

9 38. The content specification, Examination test item bank, and Examination
10 test questions are original, copyrightable works of authorship. ARRT has complied in
11 all respects with the requirements of the Copyright Act. 17 U.S.C. § 101 et seq. ARRT
12 accordingly enjoys exclusive rights to copy, distribute, display, publish, and prepare
13 derivative works of the content specification, Examination test question bank, and
14 Examination test questions. *See* 17 U.S.C. § 106.

15 39. ARRT’s ownership of copyrights in the content specification, Examination
16 test item bank, and Examination questions is evidenced by United States Copyright
17 Registration Nos. Txu1-279-139, Tx5-925-479, and Tx6-185-730. Such registration
18 certificates “constitute prima facie evidence of the validity of the copyright” and of the
19 facts stated in the certificates, including ARRT’s ownership of the copyrights. 17
20 U.S.C. § 410(c).

21 40. ARRT’s copyrights in the content specification, Examination test item
22 bank, and Examination questions are valid and enforceable.

23 2. Copying

24 41. Copying can be established through circumstantial evidence that the
25 defendant had access to the plaintiff’s protected work and that the defendant’s work is
26 substantially similar to the plaintiff’s work. *See Shaw*, 919 F.2d at 1356.

27 42. Substantial similarity does not require verbatim copying: Immaterial
28

1 variations in the content of secure test questions or answers to not alter the conclusion
2 that infringing material is substantially similar to copyrighted material. *ETS v.*
3 *Katzman*, 793 F.3d at 541; *ETS v. Simon*, 95 F. Supp. 2d at 1085-86. ARRT may show
4 copyright infringement through either direct or circumstantial evidence or both. Direct
5 evidence of copying includes party admissions. *See Rottlund Co. v. Pinnacle Corp.*,
6 452 F.3d 726, 732 (8th Cir. 2006). Another way of determining substantial similarity is
7 whether an ordinary observer would detect substantial similarity between the two
8 works. *See Assoc. of Am. Med. Colleges v. Mikaelian*, 571 F.Supp. 144, 149 (E.D.Pa.
9 1983).

10 43. Defendants obtained access to ARRT’s content specification from publicly-
11 available sources. Defendants obtained access to copyrighted questions through
12 McLane Hansen’s having taken the Examination on three occasions, and from others
13 who had taken the Examination. Certain questions in the RTRR are substantially
14 similar to ARRT copyrighted questions that did not appear on any version of the
15 Examination taken by McLane Hansen, supporting the conclusion that Defendants also
16 gained access to ARRT’s copyrighted questions from other exam takers.

17 44. Defendants’ representations that “LISTED BELOW ARE QUESTIONS
18 FROM STUDENTS WHO HAVE TAKEN THEIR ARRT BOARD EXAM” is
19 evidence that Defendants copied the questions from the Examination. Defendants’
20 representation and that their “notebooks [*sic*] content is structured after the ARRT’s
21 2005 newly updated specification guidelines” are evidence of that Defendants copied
22 ARRT’s test specification.

23 45. As shown by the side-by-side comparisons provided to the Court, portions
24 of the RTRR are substantially similar to ARRT’s Examination questions. As shown by
25 the side-by-side comparisons provided to the Court, portions of the RTRR are
26 substantially similar to ARRT’s content specifications for the Examination. Defendants
27 have therefore infringed ARRT’s copyrights.

28 46. As a copyright holder, ARRT may be entitled to a permanent injunction to

1 address acts of infringement. Where the threat of ongoing harm exists, permanent
2 injunctions are proper with respect to the unlawful distribution of copyrighted test
3 questions to maintain the integrity of the examinations from which the test questions
4 have been taken. *See ETS v. Katzman*, 793 F.2d 533, 545 (3d Cir. 1986); *Nat’l Conf. of*
5 *Bar Exam’rs v. Multistate Legal Studies, Inc.*, 458 F. Supp. 2d 252, 256 (E.D. Pa. 2006).

6 47. As a copyright holder, ARRT is entitled to recover damages and attorneys’
7 fees. *See* 17 U.S.C. §§ 504, 505.

8
9 **B. ARRT’s UCL Claim**

10 48. Sections 17200 through 17209 of the California Business & Professions
11 Code (the “UCL”) prohibit unfair competition, including unfair and unlawful business
12 acts or practices.

13 49. Section 123 of the California Business & Professions Code prohibits:
14 conduct which subverts or attempts to subvert any licensing
15 examination or the administration of any examination,
16 including, but not limited to . . . conduct which violates the
17 security of the examination materials; . . . the unauthorized
18 reproduction by any means of any portion of the actual
19 licensing examination; . . . paying or using professional or
20 paid examination-takers for the purpose of reconstructing any
21 portion of the licensing examination; obtaining examination
22 questions or other examination material, except by specific
23 authorization either before, during or after an examination; or
24 using or purporting to use any examination questions or
25 materials which were improperly removed or taken from any
26 examination for the purpose of instructing or preparing any
27 applicant for examination; or selling, distributing, buying,
28 receiving, or having unauthorized possession of any portion of

1 a future, current, or previously administered licensing
2 examination.

3 50. Defendants have obtained past Examination questions and added these
4 questions to the RTRR without ARRT's authorization, providing them to future test-
5 takers. The disclosure of student recollections of secure test materials by defendants
6 render the materials worthless to ARRT. *See ETS v. Katzman*, 793 F.2d at 543.

7 51. Defendants have encouraged others to violate the security of Examination
8 materials.

9 52. Defendants' conduct has violated Cal. Bus. & Prof. Code § 123 and
10 constitutes unfair competition within the meaning of the UCL.

11 53. A plaintiff is entitled to an injunction under the UCL if necessary "to
12 prevent the use or employment of the unfair practice." *Committee on Children's*
13 *Television, Inc. v. General Foods Corp.*, 673 P.2d 660, 668-69 (Cal. 1983). The Court
14 finds that the agreed-upon injunction is appropriate in this case.

15
16 **C. ARRT'S Breach of Contract Claim**

17 54. An enforceable contract is an agreement between parties whereby one
18 acquires a right to an act by the other and the other assumes an obligation. *Despatch*
19 *Oven Co. v. Rauenhorst*, 40 N.W.2d 73, 78 (1949) (citation omitted). When parties
20 enter contracts, they become liable for either discharging the agreed upon duties or
21 paying. *Id.*

22 55. Through the Agreements contained in McLane Hansen's applications, the
23 Pearson VUE Candidate Rules Agreements—ARRT, and the Non-Disclosure
24 Agreements, McLane Hansen agreed not to take and reproduce test questions, and to
25 refrain from other prohibited conduct, in exchange for the taking the Examination. The
26 contracts are therefore valid and enforceable.

27 56. In exchange for taking the Examination, McLane Hansen agreed on three
28 separate occasions to the conditions, covenants, and promises required by the

1 Application Agreements, the Pearson VUE Candidate Rules Agreements—ARRT, and
2 the Non-Disclosure Agreements. Hansen specifically agreed through these contracts not
3 to take Examination questions from the exam and reproduce them without the consent
4 of ARRT.

5 57. Defendant McLane Hansen has breached these contracts by taking
6 questions for the Examination, reproducing them in the RTRReview, and offering for
7 sale and selling the RTRReview all without consent of ARRT.

8 58. Because McLane Hansen violated his contractual obligations, including the
9 obligation not to take and reproduce Examination questions, ARRT has suffered and
10 continues to suffer significant damages.

11 **V. RELIEF**

12 Based upon the facts and applicable legal principles to which all parties have
13 stipulated, **THE COURT HEREBY ORDERS** that:

14 1. Judgment is entered in favor of Plaintiff and against Defendants on all
15 counts of the First Amended Complaint.

16 2. Judgment is further entered in favor of Plaintiff and against Defendant
17 TMAC Entertainment, LLC, in the amount of \$250,000.00. Said monetary judgment
18 shall be fully satisfied upon the full transfer of assets of the RTRReview business as
19 provided in the parties' separate Settlement Agreement.

20 3. Defendants, their officers, agents, servants, employees, attorneys,
21 members, managers, and all persons in active concert or participation with them, are
22 hereby **PERMANENTLY ENJOINED** from:

23 a. distributing or copying ARRT's copyrighted test questions or
24 content specifications, or soliciting Examination takers to disclose copyrighted test
25 questions to Defendants.

26 b. infringing ARRT's existing or future copyrights in any manner, by
27 copying, duplicating, distributing, selling, publishing, reproducing, adapting, publicly
28 performing, displaying, preparing derivative works based on, renting, leasing, offering,

1 or otherwise transferring or communicating in any manner, orally or in written, printed,
2 audio, photographic, electronic or other form, including but not limited to any
3 publication on the internet or communication in any class, seminar or presentation, any
4 matter that is identical or substantially similar to ARRT's copyrighted materials;

5 c. instructing, counseling, advising, requesting or suggesting that any
6 person with access to, or intending to obtain access to, any ARRT examination disclose
7 to any defendant, or to any agent, representative, employer or employee of any
8 defendant, any Examination test questions or answers (in whole or in part);

9 d. attempting to reconstruct or duplicate any test questions or answers
10 that are accessed during an ARRT exam administration, through memorization, note
11 taking or any other means or techniques;

12 e. providing or attempting to provide prospective test-takers with
13 information about questions or answers that have appeared on any ARRT examination
14 that have not been voluntarily published by ARRT for general distribution to the public;
15 and

16 f. Offering, selling, promoting, advertising or disseminating in any way
17 the RTRR.

18 4. Within twenty (20) days of the date of this Final Judgment and Permanent
19 Injunction, Defendants shall deliver to ARRT's counsel all copies of ARRT
20 Examination questions in their possession, custody, or control, including but not limited
21 to any questions that are substantially similar to copyrighted ARRT questions which
22 Defendants or their agents obtained from past exam takers or from any other source.

23 5. Within twenty (20) days of the date of this Final Judgment and Permanent
24 Injunction, Defendants shall deliver to ARRT's counsel a list of, and all information in
25 their possession, custody, or control regarding, the identities of persons who have
26 purchased or otherwise received the RTRR.

27 6. Within twenty (20) days of the date of this Final Judgment and Permanent
28 Injunction, Defendants shall:

1 a. deliver to ARRT's counsel and file with the Court a non-confidential
2 declaration sworn under penalty of perjury stating the name, address, and phone number
3 of each and every person who has provided to Defendants any of ARRT's confidential
4 Examination questions or otherwise shared with Defendants their recollections of such
5 questions.

6 b. deliver to ARRT's counsel on a non-confidential basis all
7 information in Defendants' possession, custody, or control relating to the provision of
8 such questions.

9 7. Within twenty-five (25) days of the date of this Final Judgment and
10 Permanent Injunction, Defendants shall cause to be filed with the Clerk of Court a
11 declaration signed by each of them certifying their compliance with this Final Judgment
12 and Permanent Injunction and describing the manner of such compliance.

13 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

14
15 **Dated: December 2, 2008**

16 
17 **Hon. Margaret M. Morrow**
18 **United States District Judge**