

Plaintiff American Board of Internal Medicine (“ABIM”) originally tendered the expert report of Lawrence Ward, M.D.; that report opined on the similarities between ABIM’s copyrighted examination questions and the pages and pages of handwritten notes made and distributed by defendant/counterclaim plaintiff/third-party plaintiff Jaime A. Salas Rushford, M.D. In support of his motion to strike that report, defendant tendered the “expert response report” of Westby G. Fisher, M.D., a blogger and virulent critic of ABIM who lacks the qualifications for that “expert response report.” For the reasons that follow, ABIM moves to strike Dr. Fisher’s so-called “expert response report.”

I. INTRODUCTION.

In support of its copyright infringement claim, ABIM produced the expert report of Lawrence Ward, M.D., a Professor of Medicine and the Physician Secretary of ABIM’s Internal Medicine Exam Committee during the times here relevant. In summary, Dr. Ward opined that certain notes that defendant disclosed to Dr. Rajender K. Arora -- a board review course proprietor -- were copied or derived from questions that appeared on recent versions of the ABIM Certifying Examination in Internal Medicine. Dr. Ward reached that opinion by applying his expertise in the drafting and selection of ABIM exam questions, and by matching unique, identifying characteristics of the ABIM exam questions to the content of defendant’s notes. Significantly, Dr. Ward was not asked to, nor did he, opine on whether all or part of the ABIM exam questions were “protectable” or “original” under copyright law. As ABIM explained in its opposition to defendant’s motion to strike Dr. Ward’s report, that opinion would be inadmissible under Third Circuit law, which requires that the fact-finder determine -- from the perspective of a layperson -- whether a defendant copied sufficient protectable elements of a copyrighted work to rise to the level of infringement.

Moving to strike Dr. Ward's report, defendant proffered an "expert response report" from Dr. Fisher, a physician/medical blogger and unhinged critic of ABIM.¹ Rather than attempt to rebut Dr. Ward's well-founded opinion that defendant blatantly copied ABIM's copyrighted copyrighted questions, Dr. Fisher -- who is neither a lawyer nor versed in the expertise of generating professional examination questions designed to gauge a physician's proficiency -- impermissibly opines on an issue of law: whether ABIM's exam questions are "original to ABIM" and thus protectable under copyright law. Even putting aside Dr. Fisher's stark lack of qualifications to render that opinion, the protectability of ABIM's test questions is an issue of law in respect of which expert opinion is wholly inappropriate. Dr. Fisher's "expert response report" is inadmissible under the law of this Circuit, not to mention it is entirely unhelpful to the fact-finder. Moreover, as is the case with Dr. Fisher's affirmative expert report, Dr. Fisher's "expert response report" is nothing more than a net opinion: it is a mish-mash of biased, irrational conclusions entirely untethered to any actual evidence or expert analysis. The "expert response report" should be stricken, and ABIM should not be required to engage in any further unnecessary and wasteful discovery in respect of it.

¹ Tellingly, defendant separately proffered a purported "expert report" from the same Dr. Fisher to support of defendant's counterclaims against ABIM and defendant's third-party claims against the ABIM individuals, which counterclaims and third-party claims have nothing to do with copyright infringement. ABIM and the ABIM individuals have moved to strike that report on the ground that, among many other deficiencies, Dr. Fisher simply has no expertise that is potentially relevant to defendant's claims. The same holds true as to ABIM's copyright claim.

II. BACKGROUND.

The facts relevant to defendant's extensive infringement of ABIM's copyrights have been set out at length in previous filings. [Dkt. No. 36, at 3-7; Dkt. No. 134-1, at 3-7.] Focusing instead on the facts and allegations truly relevant to this motion yields the following.

Days before taking ABIM's certifying examination in internal medicine in 2009, defendant telephoned Dr. Geraldine Luna, a colleague who had taken the examination earlier that day. At defendant's insistence, Dr. Luna gave defendant details from dozens of ABIM's copyrighted questions. Defendant took detailed notes of that call, and then sent them to Dr. Arora, the proprietor of the review course defendant attended. Defendant also collected copyrighted ABIM exam questions from other sources and forwarded them to Dr. Arora as well. (Compl. ¶¶ 31-46.)

Among other evidence in support of this claim, ABIM produced the expert report of Dr. Ward, who served as the Physician Secretary for the ABIM Internal Medicine Exam Committee from 2006 to 2009, the time when defendant cheated on his examination. Dr. Ward concluded that 96 notes that defendant sent to Dr. Arora were copied or derived from ABIM's examination questions. Dr. Ward's report includes a question-by-question analysis explaining the matches.

In purported response to Dr. Ward's report, defendant tendered an "expert response report" from Dr. Fisher.² Without any qualifications or factual support therefor, Dr. Fisher opines that Dr. Ward's conclusion as to copying is "impossible to prove based on the materials consulted" and "demonstrably false." Undaunted by his lack of qualifications or his disregard of the facts, Dr. Fisher criticizes Dr. Ward's alleged failure to "identify any source

² For ease of reference, Dr. Fisher's "expert response report" is attached hereto as **Exhibit "A."**

accessible to Dr. Salas Rushford from where he allegedly based all the excerpts listed in its Appendix B.” (Fisher “expert response report” at 4.) Dr. Fisher further “opines” that some of ABIM’s questions reflect “classic” disease presentations, and thus cannot be “original” to ABIM. (Fisher “expert response report” at 5.) Similarly, Dr. Fisher concludes that certain wrong answer choices in ABIM’s questions would be “common” in a differential diagnosis, and thus “cannot be said to be original to ABIM.” (Fisher “expert response report” at 6.) After reaching these unsupported and unsupportable conclusions, Dr. Fisher then spends a single paragraph baldly concluding -- without identifying the bases for that conclusion -- that it is “most likely” that the notes defendant sent to Dr. Arora are “class notes from a board review course, or notes from published board preparation materials, or review notes or examples created by physicians studying for the internal medicine examination.” (Fisher “expert response report” at 7.)

Defendant served Dr. Fisher’s “expert response report” on November 17, 2016.

This motion to strike followed.

III. ARGUMENT.

A. Standards of review.

Federal Rule of Evidence 702 allows for the admission of expert testimony at trial subject to certain restrictions:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

[*Fed. R. Evid.* 702.]

Thus, to show that expert testimony is admissible, the proponent must satisfy a three-part test:

(1) that the proffered witness is qualified as an expert; (2) that the testimony is reliable; and (3) that the testimony “fits” the case, meaning it is relevant and will assist the trier of fact. *Zeller v.*

J.C. Penney Co., No. 05-2546, 2008 WL 906350, at *4 (D.N.J. March 31, 2008).

B. Dr. Fisher’s “expert response report” addresses only the issue of law of “actionable” copying, and therefore is precisely the type of expert opinion that is inadmissible in copyright infringement cases.

Copyright infringement involves two discrete elements: (1) ownership of a valid copyright; and (2) unauthorized copying of original elements of the plaintiff’s work. *Kay Berry, Inc. Taylor Gifts, Inc.*, 421 F.3d 199, 208 (3d Cir. 2005). In the Third Circuit, which has adopted the Second Circuit’s approach to the infringement analysis set out in *Arnstein v. Porter*, 1564 F.2d 464 (2d Cir. 1946), the second element (unauthorized copying) is divided into two parts: “actual” copying and “actionable” copying. *Dam Things from Denmark, a/k/a/ Troll Co. ApS v. Russ Berrie & Co.*, 290 F.3d 548, 562 (3d Cir. 2002). The inquiry into actual copying is meant to assess “whether there is sufficient similarity between the two works in question to conclude that the alleged infringer used the copyrighted work in making his own.” *Kay Berry*, 421 F.3d at 208. This inquiry is not limited to the protectable elements of the work, but encompasses any “similarities that are probative of copying between the works.” *Dam Things from Denmark*, 290 F.3d at 562 (internal quotation marks omitted) (quoting *Laureyssens v. Idea Grp., Inc.*, 964 F.2d 131, 140 (2d Cir. 1992)). Actual copying is a proper subject of expert testimony. *Kay Berry*, 421 F.3d at 208 (stating that “expert testimony is permissible to help reveal the similarities that a

lay person might not ordinarily perceive”); *Dam Things from Denmark*, 290 F.3d at 562 (stating that actual copying can be proven by expert testimony).

Once actual copying has been established, a plaintiff also must show that the copying is “actionable,” that is, that there are substantial similarities between the copy and the original “related to protectable material.” *Kay Berry*, 421 F.3d at 208. “Protectable” material means material that contains at least a “slight amount” of “originality.” *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345-46 (1991). This inquiry must be from the perspective of a layperson, and therefore must be conducted by the “fact-finder . . . without the aid of expert testimony.” *Ibid.* (emphasis supplied); *see also Dam Things from Denmark*, 290 F.3d at 562.

Applying these principles, courts both in this Circuit and elsewhere have held that, when considering actionable copying, expert testimony is of no use to the fact-finder and is not admissible. *See Interplan Architects, Inc. v. C.L. Thomas, Inc.*, No. 08-3181, 2010 WL 4065465, at *11 (S.D. Tex. Oct. 9, 2010) (excluding expert opinion on actionable copying); *Cottrill v. Spears*, No. 02-3646, 2003 WL 21223846, at *8 n.10 (E.D. Pa. May 22, 2003) (stating that expert opinion would not be considered under “intrinsic” actionable copying test).

Yet, contrary to the overwhelming weight of authority, that is precisely what Dr. Fisher’s “expert response report” tries to do. For example, Dr. Fisher repeatedly opines that ABIM questions expressing “classic” presentations of diseases cannot be considered “original” to ABIM; he likewise opines that using wrong answer choices that might pertain to a real-life differential diagnosis cannot be “original.” Either of these is plainly improper. Dr. Fisher lacks any expertise in copyright law, and is neither qualified nor permitted to testify regarding what is original enough to be protectable under copyright law. And, to be sure, Dr. Fisher is wrong. The

fact that a scenario might occur in real-life does not mean that the expression of those “classic” scenarios is not subject to copyright protection; otherwise, books describing historical events would not be copyrightable, a notion that is laughable. Indeed, *Educational Testing Services v. Katzman*, 793 F.2d 533, 541 (3d Cir. 1986), concluded that a plaintiff’s expression of a basic mathematics problem was protectable, and found as a fact that the defendant had engaged in actionable copying when he simply changed the variables used in that math problem. It readily is apparent that Dr. Fisher’s “expert response report” is the product of an unqualified author that is unhelpful to the jury and is impermissible under the law. It should be stricken.

C. Dr. Fisher’s unfounded conclusion that defendant’s notes somehow are from a board review course is an impermissible net opinion.

Dr. Fisher also “opines” that the pages and pages of notes defendant sent to Dr. Arora are “most likely” from a board review course or other public board preparation materials. Shunting aside the uncontrovertible facts that directly contradict Dr. Fisher’s “opinion” and which Dr. Fisher simply ignores as somehow inconvenient to the conclusion he wishes to reach, Dr. Fisher devotes all of a single paragraph to this conclusion and, tellingly, he does not and cannot provide any evidentiary support. *Federal Rule of Evidence 702* requires that an expert’s opinion be based on sufficient factual analysis to be admissible into evidence. *Elcock v. Kmart Corp.*, 233 F.3d 734, 754-55 (3d Cir. 2000). A bare, unsupported opinion is not admissible, and is an impermissible “net opinion.” *Zeller v. J.C. Penney Co.*, No. 05-2546, 2008 WL 906350, at *7 n.13 (D.N.J. March 31, 2008).

Dr. Fisher’s rank speculation as to the source of defendant’s notes manifestly fails this test. (a) he does not analyze each question -- as Dr. Ward did -- to identify aspects that indicate it may have come from a board review course; and (b) he lacks any experience at all in creating or professionally evaluating valid and thoughtful examination questions. Apart from

two supposed comparisons to board prep materials, Dr. Fisher fails to compare any of the notes identified in Dr. Ward's chart to the supposed board review materials from which he claims the notes were "most likely" derived or, more to the point, to the actual examination questions defendant unlawfully copied.

An unsupported opinion that merely backs up a party's own self-serving testimony is inadmissible and uniquely unhelpful to the fact-finder: it fails to explain how the expert used his or her expertise to reach the conclusion.³ See *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 424 (5th Cir. 1987) (excluding expert report on causation where expert failed to analyze other potential causes and simply "pick[ed] the cause that is more advantageous" to party offering expert). Dr. Fisher's conclusory report should be stricken.⁴

IV. CONCLUSION.

For the foregoing authority, arguments, and reasons, ABIM respectfully prays that Dr. Fisher's "expert response report" be stricken.

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³ Notably, ABIM served a request for production in May 2015 seeking "[a]ll documents concerning [defendant's] preparation or studying for any ABIM Examination." Apart from a handout from the Arora Board Review referenced by Dr. Fisher, defendant failed to produce any of the material cited in Dr. Fisher's "expert response report."

⁴ Only one of Dr. Fisher's other criticisms of Dr. Ward's report warrants clarification. Dr. Fisher states that "[t]wo of the allegedly original questions listed in Appendix B to Dr. Ward's report do not exist" in the questions ABIM produced. They are merely typographical errors: Row 14 matches a Notes Portion to ABIM question number 1332, when the actual question is 13322 (ABIM00084); and, likewise, Row 78 matches a Notes Portion to ABIM question number 39355, when the actual question is 39255 (ABIM00157). Dr. Fisher could not have been actually confused by these typos, as Row 78 illustrates in detail just how close many of defendant's copies are to ABIM's copyrighted questions.

Respectfully submitted,



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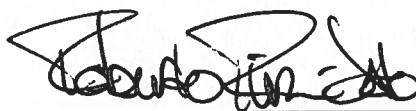
*Attorneys for plaintiff American Board of Internal
Medicine and the ABIM individuals*

DATED: December 23, 2016

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed ABIM's motion to strike the "expert response report" of Westby G. Fisher, M.D. with the Clerk of Court using the CM/ECF system, and thereby served all counsel of record with a copy thereof.

DATED: December 23, 2016



Roberto A. Rivera-Soto