UNITED STATES COPYRIGHT OFFICE LIBRARY OF CONGRESS

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Secure Test Registration Procedures

37 CFR Parts 201 and 202

[Docket 2017-8]

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The Association of Test Publishers ("ATP") welcomes the opportunity to submit these comments on the issues raised in the above Docket. The ATP is the international trade association comprised of hundreds of publishers, sponsors, and delivery vendors of tests used in various settings (including employment, education, clinical psychology, and certification/licensure/credentialing), as well as businesses that provide testing services or administer test programs ("ATP Members").

The ATP has heard from many members who have been seriously and negatively impacted by the actions taken by the Copyright Office ("Office"). Initially, those complaints involved the Office's adoption of an Interim Rule that reversed decades of procedures and practices for the examination and registration of secure tests, including release of a revised Circular 64. 82 *Fed. Reg.* 26,850 (June 12, 2017) ("Original Notice"). By that action, the Office refused to permit continued registration of secure item banks, among other things. Following meetings with testing industry representatives, in an effort to address the item bank problem, the Office adopted an alternative "group registration" process. 82 *Fed. Reg.*52,224 (November 13, 2017) ("Updated Notice"). While appreciated, that effort did not resolve the testing industry's concerns and in fact created additional issues; these comments address those matters.

Originally, public comments on the Interim Rule were due December 11, 2017, but the Office extended the date for comments on both the Original Notice and the Updated Notice to January 31, 2018 (*see* 82 *Fed. Reg.* 56,890 (December 1, 2017). Subsequently, the Office further extended the comment date to April 2, 2018 (*see* 83 *Fed. Reg.* 2,070-71 (January 16, 2018). The ATP hopes these comments will enable the Office to improve the Interim Rule and the group registration process.

**Background**

The "secure test" registration process has been in place since 1978, adopted as part of the regulations implementing the Copyright Act of 1976.[1] Those secure test regulations have been relied upon for nearly four decades by the testing industry. Indeed, those regulations have functioned smoothly, even as technological changes have been made in the way many tests are delivered.[2] As those changes occurred, the Office adjusted its original registration procedure "to permit secure registration of tests administered in a machine-readable format and secure tests administered with physical booklets containing questions taken from an automated database" (*see* Updated Notice at 52,225), thereby facilitating the ongoing protection of works long been recognized as warranting different treatment by the Office. The Office has used its updated secure test registration procedures for 20+ years, well **after** the advent of computerized testing. The Office also described those new computer-based testing procedures in a new version of *Copyright Registration of Secure Tests* ("Circular 64"), thereby providing formal notice to the public of its expanded handling of secure test registrations (*id.*).[3]

The 1978 regulations define a ''secure test'' as ''a nonmarketed test administered under supervision at specified centers on specific dates, all copies of which are accounted for and either

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[1] See 42 *Fed. Reg.* 59302, 59304 & n.1 (Nov. 16, 1977), which went into effect in 1978 (the "1978 regulations). That Notice cites communications from many testing organizations that are now members of the ATP (e.g, ETS, ACT, The College Board), although the ATP did not exist at that time.

[2] As the Office itself noted, the 1978 secure test registration procedure "has remained essentially unchanged for more than thirty years, and for the most part it has worked well for both the Office and applicants alike." 82 *Fed. Reg.* at 26851.

[3] In order to preserve its rights in the unlikely event of any subsequent legal challenges relating to this rulemaking, the ATP reasserts that issuance of the Interim Rule on June 12, 2017, violated the Administrative Procedure Act ("APA") because it changed the Office's regulations and procedures for secure test registration without holding the required notice and comment rulemaking. *See* ATP Letter of June 29, 2017. The Interim Rule clearly modified and amended the existing regulations and, in the process, declared that test content that has been allowed to be registered for decades is no longer allowed to be so registered. New rules that make substantive changes in prior regulations are subject to the APA's notice-and-comment procedures. *Sprint v. FCC,* 315 F.3d 369, 374 (D.C. Cir. 2003). While the group registration process provides an alternative for registering secure tests items, it does not cure the fatal violations of the APA – it too was adopted without APA notice and comment. Perhaps in recognition of these issues, the Office has indicated in its August 2017 meeting with representatives of the testing industry that it will hold a future rulemaking under the APA to develop a revised definition of "secure test" that it will propose based on comments in this Docket.

destroyed or returned to restricted locked storage following each administration. For these purposes, a test is not marketed if 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 CFR 202.20(b)(4). *See* 42 *Fed. Reg.* 59,302, 59,304 & n.1 (Nov. 16, 1977). As the Office acknowledged in the Updated Notice (at 52,225), the secure test process was "intended to protect the confidential nature of these works" and this definition was intended to "best identify the kinds of tests that raised special confidentiality concerns." Further, the Office itself observed that retention of an archival copy of a secure test and making it available for public inspection "could severely prejudice the future utility, quality, and integrity of the materials.'' *Id.*

As the ATP previously explained in its pre-Interim Rule letter to the Office, dated March 21, 2017, the then-current secure test registration process is critical because exposure to reusable test items and answers (and other sensitive test-related materials, such as score sheets, test manuals, and scoring rubrics) would enable future test takers to learn what questions (and possibly even answers) will be asked before they take the test. Such unauthorized access strips a test of its assessment value (i.e., its science-based psychometric validity, reliability, fairness and legal defensibility), permits some test takers to cheat, undermines the results of the test, jeopardizes the public health and welfare to the extent that an assessment is use for licensure or certification, and damages the integrity and reputation of the organization that administers the test. In short, nothing really has changed as far as the need and utility of a secure test registration process since the 1978 regulations and definition of "secure test" were first introduced.

Equally significant, many members of the ATP have relied heavily on the "previous" secure test registration process to protect the copyright on many high-stakes tests, ranging from those used in: (1) education (e.g., K-12, admission to post-secondary institutions, admissions to graduate and professional schools); (2) employment settings (e.g., pre-employment screening in jobs related to public health and safety, such as police officers, fire fighters, airline pilots, nuclear power facility workers, promotion of existing employees, training programs); (3) establishing candidate competency or mastery related to issuance of certificates and/or licenses (e.g., professions requiring state licensing, board certification), and

credentials used in the workforce as well as education; and (4) clinical and other diagnostic determinations related to mental and physical health. In all of these settings, the ATP submits that the previous secure test registration process has for decades appropriately protected the utility and public value of various "high-stakes" tests, those tests having significant potential impact on the welfare of individuals and/or the public and requiring protection of items for future use, to ensure the integrity of both the tests and the programs that use them.[4]

The ATP also explained in its March 21 letter how the use of item banks/item pools is an important current secure testing methodology that meets the effective requirements of 37 C.F.R. §202.20(b)(4) and (c)(2)(vi), as well as being consistent with the guidance provided in the then-current Circular 64. Unfortunately, the Office failed to reflect any of this information in the Original Notice, which was premised on various mistaken assertions[5] and did not suggest a full understanding and appreciation of today's technologically-advanced forms of testing (i.e., computer-adaptive testing [CAT], where the test is constructed using items that adapt to each test taker's ability level by selecting subsequent items according to the test taker's previous responses; linear-on-the-fly testing [LOFT], which

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[4] The ATP urges the Office to formally accept the concept tests used for "high-stakes decision-making" as an element in the definition of "secure test." As noted in the comments from ACT, Inc. (page 1) , the *Standards for Educational and Psychological Testing* (2014) jointly sponsored by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education (hereafter, the "Joint Standards"), speak to the use and definition of this term. A "high-stakes test" is a test used to provide results that have important, direct consequences for individuals, programs, or institutions involved in the testing. On the other hand, a "low-stakes test" is a test used to provide results that have only minor or indirect consequences for individuals, programs, or institutions involved in the testing. "High-stakes tests have well-known and well-established concrete consequences for test takers (e.g., admission to college, issuance of a certificate or license, qualification for a job) and almost always require the security of items to protect future use of those items in subsequent tests where test takers must not have access to, or have seen, the items or answers. In contrast, most items that are developed for one-time use (e.g., classroom tests, pop quizzes) do not meet the professional standards governing the psychometric science-based principles of validity, reliability, and fairness, nor are they intended to be protected in order to be used again in the future.

[5] For example, the Office stated that it needed the Interim Rule because some applicants had commingled registrations of secure test content with registrations of computer software (*see* 82 *Fed. Reg.* 26,852). As the ATP noted in its June 29, 2017 letter, the Office's concern is not a sufficient basis for adopting the Interim Rule because this problem is infrequent at best. In most cases, the owner of secure test content is not the same entity that owns the test administration computer software. But more to the point, as the ATP also noted, if the Office felt this problem were occurring, it had the authority to reject such a hybrid application and require two separate applications (with separate filing fees). All the Office needed to do to fix that problem was simply to modify or repeal Section 720.5 of the *Compendium of Copyright Office Practices* (3rd Ed.) – which would be a far less disruptive solution to a problem that the ATP submits does not even exist.

constructs a unique test for each test taker from a large pool of items; and computer mastery testing [CMT], which curtails administration once the test taker demonstrates content mastery or lack thereof). None of these are "fixed form" tests because all of the items on the eventual test are drawn from an item bank or pool, but they all use and rely upon secure test content. Indeed, the Office concluded that no test drawn from a database/item bank can meet the definition of a "secure test."

The Office has acknowledged that a number of questions exist about the Interim Rule, involving both the Original Notice and the Updated Notice. The ATP respectfully urges the Office to adopt a Final Rule that incorporates changes based on these comments, related to the handling of item banks and/or group registrations, as well as to the definition and/or interpretation of secure tests. In our opinion, it is impossible to separate these issues conceptually, inasmuch as the use of item banking in today's testing environment is often one element of a testing organization's security protocols.[6] Current test security protocols often include the use of item banks to ensure that the content owner has a sufficiently large pool of items available to assure that test items are not easily exposed to test takers, as well as to provide "backup" items in case some items are compromised. Accordingly, the ATP will address the issues of item banks and secure test definition from a coordinated, integrated perspective.

A. **Definition of Secure Test**

As noted above, the current definition of "secure test" was adopted in 1977 as part of the implementation of the new Copyright Act of 1976, which regulations became effective on January 1, 1978. That definition was clearly predicated on, and only contemplated, the use of paper-and-pencil testing, where test items are printed in test booklets that are then physically distributed to physical locations where tests are administered to test takers (e.g., schools, test centers). Such paper-based testing was the only format generally available at that time – computers had not yet had any meaningful impact

[6] Thus, the ATP submits that the Office cannot reasonably address issues about the use of item banks and group registrations without taking into account an appropriate definition of "secure test." Although the Office has suggested that it will not address the definition of "secure test" until it conducts a future rulemaking, the ATP encourages the Office to reconsider that position and adjust the definition as needed to resolve the important concerns being raised about the continued need to employ item banks as well as group registrations as part of secure testing protocols.

on testing in 1977. Because those physical locations existed, it was possible to physically secure tests that needed to be protected against disclosure to future test takers because their contents might be reused on future exams. That definition – at least as it is being restrictively interpreted by the Office in the Interim Rule – could be considered outdated and should be modified to adjust for technological changes in the way testing is accomplished today.

The testing industry has changed dramatically over the years because of technology. By the 1990s, the Office made adjustments to the secure test procedures in recognition of those changes (see Updated Notice at 52,226). With the advent of computers, virtually every part of life has changed to reflect the ability to automate processes, including testing. As specific types of computer-based testing (e.g., computer-adaptive testing, linear on-the-fly testing, computer mastery testing, multi-stage testing) have become more and more routine, an associated development has been the increased use of item banks. It is not uncommon for sponsors of certain tests (e.g., admissions testing, testing in certification/licensure programs) to develop banks of questions numbering in the tens of thousands, with banks of 50,000 – 75,000 items not being unusual. Fundamentally, an item bank comprised of 20,000 items is as equally copyrightable as the same 20,000 items written individually on pieces of paper and submitted for examination and registration; therefore, the item bank database can be said to represent multiple secure tests.[7] Thus, for reasons other than copyrightability of secure test content, the Office's Interim Rule impairs the ability of testing organizations to register test content that utilizes computer-based technologies that are designed to improve the availability, efficiency, and security of tests today.

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[7] When the Office examines an item bank, whether under the previous secure test registration process or the new group registration, its examiner is reviewing multiple combinations of banked items that are available to be compiled into various, specific test forms by the content owner. Each such test form is a secure test. The Office's suggestion that such combinations may not be copyrightable is incorrect; as the ATP demonstrates below, separate forms are built from groups of items taken from an item bank using psychometric principles related to the alignment of items that assess a given subject matter, evaluating the degree of difficulty of a set of items relating to that subject matter, and determining the comparability of items within a subject matter area and/or within a degree of difficulty. Thus, the different individual test forms constructed from the item banks are no less secure tests than paper-based exams.

Technological advancements, however, have not changed the essential nature of either secure tests or the secure items that are part of those tests. In the same way that section 110 of the Copyright Act (17 U.S.C. §110) evolved to permit registration of works in remote face-to-face educational instruction, the secure test registration procedure appropriately should evolve to reflect the changes that digital technology has brought to secure tests. The application of these kinds of format-neutral principles to the definition of "secure test" will enable a registration procedure that will not be readily outmoded by future changes in technology and testing.[8] Fundamentally, the ATP contends that if individual test items are copyrightable (as the Office readily concedes), then the mode of their delivery (via paper or computer) makes absolutely no difference. Moreover, the creation of a test form made up of individual items, whether that form is fixed or variable, is an integral part of the application of scientific psychometric/ measurement principles – i.e., the "creativity" – that is deeply ingrained into test development. Each test form results from the implementation of stringent professional standards that produce a test that is valid, reliable, and fair to every test taker, and that it is being administered in a standard manner to all test takers. See Joint Standards.

Finally, the compilation of test items within a specific form is equally an element of that creative scientific process – a test form as a creative work is NOT remotely akin to merely compiling content (e.g., telephone numbers into a directory). In fact, the ATP strongly believes that it is appropriate to register an individual test form (or multiple forms drawn from a single item bank) based on the "selection, coordination, or arrangement" of the items in the test form applying specific psychometric principles.[9]

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[8] The ATP expects that more sophisticated items and database formats will emerge, perhaps before this round of discussions with the Office concludes. For example, the new definition should already include a secure test using voice recognition and holographic imaging technology together with serious gaming methodology.

[9] The Office has determined that the creation, by virtue of the particular selection, coordination, or arrangement of an original work of authorship within Section 102, is eligible for copyright protection. The Office's policy is based on the Supreme Court's decision in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346, 356 (U.S. 1991), which limited protectable compilations to ''a work formed by the collection and assembling of preexisting material or data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.'' *See* Statement of Policy, 77 *Fed. Reg.*37,605 (June 22, 2012). The ATP strongly contends that this policy is equally applicable to secure test items used to create secure test forms and/or secure tests.

Indeed, the particular combination of items into a test form should be (and almost always is) based on the application of psychometric/scientific principles to ensure that a test form is valid, reliable, and fair to every test taker taking that test form, as well as to ensure that different forms intended to measure the same content, knowledge, skill, ability, or competency to produce results that can be equated so that scores on different forms can be compared with one another.[10] Furthermore, even if some items in an item bank were deemed to be not copyrightable, a proposition that we question, given the creativity that is generally reflected in crafting item array/presentation and the "distractors" contained in a set of possible answer choices, the work should be registered based on the "selection, coordination, or arrangement" of the unoriginal questions and their inclusion with original material.[11] Thus, the ATP contends that the definition of "secure test" should also include individual secure test forms that are separate compilations

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[10] In addition to technological changes in testing methodologies, technology has changed test items themselves. Many tests today are no longer limited to the use of multiple choice items or fill-in-the blanks, but rely more heavily on "innovative items." Such innovative items can be in any format—computer-based (e.g., hot spot or drag-and-drop), paper-and-pencil (e.g., essay or short answer, situational judgment tests), or performance tasks (e.g., verbal language or translation tasks, surgical skills test). Indeed, a simulation video is no different than a drawing/passage, except that the video itself may be original content along with associated questions about it. Consequently, the variety of item content for which secure test registration is sought has changed considerably over the past decade along with technology itself, especially in the types of computer-based items. Office representatives have stated in meetings with the testing industry that some innovative items perhaps are not copyrightable, the ATP asserts that, no matter how it is constructed, every item that has been created meeting psychometric principles to measure a competency, skill, knowledge, ability, trait, or characteristic within a specific testing construct, is eligible for copyright. The complexity of any item (or seeming lack thereof), should not negatively affect eligibility for copyright, and original innovative items that are part of secure tests should not be denied copyright protection. The ATP believes that the originality of a test item should be judged according to these additional qualitative factors. A test item that appears on its face as a simple math problem is actually a very carefully constructed original question. A test item that initially appears simple could be testing proofreading skills or could be measuring the effectiveness of the distractors within that question. To that end, the ATP believes that the Copyright Office should give deference to the originality of test items even if they appear simple on their face. When test items are used in high stakes testing, the test items should be considered original works of authorship eligible for copyright registration even if they appear to be simple questions on their face.

[11] Contrary to this position, the ATP has been informed by one of its members that in a group of 1500 items, an examiner recently threw out more than 100 items as not eligible for copyright. Such an action by an examiner, taken without regard for the existence of "distractor" items, and without any apparent analysis of the selection and creativity of the total group of items, is very disturbing. This outcome demonstrates that the Office's new group registration process is not an adequate alternative to the previous registration of item banks. Moreover, in that instance, the examiner informed the owner that the ineligible items would be identified in the TX. Nowhere in the Interim Rule or the Updated Notice has the Office stated, or even implied, that it intended to act in such a flagrant manner, in disregard for the IP content of a testing organization, essentially making its items public, or at least rendering them open to challenge in "fair use" litigation.

of secure test items derived from a single item bank of secure test items.

The ATP considers it imperative for the Office to modernize its definition to reflect and accommodate today's technologically-advanced forms of testing. ATP Members have created valuable original works of authorship that need to remain confidential in order to maintain the integrity of each test. Thus, the ATP strongly recommends that the Office update the definition of "secure test" to recognize the technologic improvements present in today's testing environment so that ATP Members can better preserve their valuable intellectual property.[12] The ATP encourages the Office to address the following points in any modified definition, as well as modification of the pre-examination questionnaire:

- **The revised definition must cover "secure test items", "secure test forms", and "secure tests" because individual items and compilations of items into specific forms (that may be fixed or variable) are equally capable of being copyrighted as a "secure test."** Individual items, singly and as elements of different test forms, are increasingly held by, and delivered through, computer systems. The ATP has explained that when the Office reviews an item bank or a group of items, it is essentially reviewing multiple versions of the test forms that may be created out of that pool of items.[13] Test forms provide alternate or different variations for measuring the same content or the same skills, knowledge, ability, etc. A testing organization develops different forms whose respective content have been validated and equated in order to assure that there are multiple tests to measure the same content, etc. In essence, then, separate test forms are produced to protect the security of a test. In some instances, the different test forms may share some items and in other instances, items common to different tests (i.e., anchor items) are used so that the forms can be equated with one another,

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[12] Alternatively, the Office might be able to retain the 1978 language if it were to provide clear and unequivocal updated interpretations of the original definition so that a test content owner has appropriate benchmarks to follow in determining if its test items and test forms qualify for registration as a "secure test." However, on balance, the ATP concludes that adoption of an updated definition would avoid confusion and establish a clear change in interpretations affecting the registration of secure tests.

[13] Another, equally important, form-related issue is the appropriateness of random order of items drawn from an item pool as a "secure test." The Original Notice (and revised Circular 64) state that randomly ordering items does not qualify as a "secure test." The ATP respectfully disagrees with that evaluation. The random selection of items from an item bank and the assembly of such items into separate secure test forms, when accomplished using psychometrically documented algorithms, makes each form eligible for copyright protection.

and scores on the forms can be compared. The fact that a computer is involved in the delivery of those items or forms is of no consequence from a copyrightability perspective.[14]

- **The revised definition must make it clear that secure test items and forms may either be physically secured (e.g., stored in a locked room) or digitally secured (e.g., stored in a secure computer file).** No distinction should be made between physical and digital storage; both approaches are equally capable of providing the required security for test items, forms, and tests. In fact, it may be argued that some form of digital storage (i.e., encryption) provides greater security than physical storage – if the physical storage is breached, the actual test in readable form is obtained, but if the encrypted digital storage is hacked, the file cannot be decrypted and read without the key.

- **The revised definition must recognize that in today's environment, "supervision" of test takers can be accomplished in person or remotely.** The development of secure computerized test delivery and remote online proctoring allows supervision of test takers both at physical test sites (i.e., test centers) and at other locations (e.g. home, school, business). Indeed, supervision can take many forms. It is possible to "lock down" a computer so it has no access to the Internet and thus, the test taker has no opportunity to go online to access materials or obtain answers. Similarly, the use of keystroke logging, digital video recording, laptop cameras, and other similar technology, are being successfully used to maintain a secure test environment and monitor a test taker online or remotely during the test administration to ensure that no cheating is taking place, while at the same time providing greater convenience and flexibility for the test taker.

- **The revised definition must recognize that a "specified center" (as a place where test takers are physically assembled at the same time) is NO longer a requirement for a secure test.** The Office stated in the Original Notice (at 26,852), that a "test" administered via a Web site to people located in their individual homes or offices would not be

[14] As previously noted, computer delivery software and the test content are two different works usually owned by separate entities. A test content owner is only interested in registering the secure content. Thus, it is reasonable for the Office to require that two separate applications be filed if software is included in a single application; the Office should adopt such a policy statement.

eligible for this procedure, both because a home or office would not qualify as a "specified center" and because the tests presumably would not be administered "under supervision." This statement is not correct; as demonstrated in the previous bullet, appropriate secure test supervision can be achieved remotely, so there is no need to require that a "secure test" be administered in a "specified center" – it is now possible for a secure test to be administered without the use of a physical location and without requiring all test takers to "assemble" in one place. In fact, it is common practice today for a single test taker to report to a third-party test location. Moreover, the Office's assertion proves too much – many secure tests in the employment arena are in fact administered "at the office" under the supervision of the HR department or similar personnel. Indeed, the 1978 definition does not specify what type of center is required; many different secure tests, especially in the certification/licensure area and/or personnel testing, are routinely administered to test takers at home or at work (but not in a specified center). This reality must be recognized in the revised definition.

- **The revised definition must recognize that a test administration may be "scheduled" or allowed to begin with the permission of the test sponsor/test administrator, without regard for whether the schedule is fixed for all test takers or is fixed by the individual test taker (i.e., on-demand testing).** Many test sponsors are allowing candidates/examinees to take tests at times of their choosing. Whether the test is taken "on demand" or within some approved testing window, it is essentially considered to be "scheduled" by testing organizations and/or their test delivery vendors.[15]

- **The revised definition must recognize that the "distribution and use" of computer-based tests is not different from paper-based tests and still entails procedures that enable "ownership and control of copies [to] remain with the test sponsor or publisher."** Similar to physical versus digital storage, the distribution and use of a digital test provides full control for the content owner to protect the test, as well as the items, from disclosure, whether such

[15] The Interim Rule, as well as the revised Circular 64, states that a computer-based test will not be considered to be a secure test "unless the test takers are physically assembled at a test center on scheduled dates…." The submission questionnaire likewise asks if the test is administered on "scheduled dates." These requirements clearly conflict with the actual language of the 1978 regulations, which does not use the term "scheduled dates" at all, but instead only requires that a test "be administered under supervision at specified centers on specific dates." Consequently, the Office must adopt a new definition or interpretation that is consistent with the original language.

distribution and use is via the Internet or by means of a USB, flash drive, or other mechanism.

Another option that the ATP recommends for the Office to help content owners clearly understand if they are eligible to register for a secure test copyright – as well as to give the Office reasonable benchmarks in determining if an applicant is eligible to register for a secure test -- would be to create a series of presumptions surrounding what constitutes a secure test, or what does not. The following are proposed presumptions:

- **Establish a presumption that a test that is relied upon for "high-stakes decision-making" requires the use of secure testing procedures.** In a subset of this presumption, that criterion will relate to some form of governmental involvement (federal, state, or local) such as a requirement for licensure or certification, use in education settings (e.g., standardized assessment of end-of-course or end-of-year proficiency, school admissions or scholarship decisions); or testing related to public employment (e.g., police, fire fighters, first responders, air traffic controllers, airport screeners), as well as private employment (e.g., pilots, nuclear power facilities, securities brokers), where public health and safety requirements dictate that the items be secure for future uses; or testing related to some element of public safety and health (e.g., medical or mental health diagnostic testing). In another subset, that "high-stakes" criterion will relate to purely to the use of test data and the need for confidentiality of test items to ensure the accurate and meaningful use of the test (e.g., voluntary testing programs in education and/or employment, such as for job or career training).

- **Establish a presumption that a test used in a certification program that has been accredited against recognized standards by ISO, ANSI, NCCA, or a similar accrediting body, meets the definition of secure test.**

- **Establish a negative presumption that ordinary teacher-built classroom tests are NOT eligible for registration as a secure test.** The Office should clarify that such tests, because they are not high-stakes or presumptively secure, will be rejected for

registration. The ATP understands that such a negative presumption may assist the Office in quickly denying some applications without the expenditure of resources.

- **Change the questionnaire**. Consistent with the above revisions, the questionnaire (questions 7 and 8) must be revised to reflect the registration of item banks and the use of computers to administer secure tests. Furthermore, the ATP recommends that the Office adopt a procedure (similar to that now in use under Section 1201) that allows for streamlined approval of applicants as secure test registrants. Moreover, testing organizations are by and large repeat registrants. Thus, once the Office has received a questionnaire from an organization about a specific test or test program and confirmed its eligibility, the Office should send a letter to that effect (e.g. a PDF) to the applicant. For future registrations by the same organization, it could simply certify that no facts about the organization, test and/or program have changed, and submit the letter sent by the office in lieu of the questionnaire.[16]

Based on the above concepts, the ATP proposes adoption of the following definition of "secure test":

> A "**secure test**" is a high-stakes, non-marketed test comprised of a group of secure test questions and answer choices ("items") that are contained in a fixed test or stored together as a complete test or as part of a bank of test items, created through generally-accepted industry practices to measure the certain content, knowledge, skill, mastery, or competency, delivered in a supervised environment either in person or remotely, and for which the test sponsor, test publisher, and/or test administrator maintains custody and/or control.
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> For the purposes of this definition, the following terms shall have the meanings stated below:
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> - **High-stakes test** – a test used to provide results that have important, direct consequences for individuals, programs, or institutions involved in the testing, including but not limited to tests relied upon by federal, state, or local entities to regulate; for example tests leading to licensure or certification; a standardized summative proficiency test used in K-12 schools; a test used by educational institutions for admission, placement, or scholarship purposes; tests used in

[16] In an undated guide entitled, "Questionnaire for Secure Tests and Questions, Answers, and Other Items Prepared for Use in Secure Tests," the Office has changed some of the requirements in the Updated Notice by establishing two special accommodations for examining and registering the copyrightable authorship in a secure test: (1) for a secure test that is a fixed set of test questions, answers, and other material; and (2) for groups of test items that have been prepared for use in a secure test. An applicant may only use one option. Both options are based on the existing definition of "secure test" and thus would need to be revised to address the points raised by the ATP.

various employment settings, including jobs related to public health and safety (e.g., police officers, fire fighters, airline pilots, nuclear power facility workers), promotion of existing employees, training programs); a test used in a certification program that has been accredited by ISO, ANSI, NCCA, or a similar accrediting body; or a test used to make clinical and other diagnostic determinations, including those related to public safety, as well as related to mental and physical health.

- **Non-marketed** – a test that is distributed under controlled delivery and/or other circumstances by the test sponsor or publisher, including a test administered by or on behalf of the test sponsor or publisher to test takers, and not sold to the general public.

- **Generally-accepted industry practices** – selection, coordination, or arrangement of the items in the test form based on the application of psychometric principles to ensure that a test form is valid, reliable, and fair to test takers, and where different forms are assembled from the same pool of items, in a manner that allows scores from different forms to be equated so that scores from different forms can be compared to one another.

- **Supervised environment** – a testing area where administration of the test is supervised, either by a proctor who is physically present or by online or remote proctoring or other real-time monitoring of test administration data.

- **Ownership and control** – the test sponsor and/or publisher maintains ownership and/or control of all authorized copies of the test; copies of the test or the test items from which the tests are comprised must be stored securely, either physically (in a locked room) or digitally (in a secure computer file).

**B. <u>Issues Surrounding the new Group Registration Process</u>**

In its Updated Notice (November 13, 2017), the Office recognized that the original Interim Rule "did not provide secure test publishers with a means for registering individual test items that are stored in a database or test bank without disclosing the content of these works" (Updated Notice at 52,225). Based on that recognition, the Office set forth an alternative means of registering secure test questions found not in paper test forms but in item banks, enabling the group registration of secure test items. Although the ATP applauds the Office for attempting to address the immediate problems occasioned by the Original Notice in not allowing the registration of item banks, the testing industry has concerns with the concept of a group registration and practical problems relating to such registrations. We expect that those issues can best be resolved by reconsidering and reversing the Office's decision on item

banks and a return to the Office's prior practice of allowing those registrations. However, out of an abundance of caution, the ATP will address the questions/issues the Office itself has raised in the Updated Notice about the new procedure, known as the ''group registration option for secure test items'' ("GRSTQ") (*id.* at 52,226 ).[17]

a) Will an unlimited number of items be permitted to be registered using the group registration process?

The Office has indicated that an unlimited number of items will be allowed in a group registration (82 *Fed. Reg.* at 52,225); however, it states (*id.* at 52,226-27) that it will monitor the initial use of the new process to determine if it will ultimately limit the number of items, including addressing whether having an unlimited number of items in a group results in a "burden" on the Office or leads to a "reduced quality" registration record.

The ATP strongly encourages the Office not to limit the items that may be registered if the Office continues to use the group registration process as the means for allowing registration of secure test questions found in item banks. Such a change would deprive the industry of needed certainty regarding this alternative registration process, especially if the Office continues to refuse to accept registration of item banks under the prior procedure. That would prevent industry members from effectively planning and implementing their registrations of secure items/secure tests. Further, because many item banks are comprised of thousands of items (up to 75,000), any arbitrarily smaller number picked by the Office would require some means of allowing a content owner to "link" groups of items that are part of a single test and group of test forms in order to provide some semblance of coordination of registration of items

[17] The ATP does see some value in the group registration approach, with each item a distinct copyrighted work, but that value does not outweigh a return to the former secure test registration process, at least not for some ATP Members. The group registration would clarify for some content owners that, as stated in the Notice, EACH item is separately registered and is treated as a separate work. However, since the Office examiner will be evaluating each and every item for its copyright eligibility, a significant cost will be incurred because of the hourly fee (expected to be $250) for the examiner to review every unredacted item. Under such circumstances, the Office has warned that large item bank registrations could take "days" to review, which would obviously result in much higher costs than exist today. For smaller content owners, that increased cost could result in a decision not to seek copyright registration at all – the ATP recommends allowing the examiner to review representative items (see fn. 21, *infra.)*. In addition, in one recent examination under the GRSTQ, the examiner determined that more than 100 out of 1500 items were ineligible for registration – a result accompanied by significant costs and practical problems for a testing organization.

that are to be used together (e.g., all groups being reviewed by the same examiner to assure consistency of results).[18] Finally, guaranteeing registration of an unlimited number of items in a group would enable a test content owner to utilize, at least to a degree, a process that has the same utility as registration of an entire item bank, even if the cost of doing so promises to be significantly higher than it was under registration of an item bank. For all these reasons, as well as those articulated elsewhere in these comments, the ATP strongly encourages the Office to reconsider its position and return to some form of registration of item banks.[19]

b) Are the requirements for what constitutes a group appropriate?

In the Updated Notice, the Office sets forth requirements that it will apply to determine whether a group registration will be allowed (82 *Fed. Reg.* at 53,225). Those requirements include: (1) all items in a group must be either published or unpublished (i.e., no mixture); (2) all items in the group must be authored or co-authored by the same person(s); (3) all items in the group must have the same claimant; and (4) all items must have been published within a three-month period. In addition, the Office has asked (*id.* at 52,226) for comments on whether the group registration process should be restricted to works for hire. Finally, the Office stated in the Interim Rule that all questions used with a specific passage or diagram will be considered a single work.

1. As the ATP further discusses in subparagraph c below, the notion that all items for which registration is being sought must have been published within a three-month period is overly restrictive. Some content owners develop items on an ongoing basis, and only seek to register them when a specific "test" has been constructed or when it is convenient to put together a registration. Other test owners who have developed an item bank over longer periods of time may be seeking to register the entire item bank for the first time or may decide to do so only if an infringement issue arises. For these reasons, it is highly likely that many registrations will

[18] However, the ATP questions whether there is any meaningful differences in terms of the Office's resources or work burden between the evaluation one application with 10,000 items compared with ten applications each with 1,000 items—other than the amount of fees received.

[19] The ATP believes that both procedures should be able to co-exist, leaving a testing content owner the ability to select whichever process it finds most useful.

contain a mixture of test items that have been published (already used in a test) and unpublished (items not yet used).[20] Finally, many ATP Members pilot test items similar to constructing a hypothesis for an experiment; the test item will be given to test takers and not included in that test takers score, following which the test developer will then review the results of a piloted test item and determine whether that test item will ultimately be used on tests that will be scored – indeed, some test items may be discarded if they do not meet the test developers criteria for quality and validity. During pilot periods, test items may even be revised (or not); the determination whether to revise will not be known until the developer completes its validity study.

Thus, requiring a common three-month window for all items in a group is unreasonable and arbitrary. In fact, review of a mixture of items does not change the burden on the Office. Accordingly, the ATP requests that the Office drop this requirement in the Final Rule, which mandate is tantamount to the Office trying to regulate testing through the copyright laws.

2. For many of the same reasons listed above, some content owners may seek to register a group of items developed over a lengthy period of time, which exacerbates the potential that a group would include items written by different authors/co-authors, both internal employees as well as items authored by external contractors as works for hire; however, all of these items, regardless of their initial authorship will undergo psychometric (e.g., for bias) and content reviews and potential modifications throughout the development cycle prior to finalization. Accordingly, multiple contributors usually participate in the item authoring and development process to ensure adequate representation of expertise and full content coverage. In fact, items are typically developed through an iterative process and can originate from employees of a testing body, as well as individuals outside of the testing body, such as testing professionals and consultants, and content experts who contribute for hire or on a voluntary basis. For these reasons, the

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[20] The ATP notes that the definition of "publication" in a secure testing context is unsettled. As noted previously, the distribution and use of a secure test, or even a group of secure test items, merely means that the content owner continues to exercise control over the content – neither the secure items nor any secure test containing those items are available for sale to the public. Furthermore, we understand anecdotally that the Office recently described all secure test items as "unpublished"— making this requirement meaningless.

requirement that all items in a group must be written by the same author/co-authors is not appropriate, does not reflect the reality of fundamentally sound test development practice, and appears to be another attempt by the Office to regulate testing. Accordingly, this requirement should not be included the Final Rule.

3. The ATP has no problem with the requirement that all items in a group for which registration is sought must be owned by the same entity/claimant. In this connection, we also note that the requirement that an explanation of the "transfer" of ownership rights from authors/co-authors/ contributors is reasonable.
4. The ATP accepts the Office's assumption that most secure test items are "works for hire", i.e., items written by employees or contractors who then assign them over to the actual content owner. As long as the Office is equally accepting of such assignments, this requirement should pose no problems for the testing industry.
5. As regards the Office's determination that all items related to a particular piece of narrative text (e.g., a passage) or a diagram (or any individual piece of media) always will be considered as a single work, the ATP contends that in many circumstances a content owner may use a narrative or diagram for one or more questions, but the questions may be used, selected, or arranged in a way that is independent of its association with a narrative or diagram. Further, the same piece of media may be used with different sets of questions, within a single test or in multiple test forms. Therefore, an assertion that a particular piece of narrative text (e.g., a passage) or a diagram (or any individual piece of media) will be considered a single work does not reflect the fact that the selection of questions associated with any given narrative text or diagram depends on its intent and usage on a test, rather than its association to a narrative text or diagram.
6. Beyond the issues raised by the Office, another issue is the need to title the group registration (at 52,227). The Office seems to suggest that a title is needed, and it indicates that the applicant should use a title related to or including the name of the test. However, this apparent requirement seems to imply that an item in a group is only capable of being used in one test, which is not an accurate assumption. As noted above, items that are used to conduct the equating between two different test forms (i.e., anchor items) are thus actually part of two or more test forms.

Accordingly, the ATP recommends that the Final Rule should recognize that some items in a group may be used in more than one test form or test and that, as such, the Office should clarify its language about how to title the group registration in order to avoid confusion over the fact that some items may in fact appear in multiple test forms/tests.

7. The ATP wishes to comment on one other issue. In describing the group registration process, the Office notes that the registrant must agree to remove an item from the application if the examiner determines it is not eligible for copyright (*see* 52,228). While the ATP certainly understands the need to avoid "face-to-face disputes" between the registrant and the examiner, in most instances, the representative of the content owner will not have authority to agree to simply remove an item from the group. Indeed, the ATP is most concerned that the examiner's determination that any item is not copyrightable must not be the final word on that issue. Accordingly, the ATP urges the Office to augment this part of the group registration process by adding the ability for the registrant to challenge whether items were appropriately removed from the group through an expedited appeal.[21]

c) Is the Office's publication timing restriction appropriate?

The Updated Notice (at 52,226-27) requires that all items in a group registration must be "published" within a common 3-month period. this requirement is arbitrary and evidences a lack of understanding of the test development process. As discussed above in subsection (a), item development is an ongoing process; for many testing organizations, and for a variety of reasons, item development is not accomplished within a narrow window of three months. The ATP recommends that the Final Rule should contain no time limit for items to be included within a group -- such a requirement would be burdensome and costly for many test content owners. For example, a testing program that wants to

[21] As mentioned previously, *supra.* at fn. 11 and 17, during a recent registration examination, the examiner refused to include more than 100 items out of a pool of 1500, apparently asserting that these items were not eligible for copyright. Quite apart from the question of the correctness of the examiner's decision, this action significantly interferes with the testing organization's ability to prepare a necessary test or test forms for an upcoming administration. An appropriate prompt appeals process needs to be inserted into the Final Rule to enable an applicant to resolve such "copyrightability" questions expeditiously so that the organization can finalize a test for its upcoming use (*see* further discussion at page 21-22, *infra.)*.

register new items once a year, or that wants to register an existing database at one time, could not meet this arbitrary requirement. On the other hand, the ATP does not believe there are any material benefits to the public or to the Office for adopting such a requirement.

d) Is the Office's item "numbering" requirement appropriate?

The Interim Rule requires that each item in a group registration be numbered, both for the uploaded redacted items in an application and again in the unredacted copy of the items brought to the face-to-face examination. The ATP believes that simple item numbering, in and of itself, poses no problem for a content owner -- so long as the Office does not require that a registrant use a specific numbering scheme or approach.

If the Office is contemplating any type of numbering scheme, the ATP urges that the Office not adopt a mandatory type of numbering scheme. Any such numbering requirement would be costly for a content owner to develop and use. On the other hand, if a voluntary numbering scheme is considered, the Office should allow a content owner to include an index of the identification numbers for all of the items in a given item bank that is the subject of a group registration. If the content owner produces an index of items, the Office should then include that information in the TX certificate. Such an index would be a reliable way to confirm what items are involved in each group registration; the index also would be available to the copyright holder to prove the exact items contained in a group registration in the event of infringement litigation.

e) Is the submission of redacted pages any different under the Interim Rule?

The ATP does not understand the Office's concern that partial pages of a secure test generated from an item bank represents "an imperfect record" of the copyrighted test. A redacted deposit copy is being submitted for a group registration, just as it was for an item bank prior to the Interim Rule.[22] Under the secure test process that has been in existence for decades, the examiner would sit down with a

[22] One ATP Member has indicated a problem with uploading redacted items; namely, that there needs to be a way to delete or cancel the application process once it has begun to correct a mistake (e.g., a "delete" or "cancel" button) to protect item security if the application is not completed.

representative of the content owner and reviews a computer laptop or digital storage device containing ALL items sought to be registered.[23] In this way, every combination of items that may eventually constitute a "complete test" is actually available for examination. Under those circumstances, then, the Office's position in reality amounts to a mere preference for a group registration instead of continuing to allow registration of an item bank.

f) Should the Office allow the examiner to reject items s/he contents are not eligible for copyright?

The Office stated in the Updated Notice (at 52,228) that, "If the examiner determines that one or more of the test items are not copyrightable, he or she will require the applicant to exclude that material from the claim in order to continue the examination, or will refuse the claim altogether. Face-to-face disputes with the examiner about the sufficient creativity of an item will not be allowed and will result in refusal of the claim. If an applicant does not agree that an individual test item should be excluded, the applicant may seek to register that test item or test items alone and appeal the subsequent refusal." This approach allows a subjective, and likely ill-informed, judgment by an examiner to veto a carefully constructed set of items that may be used for multiple tests or forms. If items are rejected, the test sponsor/owner may well be faced with having too few items to include in a test or test form for an upcoming test administration. As noted in Subsection (b) (7) *supra.,* the ATP understands that confrontation during an examination is not an acceptable outcome, but the Office needs to provide be a suitable expedited appeals mechanism for the applicant to present its reasoning in support of registration.[24] For those reasons, the ATP urges the Office to allow an expedited appeal to enable the test

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[23] Under the previous process for registration of an item bank, the examiner reviewed a representative sample of the unredacted versus redacted test items (e.g., taken from the first 25 and last 25 pages). That process was consistent with legal decisions describing representativeness in the issuance of copyrights and established an efficient means of review (see page 22, *infra.)*. The ATP strongly recommends this process, even in a group registration; otherwise, it is doubtful that the Office will have sufficient resources to handle all secure test registrations in a timely manner.

[24] Applicants that have created test items according to industry-wide, generally-accepted best practices for psychometric validity and reliability should be given the opportunity promptly to explain the uniqueness and originality of their test items in order to preserve its entire test. Of course, the Office also needs to ensure that examiners are trained about all aspects of the registration of secure tests and items, including the need to take into account the creativity of the answer choices and the creative or unique selection or collection of items in test forms.

content owner to challenge decisions of an examiner as to copyrightability and, in that process, protect the integrity of its anticipated test or form, especially if the test is scheduled to be administered within a short timeframe.

### C. Reconsideration of Treatment of Item Banks

The Office should reconsider its decision to ban the direct registration of item banks. The ATP disagrees with the Office's conclusions about the need to replace the existing procedures for registering secure tests with a group registration. In our view, the classic adage applies – "if it ain't broke, don't fix it."

While the ATP could accept the group registration alternative process, subject to the changes recommended herein, test content owners should be entitled to return to the registration of a secure test drawn from a database of secure items, representing unique compilations and combinations of those items. That approach allows a test content owner to register its entire body of copyrightable test items (along with answers/answer choices) in an efficient manner.[25] A group registration of 20,000 items poses a number of practical problems that would be eliminated by returning to registration of an entire item bank.[26] Moreover, this approach is fully legal and consistent with federal court decisions allowing an entity to register multiple works as part of a larger collection of similar materials. *See, e.g., American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 17 (S.D.N.Y. 1994), *aff'd.* 37 F.3d 882 (2d Cir. 1994)

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[25] Furthermore, the Interim Rule is totally inconsistent with Executive Order 13777 which directed all departments and agencies to identify regulations that "are outdated, unnecessary, or ineffective." *See* 82 *Fed. Reg.* 12,285 (February 12, 2017). Indeed, it is the Interim Rule's prohibition on item banks that effectively relegates the testing industry back to the 1970's when all tests were "paper and pencil," that is the very definition of being "outdated."

[26] The ATP appreciates the Office's interest in confirming the contents and originality of each individual test item, however, we are concerned about efficiency and costs for both testing content owner and the Office. The ATP therefore recommends the Office reconsider having an examiner reviewing every single test item for originality. The ATP believes that test items in a secure test should be considered original works and that random sampling could be an effective method for group registration review. Similar to an auditor of financial statements, the number of items reviewed could be a function of the internal controls/security protocols used by the applicant.

(rejecting alleged infringer's argument that its copying of individual articles should be considered fair use because the copyright holder registered entire issues of its scientific journals and noting that "it would involve gigantic expense and inconvenience to register separately each of the 20 odd articles that appear in an individual issue…"); *see, also, Hustler Magazine, Inc. v. Moral Majority, Inc.,* 796 F.2d 1148, 1155 (9th Cir. 1986) ("a creative work does not deserve less copyright protection just because it is part of a composite work").

The Office has failed to consider that, in today's technologically advanced environment, an item bank of tens of thousands of items will be used by the content owner to develop literally thousands of versions of individual secure tests. By examining an entire item bank under the previous registration process, the Office literally has seen all of the items even if it has not seen all of the permutations of how items may be arrayed to create many different versions/forms of a test, each of which has been determined psychometrically to be valid, reliable, and fair. The requirements that these tests be "nonmarketed" and administered under supervision in a manner that ownership and control of the test remains with the test sponsor or publisher (or test administrator), are still capable of being met using modern technology.

**Conclusion**

The ATP has serious concerns about the Interim Rule, both as to the Office's actions in the Original Notice and in the Updated Notice. Frankly, the ATP considers many of the Office's decisions to be illegal and improper attempts to regulate testing through the use of the U.S. copyright laws. In a number of instances, the Office is seeking to impose its judgments about what ought to constitute a "secure test" instead of giving deference to the determinations of individual testing organization applicant based on scientific psychometric principles– based on the collective learning and technical evolution of the testing industry. Any misuse of the regulatory process by the Office could well have a chilling effect on future testing industry innovation and market competition, and ultimately lead to negative impacts on the use of secure tests in all high-stakes decision-making (e.g., public safety, health, and education).

For all of the reasons stated in these comments, the Association of Test Publishers requests that the Copyright Office withdraw its Interim Rule, as modified, and issue a Final Rule that restores the use of the previous item bank process, modifies the new group registration process, and provides a revised definition of the term "secure test" for use in both procedures.

Respectfully submitted,

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