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March 21, 2017

Ms. Karyn Temple Claggett Acting Register of Copyrights United States Copyright Office 101 Independence Ave., S.E. Washington, DC 20559-6000

 Re: Secure Test Registration Procedures

Dear Ms. Claggett:

 I represent the Association of Test Publishers (“ATP”), an international trade association comprised of hundreds of publishers and sponsors of tests used in a variety of settings, including employment, education, clinical psychology and certification/licensure/credentialing, as well as entities that provide related testing services or administer test programs (“ATP Members”). As developers and users of substantial written content, ATP Members have always paid great attention to the work of the Copyright Office, whether it is to register traditional literary works in the normal fashion or to use the special “secure test” copyright registration procedures. For decades, secure test registration has provided the testing industry with a valuable mechanism by which to protect tests and test materials that are to be used repeatedly in secure environments from the deposit requirement so that the public cannot obtain them, because exposure to 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 answers) will be asked before they take the test. Allowing secure test content to become public information would strip the test content of its assessment value and undermine the results of the tests. As one judge in an Arizona state lawsuit in the 1990’s remarked, “in my day, seeing the test questions before the test was called ‘cheating.’”

 Consequently, many ATP Members rely heavily on the secure test registration process, based on 37 C.F.R. §202.20(c)(2)(vi), and the guidance provided in Circular 64. This has been true for registration of traditional “paper and pencil” tests, as well as over the past 20 years, for a growing number of tests that are administered using a computer, both in physical test centers as well as through Internet-based test administration systems that allow for remote, online proctoring. For those publishers, the requirements that the test be “non-marketed” and administered under supervision in a manner that ownership and control of the test remains with the test sponsor or publisher, is still met in numerous ways using modern technology – technology that is constantly improving the way tests are used, administered, proctored, scored, and the way test results are reported. This is equally true even when, as commonly occurs today, individual computer-based tests given to a group of test takers are separately generated from an item bank

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(database) of secure test items (so-called “computer adaptive tests”); sometimes those item banks contains tens of thousands of items to ensure that none of the test takers actually sees exactly the same items on the test, although all items that measure the same content have been equated so all test scores are comparable. Several years ago the US Department of Education agreed that statewide computer adaptive tests are in fact as valid as paper test forms for measuring student achievement and/or progress. The same is also true for tests used in certification/licensure/credentialing programs that measure competency, skills, or abilities.

 Despite the industry’s long history of being able to register copyrights for secure tests in all different formats, whether computer-generated or in pre-printed test booklets, in recent weeks, we have received information from several ATP Members that your Office is in the process of “revising” either the regulations and/or the procedures, including Circular 64, purportedly to “clarify” both the definition of “secure tests” and the process for registering them. As part of this information, your Office has apparently suggested that a test item bank (from which multiple test forms are generated) is merely a generic “database” or “compilation” and therefore not a secure test – a position with which the ATP strongly disagrees. Other ATP Members have reported that the Office believes remote, online proctored computer-based tests that can be scheduled by test takers or taken “on-demand” (as opposed to taken on a pre-determined date) are inconsistent with the intention of the original regulations; the ATP also finds no merit to this assertion, since computer-based test items, including item banks, have been registered using the secure test procedures for many years and the same concepts of “security” apply to these newer forms of administration and proctoring.

 Making changes to the “secure test” procedures without any input from ATP Members and other stakeholders, would constitute missed opportunity and a serious mistake. Testing organizations are the very entities the secrure test registration procedures were designed for and intended to protect. In our view, such changes would require a Notice of Proposed Rulemaking. We have reviewed the last several years of NPRMs and final rules and, while other procedural changes have been addressed, we can find no indication of the sorts of changes that have been described. For example, the September 17, 2014 final rule that made changes to recordation practices contains provisions allowing the submission of electronic lists of titles where a list is at least 100 or more titles “to speed processing of documents.” Nor did the final rules announced February 6, 2017, amending the regulations governing registration and other procedures that updated and replaced certain terminology and made structural changes to Office procedures, make any changes to the “secure test” procedures. Without appropriate notice and comment, the ATP submits there would be serious flaws to any changes your Office is considering.

 Even with notice and comment, the ATP recommends that the Office conduct a meeting and invite all interested stakeholders to participate. We believe that ATP Members are uniquely qualified to propose effective methods to streamline the secure test procedures that would accomplish the Office’s asserted goals. For example, the testing industry is quite experienced at delivery of content using computers, so it stands to reason that test publishers could assist the Office in developing an effective online procedure for handling secure test registrations. This would save the Office time and money, while

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preserving the essential nature of enabling the registration of copyrights for tests that must be kept secure to assure their integrity and validity. We would be happy to work with the Office to arrange such a meeting at your earliest convenience.

 Sincerely,

Alan J. Thiemann Counsel to Association of Test Publishers

cc: William G Harris, PhD., CEO