

Two ADA Issues for Certification Organizations:

Digital Accessibility, and Handling Testing
Accommodation Requests

Presentation by Julia Judish
Certification Network Group Update
June 20, 2018

The Pillsbury logo, featuring the word "pillsbury" in a lowercase, sans-serif font. The letters are a reddish-orange color. The logo is positioned on a white rectangular background that has a subtle drop shadow against the dark blue background of the slide.

Title III of the Americans with Disabilities Act (ADA)

- General rule against discrimination by public accommodations
- “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodation of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” **42 U.S. Code § 12182**

What is a disability under the ADA?

- Broadly defined
- A physical or mental impairment – or any record or perception of that impairment – that substantially limits one or more of the major life activities of an individual



VISUAL



PHYSICAL



COGNITIVE



AUDITORY

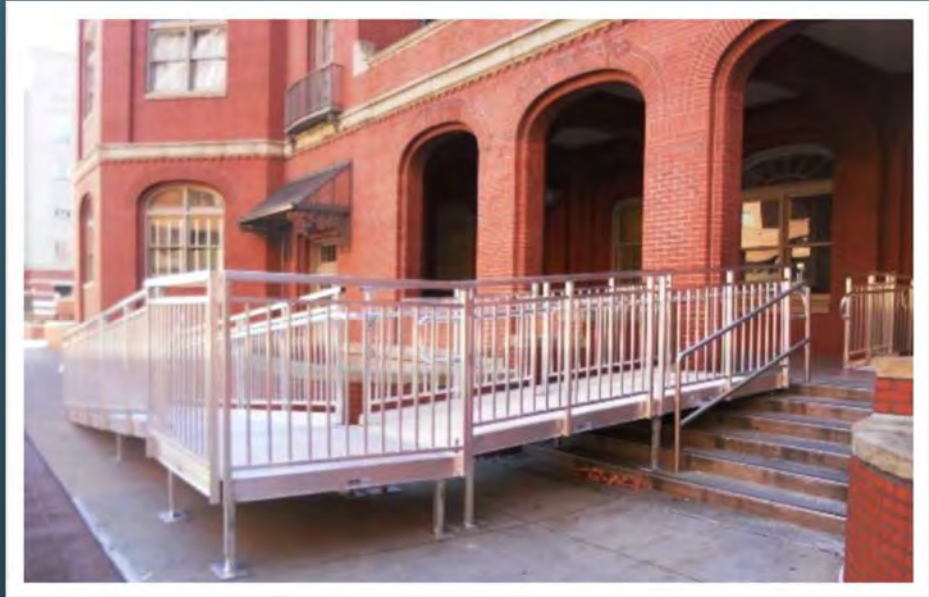
People with Disabilities

- Over 19% → 56.7 million people
- Wide range of disabilities across the four categories
- People move in and out of disabled status
- By 2030: 71.5 million baby boomers will be over age 65
- Over one-third of US families have at least one member with a disability
- Nearly 1 in 10 men are color blind

Digital Accessibility

Accessibility in the Digital Age

THEN



NOW



What is digital accessibility?

- **Removing barriers** that prevent individuals with disabilities from fully interacting with websites and mobile applications
- **Offering equal access**, through design and coding, to information and functionality via assistive technology devices

Examples of digital accessibility issues

- **Visual:** reading the screen and viewing images
- **Auditory:** understanding soundtracks to videos
- **Physical:** being unable to use a mouse

Examples of improving accessibility

- **Visual:** website readable by audible reading software
- **Auditory:** closed-captioned videos
- **Physical:** website navigable using only the keyboard

What qualifies as access?

- An individual with a disability covered under the ADA must be able to equally access a website or mobile application with the aid of commonly used assistive technology devices, such as:
 - JAWS
 - Voice Over
 - Talk Back

Website compliance with the ADA

- DOJ has not yet issued regulations/guidelines/standards
 - Trump Administration withdrew Notice of Proposed Rulemaking
- Web Content Accessibility Guidelines (WCAG) 2.0 issued by nonprofit World Wide Web Consortium (W3C)
 - Voluntary functional standards for websites
 - Speaks to web designers rather than lawyers
 - Testable success criteria to measure extent website is *Perceivable, Operable, Understandable, and Robust*



Is a website a public accommodation?

- **Courts: YES.**

- A public-facing website can be a public accommodation for the purpose of Title III of the ADA
- *Nat'l Fed'n of the Blind v. Target Corp.* (2006)

- **U.S. Dept. of Justice: YES.**

- A website is a public accommodation
- *National Federal of the Blind (NFB) et al. v. HRB Digital LLC et al.* (H&R Block settlement)

- **Air Carrier Access Act: YES.**

- Disabled access to websites is now required for airlines

Does the ADA limit “places of public accommodation” to physical spaces?

- **Circuit split**
- **NO** → **1st, 2nd, 7th** circuits “have found that the ADA can apply to a website independent of any connection between the website and a physical space.”
- **YES** → **3rd, 6th, 9th** circuits “have concluded that places of public accommodation must be physical places, and that goods and services provided by a public accommodation must have a sufficient nexus to a physical place in order to be covered by the ADA.”

Thurston v. Midvale (2018)

- On a restaurant's website, a blind individual was unable to access the menu, make a reservation, or "determine whether she could make an online reservation"
- An email and phone number on the website was insufficient to "provide full and equal enjoyment" of the website
- Visually impaired individuals would have to wait for an email or phone response during business hours, which does not provide "effective communication 'in a timely manner' or 'protect the independence of the visually impaired'"



Robles v. Yum! Brands, Inc. (2018)

- Blind individual was unable to place an order or locate physical store locations on Pizza Hut's website and mobile app
- He waited on hold for 45 minutes on a customer service line for individuals using a screen reader
- The Court found that Pizza Hut's website was a public accommodation and denied Pizza Hut's motion for summary judgment



Other cases

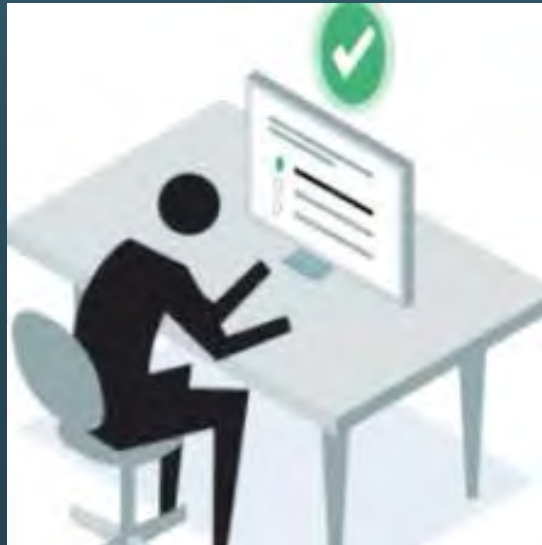


- *Access Now, Inc. v. Blue Apron, LLC* (2017): Blind plaintiffs sue due to inaccessible website: ask court to order compliance with WCAG 2.0 AA standards as remedy for ADA violation
- *Nat'l Ass'n of the Deaf v. Netflix, Inc.* (2012): Captioned text available for only subset of Netflix “Watch Instantly” titles; court denies motion to dismiss even though services are accessed exclusively in the home
- Class action recently filed against the National Association for Stock Auto Racing, Inc. due to videos on their website without closed captioning accommodations

Handling Testing Accommodation Requests

Section 36.309 of DOJ Regulations

- “Any private entity that offers **examinations** or courses related to applications, licensing, **certification**, or credentialing for secondary or postsecondary education, professional, or trade purposes **shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.**”
- 28 CFR § 36.309(a)



Is the test-taker protected by the ADA?

- *Black v. Nat'l Bd. of Med. Exam'rs (2017)*

- After failing the “Step One” medical exam three times, the individual was denied time-and-a-half for a fourth sitting
- There was **no evidence** that her ability to learn, read, remember, or concentrate was **substantially impaired** by her ADHD compared to the average person
- She had graduated at the top of her high school class, done well on the SAT, graduated from Princeton, and was at the top 20% of her class at the University of Pennsylvania



Required Accommodations

- Examination must be selected and administered to an individual with a disability in a way that “**best ensures**” the results accurately reflect the individual’s aptitude or achievement level (or other relevant factor), rather than the individual’s impaired sensory, manual, or speaking skills
- Except if the accommodation would
 - **Fundamentally alter** the measurement of the skills or knowledge the examination is intended to test
 - Result in an **undue burden** (significant difficulty or expenses)

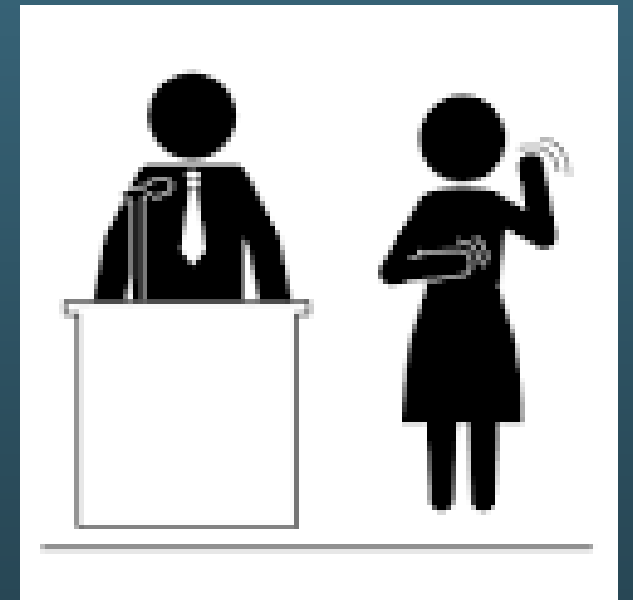
Fundamental Alteration standard

- *K.P. v. City of Chicago (2015)*
- Student with “limited computation skills” was not entitled to use a calculator on a test used for admission to the non-neighborhood magnet schools
- Test was designed in part to assess student’s ability to perform math calculations



Fundamental Alteration standard

- *Krpan v. Registry of Interpreters for the Deaf, Inc. (2016)*
 - Organization offered two credentials for interpreters: one for hearing interpreters and one for deaf or hard-of-hearing interpreters
 - Deaf individual was denied a hearing interpreter and video vignettes to be paused for the hearing interpreter certification
 - Court held that his requested accommodation would have **fundamentally altered** the nature of the exam and resulted in an **undue burden**
 - Test was designed to test an interpreter's ability to simultaneously render spoken English into ASL (and vice versa)



Undue Burden standard

- *Bonnette v. D.C. Court of Appeals (2011)*
 - Vision-impaired candidate entitled to take bar exam using a computer with an accessible screen-reading program
 - Hiring someone to read the exam to the candidate was cheaper, but would not **best ensure** top performance
 - Screen reading program **not an undue burden**, despite substantial cost
 - The organization's budget exceeded \$12 million; secure laptop equipped with screen reading software would cost \$5,000 (more than exam fee)



A Data Protection and Privacy Primer for Certification Organizations

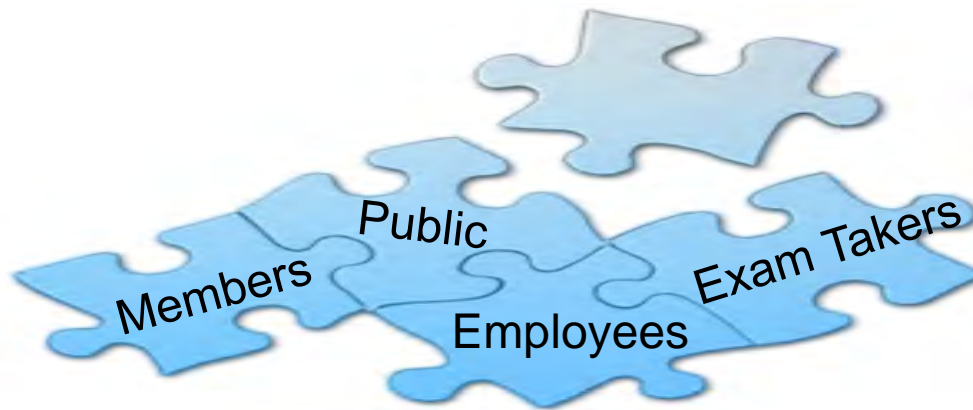
Certification Network Group Update

June 20, 2018

Presenter: Meighan O'Reardon

Data Protection and Privacy is Critical

- Certification Organizations Collect or have Access to Personal Information and other Sensitive Information from a Large Set of Constituents



- Collecting and Using Personal and Sensitive Information Carries with it many Responsibilities and Risks
- All of that Information is Valuable both to the Organization and to Malicious Actors

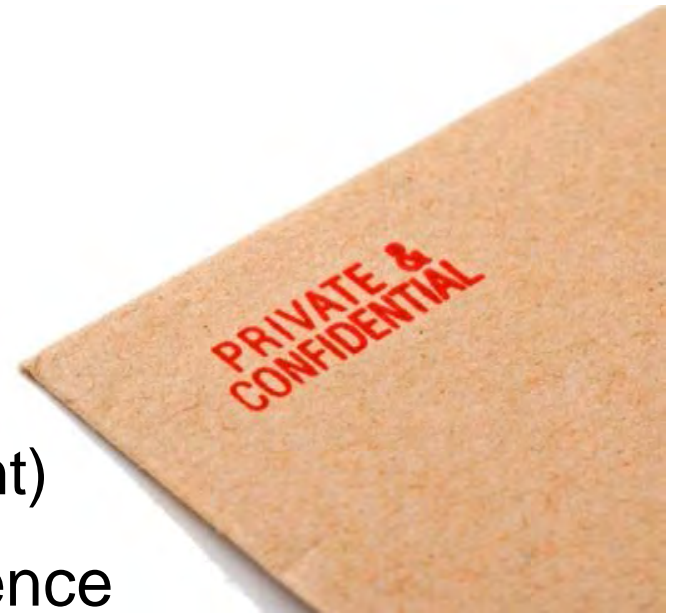
Common Data Privacy and Security Pitfalls

- Lack of Rigor around **Use, Storage and Transfer of Personal Information**
 - Transfer and Storage of Personal Information via Email
 - Storing Personal Information on Laptops or Smartphones
 - Use of Cloud Solutions Without Appropriate Due Diligence or Legal Protections
- **Third Party Access** without Proper Safeguards
- Collecting **Financially Sensitive Information** (i.e., Credit Card Data) and Processing Payments Online without Controls
- Not Following Through on **Promises** Made to Data Subjects

PRIVACY BASICS

What Kind of Data?

- **“Personal Information”** (US-oriented definition)
 - any information that can be used on its own or with other information to identify, contact, or locate a single person, or to identify an individual in context*
 - Name, Address, Phone Number, Date of Birth, Email Address, Gender, Race, etc.
 - Financial Information
 - Protected Health Information
 - Sensitive Personal Information
- Test and Certification Results
- Intellectual Property (Exam Content)
- Operating/Organizational Intelligence



Risks and Responsibilities of Holding Data

■ Risks

- Regulatory and Legal
- Misuse or Theft
- Financial Costs and Loss
- Reputational Damage
- Loss of Public Trust

■ Responsibilities

- Regulatory and Legal
- Contractual Obligations
- Security and Data Protection
- Storage and Retention



Legal and Regulatory Considerations

■ Federal

- CAN-SPAM and Telemarketing Laws
- Health Insurance Portability and Accountability Act (HIPAA)

■ State

- Data Breach Notification Laws
- Use of Social Security Numbers
- Telephone/Fax Marketing
- Data Protection Requirements
- Records Disposal

■ International

- Data Transfers
- GDPR



Can-SPAM and COPPA

■ CAN-SPAM

- Intent is to Limit Electronic Messages that have a Primary Purpose of Commercial Advertisement or Promotion of a Product or Service
- Exempts Transactional or Relationship Messages
- Opt-outs and Unsubscribe Mechanisms
- Prescriptive Message Content
- Enforced by the Federal Trade Commission

■ Children's Online Privacy Protection Act (COPPA)

- Imposes Requirements on Operators of Websites/Online Services Directed to Children Under 13 Years Old that have Actual Knowledge they are collecting Personal Information Online from a Child
- "Knowledge" Threshold
- Parental Consent

Breach Notification Law

- A Data Breach Can Take Many Different Forms (malicious, accidental, misuse, etc.)
- Almost Every State has a Data Breach Notification Law
- Must Comply with Laws of the State with the Affected Individuals
 - Not where the Organization is Located
- Not Every Incident Requires Notification
 - Safe harbors for encryption
- Notice Required to be Given to (i) Individuals, and (ii) State Authorities
- Breach Notification Laws Dictate (i) Content of Notices, (ii) Method of Delivery, and (iii) Deadlines for Delivery

Data Security Authorities

- State Laws
 - Massachusetts Regulations
 - Breach Notification Laws
- Industry Organizations
 - Payment Card Industry Data Security Standards
- Defense Department and Other Federal Standards
- Enforcement Precedents
- Common Law
 - Did your Organization take “Reasonable” Steps
 - A Growing Body of Law Describing what is Reasonable Security



General Data Protection Regulation (GDPR)

- GDPR is a legal framework that sets guidelines for the collection and processing of personal information of individuals in the European Union
- Replaced EU Data Protection Directive of 1995
- Effective 25 May 2018
- Builds on existing concepts
- Key new rights for individuals and new obligations on both 'data controllers' and 'data processors'
- Significantly extends territorial reach
- Fines of up to EUR20m or up to 4% of worldwide turnover/revenue

Does GDPR Apply to Us?

“Personal Information” any information relating to an identified or identifiable natural person

- Do you have an establishment in the EU?
- Are you offering goods and services to data subjects residing in the EU (even if no payment is required by data subject)?
- Are you monitoring data subjects residing in the EU?

A Few Key GDPR Requirements

- Consent
 - “any **freely given, specific, informed and unambiguous** indication of his or her wishes by which the data subject, either **by a statement or by a clear affirmative action, signifies agreement** to personal data relating to them being processed;”
 - the purposes for which the consent is gained does need to be “collected for **specified, explicit and legitimate purposes**”
- Breach Notification
 - Reporting to relevant supervisory authority without undue delay
- Right to Access and Erase Data
- Data Protection Officer Requirement

OF SPECIFIC INTEREST TO CERTIFICATION ORGANIZATIONS

Testing and Certification Data

- Is it Personal Information?
 - In Europe – Yes!
- European Court of Justice – Irish Case
 - Exam Scripts/Test are Personal Information
 - “a candidate sitting in a professional examination is a natural person capable of identification either directly by name or indirectly by identification number from the exam script
 - Implication: Test candidates could potentially exercise their personal data rights in relation to their written answers in a professional examination and also to the examiner's comments regarding those answers.
 - These rights would not extend to the examination questions themselves as they would not constitute personal data.

DATA PROTECTION PROGRAM BEST PRACTICES

Assess Your Current Activities

- **Collection:** How is Personal Information collected ?
- **Use:** How are You using Personal Information?
- **Access:**
 - Who has Access to Personal Information collected?
 - Are you Sharing Personal Information? With who?
- **Storage:** Where are you Storing Personal Information?
- **Security:** What Security do you have in Place?
- **Disposal:** How is Personal Information Disposed?
- **Governance:**
 - Privacy Committee
 - Policies and Legal Agreements

Handle Data with Care - Safeguards

- Implement **Technical** Practices Aligned with Data Responsibilities
 - Patch Management
 - Encryption
 - Anti-Virus
 - Passwords
 - Disposal
- Maintain **Administrative** Practices
 - Engage in Regular Training Across all of the Organization
 - Implement (and enforce) Appropriate Written Policies
- **Physical** Safeguards
 - Don't Forget about Paper
 - Access Controls

Key Contract Terms with Third Parties

- Confidentiality and Data Protection
- Technical Safeguards
- Background Checks and Restricted Personnel
- Disaster Recovery and Business Continuity
- Audit and Incident Reporting
- Cyber Insurance
- Data Protection Indemnities
- Limits of Liability

Privacy and Security Provisions in Agreements

- Services and Technology agreements are not static!
 - Keep Agreements Current as Technologies Change and Practices Evolve
 - Use Renewals to Update Provisions to Reflect New Risks
- Use Built-in Contractual Mechanisms to “Check-up” on your Suppliers’ Adherence to Privacy and Security Terms
 - Audit
 - Governance Provisions
 - Reporting
 - BCP / DR Plans and Testing



Data Breaches and Response

- Prepare Your Organization By:
 - Establishing a Written Response Plan
 - Training all Employees to IDENTIFY and Report
 - Designating Individuals to be Contacted
- Know What Data is Held by the Organization
- Know What States may be Implicated
- Implement Organizational Response
 - Privacy Committee
 - Forensics Experts
 - Legal Counsel
 - Public and client Relations
- Test and Update Plans



REALITY CHECK

Best Practices vs. Market-Driven Realities

- Limited Funding or Size of Organization Does Not Absolve an Organization from Compliance
- Data Privacy and Protection is an Organization-wide Risk
- Know What Data You Have and How You Can Use it
- Understand Your Legal Obligations
 - Are Your Practices “Reasonable”
- Know Your Third Parties
- Check and Update Your Policies
- Prepare for the Worst



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Secure Test Item Group Copyright Registration: What the New Rules Mean for Certification Organizations, and What Changes Are Coming Next

Presentation by Julia Judish
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June 12, 2017 Interim Rule

Federal Register Notice: Copyright Office implements a major shift

- No notice and comment
- Requires **separate registration applications** for **secure tests**, for computer **programs** used to generate computer-based secure tests, and for automated **item bank databases** from which the questions for test forms are drawn

Problem: the required deposits for copyright registration applications, if not treated as secure tests, are **available for public inspection**

Result: Certification organizations freeze registration application activity; huge industry opposition and outcry

November 13, 2017 Updated Interim Rule

Copyright Office proposes a fix and updates the Interim Rule

- New 37 CFR § 202.4(k) allows **group registration** of secure test items, with **each test item a separate registered “work”**:
- one application, one filing fee, and identifying material

November 13, 2017 Updated Interim Rule

37 CFR § 202.13(b)(5) defines a “test item”:

A test item is comprised of a question (or “stem”), the correct answer to that question, any incorrect answer choices (or “distractors”), and any associated material, such as a narrative passage or diagram, and each item shall be considered one work. A single narrative, diagram, or other prefatory material, followed by multiple sets of related questions and correct or incorrect answers shall together be considered one item.

November 13, 2017 Updated Interim Rule

37 CFR § 202.13(c) sets out the requirement for deposits:

In the case of a group of test items prepared for use in a secure test, the applicant must submit a redacted copy of each test item. In all cases the redacted copy must contain a sufficient amount of visible content to reasonably identify the work(s). In addition, the applicant must complete and submit the secure test questionnaire that is posted on the Copyright Office's Web site....

In the case of a group of test items prepared for use in a secure test, the applicant must bring an unredacted copy of all the test items.

November 13, 2017 Updated Interim Rule

37 CFR § 202.13(d) Group registration requirements. The Copyright Office may register a group of test items if the following conditions have been met:

- (1) All the test items must be prepared for use in a secure test, and the name of the secure test must be identified in the title of the group.
- (2) The group may contain an unlimited amount of works, but the applicant must identify the individual works included within the group by numbering each test item in the deposit.
- (3) The applicant must provide a title for the group as a whole, and must append the term “GRSTQ” to the beginning of the title.

November 13, 2017 Updated Interim Rule

37 CFR § 202.13(d) (cont'd):

(4) The group must contain only unpublished works, or works published within the same three-calendar-month period and the application must identify the earliest date that the works were published.

(5) All the works in the group must have the same author or authors, and the copyright claimant for each work must be the same. Claims in the selection, coordination, or arrangement of the group as a whole will not be permitted on the application. Each item in the group must be separately copyrightable or must be excluded from the group.

What Next?

June 12, 2017 Interim Rule also made minor revisions to the definition of “Secure test” in 37 CFR § 202.13(b):

- (1) A *secure test* is a nonmarketed test administered under supervision at specified centers on scheduled dates, all copies of which are accounted for and either destroyed or returned to restricted locked storage following each administration.
- (2) A test is *nonmarketed* if copies of the test are not sold, but instead are distributed and used in such a manner that the test sponsor or publisher retains ownership and control of the copies.
- (3) A test is administered *under supervision* if test proctors or the equivalent supervise the administration of the test.
- (4) A *specified center* is a place where test takers are physically assembled at the same time.

What Next?

Remarks in the Federal Register Notices invited comments on the definition of “secure test.”

- Copyright Office intends to issue Notice of Proposed Rulemaking to revise definition
- Major decision points:
 - How to differentiate between “secure tests” and other tests not eligible for secure application procedures
 - Remote proctoring