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March 30, 2018

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

Re: Interim Rule on Secure Tests

Dear Ms. Claggett,

On behalf of a coalition of nonprofit certification organizations and other testing and accrediting organizations that support secure, computer-based certification testing, this firm submits comments on the interim rule on copyright registration of secure tests that was published in the *Federal Register* on June 12, 2017, as later supplemented by group registration procedures published in the *Federal Register* on November 13, 2017 (the “Interim Rule”). The organizations we represent in this coalition include:

- Institute for Credentialing Excellence (“ICE”) and its accreditation division, the National Commission for Certification Agencies (“NCCA”)
- American Institute of CPAs (“AICPA”)
- Financial Industry Regulatory Authority, Inc. (“FINRA”)
- Educational Testing Service (“ETS”)
- Prometric
- Society for Human Resource Management (“SHRM”)
- CFA Institute
- National Restaurant Association and its related nonprofit certification body, the National Registry of Food Safety Professionals
- American Society of Association Executives (“ASAE”)
- National Commission on Certification of Physician Assistants (“NCCPA”)
- American Academy of Nurse Practitioners Certification Program (“AANPCB”)

- National Certification Commission for Acupuncture and Oriental Medicine (“NCCAOM”)
- Certification Commission for Healthcare Interpreters (“CCHI”)
- Board of Pharmacy Specialties (“BPS”)
- Argentum and its related nonprofit, the Senior Living Certification Commission (“SLCC”).

Our clients greatly appreciate the Copyright Office’s openness to considering the concerns of certification and testing organizations and its responsiveness to those concerns in developing new procedures for group registration of secure test items, as reflected in the November 13, 2017 supplemental interim rule. **As a general matter, our clients support the Interim Rule’s approach to group registration of secure test items.** We will focus our comments in two areas: (1) requests that a Final Rule include confirmation or clarification of certain aspects of the procedures, and (2) suggestions for future updates to the regulatory definition of a “secure test.”

I. Specific Comments on the Interim Rule

We request confirmation or clarification of the following points in the regulatory provisions of the Final Rule.

- The Interim Rule provides, in 37 CFR § 202.13(d)(4), that group registration applications may include only “unpublished works” or “works published within the same three-calendar-month period.” **The Final Rule should clarify that unpublished test items stored in secure test item banks are not deemed to be published based on their use in a secure test administration.** This is consistent with the case law. *See, e.g., Association of Am. Medical Colleges v. Cuomo*, 928 F.2d 519, 526 (2d Cir.), *cert. denied*, 502 U.S. 862 (1991) (rejecting argument that the MCAT “does not fall within the traditional published/unpublished dichotomy because of the limited exposure to the test regularly granted to test-takers” and affirming district court’s finding that “the MCAT is an unpublished work” due to its secure nature); *National Conference of Bar Examiners v. Multistate Legal Studies, Inc.*, 692 F.2d 478, 486 n. 8 (7th Cir. 1982) (in upholding validity of Copyright Office’s secure test deposit regulation, noting: “We agree with the Register of Copyrights that the [Multistate Bar Exam] would probably be classified as an unpublished work under 17 U.S.C. § 101....”); *Coll. Entrance Examination Bd. v. Pataki*, 889 F. Supp. 554, 569 (N.D.N.Y.), *opinion modified in other respects on reconsideration*, 893 F. Supp. 152 (N.D.N.Y. 1995) (“by its very definition, a secure test is one over which the owner of the copyright does not relinquish

ownership or control. Thus, to concede that GMAC's tests are secure is likewise to concede that they are unpublished works within the meaning of the [Copyright] Act"). **The Final Rule should also clarify under what circumstances a "published work" may qualify for the secure test registration procedures.**

- **The Final Rule should confirm the validity of prior secure test registrations**, such that any secure test items included in previously registered secure tests should not be submitted for registration in a group application unless the applicant is seeking copyright registration for the item as a separate, stand-alone work.
- The new definition of "test item" (37 CFR § 202.13(b)(5)) states that 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." Section 202.13(d)(2) requires applicants "to identify the individual works included within the group by numbering each test item." The Final Rule should clarify that, if multiple questions relating to the same prefatory material are not always presented together as a complete group to test takers (e.g., the questions are alternatives, or different subsets of questions are presented algorithmically in response to the test taker's performance), each question in the decision tree of questions would be a different item. **The Final Rule should also permit applicants to either include the prefatory material in each of related questions (i.e., repeating the passage before each separately numbered question) or reference the prefatory material in later questions.**
- **The Final Rule should clarify that § 202.13(d)(5)'s requirement that "all the works in the group must have the same author or authors" does not preclude registration of test items that refer to prefatory material that does not have the same authorship as the question itself.** In such instances, the applicant can specify that it is not seeking to register the prefatory material in that application.
- **The Final Rule or other official guidance should explain what the Copyright Office will do if it rejects all or part of material submitted in a secure test registration application**, either as ineligible for submission under the secure test procedures or because the Office considers the items not to be copyrightable original works of authorship. In particular, the Final Rule should specify that the Copyright Office will not retain or make available for public inspection any unredacted material associated with rejected items from a secure test registration application.

- The Final Rule and/or revisions to *Circular 64* should provide **guidance on redaction methodologies for secure test items that use audio and/or visual clips.**

II. Proposals for Updating the Secure Test Definition

Based on statements in the *Federal Register* notices for the Interim Rule, we anticipate that the Copyright Office will publish a Notice of Proposed Rulemaking on revising the current definition of a “secure test.” We support revising the current definition and urge the Copyright Office to issue an NPRM soon, taking into account public comments on potential changes.

The current regulatory definition of a “secure test,” as reflected in 37 CFR § 202.20(b)(4) prior to modification in the June 13th Interim Rule, dates from 1978. It defined 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 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.

As modified by the June 13th Interim Rule, the definition now is found at 37 CFR § 202.20(b)(1) and requires a secure test to be “administered under supervision at specified centers on *scheduled* dates....” Under the June 13th Interim Rule, § 202.20(b)(2) now contains the definition of a *nonmarketed* test; § 202.20(b)(3) states that “A test is administered *under supervision* if test proctors or the equivalent supervise the administration of the test,” and § 202.20(b)(4) explains that “A *specified center* is a place where test takers are physically assembled at the same time.”

We request that the Copyright Office revise the definition of a “secure test” to incorporate the following principles.

- The revised definition should be expanded to define both secure tests and secure test items, in order to align with the new option for group registration of individual items from item bank databases used to construct secure tests.
- The revised definition should specify that secure test items can be either physically secured (e.g., stored in a locked room) or maintained securely in electronic format (e.g., stored in a secure computer file).

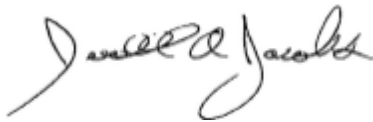
- The revised secure test definition should be flexible enough to capture technological changes that have already been adopted by secure testing entities and to anticipate further technological advances:
 - The new definition should eliminate the requirement that a secure test be “at specified centers on scheduled dates” to allow for computerized test delivery and on-demand testing.
 - The new definition should also specify that the required “supervision” may be demonstrated either by in-person proctoring or by remote proctoring technology that provides at least the same level of security as in-person proctoring. For example, keystroke logging, laptop cameras, biometric identification, and other technologies can potentially be used to keep tests secure and supervised, while at the same time allowing for greater convenience and flexibility on the part of the test-taker. This change will assist the testing industry in leveraging technological advances to develop tests that are accessible to individuals with disabilities who have faced obstacles to participation in traditional secure test administrations in a test center. It will also expand the availability of secure testing opportunities to individuals in rural or remote locations, as well as to service members stationed overseas.
- The revised definition should provide examples of the kinds of factors that will generally support a finding that a test or test item falls under the secure test definition. Tests or test items lacking these factors may still qualify as secure tests, but the list of examples would provide helpful guidance both to the public and to the Copyright Office in identifying tests eligible for the secure test registration procedures. These examples should include the following, to the extent the tests and test items are created, maintained, and administered securely:
 - Certification or licensure exams developed by testing programs accredited by ANSI, NCCA, or the ISO.
 - Tests that have been documented as meeting psychometric validity standards for test results, either for a single exam form or for variable exam forms validated as testing the same knowledge.
 - Tests required by federal, state or local law for licensure, certification, qualification for participation in a profession.

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- Tests adopted by governments or school division for testing in public schools or used by multiple public institutions of higher education for admission determinations.
- The revised definition should also include examples of tests that do not qualify for secure test registration materials, such as ordinary classroom tests (e.g., pop quizzes, teacher-built tests) and tests in which the test questions are made available in advance of the test administration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jerald A. Jacobs". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Jerald A. Jacobs