

the event sponsor to grant general permission to enter the regulated area.

Dated: February 11, 2021.

**T.J. Barelli,**

*Captain, U.S. Coast Guard, Captain of the Port San Diego.*

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## LIBRARY OF CONGRESS

### Copyright Office

#### 37 CFR Part 202

[Docket No. 2017-8]

#### Secure Tests

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Interim rule.

**SUMMARY:** The U.S. Copyright Office is issuing an interim rule amending its regulations governing the registration of copyright claims in secure tests and secure test items in order to address a temporary disruption caused by the COVID-19 pandemic. The interim rule allows for examination of these claims via secure videoconference during the national emergency.

**DATE:** Effective February 19, 2021.

**FOR FURTHER INFORMATION CONTACT:** Regan A. Smith, General Counsel and Associate Register of Copyrights, [regans@copyright.gov](mailto:regans@copyright.gov), or Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practice, [rkas@copyright.gov](mailto:rkas@copyright.gov). They can be reached by telephone at 202-707-3000.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Under section 408 of the Copyright Act, the U.S. Copyright Office is responsible for registering copyright claims.<sup>1</sup> In so doing, the Office is obligated to obtain a registration deposit that is sufficient to verify the claim and to provide an archival record of what was examined and registered.<sup>2</sup> Deposits of unpublished material must be kept for the full term of copyright protection,<sup>3</sup> and all deposits are available for public inspection.<sup>4</sup> The Act, however, authorizes the Office to issue regulations establishing “the nature of the copies . . . to be deposited” in specific classes of works and to “permit, for particular classes,

the deposit of identifying material instead of copies or phonorecords.”<sup>5</sup>

Pursuant to that authority, the Office has long provided special registration procedures for “secure tests” that require the maintenance of confidentiality of their contents. These tests include tests “used in connection with admission to educational institutions, high school equivalency, placement in or credit for undergraduate and graduate course work, awarding of scholarships, and professional certification.”<sup>6</sup> Current regulations define a secure test as “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 or secure electronic storage following each administration.”<sup>7</sup>

On June 12, 2017, the Office issued an interim rule (the “June 2017 Interim Rule”) that memorialized certain aspects of its secure test procedure and adopted new processes to increase the efficiency of its examination of such works.<sup>8</sup> Under this rule, applicants must, among other things, submit an online application, a redacted copy of the entire test, and a brief questionnaire about the test through the electronic registration system.<sup>9</sup> This procedure allows the Office to prescreen an application to determine whether the work appears to be eligible for registration as a secure test. If the test appears to qualify, the Office will schedule an in-person appointment for examination of an unredacted copy of the test.<sup>10</sup> All in-person appointments take place at the Copyright Office, located in Washington, DC, at the James Madison Memorial Building of the Library of Congress.

During the in-person meeting, the examiner reviews the redacted and unredacted copies in a secure location in the presence of the applicant or its representative.<sup>11</sup> If the examiner determines that the relevant legal and formal requirements have been met, he or she will register the claim(s) and add

<sup>5</sup> *Id.* 408(c)(1).

<sup>6</sup> 42 FR 59302, 59304 & n.2 (Nov. 16, 1977); *see also* 43 FR 763, 768 (Jan. 4, 1978) (adopting the definition of a secure test).

<sup>7</sup> 37 CFR 202.13(b)(1).

<sup>8</sup> 82 FR 26850 (June 12, 2017); *see* 37 CFR 202.13, 202.20(b)(3), (c)(2)(vi) (implementing the June 2017 Interim Rule).

<sup>9</sup> 37 CFR 202.13(c)(2).

<sup>10</sup> *Id.*

<sup>11</sup> The applicant must bring to the meeting, among other materials, a signed declaration confirming that the redacted copy brought to the meeting is identical to the redacted copy that was uploaded to the electronic registration system. *Id.* 202.13(c)(3)(iv).

an annotation to the certificate reflecting that the work was examined under the secure test procedure. The registration is effective as of the date that the Office received—in proper form—the application, filing fee, and the redacted copy that was uploaded to the electronic registration system.<sup>12</sup> The June 2017 Interim Rule thus gives applicants the benefit of establishing as their effective date of registration the date when those redacted materials are initially submitted to, and received by, the Office electronically, rather than the later date when the in-person examination of the unredacted material takes place.

In response to concerns raised by stakeholders following the June 2017 Interim Rule, the Office issued a second interim rule on November 13, 2017 (the “November 2017 Interim Rule”) to permit the registration of a group of test items (*i.e.*, sets of questions and answers) stored in a database or test bank and used to create secure tests.<sup>13</sup> For these claims, the November 2017 Interim Rule adopted most of the registration procedures that apply to secure tests under the June 2017 Interim Rule.

On May 8, 2020, the Office issued a third interim rule to address a disruption caused by the COVID-19 pandemic (the “May 2020 Interim Rule”).<sup>14</sup> Specifically, certain tests that normally would qualify for registration as secure tests could be rendered ineligible for this option, because they were being administered remotely rather than at specified testing centers due to pandemic-related restrictions. The interim rule amended the definition of a “secure test” to allow otherwise-eligible tests currently being administered online during the national emergency to qualify as secure tests, provided the test administrator employed sufficient security measures.<sup>15</sup> The rule did not specify particular measures required to meet this standard, in order to afford applicants flexibility to tailor such processes to their specific needs. The Office noted that the rule did not alter the requirement that a secure test be administered “under supervision,” meaning that “test proctors or the equivalent supervise the administration of the test.”<sup>16</sup>

<sup>12</sup> 82 FR at 26853.

<sup>13</sup> 82 FR 52224 (Nov. 13, 2017). *See* 37 CFR 202.4(b), (k), 202.13 (implementing the November 2017 Interim Rule).

<sup>14</sup> 85 FR 27296 (May 8, 2020). *See* 37 CFR 202.13(b)(1) (implementing the May 2020 Interim Rule).

<sup>15</sup> 37 CFR 202.13(b)(1).

<sup>16</sup> 85 FR at 27298; *see* 37 CFR 202.13(b)(3).

<sup>1</sup> 17 U.S.C. 408.

<sup>2</sup> *Id.* 408(b), 705(a).

<sup>3</sup> *Id.* 704(d).

<sup>4</sup> *Id.* 705(b).

The Office made clear that the modifications made under the May 2020 Interim Rule were temporary and would last only until the COVID-19 emergency ended.<sup>17</sup> The Office also noted that the accommodation made under the May 2020 Interim Rule was not determinative of the final rule in this proceeding, but that the Office would monitor the operation of the rule to evaluate whether and under what conditions tests that are remotely administered by the test publishers should qualify as “secure tests” under the Office’s regulations once the emergency period ends.<sup>18</sup>

The Office also noted that it was exploring possible options to examine secure test claims via secure videoconference. To that end, the Office invited comments on the technological requirements that would be needed for test publishers to participate if the Office decided to implement such a process. The Office specifically sought comment on the feasibility of using the WebEx platform for remote examination, as that program is currently supported by the Library of Congress.<sup>19</sup> The Office received five comments in response.<sup>20</sup> As discussed further below, the comments generally supported the use of WebEx, or other secure videoconferencing platforms.<sup>21</sup>

The comments also reiterated previous concerns regarding the Office’s “secure test” definition set forth in 37 CFR 202.13(b), primarily the requirement that a test must be administered on “scheduled dates” at a “specified center” where “test takers are physically assembled at the same time.”<sup>22</sup> NCTA and ATP referred to points previously made by several commenters in this proceeding “that existing testing technology already supports the identical testing outcomes

provided” in the May 2020 Interim Rule.<sup>23</sup> They contend that the Office’s “attempt to limit the [May 2020] Interim Rule to tests that were ‘formerly conducted in person’ fails to recognize that there is simply no difference in at home/remote proctored testing because of COVID-19—the same type of testing that was occurring on a daily basis before COVID-19, and will continue to occur in exactly the same manner following a time when in-person testing may resume.”<sup>24</sup> They conclude “there is no basis for requiring users of the [May] 2020 Interim Rule to ‘return’ to in-person testing” whenever the national emergency ends and urge the Office to make the May 2020 Interim Rule permanent.<sup>25</sup>

## II. The Interim Rule

While the Office continues to evaluate the secure tests regulations as a whole—taking into consideration the concerns of test publishers expressed throughout this rulemaking—to determine whether changes may be warranted before issuing a final rule, it issues this additional interim rule to allow for the remote examination of secure test claims by Copyright Office staff during the national emergency. Although applicants continue to submit these claims during the Office’s closure, the Office cannot conduct in-person examinations. As a result, the Office now has more than 1,500 secure test claims pending and expects that this number will otherwise continue to grow for the duration of the COVID-19 emergency. The accumulation of claims has created a backlog of secure test claims that cannot be examined until the Office resumes normal operations. To address this issue, the Office has devised a process that it is now adopting that will allow its staff to perform secure test examinations remotely during the national emergency.

### A. Examination Under the Existing Rules and Considerations for a Remote Examination Process

Currently, applicants seeking registration of a secure test or a group of secure test items must submit the following materials through the Office’s electronic registration system: (1) The application, (2) a filing fee, (3) a brief questionnaire, and (4) a redacted copy of the work(s). The examiner assigned to the claim reviews the submitted materials to determine if the work(s) qualify as a secure test or secure test

items.<sup>26</sup> If so, the examiner contacts the applicant to schedule an in-person appointment.

At the in-person examination, under the 2017 Interim Rules, applicants are required to bring the following materials to the Office: (1) A copy of the completed online application, (2) a nonrefundable secure test examination fee (calculated on an hourly basis), (3) a copy of the redacted version of the work(s) uploaded to the electronic registration system, (4) a signed declaration that the redacted copy brought to the in-person appointment is identical to the redacted copy uploaded through the electronic registration system, and (5) an unredacted copy of the actual test that is administered to test takers at specified centers on scheduled dates or an unredacted copy of the actual test items included in the group registration. The redacted and unredacted copies may be brought to the appointment in electronic form, provided they are stored on a CD-ROM, DVD, flash drive, or other external storage device. In such cases, the applicant must bring a laptop or other electronic device for the examiner to view the secure test materials. In recognition that the national coronavirus emergency made testing administration at specified centers infeasible, the May 2020 Interim Rule temporarily suspended this requirement, “provided the test administrator employs measures to maintain the security and integrity of the test that it reasonably determines to be substantially equivalent to the security and integrity provided by in-person proctors.”<sup>27</sup>

The examiner then reviews the redacted and unredacted copies in the applicant’s presence. Upon completion of the in-person examination, the examiner will stamp the date of the appointment on the redacted and unredacted copies. If paper copies are examined, the examiner date-stamps both the redacted and unredacted versions. If electronic copies are examined, the examiner places the external storage device (such as a flash drive, CD, etc.) in its container, seals the container with tamper-proof tape, stamps the date of the appointment on a label, and applies that label to the container. Then the examiner returns the physical or electronic copies to the applicant. The signed declaration and the previously uploaded redacted copy of the work(s) are retained in the

<sup>17</sup> Pursuant to her authority under section 710(a) of the Copyright Act, the Register determined that the disruptions to the copyright system resulting from the national emergency remain in effect as of January 7, 2021. See U.S. Copyright Office, *Copyright Office Further Extends Timing Adjustments for Persons Affected by the COVID-19 Emergency* (Jan. 7, 2021), <https://www.copyright.gov/newsnet/2021/871.html>.

<sup>18</sup> 85 FR at 27298.

<sup>19</sup> *Id.*

<sup>20</sup> The public comments received in this proceeding may be accessed from the Office’s website at <https://www.copyright.gov/rulemaking/securetests/>.

<sup>21</sup> See Comments of the National College Testing Association at 7–8 (June 8, 2020) (“NCTA Comments”); Comments of Association of Test Publishers at 9–11 (June 8, 2020) (“ATP Comments”); Comments of Association of American Medical Colleges at 1–2 (June 5, 2020) (“AAMC Comments”); Comments of Educational Testing Service (May 20, 2020) (“ETS Comments”).

<sup>22</sup> See NCTA Comments at 4; ATP Comments at 6–7.

<sup>23</sup> NCTA Comments at 4; ATP Comments at 5.

<sup>24</sup> NCTA Comments at 4; ATP Comments at 5–6.

<sup>25</sup> NCTA Comments at 4; ATP Comments at 6.

<sup>26</sup> For ease of reference, the term “secure tests” is used interchangeably in this notice to refer to both secure tests and groups of secure test items.

<sup>27</sup> 37 CFR 202.13(b)(1); 85 FR at 27298.

Office's records and may be made available to the public under appropriate circumstances. If the work(s) contain sufficient creative authorship, a registration certificate will be mailed to the applicant within a few weeks of approval. Because of the national emergency, in-person examinations have been suspended since March 2020.

The comments received in response to the May 2020 Interim Rule suggested various security protocols and other procedures for the Office to consider in implementing remote examination. The National College Testing Association (NCTA) supported examination by videoconference and suggested various software protocols that the Office could consider to maintain security, such as confirming compliance with National Institute of Standards and Technology ("NIST") Federal Information Processing Standards, employment of appropriate encryption techniques, and enhanced training of Office examiners in the use of secure virtual meeting technologies.<sup>28</sup> The Association of Test Publishers (ATP) echoed these suggestions and also suggested that the Office employ dual screen control and dual scrolling software.<sup>29</sup> The Association of American Medical Colleges (AAMC) endorsed the use of WebEx, and suggested that for security reasons, the applicant should be the host of any teleconference.<sup>30</sup>

After reviewing these comments, the Literary Division of the Registration Program solicited responses from frequent submitters of secure test applications to determine their willingness and ability to participate in a "test run" of a remote examination. The National Board of Medical Examiners ("NBME") expressed interest in participating. NBME proposed that the "test run" be conducted using a fabricated deposit copy created specifically for use in the "test run;" the remote examination would be performed through the WebEx platform,

<sup>28</sup> NCTA Comments at 7–8. NCTA also stated that the Office should permanently adopt the principal alterations in the 2020 Interim Rule—particularly allowing remote testing, remote proctoring, and electronic storage of tests. *Id.* at 3–6.

<sup>29</sup> ATP Comments at 9–11. ATP also suggested that the Office create a document that contains the material being registered that was returned to the applicant, in essence, generating the unredacted deposit. *Id.* The interim rule retains that responsibility with the applicant. ATP also stated that the Office should adopt many of the interim rule changes permanently, principally remote testing and proctoring, and secure electronic storage. *Id.* at 4–9.

<sup>30</sup> AAMC Comments at 1–2.

since it is currently supported by the Library.<sup>31</sup>

The "test run" examination took place on June 12, 2020. NBME set up the 30-minute appointment through WebEx and provided the link to the examiner. NBME shared its computer screen with the examiner through WebEx and displayed redacted and unredacted deposit copies side-by-side, as would occur at an in-person examination. NBME used the dual-scrolling software "Setup Scrolling," which allows for the viewing of two PDF documents side-by-side and scrolling through both documents at the same time, while keeping the pages from each document aligned. This feature permits the examiner to easily compare the two PDF documents. NBME gave the examiner control of its computer in order to scroll through and examine the deposit material, much in the same manner and at the same speed as in an in-person examination.

Overall, the remote examination proceeded smoothly. NBME, however, raised several logistical issues, including questions regarding the submission of the signed declaration and the date-stamping of the unredacted deposit. The Office has developed proposed solutions to these issues, addressed below. Given the success of the "test run," the Office now is prepared to move forward with the examination of secure test applications through secure videoconference for the duration of the national emergency.

#### *B. The Remote Examination Procedure Under This Interim Rule*

Based on this input, the Office is now adopting a procedure for examining secure tests that is generally the same as outlined in the current regulation, except as described below.<sup>32</sup> Participation in the process set forth in today's Interim Rule is strictly voluntary. Applicants may opt for an in-person examination, recognizing that such examinations cannot occur until the national emergency ends and the Office resumes normal operations.

Applicants are still required to submit the application, filing fee, questionnaire, and redacted copy of the work(s) through the electronic registration system. As before, the examiner will review these materials to determine if the work(s) qualifies as a secure test or

<sup>31</sup> See 85 FR at 27298. No registrations were issued as a result of this test run; it was conducted solely to determine the feasibility of the process.

<sup>32</sup> Today's interim rule provides an overview of how remote examination will work; more detailed instructions can be found in the Office's circular on secure tests (Circular 64), available at <https://www.copyright.gov/circs/>.

a group of secure test items. If any issues arise during this review, the examiner will communicate with the applicant to resolve such issues before scheduling a remote examination.

Once any issues regarding the submitted materials have been resolved, the examiner will work with the applicant to schedule the appointment for the remote examination. The applicant is responsible for setting up the appointment through the WebEx platform or other similar teleconferencing platforms that have been approved for use by the Library of Congress,<sup>33</sup> and sending the videoconference information to the email address provided by the examiner.

The day before the scheduled appointment, the examiner will enable the "Upload Deposit" function in the electronic registration system to allow the applicant to upload the declaration form attesting that the redacted copy uploaded through the system and the redacted copy displayed at the remote examination are identical. The declaration must include a legally binding signature. The Office will accept an electronic signature as defined in 15 U.S.C. 7006, such as "/s/ Jane Doe," a digital image of a handwritten signature on the form, or other verified electronic signature. By contrast, the applicant need not supply a completed copy of the online application; the examiner can retrieve a copy from the electronic registration system, if necessary.

On the day of the appointment, the examiner will log into the approved teleconferencing platform at the appropriate time using the information provided by the applicant. All participants must use a personal computer that has a camera and a microphone so that the applicant and examiner will be able to see and communicate with each other during the videoconference. During the examination, the applicant will pull up the redacted and unredacted copies side-by-side when instructed by the examiner. The applicant must have so-called "dual-scrolling" software that is compatible with the teleconferencing platform being used in order to participate in a remote examination allowed under today's interim rule. The applicant must remain available to answer any questions the examiner may have during the course of the examination.

<sup>33</sup> In its circular on secure tests, the Office will provide a representative list of software programs that provide this functionality.

Normally, at the conclusion of the in-person examination, the examiner would date-stamp the redacted and unredacted paper copies of the deposit, or, if the applicant brought electronic copies to the appointment, the examiner would place the physical storage device in its container, seal the container with tamper-proof tape, stamp the date of the appointment on a label, and apply that label to the container.

As this step is not possible in a remote examination, applicant will be responsible for maintaining its copy of the unredacted deposit, in the event it is needed for litigation or other purposes. The interim rule specifies that the metadata of the unredacted deposit file must include the date of the examination, and the service request number generated by the electronic registration system. The redacted deposit that was uploaded to the electronic registration system can be used to identify the material examined by the Office by comparing the redacted and unredacted copies examined during the videoconference session to determine if they match. In connection with the Office's overall continuing analysis of the registration option for secure tests, the Office is considering whether to impose a records retention requirement upon applicants who register under these conditions, similar to other regulatory records retention provisions.<sup>34</sup>

After the appointment, the examiner will prepare a Secure Test Appointment Receipt, containing the following information: (1) Date of appointment; (2) time of appointment; (3) name of work examined; (4) name of examiner conducting examination; (5) applicant's representative(s); and (6) the fee charged per hour. This receipt will be uploaded into the record in the electronic registration system. The examiner will email a copy of this receipt to the applicant, along with instructions for submitting the secure test examination fee.<sup>35</sup> The fee must be paid through *pay.gov* or charged to an active deposit account. The Office will not issue a registration certificate until it receives full payment of this fee. Calculation of the fee will be done on an hourly basis, in the same manner as for an in-person examination.

If the Office issues a registration certificate, the examiner will add an annotation that includes the date of the appointment. The effective date of registration will be the date that the Office received—in proper form—the

application, filing fee, and the redacted copy of the test that was uploaded to the electronic registration system, consistent with the current procedure.<sup>36</sup>

As with the other interim rules issued in this proceeding, the Office will monitor the operation of today's interim rule to evaluate whether remote examination of secure tests and groups of secure test items via secure videoconference should continue once the national emergency period ends. The Office understands the concerns of, and importance to, test publishers that the definition for a "secure test" reflect the current testing practices and testing technology, as well as other issues raised by commenters throughout this rulemaking proceeding. The Office takes these concerns seriously and continues to carefully consider them. The Office anticipates issuing a future separate notice that will revisit the regulatory definition for a "secure test."

In light of the ongoing national emergency, the Copyright Office finds good cause to publish these amendments as an interim rule effective immediately, and without first publishing a notice of proposed rulemaking, "because of the demonstrable urgency of the conditions they are designed to correct."<sup>37</sup>

#### List of Subjects in 37 CFR Part 202

Copyright, Preregistration and Registration of Claims to Copyright.

For the reasons set forth in the preamble, the Copyright Office amends 37 CFR part 202 as follows:

#### PART 202—PREREGISTRATION AND REGISTRATION OF CLAIMS TO COPYRIGHT

■ 1. The authority citation for part 202 continues to read as follows:

**Authority:** 17 U.S.C. 408(f), 702.

■ 2. Amend § 202.13 as follows:

- a. In paragraph (c)(1), remove "standard application" and add "Standard Application" in its place;
- b. Revise paragraph (c)(2);
- c. In paragraph (c)(3) introductory text, remove "bring" and add in its place "provide"; and
- d. Revise paragraph (c)(3)(v) and (c)(4).

The revisions read as follows:

#### § 202.13 Secure tests.

\* \* \* \* \*

<sup>36</sup> See 82 FR at 26853.

<sup>37</sup> H.R. Rep. No. 79-1980, at 260 (1946). See 5 U.S.C. 553(b)(3)(B) (notice and comment is not necessary upon agency determination that it would be "impracticable, unnecessary, or contrary to the public interest"); *id.* at 553(d) (30-day notice not required where agency finds good cause).

(c) \* \* \*

(2) In case of a secure test, the applicant must submit a redacted copy of the entire test. 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 website. The questionnaire and the redacted copy must be contained in separate electronic files, and each file must be uploaded to the electronic registration system in Portable Document Format (PDF). The Copyright Office will review these materials to determine if the work(s) qualify for an examination under secure conditions. If they appear to be eligible, the Copyright Office will contact the applicant to schedule an appointment to examine an unredacted copy of the work(s). The examination may be conducted in-person or through remote access as directed by the instructions provided on the Office's website.

(3) \* \* \*

(v) In the case of a secure test, the applicant must provide an unredacted copy of the entire test. In the case of a group of test items prepared for use in a secure test, the applicant must provide an unredacted copy of all the test items. The applicant shall include the following information in the metadata of an unredacted electronic file:

(A) The date of the examination; and

(B) The service request number generated by the electronic registration system.

(4) The Copyright Office will examine the copies specified in paragraphs (c)(3)(iii) and (v) of this section under secure conditions. The Office will retain the signed declaration and the redacted copy that was uploaded to the electronic registration system. If the examination is conducted in-person, the Office will stamp the date of the appointment on the copies and will return them to the applicant when the examination is complete.

\* \* \* \* \*

Dated: February 3, 2021.

**Shira Perlmutter,**

*Register of Copyrights and Director of the U.S. Copyright Office.*

Approved by:

**Carla D. Hayden,**

*Librarian of Congress.*

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<sup>34</sup> See, e.g., 37 CFR 210.27(m); 85 FR 58114, 58154 (Sept. 17, 2020).

<sup>35</sup> See 37 CFR 201.3(d)(5).