



PROFESSIONAL
CERTIFICATION
COALITION

June 27, 2023

Ms. Shira Perlmutter

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

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Re: June 1, 2023 Interim Rule on Secure Tests

Dear Ms. Perlmutter, Ms. Wilson, and Mr. Kasunic,

The Professional Certification Coalition (“PCC”)¹ writes in response to the June 1, 2023 Secure Test Interim Rule, published in the *Federal Register* by the U.S. Copyright Office with a request for comments (the “June 2023 Interim Rule”). 88 FR 35741. The PCC appreciates that the June 2023 Interim Rule takes the immediate step of largely preserving the status quo as set forth in the Copyright Office’s May 8, 2020 interim rule definition of “Secure Test,” which otherwise would have expired with the end of the COVID-19 pandemic national emergency on April 10, 2023 (due to the enactment of House Joint Resolution 7) or the expiration of the national public health emergency declaration on May 11, 2023. We respectfully request, however, that Copyright Office revise the definition of “Secure Test” in a further rulemaking in order to address the June 2023 Interim Rule’s inconsistent treatment of remotely administered tests and to enable secure tests first developed after May 2020 to qualify for the Copyright Office’s secure test registration application procedures.

¹ The PCC is a nonpartisan, nonprofit association formed to address legislation and regulations that affects professional certification programs, those who hold private certification credentials, and the many constituencies that rely on professional certification. The PCC’s organizational members include non-governmental certification organizations, professional societies, and service providers. The PCC’s members reflect a wide spectrum of professions, including health care, engineering, financial services, and information technology, among many others. Our founding organizations – the American Society of Association Executives (the leading organization for association management) and the Institute for Credentialing Excellence (the leading developer of accreditation standards for professional certification programs) – govern the PCC. More information about the PCC and the current member list are posted at <https://www.profcertcoalition.org/about-pcc>.

Prior to the May 8, 2020 interim rule, no test administered other than under supervision at specified centers could be included in an application for a copyright registration under the Copyright Office's application procedures for secure tests. Meeting the Copyright Office's definition of a "Secure Test" is critical for certification examinations, because ordinarily an application for copyright registration would entail providing a publicly viewable deposit of the full content for which copyright registration is sought: i.e., disclosing the test questions and answers. To avoid this outcome, the Copyright Office allows deposit of redacted copies of secure tests, although Copyright Office examiners review unredacted copies of the full copyright registration application materials before a copyright registration is granted. Copyright registration for secure tests can be sought either for a fixed exam form or for secure test questions and answers and other related materials ("test items") under the procedures for group registration of secure test items set forth in the Copyright Office's November 13, 2017 interim rule.

With the onset of the COVID-19 pandemic in the U.S. and the declaration of a national emergency in March 2020, many test centers closed their doors or restricted testing availability only to certification examinations taken by health care professionals or other examinations deemed critical to the response to the pandemic. Certification organizations pivoted to remote administration of some examinations, and accrediting agencies for certification programs adopted new accreditation standards allowing for accredited examinations to be administered through live remote proctoring methods.²

In recognition of these developments and the extraordinary circumstances of the continuing pandemic, the Copyright Office published the May 8, 2020 interim rule and set out a new definition of "Secure Test" that could include certain remotely administered tests:

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 or secure electronic storage following each administration. A test otherwise meeting the requirements of this paragraph shall be considered a secure test if it normally is administered at specified centers but is being administered online during the national emergency concerning the COVID-19 pandemic, 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.

(Emphasis added.)

² The National Commission for Certifying Agencies ("NCCA"), for example, approved a limited exception for Live Remote Proctoring as of March 20, 2020 (see <https://mailchi.mp/54c3e69a058f/certificate-program-for-the-credentialing-specialist-528898>). After further assessment, in November 2020, NCCA adopted formal pathways for certification programs holding or seeking accreditation to meet NCCA's Standards with respect to examinations administered with Live Remote Proctoring (see <https://www.credentialingexcellence.org/Accreditation/COVID-19-Exception-Live-Remote-Proctoring>). NCCA has continued to develop guidance on secure ways to administer certification exams with Live Remote Proctoring (see <https://www.credentialingexcellence.org/Accreditation/Earn-Accreditation/NCCA/NCCA-LRP-Updates>).

The June 2023 Interim Rule also allows certain remotely administered tests to qualify as “Secure Tests.” But while no longer limiting that recognition to tests administered remotely during the national emergency, the June 2023 Interim Rule still has a calendar-based condition for recognition of remotely administered tests:

A test otherwise meeting the requirements of this paragraph shall be considered a secure test if **it was normally administered at specified centers prior to May 8, 2020, but is now being administered online**, 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.

(Emphasis added.)

The PCC’s understanding is that the reference to tests “normally administered at specified centers prior to May 8, 2020” relates to the testing program more broadly, not the specific questions that an examinee encounters in a particular administration of that testing program. Thus, certification programs that had received copyright examinations for secure test items used in examinations administered in specific centers prior to May 2020 can apply for group registration of new test items developed for that certification examination, even if the certification examination is now administered using reliable live remote proctoring procedures to ensure test security and integrity.

By incorporating a calendar-based condition in the secure test definition, however, **the June 2023 Interim Rule creates a double standard, excluding some certification examinations from the definition of “Secure Test” even though they are administered with the same security safeguards as other examinations deemed to meet that definition:**

- Any new examination programs that are administered both at test centers and remotely are excluded from the definition of “Secure Test” if those examinations were launched after May 8, 2020.
- Any examination programs that have been administered exclusively remotely from their first launch, rather having a test center-based option prior to May 8, 2020, are also excluded from the definition of “Secure Test.”

As time passes, the double standard created by this “grandfathering” approach in the June 2023 Interim Rule will unfairly withhold access to copyright registration from increasing numbers of certification examination programs which have been developed in order to meet needs for new assessments and to issue credentials reflecting new or changing industry recognitions of valuable professional expertise. The PCC therefore urges the Copyright Office to develop a new definition of “secure tests” that eliminates this double standard. The PCC respectfully suggests the following updated definition:

A secure test is a nonmarketed test administered under supervision at specified centers on scheduled dates or securely online, all copies of which are accounted for and either destroyed or returned to restricted locked storage or secure electronic storage following

each administration. A test otherwise meeting the requirements of this paragraph shall be considered to be administered *securely online* if 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.

Thank you for your consideration of these issues. If you have any questions regarding this letter, please feel free to contact us using the contact information identified below.

Sincerely,



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