



## **LIBRARY OF CONGRESS**

### **U.S. Copyright Office**

#### **37 CFR Parts 201 and 202**

**[Docket No. 2017-8]**

#### **Secure Tests**

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

**ACTION:** Interim rule with request for comments.

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**SUMMARY:** The U.S. Copyright Office is issuing an interim rule that memorializes its special procedure for examining secure tests. The interim rule also includes a new workflow that will increase the efficiency of these examinations. Going forward, applicants must submit an online application, upload a redacted copy of the entire test to the electronic registration system, and complete and submit a brief questionnaire about the test. If the work appears to be eligible for the secure test process, the Office will contact the applicant and schedule an appointment to deliver the test to the Office in person. On the appointed date, the applicant must bring a copy of the application and a complete unredacted copy of the actual test. In addition, the applicant must bring a copy of the redacted version of the test, and a signed declaration confirming that this copy is identical to the redacted copy that was uploaded to the electronic registration system. If the Office confirms that the work qualifies as a secure test, it will examine the test as a whole to determine if it contains sufficient copyrightable authorship. If the Office registers the secure test, the registration will be effective as of the date that the Office received the application, filing fee, and the redacted copy of the entire test in proper form through the electronic registration system. The Office welcomes public comment on the

interim rule.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. Comments on the interim rule must be made in writing and must be received by the U.S. Copyright Office no later than [INSERT DATE 180 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

**ADDRESSES:** For reasons of government efficiency, the Copyright Office is using the regulations.gov system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through regulations.gov. Specific instructions for submitting comments are available on the Copyright Office website at <http://copyright.gov/rulemaking/securetests/>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office for special instructions using the contact information below.

**FOR FURTHER INFORMATION CONTACT:** Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practice, Erik Bertin, Deputy Director of Registration Policy and Practice, or Abioye Mosheim, Attorney Advisor, by telephone at 202-707-8040 or by email at [rkas@loc.gov](mailto:rkas@loc.gov), [ebertin@loc.gov](mailto:ebertin@loc.gov) and [abmo@loc.gov](mailto:abmo@loc.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

**A. The Current Regulation**

Section 408(c)(1) of the Copyright Act authorizes the Register of Copyrights (the “Register”) to issue regulations establishing administrative classes for the purpose of

registering works with the U.S. Copyright Office (the “Office”). It authorizes the Register to issue regulations specifying the nature of the copies or phonorecords required for each class. And it states that the Register “may require or permit, for particular classes, the deposit of identifying material instead of copies or phonorecords.” 17 U.S.C. 408(c)(1).

The Office’s current practice for examining a secure test provides special procedures to protect the confidential nature of these works.<sup>1</sup> A “secure test” is “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.” 37 CFR 202.20(b)(4). With respect to the deposit requirement, the regulations state that “[i]n the case of any secure test the Copyright Office will return the deposit to the applicant promptly after examination [ , p]rovided, [t]hat sufficient portions, description[s], or the like are retained so as to constitute a sufficient archival record of the deposit.” 37 CFR 202.20(c)(2)(vi).

## **B. Current Examination Practices**

Under the Office’s current practices, “special arrangements can be made for the examination of such material under strict conditions of security and in the presence of a representative of the copyright owner.” 42 FR 59302, 59304 (Nov. 16, 1977). These practices are not, however, mentioned in the Office’s regulations. Instead they are set

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<sup>1</sup> The Office developed this procedure in response to correspondence submitted by Educational Testing Service, which was supported by twenty-two other examining boards and councils, including the National Board of Medical Examiners, the Federation of State Medical Boards, and the National Conference of Bar Examiners. 42 FR 59302, 59304 n.2 (Nov. 16, 1977).

forth in sections 720.1 through 720.5 of the *Compendium of Copyright Office Practices, Third Edition* (hereinafter “*Compendium*”).<sup>2</sup> Briefly stated, applicants submit an application and the appropriate filing fee. Then they call the Office to schedule an appointment with an examiner. On the appointed date they bring a copy of the completed application to the Office, along with a redacted and an unredacted copy of the actual test. The examiner reviews these materials with the applicant present, and then returns the unredacted copy to the applicant when the examination is complete. The redacted copy is retained by the Office.

This procedure has remained essentially unchanged for more than thirty years, and for the most part it has worked well for both the Office and applicants alike. Recently, however, the Office has identified several issues that warrant attention.

First, the secure test procedure only applies to tests that satisfy the definition of a “secure test” as set forth in the regulation. 37 CFR 202.20(b)(4). Under the current process, test publishers do not submit an actual copy of the test when they initially file an application and pay the filing fee. As a result, the Office has no way of knowing whether a test is eligible for the secure test procedure until the applicant arrives at the Office. On several occasions, applicants have travelled to the Office – sometimes from a great distance and at great expense – only to discover that their works do not qualify as secure tests. This is inconvenient for applicants, and it also deprives them of an earlier effective date of registration.<sup>3</sup> If they decide to register their works using the normal procedure for

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<sup>2</sup> The Office also published these practices in *Copyright Registration for Secure Tests* (Circular 64). This circular has been revised to reflect the new procedures discussed in this interim rule. Similar changes will be made to the *Compendium* in the near future.

<sup>3</sup> The effective date of registration is the date the Office has received an application, an applicable filing fee, and the applicable deposit. 17 USC 410(d).

tests, rather than the special procedure for secure tests, applicants must submit a complete, unredacted copy of the work. In this situation the effective date of registration will be based on the date that the unredacted copy is received. *See Compendium 720, 1509.1(G).*

Second, because secure test publishers do not submit a copy of their works until they meet with the examiner, they prefer to schedule their appointments as soon as possible, in order to establish the earliest possible effective date of registration. The Office has traditionally accommodated these requests. As a result, secure test publishers often effectively gain the benefits of expedited service without providing a justification for special handling and without paying the additional fee for this service. 37 CFR 201.3(d)(7). Moreover, publishers do not always know which test or how many tests they will bring to the appointment. Therefore, the Office may not have a sufficient number of examiners on hand to conduct the examination.

Third, the applicant must bring a redacted and an unredacted copy of the secure test for the examiner's review. *Compendium 720.2.* While the unredacted copy must contain a complete copy of the entire test so that the Office can examine it for copyrightable authorship, under the Office's current practices, the redacted copy will be accepted even if it contains a fraction of the test material, rather than the complete test. *Id.* 720.4.

Finally, under the Office's current practices the applicant may register a secure test and a computer program used to administer that test by filing one application and one filing fee, if the works are owned by the same party and if the applicant submits an appropriate deposit for both the test and the program. *Id.* 720.5. As discussed below,

however, the Office does not examine the computer program under secure conditions, because computer programs are not secure tests.

### **C. Issues with Current Practices**

Although the Office's secure test registration practices have worked reasonably well, they currently do not produce an optimal record of the actual tests submitted for registration. Under current practice, as mentioned above, the applicant must bring a copy of the completed application to the Office, along with a redacted and an unredacted copy of the actual test. When the examiner completes his or her review of a secure test, he or she will stamp the date of the appointment on the unredacted copy and return it to the applicant. What remains in the Office is a redacted copy of the test which, in most cases, only includes portions of the first and last pages of the test. Even in the case of a test administered in machine readable format or a test that contains questions taken from a database, the redacted copy deposited with the Office includes another 50 pages from the test but no more. Thus, under the current practice, the deposit that is maintained by the Copyright Office provides, at best, imperfect evidence of the complete test examined and registered by the Office. This may adversely affect, for instance, the ability of a plaintiff to show that it registered the test with the Copyright Office prior to bringing an infringement suit.

The Office's practices with respect to tests administered using databases and/or computer programs raise other concerns. A database may contain a selection of questions that can be used to create many different tests. A computer program can be used to measure and record the answers given in response to a particular set of test questions. But the actual database and the actual program are not "tests" that are administered to test

takers “under supervision at specified centers on specific dates.” 37 CFR 202.20(b)(4). As such, they cannot be considered a “secure test” within the meaning of the regulation, and using the secure test application process for such works is inconsistent with that regulation. In addition, databases and secure tests have distinct deposit requirements. An applicant may register a database by submitting a mere fraction of the content that appears within that work. 37 CFR 202.20(c)(2)(vii)(D)(3) through (5). On the contrary, to register a secure test, applicants must submit “one complete copy” of the work, which will be returned to the applicant when the examination is complete. 37 CFR 202.20(c)(2)(vi). Finally, allowing an applicant to register a secure test together with a computer program used to administer the test, is inconsistent with the Office’s general policy of requiring a separate application and filing fee for each distinct copyrightable work. *See* 17 U.S.C. 408(a), 409 (authorizing the Office to register a single “work”); *Compendium* 511 (stating that “an applicant should prepare a separate application, filing fee, and deposit for each work that is submitted for registration”).

## **II. The Interim Rule**

The interim rule codifies the Office’s longstanding practices for examining secure tests, while addressing several of the issues identified in the current practices described above.

### **A. Submitting the Claim**

To register a secure test under the interim rule, applicants must complete and submit an application through the electronic registration system using the Standard Application, and they must pay the \$55 filing fee for this application. Paper applications will no longer be accepted. Prior to making an examination appointment, applicants must complete and

submit through the electronic registration system a brief questionnaire about the test, which may be obtained from the Office’s website at <https://copyright.gov/forms/securetest-questionnaire.pdf>, and they must submit a redacted copy of the entire test. These steps are designed to identify works that are not eligible for the secure test procedure before the applicant invests the time and expense – perhaps mistakenly – in scheduling an appointment and travelling to the Office.

Applicants must file a separate application, pay a separate fee, and upload a separate questionnaire for each secure test or when registering multiple versions of the same secure test. The Office will not register multiple secure tests together as an unpublished collection, a unit of publication, or a group of updates or revisions to a database. In addition, for the reasons given above, a particular secure test cannot be registered together with a database that has been used to create the test or a computer program that is used to administer the test. To register a database or a computer program, applicants must submit a separate application, pay a separate fee, and submit the appropriate deposit for each work. Under no circumstances will the Office examine a database or a computer program under the special procedure for secure tests.

When completing the application, applicants should state “secure test” as part of the title of the work, so that the Office can assign the claim to an appropriate member of the Registration Program. Upon request, the examiner will remove this statement from the title field before the claim is approved. Applicants may assert a claim in this type of work by stating “text,” or “compilation of test questions” in the application. To register a revised version of a preexisting test, applicants may state “revised secure test.”

The redacted copy of the test should contain an unredacted copy of the title page for the test (if any), and a redacted copy of each page of questions. The number that has been assigned to each question (if any), and the page number that appears on each page of the test (if any) should be completely visible. Most of the content that appears on each page may be blocked out, provided that the applicant leaves a narrow vertical or diagonal strip of visible content. An example of an appropriate method for preparing a redacted copy has been provided in the new circular for secure tests. *See Copyright Registration for Secure Tests* (Circular 64).

Applicants must upload the questionnaire and the redacted copy of the test to the electronic registration system; each item must be uploaded as a separate file. The file name for the questionnaire should include the term “Questionnaire” and the case number assigned to the claim. This eleven-digit number is automatically generated by the electronic registration system and it appears near the top of each screen of the online application. The file name for the redacted copy should match the title provided in response to questions 1 and 9 of the questionnaire.

## **B. Scheduling the Appointment**

Once the application, filing fee, questionnaire, and the redacted copy have been received, the Office will assign the claim to a Literary Division examiner. The examiner will review these items to determine if the work appears to be eligible for the secure test procedure, based on the following criteria:

First and foremost, the work must be a “test.” Questions that are stored in – or randomly pulled from – an electronic database or a test bank cannot be registered as a

secure test if the database or test bank is simply a medium for storing questions and does not represent an actual test.

Second, under the longstanding regulatory definition, the test also must be administered under supervision at specified centers on scheduled dates. See 37 CFR 202.20(b)(4).<sup>4</sup> A “specified center” is a place where test takers are physically assembled at the same time. For example, a “test” administered via a website to people located in their individual homes or offices would not be eligible for this procedure, both because a home or office would not qualify as a “specified center” and because the tests presumably would not be administered “under supervision.” In contrast, a test administered via computer to test takers gathered at the same time at proctor-monitored locations would qualify, even if the test is accessed through a secure website. In addition, the test must be administered “under supervision,” *e.g.*, with test proctors or the like. These features are what, in the Office’s estimation, most readily distinguish an ordinary test from a “secure” test that requires special registration procedures, including the acceptance of a redacted copy of the deposit. These features were common to all of the test publishers that originally requested this procedure as a matter of public policy, and these features continue to be employed in the administration of the secure tests that provided the foundation for this procedure. 42 FR 59304 & n.2 (citing “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”).

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<sup>4</sup> The interim rule replaces the phrase “specific dates” in the current regulation with the more precise phrase “scheduled dates.” No substantive change is intended.

If the test appears to be eligible for the secure test procedure, the examiner will contact the applicant and schedule an appointment to examine the test. But the fact that the examiner schedules an appointment does not necessarily mean that the work is eligible for the secure test procedure or that it will be registered. If at the time of the appointment, the examiner determines that the work does not meet the relevant legal and formal requirements, he or she will refuse to register the work as a secure test.<sup>5</sup>

### **C. Processing Time**

Secure test claims will be reviewed in the order they are received, and will not be given priority over other claims with an earlier filing date. If an applicant would like to expedite the examination of a particular test or the scheduling of an appointment, the applicant must submit a request for special handling, demonstrate that there is a compelling reason for the request (such as litigation or publication deadlines), and pay the additional fee for expedited service. But regardless of whether the applicant requests special handling, the date that the Office received all the required elements in proper form through the electronic registration system will retroactively become the effective date of registration if the application is approved after examination.

### **D. What to Bring to the Appointment**

On the day of the appointment, the applicant must bring the following materials to the Office:

- (i) *A copy of the completed application.*

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<sup>5</sup> If the work appears to be eligible for registration under the normal examination procedures for a test, the examiner will ask the applicant to upload a complete, unredacted copy of the work, and he or she will change the effective date of registration to match the date that the unredacted copy is received.

- (ii) *The nonrefundable secure test examination fee.* This fee will be based on the amount of time that it takes to examine the test materials during the appointment, and it is in addition to the filing fee mentioned above. Both the filing fee and the examination fee are nonrefundable, regardless of whether the Office issues a certificate of registration for the test.
- (iii) *A copy of the redacted version of the test that was uploaded to the electronic registration system.*
- (iv) *A signed declaration confirming that this redacted copy is identical to the redacted copy that was uploaded to the electronic registration system.*  
Applicants may obtain a copy of this declaration from the Office’s website at <https://copyright.gov/forms/securetest-declaration.pdf>.
- (v) *An unredacted copy of the actual test that is administered to test takers at specified centers on scheduled dates.*

In all cases, applicants must bring a physical copy of the unredacted version of the test, and the content of the test must be completely visible so that it may be examined. The questions that appear in the unredacted copy should precisely match the questions that appear in the redacted copy. If the test is administered with test booklet(s), the applicant should bring one complete copy of those booklet(s).<sup>6</sup> If it is administered at specified centers on scheduled dates with computers or other electronic devices, the applicant may bring one of the following items:

- (i) *A printout containing a complete copy of the actual test; or*

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<sup>6</sup> As mentioned above, different versions of the same test cannot be registered together on one application. There is no group registration option for secure tests.

- (ii) *An electronic file that contains a complete copy of the actual test.* The file must be stored on a CD-ROM, DVD, flash drive, or other storage device. The applicant must bring a laptop or other electronic device that can be used to view the test materials. Providing access to an electronic copy available online or an electronic file stored solely on the applicant's device (rather than a separate storage device) is insufficient. In addition, the applicant should bring an appropriate container for the storage device, such as an envelope or jewel case.

#### **E. In-Person Examination of Secure Tests**

The examiner will review the redacted and unredacted copies in a secure location in the presence of the applicant or his/her representative.<sup>7</sup> When the examination is complete, the examiner will stamp the date of the appointment on the redacted and unredacted copies and will return them to the applicant. If the applicant brought test booklet(s) or a printout of the test, the specialist will stamp the first page of the test materials. If the applicant brought an electronic file stored on a flash drive or other storage device, the examiner will place the device in its container, stamp the date of the appointment on a label, apply that label to the container, and seal the container with tamper-proof tape. The signed declaration and the redacted copy that was uploaded to the electronic system will be retained by the Office.

If the examiner determines that the relevant legal and formal requirements have been met, he or she will register the claim(s) and will add an annotation to the certificate

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<sup>7</sup> If the test is lengthy or if the applicant is bringing multiple tests to the appointment, the Office may assign two or more examiners to handle the claims. The number of examiners assigned to each claim will be determined solely by the Office. In such cases, the applicant must pay a separate examination fee for each staff member who participates in the examination.

such as: “Basis for registration: Secure test examined under 37 CFR 202.13.” The registration will be 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. In this respect, the interim rule will provide test publishers with the benefit of an earlier effective date of registration as compared to the current procedure.

### **III. Request for Comments**

The interim rule will go into effect 30 days after the publication of this notice in the **Federal Register**. Comments will be due 150 days thereafter. The Office decided to issue this rule without publishing an initial notice of proposed rulemaking for two reasons.

First, this is a “rule[] of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(3)(A). It does not “alter the rights or interests of parties.” *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994). It merely “alter[s] the manner in which the parties present themselves or their viewpoints to the agency.” *Id.* Thus, notice and comment is not required under the Administrative Procedure Act.

Second, the rule codifies many of the Office’s existing procedures for examining secure tests. These procedures have been in place for more than thirty years, so interested parties should be familiar with them already. The rule does change the Office’s current procedures in some respects, but there is good cause for making these changes effective on an interim basis: Doing so will give both the Office and interested parties an opportunity to see how the new procedures work in practice, and to consider whether these procedures should be modified in any respect before the Office issues a final rule. *See* 5 U.S.C. 553(b)(3)(B).

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**List of Subjects**

**37 CFR Part 201**

Copyright, General provisions.

**37 CFR Part 202**

Copyright, Preregistration and Registration of Claims to Copyright.

**Interim Regulation**

In consideration of the foregoing, the U.S. Copyright Office amends 37 CFR parts 201 and 202 as follows:

**PART 201 – GENERAL PROVISIONS**

1. The authority citation for part 201 continues to read as follows:

**Authority:** 17 U.S.C. 702.

2. In § 201.3, revise paragraph (d)(5) to read as follows:

**§ 201.3 Fees for registration, recordation, and related services, special services, and services performed by the Licensing Division.**

\* \* \* \* \*

(d) \* \* \*

(5) Secure test examining fee (per staff member per hour) . . . . . 250

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**PART 202 - PREREGISTRATION AND REGISTRATION OF CLAIMS TO COPYRIGHT**

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

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

4. Add § 202.13 to read as follows:

**§ 202.13 Secure tests.**

(a) *General.* This section prescribes rules pertaining to the registration of secure tests.

(b) *Definitions.* For purposes of this section—

(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.

(c) *Deposit requirements.* Pursuant to the authority granted by 17 U.S.C. 408(c)(1), the Register of Copyrights has determined that a secure test may be registered with identifying material, if the following conditions are met:

(1) The applicant must complete and submit a standard application. The application may be submitted by any of the parties listed in § 202.3(c)(1).

(2) The appropriate filing fee, as required by § 201.3(c) of this chapter, must be included with the application or charged to an active deposit account.

(3) The applicant must submit a redacted copy of the entire secure test. In addition, the applicant must complete and submit the 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 qualifies for the secure test procedure. If the work appears to be eligible, the Copyright Office will contact the applicant to schedule an appointment to examine an unredacted copy of the test under secure conditions.

(4) On the appointed date, the applicant must bring the following materials to the Copyright Office:

- (i) A copy of the completed application.
- (ii) The appropriate examination fee, as required by § 201.3(d) of this chapter.
- (iii) A copy of the redacted version of the secure test that was uploaded to the electronic registration system.
- (iv) A signed declaration confirming that the redacted copy specified in paragraph (c)(4)(iii) of this section is identical to the redacted copy that was uploaded to the electronic registration system.
- (v) An unredacted copy of the entire secure test.

(5) The Copyright Office will examine the copies specified in paragraphs (c)(4)(iii) and (v) of this section in the applicant's presence. When the examination is complete, the Office will stamp the date of the appointment on the copies and will return them to the applicant. The Office will retain the signed declaration and the redacted copy that was uploaded to the electronic registration system.

5. Amend § 202.20 as follows:

- a. Revise paragraph (b)(3).;
- b. Remove paragraph (b)(4);

- c. Redesignate paragraphs (b)(5) and (6) as paragraphs (b)(4) and (5), respectively;
- d. Remove “, as amended by Pub. L. 94-553” from newly redesignated paragraph (b)(4) and add a period in its place; and
- e. Revise paragraph (c)(2)(vi).

The revisions read as follows:

**§ 202.20 Deposit of copies and phonorecords for copyright registration.**

\* \* \* \* \*

(b) \* \* \*

(3) The term *secure test* has the meaning set forth in § 202.13(b).

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(c) \* \* \*

(2) \* \* \*

(vi) *Tests*. In the case of tests, and answer material for tests, published separately from other literary works, the deposit of one complete copy will suffice in lieu of two copies.

In the case of any secure test the applicant may submit identifying material in lieu of one complete copy if the conditions set forth in § 202.13(c) have been met.

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Dated: May 19, 2017

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**Karyn Temple Claggett,**  
*Acting Register of Copyrights and  
 Director of the U.S. Copyright Office*

Approved by:

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**Carla D. Hayden,**  
*Librarian of Congress*

**[BILLING CODE 1410-30-P]**

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