

July 3, 2023

Ms. Shira Perlmutter

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

Suzanne V. Wilson

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Re: June 1, 2023 Interim Rule on Secure Tests

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

The Institute for Credentialing Excellence (I.C.E.) is the professional membership association for credentialing organizations and their staff. I.C.E. represents over 400 such credentialing bodies and over 2000 individual staff members. I.C.E. is a 501(c)(3) organization whose mission is to “Lead through accreditation, advocacy, education, innovation, research, and standards to enhance the value of credentialing organizations.” We are a leading standards developer with two premier standards for certification (NCCA Standards) and certificate programs (ICE1100 Standards).

We write in response to the June 1, 2023, request for comments on the 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. This proposed rule appropriately preserves status quo expressed in the Copyright Office’s 2020 Interim Rule (May 8, 2020) which would have expired with the end of the COVID19-pandemic national emergency (April 10, 2023) and the expiration of the national public health emergency declaration (May 11, 2023).

We request that the Copyright Office revise the definition of “Secure Test” in its rulemaking process in order to address the 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. Prior to the May 8, 2020 Interim Rule, no test, other than those administered at a physical test center, could be included in an application for copyright registration. For a certification organization which administers tests related to skills and competencies needed in the workplace, often in high stakes environments such as healthcare and construction, the secure test application process allowed for copyright registration without having to provide a publicly viewable deposit of content (thereby disclosing questions and answers to a potential test taker public.) Since the Copyright Office allows for



a deposit of redacted copies of secure tests, certification exams can be therefore protected under the provisions of the November 13, 2017 Interim Rule.

With the onset of the pandemic, test centers worldwide closed their doors for safety concerns. Certification organizations relied on the remote proctoring technology as a means to continue testing candidates for their various professions (including healthcare related professionals who were desperately needed during the pandemic).

The National Commission for Certifying Agencies (NCCA) is the accrediting arm for I.C.E. The NCCA currently accredits over three hundred personnel certification programs for approximately one hundred and thirty (130) certification organizations. The NCCA allowed for its accredited programs to offer live remote proctoring as a solution and adopted new accreditation standards that allow for multiple methods of exam administration.¹

Likewise, the Copyright Office recognized the extraordinary circumstances brought on by the pandemic and set forth the May 8, 2020 Interim Rule for the definition of secure test to include 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.**

The June 2023 Interim Rule allows some remotely administered tests to qualify as “Secure Tests” merely based on a calendar requirement of having existed prior to May 8, 2020:

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.

¹ 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>).

This arbitrary date requirement eliminates the opportunity for any newly developed certification from receiving Copyright Registration under the “Secure Test” definition merely by the fact that it did not exist prior to May 8, 2020. Case in point is I.C.E.’s own certification the ICE-CCP® (Certified Credentialing Professional) which was launched in October 2021.

A sampling of our accredited programs data shows there is any number of newly created certification programs not covered by the June 1, 2023, Interim Rule which could include the following:

- CPBA-AP® (Certified Progressive Behavior Analyst – Autism Professional) from the Progressive Behavior Analyst Autism Council, initially offered December 1, 2021;
- the ONQS (Obstetric and Neonatal Quality and Safety Subspecialty) from the National Certification Corporation for the Obstetric, Gynecology and Neonatal Specialties, initially offered July 1, 2020;
- and the CGRA® (Cancer Genetic Risk Assessment) from the National Consortium of Breast Centers, initially offered May 27, 2020.

The June 1, 2023, Interim Rule also excludes examinations that were exclusively administered by remote proctoring prior to May 8, 2020.

The grandfathering approach to the June 1, 2023, Interim Rule on the “Secure Test” definition will create an inequity in the marketplace of professional certification examinations, leading to an ever-increasing number of examinations that do not qualify under the new rule for copyright registration. As new jobs and roles are created in an ever-changing workplace environment and the rapid change created by technology, certification programs will suffer and as such so will the ability to recognize workplace skills and competencies. As was witnessed during the pandemic emergency, remote proctoring enables healthcare workers to obtain their certification by overcoming the challenges of in-person testing centers such as rural access or other accessibility issues.

I.C.E. would respectfully refer to the proposed definition created by the Professional Certification Coalition (PCC) and communicated through comments in response to the Interim Rule in a letter dated June 27, 2023. The proposed definition is as follows:

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 the opportunity to comment on the proposed changes. If you have any questions regarding the content of this letter or need more details on the accredited personnel certification community, please feel free to reach out at the contact information provided below.

Sincerely,

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