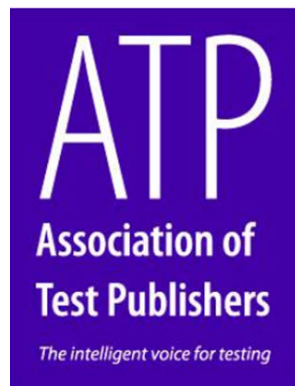




Association of Test Publishers  
Guidelines for Legal Protection of  
Assessment Content

January 2015



© Association of Test Publishers, 2015

## **Message from William G. Harris, CEO, ATP**

In 2009, the establishment of an ATP Security Committee (ATPSC) signaled awareness of the ever-growing concern over intellectual property (IP) theft that compromises assessments developed by and used within the testing community. Since then, the attention to security concerns within the industry has expanded with ongoing enhancements to the technology available to assessment providers and the test-taker population.

The ATP Security Committee provides a forum to encourage assessment organizations to collaborate in addressing test security concerns. The goals of the Committee are to (1) identify methods to improve test security; (2) establish and disseminate security best practices; and (3) protect the integrity of assessments and assessment programs. By focusing on industry needs and providing solutions, we are creating a resource center for ATP members to access information and assistance in implementing or improving security efforts and programs.

## Acknowledgements

This ATPSC wishes to acknowledge the contributions of the following individuals, who participated in the two phases of creating this document:

**Rory E. McCorkle, PhD, MBA, CAE, SPHR**

ATP Security Committee Chair, 2014-2015

President

International Credentialing Associates (ICA)

**Barbara Foster**

Psychometrician

American Board of Obstetrics and Gynecology

**Maurilio Gorito, CCIE**

Certification Manager

Riverbed Technology, Global Certification Programs

**Benjamin Hunter**

Assessment Quality and Security Specialist

Pharmacy Technician Certification Board (PTCB)

**Steven T. Peluso, Esq.**

Law Office of Steven T. Peluso, Esq.

**Aimee Hobby Rhodes**

Director, Examination Security

CFA Institute

**Rachel Schoenig**

Assistant Vice President, Test Security

ACT

**Jennifer Semko, Esq.**

Partner

Baker and McKenzie LLP

**Marc J. Weinstein, Esq.**

Partner

Dilworth Paxson LLP

## Introduction

This document outlines common legal strategies and best practices/guidelines that test sponsors and/or publishers may consider using to protect their assessment content. Although this report has been prepared with test publishers and sponsors of testing programs in mind, its contents apply equally to all types of assessments in all types of settings (e.g., clinical, educational, industrial/organizational, certification/licensure, and workforce skills credentialing).

Nothing contained in the document should be construed as legal advice; users are encouraged to seek legal advice from an attorney with suitable expertise in this area. While there are a number of legal strategies available for the protection of examination content, each has its own strengths and weaknesses and some are better suited than others for particular applications in testing. Moreover, although U.S. federal law exists in this area, state laws that apply to the protection of examination content can vary from state to state; similarly, international laws can vary significantly from country to country. Therefore, testing organizations should develop legal protection strategies tailored to their particular circumstances and needs and ensure that their strategies comply with all applicable laws. In order to determine the most appropriate and effective legal protection strategies to employ, testing organizations should seek the advice of legal counsel with experience representing testing organizations, especially counsel with appropriate expertise.

## Disclaimer

While the ATP has made every effort to ensure that the information contained in this document has been obtained from reliable sources, all information is provided “as is” and neither the ATP, nor any participating publishers or service providers, make any warranty, express or implied, nor do they assume any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, product, or process described in this document. In no event will the ATP, its agents or employees thereof, be liable to any user of this report for any decision made or action taken in reliance on the information in this document or for any consequential, special or similar damages, even if the ATP has been advised of the possibility of such damages.

The information in this document is provided with the understanding that neither the ATP nor any individuals who participated in the preparation of this document shall be deemed to be engaged in rendering legal, technical, or assessment and psychometric advice and services. Therefore, this document should not be used as a substitute for consulting with competent legal, technical, psychometric or assessment advisers.

# Table of Contents

Introduction .....	4
Disclaimer.....	4
Copyright.....	6
Background .....	6
Copyright Basics .....	7
Rights Provided with Copyright .....	7
Copyright Notice .....	7
Copyright Registration for Secure Tests .....	8
Requirements.....	9
Complete the copyright registration form.....	9
Make an appointment with the Copyright Office.....	10
Prepare the documents .....	11
Registering individual forms versus entire item bank .....	12
Payment .....	12
What to expect at the appointment with the Copyright Office .....	12
Certificate of Registration .....	13
Infringement Actions and Statute of Limitations.....	13
Enforcement .....	14
Use of Contracts to Protect Tests .....	16
Basics.....	16
Essential Components of Examinee Agreements .....	16
Arbitration Clauses.....	19
Presentation and Execution of the Examinee Agreement.....	20
Contracts with Organization Insiders and Outsiders .....	21
Enforcement .....	22
Trade Secrets .....	24
Basics.....	24
Legislation .....	24
Requirements.....	25
The Benefits .....	26
Enforcement .....	26
International Copyright and Trade Secrets Considerations.....	28
International Copyright Treaties and Conventions.....	28
Differences in Copyright Laws.....	29
International Protection of Trade Secrets .....	29
Conclusion.....	31
Appendix .....	32

# Copyright

## Background

Commonly referred to as the *Copyright Clause* of the United States Constitution, Article I, Section 8, Clause 8 empowers Congress “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” Congress enacted the first Copyright Act in 1790. The last major revision of the statute was the Copyright Act of 1976 (hereinafter the “Copyright Act”), which remains in effect today, although the statute has been amended since its enactment.

In the United States, the official federal depository for copyrighted material is the Library of Congress. The Copyright Office is the department within the Library of Congress that oversees copyright activities, including copyright registrations. The Copyright Office is located in Washington, DC, and its website is [www.copyright.gov](http://www.copyright.gov). This website contains helpful information on copyright and the copyright registration process. Each *Copyright Circular* referred to below can be found on the website.

The Copyright Act preempts state law insofar as a work falls within its scope. It is unlikely that most test publishers or sponsors would need to protect a work that is not covered by the federal statute<sup>1</sup>. As such, the following discussion applies to the protections afforded under the Copyright Act. If a special circumstance were to arise in which a work that is not covered by the Copyright Act needed to be protected, state law may apply.

---

<sup>1</sup> Under common law, a copyright is automatically created when it is fixed in a tangible form for the first time. As long as it is an original work of authorship, you may claim ownership and protection and even place a copyright notice, including the "small c with a circle" symbol, on the particular work. Although a notice is not required any longer, should one desire to use it, it is important to follow the convention of using the © symbol followed by the year of the first publication of the work followed by the owner of the copyright and the work.

While creating and maintaining common law copyright protection is beneficial, the Copyright Act, a federal statute, provides additional benefits and protection rights to an owner. The most commonly recognized rights are the ability to sue within federal court, the ability to recover statutory damages up to \$150,000.00 for willful infringement, and the ability to recover attorneys' fees. However, in order to receive these benefits, the copyright must be registered with the Copyright Office at the Library of Congress.

## Copyright Basics

### *Rights Provided with Copyright*

Copyright exists “in original works of authorship fixed in any tangible medium of expression.” Under copyright law, the copyright holder has the exclusive right to use the work as well as any derivative works thereof. A derivative work is a work based on or derived from one or more already existing works (e.g., translations, abridgments, condensations of preexisting works, a “new edition” of a preexisting work in which the editorial revisions, annotations, elaborations, or other modifications represent, as a whole, an original work). Examination items, test forms and other assessment-related materials meet the statutory definition of “literary works”, and as such are afforded protection under the Copyright Act. Copyright protection attaches as soon as the work is fixed in a tangible means of expression. That act of creation gives rise to the right.

For literary works, copyright vests the exclusive right to reproduce, distribute, and prepare derivative works therefrom with the copyright holder. This prohibits copying and distributing all assessment content (e.g., examination items, forms, test manuals, answer sheets, scoring rubrics). The means by which the work is copied or distributed does not affect the prohibition. For example, copying by a mechanical means or from memory is prohibited, as is distribution in hard copy or via an electronic format such as posting on a website or blog.

Producing a work “substantially similar” to the original is also prohibited. For example, changing portions of an examination item, such as introducing different numbers or names in an item stem or slightly altering answer choices so that the “new” item does not read “exactly” as the original, can be an infringement. However, the line between a substantially similar work and a new work is not hard and fast. Rather, such a determination is heavily dependent on the specific facts of each case.

### *Copyright Notice*

It is no longer mandatory that a copyright notice be affixed to the work in order to claim copyright. It is advisable, however, that such a notice be affixed to all works in which copyright is claimed for at least three reasons. First, copyright in works published before March 1, 1989 may be lost if the proper notice is not affixed. Second, the notice establishes the date of first publication. Third, and perhaps most importantly, effective notice is essential to rebut an “innocent infringement” defense if an infringer in an effort to mitigate damages raises such a defense. The “knowledge” of the infringer and the impact of such knowledge or “willfulness” on damages will be further discussed in the section on damages.

*Copyright Circular 3* defines the elements of an effective copyright notice. In order for a copyright notice, affixed to a visually perceptible work such as an examination, to be effective it must contain the following three elements:

- Contain the symbol © (letter C in a circle); the word “Copyright”; or the abbreviation “Copr”;
- Set forth the year of first publication. If the work is a derivative work or a compilation incorporating previously published material, the year of first publication of the derivative work or compilation is sufficient; and
- Set forth the name of the copyright owner, an abbreviation by which the name can be recognized, or a generally known alternative designation of owner.

In addition, all three elements should appear together or close to each other on the copies.

*Copyright Circular 3* gives the following example of a proper copyright notice:

**Example: © 2012 Jane Doe**

*Copyright Circular 3* also sets forth the copyright notice requirements for non-visually perceptible works.

### *Copyright Registration for Secure Tests*

The Copyright Office requires that a work be “deposited” at the time of registration. Generally, this means that the work is available for public inspection. Accordingly, this normal approach for copyright registration may cause serious problems for a content owner when the assessment content is intended to be kept secure. In the case of secure tests, the Copyright Office has instituted deposit procedures to ensure examination content will not be made public. *Copyright Circular 64* sets the procedures for registering secure tests.

If a test is deposited using the secure registration process, then copies of test content do not remain at the Copyright Office. Secure tests may be submitted to the Copyright Office via regular mail. However, it is recommended that registration be done in person, inasmuch as the Copyright Office does not guarantee the security or confidentiality of any secure content received in the mail. The registration process is further detailed in this document.

A secure test is a “non-marketed” test administered under supervision at specified locations (e.g., test centers, schools) on specific dates, all copies of which are accounted for and either destroyed or returned to restricted, locked storage following each administration. A test is considered non-marketed if copies are not sold and the test is distributed and used in such a manner that ownership and control of the copies remains with the test publisher or sponsor. Most high stakes examinations will meet the definition of a secure test.



The Copyright Office will accept registration of individual examination booklets or digital copies for secure tests that are administered in a machine-readable format or on a traditional print-copy booklet whose contents are taken from a larger, automated database – a copy of the database. There are positives and negatives to both types of registration; one advantage of database registration is that it captures all items regardless of their appearance in an examination booklet or database. Regardless of which format is used, it is essential that a copy of the booklets or database as deposited at the Copyright Office be retained, as they will serve as the only recorded content of the deposit.

It should also be noted that organizations likely have test materials that do not meet the statutory definition of a secure test should still be registered with the Copyright Office. For example, an organization might want to register its role delineation, job analysis, study guides, or practice examinations, as well as any non-secure materials for a secure test.

## Requirements

This section discusses the process of registering copyrights using the secure test process.

### *Complete the copyright registration form*

The testing organization must complete a copyright registration form. The Copyright Office is currently accepting one registration form, Form TX. Registration forms are available from the Copyright Office website at: <http://www.copyright.gov/forms/formtxd.pdf>.

The Copyright Office is currently accepting registrations through the online registration system or the paper Form TX.<sup>2</sup> For more information about current fees, please refer to the following link from the Copyright Office website: <http://copyright.gov/circs/circ04.pdf>.

After completing the application, do not mail the materials to the Copyright Office. Bring the materials to the office on the day of the appointment. If the materials are mailed, they will be processed along with registration forms the office receives and the security of the materials cannot be guaranteed.

The Copyright Office recommends completing applications online, because they are less expensive and processing times are quicker than for a paper application. Start the application online, and choose the option to mail in the deposit. As stated in the previous paragraph, rather than mailing testing materials as directed by the online application, bring the materials with you at your scheduled appointment date and time.

---

<sup>2</sup> Current online basic registration fee is \$55 while the fee for a paper form registration is \$85

To copyright separate tests individually, a form must be completed for each assessment. If there are a set of tests to be copyrighted (item bank instructions in next section), time and money can be saved by combining them into one form. However, registering a full item bank may cause issues with copyright enforcement in the future, specifically with defense against the doctrine of fair use. The Appendix to this document provides an example of how multiple tests can be submitted on one registration form.

The registration forms asks for:

- the identity of the claimant;
- the identity of the author(s);
- the manner in which the claimant obtained ownership of the copyright;
- the title of the work;
- whether the work is a “work made for hire;” and
- the date of first publication.

It is important that this information is provided correctly. The answers to these questions may not be intuitive. For example, there are legal definitions for “work made for hire” and “published”. Testing organizations should seek advice from legal counsel when completing these registration forms, especially during the first time through the process.

### ***Make an appointment with the Copyright Office***

Contact the Copyright Office and request an appointment to register a *secure test*. To make an appointment to register a secure test, call the Copyright Office’s Literary Division at (202) 707-8250. Appointments are generally scheduled for Tuesdays, Wednesdays, and Thursdays between the hours of 10 a.m. and 2 p.m. When making the appointment, confirm the building and room number.

Allow plenty of time to set up the meeting. Usually you will need to leave a message at the Copyright Office and wait several days for a response. The first available appointment may be a month or more away. On the day of the appointment, check in at the Public Information Office, which can be found in Room 401 of the James Madison Building at 101 Independence Avenue, SE Washington, DC 20540

The general contact information for the Copyright Office is:

U.S. Copyright Office  
101 Independence Ave., S.E. Washington, D.C. 20559-6000  
(202) 707-5959 or 1-877-476-0778 (toll free)  
Hours of operation: 8:30 a.m. - 5:00 p.m. ET, Monday - Friday.

## *Prepare the documents*

For each secure test, prepare two sets of documents.

First, prepare a full set of test items. The full set of items can be presented in paper-based or computer-based forms. Either the full form as presented to examinees should be used (along with instructions) or it should contain all of the items in the item bank from which a test may be generated along with instructions. For example, a testing organization may have equating items, operational items, and field test items. All test takers may receive the equating items and operational items but not everyone may receive the same set of field test items. Therefore, the organization may arrange all the equating and operational items in numerical order and place the field test items at the end.

If the test is available in an electronic format, bring an electronic copy of the full exam to the appointment. However, you **must** bring a laptop computer to view the test, as the Copyright Office does not have computers set up for this purpose.

If there is a copyright notice on the test, please be sure to include that in the documents brought to the Copyright Office.

Second, prepare a redacted sample of the test items. Keep in mind that this document may be used later in a court of law, so it should be prepared under the assumption that it could be included as evidence in a lawsuit.

This sample will be left at the Copyright Office. There are two methods to do this:

- Method 1: The sample consists of the cover page, instructions, and 50 pages of redacted samples. This is the most common method used today; or
- Method 2: The sample consists of the cover page and instructions for the full exam. Redacted copies of the first and last page of the full exam must be included as well.

There are multiple ways to redact an examination. Enough of the text on each page must be visible so that one can determine if the copy was made from the full test, but not so much as to compromise the items.

Please note that even if you bring the full copy of the exam on a laptop, redacted copies must still be brought to leave with the Copyright Office. A password protected CD or physical copy will suffice.

The organization must keep careful records of all items provided in each copyright registration. Using attached continuation sheets with the copyright registration to list all item numbers provided may also be helpful, particularly with international copyright enforcement. This will provide a public record of items contained on the exam form or item bank. However, some organizations may not wish to do this as the item numbers will be made public in this case.

For more information on registering exams using the secure tests process, see the Copyright Office’s Circular 64 at <http://copyright.gov/circs/circ64.pdf>.

### ***Registering individual forms versus entire item bank***

While some organizations may register individual test forms, other organizations may find it beneficial to register their entire item bank. This is especially true for organizations that publish multiple forms per year or utilize bank-based delivery systems (e.g., Computer Adaptive Tests, Computer Mastery Tests, Linear-On-The-Fly). The process for registering an entire item bank does not differ from the process of registering a single examination. In this instance, the entire item bank would be treated “as an individual form”, as mentioned in the previous section, and the same process would apply.

### ***Payment***

You will have to pay for the registration at the appointment. Several payment methods are available. The Copyright Office accepts both personal and company credit cards, and will provide a receipt at the appointment. Keep the receipt as proof of copyright registration.

Please note that there is a per hour per staff member fee to register a secure test<sup>3</sup>. This fee is in addition to the application fee. If registering a large number of tests at an appointment, you may have to pay for the time of more than one staff member.

Another payment method is to set up a Deposit Account with the Copyright Office. This is only recommended if you register several secure tests throughout the year. For more information about setting up a Deposit Account, please refer to this link from the Copyright Office website: <http://copyright.gov/circs/circ05.pdf>.

### ***What to expect at the appointment with the Copyright Office***

To register a secure test, bring both the full test and a redacted sample version to the Copyright Office. Security in the Madison Building, where the Copyright Office is located, is high – identification is required (a driver’s license or state ID will suffice). Bags and materials will be screened by x-ray upon arrival and by a security guard upon departure. Consider these procedures when planning the timeline for the visit.

The personnel at the Copyright Office are generally gracious, courteous, and efficient. The process usually does not take long. The staff member assigned to the appointment will flip through the full exam set and compare the document to the sample set. He or she will also confirm that the title on the exam

---

<sup>3</sup> Currently, this fee is \$250 per hour per staff member.

documents matches the title on the registration form. When all information is confirmed, the staff member will date-stamp the documents. The full secure test will be returned and the Copyright Office will retain the redacted document.

Depending on the number of tests being registered at the appointment, appointments can generally be completed in an hour or less. However, appointment fees cannot be prorated and you will be charged for the minimum one hour.

### *Certificate of Registration*

The Copyright Office will issue a Certificate of Registration within several weeks or up to several months of the appointment. This certificate should be retained. It is proof that your organization holds a copyright on the applicable test, and will be required in the case of litigation concerning the copyrighted material. However, physical possession of the certificate is not required to begin the litigation process.

Expedited handling of a certificate can be requested, which dramatically reduces this processing time. However, this must be justified to the Copyright Office and is very expensive.

### *Infringement Actions and Statute of Limitations*

A claim for copyright infringement may only be brought in federal court.<sup>4</sup> It is important to know the statute of limitations when bringing civil copyright infringement actions. Such actions must commence within three (3) years after the copyright owner became aware of the asserted infringement.

Timely enforcement of a copyright is essential. Once the statute of limitations has passed, a claim can no longer be asserted. The length of time that a copyright owner waits to enforce its rights may also affect the damages awarded. For example, in order to be granted injunctive relief a party must show irreparable harm. If a party waits to enforce its rights, it will be hard to show that the harm was irreparable due to the owner's inaction. The same holds true for monetary damages: the longer an owner "waits" to bring a case, the lesser the value a court may find the infringed materials to have. Finally, in extreme cases, a delay may be found to have prejudiced the alleged infringer to such an extent that the legal doctrine of "laches" applies and the claim is disallowed, even though the claim is brought within the timeframe allowed by the statute of limitations.

---

<sup>4</sup> Which court an infringement action can be brought will vary depending on the jurisdiction of the parties or based upon contract terms.

## Enforcement

The holder of a copyright has several avenues of redress in the event a work is infringed upon. The holder may claim monetary damages, request that the court issue an injunction that prohibits further violation of the holder's copyright, ask that infringing materials be accounted for, destroyed, and/or request compensation for court costs and attorney fees. The types of redress are not mutually exclusive and a court may order one or a combination of the above.

In order to commence a copyright infringement action the work must first be registered with the Copyright Office. The timing of the registration is important. In order to claim statutory damages, the work must have been registered with the Copyright Office prior to the infringement occurring or within three (3) months after the first publication of the work. Preserving the right to claim statutory damages gives the copyright holder the right to elect the most favorable manner in which monetary damages will be calculated (see below). Therefore, it is advisable that works are submitted for registration as soon as possible after publication.

A copyright holder may claim monetary damages in the event that a work is infringed upon. The copyright owner is entitled to recover actual damages resulting from the infringement, as well as any profits the infringer has made that are attributable to the infringement; such profits are not taken into account in computing the actual damages. If the copyright registration is made in a timely manner, the copyright holder may elect to collect statutory damages instead.

Section 504 of the Copyright Act states that at any time before a final judgment is rendered, a copyright holder may elect to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action. Preserving the right to elect statutory damages is important for the copyright holder because it gives the copyright holder a choice of damage options. Statutory damages relieve the copyright holder from having to show actual damages and profits, which oftentimes are difficult to calculate and/or prove. They also provide a monetary recovery in those instances in which the actual damages and/or profits may be dismissed, thereby discouraging infringement in those instances in which the infringer does not seek or gain financially.

The court sets the amount of statutory damages, which can range from a sum of not less than \$750 or not more than \$30,000 *per work*, which could be either per examination form or per a total item bank depending on how it is registered. In a case where the copyright owner meets the burden of proof and the court finds that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000. In a case where the infringer meets the burden of proof and the court finds that the infringer was unaware and had no reason to believe

that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.<sup>5</sup>

---

<sup>5</sup> There is one instance that may be applicable to testing organizations in which such reduction is not discretionary; where an infringer believed and had reasonable grounds for believing that use of the copyrighted work was “fair use” and the infringer was an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of employment.

# Use of Contracts to Protect Tests

## Basics

At the most basic level, a contract is formed when one party offers and another party accepts the terms of an agreement for mutual consideration with the intent to create legally binding obligations to one another. A contract is of critical importance in the US legal system because it specifies the rights and responsibilities each party has to the other within the context of their business relationship, and enables the parties to take legal action to enforce the contract terms if one of the parties fails to fulfill its responsibilities or otherwise violates the terms of the contract. A contract often specifies the range of possible consequences that can result from a party's failure to abide by its terms and how disputes will be resolved, including establishing what laws will apply, where disputes will be litigated, or whether they must be arbitrated outside of the court system.

Thoughtfully (and carefully) drafted contracts between a testing organization and other parties protect test content by clearly identifying the owner of the test materials, providing for specific, limited use of the content, and specifying all required and prohibited conduct in relation to the test (e.g., development, administration). Testing organizations should enter into contracts with all individuals and entities both internal and external to their organization that present potential risks to the protection of test content, including but not limited to test takers, employees, officers, directors, and third party vendors, including proctors or other test administrators. This is especially true in the case of tests that are intended to be secure, where the continued validity of the test requires that items and related materials not be disclosed so that future test takers may learn about the test content or gain access to test answers.

This report focuses on the use of contracts related to test takers of secure tests and for use with employees and/or outside vendors in the process of test development and administration.

## Essential Components of Examinee Agreements

In high-stakes testing, test takers often have the greatest incentive to engage in conduct to subvert the examination for obtaining an unearned advantage on the exam.<sup>6</sup> Thus, the terms of a testing organization's examinee agreement (or so-called test taker form) must be well conceived and strategically configured to provide the testing organization with the greatest level of protection possible to deter, detect, investigate, and respond to potential exam fraud and/or infringement of the testing organization's intellectual property rights. The following are some essential concepts to consider when drafting and revising examinee agreements for high-stakes exams.

---

<sup>6</sup> For purposes of this section of the document, the assumption is made that a test taker will be of legal age and can therefore be able to enter into a binding agreement.



Examinee agreements should be written in clear, unambiguous, and easy to understand language. Because testing organizations often have extensive rules, policies, and procedures related to eligibility, registration, testing, scoring, appeals, and related matters, many testing organizations have a rather brief examinee agreement, perhaps no more than two pages, that incorporates by reference an extensive set of policies and procedures (sometimes referred to as a “guide” or “handbook”) that the organization updates on a periodic basis.<sup>7</sup> In this way, the organization can regularly change dates and update other details in its handbook without rewriting the entire examinee agreement every year. Such incorporation of an entire handbook/guide by reference approach also allows for clear, uncluttered communication of the essential components of the examinee agreement in a form that is easily digested by examinees, without being bogged down in all of the details that must be included in its handbook. For an example, see the Examinee Agreement of the Association of American Medical Colleges for the MCAT Exam: <https://www.aamc.org/students/download/305340/data/2014examineeagreement.pdf>.

Examinee agreements should include a broad provision that prohibits all attempts by the examinee to subvert the validity of the test. This provision should prohibit actual or attempted disclosure, reproduction, receipt, distribution, and/or use, in whole or in part, of secure test content. In addition, the agreement should require the examinee to acknowledge and affirm their compliance with all of the terms thereof, before, during, and immediately upon conclusion of the exam.

In addition to a broad provision prohibiting exam subversion, the policies and procedures incorporated by reference into the examinee agreement should also include more detailed provisions that target specific forms of exam subversion that are of concern to the organization. The policies and procedures should clearly and concisely set forth all required and prohibited examinee conduct before, during, and after the exam, as well as all of the test sponsor’s rules related to eligibility, registration, testing, scoring, appeals, and related matters. For an example, see the policies and procedures of the Association of American Medical Colleges for the MCAT Exam: <https://www.aamc.org/students/download/63060/data/mcatessentials.pdf>. Also, see the Graduate Management Admission Council GMAT Handbook: <http://www.gmac.com/gmat/prepare-candidates-for-the-exam-classroom/gmat-handbook.aspx>.

When possible, specific examples should be included to demonstrate what conduct is prohibited. Each testing organization should carefully consider what conduct it intends to prohibit. For example, the organization should consider whether a situation in which two examinees walk out of a test center and talk about the answers to the questions they found most challenging is prohibited or not. It is critical that the prohibitions be clear and precise – not too narrow and not too broad. Ultimately, the testing organization will want to develop a set of terms and conditions for examinee that it can stand behind as being fair and necessary to the protection of its test content. The testing organization may also consider including provisions in its policies and procedures that describe acceptable test preparation techniques

---

<sup>7</sup> See discussion of full requirements related to test takers' notice of all terms and conditions (at pages 20-21).

to clearly establish the conduct that the testing organization expects of its examinees. The testing organization's conduct expectations and examples of permissible conduct can be effectively reinforced and illuminated by additional communications to examinees that apply the policies and procedures to real world examples. For an example of a supplemental communication that reinforces the testing organization's policies and procedures, see American Registry of Radiological Technologists, "Exam Security: What's OK and What's Not" at <https://www.arrt.org/videos>. For another example, see the Guidelines for Discussion of the MCAT Exam: <https://www.aamc.org/students/applying/mcat/taking/139566/discussion.html>.

Testing organizations should explicitly provide in their policies and procedures that they may use all methods available to detect and investigate exam fraud, including but not limited to forensic data analysis. In addition, testing organizations should establish and notify examinees about all test center rules, including requirements for authenticating examinees and ensuring that they are not bringing prohibited devices into the test (e.g., use of digital fingerprinting or palm vein scans, scanning with a metal detecting wand, and hand searching of personal belongings).

Another term that some test sponsors are starting to include in examinee agreements is a "cooperation provision" that requires examinees to fully cooperate with the test sponsor in any investigation of potential violations of testing rules, policies and procedures. Cooperation provisions can require the examinee to provide an in-person interview where the examinee must truthfully and completely answer all questions of the test sponsor and produce requested documents and electronic records related to the investigation. Effective cooperation provisions further provide that an examinee's refusal to cooperate in the test sponsor's investigation is in and of itself a material violation of the examinee agreement that serves as an independent basis for the test sponsor to impose sanctions against the examinee. A cooperation provision offers a method to bolster the protection afforded to secure assessment content by incentivizing the examinee to provide all information related to a test sponsor's investigation, thereby enabling the test sponsor to gather evidence that it may otherwise not be able to obtain.

Test sponsors should also include terms in their examinee agreements that clearly identify the complete range of possible actions that the sponsor has the right to take in response to an examinee's violation of the agreement. Such actions may include, but are not limited to: invalidation of test scores; restrictions and/or prohibitions on retesting following invalidation; suspension or revocation of eligibility or certification; pursuing civil legal action; licensure and/or regulatory action; and/or referring the matter for criminal prosecution. The agreement should also describe the process by which the test sponsor determines what sanction it may impose against the examinee and how the examinee may go about appealing the test sponsor's decision. Of equal importance in this section is a provision that clearly spells out the process by which an examinee can challenge and/or appeal a sanction imposed by a test sponsor. Sometimes a test sponsor's sanctions and appeals processes may be articulated in such detail that it is more appropriate to create a separate document exclusively about the sanctions and appeals process that can then be incorporated by reference into the examinee agreement. If a test sponsor creates such a separate document, it should then require examinees to acknowledge that they have

reviewed the “sanctions and appeals document” and that they agree that its terms are part of the examinee agreement.

Although beyond the scope of this publication, it is critical that the test sponsor’s sanctions and appeals regime provide due process to examinees. “Due process” has specific legal meaning that arises from principles set forth in the United States Constitution that were further honed by the courts over many years of court decisions, including decisions specifically related to high-stakes testing. Boiled down to its essence, due process requires that a test sponsor provide an examinee with notice of the sanctions, a fair opportunity to challenge the test sponsor’s evidence and present other evidence that may be relevant to the matter. It bears repeating on this issue that test sponsors should consult with legal counsel to ensure that their sanctions and appeals processes meet all of the legal requirements of due process.

Methods to communicate this information to examinees are critical. These were previously covered in the *ATP SC Test Security Messaging Best Practices Report*, published in 2012. Please refer to this publication for further consideration regarding communication methods.

### *Arbitration Clauses*

The contract should also address the procedures for resolving and/or litigating disputes that arise between the examinee and the testing organization. Testing organizations should consider whether it is prudent to include an arbitration provision. Arbitration is a type of alternative dispute resolution conducted privately between the parties outside of the court system according to terms explicitly agreed upon by the parties. Testing organizations that interact with large numbers of examinees often favor arbitration provisions in examinee agreements because arbitration takes much less time to complete and is far less expensive than litigation in courts. Contracts can also provide for the confidential treatment of arbitration proceedings, a feature that is usually not available in litigation. An arbitration provision can also limit the scope of disputes that are submitted for arbitration as well as the identification, applicable procedures, and authority of the arbitrators. For example, a testing organization can have an arbitration provision that provides that an examinee’s exclusive remedy to challenge a test score or the invalidation thereof is binding arbitration and that the only issue that the arbitrator can decide is whether the testing organization was fair and reasonable in determining or invalidating the examinee’s score. Test sponsors can also reserve the right to bring a civil action in court against any examinee that engages in copyright infringement or other conduct that violates the intellectual property rights in its exam content. Arbitration provisions can be binding or non-binding. In a binding arbitration, the decision of the arbitrators is the final word on the dispute and it cannot be appealed. In a non-binding arbitration, the party not satisfied with the outcome can then pursue litigation in the court system.

Even in contracts that include arbitration provisions, the contract should address in what court(s) the parties may file a legal action arising under the contract and which state’s laws should be applied by the

court to interpret the contract. These provisions are respectively known as forum selection and choice of law clauses.

### *Presentation and Execution of the Examinee Agreement*

Examinees should be required to acknowledge and accept the terms and conditions of the examinee agreement before, during, and after the exam administration. The examinee agreement should be accessible in its entirety for prospective examinees to review and agree to prior to registering for an exam. This can be accomplished by adding it to a prominent place on your website or by including it in the publication that sets forth the sponsor's policies and procedures for testing. If the examinee agreement incorporates by reference a policies and procedures document, as most do, then the policies and procedures document must also be displayed or otherwise made easily accessible and available in each place where the examinee agreement is displayed or made available.

The examinee agreement should be incorporated into the application process that individuals complete when registering for the exam. If exam registration is online, examinees may be able to indicate agreement to the terms and conditions by clicking an "I agree" button after the terms have been presented on a computer screen.<sup>8</sup> Pre-test communications should also be used to remind examinees of their prior acceptance of the examinee agreement and direct them with web links to the complete text of the agreement and all incorporated policies and procedures.

In addition, examinees should be required at the time of the exam administration to read, acknowledge, and accept the examinee agreement prior to being allowed to commence the exam. It is especially important that examinees re-affirm their acceptance of the agreement at the moment that they are about to take the exam because it is possible that they could have been exposed to harvested exam items after having registered for the exam but prior to taking it – an effective examinee agreement will require the examinee to acknowledge that they have not received or viewed actual prior or current secure exam content. Again, the acceptance can be demonstrated by the examinee "clicking-through" agreement screens displayed prior to the first question of a computer-based exam, or, for paper-based tests, by handwritten signature on an acknowledgement form that must be signed by the examinee and collected by a proctor before the examinee receives a test booklet. Testing organizations that provide certification, registration, or membership services should consider including non-disclosure provisions in their applications for certification, registration, or membership, annual renewal forms, and in the standards of conduct governing registered or certified individuals.

Finally, at the conclusion of the test session, the examinee should be required to acknowledge and accept the terms and conditions of the agreement for the third time, in the same manner as required at

---

<sup>8</sup> In some jurisdictions, the examinee must have reviewed the entire set of terms and conditions before providing a legally binding agreement, rather than merely "clicking" on an acceptance of them. Thus, consistency may dictate that this process be used in all cases.

the start of the exam. The requirement of a final acknowledgment and acceptance is intended to reinforce the examinee's obligation to the test sponsor to maintain the confidentiality of the exam and not share or reconstruct any part of the exam content. This final step is especially important upon completion of the exam because that is the time when exam content is freshest in the examinee's mind, and at greatest risk of reconstruction and sharing upon leaving the testing environment.

## **Contracts with Organization Insiders and Outsiders**

A testing organization should also have contracts with each person and/or entity that could potentially compromise the integrity of its assessment through disclosure of secure content or other means. Thus, a testing organization should have non-disclosure agreements with all in-house and third party item writers, item reviewers, subject matter experts, test development staff, test delivery and proctor staff (including teachers, para-educational staff, and other personnel involved in administration and proctoring activities), psychometric staff, IT staff, officers and directors of the organization, as well as with third-party contractors that handle secure exam content, including but not limited to test center operators.

Under United States copyright law, all works of original authorship by an employee for an employer created within the scope of the employment relationship are automatically considered works made for hire under copyright law, so no copyright assignment is technically necessary from an employee to an employer. However, it remains a helpful reminder and deterrent to employees to include a "work made for hire" provision in employment contracts with staff item writers and test developers.

In contrast with the treatment of items written by employees of the testing organization, United States copyright law does not provide any presumptions about the ownership of items written by third party item writers, including non-employee volunteer subject matter experts and vendors. Accordingly, testing organizations must require that volunteer and third party item writers enter into contracts that clearly state that items written by them are "works made for hire" and that all rights in the items, including copyrights and any other rights that could apply to the items, are assigned to and belong exclusively to the educational organization, test publisher, or testing organization. Without such an agreement, a defendant in a future copyright infringement case could potentially establish that the copyright registrations for those items are not valid, thereby depriving the educational organization, publisher, or testing organization from obtaining statutory damages. Thus, it is critical for test developers and/or sponsors to complete all of the legal steps necessary to document their ownership of all copyrights in their items before including the items in live assessments.

Another potential contract situation is for test prep providers. Many testing organizations have content specifications or curricula that examinees use to guide their study. Frequently the content specifications or curricula are themselves copyrighted materials. Test prep providers, which can be an internal or external entity, sometimes include the content specifications or curricula in the prep course materials to demonstrate that they are operating a program tied specifically to the assessment. While the content

curriculum/specification is not necessarily a secret, it can still be subject to copyright protection and should not be reproduced without the testing organization's permission. Testing organizations also may want to consider contracting with test prep providers to allow use of the content curricula/specifications. In exchange for the right to use the content specifications or curricula, the test prep providers should agree to non-disclosure provisions and abide by other standards of conduct to protect exam security.

## Enforcement

As mentioned above in the discussion about terms and conditions of examinee agreements, an effective contract will contain provisions that address what happens when the parties have a dispute related to the subject matter of the contract. In the case of an examinee agreement with an arbitration provision, the party asserting a breach would have to submit a demand for arbitration to the testing organization and, perhaps, to the agreed arbitration forum. If a breach of contract claim is to be arbitrated, the parties must abide by the procedures provided for in the contract's arbitration provision. The arbitration provision may simply incorporate by reference the rules of an established alternative dispute resolution forum, such as the American Arbitration Association ("AAA"). If that is the case, then the party making the arbitration demand would have to follow the AAA's rules for initiating and proceeding with arbitration, including the payment of any associated fees.

If there is not an arbitration provision in the contract, the party asserting a breach would have to serve the other party with a complaint, the legal document that sets out the plaintiff's legal claims, outlines the factual basis for the claims, and asserts the right of the party to pursue the lawsuit in the court in which it was filed. If the contract includes a choice of law and/or forum selection clause in the contract, then the parties must abide by those terms if they elect to file a lawsuit. If the contract does not contain a choice of law or forum selection provision, the test publisher/sponsor must consider what court has jurisdiction over the contract before filing the lawsuit. In addition, the educational organization/test publisher/sponsor must consider the statute of limitations for pursuing contract claims in litigation, which varies based on state law.

However, in many instances, prior to filing a demand for arbitration or a complaint in court, most parties with a grievance under a contract typically send a letter to the other party in which they set forth their claims and demands in an effort to avoid arbitration or litigation. Thus, many disputes are resolved before arbitration or litigation proceedings are initiated. Settlements are often the most cost effective way to deal with contract disputes, so long as the parties can resolve the matter to their mutual satisfaction.

A contract can usually only be enforced against a party that entered into it. Contractual protections only apply to those who are parties to the contract. An individual who never agrees to the contract is not bound by its provisions. However, in cases where a third party has knowledge of the contract and specifically induces another to breach the agreement, a claim for tortious interference with contractual

relations may be available to the testing organization. This claim has been particularly effective against test prep companies that solicit examinees to harvest live items from a secure exam and then “brain dump” the items to the test prep company so that they can be incorporated into the illicit preparation materials sold to other examinees who are preparing for the exam. The availability of this claim reinforces the need for testing organizations to communicate the terms of the examinee agreement clearly and effectively, including all policies and procedures, not only to legal-aged test takers but also to any person or entity that could potentially have an interest in subverting the exam. Accordingly, the examinee agreement and policies and procedures should not be buried somewhere in the testing organization’s website, or made available only at the time of registration – it should be readily available for the public to review.

# Trade Secrets

## Basics

Many organizations protect information of value through trade secret law; in many instances, trade secrets in the testing arena are already copyrighted tests, so trade secret law is often comingled with infringement. Generally, confidential business information that an entity believes provides it with a competitive advantage and commercial value may be considered a trade secret. Trade secrets can include both industrial and commercial secrets. Depending on the jurisdiction, trade secrets are part of protection against unfair competition or of confidential information. What information constitutes a trade secret depends on the law of the jurisdiction and the circumstances of the specific case.

Trade secret law protects the owner from disclosure of the information through misappropriation or any other improper means. It does not protect the owner against another party obtaining the information through invention, reverse engineering, license from the owner, observation, and/or from published literature. Where inappropriate disclosure is found, the owner of the trade secret can obtain injunctive relief, damages, or even attorney fees.

## Legislation

In the U.S., most jurisdictions have adopted a version of the Uniform Trade Secret Act (UTSA), which was first published by the Uniform Law Commission (formerly the National Conference of Commissioners on Uniform State Laws) in 1979 and later amended in 1985. The UTSA is a model law aimed at unifying trade secret law across the adopting jurisdictions. Only New York, North Carolina, and Massachusetts have not adopted the UTSA, although each of these three jurisdictions has enacted legal protections for trade secrets. UTSA defined trade secrets as:

*“...information, including a formula, pattern, compilation, program, device, method, technique, or process, that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”*

The UTSA defines improper means as “theft, bribery, misrepresentation, breach, or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.”

Even under the UTSA, not all jurisdictions view secure tests as trade secrets (e.g., Ohio). Consult an attorney to review of existing case law in the jurisdiction to determine whether secure tests are considered trade secrets.



## Requirements

To constitute a trade secret, the information must have actual or potential independent commercial value. It also must be secret – in other words, generally not known – and the owner must have taken reasonable steps to keep the information secret. In most jurisdictions, assessment programs would meet the first prong of the criteria of having “actual or potential independent commercial value” since they lead to an outcome of independent commercial value (e.g. licensure, credentials, admissions, or scholarships). Similarly, the value of secure test items can be established because they have a psychometric value, which could be considered as equivalent to secret scientific information, as well as a cost to produce.

To be considered a “trade secret”, the information cannot be known or readily obtained through proper means, as described in the Basics section. While certain assessment content may be exposed to examinees, contractual nondisclosure provisions provide evidence that the test content is being maintained as a trade secret. While the test content is necessarily exposed during the assessment process, it is not generally known or readily obtained “by proper means.” As such, most assessment programs would meet the “secrecy” prong of the criteria.

It is critically important that the test publisher/testing organization take reasonable steps to protect the secrecy of the test content. Ideally, the steps the testing organization takes to protect its test content should be documented and should include the following:

- The content is not available to the public;
- Use of contracts with test takers, where appropriate, to prohibit disclosure;
- Non-disclosure agreements have been signed by staff, contractors, and subject matter experts;
- The content is disclosed internally only to a limited number of individuals on a need to know basis;
- The content is physically secured (e.g., within a locked facility and by controlled visitor access); and
- The content is electronically secure (e.g., on a non-networked computer or secure network).

In an action for misappropriation of trade secrets, an educational organization/test publisher/testing organization can obtain injunctive relief, actual damages, and recovery of the amount by which the wrongdoer was unjustly enriched. In some situations, the attorney’s fee may also be recoverable.

## The Benefits

Trade secret protection shields more than copyright because the definition of “misappropriation” is broader than the concept of copying which requires that the infringing work be “substantially similar” to the original.

Trade secret protection is also broader than contract protection, in that it applies to anyone who misappropriates the information, not just the parties to a contract.

For trade secret protection to apply, however, the testing organization must take appropriate steps to actively protect the information it considers a trade secret. Failure to do so will disallow the trade secret claim.

## Enforcement

Organizations can choose to pursue action against a party who has misappropriated a trade secret. Theft of trade secrets can be addressed through injunctive relief, stopping the party from any further use of the trade secret(s). Monetary damages may also be awarded to the organization. Finally, dependent upon the jurisdiction, the infringing party could be punishable by fines and jail time.

Trade secret cases can be difficult to prosecute because the courts look to balance the right of a company to protect confidential information against the rights of individuals to use readily accessible data. Before taking action, the testing organization should consider how valuable the loss of content is to the organization, as well as the impact on the organization’s reputation/brand. Since organizations must show that the information is truly maintained in secrecy, an organization should carefully consider the wisdom of asserting a claim if trade secrets are the only basis for a case. The rules for discovery in trade secrets cases allow the defendant to obtain information from the organization to ensure that secrecy was maintained. This may open up a testing organization to a public relations disaster if the organization is found to have flaws in security and internal operations, which can be brought to light through this discovery process. Well-designed employee agreements, volunteer agreements, and proper security measures are required for an organization to prevail in a trade secrets case.

To take action against an infringing party based upon trade secrets law, an organization will need to provide sufficient descriptive information about the trade secret to demonstrate each of the characteristics discussed above. This must be done with an awareness of the particulars in the trade secrets law in that jurisdiction, since this varies significantly. This requirement could be damaging to the testing organization, since it involves revealing information about the trade secret itself (e.g., assessment items, development processes). The testing organization must also show that the secrets disclosed provide the organization a competitive advantage and are maintained in secrecy, as discussed above.

Generally, trade secrets cases must show the following factors:

- Economic value was obtained from the secrets (typically valid for assessments);
- Reasonable secrecy measures taken;
- The information is not readily obtained from other sources; and
- The offending party had access to the trade secrets.

Monetary damages can be sought in trade secrets cases. Damages would include actual revenue loss incurred from the loss of use of the trade secret(s). Damage may also include money gained by the infringing party from the illegal use of the trade secret(s). Punitive damages might also be awarded if the testing organization can prove that the infringing party purposefully violated the trade secret.

Trade secrets enforcement also has its drawbacks. In some cases, the infringing party may be able to use the trade secret after the lawsuit is concluded. In addition, trade secrets enforcement may be limited against disclosures by independent contractors of the organization, which, for example, may present issues with educational organizations/test publishers/sponsors who use paid contractors to develop assessment items. Finally, for organizations that have processes to publish assessments after usage, trade secrets may not be enforced as they may view the secrets as those that are inevitably disclosed.

## International Copyright and Trade Secrets Considerations

There is no single statute or law providing “international” protection for copyrights. The nature and scope of the protections provided to the owner of copyrighted materials will depend upon the local laws of the specific country at issue. That said, most countries honor and allow for the enforcement of the rights of U.S. copyright holders thanks, in large part, to international treaties and conventions. However, there are some countries that offer very little, if any, copyright protection for foreign works.

If you suspect that your intellectual property is being infringed in a foreign country, or to obtain more specific information about the scope of copyright or trade secrets protection provided by a particular country, consult an attorney familiar with the intellectual property laws of that jurisdiction. To understand legal rights in a foreign country, it will also be important to understand the legal system of the country at issue—including such matters as the nature and speed of litigation, the fairness of the courts, availability of counsel, appeal rights, available remedies, and likely costs.

### International Copyright Treaties and Conventions

The most significant international treaty governing copyrights is the Berne Convention for the Protection of Literary and Artistic Works (the “Berne Convention”). The Berne Convention requires that a signatory nation treat the copyrights of authors from other signatory countries in the same way that it treats those of its own nationals. The treaty also establishes strong minimum standards for copyright law that must be implemented in the signatory countries. For example, Berne Convention countries must make copyright protection “automatic” and cannot require formal registration before copyright protection is triggered (as noted previously, however, there are still significant benefits to copyright registration under U.S. law in order to preserve the right to statutory damages and recovery of attorney’s fees). The Berne Convention also eliminates the requirement that a physical copyright notice be placed upon a copyrighted work in order to trigger legal protection. There are currently 168 signatories to the Berne Convention, and the United States became an official party to the treaty in 1989.

Another notable international agreement is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) administered by the World Trade Organization. Like the Berne Convention, one goal of TRIPS is to ensure that member countries treat the works of foreign authors in the same way as those of its own nationals. More than 155 countries have become a party to this agreement, including all G-20 countries.

For more information about international copyright treaties and conventions and a current list of countries and the treaties/conventions to which they are a party, see “Circular 38a” published by the U.S. Copyright Office (<http://copyright.gov/circs/circ38a.pdf>).

Finally, the World Intellectual Property Organization Copyright (WIPO) Treaty was enacted in 1996 to provide additional protections for copyright deemed necessary due to advances in information

technology since the formation of previous copyright treaties. The WIPO treaty has been ratified by 93 countries, including the United States (though enactment of the Digital Millennium Copyright Act in 1998).

## Differences in Copyright Laws

One notable difference between U.S. copyright law and the copyright laws of other countries relates to the doctrine of “fair use,” which is a defense to a copyright infringement claim that has been developed through U.S. court decisions and is memorialized in Section 107 of the Copyright Act. In the United States, whether a particular reproduction of a copyrighted work constitutes “fair use” depends upon a various factors including: the purpose and character of the use (including whether the use is commercial); the nature of the copyrighted work; the amount and substantiality of the portion of the work used in comparison to the copyrighted work as a whole; and the effect of the use on the market for, or value of, the work. The “fair use” defense is often asserted by alleged infringers who claim that their use of the copyrighted work is for educational or non-commercial purposes, for example.

There is no definitive test for fair use in the United States and the issue is often the subject of dispute and litigation. In contrast, in many foreign countries, “fair use” exemptions to copyright infringement are narrower and specifically defined. Rather than a general doctrine of fair use, many countries’ laws contained a defined list of specific uses that will be exempted from copyright infringement claims. Although a comprehensive summary is beyond the scope of this overview, the laws of foreign countries can also be quite varied with respect to significant issues like recovery of attorney’s fees, criminal prosecution for infringement, calculation of damages, administrative remedies, the availability of preliminary injunctions, and other matters.

## International Protection of Trade Secrets

Trade secrets protection varies widely from country to country. However, the TRIPS agreement administered by the World Trade Organization sets forth guidelines that include trade secrets protection. Importantly, TRIPS does not establish a unified “international” law of trade secrets. Rather, it establishes minimum standards that each party must adopt and incorporate as part of its local law. The parties may regulate freely in those matters not covered by the agreement, and may provide protections greater than those contained in TRIPS. Enforcement occurs at the local level.

Trade secrets protection is included in Article 39 of TRIPS, Protection of Undisclosed Information. “According to Article 39.2, the protection must apply to information that is secret, that has commercial value because it is secret, and that has been subject to reasonable steps to keep it secret. The Agreement [TRIPS] does not require undisclosed information to be treated as a form of property, but it does require that a person lawfully in control of such information must have the possibility of preventing

it from being disclosed to, acquired by, or used by others without his or her consent in a manner contrary to honest commercial practices.”<sup>9</sup>

---

<sup>9</sup> World Trade Association (2015). Retrieved from [http://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm).

## Conclusion

Legal tools available for exam content protection can take many forms and can each provide different remedies. The choice of which legal tools to use for exam content protection should be made in conjunction with legal counsel, taking into account the testing organization's test type, use, stakes, testing environment, and risks. Used separately or in combination, the legal tools discussed in this document can form a powerful exam protection strategy for testing organizations.

## Appendix

The first two pages are an example of a completed TX form (front and back) for a single exam.

The following two pages are an example of a completed continuation page for the TX form (front and back). This form is used in combination with the above form when more than one test is being copyrighted as a set.



Copyright Office fees are subject to change. For current fees, check the Copyright Office website at [www.copyright.gov](http://www.copyright.gov), write the Copyright Office, or call (202) 707-3000.

**Privacy Act Notice:** Sections 408-410 of title 17 of the *United States Code* authorize the Copyright Office to collect the personally identifying information requested on this form in order to process the application for copyright registration. By providing this information you are agreeing to routine uses of the information that include publication to give legal notice of your copyright claim as required by 17 U.S.C. §705. It will appear in the Office's online catalog. If you do not provide the information requested, registration may be refused or delayed, and you may not be entitled to certain relief, remedies, and benefits under the copyright law.

For Individual Exams, Put Name of exam. For Full Item bank registration, use Org. Name Item Bank

REGISTRATION NUMBER \_\_\_\_\_

TX TXU  
EFFECTIVE DATE OF REGISTRATION \_\_\_\_\_

Month Day Year

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

**1** TITLE OF THIS WORK ▼  
ABC Credentialing Item Bank

PREVIOUS OR ALTERNATIVE TITLES ▼

PUBLICATION AS A CONTRIBUTION If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work ▼

If published in a periodical or serial give: Volume ▼ Number ▼ Issue Date ▼ On Pages ▼

**2 a** NAME OF AUTHOR ▼ Leave this Blank

DATES OF BIRTH AND DEATH  
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?  
 Yes  
 No

AUTHOR'S NATIONALITY OR DOMICILE  
Name of Country  
OR { Citizen of United States  
Domiciled in \_\_\_\_\_

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK  
Anonymous?  Yes  No  
Pseudonymous?  Yes  No

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

**b** NAME OF AUTHOR ▼ Yes - Made for Hire

DATES OF BIRTH AND DEATH  
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?  
 Yes  
 No

AUTHOR'S NATIONALITY OR DOMICILE  
Name of Country  
OR { Citizen of \_\_\_\_\_  
Domiciled in \_\_\_\_\_

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK  
Anonymous?  Yes  No  
Pseudonymous?  Yes  No

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

**c** NAME OF AUTHOR ▼

DATES OF BIRTH AND DEATH  
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?  
 Yes  
 No

AUTHOR'S NATIONALITY OR DOMICILE  
Name of Country  
OR { Citizen of \_\_\_\_\_  
Domiciled in \_\_\_\_\_

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK  
Anonymous?  Yes  No  
Pseudonymous?  Yes  No

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

**3 a** YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED  
2014

**b** DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK  
Month \_\_\_\_\_ Day \_\_\_\_\_ Year \_\_\_\_\_ Nation \_\_\_\_\_

**4** COPYRIGHT CLAIMANT(S) Name and address must be given the author given in space 2. ▼  
ABC Credentialing  
1234 Whatever Lane, Some City, USA 12345

APPLICATION RECEIVED  
ONE DEPOSIT RECEIVED  
TWO DEPOSITS RECEIVED  
FUNDS RECEIVED

TRANSFER If the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright. ▼

See instructions before completing this space.

MORE ON BACK ► • Complete all applicable spaces (numbers 5-9) on the reverse side of this page. • See detailed instructions. • Sign the form at line 8. DO NOT WRITE HERE Page 1 of \_\_\_\_\_ pages

Select "No" for first time registrations.  
For re-Registrations, See Re-Registration Example

EXAMINED BY	FORM TX
CHECKED BY	
<input type="checkbox"/> CORRESPONDENCE	FOR COPYRIGHT OFFICE USE ONLY
Yes	

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

**PREVIOUS REGISTRATION** Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office?

Yes  No If your answer is "Yes," why is another registration being sought? (Check appropriate box.) ▼

- a.  This is the first published edition of a work previously registered in unpublished form.
- b.  This is the first application submitted by this author as copyright claimant.
- c.  This is a changed version of the work, as shown by space 6 on this application.

If your answer is "Yes," give: **Previous Registration Number** ▶

**Year of Registration** ▶

5

**DERIVATIVE WORK OR COMPILATION**

**Preexisting Material** Identify any preexisting work or works that this work is based on or incorporates. ▼

a 6

See instructions before completing this space.

**Material Added to This Work** Give a brief, general statement of the material that has been added to this work and in which copyright is claimed. ▼

b

Applicable for those who have a deposit account with copyright office only

**DEPOSIT ACCOUNT** If the registration fee is to be charged to a deposit account established in the Copyright Office, give name and number of account.  
Name ▼ Account Number ▼

a 7

**CORRESPONDENCE** Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/Zip ▼  
Contact

b

ABC Credentialing INC  
Address Here

Company Contact Info

Area code and daytime telephone number ▶ 1234567890

Fax number ▶ 2345678901

Email ▶ testsecurity@ABCINC.org

Authorized Agent of Company Name

**CERTIFICATION\*** I, the undersigned, hereby certify that I am the

- Check only one ▶
- author
  - other copyright claimant
  - owner of exclusive right(s)
  - authorized agent of

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

ABC Credentialing INC  
Name of author or other copyright claimant, or owner of exclusive right(s) ▲

8

**Typed or printed name and date** ▼ If this application gives a date of publication in space 3, do not sign and submit it before that date.

Joe Claimant

Authorized Agent name

Date ▶ 7/1/2014

**Handwritten signature** ▼

Signature Here!

Authorized Agent Signature

**Certificate will be mailed in window envelope to this address:**

Name ▼	Joe Claimant C/O ABC Credentialing
Number/Street/Apt ▼	123 Some Street
City/State/Zip ▼	Any State, USA 12345

Include name here that will be on copyright registration

**YOU MUST:**

- Complete all necessary spaces
- Sign your application in space 8

**SEND ALL 3 ELEMENTS IN THE SAME PACKAGE:**

1. Application form
2. Nonrefundable filing fee in check or money order payable to Register of Copyrights
3. Deposit material

**MAIL TO:**  
Library of Congress  
Copyright Office-TX  
101 Independence Avenue SE  
Washington, DC 20559

9

\*17 U.S.C. §506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than \$2,500.

Copyright Office fees are subject to change. For current fees, check the Copyright Office website at [www.copyright.gov](http://www.copyright.gov), write the Copyright Office, or call (202) 707-3000.

**Privacy Act Notice:** Sections 408-410 of title 17 of the *United States Code* authorize the Copyright Office to collect the personally identifying information requested on this form in order to process the application for copyright registration. By providing this information you are agreeing to routine uses of the information that include publication to give legal notice of your copyright claim as required by 17 U.S.C. §705. It will appear in the Office's online catalog. If you do not provide the information requested, registration may be refused or delayed, and you may not be entitled to certain relief, remedies, and benefits under the copyright law.

For Individual Exams, Put Name of exam. For Full Item bank registration, use Org. Name Item Bank

REGISTRATION NUMBER \_\_\_\_\_

TX TXU

EFFECTIVE DATE OF REGISTRATION \_\_\_\_\_

Month Day Year

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

**1** TITLE OF THIS WORK ▼  
ABC Credentialing Item Bank

PREVIOUS OR ALTERNATIVE TITLES ▼

PUBLICATION AS A CONTRIBUTION If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work ▼

If published in a periodical or serial give: Volume ▼ Number ▼ Issue Date ▼ On Pages ▼

**2 a** NAME OF AUTHOR ▼ Leave this Blank

DATES OF BIRTH AND DEATH  
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?  
 Yes  
 No

AUTHOR'S NATIONALITY OR DOMICILE  
Name of Country  
OR { Citizen of United States  
Domiciled in \_\_\_\_\_

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK  
Anonymous?  Yes  No  
Pseudonymous?  Yes  No

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

**b** NAME OF AUTHOR ▼ Yes - Made for Hire

DATES OF BIRTH AND DEATH  
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?  
 Yes  
 No

AUTHOR'S NATIONALITY OR DOMICILE  
Name of Country  
OR { Citizen of \_\_\_\_\_  
Domiciled in \_\_\_\_\_

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK  
Anonymous?  Yes  No  
Pseudonymous?  Yes  No

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

**c** NAME OF AUTHOR ▼

DATES OF BIRTH AND DEATH  
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?  
 Yes  
 No

AUTHOR'S NATIONALITY OR DOMICILE  
Name of Country  
OR { Citizen of \_\_\_\_\_  
Domiciled in \_\_\_\_\_

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK  
Anonymous?  Yes  No  
Pseudonymous?  Yes  No

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

**3 a** YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED This information must be given in all cases. 2014

**b** DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK Complete this information ONLY if this work has been published. Month \_\_\_\_\_ Day \_\_\_\_\_ Year \_\_\_\_\_ Nation \_\_\_\_\_

**4** COPYRIGHT CLAIMANT(S) Name and address must be given the author given in space 2. ▼ Company Name/ Address

ABC Credentialing  
1234 Whatever Lane, Some City, USA 12345

TRANSFER If the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright. ▼

APPLICATION RECEIVED  
ONE DEPOSIT RECEIVED  
TWO DEPOSITS RECEIVED  
FUNDS RECEIVED

DO NOT WRITE HERE OFFICE USE ONLY

MORE ON BACK ► • Complete all applicable spaces (numbers 5-9) on the reverse side of this page. • See detailed instructions. • Sign the form at line 8.

DO NOT WRITE HERE  
Page 1 of \_\_\_\_\_ pages

**NOTE**  
Under the law, the "author" of a "work made for hire" is generally the employer, not the employee (see instructions). For any part of this work that was "made for hire" check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part, and leave the space for dates of birth and death blank.



Select Yes

Select "C"

EXAMINED BY _____	FORM TX
CHECKED BY _____	
<input type="checkbox"/> CORRESPONDENCE	FOR
Yes	COPYRIGHT
	OFFICE
	USE
	ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

**PREVIOUS REGISTRATION** Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office?

Yes  No If your answer is "Yes," why is another registration being sought? (Check appropriate box.)

- a.  This is the first published edition of a work previously registered in unpublished form.
- b.  This is the first application submitted by this author as copyright claimant.
- c.  This is a changed version of the work, as shown by space 6 on this application.

If your answer is "Yes," give: **Previous Registration Number** ▶ **Prior Regist. #**      **Year of Registration** ▶ **Year or Prior Reg.**

5

**DERIVATIVE WORK OR COMPILATION**

**Preexisting Material** Identify any preexisting work or works that this work is based on or incorporates.

State Items Previously Copyrighted (Items 1-X)

a 6

See instructions before completing this space.

**Material Added to This Work** Give a brief, general statement of the material that has been added to this work and in which copyright is claimed.

State Items Added (Items X+1 - Z)

Applicable for those who have a deposit account with copyright office only

**DEPOSIT ACCOUNT** If the registration fee is to be charged to a deposit account established in the Copyright Office, give name and number of account.  
Name ▶ Account Number ▶

a 7

**CORRESPONDENCE** Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/Zip ▶  
Contact

ABC Credentialing INC  
Address Here

Company Contact Info

Area code and daytime telephone number ▶ 1234567890  
Email ▶ testsecurity@ABCINC.org

Fax number ▶ 2345678901

Authorized Agent of Company Name

**CERTIFICATION\*** I, the undersigned, hereby certify that I am the  
of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

- Check only one ▶
- author
  - other copyright claimant
  - owner of exclusive right(s)
  - authorized agent of ABC Credentialing INC

Name of author or other copyright claimant, or owner of exclusive right(s) ▶

8

**Typed or printed name and date** ▶ If this application gives a date of publication in space 3, do not sign and submit it before that date.

Joe Claimant

Authorized Agent name

Date ▶ 7/1/2014

**Handwritten signature** ▶

Signature Here!

Authorized Agent Signature

**Certificate will be mailed in window envelope to this address:**

Name ▶  
Joe Claimant C/O ABC Credentialing

Number/Street/Apt ▶  
123 Some Street

City/State/Zip ▶  
Any State, USA 12345

Include name here that will be on copyright registration

**YOU MUST:**

- Complete all necessary spaces
- Sign your application in space 8

**SEND ALL 3 ELEMENTS IN THE SAME PACKAGE:**

1. Application form
2. Nonrefundable filing fee in check or money order payable to Register of Copyrights
3. Deposit material

**MAIL TO:**  
Library of Congress  
Copyright Office-TX  
101 Independence Avenue SE  
Washington, DC 20559

9

\*17 U.S.C. §506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than \$2,500.