



United States Copyright Office

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**Re: Second Request for Reconsideration for Refusal to Register 310-101
Facebook Advertising Core Competencies (SR 1-4049892621), 321-101
Facebook Certified Buying Professional (SR 1-4052280529), and 322-101
Facebook Certified Planning Professional (SR 1-4052280566);
Correspondence ID: 1-387AM5V**

Dear Mr. Petersen:

The Review Board of the United States Copyright Office (“Board”) has considered Facebook, Inc.’s (“Facebook’s”) second request for reconsideration of the Registration Program’s refusal to register text and photograph claims in the works titled “310-101 Facebook Advertising Core Competencies,” “321-101 Facebook Certified Buying Professional,” and “322-101 Facebook Certified Planning Professional” (the “Works”). After reviewing the applications, deposit copies, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denial of registration.

I. DESCRIPTION OF THE WORKS

The Works are unpublished certification exams that can be delivered online. The exams are part of Facebook’s Blueprint Certification Program, which provides certifications to marketing professionals in Facebook’s advertising tools and policies. The exams can be administered by remote proctors that monitor exam takers through the exam taker’s webcam and microphone. For each of the Works, the applicant submitted two deposits: (1) three-page redacted version of the exam, and (2) three-page summary describing the exam and how it is administered.

II. ADMINISTRATIVE RECORD

On October 12, 2016, Facebook filed three separate secure test applications for the Works and submitted redacted deposits for registration. In a September 12, 2017, letter, the Copyright Office refused to register all three claims, finding they did not “satisfy the regulatory definition for a secure test.” Letter from U.S. Copyright Office to Joseph Petersen, Kilpatrick Townsend & Stockton, LLP (Sept. 12, 2017).

In a December 8, 2017, letter, Facebook requested that the Office reconsider its initial refusal to register the Works, requesting that the Office revise the Interim Rule adopted by the Office on June 12, 2017, to “amend the definition of a secure test to account for modern security measures and test-taking practice.”¹ Letter from Joseph Petersen to U.S. Copyright Office at 5 (Dec. 8, 2017) (“First Request”). On October 9, 2018, the Office denied the first request for reconsideration, finding that the works did not meet the regulatory definition of a secure test. Letter from Gina Giuffreda, Attorney-Advisor, U.S. Copyright Office, to Joseph Petersen (Oct. 9, 2018). The Office reiterated that tests “administered via a Website to people located in their individual homes or offices would not be eligible for this [secure test] procedure, both because a home or office would not qualify as a ‘specified center’ and because the tests presumably would not be administered ‘under supervision.’” *Id.* at 2 (*quoting* Secure Tests, 82 Fed. Reg. 26,850, 26,852 (June 12, 2017)). The Office noted that the Works are administered precisely in the manner that the Office explicitly excluded from eligibility for the secure test procedure; therefore, their arguments would be more appropriately made in the context of rulemaking.² *Id.* at 2.

In a January 11, 2019, letter, Facebook requested that, pursuant to 37 C.F.R. § 202.5(c), the Office reconsider for a second time its refusal to register the Works. Letter from Joseph Petersen to U.S. Copyright Office (Jan. 11, 2019) (“Second Request”). In that letter, Facebook argued that the Interim Rule’s definition of “secure test” fails “to give proper consideration to testing practices in the digital age and arbitrarily and capriciously deny the benefits of registration to owners of copyright in secure tests administered using modern technology.” *Id.* at 3. Facebook contended that the Interim Rule effectively prevents Facebook from registering its Works “by requiring it to forego confidentiality” and denying it the opportunity to submit redacted deposit copies. *Id.* at 4.

III. DISCUSSION

A. Legal Framework: Eligibility of Secure Tests

To register a work with the Copyright Office, an applicant must submit a complete application, filing fee, and appropriate deposit. 17 U.S.C. § 408. In general, applicants must provide a complete copy of unpublished works, meaning a copy that contains all of the

¹ On June 12, 2017, the Office issued an interim rule memorializing its special procedure for the examination of secure tests. *See* 82 Fed. Reg. 26,850 (June 12, 2017) (the “Interim Rule”). The Interim Rule became effective on July 12, 2017.

² The comment period for submitting comments on the Interim Rule closed on April 2, 2018. 83 Fed. Reg. 2,070 (Jan. 16, 2018). The Office is currently considering the comments submitted.

copyrightable authorship claimed on the application. *Id.* § 408(b)(1); 37 C.F.R. § 202.20(b)(2)(i). The Copyright Office is required to make all such “articles deposited in connection with completed copyright registration” available for “public inspection.” 17 U.S.C. § 705(b). The Office recognizes, however, that making complete copies of certain works open to public inspection may prejudice the work’s future utility or jeopardize a copyright owner’s trade secret protection under state law. Therefore, the Copyright Office has used its authority under section 408(c)(1) to establish administrative classes and “permit, for particular classes, the deposit of identifying material instead of copies or phonorecords.” 17 U.S.C. § 408(c)(1).

One of the types of works that the Office has determined can include identifying material is “secure tests.” The Copyright Office distinguishes secure tests to protect the confidential nature of these works. “Secure tests” are defined as a “nonmarketed test administered under supervision at *specified centers* on scheduled dates, all copies of which are accounted for and either destroyed or returned to restricted locked storage following each administration.” 37 C.F.R. § 202.13(b)(1) (emphasis added).³ Thus, to be eligible for the secure test procedure, the work must meet certain criteria. First, the work must be a “test.” Questions that are stored in—or randomly pulled from—an electronic database or a test bank cannot be registered as a secure test if the database or test bank is simply a medium for storing questions and does not represent an actual test. Second, the test must be administered at specified centers on scheduled dates. A “specified center” is a “place where test takers are *physically* assembled at the same time.” *Id.* at § 202.13(b)(4) (emphasis added). Third, the test must be administered “under supervision,” with test proctors or the like. Therefore, tests administered remotely do not satisfy the definition of a “secure test” and cannot be registered using the secure test procedure.

To register a secure test, instead of providing a complete unredacted copy of the work, applicants are permitted to submit a redacted copy of the entire test with a completed online application and questionnaire. If the work appears to be eligible for the secure test process, the Office will contact the applicant to schedule an appointment for the applicant to deliver the unredacted test to the Office in person. If the Office confirms that the work qualifies as a secure test, it will examine the test as a whole to determine if it contains sufficient copyrightable authorship. When the examination is complete, the Office will return the unredacted copies. The Office retains only the redacted copy that was uploaded to the electronic registration system. If the Office registers the secure test, the registration will be effective as of the date that the Office received the application, filing fee, and the redacted copy of the entire test in proper form.

B. Analysis of the Works

After carefully examining the Works and applying the legal standards discussed above, the Board finds that Facebook’s tests are not registrable using the secure test procedure.

³ Prior to the current regulations, the Office’s regulations defined a “secure test” as a “non-marketed test regularly administered under supervision at specified centers on specific dates, all copies of which are accounted for and either destroyed or returned to restricted locked storage following each administration.” 37 C.F.R. § 220(b)(4) (2016) (superseded by 37 C.F.R. § 202.13(b)(4)). The Interim Rule memorialized the Office’s interpretation of this provision.

The Works as submitted each contain a three-page description and a three-page test that is almost completely redacted. For each test, the only viewable content is the title page and short phrases on pages two and three. While the descriptions of the tests indicate that the Works may contain sufficient literary authorship to warrant copyright registration, the tests do not themselves display copyrightable subject matter. *See* 37 C.F.R. § 202.1(a) (prohibiting registration of “[w]ords and short phrases”); COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.4(c) (3d ed. 2017) (“COMPENDIUM (THIRD)”) (providing that the Office cannot register “brief combinations of words, even if the word or short phrase is novel or distinctive”).⁴

Further, current regulations do not permit Facebook to deposit redacted copies of the unpublished tests for registration. *See* 17 U.S.C. § 408(b) (“[T]he material deposited for registration shall include . . . in the case of an unpublished work, one complete copy or phonorecord”). Facebook argued that the Office should consider the tests to be secure tests and permit the deposit of redacted copies.⁵ The tests, however, do not meet the secure test definition set forth in 37 C.F.R. § 202.13. The tests are administered “either online . . . or in person at a . . . professional testing center.” Second Request at 2. The remote exams are proctored via webcam. First Request at 5. These facts disqualify Facebook from registering the tests using the secure test procedure because the tests may be administered online by remote proctors and not within “specified centers” where test takers are physically assembled, as required by current Office regulations. Indeed, Facebook’s tests fall squarely within a scenario considered by the Office in the preamble to the Interim Rule establishing the procedure for the examination of secure tests. There, the Office stated that tests “administered via a Web site to people located in their individual homes or offices would not be eligible for this [secure test] procedure, both because a home or office would not qualify as a ‘specified center’ and because the tests presumably would not be administered ‘under supervision.’” 82 Fed. Reg. at 26,852. Therefore, the redacted works do not meet the regulatory definition of a secure test and must be refused as submitted.⁶

Nonetheless, Facebook argued that the Office should exercise administrative flexibility to consider the tests to be secure tests. Facebook contended that its “testing environment mirrors those of tests traditionally considered to be secure.” First Request at 5. Facebook also claimed that “it would frustrate the purpose of the Copyright Act to require it and other owners of copyright in tests administered remotely to submit unredacted deposit copies, which would have the effect of ‘mak[ing] the Copyright Act unavailable’ for protecting secure tests administered using communications networks.” Second Request at 6 (quoting *Nat’l Conference of Bar Exam’rs v. Multistate Legal Studies, Inc.*, 692 F.2d 478, 484 n.6 (7th Cir. 1982)). Finally,

⁴ Therefore, the Works do not “indisputably contain copyright authorship.” *See* Second Request at 2.

⁵ It is unclear whether the redacted copies submitted by Facebook comply with the Interim Rule regarding deposit copies. The current regulations require submission of “a redacted copy of the *entire* secure test.” 37 C.F.R. § 202.13(c)(3) (emphasis added). The deposits for each test at issue here contain a title page and two redacted test pages. From the descriptions supplied with the Second Request, it appears that the redacted materials may not represent redacted copies of the entire test.

⁶ In its Second Request, Facebook quotes the definition of secure test as it existed prior to the Interim Rule. Second Request at 3; *see* note 3, *supra*. Notably, as indicated above, that definition required that a secure test be “administered under supervision at *specified centers on specific dates*.” *Id.* (emphasis added). The Interim Rule clarified the Office’s interpretation of this definition, using very similar language. Thus, the Office’s application of this interpretation to Facebook’s tests cannot be called “arbitrary and capricious.”

Facebook argued that the Interim Rule should be amended in light of “technological advances [that] enable companies to administer tests securely using the internet and other remote means.” Second Request at 2.

No matter how rigorous the security measures, the tests are not eligible to use the Office’s secure test procedure under current regulations. While Facebook’s comments remain under consideration in the secure test rulemaking proceeding, the Board must apply the regulations as they currently exist. Further, the Board is not persuaded by Facebook’s reference to *National Conference of Bar Examiners*, which addressed the interpretation of section 408 with regard to the Register’s authority to accept identifying materials, or excised copies, in lieu of actual copies of the work. There, the defendant, Multistate Legal Studies, Inc., challenged the validity and constitutionality of the Copyright Office secure test regulation, 37 C.F.R. § 202.20, under which plaintiffs’ Multistate Bar Examination, or MBE, was registered, arguing that section 704(d) requires an “entire deposit.” The Seventh Circuit read section 704(d) in conjunction with section 408(c)(1) and concluded that the term “entire deposit” must refer to the excised copies. The court did not scrutinize the Office’s definition of “secure test” or how the Office administers the secure test procedure.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claims in the Works. Facebook’s descriptions, however, explaining how Facebook plans to administer the tests are copyrightable and may be registered. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.



U.S. Copyright Office Review Board

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