Copyright Protection for Written Examinations

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A new case prompts Professor Field to confirm a long-held suspicion that tests such as the LSAT may not qualify for copyright, but other protection is available.

National Ass'n of Boards of Pharmacy v. Board of Regents of the University System of Georgia, 2011 WL 649951 (11th Cir.) (NABP), proceeds on the assumption that questions in a licensing examination are copyrightable. That proposition is supported by Third, Seventh and Eighth Circuit opinions. Despite potentially benefitting from such an assessment, I am highly skeptical. Even when examinations contain lengthy fictitious, even entertaining, fact patterns, their function is not to convey information.

The Copyright Office in 37 C.F.R. § 202.20 nevertheless provides for registration. Section 202.20(c)(2)(vi) calls for the deposit of one complete copy but promises prompt return of tests that qualify as "secure" under § 202.20(b)(4).

The return of secure tests under essentially identical provisions was challenged in Conference of Bar Examiners v. Multistate Legal Studies, Inc., 692 F.2d 478, 481 n.1 (7th Cir. 1982) (CBE). Defendant argued that the regulation exceeds the Register's rulemaking authority under 17 U.S.C. § 408(c). But *CBE* concludes otherwise, holding that authority "can be found in the clear terms of the statute." *Id*. at 484 (note omitted).

Four years later, defendants advanced different challenges in Educational Testing Services v. Katzman, 793 F.2d 533 (3d Cir. 1986). They argued that items in ETS' Scholastic Aptitude Test (SAT) did not qualify because copyright did not cover individual items in versions of the SAT registered as compilations. 793 F.2d 538. The court, however, found that proposition inconsistent with the text of 17 U.S.C. § 103(b). *Id*. at

538-39.

Katzman also argued that any expression in SAT questions had merged with unprotected subject matter so as to defeat copyright. Again, the court disagreed, saying, “It is apparent on the face of the materials that ETS' questions do not represent the only means of expressing the ideas thereon (sic).” *Id*. at 540.

That court was influenced by awareness that “test questions are central to the essence of plaintiff's operations. Indeed, test questions are ETS’ operation.” 793 F.2d 544 (citation and internal quotation marks omitted). Moreover, their preparation represents “expenditure of significant time, effort and money.” *Id.* But effort alone as a foundation for copyright was later rejected in Feist Publications, Inc. v. Rural Telephone Service Company, Inc, 499 U.S. 340, 354 (1991). Although the Court’s focus in *Feist* was originality, it seems to leave scant space for copyright based on effort alone.

Originality was the focus of two challenges in Applied Innovations, Inc. v. Regents of the University of Minnesota, 876 F.2d 626 (8th Cir. 1989). Defendants claimed, first, that particular questions in the Minnesota Multiphasic Personality Inventory (MMPI) lack originality, but the opinion finds the requirement both minimal and satisfied. *Id*. at 635. A second argument, similar to the merger defense offered In *Katzman*, is said to present a close question. But the opinion rejects that, too; “MMPI testing data, at least for purposes of analysis under the copyright law, do not represent pure statements of fact or psychological theory; they are instead original expressions of those facts or processes as applied and as such are copyrightable.” *Id*. at 636.

Still, that tests may be registered, that questions despite being based on facts and ideas represent original expression, and that selection and validation may require considerable effort does not make tests copyrightable. No defendant seems to have so

far based an argument on Baker v. Selden, 101 U.S. 99, 105 (1879), but it presents an additional hurdle less easily overcome.

That bookkeeping forms published by Selden were unprotected is less important than the reason offered for that conclusion. “[I]n most other cases the diagrams and illustrations can only be represented in concrete forms of wood, metal, stone, or some other physical embodiment. But the principle is the same in all. The description… though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself.” *Id*. at 105.

Thus, 37 C.F.R. § 202.1(c), provides, “Blank forms… and the like, which are designed for *recording* information and do not in themselves *convey* information,” are “not subject to copyright.” (Emphasis added.) Although 17 U.S.C. § 102(b) is usually regarded as capturing the holding in *Baker*, that regulation is not well supported by its text. Better support appears in the Act’s definition of a “useful article” as one “having an intrinsic utilitarian function that is not merely to… *convey* information.” 17 U.S.C. § 101 (Emphasis added.)

Indeed, registered forms may not qualify for copyright. *See* Advanz Behavioral Management Resources, Inc. v. Miraflor, 21 F.Supp.2d 1179 (C.C. Cal.1998). Tests are, if anything, less deserving. Even instructions that accompany tests are suspect under § 102(b). Apart from instructions, the sole function of a test is to collect, not convey, information then used to measure knowledge or other attributes. In light of that, tests no more warrant copyright than, say, original devices for linear measurement that might be printed on paper rather than wood or metal.

Creators of tests should therefore consider alternative ways to halt and redress unauthorized duplication. NABP, for example, did so by alleging that defendant

“obtained NAPLEX questions by having recent examinees send him questions they remembered seeing on the exam. Through this scheme, he compiled hundreds of NAPLEX questions for his review materials.” 2011 WL 649951 at *1. *See also, id.* n. 3 (allegations accepted as true).

When persons administering and taking tests have agreed not to share content with others, liability should be easily established under the Uniform Trade Secret Act § 1(2) or § 40(b) of the Restatement (Third) of Unfair Competition. In egregious circumstances, those using information known to have been disclosed despite contrary obligations could also face prosecution under the Economic Espionage Act, 18 U.S.C. § 1832(a)(3). Indeed, comparison of fines and jail terms provided there with ones potentially imposed under 18 U.S.C. § 2319 (willful copyright infringement) suggests that the latter may offer less deterrent.