

## STANDARDIZED TESTS: RECOUPING DEVELOPMENT COSTS AND PRESERVING INTEGRITY\*

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### ABSTRACT

Psychometric tests are designed to measure knowledge and a variety of psychological attributes. To be useful, they must be validated, sometimes at great expense. Developers often seek to recoup costs by controlling reproduction. Further, developers often seek to avoid validity-defeating publication.

Thus far, copyright law has served both ends despite a variety of challenges, including ones occasionally based on subject matter. No one, however, seems to have claimed that copyright law is ill-suited to control the reproduction of text designed to produce or collect information rather than disseminate it.

Focusing on that dichotomy, this Article argues that current copyright law should have, at best, a limited role in halting free riders and preserving the potential for reuse of validated questions. It also briefly explains why copyright is rarely needed.

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\* This paper is based in part on two of the author's op-eds previously published in iP Frontline. See generally Thomas G. Field, Jr., *Copyright Protection for Written Examinations*, iP FRONTLINE (Apr. 6, 2011), available at <http://www.ipfrontline.com/depts/article.aspx?id=25141&deptid=4>; Thomas G. Field, Jr., *Should Copyright Protect Evaluative Tools?*, iP FRONTLINE (Jan. 11, 2012), available at <http://www.ipfrontline.com/depts/article.aspx?id=26212&deptid=4>.

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## INTRODUCTION

Questions, if not tests, crafted to evaluate whether students have acquired the knowledge and skills instructors intend to impart to them surely number in the millions. Insofar as copyright protects original expression as soon as it is fixed,<sup>1</sup> one might assume that instructors or their employers hold copyright once questions have been recorded on paper or other media.<sup>2</sup> But the copyrightability of tests is open to dispute.

Copyright subject matter is limited. Some limitations are clear. Strangers may freely reproduce facts published by others, even if collected at great expense,<sup>3</sup> and, ideas, no matter how original or valuable, may be restated using different language.<sup>4</sup> However, the extent to which forms intended to collect rather than convey information<sup>5</sup> and the extent to which the expression of simple ideas are copyrightable are less clear.<sup>6</sup>

An issue that does not seem to have been addressed thus far is whether text intended to collect information for use by authors rather than presented to inform readers is protected. That is the primary objective of this Article.

Instructors often permit others, including students, to have access to and to reproduce their test questions.<sup>7</sup> Yet those who standardize tests<sup>8</sup> for various

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<sup>1</sup> See 17 U.S.C. § 102(a) (2006).

<sup>2</sup> See Thomas G. Field, Jr., *From Custom to Law in Copyright*, 49 IDEA 125, 146 (2008) (“That schools have traditionally eschewed copyright in job-related work produced by employees should be seen, particularly in light of unambiguous statutory provisions, to indicate only lack of interest, not lack of right.”).

<sup>3</sup> See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 353 (1991) (rejecting “sweat of the brow” as a substitute for originality).

<sup>4</sup> See 17 U.S.C. § 102(b) (2006) (“In no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is . . . embodied in such work.”).

<sup>5</sup> See *Bibbero Sys., Inc. v. Colwell Sys., Inc.*, 893 F.2d 1104, 1108 (9th Cir. 1990) (finding forms for recording information did not qualify for copyright despite containing simple instructions and having been registered by the Copyright Office).

<sup>6</sup> See, e.g., *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 677, 678–79 (1st Cir. 1967) (justifying the so-called merger doctrine in the context of rules for a sales promotional contest).

<sup>7</sup> See, e.g., Thomas G. Field, Jr., *Index to Professor Field's IP Finals*, UNIV. OF N.H. SCH. OF L., <http://law.unh.edu/thomasfield/ipfinals/index.php> (last visited Jan. 20, 2012) (linking to nearly 2000 questions, most with keys).

purposes and validate them at considerable expense<sup>9</sup> often seek to recoup and control costs by limiting reproduction.<sup>10</sup> They also try to avoid any kind of access or publication that might necessitate redrafting.<sup>11</sup>

Part I of this Article shows that copyright law has generally served developers well by allowing them to overcome a variety of defenses. It begins with consideration of screening tests such as the SAT (once known as the Scholastic Aptitude Test)<sup>12</sup> used, for example, to determine admission to schools and professions. Part I concludes with a few examples of conflicts involving tests of other kinds of abilities and attributes.

Part II examines general legal authorities that have thus far framed the scope of copyrightable subject matter. Pointing out that key authorities have been largely ignored in disputes involving standardized tests, Part II advances the thesis that copyright law, presumably intended to prevent unauthorized dissemination of information, has been inappropriately applied to text-based evaluative instruments designed to collect rather than disseminate information.

Part III explains why all would not be lost if courts were to find merit in the dichotomy advanced in Part II, however remote the possibility. To that end, Part III briefly reviews an obvious assortment of alternatives for controlling unauthorized reproduction and use of standardized tests.

## I. COPYRIGHT AS PREVIOUSLY APPLIED TO STANDARDIZED TESTS

All psychometric tests have much in common. Yet, these tests often differ, particularly with regard to effects on examinees, programs, and institutions. This Part begins by briefly reviewing six cases involving screening tests

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<sup>8</sup> For present purposes, information provided by Wikipedia is adequate. Wikipedia defines a “standardized test” as one “administered and scored in a consistent, or ‘standard’, manner. Standardized tests are designed in such a way that the questions, conditions for administering, scoring procedures, and interpretations are consistent and are administered and scored in a predetermined, standard manner.” *Standardized Test*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Standardized\\_test](http://en.wikipedia.org/wiki/Standardized_test) (last visited Jan. 20, 2012) (citations omitted).

<sup>9</sup> See, e.g., *Nat’l Ass’n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1301–02 (11th Cir. 2011); see also Emily Campbell, “Testing” the Copyright Clause: Copyright Protection for Educational and Psychological Tests, 69 NEB. L. REV. 791, 804 (1990) (“The standardization of tests is typically an expensive undertaking and may take years because of the number of subjects that have to be recruited for participation in the testing procedure.”).

<sup>10</sup> See, e.g., *Applied Innovations, Inc. v. Regents of the Univ. of Minn.*, 876 F.2d 626, 628 (8th Cir. 1989).

<sup>11</sup> See, e.g., *Nat’l Ass’n of Bds. of Pharmacy*, 633 F.3d at 1301–02.

<sup>12</sup> See *SAT*, COLLEGEBOARD.ORG, <http://sat.collegeboard.org/home> (last visited Sept. 1, 2012).

such as the Multistate Bar Examination. Second, this Part discusses three disputes involving tests intended to measure abilities not necessarily used to screen applicants seeking entrance to academic programs or professions.

One difference between the two types of tests is that the former are administered to many people simultaneously whereas the latter are apt to be administered ad hoc. The most important difference, however, is that those subjected to the former have strong incentives to study and “do well,” whereas those subjected to the latter are unlikely to entertain the notion of “doing well” or to be strongly motivated to prepare.

### A. *Screening Tests*

The stakes are high when standardized tests determine whether examinees will be admitted to educational programs of choice or to professions for which they have prepared at considerable expense. The stakes may be even higher for schools that admit or eventually graduate them.<sup>13</sup>

#### 1. The Multistate Bar Exam

An early case involving a screening test was brought by the National Conference of Bar Examiners (“NCBE”) against a firm preparing candidates for the Multistate Bar Exam (“MBE”).<sup>14</sup> The NCBE alleged unfair competition as well as copyright infringement for using questions copied from examinations offered in the late 1970s.<sup>15</sup>

For reasons that are not entirely clear, despite initially asserting them, the NCBE dropped its copyright claims.<sup>16</sup> The court nevertheless found that

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<sup>13</sup> See, e.g., Ross Reinhold, *Myers Briggs Test: What Is Your Myers-Briggs Personality Type?*, PERSONALITYPATHWAYS, [http://www.personalitypathways.com/type\\_inventory.html](http://www.personalitypathways.com/type_inventory.html) (last visited Sept. 1, 2012). A note says, “While sometimes referred to as the Myers-Briggs Personality Test, the Briggs Myers personality test, Myers Briggs Test or the MBTI test, the MBTI® is not a personality test but a personality inventory or instrument in which there are no right or wrong answers.” See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-20, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS 34 (2009) (“[A]ccording to representatives from LSAC, the ABA, some law schools, and one minority student group, schools are reluctant to admit applicants with lower LSAT scores because the median LSAT score is a key factor in the *U.S. News and World Report* rankings.”).

<sup>14</sup> Nat’l Conf. Bar Exam’rs v. Multistate Legal Studies, Inc., 692 F.2d 478, 480 (7th Cir. 1982), cert. denied, 464 U.S. 814 (1983).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 481–82

## Standardized Tests

289

defendant's challenge to the validity of copyright in the MBE remained justiciable.<sup>17</sup>

That challenge focused on a copyright regulation that permits registration of "secure" tests.<sup>18</sup> When an applicant to register so identifies a test, the Office "retain[s] only such portions, description, or the like so as to constitute a sufficient archival record of the deposit . . ."<sup>19</sup> In defendant's view, however, the regulation lacked statutory support<sup>20</sup> or, in the alternative, was unconstitutional.<sup>21</sup> For reasons unrelated to those of concern here, the Seventh Circuit rejected both theories and "conclude[d] that the district court correctly held plaintiffs' copyright valid . . ."<sup>22</sup>

### 2. The SAT<sup>23</sup>

At about the same time the NCBE's suit was winding down, Educational Testing Services ("ETS") learned that the Princeton Review ("Review") had distributed copies of tests that were subsequently administered.<sup>24</sup> ETS then

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<sup>17</sup> *Id.* at 482.

<sup>18</sup> *Id.* at 481 n.1; *see* Deposit of Copies and Phonorecords for Copyright Registration, 37 C.F.R. § 202.20(c)(2)(vi) (2011).

<sup>19</sup> *Nat'l Conf. Bar Exam'rs*, 692 F.2d at 483.

<sup>20</sup> *See, e.g., id.* at 483–84.

<sup>21</sup> *Id.* at 484–85.

<sup>22</sup> *Id.* at 487. The district court's finding "Multistate Bar Examination," to be a valid trademark was, however, reversed because it accurately described plaintiffs' test. *Id.* at 488.

<sup>23</sup> The College Board is the current administrator of the exam. *See* SAT, COLLEGEBOARD.ORG, <http://sat.collegeboard.org/home> (last visited Sept. 1, 2012). The College Board holds two federal trademark registrations. Registration Number 1067665 dates from 1977 and is associated with "printed tests and test booklets." SAT, Registration No. 1067665. Registration Number 3567089 dates from 2009 and is associated with preparing, administering and scoring standardized tests; providing registration information, schedules and materials for standardized test preparation via a global computer network; preparation of statistical reports based on standardized test performances, namely, predicting college performance of test takers, comparison of group scores; test performance by selected subgroups of test takers, test characteristics, and effects of coaching; conducting seminars in the field of statistical analysis of test performance scores; and advisory services to students and educational professionals in the area of test registration information, schedules and materials. SAT, Registration No. 3567089. I appreciate the assistance of my colleague, Professor Ashlyn J. Lembree, in locating those records. Further information may be found on the U.S. Patent and Trademark Office's Trademark Application and Registration Retrieval ("TARR") Web server at <http://www.uspto.gov/trademarks/TARR.jsp> (last visited Sept. 1, 2012).

<sup>24</sup> *Educ. Testing Servs. v. Katzman*, 793 F.2d 533, 536 (3d Cir. 1986). Several test names are mentioned but they were apparently parts of the SAT. Wikipedia reports that the test "was first introduced in 1926, and its name and scoring have changed several times. It was first

“cancelled the scores of those Review students who had been given access to the stolen test.”<sup>25</sup> Katzman, the sole shareholder of the Review,<sup>26</sup> was not held responsible for theft of the tests, but he and an associate agreed, in 1983,

[T]o return all copies of the purloined tests, to refrain from copying or distributing any ETS copyrighted or copyrightable materials or registering for or attending any test administered by ETS unless it was for bona fide purposes, and to notify ETS if any unlawfully obtained ETS tests came into their possession and provide ETS with information as to their source.<sup>27</sup>

However, ETS later concluded that Katzman was not honoring the agreement. In 1985, ETS sued Katzman, alleging that the Review distributed questions similar to those in the tests Katzman had promised to return, forcing ETS to provide additional examinations and to retire questions from use.<sup>28</sup> ETS also alleged that Katzman “distributed ‘facsimile’ SATs that contained ‘verbatim or nearly verbatim’ SAT questions, forcing ETS to retire [them].”<sup>29</sup> In ETS’s view, those questions were obtained by Review employees who had registered and taken the exam in violation of the agreement set out above.<sup>30</sup> Based on documentary evidence, the district court issued a temporary restraining order and later a preliminary injunction.<sup>31</sup>

Although the district court’s findings left much to be desired, the Third Circuit reviewed using documents supplied by the parties.<sup>32</sup> ETS had registered copyright in accordance with the secure test regulations,<sup>33</sup> but defendants did not challenge that. Rather, they argued that the tests were registered as compilations and provided no protection for individual questions.<sup>34</sup> The court found merit neither in that argument<sup>35</sup> nor in arguments that the copyright was for

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called the Scholastic Aptitude Test, then the Scholastic Assessment Test, but now SAT does not stand for anything.” *SAT*, WIKIPEDIA, <http://en.wikipedia.org/wiki/SAT> (last visited Sept. 1, 2012).

<sup>25</sup> *Katzman*, 793 F.2d at 536.

<sup>26</sup> *Id.* at 535.

<sup>27</sup> *Id.* at 536.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; see *supra* text accompanying note 27.

<sup>31</sup> *Educ. Testing Servs. v. Katzman*, 793 F.2d 533, 536 (3d Cir. 1986).

<sup>32</sup> *Id.* at 537–38.

<sup>33</sup> *Id.* at 538; see *supra* text accompanying notes 18–19.

<sup>34</sup> *Katzman*, 793 F.2d. at 538.

<sup>35</sup> *Id.* at 539.

“ideas” as precluded by § 102(b).<sup>36</sup> Defendants also argued the merger doctrine, but the court said, “[w]e need not define the limits of the merger principle in this case. It is apparent on the face of the materials that ETS’ questions do not represent the only means of expressing the ideas thereon.”<sup>37</sup>

### 3. The Medical College Admission Test

A 1991 suit brought by the creators of the Medical College Admission Test (“MCAT”) poses a wholly different reason for copying tests and questions.<sup>38</sup> Arguing preemption, the creators of the MCAT challenged enforcement of a New York statute that mandated reports analyzing test scores according to race, ethnicity, gender, and linguistic background.<sup>39</sup> The statute also allowed public inspection of the reports, the test questions, and the test answers.<sup>40</sup> The district court awarded summary judgment and an injunction for the plaintiff.<sup>41</sup> Concluding that no conflict would exist if the state’s use was fair, the Second Circuit reversed and remanded, saying, “the purported harm to the MCAT stems from a non-commercial, non-competing use. Moreover, the degree of potential harm to the MCAT and the availability of means to minimize that harm are sharply in dispute. Accordingly, there remain factual issues which deserve further elucidation before the district court.”<sup>42</sup> Thus, after “nearly ten years of litigation,” the case was remanded.<sup>43</sup>

Although validity of copyright for the MCAT appears not to have been disputed, a partial dissent by Judge Mahoney stresses a second issue, relevant here.<sup>44</sup> Judge Mahoney agreed “that summary judgment was improper,” but expressed skepticism about the alleged conflict between federal and state law.<sup>45</sup> In his view:

[W]hen the [plaintiff] seeks to administer the MCAT and rank applicants on the results, it enters a field of conduct that, as I view the matter, New York may permissibly regulate . . . I would rule that a limited degree of interfer-

<sup>36</sup> *Id.* Section 102(b) is quoted in full *supra* note 3.

<sup>37</sup> *Katzman*, 793 F.2d. at 540.

<sup>38</sup> *Ass’n Am. Med. Colls. v. Cuomo*, 928 F.2d 519, 521 (2d Cir. 1991).

<sup>39</sup> *Id.* at 521–22.

<sup>40</sup> *Id.* at 522.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 525.

<sup>43</sup> *Id.* at 521.

<sup>44</sup> *Ass’n Am. Med. Colls. v. Cuomo*, 928 F.2d 519, 526 (2d Cir. 1991); *see id.* at 522.

<sup>45</sup> *Id.* at 526.

ence with copyright privileges is permissible where a state, for purposes wholly unrelated to the policies that underly [sic] the protection of intellectual property, endeavors to regulate the manner in which an author markets his expression.<sup>46</sup>

#### 4. The Chicago Academic Standards Exams

When Mr. Schmidt, a public school teacher, published the Chicago Academic Standards Exams he regarded as faulty, the Chicago Board of Education sued for copyright infringement.<sup>47</sup> As in the previous case, most of the court's attention regarding the merits<sup>48</sup> was given to the "privilege of fair use in relation to secure tests."<sup>49</sup> As to that, the Seventh Circuit's opinion concluded:

There is more than a suspicion that Schmidt simply does not like standardized tests. That is his right. But he does not have the right, as he believes he does . . . to destroy the tests by publishing them indiscriminately, any more than a person who dislikes Michelangelo's statue of David has a right to take a sledgehammer to it . . . . If Schmidt wins this case, it is goodbye to standardized tests in the Chicago public school system; Schmidt, his allies, and the federal courts will have wrested control of educational policy from the Chicago public school authorities.<sup>50</sup>

In addition to asserting a fair use defense, Schmidt also lodged an attack on the validity of plaintiff's copyright registration, arguing that plaintiff claimed "copyright in the entire contents of the tests" based on another party's contributions.<sup>51</sup> But the challenge was seen as "frivolous" insofar as the "other" party's work was for hire as well as assigned.<sup>52</sup>

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<sup>46</sup> *Id.* at 527.

<sup>47</sup> Chicago Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 627 (7th Cir. 2003). The purpose of the tests is not stated, but:

[P]ublication of [the board's] standardized tests would not only prevent validation by precluding reuse of any of the questions in them, but also require the school board to create many new questions, at additional expense; and they might not be as good as the original questions, in which event there would be diminished quality as well as added cost.

*Id.*

<sup>48</sup> Process also gets attention. *See id.* at 632 ("This is an appallingly bad injunction.").

<sup>49</sup> *Id.* at 628.

<sup>50</sup> *Id.* at 630–31.

<sup>51</sup> *Id.* at 631.

<sup>52</sup> Chicago Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 627 (7th Cir. 2003). Earlier in the opinion, the court also discusses the apparent paradox of allowing copyright for secret documents but concludes that secrecy has nothing to do with copyrightability, saying "federal copyright is now available for unpublished works that the author intends never to see the



## 5. The Project Management Professional Exam

In 2004, the Eighth Circuit considered an appeal unlike the others discussed above, but it warrants mention.<sup>53</sup> Plaintiff brought the suit against a competitor who “offer[ed] competing courses to prepare students to pass the Project Management Professional (PMP) Exam given by the Project Management Institute (PMI).”<sup>54</sup> However, neither party was affiliated with the Project Management Institute (“PMI”) and the validity of plaintiff’s copyright on the record presented was unclear.<sup>55</sup>

Were the plaintiff herself infringing PMI’s copyrights, her work would be an unauthorized derivative and her copyright invalid.<sup>56</sup> Moreover, if defendant’s work was derived from PMI’s work to which plaintiff had no claim, rather than from plaintiff’s original contributions in preparing study materials, her claim would fail for lack of title.<sup>57</sup>

## 6. The North American Pharmacist Licensure Examination

The final case involving screening tests is similar to *Katzman*. It arose just last year<sup>58</sup> and presents complex procedural issues.<sup>59</sup> Because it also involved a prior agreement to cease using questions from two exams used by state pharmacy boards to qualify would-be pharmacists, the complaint had three counts: copyright infringement, misappropriation of trade secrets under Georgia’s version of the Uniform Trade Secret Act, and breach of contract.<sup>60</sup>

The district court dismissed the second and third counts as barred by the Eleventh Amendment.<sup>61</sup> This left only the copyright count. Validity of copy-

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light of day.” *Id.* It also notes, “tests are expressive works that are not costlessly created, and the costs are greater and so the incentive to create the tests diminished if the tests cannot be reused.” *Id.* *Educ. Testing Servs. v. Katzman*, 793 F.2d 533, 544 (3d Cir. 1986) is cited for support as is *Campbell*, *supra* note 9, at 796–805.

<sup>53</sup> *Mulcahy v. Cheetah Learning L.L.C.*, 386 F.3d 849 (8th Cir. 2004).

<sup>54</sup> *Id.* at 850.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 853.

<sup>57</sup> *Id.* at 855.

<sup>58</sup> *Nat’l Ass’n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297 (11th Cir. 2011).

<sup>59</sup> *See generally id.* at 1306 (relating the procedural history).

<sup>60</sup> *Id.* at 1302.

<sup>61</sup> *Id.* at 1305; *see also id.* at 1305 n.15.

right claims appears not to have been contested and is not discussed.<sup>62</sup> Relief on the basis of copyright infringement was potentially available, but, under the Eleventh Amendment, it would be limited to injunctive relief in federal courts.<sup>63</sup>

### *B. Other Tests of Abilities and Attributes*

#### **1. The Love and Liking Scales**

So called “love” and “liking” scales were the focus of a suit brought against Boston Magazine based on its 1977 publication of excerpts from a dissertation.<sup>64</sup> As explained by Dr. Rubin, author of the dissertation and creator of the scales, the scales “are a scientifically valid method of determining whether two persons are in love.”<sup>65</sup> The scales therefore furnish a paradigmatic example of a test where, at least in comparison with tests such as the MCAT,<sup>66</sup> the idea of “doing well” is arguably meaningless, and the need for secrecy is less compelling, if it exists at all.

Most of the First Circuit’s opinion addresses fair use as controlled by *Folsom v. Marsh*<sup>67</sup> and other authorities under the 1909 Act.<sup>68</sup> The fair use defense failed because: “The scales which the defendants copied were an essential part of the copyrighted dissertation. They stated in interrogative form an analysis based on the theory set forth in the dissertation.”<sup>69</sup>

Despite the necessity of using the scales to perform plaintiff’s analysis, the court found them copyrightable.<sup>70</sup> First, the opinion rejects the assertion that they are excluded as scientific discoveries because “there may be a valid copy-

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<sup>62</sup> See *id.* at 1303 (asserting of lack of subject matter jurisdiction was the only defense mounted).

<sup>63</sup> See Nat’l Ass’n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga., 633 F.3d 1297, 1315–19 (11th Cir. 2011) (holding that because claims under the Fourteenth Amendment failed and that Congress may not abrogate the States’ sovereign immunity under the patent and copyright clause, plaintiffs could not collect damages).

<sup>64</sup> Rubin v. Boston Magazine Co., 645 F.2d 80, 81, 82 (1st Cir. 1981).

<sup>65</sup> *Id.* at 82–83.

<sup>66</sup> See *supra* text accompanying note 38.

<sup>67</sup> 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

<sup>68</sup> *Rubin*, 645 F.2d. at 82.

<sup>69</sup> *Id.* at 84 (citations omitted).

<sup>70</sup> *Id.* at 83.

right on an original form of expression of an idea, concept, or discovery.”<sup>71</sup> Moreover, “[i]t is of no significance that the scales are in the form of questions . . . . Since the term “writings,” as used in the Constitution and in the statute, is intended to be read expansively, the term covers sets of questions as well as other forms of expression.”<sup>72</sup> Finally, the opinion rejects the notion that

copyright protection to the scales will give Dr. Rubin a monopoly of the theory on which the scales are based. There are an infinite number of ways of stating Dr. Rubin’s theory and an infinite number of questions which may be asked in order to find out whether two persons have the characteristics to which the theory refers.<sup>73</sup>

## 2. The Minnesota Multiphasic Personality Inventory

In 1989, the Eighth Circuit considered the Minnesota Multiphasic Personality Inventory (“MMPI”), another test where the idea of “doing well” is essentially meaningless.<sup>74</sup> In that case, defendant, a software publisher, appealed the district court’s ruling that it had infringed copyrights held by the University of Minnesota and its exclusive commercial licensee.<sup>75</sup> Plaintiffs also appealed a ruling that limited the scope of their rights.<sup>76</sup>

Despite a convoluted history of development, the court agreed that plaintiffs had title.<sup>77</sup> It also found no evidence that government sponsorship mattered.<sup>78</sup> The plaintiffs’ scope of rights was nevertheless limited because some materials in issue had fallen into the public domain for failure of their publisher to renew a registration.<sup>79</sup>

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<sup>71</sup> *Id.* at 82 (citing *Mazer v. Stein*, 347 U.S. 201, 217–18 (1954); *Baker v. Selden*, 101 U.S. 99, 102–03 (1879), and *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678–79 (1st Cir. 1967), as well as § 102(b), already enacted but not applicable to an earlier-arising dispute).

<sup>72</sup> *Id.* at 83 (citations omitted).

<sup>73</sup> *Id.*

<sup>74</sup> *See Applied Innovations, Inc. v. Regents of the Univ. of Minn.*, 876 F.2d 626, 628 (8th Cir. 1989) (“The MMPI is a psychometric test used by medical and psychological professionals to make objective assessments of major personality characteristics . . . such as truthfulness, hypochondria, introversion, depression, and sexual orientation.”).

<sup>75</sup> *Id.* at 627. Plaintiffs, however, did not appeal an adverse ruling on trademark infringement. *See id.* at 628.

<sup>76</sup> *See id.* at 627.

<sup>77</sup> *Id.* at 632.

<sup>78</sup> *Id.* at 634.

<sup>79</sup> *Applied Innovations, Inc. v. Regents of the Univ. of Minn.*, 876 F.2d 626, 636–37 (8th Cir. 1989).

That established, the court said,

[b]ecause . . . it is not disputed that defendant’s software copied at least some of the test statements . . . and all the testing data needed to score and interpret the MMPI . . . we are concerned only with whether the test statements and testing data are per se uncopyrightable.<sup>80</sup>

The court then considered two arguments advanced by the defendant: first, that the questions lacked originality,<sup>81</sup> and second, most significant for present purposes, “that the test statements and testing data cannot be copyrighted because they are facts or methods or processes for discovering facts.”<sup>82</sup>

The court found the originality requirement satisfied despite claims on text consisting of “short, simple, declarative sentences . . .”<sup>83</sup> Moreover, the court found, “revisions of the questions in pre-existing psychometric tests represent ‘distinguishable’ variations of the prior works. The revisions are recognizable as the work of the authors and thus are sufficiently original to warrant copyright protection as derivative works.”<sup>84</sup>

With regard to the second issue, the court began by saying, “[t]his is a close question.”<sup>85</sup> But it ruled for plaintiffs:

The district court found that although the authors began with certain discovered facts, statistical models and mathematical principles, which cannot be copyrighted, they then made certain adjustments on the basis of their expertise and clinical experience. In other words, the 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.<sup>86</sup>

### 3. The Mini–Mental State Examination

The final psychometric test considered does not seem to have sparked reported litigation. Nevertheless, the fallout from asserted copyright claims was the subject of a recent compelling account by Newman and Feldman:

For three decades after its publication, in 1975, the Mini–Mental State Examination (MMSE) was widely distributed in textbooks, pocket guides, and Web

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<sup>80</sup> *Id.* at 635.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 636.

<sup>83</sup> *Id.* at 635.

<sup>84</sup> *Id.* at 635–36 (citation omitted).

<sup>85</sup> *Applied Innovations, Inc. v. Regents of the Univ. of Minn.*, 876 F.2d 626, 636 (8th Cir. 1989).

<sup>86</sup> *Id.*

## Standardized Tests

297

sites and memorized by countless residents and medical students. The simplicity and ubiquity of this 30-item screening test... made it the de facto standard for cognitive screening . . . . In 2000, its authors . . . began taking steps to enforce their rights.<sup>87</sup>

Consequently, “[t]he MMSE form is gradually disappearing from textbooks, Web sites, and clinical tool kits.”<sup>88</sup>

Moreover, “The Sweet 16,” an apparently simplified protocol developed at Harvard and distributed for free non-profit use, has been withdrawn following “an apparent copyright dispute.”<sup>89</sup> As this Article is written, a brief discussion of the Sweet 16<sup>90</sup> and an announcement of its withdrawal<sup>91</sup> can be found on the Internet.

Newman and Feldman see the action taken to halt use of the Sweet 16 to be “unprecedented for a bedside clinical assessment tool, [and to have] sent a chill through the academic community.”<sup>92</sup> Finding it a potential “harbinger of more to come,” they worry that other clinical tools “might be pulled back behind a wall of active copyright enforcement by the authors or their heirs.”<sup>93</sup>

To forestall that, Newman and Feldman argue that reproduction and use should be governed by a license of the type advocated by Creative Commons.<sup>94</sup> Indeed, prior to withdrawal of the Sweet 16, its authors offered a license of that kind, saying, “[t]he Sweet 16 is a copyrighted *instrument*. It can be used free of charge only by nonprofit organizations and educational institutions (such as

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<sup>87</sup> John C. Newman & Robin Feldman, *Copyright and Open Access at the Bedside*, 365 *NEW ENG. J. MED.* 2477, 2477 (2011); see also DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 35 (2007) available at [http://www.justice.gov/atr/public/hearings/ip/chapter\\_2.htm](http://www.justice.gov/atr/public/hearings/ip/chapter_2.htm) (last visited Sept. 1, 2012) (Chapter 2 “focuses on antitrust issues that may arise from collaborative standard setting when standards incorporate technologies that are protected by intellectual property rights.”).

<sup>88</sup> *Id.* at 2447–48.

<sup>89</sup> *Id.* at 2448.

<sup>90</sup> See *Update about the Sweet 16 Instrument*, THE HOSPITAL ELDER LIFE PROGRAM, <http://www.hospitalelderlife-program.org/private/sweet16-disclaimer.php?pageid=01.09.00>. (last visited Sept. 1, 2012).

<sup>91</sup> See THE HOSPITAL ELDER LIFE PROGRAM, UPDATE ON SWEET 16, (Jan. 13, 2012), [http://www.hospitalelderlifeprogram.org/pdf/statement\\_sweet%2016\\_11312.pdf](http://www.hospitalelderlifeprogram.org/pdf/statement_sweet%2016_11312.pdf).

<sup>92</sup> Newman & Feldman, *supra* note 87, at 2448.

<sup>93</sup> *Id.*

<sup>94</sup> See CREATIVE COMMONS, <http://creativecommons.org/licenses/by/3.0/> (last visited Sept. 1, 2012).

universities). All uses of the Sweet 16, including any reproduction, presentation or publication must include the following [copyright notice].<sup>95</sup>

Last, it is noteworthy that Newman and Feldman highlight the “clear clinical benefit of using well-tested, well-validated, continually improved clinical *tools* in complex patient care—as demonstrated by the MMSE’s use before 2000.”<sup>96</sup> Absent copyright for such tests, it seems clear their objective would be better served. Moreover, the fact that the test was freely distributed for twenty-five years before copyright claims were asserted strongly suggests that such protection played no role in fostering its creation.

### *C. Summary and Prologue*

Some materials associated with standardized tests are clearly subject to copyright.<sup>97</sup> Whether the tests themselves constitute proper subject matter for copyright, however, is a different matter.

Parties accused of infringing copyright in standardized tests rarely challenge the existence of the claimed copyright. Moreover, when challenges have been lodged, key authorities have usually been overlooked. In the two noted instances when such authorities were cited, consideration was perfunctory.<sup>98</sup>

Courts are likely to have been influenced by Copyright Office rules that permit registration of tests, particularly secure tests. In the one instance, the rules, themselves, were challenged unsuccessfully.<sup>99</sup>

The next Part of this Article more closely considers relevant authorities that courts have given, at best, superficial consideration and other authorities that have been ignored, presumably for want of advocacy. These authorities, including Copyright Office rules, suggest that the availability of copyright for materials designed to collect rather than distribute information is an anomaly.

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<sup>95</sup> *Update about the Sweet 16 Instrument*, *supra* note 90 (emphasis added).

<sup>96</sup> Newman & Feldman, *supra* note 87, at 2449 (emphasis added).

<sup>97</sup> There is no reason to doubt the copyrightability of examination preparation materials when they do not infringe the copyrights of others. *See, e.g., supra* text accompanying notes 50 and 51.

<sup>98</sup> *See Educ. Testing Servs. v. Katzman*, 793 F.2d 533, 539 (3d Cir. 1986); *Rubin v. Boston Magazine Co.*, 645 F.2d 80, 82 (1st Cir. 1981).

<sup>99</sup> *See supra* text accompanying notes 18 and 19.

## II. A SKEPTICAL VIEW OF COPYRIGHT PROTECTION FOR STANDARDIZED TESTS

The appropriateness of copyright protection for standardized tests aptly characterized as “instruments”<sup>100</sup> or “tools”<sup>101</sup> should have sparked more doubt than courts have evidenced. Moreover, it should foster more doubt than the Copyright Office seems to demonstrate in registering them, perhaps in both instances, because the issue has not been so framed.

The seminal case, *Baker v. Selden*,<sup>102</sup> stresses a critical distinction between subject matter proper for copyright protection and subject matter that falls outside its scope. *Rubin* cites *Baker*, but only in a string of cases not separately considered;<sup>103</sup> other cases involving standardized tests do not.

In *Baker*, the Court focused on blank forms published in Selden’s book that described an apparently new and important<sup>104</sup> bookkeeping system: “The very object of publishing a book . . . is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.”<sup>105</sup>

Elaborating, the opinion says:

The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters-patent.<sup>106</sup>

Moving closer to the subject matter of interest in this paper, consider a book describing a new system of measurement that illustrates it with a ruler or protractor. The description of the measuring instruments, but not the instruments, would be protected by copyright.

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<sup>100</sup> See *supra* emphasized text accompanying note 96.

<sup>101</sup> See *supra* emphasized text accompanying note 97.

<sup>102</sup> 101 U.S. 99 (1879).

<sup>103</sup> See *supra* note 71.

<sup>104</sup> See *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807, 814 n.6 (1st Cir. 1995), *aff’d by an equally divided Court*, 516 U.S. 233 (1996) (“Selden’s system of double-entry bookkeeping is the now almost-universal T-accounts system.”).

<sup>105</sup> *Baker*, 101 U.S. at 103.

<sup>106</sup> *Id.* at 105 (emphasis added).

*Baker's* dichotomy is now reflected in § 102(b).<sup>107</sup> It provides that copyright is not available for an “idea, procedure, process, system, method of operation, concept, principle, or discovery.” Not only are things such as ledgers, rulers, and protractors facially excluded, but § 102(a)(5) also offers copyright protection for “pictorial, graphic, and sculptural works.”<sup>108</sup>

To work that out, one must turn to § 101's definition of the phrase that excludes “useful articles.” These are, in turn, also defined in the same section as articles “having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”<sup>109</sup> Only there, do we see a problem with ledgers, rulers, protractors, and, indeed, instruments designed to assess knowledge, skills, and a variety of intellectual abilities.

This calls to mind *Mazer v. Stein*,<sup>110</sup> a second case cited without discussion in *Rubin*.<sup>111</sup> Addressing protection for a sculpture made into a lamp, *Mazer* says:

Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself. Thus, in *Baker* . . . the Court held that a copyrighted book on a peculiar system of bookkeeping was not infringed by a similar book using a similar plan which achieved similar results where the alleged infringer made a different arrangement of the columns and used different headings.<sup>112</sup>

If nothing else, this language clarifies *Baker's* exclusion.

Thus, a related copyright regulation supplements § 102(b): “The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained: . . . (b) Ideas, plans, methods, systems, or *devices*, as distinguished from the particular manner in which they are expressed or described in a writing.”<sup>113</sup>

In that vein, consider the paper initially describing the MMSE.<sup>114</sup> It begins, “[e]xamination of the mental state is essential in evaluating psychiatric patients,”<sup>115</sup> and concludes, “[w]hen given to 69 patients . . . [t]he Mini-Mental

<sup>107</sup> See *supra* note 4. It is referenced in *Rubin*, but applied only in *Katzman*. See 793 F.2d 533, 539 (3d Cir. 1986); 645 F.2d 80, 82 (1st Cir. 1981).

<sup>108</sup> 17 U.S.C. § 102(a)(5) (2006).

<sup>109</sup> 17 U.S.C. § 101.

<sup>110</sup> 347 U.S. 201 (1954).

<sup>111</sup> See *Rubin v. Boston Magazine Co.*, 645 F.2d 80, 82 (1st Cir. 1981).

<sup>112</sup> 347 U.S. at 217.

<sup>113</sup> 37 C.F.R. § 202.1(b) (2010) (emphasis added).

<sup>114</sup> Marshal F. Folstein et al., “Mini-Mental State:” *A Practical Method for Grading the Cognitive State of Patients for the Clinician*, 12 J. PSYCHIATRIC RES. 189, 189–90 (1975).

<sup>115</sup> *Id.* at 189.



Status was useful in quantitatively estimating the severity of cognitive impairment, in serially documenting cognitive change, and in teaching residents a method of cognitive assessment.”<sup>116</sup>

As in *Baker*, that article would be subject to copyright, but one should wonder whether copyright encompasses the appended instrument<sup>117</sup> “useful in *quantitatively* estimating the severity of cognitive impairment.”<sup>118</sup>

It is clear that such standardized tests, characterized as “instruments”<sup>119</sup> or “tools,”<sup>120</sup> as do rulers and protractors, measure characteristics of interest to their users and describe nothing. Tests are for collecting, not conveying, information, and whether individual items are framed as questions is not relevant.<sup>121</sup> Thus, that a diagnostic protocol such as the MMSE or MMPI is text-based offers scant reason to find it copyrightable.

As mentioned,<sup>122</sup> the Eighth Circuit found copyrightability of the MMPI to present a “close question.”<sup>123</sup> Section 102(b) was not cited, but its test was considered.<sup>124</sup> Perhaps a ruling in favor of copyright<sup>125</sup> would have differed had *Baker* also been considered.

That the Copyright Office registered the MMPI and associated materials seems not to have influenced the outcome of that case. That regulations accommodate the need for the secrecy of so-called secure tests is apt to be more influential.<sup>126</sup>

Such registration may be driven by the Copyright Office’s position that, when “there is a reasonable doubt about the ultimate action which might be taken by an appropriate court,” it may nevertheless register.<sup>127</sup> Moreover, that view is explicitly reflected in at least one instance where another regulation accommodates the need for secrecy.<sup>128</sup>

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<sup>116</sup> *Id.* at 196.

<sup>117</sup> The text and instructions for the MSSE are also provided. *Id.* at 196–98.

<sup>118</sup> *Id.* at 196 (emphasis added).

<sup>119</sup> See *supra* emphasized text accompanying note 96.

<sup>120</sup> See *supra* emphasized text accompanying note 97.

<sup>121</sup> See *Rubin v. Boston Magazine Co.*, 645 F.2d 80, 83 (1st Cir. 1981).

<sup>122</sup> See *supra* text accompanying notes 87–88.

<sup>123</sup> *Applied Innovations, Inc. v. Regents of the Univ. of Minn.*, 876 F.2d 626, 636 (8th Cir. 1989).

<sup>124</sup> See *supra* text accompanying note 88.

<sup>125</sup> See *supra* text accompanying notes 76–77.

<sup>126</sup> See 37 C.F.R. § 202.20(c)(2)(vi) (2010); *supra* text accompanying note 18.

<sup>127</sup> U.S. COPYRIGHT OFFICE, COMPENDIUM II: COPYRIGHT OFFICE PRACTICES § 605.05 (1984).

<sup>128</sup> See 37 C.F.R. § 202.20(c)(2)(vii)(B) (2010) (“Where registration of a program containing trade secrets is made on the basis of an object code deposit the Copyright Office will make

Another regulation more closely linked to *Baker* excludes: “[b]lank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like, which are designed for *recording* information and do not in themselves *convey* information.”<sup>129</sup> Stressed language is exceedingly difficult to reconcile with the rule that permits registration of secure tests. It is difficult to view such tests as functionally different from forms that record user-supplied information but, themselves, convey no information.

As explained by the Ninth Circuit, the Office has a “text with forms” exception to its blank forms rule.<sup>130</sup> Copyright registered under that exception was nevertheless found invalid:

Michael Buckley, the president of Bibbero, claims that [its form] should be copyrightable because considerable effort and creativity went into designing it. Similar comments were submitted to the Copyright Office in support of abolishing the blank forms rule when the Copyright Office reconsidered the rule in 1980. The Copyright Office nevertheless chose to reaffirm the validity of the rule.<sup>131</sup>

Further, the Ninth Circuit explained:

We also find that the “text with forms” exception to the blank forms rule is inapplicable here. It is true, as Bibbero notes, that [its form] includes some simple instructions . . . such as “complete upper portion of this form.” These instructions are far too simple to be copyrightable as text in and of themselves, unlike the instructions in other “text with forms” cases. We therefore affirm the district court’s holding that Bibbero’s [form] is not copyrightable.<sup>132</sup>

It seems very likely that Selden’s book also represented effort and creativity, but that did not render his forms copyrightable.<sup>133</sup> Soon after *Bibbero*, the Supreme Court also had occasion to reject effort as an indicator of merit.<sup>134</sup> Although its *Feist* opinion primarily concerns originality, it evidences little sympathy for the idea that “sweat of the brow” justifies copyright protection.<sup>135</sup>

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registration under its rule of doubt and warn that no determination has been made concerning the existence of copyrightable authorship.”)

<sup>129</sup> 37 C.F.R. § 202.1(c) (2010) (emphasis added).

<sup>130</sup> *Bibbero Sys., Inc. v. Colwell Sys., Inc.*, 893 F.2d 1104, 1108 (9th Cir. 1990).

<sup>131</sup> *Id.* at 1108 n.1 (citations omitted).

<sup>132</sup> *Id.* at 1108 (citations omitted).

<sup>133</sup> See *supra* text accompanying note 106.

<sup>134</sup> See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

<sup>135</sup> *Id.* at 353 (quotations omitted).

Note also the Ninth Circuit's reference to the simplicity of Bibbero's instructions.<sup>136</sup> Although the court does not invoke the merger doctrine, the basic concern is the same. Consider the justifications for that doctrine as articulated in *Morrissey*,<sup>137</sup> yet another case cited but not discussed in *Rubin*.<sup>138</sup>

Addressing "a set of rules for a sales promotional contest of the 'sweepstakes' type," *Morrissey*<sup>139</sup> says:

When the uncopyrightable subject matter is very narrow, so that "the topic necessarily requires," if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance. In such circumstances it does not seem accurate to say that any particular form of expression comes from the subject matter.<sup>140</sup>

Although a merger defense was rejected in *Katzman*,<sup>141</sup> defendant's argument appears remote from the point made here. That simple facts can be presented in many ways should be irrelevant when alternative presentation compromises utility. It seems doubtful that the language of most standardized tests could be substantially altered without compromising validity, particularly when something as seemingly minor as question order is known to affect results.<sup>142</sup>

### III. THE NEED FOR COPYRIGHT

It is difficult to argue with the notion that those who invest private risk capital in creating new things of esthetic, economic, and social value should be able to harvest what they have sowed. As discussed here, however, much attention has been given to carefully calibrating means to that end. Indeed, in some instances, the law is not up to the challenge.<sup>143</sup>

<sup>136</sup> See *Bibbero Sys., Inc.*, 893 F. 2d at 1108.

<sup>137</sup> See *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678–79 (1st Cir. 1967).

<sup>138</sup> See *Rubin v. Boston Magazine Co.*, 645 F.2d 80, 82 (1st Cir. 1981).

<sup>139</sup> 379 F.2d at 676.

<sup>140</sup> *Id.* at 678–79 (citations, including one to *Baker*, omitted).

<sup>141</sup> See *supra* text accompanying note 36.

<sup>142</sup> Much information about the topic can be found on the Internet. See, e.g., *What is Question Randomization?*, SURVEYMONKEY, [http://help.surveymonkey.com/app/answers/detail/a\\_id/4499/~/~alleviate-question-order-bias-by-using-question-randomization](http://help.surveymonkey.com/app/answers/detail/a_id/4499/~/~alleviate-question-order-bias-by-using-question-randomization) (last visited Sept. 1, 2012). Indeed, this problem is one of concern to this Author, who conducts thirteen weekly in-class quizzes, using three differently colored versions. Color aside, they differ only by question order, but often some versions seem easier than others. Failing to devise an alternative, the Author hopes that no one will consistently receive the most or least difficult version.

<sup>143</sup> It is doubtful that Bibbero, for example, had alternative means to prevent others from free riding on its effort and creativity. See *supra* text accompanying note 134. See also Barclays

**304**                    *IDEA—The Intellectual Property Law Review*

Copyrights offer many important advantages over alternative forms of intellectual property, including the cost of registration<sup>144</sup> if needed,<sup>145</sup> civil<sup>146</sup> and criminal deterrents,<sup>147</sup> and duration.<sup>148</sup> Those advantages have justified—if they have not motivated—congressional, judicial, and administrative reluctance<sup>149</sup> to confer them on particular kinds of works.

This Article has argued that copyright law as heretofore envisioned is inappropriate for standardized tests because form and function are inseparable. Developers who wish to halt free riders and preserve the ability to reuse questions should anticipate the possibility that courts may agree.

Moreover, “sweat of the brow” arguments made in favor of copyright for tests as such<sup>150</sup> or made to limit fair use<sup>151</sup> lose potency when ample alternatives ordinarily enable developers to protect and recoup investments. Detailed discussion seems unnecessary, but several options warrant mention.

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Capital Inc. v. Theflyonthewall.com, Inc., 650 F.3d 876, 878 (2d Cir. 2011) (“the plaintiffs’ claim against the defendant for ‘hot news’ misappropriation of the plaintiff financial firms’ recommendations to clients and prospective clients as to trading in corporate securities is preempted by federal copyright law.”); Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 852–53 (2d Cir. 1997) (the NBA was unable to halt what it saw as Motorola’s free-riding); Columbia Broad. Sys., Inc. v. DeCosta, 377 F.2d 315, 317 (1st Cir. 1967) (“Our Paladin is not the first creator to see the fruits of his creation harvested by another, without effective remedy; and although his case is undeniably hard, to affirm the judgments below would, we think, allow a hard case to make some intolerably bad law.”).

<sup>144</sup> See *Fees*, UNITED STATES COPYRIGHT OFFICE (Dec. 1, 2011), <http://www.copyright.gov/docs/fees.html> (last visited Sept. 1, 2012) (charging \$35 for a single electronic registration).

<sup>145</sup> See 17 U.S.C. § 411(a) (2006) (requiring registration to litigate copyright in domestic works).

<sup>146</sup> Including, for example, potentially massive statutory damages under § 504(c). See, e.g., *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1195 (2001), *cert. denied sub nom. Feltner v. Columbia Pictures Television, Inc.*, 534 U.S. 1127 (2002) (affirming the propriety of a jury award exceeding \$31 million); 17 U.S.C. § 504(c) (2006).

<sup>147</sup> See 17 U.S.C. § 506 (2006).

<sup>148</sup> See 17 U.S.C. § 302(a) (enduring for a term consisting of author’s life plus 70 years where the author is identified and owns rights); 17 U.S.C. § 302(c) (enduring for a term of the shorter of 120 years from creation, or 95 years from publication, where the author is not identified or the work was done for hire).

<sup>149</sup> See *supra* Part II.

<sup>150</sup> See, e.g., Campbell, *supra* note 9, at 805–06.

<sup>151</sup> See, e.g., Jillian Clark Stull, *Copyrighted Standardized Tests: Is There a “Fair Use?”*, 35 J.L. & EDUC. 565, 569–70 (2006) (applauding the court in *Chicago Board of Education*).

## Standardized Tests

305

### A. Patent Protection

The comparative advantages of design patents over copyrights surely inspired the copyright registration contested in *Mazer*.<sup>152</sup> Such patents cover ornamental features<sup>153</sup> of “useful articles” excluded from copyright.<sup>154</sup> Minimal design patent fees are over thirty times the cost of a typical copyright registration,<sup>155</sup> but their terms are less than a sixth of the shortest copyright term.<sup>156</sup>

*Baker* stated that the sort of protection Selden sought for his bookkeeping system “can only be secured, if it can be secured at all, by letters-patent.”<sup>157</sup> But only recently has the patentability of such technology been seriously entertained.<sup>158</sup> Moreover, it is seriously doubted.<sup>159</sup> Assuming the subject matter qualifies, a topic that is not further addressed here, the comparative cost of obtaining patents for functional rather than ornamental subject matter is even greater than for design patents.<sup>160</sup>

### B. Trade Secret Protection

If patents were to be or to become available for standardized tests, their contents would be published,<sup>161</sup> probably before issue.<sup>162</sup> That would make them

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<sup>152</sup> See *supra* text accompanying notes 112–114.

<sup>153</sup> See 35 U.S.C. § 171 (2006).

<sup>154</sup> See *supra* text following note 109 (quotations omitted).

<sup>155</sup> See 35 U.S.C. § 41(a)–(b) (2006) (totaling \$1220 for current filing and examination fees, but, unlike the situation with utility patents granted under § 101, maintenance fees are not charged); *cf.* sources cited *supra* note 144.

<sup>156</sup> See 35 U.S.C. § 173 (2006) (enduring a term of fourteen years from grant); *cf.* sources cited *supra* note 148.

<sup>157</sup> 101 U.S. 99, 105 (1879).

<sup>158</sup> The seminal case is *State St. Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998).

<sup>159</sup> *State St. Bank & Trust Co.* is put very much in doubt by *Bilski v. Kappos*, 130 S.Ct. 3218 (2010), stating “nothing in today’s opinion should be read as endorsing interpretations of § 101 that the Court of Appeals for the Federal Circuit has used in the past”. 130 S. Ct. at 3231 (citing *State St. Bank & Trust Co.* and another case); see also *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 2012 WL 912952 *passim* (finding a diagnostic protocol unpatentable as a “law of nature”).

<sup>160</sup> See 35 U.S.C. § 41(a)–(b) (2006) (totaling at least \$2060 for current filing and examination fees and an additional \$7570 in maintenance fees to keep the patent in force for full terms, under § 154(a), of about 17 years); *cf.* source cited *supra* note 144.

<sup>161</sup> See, e.g., *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 484 (1974) (noting that disclosure is the quid pro quo for the right to exclude).

unattractive to developers of secure exams. But the contents would qualify as trade secrets. Developers may restrict access and obligate those with access to agree not to reveal or to duplicate exam questions. If so, they should find breach of such obligations to amount to misappropriation of trade secrets as well as breach of contract.<sup>163</sup> Misappropriation is unlikely to result in recoveries that include costs and attorney fees, much less statutory damages, but, as with copyright, the possibility of criminal sanctions may serve as a deterrent.<sup>164</sup>

That said, the need for secrecy might be overvalued. As related in the opinion addressing the MCAT dispute:

[T]he State presented the testimony of Professor Walter M. Haney, Director of the Educational Technology Program at Boston College. Professor Haney testified that it was “entirely conceivable” that disclosed MCAT questions would be reusable. In a later affidavit, Professor Haney referred to a study concerning the effects of disclosure on performance on the Test of English as a Foreign Language (“TOEFL”) which stated: “[a]s more and more disclosed TOEFL tests become available . . . the effect of test disclosure should diminish to a negligible level, eventually allowing disclosed TOEFL items to be re-used in institutional test forms.” Professor Haney also testified that various equating strategies might be employed to reduce any scoring deviations resulting from re-use of MCAT questions.<sup>165</sup>

### C. *Trademark and Related Protection*

Trademark protection is unavailable for terms that are merely descriptive,<sup>166</sup> but the SAT is nevertheless federally registered as a trademark.<sup>167</sup> Marks aside, the Lanham Act, which sets out the federal trademark law,<sup>168</sup> is also useful

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<sup>162</sup> See 35 U.S.C. § 122(b) (2006).

<sup>163</sup> *Compare* Educ. Testing Servs. v. Katzman, 793 F.2d 533, 536 (3d Cir. 1986) (failing to raise a claim for trade secret misappropriation), *with* Nat’l Ass’n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga., 633 F.3d 1297, 1302 (11th Cir. 2011) (raising a claim for trade secret misappropriation).

<sup>164</sup> See The Economic Espionage Act of 1996, 18 U.S.C. §§ 1831–39 (2006).

<sup>165</sup> Ass’n of Am. Med. Colls. v. Cuomo, 928 F.2d 519, 525 (2d Cir. 1991); *cf.* 18 U.S.C. § 1833(1) (2006) (exempting lawful government activities).

<sup>166</sup> See Nat’l Conference of Bar Exam’rs v. Multistate Legal Studies, 692 F.2d 478, 488 (7th Cir. 1982) (“[P]laintiffs also use the initials ‘MBE’ to designate their test [but that] is of no consequence. Abbreviations for generic or common descriptive phrases must be treated similarly.”).

<sup>167</sup> See *supra* note 23.

<sup>168</sup> Codified at 15 U.S.C. §§ 1051 et seq. (2006).

for halting false claims of association and sponsorship.<sup>169</sup> Particularly when coupled with measures related to professional licensing, that Act should satisfy many developers' needs.<sup>170</sup>

#### ***D. Self-help***

Developers who need not keep individual elements of tests secret have increasing opportunities for self-help. When scoring is critical, replication of tests on the Internet or elsewhere is harmless. Indeed, when tests are presented on the Internet, scoring and related diagnosis can readily be brought in house.<sup>171</sup>

#### ***E. Copyright***

As noted above, copyright should be available for explanatory and descriptive text. With due regard for the merger doctrine, it should also cover specific language used in instructions.<sup>172</sup> Templates now used for hand scoring the MMPI seem unlikely to qualify for copyright, but software also used to the same end surely does.<sup>173</sup>

Developers who find alternative forms of intellectual property for standardized tests, themselves, to be collectively inadequate could strengthen their hand by seeking amendments to the Copyright Act. Were Congress to find favorable amendment warranted, it could also, probably better than federal courts, accommodate the interests of individuals, programs, and institutions that may be adversely affected by the outcomes of screening tests.<sup>174</sup> Congress

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<sup>169</sup> See 15 U.S.C. § 1125(a)(1)(A) (2006) (providing for a civil action brought on the basis of another's false representation of "origin, sponsorship or approval").

<sup>170</sup> See, e.g., Reinhold, *supra* note 13 (describing what seems to be substantial control over the widely available Myers Briggs Test).

<sup>171</sup> See, e.g., *Minnesota Multiphasic Personality Inventory*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Minnesota\\_Multiphasic\\_Personality\\_Inventory](http://en.wikipedia.org/wiki/Minnesota_Multiphasic_Personality_Inventory) (last visited Sept. 1, 2012) ("Standardized answer sheets [for the current version of the MMPI] can be hand scored with templates that fit over the answer sheets, but most tests are computer scored. Computer scoring programs for the the [sic] MMPI-2 (567 items) and the MMPI-2-RF (338 items) are licensed by the University of Minnesota Press to Pearson Assessments and other companies located in different countries.").

<sup>172</sup> See *Educ. Testing Servs. v. Katzman*, 793 F.2d 533, 540 (3d Cir. 1986).

<sup>173</sup> See, e.g., *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 813 n.5 (1st Cir. 1995), *aff'd by an equally divided Court*, 516 U.S. 233 (1996).

<sup>174</sup> See, e.g., Aron E. Goldschneider, *Cheater's Proof: Excessive Judicial Deference Toward Educational Testing Agencies May Leave Accused Examinees No Remedy to Clear Their Names*, 2006 BYU EDUC. & L.J. 97, 155 (2006); see also *supra* note 13.

**308**            *IDEA—The Intellectual Property Law Review*

might also be in a position to better address the concerns of commentators such as Newman and Feldman who urged, with reference to the MMSE, that “[r]estrictive licensing of such basic tools wastes resources, prevents standardization, and detracts from efforts to improve patient care.”<sup>175</sup>

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<sup>175</sup> Newman & Feldman, *supra* note 87, at 2449.