Chapter X

Legal Implications of Online Assessment: Issues for Test and Assessment Owners

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Abstract

At a time when information, including purloined test and assessment content, moves at “Internet speed,” test and assessment owners are usually comforted to know that the law provides meaningful protection if threshold test security measures are observed. This chapter explores the question of whether that protection extends to the use of online assessment which promise greater access, convenience and savings. Applying threshold security requirements derived from copyright and trade secret laws, this analysis indicates that in its widely practiced and current form, online assessment would fail to qualify for protections by which disclosure of text content could be swiftly condemned. Online test and assessment owners are cautioned to explore threshold security alternatives and to carefully weigh the importance of their tests, as well as investments in the creation and distribution of a test instrument, against the potential loss of test content.
Introduction

As with most other types of information, use of the Internet for the delivery of assessments can increase access, convenience, even learning, and vastly lower the cost on both sides of the ledger (test and assessment owners and test takers). Faced with such potential, test and assessment owners can hardly afford to bypass consideration of an online test delivery strategy.

Consideration of such a strategy, however, calls for a clear understanding of an assessment’s value. Apart from the time-honored necessity to seek valid and reliable scores, most types of tests and assessments also derive value from the measures taken to secret their contents before, during and after administration. “Test security” in short, plays a critical role in the efficacy (as well as the cost) of tests and assessments—a lesson reflected in U.S. copyright law, which has long provided special protections for “secure tests.”

In recognition of the relationship of security to the value of certain types of assessments, professor Robert Kriess (1996) noted that copyright law specifically departs from its overarching policy of ensuring creators the rewards of their work in exchange for access. Owners of secure tests, in other words, inherit all of the typical rights and protections of copyright ownership without a corresponding requirement of disclosure.

To attain and maintain this enigmatic copyright status, however, courts have reiterated that nondisclosure of test and assessment content should be understood as a privilege as well as an obligation to keep that content secure (College Board v. Pataki, 1995). To assist in that effort, copyright law allows secure test owners to condemn virtually any unauthorized use of their test or assessment content.

The questions of law and practice explored in this chapter involve whether online assessment, envisioned as a more convenient, flexible and cost-effective alternative to brick-and-mortar testing centers with professional staff and other security infrastructure, satisfy the legal thresholds for security necessary for secure test copyright and trade secret protections.

Online Insecurity?

From a professional certification and licensure perspective, in the recent past the phrase online assessment has indicated roughly the opposite of secure, professional test delivery in which test-taker identity is systematically authenticated, and test-taking behavior is closely scrutinized. While skeptical of the relative insecurity of online assessment, “high-stakes” testing programs have also admired its lower cost and flexibility.
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