

Copyright and the Commodification of Advantage: The Case of Test Prep and Admissions Counseling

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The paper will address the proper copyright treatment of standardized test questions, test preparation, and admissions counseling. Both testing organizations and test prep companies copyright their questions and materials and usually strictly control their distribution. I question the spate of cases enabling those business practices by recognizing broad copyright in test questions. Such "works" may not be copyrightable because the idea they express can only be expressed in the language (or language substantially similar to that) of the question. Even if that argument is not accepted, there are good policy reasons for states to intervene and require disclosure of test questions, test preparation materials, and admissions counseling materials. The policy discussion will focus on the economics and philosophy of positional goods. Finally, the paper will address the potential preemption and takings challenges to such a state intervention.