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CHICAGO BOARD OF EDUCATION V. SUBSTANCE, INC.*354 F.3d 624 (7th Cir. 2003)*

The Seventh Circuit ruled on the applicability of the fair use defense to the use of quasi-secret standardized tests. The court held that the quasi-secret nature of the tests did not foreclose the possibility of the fair use defense, but that defendants did not have the right to eliminate all economic value of the tests by publishing them indiscriminately and in their entirety.

The Chicago Board of Education created and copyrighted a series of standardized tests entitled “Chicago Academic Standards Exams” (“CASE”). The tests were “secure tests” which were not marketed and were administered under tight supervision. After the tests were administered, all copies were accounted for and either destroyed or returned to restricted storage, where the tests were kept secret to enable reuse. Defendant, a teacher named Schmidt, edited a local teachers’ newspaper called *Substance*, owned by co-defendant Substance, Inc. Schmidt published complete copies of six CASE tests in *Substance* to demonstrate alleged flaws within the tests. The Chicago Board of Education brought suit alleging copyright infringement. The district court held in favor of the school board, dismissing defendants’ fair use defense and issuing a permanent injunction.

Defendants appealed. The Seventh Circuit affirmed in part, vacated in part, and remanded. The court first noted that although it might seem paradoxical, copyright can exist in so-called “secret documents.” The court further held that the fair use defense was available to Schmidt notwithstanding the quasi-secret nature of the tests, but that defendants did not have the right to eliminate all value by publishing the tests in their entirety. The court found that although Schmidt had a right to criticize the tests, he did not have the right to cause such a high level of harm. In addition, the court pointed out the possibility of “floodgate” damages if Schmidt was not enjoined—if Schmidt was allowed to publish six tests, then other teachers could also publish small batches of tests, and soon none of the tests would be valuable or effective. Therefore, the court upheld the injunction.