

Legal Experts On Pearson V. Chegg And Why It Could Be A Huge Deal

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LOS ANGELES, CA - AUGUST 24: A general view during the Chegg.com Campus Takeover's Coffee with Chegg ... [+]
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This past week, Pearson, a public, billion-dollar education and publishing company sued Chegg, another public, billion-dollar education company. Though calling Chegg an education company is a stretch.

And while the outcome is unclear, experts say the suit could place Chegg and other answer-for-hire companies in prolonged legal danger.

The essence of Pearson's legal claim is that Chegg is engaging in "massive" violation of copyrights held by Pearson because Chegg has published, and sold, answers to the tests and practice questions Pearson has in its textbooks. Pearson argues that the questions and answers belong to them and they should be able to decide when and how they are used.

If Pearson prevails, it could damage not only Chegg's business model but the enterprises of several other companies that sell answers to academic questions written by text publishers, professors or professional licensing bodies. Those companies include illicit cheating services, file sharing companies that sell access to tests and answers, as well as the respectable tutoring and test preparation companies.

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In other words, the implications of this legal challenge could extend well beyond just Pearson versus Chegg.

Given the stakes of the challenge, I asked several legal experts in the area of copyright and intellectual property law what they made of Pearson's claims and Chegg's possible defenses.

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"This case is a tough one for Pearson," said Nicole Haff, Litigation Partner and IP/Copyright Lawyer at Romano Law, in New York City.

"When the current U.S. Copyright Act was being amended in the 1960s, there was a push from stakeholders in the textbook industry to expand derivative works to include what was being described as supplementary works," Haff said. These works included those "prepared by another for the purpose of explaining, illustrating or commenting on tests and answer materials for tests. The fact that this was not adopted, arguably, shows that answers to study guides and explanations to study guide questions are not protected as derivative works under the Copyright Act."

William Scott Goldman of the Goldman Law Group in Washington D.C., said, "While Chegg's copying of Pearson's textbook study questions could be deemed infringement, Pearson may be overreaching in claiming that Chegg's answers, based on those questions, also violate the Pearson copyrights. Chegg may be able to successfully argue that said answers are simply derivative works."

Also in the "reach" camp is Dorothie Laguerre Smith, an Intellectual Property attorney from IPS Legal Group in Miami, who noted that she used Chegg as a student, and said that, "Pearson is up for a fight, as they are making claims to matters that are not generally protected by copyright law but instead patent law," calling the copyright claim a "far reach."

At the same time though, Smith says, “Pearson certainly has leverage in the lawsuit where it can show that Chegg copied its textbook material verbatim.” Though, she also says, Chegg may be able to argue that other people, and not Chegg specifically, uploaded the copied content and that procedures already exist to address those circumstances.

Also giving Pearson’s argument some consideration is Ray Harris, a copyright lawyer at Fennemore Craig in Phoenix, who said, “work for hire is defined to include a specially commissioned work used as a test or as answer material for a test.” So, Harris added, “I would consider the test and the answers protected by copyright.”

And while the lawyers agreed that copyright protections do not apply to facts – that two and two is four cannot be protected, for example – Harris said copyrights do “protect a compilation of facts selected, coordinated or arranged by the author to create an original work.” And, “even if answers to, for example, math questions may be facts, the selection and organization of the questions, and hence the answers, can be protected as a compilation.” Harris seems pretty clear, saying again, “Copying the answers violates an exclusive right of the copyright owner.”

Ryan Vacca, Professor of Law at University of New Hampshire School of Law, who is the author of a casebook and numerous articles on copyright law, also seemed to land in that camp, saying, “Pearson’s questions are entitled to copyright protection.” And, “The complaint gives several examples of Chegg reproducing the questions, either verbatim or a substantially similar version, before providing the answer. Assuming these are representative samples, this would be a pretty straightforward violation of Pearson’s reproduction right.”

On the question of whether the answers are likewise protected, Vacca said, “although it seems sensible that an answer would be based upon a question, courts haven’t always interpreted this literally.” The professor added that we would not consider a student who wrote out the same answers to the same questions as having infringed on anyone’s protections.

Still, he said, if Chegg’s answers are found to have violated Pearson’s copyrights, “then Chegg may try to argue fair use. The factual basis of many of Pearson’s questions may be helpful to Chegg, but given the commercial nature of Chegg’s business, the amount of copying alleged to have occurred, and the fact that its products are involved in cheating scandals, it looks like an uphill battle for Chegg.”

That’s similar to the views of Francelina Perdomo, a Partner at Gallet Dreyer & Berkey in New York City who is focused on copyright, trademarks and publishing issues. She says, “Chegg is using excerpts from Pearson’s copyrighted works to formulate answer questions. The copying itself infringes on Pearson’s copyrights, and the answers to Pearson’s end-of-chapter questions are likely derivative works.” She added, “the fact that we are dealing with educational subject matter doesn’t make Chegg’s use fair use.”

Significantly, Professor Vacca also said, “If [Chegg is] liable, the amount of damages Pearson obtains could be quite significant. It might include market harm to Pearson’s textbook sales, the profits Chegg earned from reproducing these questions, or statutory damages.”

If you’re scoring at home, that’s something like two and half lawyers who say Pearson will have a tough time and three and a half who lean in direction of giving Pearson’s claims some weight. Not sure what else you expected from lawyers.

But it’s the follow on question that is potentially even more important to the education marketplace - should Pearson win, could others who’ve had their questions similarly “used” by answer-sellers such as Chegg also sue?

Smith, the attorney at IPS in Miami is a yes. “If Pearson is successful in its suit, this ruling can affect the entire academic industry. This may give rise to a cause of action to college professors, universities, and others, whose content is used by Chegg to create answers.”

Professor Vacca agrees, saying, “yes, this could be a possibility,” adding, “to the extent Chegg collects professors’ questions and includes them in their database for others to use, then the result should be similar. The damages would likely be less because individual professors don’t have much market power.”

That’s fair. But, while an individual professor’s claims may be smaller when compared with Pearson’s, there are many more of them. Thousands and thousands of professors and schools have had their copyrighted exam and course materials used by Chegg and others to sell answers.

If those dominos fall, if Pearson wins and professors or schools also sue, that could be a market-altering bombshell. Chegg, which gets a majority of its revenue from the unit that sells answers to other people’s questions, could be directly impacted. And according to other recent reporting, Course Hero, a site that shares files - a good portion which are copyrighted course materials and assignment answers written by other people - is considering an IPO.

And they are not even close to the only companies in the business of selling academic answers for profit. A court ruling that makes answers subject to the copyright of the question writer would, at least in theory, impact all of them.

There are plenty of ifs still out there and based on this sample of legal experts, no outcome is certain. But with billions of dollars at stake, it merits close attention.

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