

CHEATERS NEVER PROSPER: THE LEGAL LIABILITY AND ETHICAL RESPONSIBILITY OF “HOMEWORK HELP” SITES

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“I would prefer even to fail with honor than to win by cheating.”¹

ABSTRACT

Students’ use of “homework help” sites soared during the COVID-19 pandemic and the resulting resort to remote instruction. Unfortunately, instead of using the sites for learning assistance, many students used them to cheat. Indeed, a new word, “chegging,” associated with the homework help site, Chegg.com, became synonymous with plagiarizing homework and test answers from these sites and submitting the work as the students’ own. Just as the pandemic eased and students returned to the classroom, concerns about student cheating again surfaced with the introduction of ChatGPT and other generative artificial intelligence, which educators again feared would be used by students to plagiarize homework and test answers. When students use such resources to submit plagiarized work as their own, they have undoubtedly engaged in unethical and possibly tortious and illegal behavior. But what about the sites that provide the students with the technology used to cheat? This article explores the potential legal liability of homework help sites such as Chegg and generative artificial intelligence technologies such as ChatGPT, including claims for copyright infringement, violation of state laws regarding educational integrity and unfair competition, and federal wire fraud statutes. The article then addresses why existing statutory schemes, even if enforced, may be insufficient to impact the operations of businesses that provide technologies that students use to cheat. Lastly, this article addresses the ethical implications of unchecked student cheating and why it is important for us as a society to pursue existing causes of action or to amend our current laws in order to deter businesses from helping students cheat.

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1. SOPHOCLES, PHILOCTETES, 405 (David Grene trans.), reprinted at <https://faculty.washington.edu/rsoder/EDLPS579/MILPhiloctetes.pdf>.

INTRODUCTION

Cheating in academia is not a new phenomenon. However, instances of cheating appeared to skyrocket during the COVID-19 pandemic when most students were attending classes remotely. Remote instruction transformed the traditional form of in-person testing in the classroom to students taking examinations online and without traditional means of proctoring. Many students took advantage of remote testing to cheat, largely assisted by the Internet. Some students made unauthorized use of the Internet to look up answers online, others worked with their fellow students using apps like GroupMe and Discord, and still others used homework help sites to seek assistance on exam questions in real-time. When utilizing the homework help sites during live examinations, the students would post exam questions on the site, wait for answers to be provided by the site's "experts," and then submit the answers as the student's own. This article focuses on the role of homework help sites in student cheating and addresses whether these sites have potential civil and criminal liability for providing such assistance. The article also explores the ethical implications of allowing such cheating to go unchecked. The article then examines existing remedies potentially available against homework help sites and whether or not they provide effective recourse. The article lastly suggests the passage of new legislation to more effectively prevent businesses from helping students cheat.

Part I of this article provides an overview of homework help sites and the proliferation of student cheating that occurred during the COVID-19 pandemic, and the potential use of generative artificial intelligence like ChatGPT to help students cheat. It then discusses current litigation pending against two of the major homework help sites, Chegg and Course Hero, only a handful of which address their role in helping students cheat. Part II of this article addresses whether the homework help sites violate existing laws by providing services that facilitate student cheating. It explores potential claims for copyright infringement, violation of state education codes, state unfair competition laws, and federal wire fraud laws. The article concludes that viable claims exist against certain businesses used by students to cheat under each of these laws, although some claims may be easier to prove than others. Part III of this article examines the deleterious effect that unchecked student cheating has on numerous stakeholders, including the cheating student, non-cheating students, educational institutions, employers, and society as a whole. Part IV explores whether, if existing legal claims are viable, they are effective in discouraging businesses from profiting from assisting student cheating. Lastly, Part V suggests how laws could be changed to more effectively deter businesses from aiding student cheating.

I. AN OVERVIEW OF HOMEWORK HELP SITES, GENERATIVE ARTIFICIAL INTELLIGENCE, AND ACADEMIC CHEATING

A. *Homework Help Sites and Academic Cheating Proliferated During the COVID-19 Pandemic*

During the COVID-19 pandemic and the move to remote education, student cheating proliferated.² Such cheating was aided by “homework help” websites such as Chegg, Course Hero, and others.³ Of the various homework help sites, Chegg, a publicly held company, is the largest, and, during the height of the pandemic, was valued at more than \$12 billion.⁴ Chegg began in 2000 as a campus flea market and then switched strategy in 2005 to become a textbook sales and rental company with moderate success.⁵ However, it hit paydirt when it created Chegg Study, a monthly subscription service. Chegg Study claims to have a database of answers to over forty-six million textbook and exam problems.⁶ It further offers the services of more than 70,000 “experts” who will supply answers to subscribers who post questions to the site.⁷ Sometimes the answers are provided in less than fifteen minutes, which allows students to post questions during live remote exams and receive the answers in time to submit as their exam answers.⁸ There was a nearly 200% jump in questions submitted to Chegg Study after the start of the pandemic.⁹

Coming in second in terms of value is Course Hero, a privately held company valued at \$1.1 billion.¹⁰ In contrast to Chegg, Course Hero’s original business model, rather than using freelance experts, relied upon students posting answers to questions or copies of essays or other homework.¹¹ However, Course Hero recently added a resource of over 2,600 expert tutors available to

2. See Sneha Dey, *Reports of Cheating at Colleges Soar During the Pandemic*, NPR (Aug. 27, 2021, 6:00 AM EST), <https://www.npr.org/2021/08/27/1031255390/reports-of-cheating-at-colleges-soar-during-the-pandemic>.

3. While Chegg and Course Hero purport to enforce standards of academic integrity, other sites blatantly sell cheating. For example, onlineclasshelp.com offers to take an entire online class for a student, take individual tests, or prepare projects and papers. The site guarantees that a student will receive an “A” or a “B.” ONLINE CLASS HELP, onlineclasshelp.com (last visited Jan. 2, 2024). Edubirdie.com advertises that it will write a paper for a student beginning at a cost of \$13.99 per page. EDUBIRDIE, edubirdie.com (last visited Jan. 2, 2024).

4. Susan Adams, *This \$12 Billion Company Is Getting Rich Off Students Cheating Their Way Through COVID*, FORBES (Jan. 28, 2021, 6:30 AM EST), <https://www.forbes.com/sites/susanadams/2021/01/28/this-12-billion-company-is-getting-rich-off-students-cheating-their-way-through-COVID/?sh=2ed7600b363f>.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Elizabeth Redden, *A Spike in Cheating Since the Move to Remote?*, INSIDE HIGHER ED (Feb. 4, 2021), <https://www.insidehighered.com/news/2021/02/05/study-finds-nearly-200-percent-jump-questions-submitted-chegg-after-start-pandemic>.

10. See Adams, *supra* note 4.

11. *Id.*

assist with homework questions and represents that answers can be provided in as few as thirty seconds.¹² This also now allows students to receive live exam assistance. While Chegg and Course Hero are the largest, homework help sites number in the thousands.¹³

The pandemic was replete with well-publicized college cheating scandals. A statistics instructor at North Carolina State University caught about 200 students cheating on the final exam by posting the exam questions on Chegg.¹⁴ More than seventy West Point cadets were caught cheating on a calculus final exam after they all made the same errors on the test because they had shared answers.¹⁵ California State University, Los Angeles, had a large-scale cheating scandal when answers to an exam were shared among the students on a GroupMe chat.¹⁶ A professor at the University of California, Berkeley, reported that a student in a 600-person undergraduate physics class posted a midterm exam on Chegg less than five minutes into the test, and half an hour later, the answers to all of the problems were available.¹⁷ Numerous higher education institutions across the country have reported widespread violations of academic integrity since March 2020.¹⁸

Of course, cheating is not unique to remote instruction during a pandemic. Cheating in academia has been around for ages. Students could always find ways to cheat, but it became much easier to do so with the dawn of the Internet. The early days of the Internet heralded in term paper “mills” where students could contract to have assigned essays, term papers, and theses written by experts.¹⁹ These mills still exist and are readily available to students seeking to have their papers written for them.²⁰

Teachers and administrators have also engaged in cheating. In August 2021, Edward Ennels, an instructor at Baltimore City Community College, pled

12. *AI-Powered Homework Help*, COURSE HERO, <https://www.coursehero.com/ai-homework-help/> (last visited Sept. 7, 2023).

13. Tawnell D. Hobbs, *Cheating at School Is Easier Than Ever—and It’s Rampant*, WALL ST. J. (May 12, 2021, 10:00 AM EST), <https://www.wsj.com/articles/cheating-at-school-is-easier-than-everand-its-rampant-11620828004>. Some other sites that provide answers for a fee are Bartleby (Bartleby.com), EduBirdie (edubirdie.com), SweetStudy (sweetstudy.com), Socratic (socratic.org), and Studypool (studypool.com).

14. Adams, *supra* note 4; Hobbs, *supra* note 13.

15. Vanessa Romo & Tom Bowman, *More Than 70 West Point Cadets Accused of Cheating in Academic Scandal*, NPR (Dec. 21, 2020, 10:40 PM EST), <https://www.npr.org/2020/12/21/949025580/more-than-70-west-point-cadets-accused-of-cheating-in-academic-scandal>.

16. Lea Loeb, *Cal State LA Was Caught in a Large-scale Cheating Scandal, but It’s Not Alone*, GOLDEN GATE XPRESS (Mar. 30, 2021), <https://goldengatexpress.org/97004/campus/cal-state-la-was-caught-in-a-large-scale-cheating-scandal-but-its-not-alone/>.

17. See Redden, *supra* note 9.

18. *Id.*; Dey, *supra* note 2; Hobbs, *supra* note 13.

19. For an in-depth discussion of the evolution of term paper mills, see DAVE TOMAR, *THE COMPLETE GUIDE TO CONTRACT CHEATING IN HIGHER EDUCATION* 38–44 (2022).

20. *Id.* at Appendix D.

guilty to charges of bribery and misconduct in office.²¹ Ennels was accused of having students pay him for academic access codes as well as seeking and taking bribes in exchange for higher grades.²² Similarly, in June 2018, high school teacher Amanda Richardson was suspended pending the outcome of an investigation over allegations that she took money in exchange for giving students better grades.²³ In August 2021, the former dean of Temple University's Richard J. Fox School of Business and Management, Moshe Porat, was convicted on charges of conspiracy to commit wire fraud and wire fraud based on the claim that Porat schemed with others to provide false information to U.S. News & World Report in order to inflate the college's rankings in the annual U.S. News surveys of top online and part-time MBA programs.²⁴ The conspirators succeeded in significantly boosting the college's rankings, leading to millions of dollars a year in increased tuition revenues.²⁵

One of the greatest college cheating scandals of all time, now famously known as "Varsity Blues," involved numerous wealthy and famous parents scheming to have their children admitted to prestigious universities through cheating and bribery.²⁶ Using the services of William "Rick" Singer, the parents achieved their objectives in one of two general ways: arranging to have their

21. Will Vitka, *Former Baltimore Math Professor Took Pay for Grades in Bribery Scheme; Gets One Year in Jail*, WTOPNEWS (Aug. 6, 2021, 10:01 AM), <https://wtop.com/crime/2021/08/former-baltimore-math-professor-took-pay-for-grades-in-bribery-scheme-gets-1-year-in-jail/>.

22. *Id.* Ennels was sentenced to ten years' incarceration, with nine years suspended, followed by five years of supervised probation and ordered to pay restitution in the amount of \$60,000. *Id.*

23. *Philadelphia High School Teacher Accused of Taking Bribes for Better Grades*, 6ABC ACTION NEWS (June 6, 2018), <https://6abc.com/philadelphia-linc-high-school-bribes-bribery/3570210/>.

24. Press Release, *Former Temple Business School Dean Convicted of Fraud*, DEP'T. OF JUST., U.S. ATT'YS OFF., E. DIST. OF PA., (Nov. 29, 2021), <https://www.justice.gov/usao-edpa/pr/former-temple-business-school-dean-convicted-fraud>.

25. *Id.* A Columbia University math professor has similarly accused Columbia of using data that was "inaccurate, dubious or highly misleading" in order to obtain a No. 2 ranking with U.S. News & World Report. Anemona Hartocollis, *U.S. News Ranked Columbia No. 2, but a Math Professor Has His Doubts*, N.Y. TIMES (Mar. 17, 2022), <https://www.nytimes.com/2022/03/17/us/columbia-university-rank.html>. As a result of these allegations, Columbia announced that it would not be participating in the next U.S. News rankings. Anemona Hartocollis, *Columbia Won't Participate in the Next U.S. News Rankings*, N.Y. TIMES (June 30, 2022), <https://www.nytimes.com/2022/06/30/us/columbia-us-news-rankings.html>. Columbia has since admitted that it relied on "outdated and/or incorrect methodologies" in submitting its data to U.S. News & World Report in connection with the 2021 rankings. Artemis Moshtaghian, *Columbia University Acknowledges Submitting Inaccurate Data for Consideration in College Rankings*, CNN (Sept. 11, 2022), <https://www.cnn.com/2022/09/11/media/columbia-university-us-news-world-report-college-rankings/index.html>.

26. For a summary of the Varsity Blues scandal, see Valerie Flugge & Nanci K. Carr, *Did You Fail to Tell Me Something, Mom? Nondisclosure Fraud in the Wake of Varsity Blues*, 46 U. DAYTON L. REV. 245 (2021).

child's ACT or SAT scores inflated²⁷ and bribing college coaches and athletic directors to admit their child as a student-athlete.²⁸ Fifty-seven defendants were charged in the Varsity Blues scandal; the majority pled guilty or agreed to do so.²⁹ The first two defendants to take the case to trial were convicted in October 2021.³⁰ Singer, who cooperated with authorities in the prosecution of the other defendants, was sentenced to forty-two months in prison.³¹

Of more recent concern has been the launch of ChatGPT, a generative artificial intelligence, in November 2022. The chatbot was created by San Francisco-based artificial intelligence company OpenAI and immediately caused concern among educators that the tool would be used by students to

27. This was accomplished in various ways, including paying exam proctors to correct the exams before submission, paying someone else to take the exam, providing a copy of the exam in advance, and allowing students extra time. See Kenzie Bryant, "Operation Varsity Blues" is the One Scam to Rule Them All, VANITY FAIR (Mar. 12, 2019), <https://www.vanityfair.com/style/2019/03/lori-loughlin-felicity-huffman-college-cheating-scandal>.

28. Athletic departments have more leeway to accept students who do not otherwise meet the academic standards for admission at their respective institutions. See Valerie Strauss, *Who Gets the Largest College Admissions Advantage? Let's Look at the Athletes.*, WASH. POST (Mar. 13, 2019, 2:19 PM), <https://www.washingtonpost.com/education/2019/03/13/who-gets-largest-college-admissions-advantage-lets-look-athletes/> (citing *College and Beyond*, ANDREW W. MELLON FOUND., <https://mellon.org/grants/grants-database/grants/national-opinion-research-center/19600698/>) ("[A]thletes with lower academic credentials get admitted at four times the rate of non-athletes with similar credentials.").

29. Sophie Kasakove, *The College Admissions Scandal: Where Some of the Defendants Are Now*, N.Y. TIMES (Oct. 9, 2021), <https://www.nytimes.com/2021/10/09/us/varsity-blues-scandal-verdict.html>.

30. Kimberlee Speakman, *Two Parents Found Guilty of Fraud and Bribery Charges in First 'Varsity Blues' Trial*, FORBES (Oct. 8, 2021, 6:06 PM EST), <https://www.forbes.com/sites/kimberleespeakman/2021/10/08/two-parents-found-guilty-of-fraud-and-bribery-charges-in-first-varsity-blues-trial/?sh=32f7e25c7828>. Those convictions, however, were recently reversed. See *infra* note 181. On June 16, 2022, the first acquittal in the Varsity Blues scandal was obtained by parent Amin Khoury, who had been accused of delivering a bribe of cash in a brown paper bag to Georgetown's tennis coach in order to gain admission to Georgetown for Khoury's daughter. *Georgetown Father Found Not Guilty in Final Trial of "Varsity Blues" College Admissions Scandal*, CBS NEWS (June 16, 2022, 8:23 PM), <https://www.cbsnews.com/news/georgetown-father-amin-khoury-not-guilty-final-trial-varsity-blues-college-admissions-scandal/>. The tennis coach, who admitted to accepting nearly \$3.5 million in bribes, on the other hand, was sentenced to thirty months in prison, the longest sentence of any of the Varsity Blues defendants to date. Melissa Korn, *Former Georgetown Tennis Coach Sentenced to 2.5 Years in Prison*, WALL ST. J. (July 1, 2022, 11:40 AM EST), <https://www.wsj.com/articles/former-georgetown-tennis-coach-sentenced-to-2-5-years-in-prison-11656690042?mod=e2tw>.

31. Tovia Smith & Jaclyn Diaz, *Rick Singer, Head of the College Admission Bribery Scandal, Gets Forty-Two Months in Prison*, NPR (Jan. 4, 2023, 4:45 PM EST), <https://www.npr.org/2023/01/04/1146837418/rick-singer-sentenced-varsity-blues-college-admissions-bribery-scandal>.

cheat.³² ChatGPT can, among other things, draw information from the Internet to write essays and answer complex questions.³³ The tool has already been used to successfully pass MBA, law, and medical exams.³⁴ In an informal poll conducted by The Stanford Daily, 17% of Stanford students reported using ChatGPT to assist with their fall quarter assignments and exams; 5% reported that they submitted the material provided by ChatGPT with little or no edits.³⁵ One difference between ChatGPT and sites like Chegg and Course Hero, however, is that ChatGPT has many uses unrelated to student assistance; “homework help” sites, on the other hand, target students directly.³⁶

B. Current Litigation Pending Against Chegg and Course Hero

There are currently several lawsuits pending against or involving Chegg and Course Hero for claims of fraud and copyright infringement. Those lawsuits are described briefly below.

1. Investor Lawsuit Against Chegg

In December 2021, a class action lawsuit was filed in the U.S. District Court for the Northern District of California, alleging that Chegg misled investors about the reasons for, and potential sustainability of, Chegg’s rapid growth.³⁷ The lawsuit claims that Chegg asserted that its increase in subscribers, revenues, and profits in 2020 was “due to the strength of its business model and the Company’s leaders’ business acumen” when, in fact,

32. See Camilla Cavendish, *ChatGPT Will Force School Exams Out of the Dark Ages*, FIN. TIMES (Jan. 20, 2023), <https://www.ft.com/content/41243091-d8d7-4b74-9ad1-5341c16c869f>.

33. Julia Mueller, *ChatGPT Passes Wharton Business School Test: Research Paper*, HILL (Jan. 22, 2023, 10:21 PM EST), <https://thehill.com/policy/technology/3825754-chatgpt-passes-wharton-business-school-test-research-paper/>.

34. *Id.* (ChatGPT was used to complete the final exam in Operations Management, a core course in the Wharton MBA program, and would have received a B to B- on the exam); Samantha Murphy Kelly, *ChatGPT Passes Exams From Law and Business Schools*, CNN BUSINESS (Jan. 26, 2023, 1:35 PM EST), <https://www.cnn.com/2023/01/26/tech/chatgpt-passes-exams/index.html> (ChatGPT used to complete law exams in four courses and performed on average at the level of a C+ student); Matt Delaney, *AI Language Bot ChatGPT Can Pass Parts of Business, Law and Medical Exams*, WASH. TIMES (Jan. 29, 2023), <https://www.washingtontimes.com/news/2023/jan/29/chatgpt-ai-language-bot-can-pass-business-law-and/> (ChatGPT was able to achieve passing marks on parts of the U.S. Medical Licensing Exam).

35. Mark Allen Cu & Sebastian Hochman, *Scores of Stanford Students Used ChatGPT on Final Exams, Survey Suggests*, STANFORD DAILY (Jan. 22, 2023, 4:03 PM), <https://stanforddaily.com/2023/01/22/scores-of-stanford-students-used-chatgpt-on-final-exams-survey-suggests/>.

36. For this reason, generative artificial intelligence companies are not accurately described as “homework help” sites. However, for ease of reference, I include them within that general description throughout this article.

37. Elizabeth Redden, *Suit Accuses Chegg of Cheating Investors*, INSIDE HIGHER ED (Jan. 5, 2022), <https://www.insidehighered.com/news/2022/01/05/suit-accuses-chegg-cheating-investors>.

the growth was due to students using Chegg's services during remote instruction to "complet[e] their homework, tests, writing assignments, and even dissertations and exams."³⁸ The lawsuit further alleges that once students returned to campuses and schools implemented protocols to eliminate cheating, "students predictably stopped subscribing to the platform."³⁹ Based on these assertions, the investors allege that "Chegg had no basis to believe that the extraordinary, but temporary, growth trends would continue, but failed to adequately inform investors of that reality."⁴⁰

2. Pearson plc's Lawsuit Against Chegg

In September 2021, educational publishing giant Pearson plc, who used to be partnered with Chegg, filed a lawsuit accusing Chegg of copyright infringement for selling students the answers to the end-of-the-chapter questions appearing in Pearson's textbooks.⁴¹ According to the suit filed in federal court in New Jersey, "[b]y using and copying Pearson's original creative content to make answer sets based on that content, Chegg infringes Pearson's exclusive rights as a copyright holder, including the rights of reproduction, preparation of derivative works, and distribution."⁴² Pearson's lawsuit involves two theories: (1) Chegg copied entirely or poorly paraphrased the end-of-the-chapter questions appearing in Pearson textbooks; and (2) the answers prepared by Chegg freelancers are derivative works of those questions.⁴³ With respect to the second theory, the argument is that the answers are necessarily created from the original content of the questions, and therefore infringe on Pearson's exclusive right to prepare derivative works based on its questions.⁴⁴

3. A Professor's Lawsuit Against Students Posting the Professor's Exam on Course Hero

In March 2022, Chapman University Professor David Berkovitz filed a copyright infringement lawsuit against the student or students who posted both his midterm and final exams on Course Hero asking for help in answering the test questions.⁴⁵ Berkovitz asserted that the reason for his lawsuit was to be able

38. *Id.*

39. *Id.*

40. *Id.*

41. Bob Van Voris, *Pearson Sues Chegg for Selling Answers to Textbook Questions*, BLOOMBERG (Sept. 14, 2021, 10:11 AM PST), <https://www.bloomberg.com/news/articles/2021-09-14/pearson-sues-chegg-for-selling-answers-to-textbook-questions>.

42. *Id.*

43. Jonathan Bailey, *Understanding the Pearson v. Chegg Copyright Infringement Lawsuit*, PLAGIARISMTODAY (Sept. 15, 2021), <https://www.plagiarismtoday.com/2021/09/15/understanding-the-pearson-v-chegg-lawsuit/>.

44. *Id.*

45. Jaclyn Peiser, *A Professor Found His Exam Questions Posted Online. He's Suing the Students Responsible for Copyright Infringement*, WASH. POST (Mar. 17, 2022, 6:08 AM EST), <https://www.washingtonpost.com/nation/2022/03/17/chapman-university-professor-lawsuit-copyright-cheating/>.

to discover “who posted the questions and find out whether they received help answering them.”⁴⁶ Berkovitz stated that when he tried to learn the student’s identity from Course Hero, he was told that he would need a subpoena.⁴⁷ With a lawsuit in place, he predicted he could obtain one, and claimed that he would drop the case once he had the information about who posted the exams.⁴⁸

4. Post University’s Lawsuit against Course Hero

On September 27, 2021, Post University, Inc. brought a lawsuit against Course Hero, alleging that by posting materials owned by Post University, such as tests and quizzes, assignments, syllabi, and instructor resources, on its website, Course Hero, *inter alia*, infringed Post University’s copyrights and trademarks.⁴⁹ That action remains pending.

This article explores in detail whether homework help sites, such as Chegg and Course Hero, and generative artificial intelligence companies, such as ChatGPT, have potential civil or criminal responsibility for their role in assisting students to cheat. As set forth in the following section, there are several viable claims against companies that help students cheat.

II. THE HOMEWORK HELP SITES HAVE ARGUABLY VIOLATED SEVERAL LAWS BY HELPING STUDENTS CHEAT

A. *The Homework Help Sites May Be Liable for Copyright Infringement*

Copyright is a form of intellectual property that affords “the set of exclusive rights granted to authors as to the ownership and use of their creative works.”⁵⁰ To qualify for protection, the work of authorship must be original and fixed in a tangible medium.⁵¹ The Copyright Act provides that the fixation requirement has been met “when its embodiment . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁵² Originality requires that the work’s origin is the author, who has not copied it from another source.⁵³ Moreover, the work must demonstrate “some minimal degree of creativity.”⁵⁴

46. *Id.*

47. *Id.*

48. *Id.* The docket for the U.S. District Court for the Central District of California reflects that Professor Berkovitz voluntarily dismissed his lawsuit on April 11, 2022.

49. Complaint, Post Univ., Inc. v. Course Hero, Inc., No. 21-cv-01242, 2023 WL 4196399 (D. Conn. 2021). A copy of the Complaint can be found here: <https://copyright.byu.edu/0000017c-4cf6-df77-a77c-5cfefa550001/post-university-v-course-hero-complaint>.

50. KURT M. SAUNDERS, INTELLECTUAL PROPERTY LAW: LEGAL ASPECTS OF INNOVATION AND COMPETITION 259 (2016).

51. Copyright Act of 1976, 17 U.S.C. § 102(a). A work is “fixed” when embodied in a copy or phonorecord, both of which are defined in the Copyright Act as a material object. *See id.* § 101.

52. 17 U.S.C. § 101.

53. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

54. *Id.*

Copyright protection extends only to the original and fixed expression embodied in works of authorship, including: (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and audiovisual works; (7) sound recordings; and (8) architectural designs.⁵⁵ A compilation of facts or data is protected to the extent that there is originality in selecting, coordinating, or arranging the elements.⁵⁶ Ideas, discoveries, principles, methods, procedures, and useful articles are not eligible for copyright protection.⁵⁷

Copyright protection for a work of authorship vests the moment an original work is fixed, regardless of whether it is ever published.⁵⁸ Although not required, the copyright owner may register the copyright with the U.S. Copyright Office.⁵⁹ The term of copyright protection for most works is the author's lifetime, plus seventy years.⁶⁰ Copyright owners have the exclusive rights to reproduce their works,⁶¹ adapt their works to create derivative works,⁶² publicly distribute,⁶³ publicly perform,⁶⁴ and display their works.⁶⁵ Any person

55. 17 U.S.C. § 102(a).

56. *See Feist*, 499 U.S. at 345.

57. 17 U.S.C. § 102(b).

58. *See id.* § 102(a).

59. 17 U.S.C. § 408(a). Registration creates a presumption of ownership of a valid copyright; *see id.* § 410(c).

60. *See* 17 U.S.C. § 302(a).

61. *Id.* § 106(1). The right of reproduction is arguably the most fundamental right granted to copyright owners. The right extends to making any type of copy, including posting the copyrighted work to a website. *See Copyright Exclusive Rights*, COPYRIGHT ALLIANCE (June 2022), <https://copyrightalliance.org/education/copyright-law-explained/copyright-owners-rights/copyright-exclusive-rights/>.

62. 17 U.S.C. § 106(2). A derivative work is “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’” *Id.* § 101. Some examples of derivative works “include translating a book” and “transforming a novel . . . into a motion picture” *See* COPYRIGHT ALLIANCE, *supra* note 61.

63. 17 U.S.C. § 106(3). The right of distribution allows the copyright owner to control the manner in which the work “is transferred to others, whether by sale, lease, rental, or lending.” *See* COPYRIGHT ALLIANCE, *supra* note 61.

64. 17 U.S.C. § 106(4). The public performance right allows the copyright owner “to control the manner in which a work is publicly performed. . . . Some activities that implicate the public performance right include showing a motion picture in a public area or streaming movies, sports events, concerts or music over the internet.” *See* COPYRIGHT ALLIANCE, *supra* note 61.

65. 17 U.S.C. § 106(5). “In general, a . . . display is considered ‘public’ when the work is performed in a public place or at a place where a substantial number of persons outside of a normal circle of a family and friends are gathered, or a performance of the work is transmitted to the public. Some activities that implicate the public performance right include” using a photograph on a website

who exercises any of the copyright owner's exclusive rights without authorization may be liable for copyright infringement.⁶⁶

1. Student Posting of Exam Questions or Homework Problems on the Homework Help Sites Likely Constitutes Copyright Infringement if the Questions are Original to the Instructor

To establish direct infringement, a plaintiff must establish that it owns a valid copyright and that the defendant copied protected aspects of the work.⁶⁷ Additionally, the two works must be substantially similar.⁶⁸

If the material posted by the student on a homework help site is original to the instructor and evidences some minimal degree of creativity, the student posting the material has likely directly infringed the instructor's copyright by reproducing the work and publicly distributing and displaying it.⁶⁹ The bar for establishing originality is not high.⁷⁰ Exam questions in any form, whether essay, multiple choice, fill in the blank, or true/false, if created by the instructor, will likely satisfy the minimal degree of creativity required.⁷¹

Copyright infringement is a strict liability tort,⁷² and a party who publishes an infringing work without knowing that it was infringing may nevertheless be

or signage, or showing a mural as a prominent backdrop in a movie scene. *See* COPYRIGHT ALLIANCE, *supra* note 61.

66. *See* 17 U.S.C. § 501(a).

67. *Feist*, 499 U.S. at 361; *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116–17 (9th Cir. 2018); *N. Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir. 1992).

68. *See* *Mattel, Inc. v. MGA Ent., Inc.*, 616 F.3d 904, 913–14 (9th Cir. 2010).

69. *See supra* notes 60–65 and accompanying text.

70. *Feist*, 499 U.S. at 362.

71. *See, e.g.,* *United States v. Hedaithy*, 392 F.3d 580 (3d Cir. 2004) (Test of English as a Foreign Language exam and questions protected by copyright); *Educ. Testing Servs. v. Katzman*, 793 F.2d 533, 538–39 (3d Cir. 1986) (Scholastic Aptitude Test protected by copyright); *Faulkner Press, L.L.C. v. Class Notes, L.L.C.*, 756 F. Supp. 2d 1352, 1357 (N.D. Fla. 2010) (holding that film study questions and practice questions qualified for copyright protection because “[w]ith regard to the practice questions, again Dr. Moulton selected facts from other materials in his electronic textbooks to create the practice questions. The selection was not mechanical or routine. Some originality was involved.” His selection therefore qualifies for copyright protection.); *Nat’l Conf. Bar Exam’rs v. Saccuzzo*, 2003 WL 21467772 (S.D. Cal. 2003) (California Bar examination questions and answers); *Educ. Testing Serv. v. Simon*, 95 F. Supp. 2d 1081, 108593 (C.D. Cal. 1999) (MSAT exam); *Educ. Testing Serv. v. Miller*, 21 U.S.P.Q.2d 1467 (D.D.C. 1991) (Foreign Service exam); *Ass’n Am. Med. Colls. v. Mikaelian*, 571 F.Supp. 144, 150 (E.D. Pa. 1983) (MCAT test questions); *Addison-Wesley Publ’g Co. v. Brown*, 223 F. Supp. 219 (E.D.N.Y. 1963) (problems in a physics textbook that had been selected and arranged to serve as exercises illustrating chapter material entitled to copyright protection).

72. *See, e.g.,* *Jacobs v. Memphis Convention & Visitors Bureau*, 710 F. Supp. 2d 663, 678 (W.D. Tenn. 2010); *King Recs., Inc. v. Bennett*, 438 F. Supp. 2d 812, 852 (M.D. Tenn. 2006); *Saccuzzo*, 2003 WL 21467772 at *4 (“There is no need to prove anything about a defendant’s mental state to establish copyright infringement; it is akin to a strict liability tort.”); *Educ. Testing Serv. v. Simon*, 95 F. Supp. 2d at 1087. *See also* A. Samuel Oddi, *Contributing Copyright Infringement: The Tort and Technological Tensions*, 64 NOTRE DAME L. REV. 47, 52 (1989).

liable for copyright infringement.⁷³ There are two types of infringement: primary and secondary.⁷⁴ A primary infringement involves a direct infringement by the defendant.⁷⁵ Secondary infringement occurs if someone facilitates another person or group in infringing on a copyright.⁷⁶ Somebody who knowingly induces, causes, or materially contributes to copyright infringement may be held liable as a contributory infringer if they knew or had reason to know of the infringement.⁷⁷ Vicarious liability may arise when a party has the right and ability to supervise the infringing activity and also has a direct financial interest in the activity.⁷⁸

The question then is whether homework help sites, like Chegg and Course Hero, can be liable for secondary copyright infringement based on a student's posting of infringing material on their sites.⁷⁹ The answer to this question turns on the Digital Millennium Copyright Act (DMCA).

2. The Digital Millennium Copyright Act Safe Harbor Provisions Do Not Necessarily Provide a Safe Harbor for the Homework Help Sites

The DMCA was enacted by Congress in 1998.⁸⁰ One of the reasons for its enactment was the concern that subjecting online service providers to liability when a user posted infringing content would inhibit the growth of the Internet.⁸¹ Section 512 of the DMCA therefore created four safe harbors to protect online service providers from liability for copyright infringement: (1) transitory communications; (2) system caching; (3) storage of information on

73. At minimum, publishing a copyrighted work on one's website would violate the author's exclusive right to reproduce, display, and publicly distribute their work. 17 U.S.C. § 106.

74. See *A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013, 1019 (9th Cir. 2001).

75. See *id.* at 1013.

76. See William Landes & Douglas Lichtman, *Indirect Liability for Copyright Infringement: Napster and Beyond*, 17 J. ECON. PERSP. 113 (2003). "The Copyright Act of 1976 does not explicitly recognize the possibility of indirect liability. Nevertheless, courts have held third parties liable for copyright infringement under two common law doctrines: contributory infringement and vicarious liability." *Id.* at 114.

77. *Napster*, 239 F.3d at 1019; *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996); *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

78. *Napster*, 239 F.3d at 1022; *Gershwin*, 443 F.2d at 1162.

79. This potential secondary copyright infringement analysis would not apply to generative artificial intelligence companies like ChatGPT because, unlike companies like Chegg and Course Hero, these companies simply provide (at least currently) answers to submitted questions and do not post the submitted questions themselves on a website or otherwise.

80. 17 U.S.C. §§ 512, 1201–02.

81. According to its legislative history, the DMCA was designed to "clarify[y] the liability faced by service providers who transmit potentially infringing material over their networks," and in the process to "ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will expand." S. Rep. No. 105-190, at 2 (1998). The Senate Report expressed the view that "without clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet." *Id.* at 8.

systems or networks at the direction of users; and (4) information location rules.⁸²

For purposes of the first safe harbor, a service provider is defined as “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”⁸³ The definition of a service provider for purposes of the remaining three categories is somewhat broader: “a provider of online services or network access, or the operator of facilities therefor.”⁸⁴

A service provider may only take advantage of a safe harbor if the service provider:

- (1) has adopted and reasonably implemented, and informs subscribers and account holders . . . of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders . . . who are repeat copyright infringers; and
- (2) accommodates and does not interfere with standard technical measures that are used by copyright owners to identify or protect copyrighted works.⁸⁵

Both Chegg and Course Hero post on their websites that misuse of their services can result in a user being banned from the platform;⁸⁶ it is unknown to what extent they actually do so.⁸⁷ If the homework help sites do not actually ban repeat infringing users, it is possible that they would not be able to claim safe harbor protection because they have not reasonably implemented a policy to terminate such infringers.⁸⁸

Of the four safe harbors, the one most applicable to homework help sites is 17 U.S.C. § 512(c), pertaining to information residing on systems or networks at the direction of users.⁸⁹ In order to be protected under this safe harbor, the

82. 17 U.S.C. § 512(a)(d).

83. *Id.* § 512(k)(1)(A).

84. *Id.* § 512(k)(1)(B).

85. *Id.* § 512(i). The standard technical measures must “have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process; [be] available to any person on reasonable and nondiscriminatory terms; and . . . not impose substantial costs on service providers or substantial burdens on their systems or networks.” *Id.* § 512(i)(2).

86. *Honor Code*, CHEGG, <https://www.chegg.com/en-US/honorcode> (last visited June 12, 2023); *Copyright Protection at Course Hero*, COURSE HERO, <https://www.coursehero.com/copyright/#/> (last visited June 12, 2023).

87. See Thomas Lancaster & Codrin Cotarlan, *Contract Cheating by STEM Students Through a File Sharing Website: A COVID-19 Pandemic Perspective*, 17 INT’L J. EDUC. INTEGRITY 1, 14 (2021) (“There is little evidence that account termination has happened.”).

88. For a discussion of what constitutes reasonable implementation of a policy to terminate repeat infringers, see *Perfect 10, Inc. v. CCBill L.L.C.*, 488 F.3d 1102, 1110–11 (9th Cir. 2007).

89. With respect to the first safe harbor of transitory communications, the service provider is acting as a passive conduit of material, and the material must not be stored any longer than is necessary to transmit it to the recipient. 17 U.S.C. § 512(a). This is not true of the homework help sites, which maintain the material on their website. For the second safe harbor, system caching, the

service provider must satisfy several elements. First, the service provider must not have actual knowledge that the material is infringing⁹⁰ or be aware of facts or circumstances from which activity is apparent (sometimes referred to as “red flag knowledge”).⁹¹ Second, upon obtaining knowledge that the material is infringing, the service provider must act expeditiously to remove or disable access to the material.⁹² Third, in a case in which the service provider has the right and ability to control the infringing activity, the service provider must not receive a financial benefit directly attributable to the infringing activity.⁹³ Lastly, the service provider must have a designated agent available to the public to receive notifications of claimed infringement.⁹⁴

a) Knowledge of Infringement

As to the first element, it is fair to say that in most instances it is likely that the homework help sites would not have actual knowledge of whether the materials being posted by users were infringing. The homework help sites generally would not know whether the material was original to the student, in the public domain, or whether the student had permission to post it. This argument is bolstered by the fact that the Terms of Use for sites such as Chegg and Course Hero provide that the users should only post material original to them or that which they have permission to use.⁹⁵

The red flag knowledge test is somewhat more lenient but nevertheless sets a high bar.⁹⁶ For example, in *UMG Recordings, Inc. v. Shelter Capital*

service provider may only remove or disable access to the material if the material is first removed or disabled from the originating site, or a court order has been entered requiring removal or disablement. *Id.* § 512(b). Typically, the homework help sites retain the discretion to remove user posted materials. Lastly, information location tools allow the service provider to refer or link users to other online locations, some of which may contain infringing material. *Id.* § 512(d). While the homework help sites could arguably provide links to other online sites, the primary focus of this article is on material that is directly posted to the sites.

90. *Id.* § 512(c)(1)(A)(i).

91. *Id.* § 512(c)(1)(A)(ii). The difference between actual knowledge and red flag knowledge is that actual knowledge is a subjective test while red flag knowledge is an objective one. *See Mavrix Photographs, L.L.C. v. LiveJournal, Inc.*, 873 F.3d 1045, 1057 (9th Cir. 2017); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012).

92. 17 U.S.C. § 512(c)(1)(A)(iii).

93. *Id.* § 512(c)(1)(B).

94. *Id.* § 512(c)(2).

95. For example, Chegg's Copyright Policy provides: “Chegg respects the intellectual property rights of others and we expect users of our websites and services to do the same.” *Copyright Policy*, CHEGG, <https://www.chegg.com/en-US/copyright> (last visited June 12, 2023). Similarly, Course Hero provides: “You are prohibited from uploading or submitting copyright infringing materials (including without limitation copies made without the consent of the copyright owner of testing materials, textbooks, instructor’s solution manuals, test banks, lecture notes, slide presentations, or related copyrighted works, in whole or in part).” *Course Hero Terms of Use*, COURSE HERO, <https://www.coursehero.com/terms-of-use/> (last visited June 12, 2023).

96. *See* Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 255-57 (2009); *Mavrix Photographs*, 873 F.3d at 1057-58 (red flag knowledge requires that infringement must be immediately apparent to a nonexpert).

Partners, L.L.C.,⁹⁷ the Ninth Circuit Court of Appeals held that the fact that infringing material could be on Defendant's website and the presence of news articles reporting on the abundance of copyrighted material on the site was insufficient to constitute red flag knowledge.⁹⁸ Similarly, *Perfect 10, Inc. v. CCBill L.L.C.*,⁹⁹ held that a website's use of titles indicating that the material on the website was "illegal" or "stolen" did not constitute red flag knowledge.¹⁰⁰ Furthermore, service providers are not required to affirmatively police their sites for infringers.¹⁰¹ In *Viacom International, Inc. v. YouTube, Inc.*,¹⁰² the Second Circuit Court of Appeals applied the willful blindness doctrine to the DMCA.¹⁰³ A party is "willfully blind" or engages in "conscious avoidance" when the party "[w]as aware of a high probability of the fact in dispute and consciously avoided confirming that fact."¹⁰⁴ Similar concepts of willful blindness have been applied to cases of patent infringement and trademark infringement.¹⁰⁵

Whether the homework help sites have been willfully blind to students' posting of infringing material would be a factual inquiry. Publicized reports of cheating scandals where students have used the sites to obtain answers to exam questions,¹⁰⁶ survey results showing a significantly high percentage of students using the sites to cheat,¹⁰⁷ and the significant increase in subscribers and posting of questions during the pandemic¹⁰⁸ would probably be insufficient to constitute willful blindness under the current law. However, documents and information internal to these companies may be revealing. For example, how many DMCA

97. 718 F.3d 1006 (9th Cir. 2013).

98. *Id.* at 1022–24.

99. 488 F.3d 1102 (9th Cir. 2007).

100. *Id.* at 1114.

101. See *UMG Recordings, Inc.*, 718 F.3d at 1023; *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 35 (2d Cir. 2012); *Perfect 10, Inc.*, 488 F.3d at 1111.

102. 676 F.3d 19 (2d Cir. 2012).

103. *Id.* at 35 ("Accordingly, we hold that the willful blindness doctrine may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement under the DMCA.").

104. *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003) (quoting *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993)).

105. See *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011) ("While the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on two basic requirements: (1) The defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact."); *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 109 (2d Cir. 2010) ("A service provider is not . . . permitted willful blindness. When it has reason to suspect that users of its service are infringing a protected mark, it may not shield itself from learning of the particular infringing transactions by looking the other way.").

106. See *supra* notes 14–18.

107. Forbes interviewed fifty-two students who use Chegg Study; all but four of them admitted that they use the site to cheat. See Adams, *supra* note 4.

108. See Lancaster & Cotarlan, *supra* note 87, at 8 (nearly a 200% jump in questions posted to Chegg during April to August 2020); Adams, *supra* note 4 (Chegg subscriptions and revenues spiked during the third quarter of 2020).

take-down notices have the sites received?¹⁰⁹ In *Viacom International, Inc. v. YouTube, Inc.*, the court pointed to surveys conducted by YouTube employees, as well as internal communications, reports, and emails, as indications that YouTube may have had sufficient knowledge (or willful blindness to that knowledge) that significant infringing content had been posted to its site.¹¹⁰

b) Expeditious Removal of Infringing Material

The second element of the safe harbor is likely satisfied. Both Chegg and Course Hero have a designated DMCA agent, a procedure for submitting a DMCA take-down notice, and appear to promptly remove material from their sites once such a notice has been received.¹¹¹

c) Receipt of a Financial Benefit Directly Attributable to Infringing Activity when the Service Provider Has the Right and Ability to Control that Activity

The third element provides that when the service provider has the right and ability to control the infringing activity, the service provider must “not receive a financial benefit directly attributable to the infringing activity.”¹¹² The two essential questions here are: (1) what is the “right and ability to control” the infringing activity; and (2) what is a financial benefit “directly attributable” to the activity?

1. Right and Ability to Control the Infringing Activity

The courts are in agreement that the “right and ability to control” involves something more than the ability to remove or block access to materials posted on a service provider’s website.¹¹³ In *Columbia Pictures Industries, Inc. v.*

109. In December 2021, five major textbook publishers sued e-commerce hub Shopify, alleging that since 2017, Shopify had received thousands of take-down notices alleging infringement of the publishers’ textbooks, and that Shopify was not doing enough to terminate repeat infringers. See Suzanne Smalley, *Major Publishers Sue Shopify, Alleging Copyright Violations*, INSIDE HIGHER ED (Dec. 1, 2021), <https://www.insidehighered.com/news/2021/12/02/shopify-sued-publishers-alleging-copyright-violations>. The parties confidentially settled that lawsuit in October 2022. Blake Brittain, *Shopify Settles Textbook Publishers’ Lawsuit Over Alleged Piracy*, REUTERS (Oct. 4, 2022, 4:45 PM), <https://www.reuters.com/legal/litigation/shopify-settles-textbook-publishers-lawsuit-over-alleged-piracy-2022-10-04/>.

110. 676 F.3d 19, 32-33 (2d Cir. 2012).

111. See *Copyright Policy*, *supra* note 95.; *Copyright Protection at Course Hero*, *supra* note 86.

112. 17 U.S.C. § 512(c)(1)(B).

113. See, e.g., *Mavrix Photographs, LLC v. LiveJournal, Inc.*, 873 F.3d 1045, 1058 (9th Cir. 2017) (“‘Right and ability to control’ involves ‘something more than the ability to remove or block access to materials posted on a service provider’s website.’” (quoting *UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1030 (9th Cir. 2013)); *UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1027 (9th Cir. 2013) (ability to remove materials posted by third parties does not equal ability to control); *Viacom Int’l, Inc.*, 676 F.3d at 38; Lee, *supra* note 96, at

Fung,¹¹⁴ the court held that the right and ability to control test was met when the service provider exerted substantial influence on the activities of users.¹¹⁵ In that case, Fung had the ability to locate infringing material and terminate the user's access.¹¹⁶ Additionally, Fung personally assisted users in locating infringing files.¹¹⁷ Similarly, in *Perfect 10, Inc. v. Cybernet Ventures, Inc.*,¹¹⁸ the defendant provided detailed instructions to its users regarding layout, appearance, and content, as well as monitored images posted by users and forbade the posting of certain images.¹¹⁹ In both *Fung* and *Cybernet*, then, the "something more" arose from the service providers' activities beyond passively storing user content on their websites, and involved the service providers' active assistance to their infringing users.¹²⁰

In the case of homework help sites, providing active assistance to their users is at the heart of their business. The primary reason that users post questions to the homework help sites is to receive help from the service providers' "experts" and "tutors" in preparing answers. The homework help sites therefore actively engage with their users based on the content posted by them. Additionally, pursuant to Chegg's terms of use, a user that posts material on Chegg's website grants to Chegg a nonexclusive, worldwide, perpetual, unlimited, irrevocable, royalty-free, fully sublicensable, and transferable right to exercise any and all copyright rights in the content, including the right to make derivative works.¹²¹ The user also authorizes Chegg to publish the posted material in searchable form.¹²² Course Hero's terms of use similarly provide that the user grants Course Hero a nonexclusive license in the posted material, including the right to publicly translate, modify, store, edit, display, perform, reproduce, and distribute the material for the purpose of making the material accessible to all Course Hero users and providing the services necessary to do so, as well as all other rights necessary to use and exercise all rights in the material in connection with the services or otherwise in connection with Course Hero business for any purpose.¹²³

With respect to at least these two homework help sites, then, the service provider actively assists the users by providing answers to the posted material, as well as receives a nonexclusive license to exercise all copyright rights in the

247–48 (an ISP's ability to remove materials posted by third parties does not satisfy the right and ability to control prong).

114. 710 F.3d 1020 (9th Cir. 2013).

115. *Id.* at 1045.

116. *Id.* at 1046.

117. *Id.*

118. 213 F.Supp.2d 1146 (C.D. Cal. 2002).

119. *Id.* at 1173.

120. *Viacom International, Inc.* rejects the notion that the service provider must be aware that the user content is infringing before it can be deemed to have the right and ability to control the material. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 36 (2d Cir. 2012).

121. *See Terms of Use*, CHEGG (June 29, 2021), <https://www.chegg.com/en-US/terms-of-use/>.

122. *Id.*

123. *Terms of Use*, COURSE HERO (Feb. 16, 2022), <https://www.coursehero.com/terms-of-use/>.

content. This goes far beyond having the ability to block or remove infringing material, and likely satisfies the “something more” requirement under the case law.

2. *Financial Benefit Directly Attributable to the Infringing Activity*

If the service provider has the right and ability to control the infringing activity, to receive safe harbor protection, it must not receive a financial benefit directly attributable to that activity. “In determining whether the financial benefit criterion is satisfied, courts should take a common-sense, fact-based approach, not a formalistic one.”¹²⁴ The receipt of a one-time set-up fee and flat, periodic payments from a person engaging in infringing activities is insufficient to constitute a direct financial benefit.¹²⁵ A financial benefit directly attributable to the infringing activity has been held to exist where there is a causal relationship between the infringing activity and any financial benefit a defendant reaps, regardless of how substantial the benefit is in proportion to the defendant’s overall profits.¹²⁶ Where a service provider obtains revenues from subscribers, the relevant inquiry is whether the infringing activity constitutes a draw for subscribers, not just an added benefit.¹²⁷ Thus, in *Fung*, the court held that the connection between the infringing activity and Fung’s income stream derived from advertising revenues was sufficiently direct to meet the financial benefit prong.¹²⁸

Chegg and Course Hero both sell subscriptions in order for the users to be able to access help from their “experts” and “tutors” in answering homework questions. The number of users flocking to these subscription services skyrocketed during the peak of remote learning.¹²⁹ Revenues from these subscriptions likewise soared.¹³⁰ Conversely, when students gradually returned to campus, subscriptions, revenues, and share value declined significantly.¹³¹ It

124. S. Rep. No. 105-190, at 44 (1998).

125. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) (citing H.R. Rep. 105-551(II), at 54 (1998)).

126. *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1044 (9th Cir. 2013).

127. *Id.*; see also *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004) (no evidence that indicated that AOL customers either subscribed because of the available infringing material or cancelled subscriptions because it was no longer available).

128. *Fung*, 710 F.3d at 1045 (advertising revenue was dependent on number of visitors to the site); cf. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263 (admission fees, concession stand sales, and parking fees from customers wanting to buy counterfeit recordings sufficiently alleged direct financial benefit for purposes of vicarious liability analysis).

129. See Hobbs, *supra* note 13 (subscribers to Chegg increased by 67% during the pandemic; subscriptions to another homework help site, Brainly.com, grew from 200 million to 350 million); Redden, *supra* note 37. Adams, *supra* note 4,

130. See Adams, *supra* note 4 (Chegg’s nine-month revenue through September 2020 surged 54% to \$440 million and share value was up by 345%); Redden, *supra* note 37 (Chegg’s net revenues increased by about 57% from fiscal year 2019 to fiscal year 2020).

131. See Redden, *supra* note 37 (Chegg subscribers fell from 4.9 million in the second quarter of 2021 to 4.4 million in the third quarter; share price dropped nearly 50% after Chegg announced its decline in third quarter revenue).

is easy to conclude, given these trends, that sites like Chegg and Course Hero financially benefit when the number of subscribers increases, and the number of subscribers increase when they wish to take advantage of homework/test assistance by posting instructors' questions to the sites, i.e., engage in infringing activity.¹³²

In sum, homework help sites may face potential liability resulting from students posting test questions original to an instructor on three potential grounds that disqualify them from safe harbor protection under the DMCA: (1) the sites have not reasonably implemented a policy to terminate repeat infringers; (2) the sites have been willfully blind to knowledge of infringement; and (3) the sites have the right and ability to control the infringing activity and derive a financial benefit directly attributable to the infringing activity. Of these three grounds, the last is arguably the strongest; the first two would turn on information internal to the companies that would be subject to discovery.

3. Providing Answers to the Copyrighted Exam and Homework Questions Arguably Violates the Authors' Exclusive Right to Prepare Derivative Works

Even if the homework help sites can obtain protection under DMCA for the student's original posting of the exam and homework questions, there is an additional argument that the sites nevertheless violate an instructor's copyright when their "experts" post answers to those questions. Those answers are arguably derivative works, which the author has the exclusive right to create.¹³³ In order to be liable for infringing the right of adaptation (by creating a derivative work), the defendant must have integrated copyrightable elements from the preexisting work or physically altered the work without the permission of the copyright owner and created a new work for a different market.¹³⁴ Here,

132. As noted earlier, of the fifty-two students interviewed by *Forbes* who subscribed to Chegg Study, more than 92% of them admitted that they used the site to cheat. See Adams, *supra* note 4. The use of the word "cheegging" has become synonymous with students using a homework help site to copy an answer rather than doing the work themselves. See *id.*; Todd Tiaht, *When Students Cheat: The Demise of Academic Integrity Threatens Us All*, REALCAREEDUCATION (May 14, 2021), https://www.realcleareducation.com/articles/2021/05/14/the_demise_of_academic_integrity_threatens_us_all_110577.html; Jeffrey R. Young, *More Students Are Using Chegg to Cheat. Is the Company Doing Enough to Stop It?*, EDSURGE (Feb. 23, 2021), <https://www.edsurge.com/news/2021-02-23-more-students-are-using-chegg-to-cheat-is-the-company-doing-enough-to-stop-it>.

133. For the definition of a "derivative work," see *supra* note 62.

134. See *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 967 (9th Cir. 1992); *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718, 722 (9th Cir. 1984) (tapes of the Lone Ranger program were derivative works of copyrighted scripts; "the protection of derivative rights extends beyond mere protection against unauthorized copying to include the right to 'make other versions of, perform or exhibit the work.'"); Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 217 (1983) (the right to prepare derivative works based upon a copyrighted work begins at "that point at which the contribution of independent expression to an existing work effectively creates a new work for a different market;")

the homework help sites' "experts" prepare answers based on the protected test questions. In doing so, the experts incorporate protected elements of the original test question and add independent expression in the form of their answers. The experts have thereby created a work that will serve a different market, i.e., students looking for answers to the test questions. Similarly, generative artificial intelligence companies that provide technology that produces answers to test or essay questions have, for the same reasons, arguably created an infringing derivative work.

The Copyright Act itself recognizes, in its definition of a work made for hire, that answers to test questions may be protected by copyright.¹³⁵ Additionally, two courts have expressly held that the publication of answers to copyrighted exam questions constituted copyright infringement.¹³⁶ This is not to say that every test question or every test answer is entitled to copyright protection. For example, if a test question consists of "2 + 2 = ____," neither the question nor the answer would typically invoke copyright issues.¹³⁷ However, where the test or essay question contains original expression, an answer which copies or paraphrases that expression and then adds additional independent expression would.

It is important to note that the liability of a party for creating an infringing derivative work in the form of an answer to a protected question would be on a theory of direct copyright infringement. It is the company's direct involvement

motion pictures, translations, and comic strips based on a copyrighted novel will infringe derivative rights because they add new expressive elements and serve different markets).

135. 17 U.S.C. § 101 ("A 'work made for hire' is— . . . (2) a work specially ordered or commissioned for use as a contribution to a collective work . . . as an instructional text, as a test, as answer material for a test . . .") (emphasis added).

136. *Educ. Testing Servs. v. Simon*, 95 F. Supp. 2d 1081, 1089 (C.D. Cal. 1999) ("Defendants have further violated ETS' right to create derivative works by incorporating the copied questions into a new work . . . which add, among other things, suggested answers to the questions."); *Addison-Wesley Pub. Co. v. Brown*, 223 F. Supp. 219 (E.D.N.Y. 1963). *Addison-Wesley* predated the U.S. Supreme Court's landmark decision in *Feist Publ'ns v. Rural Tel. Servs., Inc.*, 499 U.S. 340 (1991), which held that, to be protectible under copyright, information must have a minimum amount of original creativity. *Feist* held that lists of names, towns, and telephone numbers in a telephone directory did not possess sufficient originality to be entitled to copyright protection, noting that the Copyright Act rewards originality, not the "sweat of the brow." While *Addison-Wesley* did contain some "sweat of the brow" language, its holding was clearly based on the court's finding that the defendant had copied from the author's original work, college physics textbooks, when it published a manual of solutions to the textbook problems. See Michael K. Erikson, Comment, *Emphasizing the Copy in Copyright: Why Noncopying Alterations Do Not Prepare Infringing Derivative Works*, 2005 BYU L. REV. 1261, 1276 (*Addison-Wesley's* holding rested on a finding that the defendant had copied from the plaintiff).

137. However, if uncopyrightable facts are selected, coordinated, or arranged in an original way, that compilation could nevertheless be copyrightable. *Feist*, 499 U.S. at 348. See *Faulkner Press, L.L.C. v. Class Notes, L.L.C.*, 756 F. Supp. 2d 1352, 1357 (N.D. Fla. 2010) (holding that film study questions and practice questions qualified for copyright protection: "With regard to the practice questions, again Dr. Moulton selected facts from other materials in his electronic textbooks to create the practice questions. The selection was not mechanical or routine. Some originality was involved in selecting the facts and thus the practice questions qualify for copyright protection.").

in the creation of the infringing work that sets it apart from other cases holding that companies that sell equipment that can be used by others to commit copyright infringement are not liable when a third party uses that equipment to infringe, at least when the product is capable of substantial non-infringing uses. Thus, in the landmark case of *Sony Corp. of Amer. v. Universal City Studios, Inc.*,¹³⁸ the U.S. Supreme Court held that the sale of “Betamax” video tape recorders did not constitute contributory copyright infringement since the product was widely used for legitimate purposes or, at least, was capable of substantial non-infringing uses. In *Sony*, the defendant simply sold the video tape recorders to consumers, who then may or may not have used the recorders to infringe television programming.¹³⁹

Here, in contrast, neither the homework help sites nor the generative artificial intelligence companies are selling a product that a third party then uses to infringe (or not); it is the companies themselves that are creating the infringing product in the form of an “expert” or AI-generated answer. It is this infringing conduct that creates direct liability on the part of the companies.¹⁴⁰ There is also potential vicarious liability, since the companies have the ability to control and supervise what their experts or technology does, and profits from their use.¹⁴¹ Lastly, it would be difficult to argue that the creation of an answer to a protected exam question is a fair use.¹⁴²

B. *The Homework Help Sites May Be Violating State Education Codes*

Seventeen states have laws that generally ban the practice of preparing or causing to be prepared, term papers, theses, dissertations, or other written material for a fee or other compensation if the party knew, or reasonably should

138. 464 U.S. 417 (1984).

139. *Sony* also held that private use of the Betamax was a fair use because, among other things, there was no proof that the commercial value of the plaintiffs’ copyright in their television programming was impaired by private time shifting. *Id.* at 454–55.

140. *Sony* expressly recognized the difference between providing the means to infringe and participating in the infringing activity itself. *Id.* at 436 (“The producer in *Kalem* did not merely provide the ‘means’ to accomplish an infringing activity; the producer supplied the work itself, albeit in a new medium of expression.”). See also *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004) (“But to establish *direct* liability . . . something more must be shown than mere ownership of a machine used by others to make illegal copies. There must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner.”).

141. See *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

142. The use is commercial, may incorporate most or all of the protected question, and affects the market for the protected work, either by minimizing the value of the test questions because the answers are made available or by impacting the author’s right to prepare its own manual of solutions. See 17 U.S.C. § 107; see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

have known, that the material would be submitted by another person for academic credit.¹⁴³ For example, the California Education Code provides:

No person shall prepare, offer to prepare, cause to be prepared, sell, or otherwise distribute any term paper, thesis, dissertation, or other written material for another person, for a fee or other compensation, with the knowledge, or under circumstances in which he should reasonably have known, that such term paper, thesis, dissertation, or other written material is to be submitted by any other person for academic credit at any public or private college, university, or other institution of higher learning in this state.¹⁴⁴

All seventeen states cover term papers, theses, and dissertations that are to be submitted for academic credit.¹⁴⁵ Some use broader language such as “other academic task,”¹⁴⁶ “any . . . other assignment,”¹⁴⁷ “other written assignment,”¹⁴⁸ and “material submitted . . . to satisfy an academic requirement.”¹⁴⁹

Additionally, Colorado specifically prohibits assisting a student in taking an online exam:

A person or entity shall not prepare, sell, or offer to sell to another person a document or service that provides answers for, or completes on behalf of a student, an online exam that is administered pursuant to a course of study at any institution of higher education.¹⁵⁰

Maine, Massachusetts, and North Carolina also prohibit taking an exam for another person.¹⁵¹

Most of the statutes impose a knowledge requirement that the offender either knew or reasonably should have known that the material would be

143. These laws were originally passed to combat student use of Internet sites to plagiarize term papers. See Darby Dickerson, *Facilitated Plagiarism: The Saga of Term-Paper Mills and the Failure of Legislation and Litigation to Control Them*, 52 VILL. L. REV. 21, 44 (2007).

144. CAL. EDUC. CODE § 66400 (West 1976).

145. *Id.*; COLO. REV. STAT. § 23-4-101 (2023); CONN. GEN. STAT. § 53-392b (1973); FLA. STAT. § 877.17 (2023); 110 ILL. COMP. STAT. 5/1 (1982); ME. STAT. tit. 17-A, § 705 (2023); MD. CODE ANN., EDUC. § 26-201 (West 2006); MASS. GEN. LAWS ch. 271, § 50 (1973); NEV. REV. STAT. § 207.320 (1973); N.J. STAT. ANN. § 18A:2-3 (West 1999); N.Y. EDUC. LAW § 213-b (McKinney 1981); N.C. GEN. STAT. § 14-118.2 (1994); OR. REV. STAT. § 165.114 (1999); 18 PA. CONS. STAT. § 7324 (1973); TEX. PENAL CODE ANN. § 32.50 (West 1999); VA. CODE ANN. § 18.2-505 (1975); WASH. REV. CODE § 28B.10.580 (1981).

146. See, e.g., COLO. REV. STAT. § 23-4-102 (2023).

147. See, e.g., FLA. STAT. § 877.17 (2023).

148. See, e.g., MD. CODE ANN., EDUC. § 26-201 (West 2006); N.J. STAT. ANN. § 18A-2-3 (West 1999); N.Y. EDUC. LAW § 213-b (McKinney 1981); 18 PA. CONS. STAT. § 7324 (1973).

149. See, e.g., TEX. PENAL CODE ANN. § 32.50 (West 1999).

150. COLO. REV. STAT. § 23-4-103(1.5) (2023).

151. ME. STAT. tit. 17-A, § 705(2) (2023); MASS. GEN. LAWS ch. 271, § 50 (1973); N.C. GEN. STAT. § 14-118.2 (1994).

submitted for academic credit. Maryland and Nevada require actual knowledge.¹⁵² North Carolina does not have a knowledge requirement.¹⁵³

The remedies for a violation of these state statutes include civil penalties (fines), injunctions, and, in some states, imprisonment.¹⁵⁴ State laws vary on who may seek to enforce the prohibitions. California broadly provides that an action for an injunction may be brought in the name of the people of the State of California upon their own complaint or upon the complaint of any person, a public or private college, university, or other institute of higher education “acting for the interest of itself, its students, or the general public.”¹⁵⁵ Texas, on the other hand, permits only criminal prosecution by the state.¹⁵⁶

There are only a handful of published cases in which some of these state statutes were enforced.¹⁵⁷ In *State v. Saksniit*,¹⁵⁸ the New York Attorney General brought an action seeking to have the corporate defendant dissolved and all defendants enjoined from selling term papers and research materials to students. The trial court granted the Attorney General’s motion for a preliminary injunction and the appointment of a receiver, finding that the defendants were in the business of selling term papers to students and knowingly aiding and abetting them in obtaining fraudulent diplomas or degrees.¹⁵⁹ In so ruling, the court rejected the defendants’ contention that they did not know they were encouraging fraud, relying on various disclaimers such as “[w]e don’t condone plagiarism” and “[t]his material is intended to be used for research and reference purposes only.”¹⁶⁰ The court noted that the students’ instructions to the defendants, as well as the defendants’ own advertising, made clear that the defendants knew that the students were intending to submit the work for academic credit.¹⁶¹

152. MD. CODE ANN., EDUC. § 26-201 (West 2006); NEV. REV. STAT. § 207.320 (1973) (intending that the writing will be submitted for academic credit).

153. N.C. GEN. STAT. § 14-118.2 (1994).

154. California, Colorado, Illinois, New Jersey, and Washington impose civil penalties, including the issuance of an injunction, for violation of their laws. Connecticut, Florida, Maine, Maryland, Massachusetts, Nevada, New York, North Carolina, Oregon, Pennsylvania, Texas, and Virginia provide that a violation of their law is a criminal offense. For a more detailed discussion regarding the state educational integrity laws, see Dickerson, *supra* note 143.

155. CAL. EDUC. CODE § 66403 (West 1976).

156. TEX. PENAL CODE ANN. § 32.50 (West 1999). Because the majority of the states with academic integrity laws provide that a violation is a criminal offense, those statutes similarly can only be enforced by the state.

157. For an in-depth discussion of the paucity of lawsuits seeking to enforce these statutes, see Dickerson, *supra* note 143, at 51–58.

158. 332 N.Y.S.2d 343 (N.Y. 1972).

159. *Id.* at 349.

160. *Id.* at 348.

161. *Id.* at 346–48. Another trial court reached a similar conclusion in *People v. Magee*, 423 N.Y.S.2d 417 (N.Y. 1979). In *Magee*, the defendant required the paper buyers to sign a statement that they would not plagiarize the purchased product. The court noted that “[t]his procedure is patently tongue-in-cheek, and executed with an obvious wink.” *Id.* at 420.

Similarly, it is arguable that homework help sites like Chegg and Course Hero knew or reasonably should have known that the answers prepared by their experts were being submitted by the users for academic credit. Citron Research captured two screenshots of Chegg experts trying to help students avoid being caught plagiarizing through the academic integrity software Turnitin. In response to one subscriber's question about whether the Chegg answers would be shown in Turnitin, the expert responded: "[S]ince the answers are not readily visible on the internet, [T]urnitin won't be able to detect it . . . you should be good to use answers from [C]hegg . . . [T]urnitin will most likely not find it."¹⁶² In response to a similar question from a different user, another expert responded: "Yeah, anything that is present on the Internet can be detected by Turnitin. In order to rescue from Turnitin, you need to modify the sentences, frame the sentence in your own words then there will be less chance of detecting plagerised [sic] material."¹⁶³

In Appendix A, additional screenshots are attached where the Chegg user posted questions and explicitly stated that they were seeking help on exams: "please help on exam," "help with exam," "need URGENT help with EXAM PROBLEM," "exam help," and "exam help 2." While Chegg and Course Hero both have academic integrity disclaimers on their websites, in light of this type of express notification by users that they are seeking help with an active exam or exploring how to avoid plagiarism detection, coupled with the published studies showing how many users are resorting to these homework help sites to cheat, it is possible that a court would also deem these site's academic integrity disclaimers to be delivered "tongue-in-cheek" and with "an obvious wink."¹⁶⁴

162. See Citron Research, *Chegg: The Poster Child for Institutionalized Academic Cheating* (2019), <https://www.berkeleycitycollege.edu/senate/files/2019/05/The-Poster-Child-for-Institutionalized-Academic-Cheating.pdf>.

163. *Id.*

164. Chegg's Honor Code states: "[Our services] are expressly not intended to be used for cheating or fraud—like asking for answers to an active test or exam, or copying answers found online and submitting them as one's own. These actions defeat the purpose of learning and are not fair to anyone." See Chegg Honor Code, CHEGG, <https://www.chegg.com/en-US/honorcode> (last visited June 12, 2023). Course Hero similarly instructs its users not to copy answers and submit them as the user's own. Course Hero Honor Code, COURSE HERO, <https://www.coursehero.com/honor-code/> (last visited June 12, 2023). While Chegg used to cooperate with honor code investigations by providing educational institutions with the names of students and the dates and times they had visited certain questions and solutions, Chegg updated its policy on August 8, 2022, and will now only provide date and time stamps of when questions and solutions are posted. See Taylor Swaak, *Some Students Use Chegg to Cheat. The Site Has Stopped Helping Colleges Catch Them*, CHRONICAL HIGHER EDUC. (Sept. 9, 2022), https://www.chronicle.com/article/some-students-use-chegg-to-cheat-the-site-has-stopped-helping-colleges-catch-them?cid=gen_sign_in. Chegg has now joined its competitors in requiring institutions to obtain subpoenas to discover the names of students who have used the site to cheat. *Id.*

C. The Homework Help Sites May Be Violating State Unfair Competition Laws

Two California district courts have held that, in addition to violating copyright laws, replicating test questions and publishing answers to those questions also constituted a violation of California's unfair competition laws.¹⁶⁵ The courts noted that Section 17200 of the California Business and Professions Code protects the public from unfair competition, which includes business practices that are "unlawful," "unfair," or "fraudulent."¹⁶⁶ These terms have been broadly construed. "Unfair" means any practice whose harm to the victim outweighs the benefit.¹⁶⁷ "Fraudulent" does not refer to the common law tort of fraud but only requires a showing that members of the public "are likely to be deceived."¹⁶⁸ California's unfair competition law may be enforced by both private parties and the state.¹⁶⁹

It is easy to argue that when students submit plagiarized work for academic credit, it is both unfair and deceitful. *In re Lamberis*¹⁷⁰ involved an Illinois attorney who plagiarized two published works in the thesis that he submitted to obtain his LLM degree. In addressing whether the attorney's conduct warranted discipline, the court aptly noted that "[t]he essence of plagiarism is deceit."¹⁷¹ Further, the bestowing of academic credit, and perhaps a degree, based on plagiarized work is unfair to many parties.¹⁷²

Every state has its own unfair competition law, with varying degrees of strength and effectiveness.¹⁷³ The strongest statutes are those, like California's, with broad prohibitions against unfair and deceitful conduct and which allow private enforcement.¹⁷⁴ Depending on the specific provisions of state unfair competition laws, this may provide another avenue of recourse against the homework help sites.¹⁷⁵

165. National Conf. of Bar Exam'rs v. Saccuzzo, 2003 WL 21467772 (2003); *Educ. Testing Serv. v. Simon*, 95 F. Supp. 2d 1081 (1999).

166. *Saccuzzo*, 2003 WL 21467772 at *9.

167. See *Saunders v. Superior Ct.*, 27 Cal. App. 4th 832, 839 (1994); *Motors, Inc. v. Times Mirror Co.*, 102 Cal. App. 3d 735, 740 (1980).

168. See *Bank of the West v. Superior Ct.*, 2 Cal. 4th 1254, 1267 (1992).

169. CALIF. BUS. & PROF. CODE §§ 17203-17204.

170. 443 N.E.2d 549 (1982).

171. *Id.* at 552.

172. See *infra* Section III.

173. For an overview of the states' laws on unfair competition, see Carolyn L. Carter, *A Fifty-State Report on Unfair and Deceptive Acts and Practices Statutes*, NAT'L CONSUMER LAW CENTER, INC. (Feb. 2009), https://www.nclc.org/images/pdf/udap/report_50_states.pdf.

174. See Carter, *supra* note 173, at 11-12.

175. It does not appear that recourse is available under the federal unfair competition law, the Lanham Act. In *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003), the Supreme Court held that "false designation of origin" as prohibited by the Lanham Act applies only to tangible goods and not to the creator of copyrightable expression.

D. The Homework Help Sites May Be Violating Federal Wire Fraud Laws

The indicted Varsity Blues parents were each charged with, among other things, violation of the federal wire fraud statute.¹⁷⁶ The elements of wire fraud directly parallel those of the mail fraud statute but require the use of an interstate telephone call or electronic communication made in furtherance of the scheme.¹⁷⁷ The mail and wire fraud statutes proscribe the use of any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.¹⁷⁸ To prove mail or wire fraud, the evidence must establish beyond a reasonable doubt: (1) the defendant's knowing and willful participation in a scheme or artifice to defraud; (2) with the specific intent to defraud; and (3) the use of the mails or interstate wire communications in furtherance of the scheme.¹⁷⁹

The government in the Varsity Blues cases argued that admission slots to the various universities involved were "property," such that obtaining an admission slot by means of a fraudulent test score or bribery of an athletic coach was a violation of the mail and wire fraud statutes. The defendants challenged the charges, asserting that an admission slot at a university was not a type of property intended to fall within these statutes.¹⁸⁰

In *United States v. Frost*,¹⁸¹ the Sixth Circuit Court of Appeals held that an unissued university degree is a property right of the university: "Awarding degrees to inept students, or to students who have not earned them, will decrease the value of degrees in general. More specifically, it will hurt the reputation of the school and thereby impair its ability to attract other students willing to pay tuition, as well as its ability to raise money."¹⁸² In *Frost*, the defendants, professors and students, were convicted of mail fraud for their roles in a scheme that allowed the students to submit plagiarized academic work to obtain an advanced degree in exchange for the students securing lucrative government contracts for a company owned by the professors.¹⁸³

Similarly, in *United States v. Barrington*,¹⁸⁴ the defendants were convicted of conspiracy to commit wire fraud when they accessed university computers by installing keylogger software and captured usernames and passwords. The defendants then accessed the university's grading system, changed grades,

176. 18 U.S.C. § 1343.

177. See *United States v. Briscoe*, 65 F.3d 576, 583 (7th Cir. 1995); *United States v. Frey*, 42 F.3d 795, 797 (3d Cir. 1994).

178. 18 U.S.C. §§ 1341, 1343.

179. See *United States v. Hedaithy*, 392 F.3d 580, 590 (3d Cir. 2004); *United States v. Cassiere*, 4 F.3d 1006, 1011 (1st Cir. 1993).

180. Although the first two Varsity Blues defendants to go to trial were convicted on this theory, in May 2023, the First Circuit Court of Appeals reversed the convictions, holding that admission slots were not property for purposes of the wire fraud statute. *United States v. Abdelaziz*, 2023 WL 3335870 (1st Cir. May 10, 2023).

181. 125 F.3d 346 (6th Cir. 1997).

182. *Id.* at 367.

183. *Id.* at 353.

184. 648 F.3d 1178 (11th Cir. 2011).

added credits for courses that had been failed or not taken, and changed the residencies of several nonresident students to qualify them for in-state tuition.¹⁸⁵ The court rejected the defendants' arguments that grades do not constitute property of the university for purposes of the wire fraud statute, holding that changing the grades had deprived the university of tuition.¹⁸⁶

Along the same lines, the defendants' convictions for mail fraud and conspiracy to commit mail fraud were affirmed in *United States v. Hedaithy*.¹⁸⁷ In *Hedaithy*, it was alleged that defendants paid imposters to sit for the Test of English as a Foreign Language ("TOEFL") in order that defendants could obtain an acceptable score and be eligible to live in the United States under a student visa.¹⁸⁸ The defendants contended that the testing service had not been deprived of any property because it had received the testing fee when the imposters sat for the exams. The Court rejected the defendants' argument, holding that the TOEFL exam and the questions on it were the confidential information of the testing service and that confidential information is a species of property.¹⁸⁹ Furthermore, the Court noted that the testing service's property interest extended to the right to choose who had access to that confidential information; by having imposters sit for the exams, the defendants had deprived the testing service of the right to decide how to use its confidential information.¹⁹⁰ Similarly, an instructor's exam questions have value arising from the questions

185. *Id.* at 1184–85.

186. *Id.* at 1192 (by changing failing grades to passing ones, students received unearned credit hours; had their grades not been changed, the students would have had to repeat the class or take equivalent hours which would have generated additional tuition for the university). Subsequent to the *Barrington* decision, the United States Supreme Court, in *Kelly v. United States*, held that in order to support a conviction for wire fraud, the property at issue must be the object of the fraud, not an incidental byproduct of the scheme. *Kelly* involved the infamous "Bridgegate," in which the defendants orchestrated a scheme to create backlog and chaos on the George Washington Bridge to punish the mayor of Ft. Lee, New Jersey for not endorsing New Jersey governor, Chris Christie, in Christie's reelection bid. The Supreme Court held that: (1) a scheme to alter a government's regulatory choice is not one to appropriate government property; and (2) the time and labor costs of the Port Authority which was called on to address the problem were just the implementation costs of the scheme, not its object. 140 S.Ct. 1565, 1572–73 (2020). The convictions in *Barrington* relating to the altering of grades may not withstand *Kelly* since the loss of tuition was an implementation cost of the object of the scheme, which was to change grades. However, the object of the scheme to change the status of nonresident students to in-state was arguably to cost the university out-of-state tuition.

187. 392 F.3d 580 (3d Cir. 2004).

188. *Id.* at 582.

189. *Id.* at 594.

190. *Id.* at 595–96. *Cf.* *Carpenter v. United States*, 484 U.S. 19 (1987) (content of articles in *The Wall Street Journal* before they were published was property for purposes of the mail and wire fraud statutes; property right extends to keeping the information confidential and making exclusive use of the information).

being kept confidential and released only to those people chosen by the instructor.¹⁹¹

Pursuant to the holdings of these cases, students who post exam questions to homework help sites or generative artificial intelligence companies and then submit plagiarized answers for credit deprive the instructors and the educational institutions of several property interests, including the instructors' copyright in the exam questions and their answers, the confidential business information contained in the exam questions, grades, and unissued university degrees. As in *Frost*, when students obtain academic credit by submitting plagiarized material, it decreases the value of the university degree, harms the reputation of the university, and impairs its ability to attract students and raise money.

As for the homework help sites, it seems clear that, when a student posts exam or homework questions to the website, receives an answer prepared by an "expert," and then submits the expert's answer as the student's own work for academic credit, these sites have participated in a scheme to defraud the educational institutions and have used interstate wire communications to do so. Whether the homework help sites (as opposed to the student) could be guilty of wire fraud, however, would turn on the "knowing and willful participation in a scheme or artifice to defraud" and "with a specific intent to defraud" requirements of the statute.

The requisite intent under the wire fraud statutes may be inferred from the totality of the circumstances and need not be proven by direct evidence.¹⁹² Intent to defraud may also be inferred from the *modus operandi* of the scheme.¹⁹³ Additionally, the U.S. Department of Justice suggests that the continued operation of a business once complaint letters have been received regarding fraudulent conduct may be evidence of intent to defraud.¹⁹⁴ Thus, while it would certainly be more difficult than proving intent to defraud on the part of the student, it may be possible to establish the required intent on the part of the homework help sites. Much would depend on the internal records of the companies.

191. The mail fraud statute was similarly applied to four term paper companies that engaged in selling academic papers to students for submission to universities as the work of the students. *See United States v. International Term Papers, Inc.*, 477 F.2d 1277 (1st Cir. 1973).

192. *See United States v. Alston*, 609 F.2d 531, 538 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 918 (1980) (jury could infer intent to defraud from preparation of documents containing material misrepresentations designed to induce extension of credit that would not have been otherwise made); *United States v. Cusino*, 694 F.2d 185, 187 (9th Cir. 1982) (*citing United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979), *cert. denied*, 461 U.S. 932 (1983) (intent can be inferred from statements and conduct)).

193. *See United States v. Reid*, 533 F.2d 1255, 1264 n.34 (D.C. Cir. 1976).

194. The United States Department of Justice Archives, *Proof of Fraudulent Intent*, <https://www.justice.gov/archives/jm/criminal-resource-manual-949-proof-fraudulent-intent> (last visited Jan. 16, 2024).

III. LEGAL ACTION SHOULD BE PURSUED AGAINST HOMEWORK HELP SITES BECAUSE THEY ASSIST IN ERODING ACADEMIC INTEGRITY WHICH THREATENS SOCIETY IN MYRIAD WAYS

Homework help sites will not disappear with the end of the COVID-19 pandemic. Concerns about Chegg being a service that helped students cheat pre-dated the pandemic.¹⁹⁵ Despite that subscribers to Chegg dropped in the third quarter of 2021 when students were mostly returning to face-to-face instruction, overall subscriptions were still up by 17%.¹⁹⁶ Further, online education is here to stay.¹⁹⁷

Most people will agree that helping students cheat is ethically wrong. As noted by the *Saksniit* court: “The business defendants are conducting is morally wrong. It subverts the learning process and encourages intellectual dishonesty and cheating. It is directly opposed to the declared public policy of our State.”¹⁹⁸ The General Assembly of Colorado, when enacting its academic integrity statute similarly declared: “[T]he practice of trafficking in academic materials, commonly known as ghostwriting, serves no legitimate purpose and tends to undermine the academic process to the detriment of students, the academic community, and the public.”¹⁹⁹ Indeed, cheating in academia impacts many parties on many levels in extremely negative ways, including the cheating students themselves, the students who don’t cheat, educational institutions, future employers, and society as a whole.

A. Cheating Harms the Students Who Cheat

The students who cheat, of course, deprive themselves of the opportunity to learn.²⁰⁰ They will graduate without acquiring the skills and knowledge that should accompany the bestowing of their degree.²⁰¹ The students will be unprepared academically and ethically to enter the workforce.²⁰² Further, they

195. See Lindsay McKenzie, *The Wrong Partnership?*, INSIDE HIGHER EDUC. (Mar. 11, 2019), <https://www.insidehighered.com/news/2019/03/12/purdue-professors-criticize-writing-partnership-chegg>.

196. See Redden, *supra* note 37, at 2. As of August 2022, Chegg reported that it had 5.3 million subscribers. See Swaak, *supra* note 164.

197. See Madeline Fitzgerald, *How Online Learning Is Reshaping Higher Education*, U.S. NEWS (Feb. 15, 2022, 10:19 AM), <https://www.usnews.com/news/education-news/articles/2022-02-15/how-online-learning-is-reshaping-higher-education>; Natasha Singer, *Online Schools are Here to Stay, Even After the Pandemic*, N.Y. TIMES (Apr. 14, 2021), <https://www.nytimes.com/2021/04/11/technology/remote-learning-online-school.html>.

198. *State v. Saksniit*, 332 N.Y.S.2d 343, 350 (N.Y. 1972).

199. COLO. REV. STAT. § 23-4-101 (2023).

200. See *Saksniit*, 332 N.Y.S.2d at 349 (“Doing a student’s work for him not only deprives him of the valuable disciplines of the learning process, but tends to destroy his moral fibre by lending credence to the all too prevalent notion that anything, including a college degree, can be bought for a price.”).

201. See Swaak, *supra* note 164, at 4 (“‘We rely on higher education to prepare students to be participants in society’ and to solve problems . . .”).

202. See Tiaht, *supra* note 132.

deprive themselves of the opportunity to learn from their failures.²⁰³ The benefits of promoting, experiencing, and enforcing academic integrity, therefore, include achieving the necessary learning and skill to prepare the students to appropriately perform a specific profession or job, and to develop an ethical perspective which leads to correct decisionmaking.²⁰⁴

B. *Cheating Harms the Students Who Don't Cheat*

Students who cheat not only harm themselves, but they hurt their fellow students as well. Studies show that cheaters get away with their academic dishonesty. One study revealed that 95% of cheaters do not get caught.²⁰⁵ And those cheaters are successful. A Fordham University study revealed that, on average, cheaters have a G.P.A. of 3.41, while non-cheaters have an average G.P.A. of 2.85.²⁰⁶ The unfairness here seems obvious, but is well illustrated by a student referenced in *Saksniit*, who implored the Attorney General to take action to shut down the term paper mills:

I am in competition with many students for entrance into a medical school. Spaces are few and the many students make the competition fierce. Only one student will occupy a seat desired by many, and he will be the student with the best grades.

The situation is tight enough as is, but what chance do I stand if my independent work (term papers) must compete not with those of my peers but with those of professionals—people with Masters and even Doctorates in the areas in which they write? *I am subtly being blackmailed into using their immoral services.*²⁰⁷

The Chapman University professor who sued Course Hero to obtain the identity of the student(s) who posted his exam questions, David Berkovitz,²⁰⁸ explains that finding out the identity of students who may have cheated goes beyond the objective of disciplining them for cheating.²⁰⁹ Because Chapman's business school grades students on a curve, anyone who cheated and received a higher score as a result possibly affected the curve for students who followed the school's honor code and received a lower score.²¹⁰ Additionally, Professor Berkovitz notes that some students are on scholarships that are tied to

203. Amanda Richardson, *Message to Students and Parents: As a CEO, I'm 10x More Interested in Your Failures Than Your Perfection*, LINKEDIN (Mar. 13, 2019), <https://www.linkedin.com/pulse/message-students-parents-ceo-im-10x-more-interested-your-richardson>. Richardson notes that, among other things, failure teaches empathy, perspective, humility, and resilience. *Id.*

204. See Jean Gabriel Guerrero-Dib et al., *Impact of Academic Integrity on Workplace Ethical Behavior*, INT'L J. EDUC. INTEGRITY 1 (2020). Cf. *Saksniit*, 332 N.Y.S.2d. at 349.

205. See Open Education Database (OEDb), *Eight Astonishing Stats on Academic Cheating*, <https://oedb.org/ilibrarian/8-astonishing-stats-on-academic-cheating> (last visited Sept. 24, 2023).

206. *Id.*

207. 332 N.Y.S.2d at 350 (emphasis added).

208. See *supra* notes 45–49 and accompanying text.

209. Peiser, *supra* note 45.

210. *Id.* See also Swaak, *supra* note 164, at 4.

maintaining a minimum G.P.A. If students cheated, it is possible that the students on scholarship could have had their grades lowered enough that they missed the grade-point average cutoff, losing their scholarship and possibly their ability to continue their education at Chapman.²¹¹

C. *Cheating Harms the Educational Institutions Where Cheating Occurs*

As for the educational institutions, their reputation for providing a quality education is directly threatened by the prevalence of cheating. When students obtain academic credit by submitting plagiarized material, it decreases the value of the university degree, harms the reputation of the university, and impairs the university's ability to attract students and raise money.²¹² It further undermines the educational experience, lowers morale, and negatively affects the relationship between students and faculty.²¹³

D. *Cheating Harms Employers Who Hire Students Who Obtained Their Grades and Degrees by Cheating*

Employers are also impacted. Employers rely on educational institutions to graduate students who possess the knowledge and skill to perform the tasks required by their jobs. Instead, they will be hiring employees who not only did not learn the material expected of their degrees but who have learned that it pays to take the easy way out.²¹⁴ Numerous studies have demonstrated that students who engage in academic dishonesty, particularly at the undergraduate level, are more likely to demonstrate inappropriate behaviors during their professional lives.²¹⁵

E. *Cheating Harms Society*

The Enron scandal, Bernie Madoff's pyramid schemes, Martha Stewart's insider trading, Volkswagen illegal defeat devices. The list goes on and on.

The well-known accounting firm Ernst & Young was recently fined \$100 million by the SEC after its employees cheated on, ironically, the CPA ethics exam.²¹⁶ The SEC stated that Ernst & Young made a submission stating that it did not have any "current issues with cheating" when, in fact, the firm had been

211. *Id.*

212. *See* United States v. Frost, 125 F.3d 346, 367 (6th Cir. 1997).

213. *See* Kenneth H. Ryesky, *Part Time Soldiers: Deploying Adjunct Faculty in the War Against Student Plagiarism*, BYU EDUC. L. J. 119, 123 (2007).

214. *See* Swaak, *supra* note 164.

215. *See* Feyisa Mulisa & Asrat Dereb Ebessa, *The Carryover Effects of College Dishonesty on the Professional Workplace Dishonest Behaviors: A Systematic Review*, COGENT EDUC. (June 3, 2021) (surveying numerous studies demonstrating a correlation between cheating in college and workplace dishonesty); *see also* Ryesky, *supra* note 213, at 123.

216. *See* Jordan Valinsky, *Top Accounting Firm Fined \$100 Million After Employees Cheated on CPA Exams*, CNN BUSINESS (June 28, 2022, 10:16 AM), <https://www.cnn.com/2022/06/28/business/ernst-and-young-sec-cheating-fine/index.html>.

informed of potential cheating on the exam.²¹⁷ The fine is the SEC's largest ever imposed on an auditing firm and is nearly double the fine it imposed on Ernst & Young in 2019 based on similar allegations.²¹⁸

In 2021, a well-known professor and expert on honesty and ethics, Dan Ariely, was accused of using falsified data for an oft-cited study on student cheating.²¹⁹ The study had been cited by academics more than 400 times.²²⁰ The authors have since requested that the study be retracted.²²¹ Ariely admitted that the data was fabricated, but denied responsibility, blaming the insurance company that was involved in the study instead.²²²

Instances such as these infect the moral fiber of society. A recent Gallup poll reported a record-high 50% of Americans rate U.S. moral values as "poor."²²³ Another 37% said that they are "only fair;" only 1% thought them "excellent."²²⁴ The outlook for the future seems equally grim: 78% of those polled say morals are getting worse.²²⁵

This is much more than a philosophical issue. There is a direct link between trust in society and economic prosperity. Countless studies establish that countries where businesses, governments, and other institutions have engendered more trust experience stronger economic growth.²²⁶

As can be seen, unchecked student cheating is more than a problem for academia. It is a serious problem for society and should be addressed as such.

217. *Id.*

218. *Id.*

219. See Stephanie M. Lee, *A Famous Honesty Researcher Is Retracting a Study Over Fake Data*, BUZZFEED NEWS (last updated Aug. 25, 2021 1:15 PM), <https://www.buzzfeednews.com/article/stephaniemlee/dan-ariely-honesty-STUDY-retraction>.

220. *Id.*

221. Christian B. Miller, *An Influential Study of Dishonesty Was Dishonest*, FORBES (Aug. 30, 2021, 10:53 AM), <https://www.forbes.com/sites/christianmiller/2021/08/30/an-influential-study-of-dishonesty-was-dishonest/?sh=147b349f2c72>.

222. *Id.*

223. Megan Brenan & Nicole Willcoxon, *Record-High 50% of Americans Rate U.S. Moral Values as 'Poor'*, GALLUP (June 15, 2022), <https://news.gallup.com/poll/393659/record-high-americans-rate-moral-values-poor.aspx> (citations omitted).

224. *Id.* (citations omitted).

225. *Id.*

226. See Ira Kalish et al., *The Link Between Trust and Economic Prosperity*, DELOITTE INSIGHTS (May 20, 2021), <https://www2.deloitte.com/us/en/insights/economy/connecting-trust-and-economic-growth.html> ("Countries where businesses, governments, and other institutions have engendered more trust experience stronger per capita real GDP growth, a standard measure of economic prosperity."); see also Jerry Useem, *The End of Trust. Suspicion Is Undermining the American Economy*, ATLANTIC (Nov. 24, 2021), <https://www.theatlantic.com/magazine/archive/2021/12/trust-recession-economy/620522/> (economic growth is constrained in low-trust societies); see also Paul J. Zak & Stephen Knack, *Trust and Growth*, (Sept. 18, 1998) (unpublished manuscript) (available at <https://ssrn.com/abstract=136961>) (high trust societies exhibit higher rates of investment and growth).

IV. CHANGES IN THE LAW MAY BE NEEDED TO EFFECTIVELY DETER HOMEWORK HELP SITES FROM HELPING STUDENTS CHEAT

Despite the existence of potential legal action against homework help sites, it appears that few legal actions have been brought against them. A handful of lawsuits have successfully shut down a few term-paper mills. There is similarly a paucity of lawsuits against Course Hero and Chegg for their roles in posting test and homework questions and answers.

There are several problems with each of the potential available legal remedies that prevent them from being an effective means of dealing with companies that help students cheat. The strongest claim is likely for copyright infringement since the claim does not require that the homework help sites knew that they posted or created a work that infringed someone's copyright. However, as a practical matter, there are issues as to whether recoverable damages in such a claim would provide any real deterrent to a company to change its practices. Importantly, unless an instructor has registered their original exam and essay questions with the U.S. Copyright Office prior to infringement (something that is probably unlikely), they may not recover statutory damages or attorney's fees.²²⁷ That leaves actual damages and infringer profits. But how much in actual damages has an instructor incurred if a student uses a homework help site to cheat on an exam or an assignment? And how much have homework help sites profited from providing an answer to one student's question?²²⁸

As for claims for violation of state education laws, only seventeen states have such laws and they vary broadly with respect to who may enforce them and the penalties available. States have limited resources, and prosecuting homework help companies when students use them to cheat may not be a top priority. Additionally, there is the added hurdle in most of those seventeen states of proving that the homework help companies knew, or reasonably should have known, that students were using their resources to cheat.

Similar problems of inconsistent scope, remedies, and what party may bring a claim exist with state unfair competition laws. The federal wire fraud statute has an actual knowledge element that may be difficult to prove. There also is no private party enforcement.

Thus, while legal recourse currently exists, it is definitely not ideal and unlikely to provide much of a deterrent for homework help companies to take steps to eliminate or reduce the number of students using their resources to cheat.

227. 17 U.S.C. § 412.

228. An answer provided by generative artificial intelligence poses the additional problem as to how one would prove that material submitted by a student was AI generated. This is because, unlike Course Hero and Chegg, the generative artificial intelligence companies do not post the answers on an easily accessible website.

V. A PROPOSAL FOR A NATIONAL LAW DIRECTLY AIMED AT COMPANIES
THAT HELP STUDENT CHEAT

In April 2022, the U.K. enacted the Skills and Post-16 Education Act.²²⁹ Among other provisions, the Skills Act provides that it is a criminal offense for a person to provide, or arrange for another person to provide, in commercial circumstances, a “relevant service” for a student in relation to a “relevant assignment.”²³⁰ “Relevant service” means a service of completing all or part of an assignment on behalf of a student where an assignment completed in that way could not reasonably be considered to have been completed personally by the student.²³¹ “Relevant assignment” is an assignment that the student is required to complete personally as part of a course that the student is undertaking, or in order to obtain the qualification to which the course leads.²³² A person who provides such services does so in commercial circumstances if the person is acting in the course of business, or the provision of services was arranged by a person acting in the course of business, whether the person’s own business or that of the person’s employer.²³³

Furthermore, the Skills Act places the burden on the defendant to prove that the defendant did not know, and could not with reasonable diligence have known: (1) the student would or might use the provided material in completing all or part of an assignment; (2) that the student was required to personally complete the assignment; and (3) that the provided service was not permitted.²³⁴ The Act specifically provides that a statement in the form of a written standard term of the contract or arrangement that the student would not use the material provided to complete all or part of an assignment, that the student was not required to complete the assignment personally, or that the assistance was permitted is not, of itself, sufficient evidence to prove the defense.²³⁵

229. Skills and Post-16 Education Act (2022) (Eng.) (hereinafter “Skills Act”). Ireland enacted a similar law in 2019. See Katherine Donnelly, *New Laws Aim to Tackle ‘Essay Mills’ Helping Students Cheat*, INDEPENDENT.IE (Nov. 14, 2019, 21:30), <https://www.independent.ie/regional/herald/new-laws-aim-to-tackle-essay-mills-helping-students-cheat/38694073.html>.

230. Skills Act, § 27(1).

231. *Id.* § 26(2).

232. *Id.* § 26(7). Assignment includes an examination, defined as any form of assessment. *Id.* § 30.

233. *Id.* § 26(5).

234. *Id.* § 27(3)–(4).

235. *Id.* § 27(5). This type of academic integrity disclaimer is a common provision found on homework help and essay mill websites. When I asked Chat GPT if it helped students cheat, it responded: “No, I do not help students cheat. As an artificial intelligence language model, my purpose is to assist users in generating human-like text based on the input that I receive. However, it is important to note that using my responses or any other tool to cheat on assignments or exams is not ethical and violates academic integrity. It is important to use my responses or any other tool as a learning aid, and to use them in a way that is consistent with the ethical and academic standards of your educational institution.” Such disclaimers have at times been met with skepticism by the courts. See, e.g., *People v. Magee*, 423 N.Y.S.2d 417, 420 (1979).

While not without its flaws, the Skills Act accomplishes several objectives that would advance the fight against companies that profit by helping students cheat. First, like the state educational integrity laws, it is specifically directed at the act of assisting in student cheating as opposed to other laws that might be argued to apply to such circumstances, such as copyright infringement and wire fraud laws. Second, it provides a uniform, nationwide approach as opposed to patchwork adoption of laws by individual states. Lastly, it expressly recognizes that companies cannot protect themselves from liability by simply creating a term of use that students should observe academic integrity and not use the resource to cheat. (It is unlikely that placing the burden of proof on a defendant to prove lack of knowledge in a criminal proceeding like the Skills Act does would fly in the United States, however.)

In my view, the Skills Act provides a good start, but it could be improved. Providing civil remedies and enforcement by private parties in addition to criminal remedies and government enforcement would improve the possibility that violations of the law would be pursued. The law should also more precisely set forth what types of circumstances could satisfy the reasonable knowledge requirement. Here I suggest that the law could be patterned after product liability law's reasonable foreseeability requirement, that is, whether the use of homework help sites to facilitate student cheating is a foreseeable misuse or, after the fact, if sufficient instances of misuse occur, it then becomes reasonably foreseeable and corrective action must be taken. To this extent, surveys showing the number of students using the homework help sites to cheat, complaint letters documenting student cheating, and newspaper articles highlighting the extent of misuse of the sites, would be relevant to establish the reasonable knowledge requirement. Lastly, the law should provide immunity to companies that take reasonable steps to provide effective detection tools to educational institutions to assist in discovering when students have plagiarized materials submitted for academic credit through the use of their resources.²³⁶

CONCLUSION

Technological advances have many upsides, but one of the downsides has been making it easier for students to cheat. Some companies blatantly advertise that they will help students cheat; others claim to encourage academic integrity, yet students use them to cheat with astonishing frequency. The arrival of generative artificial intelligence technology has raised new concerns about student cheating.

236. One such step could be embedding the homework help sites' product with an invisible watermark to assist in detecting plagiarism. See Keith Collins, *How ChatGPT Could Embed a 'Watermark' in the Text It Generates*, N.Y. TIMES (Feb. 17, 2023), <https://www.nytimes.com/interactive/2023/02/17/business/ai-text-detection.html>; John Kirchenbauer et al., *A Watermark for Large Language Models* (Jan. 27, 2023) (unpublished manuscript) (available at <https://arxiv.org/pdf/2301.10226.pdf>). Another could be working cooperatively with plagiarism-detection services such as Turnitin. Lastly, the homework help sites could delay the posting of answers for a reasonable time to minimize the opportunity for students to receive the answers during a live exam.

This article has examined potential civil and criminal liability under current law for homework help companies when they are used by students to cheat. Potential liability exists for copyright infringement, violation of state academic integrity statutes, violation of state unfair competition laws, and wire fraud. However, none of these current laws provides an effective means of deterring companies from helping students cheat. That is illustrated by the fact that very few lawsuits have been pursued under the current statutory schemes.

As we have seen, unchecked student cheating harms almost everyone, including the students who cheat, students who do not cheat, educational institutions, employers, and society itself through an erosion of trust. As such, it warrants a hard look at what changes we can make to better deter companies from helping students cheat. A national law directly aimed at punishing companies that help students cheat, similar to the law recently adopted in the United Kingdom, would be a good start. It would provide uniformity and signal that companies that help students cheat will not be tolerated. The law could be stronger, however, by providing for civil remedies and private enforcement, by clearly defining what constitutes reasonable knowledge that students are using the companies' resources to cheat, and by providing an incentive for companies to assist educational institutions in detecting student cheating.

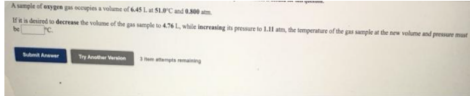
APPENDIX

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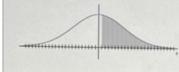
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Question 18

Find the sum of the following series if it exists $\sum_{n=0}^{\infty} \frac{(-1)^n 4^{2n}}{4^n n!}$.

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☐ e^{-64}

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Question

Circuit Analysis with Phasors and Complex Impedances

P₉ Find the steady-state current $i(t)$ for the circuit shown below. 25 points

$v_s(t) = 100 \cos(300t + 30^\circ)$

100Ω

4Ω

$L = 0.3 \text{ H}$

$C = 40 \mu\text{F}$

$i(t) = (0.3)(100)j102 \mu\text{A}$


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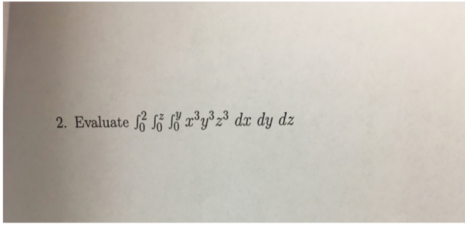
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Question



2. Evaluate $\int_0^2 \int_0^z \int_0^y x^3 y^3 z^3 dx dy dz$

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