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ANOTHER SOCIAL MEDIA CONUNDRUM: IS PRIVACY BEING USED AS A SMOKESCREEN FOR COPYRIGHT INFRINGEMENT?

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It recently came to light that a major publisher of K-12 standardized educational assessments regularly monitors social media during testing periods for public posts that contain secure content from its examinations, and then shares that information with state departments of education that utilize those assessments. Many parents and educators expressed outrage upon learning about the publisher’s web monitoring activities and have referred to it as “spying on kids.” Some parents and educators are now pointing to web monitoring as yet another reason to fight against the use of mandatory standardized assessments in public schools to measure student achievement and evaluate the performance of educators and schools.

Although it is beyond dispute that there can be no invasion of any person’s privacy to view material that is purposefully posted to social media for the entire world to see, this article will not address the many reasons why web monitoring is an appropriate strategy to protect the integrity of the assessment process. Instead, I will address an apparent lack of understanding by many regarding the legality of posting secure exam content on the Internet for the world to see.

Unfortunately, many parents angry about web monitoring have suggested that there are no laws that prohibit students and parents from copying secure exam questions and answers during the administration of standardized assessments and then publicly posting images and descriptions of the content on social media. Indeed, some people have suggested that such conduct is an appropriate form of civil disobedience. In staking out this position, education “activists” have claimed that it is not “against the law” because neither parents nor students are legally bound by any agreement to maintain the confidentiality of the contents of standardized assessments.

Anyone who believes that students or parents can lawfully copy or distribute the secure contents of standardized assessments is sadly mistaken. While it may be true that parents and students do not enter into confidentiality agreements with exam publishers or sponsors, all major assessment publishers obtain registered copyrights for the contents of their exams under United States copyright law. Thus, under United States copyright law, test publishers retain the **exclusive** right to copy and distribute their assessments and the contents thereof, and any person who does so without permission or license is liable for copyright infringement.

There can be no question that taking a photograph of any part of a copyrighted secure exam constitutes copying and that posting such an image on the Internet amounts to distribution, thereby establishing copyright infringement. Moreover, the copyright statute does not limit copyright infringement claims to photographs and verbatim copies of protected exam content. Copying may also be established by demonstrating that the defendant had access to the copyrighted material

and that the material copied and/or distributed was substantially similar to the original. Courts have held for some time that distributing substantially similar exam questions and answers reconstructed from memory constitutes copying. See, e.g., ***National Conference of Bar Examiners v. Multistate Legal Studies, Inc., d/b/a PMBR***, Civ. A. No. 04-03282-JF (E.D. Pa. 2006).

Accordingly, students or parents who post substantially similar recitations of exam content on social media may be liable for direct copyright infringement. In addition, an admission of copying removes altogether the need for the test publisher to prove substantial similarity. Thus, if a parent or student notes the source of the exam content on the social media post, that admission makes it even easier for the publisher to establish copying and infringement.

Courts have also expanded copyright protection to allow copyright infringement claims to be made against any person who intentionally induces, causes or materially contributes to the infringing activity of another. See ***Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.***, 545 U.S. 913 (2005); ***Gershwin Publishing Corp. v. Columbia Artists Management, Inc.***, 443 F.2d 1159 (2d Cir. 1971). In order to be held liable for **contributory copyright infringement**, the person must have had knowledge of the infringing conduct and either materially contributed to or induced the infringement. Thus, if parents encouraged and prompted students to copy and post photos of exam content or substantially similar recitations of exam content on social media, or parents themselves posted exam content received from students who took the exam, the parents may be liable for **contributory copyright infringement**.

Finally, some educational activists misguidedly assert that copying and distributing secure exam content is “fair use” and therefore an affirmative defense to copyright infringement under Section 107 of the Copyright Act. This is simply wrong. 17 U.S. Code § 107 provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

Although I could write another several pages on why copying and distributing secure exam content is not a fair use, I will do my best to be succinct on this point. Looking at factors two and four above, there can be no question that the nature of the copyrighted work is such that any unlicensed copying or dissemination of the work would completely undermine and invalidate the purpose of creating it in the first place, and thereby utterly destroy its value. Thus, even though factors one and four above could potentially seem to point to the possibility of some limited fair use of secure exam content for purposes of criticism, commentary, news reporting, or educational purposes, the nature of the work and destruction of the value of the work that would be caused by allowing unlicensed copying thereof requires a finding that it does not qualify as fair use. I am not aware that any court has ruled on this precise issue of law. However, any court that squarely addresses fair use as a defense to copying and distributing secure copyrighted exam content is likely to apply the above analysis and decline to allow the defense.

The foregoing basic principles of copyright law establish significant legal protections for the publishers of secure standardized assessments. Educational activists should understand that, no matter how upset they may be about various aspects of testing, it is irresponsible to suggest that people can act with impunity to copy or distribute the secure contents of examinations.