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CAN LAW STUDENTS DISRUPT THE MARKET FOR HIGH-PRICED TEXTBOOKS?

Jane K. Winn [*]

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http://digital.lib.washington.edu/dspace-law/handle/1773.1/1471

ABSTRACT

The Center for Computer-Assisted Legal Instruction (CALI) is a non-profit organization whose mission is to advance legal education through technological innovation and collaboration. With its eLangdell Press project, CALI publishes American law school textbooks in open access, royalty-free form, offering faculty authors compensation equivalent to what most law school textbook authors would earn in royalties from a traditional full-price publisher. I am writing a new sales textbook and "agreements supplement" based on contemporary business practice that I will publish in open access form with CALI's eLangdell Press. Relatively few other American legal academics publish in open access form, however, suggesting that the market for textbooks may be "locked-in" to a principal-agent conflict between students and faculty members. If American law students organized a website showing the textbook costs of all law faculty members at all law schools, they might be able to use a "naming and shaming" strategy to overcome faculty "lock-in" to high-priced textbooks and increase the adoption of open access textbooks.

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[*] Jane K. Winn, Charles I. Stone Professor, University of Washington School of Law. Thanks to Sam Baldwin, John Mayer and Mary Whisner for feedback on earlier drafts.

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INTRODUCTION

For a faculty member, the question of why most law school textbooks cost so much and why "disruptive" publishing models are gaining so little traction in legal education is merely of academic interest. For our students, however, these issues are yet another example of how the current system of legal education is unresponsive to their needs and concerns. In this essay, I will describe The Center for Computer Assisted Legal Instruction (CALI) eLangdell Press open access textbook publishing project as well as the sales law textbook and "agreements supplement" I am writing that will be published by CALI eLangdell Press. I will highlight some of the market failures apparently retarding the production and adoption of non-traditional textbooks in legal education. Although these barriers to innovation in the American legal textbook market are significant, they are not insurmountable. Given that law students have the most to gain from alternative, cheaper textbooks, it might make sense for law students to launch a "naming and shaming" strategy to give law faculty members greater incentives to produce and adopt open access textbooks.

CALI is a non-profit organization whose mission is to advance legal education through technological innovation and collaboration, and its funding comes from its member law schools, which include more than ninety-five percent of all accredited law schools in America. I have served on the board of directors of CALI since 1998. For decades, CALI has been at the forefront of harnessing technological innovation to improve student learning outcomes. Once I decided to publish a new textbook, the choice for me as a board member to publish my textbook with CALI might seem obvious. But the CALI eLangdell Press does not rely on altruism or board seats to motivate authors to publish royalty-free

textbooks. CALI has an editorial board that reviews proposals from prospective authors and offers to those authors whose books are selected for publication a lump-sum, up-front royalty equivalent to that provided by most traditional publishers for the same work.

Given that the CALI eLangdell Press project is now offering incentives similar to those offered by traditional publishers, it is surprising how few faculty members have contributed or adopted eLangdell Press textbooks. To explore the causes of the slow take-up of open access publishing generally and the counter-veiling motivations of those faculty members who have chosen to publish in open access form, I invited several colleagues who have already published open access textbooks to contribute short essays discussing their experiences:

- James Boyle & Jennifer Jenkins, *Open Legal Educational Materials: The Frequently Asked Questions*, 11 WASH. J.L. TECH. & ARTS 13 (2015).
- Joseph Scott Miller & Lydia Pallas Loren, *The Idea of the Casebook: Pedagogy, Prestige, and Trusty Platforms*, 11 WASH. J.L. TECH. & ARTS 31 (2015).
- Eric Goldman & Rebecca Tushnet, *Self-Publishing an Electronic Casebook Benefited Our Readers—And Us*, 11 WASH. J.L. TECH. & ARTS 49 (2015).

Our goal in publishing these essays is to encourage more faculty members to engage in the debate about what they can do about the high price of traditional textbooks, and to consider adopting or even authoring open access textbooks.[1]

I. SALES LAW FOR A NEW CENTURY AND AGREEMENTS SUPPLEMENT

After I began studying the use of sales contracts as governance mechanisms in global supply chains over a decade ago, I discovered a gap between the contemporary American business

[1] My colleagues and I thank the student editors of the Washington Journal of Law, Technology & Arts for publishing these essays.

practices I was learning about in my research and the orientation of every single sales law textbook on the market today. After teaching sales law with many different textbooks over several years, I concluded that the yawning gap between sales law in textbooks and sales law in action exists for the following reasons:

- Although Karl Llewellyn often achieved his goal of creating a neutral framework for transactions that could accommodate innovation in business practice with the provisions of Article 2, he also often failed. Among the most anachronistic provisions in UCC Article 2 are UCC § 1-303 Usage of Trade, UCC § 2-205 Merchant Firm Offers, UCC § 2-207 Battle of the Forms, and UCC § 2-306 Requirement and Output Contracts, all of which feature prominently in sales law textbooks. Yet none of the textbooks on the market today highlight the growing irrelevance of these provisions to contemporary business practice.
- When parties succeed in implementing best practices for supply chain management, the rate of litigation drops sharply because fewer disputes worth litigating arise in the first place, and those that do are arbitrated.[2] As a result, the facts of litigated Article 2 cases are increasingly less representative of current best business practices. They usually consist of a comedy of errors by parties who haven't got a clue what the best practices for supply chain management are, while parties who are doing supply chain

[2] Proving a negative is always difficult. This generalization is based on the small number of reported judicial decisions involving master supply agreements in recent decades when the use of master supply agreements among trading partners increased rapidly, and years of interviews with subject matter experts. For example, Walmart alone accounts for more than 10% of the U.S. retail market but there appears to be only one reported judicial decision involving sale of goods dispute between Walmart and a supplier. General Trading Int'l, Inc., v. Wal-Mart Stores, Inc., 320 F.3d 831 (8th Cir. 2003); STATISTA, http://www.statista.com/statistics/309250/walmart-stores-retail-market-share-in-the-us/ (chart showing retail market share of Walmart Stores in the United States in 2012 and 2013, based on share of retail sales). *See also* Ronald J. Gilson, Charles F. Sabel and Robert E. Scott, *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 N.Y.U.L. Rev. 170, 178 (2013) (major innovations in contract design make considerable progress outside the courts before finally being tested in litigation).

> management the right way are almost entirely absent from reported judicial decisions. Careful study of recent sales law cases can only illustrate what not to do; it provides little or no information about what contracting parties should be doing.
>
> - It is almost impossible to get a copy of the actual sales contracts at issue in litigated disputes because of the widespread practice of parties to commercial disputes requesting that courts seal records. Teaching sales contract drafting and negotiation from cases without access to the entire contract tends to frame issues from an *ex post* perspective rather than simulating the *ex ante* perspective within which contract negotiation and drafting actually occur.[3]

I eventually decided that the best way for me to prepare my students for twenty-first century law practice was to create a new textbook that combines both traditional statutory and case analysis with information about contemporary commercial practice and client requirements.

To help students learn to switch from an *ex post* litigation perspective on contract drafting to an *ex ante* negotiation perspective, I have been developing contract drafting exercises based on actual sales contracts taken from the Security and Exchange Commission's "Electronic Data-Gathering, Analysis, and Retrieval" (EDGAR) database.[4] It is an interesting question in intellectual property law whether it would be fair use for a law faculty member to incorporate a sales contract from the EDGAR database into a textbook, and reasonable minds might differ about the answer to that question. Given that I will have to sign the CALI author agreement warranting that I own or have licensed the intellectual property in all the content I am providing, I concluded I should create my own sales contracts after analyzing examples of

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[3] *See generally* Jane K. Winn, *Llewellyn Has Left the Building: The Growing Irrelevance of the UCC to 21st Century Sales Law* (Dec. 29, 2014), *available at* http://ssrn.com/abstract=2543663.

[4] Under the Securities Act of 1933, publicly listed companies are required to file with the Securities and Exchange Commission on a regular basis certain financial information as well as "material contracts." 15 U.S.C. § 77aa (2000).

EDGAR contracts. A collection of these EDGAR-like agreements will be combined into an "agreement supplement" that students will use in addition to their textbook and statutory supplement. Problems based on hypothetical fact patterns and contract drafting exercises in my sales law textbook will be keyed to the provisions of various agreements in the agreements supplement. But any faculty member teaching sales or contracts will be free to incorporate any or all of the agreements in the agreement supplement into their own classes.

In order for students in sales law to understand how anachronistic the "Battle of the Forms" problem has become for most businesses in America today, they need to be able to study what has taken the place of the Battle of the Forms: a "framework" sales contract that might be called a "master agreement" or a "supply agreement" that is ten, twenty or more pages long and has a term of one or more years. By cross-referencing issues based on Battle of the Forms fact patterns discussed in cases with strategies currently in use for addressing the same issues under framework agreements, students will see for themselves which provisions of Article 2 have become anachronistic and why.

II. LOCK-IN TO PRINCIPAL-AGENT CONFLICTS

As of 2013, the cost of the average college textbook in the United States had risen 812 percent since 1978, while the increase in the Consumer Price Index was only 250 percent and the increase for medical services was 575 percent for the same period.[5] Although no one has collected and published similar statistics for law school textbooks, the results would probably be similar. Textbooks and medical services suffer from market failures and skyrocketing prices for similar reasons: persistent "principal-agent" conflicts.

Under agency theory in economics, a principal hires an agent to work for the principal, but can only monitor the agent's performance imperfectly without in effect doing the agent's work

[5] Jordan Weissmann, *Why Are College Textbooks So Absurdly Expensive?*, ATLANTIC (Jan. 3, 2013), *available at* http://www.theatlantic.com/business/archive/2013/01/why-are-college-textbooks-so-absurdly-expensive/266801.

for him and losing the economic benefits of the delegation.[6] The principal can enjoy the economic benefit of the delegation if she can design an "incentive contract" that rewards the agent for internalizing the principal's interests and punishes the agent for pursuing his own interest at the principal's expense.[7] If law students are the "principals" of legal education because it is their tuition dollars that keep the doors open, and law faculty members are "agents" that deliver legal education services to their principals (including grading their performance), then that may help explain why the principal-agent conflict in textbook markets is as acute and intractable as it is.

Other institutional characteristics of the market for textbooks may also contribute to the problem. Formal and informal standards in the market for traditional law school textbooks combine to create a kind of "network" with strong positive network externalities for faculty members.[8] As a result, the cost for faculty members to switch to a different network based on alternative textbooks would be high. If law school textbook publishers play the role of "platform operator" in the traditional law school textbook market, then faculty as well as students may find it hard to switch to a different platform.[9] As platform operators, traditional textbook publishers can charge high prices to students and use the revenue from those high prices to subsidize the production and adoption of traditional textbooks by law faculty members. The subsidies for production of traditional law school textbooks come in the form of a promise of copyright royalty payments and the social prestige of being recognized as a textbook author among the author's academic peers. The subsidies for faculty members who adopt their products come in the form of teaching manuals and other support services to reduce the effort required to teach law

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[6] *See generally* Robert Gibbons, *Incentives in Organizations*, 12 J. ECON. PERSP. 115-132 (1998).

[7] This may be difficult to do, however. *See generally* Steven Kerr, *On the Folly of Rewarding A, While Hoping for B*, 19 ACAD. MGMT. REV. 769 (1975).

[8] *See generally* CARL SHAPIRO & HAL VARIAN, INFORMATION RULES (1999).

[9] *See* Joseph Scott Miller & Lydia Pallas Loren, *The Idea of the Casebook: Pedagogy, Prestige, and Trusty Platforms*, 11 WASH. J.L. TECH. & ARTS 31 (2015).

school classes. For widely adopted textbooks, the creation of a de facto community of adopters who can share ideas about teaching may also serve to reduce the effort required to teach classes.

The slow progress in persuading law school faculty members to migrate from the existing high-priced textbook platform maintained by traditional publishers to new networks based on open access publishing models suggests that none of the alternative publishers have yet developed a winning platform competition strategy. CALI offers a significant one-time, up-front payment to textbook authors in exchange for the license to reproduce their works in open access form, but that has not yet persuaded many law school textbook authors or adopters to switch to open access textbooks. If the market for textbooks were a conventional competitive market, then modest product innovations and reasonable remuneration might have been enough to "tip" the textbook market toward open access publishing. But the textbook market appears to be characterized by strong network effects and traditional textbook publishers seem to be formidable platform operators. Much more powerful incentives than those already offered by alternative textbook publishers will be required to overcome lock-in to principal-agent conflicts in textbook markets. Fortunately for law students, however, technology and business innovations occurring outside of legal education may have already given them the tools they need to create incentives strong enough to motivate faculty members to respond to their concerns about the high price of traditional textbooks.

III. SHARING OWNERSHIP OF THE PROBLEM

In recent decades, technological innovation has dramatically lowered the cost of creating communities based on shared consumption preferences. Well known examples of collaborative consumption communities include networks for sharing access to resources such as Zip Car, Uber or AirBnB, or for sharing access to opinions such as Yelp or TripAdvisor. The rise of sharing-economy business models is an example of what Clayton Christensen labeled "disruptive innovation" in his 1997 book, *The Innovator's Dilemma*. Christensen noted that most innovation is "sustaining innovation" which improves the performance of

established products and services in a manner consistent with the expectations of most clients. The incremental innovations characteristic of traditional high-priced textbook publishing are examples of sustaining innovations that please the faculty authors and adopters of textbooks. By contrast, disruptive innovations often appear initially to underperform existing products and services, but appeal to price-sensitive clients because they are simpler and cheaper than mainstream products. A classic example of a disruptive innovation that eventually bankrupted a once dominant incumbent is the competition between Netflix and Blockbuster Video. When Netflix started offering classic movie rentals by postal mail with no late fees in 1997, Blockbuster was confident that its core customer base would never be interested in such a service. In 2010, Blockbuster filed for bankruptcy after its core customer base was lured away by streaming video offered by Netflix and others that did not depend on charging customers late fees to be profitable.

Alternative textbook publishers such as the CALI eLangdell Press are trying to play the role of "disruptors" in the market for law school textbooks. Because law students are the ones who would benefit most if textbook markets "tip" away from traditional publishers and toward disruptive open access publishers, alternative textbook publishers would benefit from finding a way to leverage law student frustration with high textbook prices to accelerate that tipping process.

One way law students across the country could channel their frustration and support the work of alternative open access publishers would be to create a national online database of textbook costs organized according to faculty member and law school. Individual students at each American law school could contribute information about the prices of the textbooks they were required to purchase for the courses they take. With enough student support, an accurate, detailed picture would emerge about relative textbook adoption costs within a relatively short time. Such an online reporting system could be a collaborative production platform similar to Wikipedia, Yelp or TripAdvisor. If the website were programmed to generate reports in response to queries, then other law students would be able to compare textbook adoption costs before registering for courses.

Although some collaborative production systems operate on a strictly voluntary basis, many such as Wikipedia cannot operate without cash contributions as well as in-kind contributions from members. Because the population of law students is constantly shifting and the status of law students is only temporary, it would be hard to maintain such a project with only voluntary contributions. In addition, the level of technological sophistication required to create and maintain such a site might be more than law student volunteers could manage. It might therefore be necessary to use a collaborative fundraising system such as Kickstarter or solicit donations from users to raise the money to pay technology professionals to build and maintain the system.

Once information about relative textbook costs is made freely available, law students need not be the only ones to make use of it. The problem of the high cost of textbooks might finally become salient to law school administrators and the majority of law school faculty members if it were quick and easy to learn about relative textbook adoption costs. Law school administrators could take relative textbook adoption costs into account during the annual faculty merit review process, as could national educational rating services such as *U.S. News & World Report*.

An Internet "naming and shaming" campaign organized by law students would encourage law school faculty members and deans to recognize the magnitude of benefits law students would reap from a general migration from traditional full-price textbooks to open access textbooks. Few law school faculty members actually benefit directly from the high price of law school textbooks. If law students can increase the reputational "cost" to most faculty members of adopting traditional full-price textbooks, then the majority of faculty members who never directly benefited from textbook royalties under the current system might finally begin looking in earnest for open access alternatives.

Most American law faculty members would likely bristle at the suggestion that they have been "shirking" their fiduciary duties to law students when they create or adopt high-priced traditional textbooks instead of creating or adopting open access alternatives. This may be because they are simply unaware of the impact of the cost of textbooks on law students. For law faculty members who inadvertently choose high-priced textbooks when low-priced

textbooks of equivalent quality are available, collaborative collection and distribution by law students of relative textbook adoption costs could provide them with the information they need to make more informed choices.

CONCLUSION

The institutional characteristics of the market for textbooks are too subtle and complex to be described accurately in a short essay such as this, let alone fully analyzed. This essay merely suggests that the market for law school textbooks appears to be "locked-in" to significant principal-agent conflicts. Open access publishers are working to disrupt the traditional textbook market, but have only enjoyed limited success to date. The slow migration away from high-priced traditional textbooks and toward open access publishing suggests that the disruptors have not yet been able to mobilize strong enough incentives to get the textbook market to "tip." If alternative textbook publishers and law students were able to join forces, however, that might accelerate the migration. Law students could launch a "naming and shaming" campaign to encourage faculty members to switch to open access textbooks by organizing a national online database with information about relative textbook adoption costs within and across law schools in America.

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OPEN LEGAL EDUCATIONAL MATERIALS: THE FREQUENTLY ASKED QUESTIONS

James Boyle & Jennifer Jenkins[*]

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ABSTRACT

There has been considerable discussion in academic circles about the possibility of moving toward open educational materials—those which may be shared, copied and altered freely, without permission or fee. Legal education is particularly ripe for such a transition, as many of the source materials—including federal statutes and cases—are in the public domain. In this article, we discuss our experience producing an open casebook and statutory supplement on Intellectual Property Law, and answer many of the frequently asked questions about the project. Obviously, open coursebooks are less expensive and more convenient for students. But we found that they also offer pedagogical benefits for professors, who can readily preview, adapt, customize, and update the materials according to their varied needs. We also discuss the potential of current print-on-demand technology—readers can enjoy both free digital versions and low-cost hard copies. Finally, we review the evidence that, for authors, making educational materials "open" is not necessarily incompatible with a profit motive. After exploring both the benefits and limitations of open educational materials, we

[*] James Boyle is William Neal Reynolds Professor of Law, Duke Law School. Jennifer Jenkins is Senior Lecturing Fellow, Duke Law School, and Director of the Center for the Study of the Public Domain.

conclude that, on balance, open publishing models have the potential to markedly improve legal education—both through substitution and through competition—particularly as the conventional publishing model becomes increasingly outdated, rigid, and overpriced.

INTRODUCTION

In the summer of 2014, we published an Intellectual Property Statutory Supplement.[1] Like most such books, it consisted largely of freely available statutes and treaties with a short preface. Legally speaking, all of the material was in the public domain.[2] The selection and arrangement were totally obvious—"What should be in an Intellectual Property Supplement?" "How about the Copyright, Patent and Trademark statutes?" "Yes, I think those should go in." A little work was required to make sure the statutes were current. We also had to decide how to present recent reforms. (Both versions? Redlined?) The typesetting required design choices. But any competent first-year law student with some editorial judgment could have done the work with ease. In that sense the book was similar to most of its competitors—many casebook authors produce highly lucrative supplements to complement their casebooks. Some of them[3] contain original substantive material, but even that is limited and most do not. There were, however, a couple of salient differences between our statutory supplement and its competition. First, it was available for free download and was free of intellectual property claims. The

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[1] JAMES BOYLE & JENNIFER JENKINS, INTELLECTUAL PROPERTY: LAW & THE INFORMATION SOCIETY, SELECTED STATUTES & TREATIES (2014). We have now published a 2015 edition of this book: a paper version is available at http://amzn.to/1KvBEG0 (last visited Aug. 2, 2015) and a freely downloadable version is available at http://web.law.duke.edu/cspd/pdf/IPStatutes2015.pdf (last visited Aug. 2, 2015).

[2] Federal statutes are in the public domain. *See* 17 U.S.C. § 105 ("Copyright protection under this title is not available for any work of the United States Government.").

[3] *See, e.g.*, ROBERT P. MERGES, PETER S. MENELL, & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE, 2013 CASE AND STATUTORY SUPPLEMENT 677–720 (2013).

original material in the book, such as a chart comparing Copyright, Trademark and Patent, was placed under a CC BY license,[4] requiring only attribution. The statutes were clearly marked as being in the public domain. Thus the entire book—in print format—could not only be freely downloaded, reprinted or shared, it could also be commercially republished in its entirety without permission. Second, the print version was available at the cost of production. At the time of writing, it was $9.89 on Amazon. The competing statutory supplements ranged from $37.00 to $59.00.[5]

We tell this story as an indication of the *irrationality* of the current market for legal educational materials. More than $50 for *public domain* federal statutes? With minimal original content or editorial input? (In researching the competing proprietary editions, we found cases in which editors claimed on the cover that certain content was included, when it actually was not. The research assistant had not got the memo, apparently.) While this symposium focuses, rightly, on open *casebooks,* the supplement market is actually more revealing of the economics of the legal textbook market; economics that are marked by high prices, agency costs (the professor does not know the cost of the material she assigns or may be its author), and "lock-in" (it is easier to assign a casebook and supplement as a package and changing casebooks is *hard*).

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[4] Creative Commons Attribution 3.0 United States license, *available at* https://creativecommons.org/licenses/by/3.0/us (last visited Feb. 12, 2015). The license states:

> "You are free to:
>
> **Share**—copy and redistribute the material in any medium or format.
>
> **Adapt**—remix, transform, and build upon the material for any purpose, even commercially.
>
> The licensor cannot revoke these freedoms as long as you follow the license terms."

[5] ALFRED C. YEN & JOSEPH LIU, STATUTORY SUPPLEMENT TO COPYRIGHT LAW, ESSENTIAL CASES AND MATERIALS (2d ed. 2011) (listed at $37.00 on Amazon and West (last visited Feb. 12, 2015)); MERGES, MENELL & LEMLEY, *supra* note 3 (listed at $52.25 on Amazon and $55.00 on Wolters Kluwer (last visited Feb. 12, 2015)); PAUL GOLDSTEIN & MARKETA TRIMBLE, INTERNATIONAL LEGAL MATERIALS ON INTELLECTUAL PROPERTY (2014) (listed at $56.05 on Amazon and $59.00 on West Academic (last viewed Feb. 12, 2015)).

And all for raw material that, at least in the case of the statutory supplement, is mostly not copyrightable *in the first place.*

This is a broken market and one that reflects troubling pedagogical and, to be quite frank, *moral* choices on the part of both authors and publishers. Should we be using our professional relationship with our students—to whom we surely owe at least some fiduciary duty—to require wildly overpriced editions of the basic laws of the United States, particularly when those are actually in the public domain? The market for straightforward statutory supplements priced significantly above marginal cost is one that should simply disappear. Our Center at Duke has recently started a project to provide open statutory supplements in all the major law school courses under terms similar to our initial one. We would welcome collaborators. We would note that this is a task that our country's energetic law review boards could perform with ease, perhaps thus productively diverting their staff from the arcane, and arguably socially and professionally *useless*, process of obsessive citation formatting—something other legal systems manage to do without. In the process, they would fill a real educational need, a phrase not normally associated with law reviews, to the great benefit of their fellow students. (If they then charged a premium for the result, as a law review consortium does for the Bluebook[6]—the Bible of useless citation format fetishism—we would be less impressed. But the Bluebook at least contains original material.)

Having produced the statutory supplement, we then turned to the production of an Intellectual Property casebook[7]—also freely downloadable, although this time under a CC BY:NC:SA license.[8]

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[6] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (19th ed. 2010). There is an appealing irony to having to cite the Bluebook while condemning its citation fetishism.

[7] JAMES BOYLE & JENNIFER JENKINS, INTELLECTUAL PROPERTY: LAW & THE INFORMATION SOCIETY, CASES & MATERIALS (2014). We have now published a second edition of the casebook: a paper version is available at http://amzn.to/1Nz1N68 (last visited Aug. 2, 2015) and a freely downloadable version is available at http://web.law.duke.edu/cspd/pdf/IPCasebook2015.pdf (last visited Aug. 2, 2015).

[8] Creative Commons Attribution-NonCommercial-ShareAlike 3.0 United States license, *available at* https://creativecommons.org/licenses/by-nc-sa/3.0/us

The introduction to the casebook contained our rationale:

> Why do we do this? Partly, we do it because we think the price of legal casebooks and materials is obscene. Law students, who are already facing large debt burdens, are required to buy casebooks that cost $150–$200, and "statutory supplements" that consist mainly of unedited, public domain, federal statutes for $40 or $50. The total textbook bill for a year can be over $1,500. This is not a criticism of casebook authors, but rather of the casebook publishing system. We know well that putting together a casebook is a lot of work and can represent considerable scholarship and pedagogic innovation. We just put together this one and we are proud of it. But we think that the cost is disproportionate and that the benefit flows disproportionately to conventional legal publishers. Some of those costs might have been more justifiable when we did not have mechanisms for free worldwide and almost costless distribution. Some might have been justifiable when we did not have fast, cheap and accurate print-on-demand services. Now we have both. Legal education is already expensive; we want to play a small part in diminishing the costs of the materials involved.[9]

The process of producing these two books taught us a lot about the possibilities, and difficulties, of open legal educational

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(last visited Feb. 12, 2015), stating:

> "You are free to:
>
> **Share**—copy and redistribute the material in any medium or format
>
> **Adapt**—remix, transform, and build upon the material
>
> The licensor cannot revoke these freedoms as long as you follow the license terms."

[9] BOYLE & JENKINS, *supra* note 7, at xi.

materials.[10] As we went through the process, we found we were getting the same questions again and again from curious colleagues and students. The remainder of this article provides answers to those questions about open educational materials in the hope they might be of interest to a wider audience. The conclusion details some of the more surprising things we learned in the process.

I. ARE OPEN CASEBOOKS JUST AIMED AT SAVING STUDENTS MONEY?

That is a worthy goal, but for us this is not just about price. Our point is not only that the current casebook is vastly too expensive, it is also inflexible, lacking visual stimulus, incapable of customization and hard to preview and search on the open web. Casebooks do not respond well to the different needs of different professors. Every professor has the experience of requiring a casebook but then not assigning large chunks of that book, because they do not fit the design of a particular course. It is the

[10] For empirical research on the benefits of open educational resources ("OER") generally, *see* T. Jared Robinson, Lane Fischer, David Wiley, & John Hilton III, *The Impact of Open Textbooks on Secondary Science Learning Outcomes*, 43 EDUC. RESEARCHER 7, 341-51 (Oct. 2014) (quantitative study finding that open textbooks can be equally or more effective than traditional textbooks, while also being free); John Hilton III, *The Review Project* (Feb. 2015), *available at* http://openedgroup.org/review (this "summary of all known empirical research on the impacts of OER adoption . . . abstracted from an article submitted for publication in a peer-reviewed journal" concludes: "Given that (1) students and teachers generally find OER to be as good or better than traditional textbooks, and (2) students do not perform worse when utilizing OER, then (3) students, parents and taxpayers stand to save literally billions of dollars without any negative impact on learning through the adoption of OER."). For a more extensive resource on the potential of open educational resources, *see* TORU IIYOSHI & M.S. VIJAY KUMAR, EDS., OPENING UP EDUCATION: THE COLLECTIVE ADVANCEMENT OF EDUCATION THROUGH OPEN TECHNOLOGY, OPEN CONTENT, AND OPEN KNOWLEDGE (M.I.T. Press 2014), *available at* http://www.cni.org/wp-content/uploads/2014/07/9780262515016_Open_Access_Edition.pdf (last visited Feb. 20, 2015) (collection of thirty essays by prominent figures in the open education movement, exploring "the *challenges* to be addressed, the *opportunities* to be seized, and the potential *synergies* to be realized from the various efforts in the movement for enhancing educational quality and access") (emphasis in original).

educational equivalent of the old experience of buying music. In order to get the four tracks you want, you had to purchase the entire album even though you had no use for the remaining songs. Open casebooks, by contrast, offer the iTunes experience. Take just what you want.

As a result, one of the single biggest surprises we had in publishing this way was the realization that the open casebook format transformed the process of *changing* textbooks. If you are a professor, you approach changing your textbook with the same wariness as you do the decision to move to a new house or emigrate to a different country. The costs are enormous and concentrated during an incredibly disruptive period. One has to adapt all at once. For that reason, the benefits of the new version (or inadequacies of the old) must be large indeed. The "lock-in" effect makes the process of changing to a cheaper, or better, casebook a high stakes one, and it also creates warped incentives for authors and publishers. Every professor is familiar with the meaningless changes made to a perfectly good casebook, just so the author can make sure the students are buying new editions and not second-hand ones.

With an open casebook, however, all of this is transformed. One does not have to make an all-or-nothing decision to change books. We have already been contacted by colleagues who are planning only to use our material on Copyright, or our chapter on Intellectual Property and the Constitution, or our discussion of competing theories of intellectual property. One can adopt one chapter or ten with equal ease and—in the case of the digital versions—equal financial cost: zero! The high switching costs are radically diminished, indeed the nature of "switching" is transformed. With open courseware one can actually think of one's teaching materials as a "playlist" assembled from multiple sources.[11]

For students, open course books are not only less expensive;

[11] The excellent "H2O" project from Harvard's Berkman Center for Internet and Society provides open educational materials online using a web-based platform that explicitly organizes materials according to "playlists." *See H20*, BERKMAN CENTER INTERNET & SOC'Y, https://h2o.law.harvard.edu (last visited Feb. 12, 2015).

they also bring the benefits of digital technology to the learning process. Proprietary casebooks do not give students free, searchable digital access to all the materials, on all their devices, anywhere; access that does not go away when the course—or the publisher—ends. Open legal educational materials can provide all of those things.

But open educational materials also have a wider significance: they respond to the professional obligation to provide better access to legal information. There are also a lot of people outside of law school, or outside this country, who would like to know more about American law—just as there are people outside of computer science who want to know about artificial intelligence.[12] Free is a good price-point for them. Customizable is a good form. This is particularly true if one wants to translate educational materials without asking permission or paying a fee.

II. WHY HAVE A PAPER VERSION AT ALL? AND WHY WOULD ANYONE *BUY* IT?

We had heard from colleagues, both those who ban laptops in class and those who do not, that an environmentally friendly alternative to printing out course materials and then throwing them away would be desirable, particularly one that came with first sale rights and cost less than the comparable course-packet from the law school's photocopying center. But we found that the interest in paper versions of coursebooks was even more robust. Surprisingly (at least to us) there is also empirical evidence that even the "born digital" student audience prefers—all other factors being equal—to read educational materials in print.[13]

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[12] Jeffrey J. Selingo, *Demystifying the MOOC*, N.Y. TIMES, Nov. 2, 2014, at ED23; *also available at* http://www.nytimes.com/2014/11/02/education/edlife/demystifying-the-mooc.html (last visited Feb. 12, 2015).

[13] NAOMI S. BARON, WORDS ONSCREEN: THE FATE OF READING IN A DIGITAL WORLD (2015); *see also* Alice Rob, *92 Percent of College Students Prefer Reading Print Books to E-Readers*, NEW REPUBLIC (Jan. 14, 2015), http://www.newrepublic.com/article/120765/naomi-barons-words-onscreen-fate-reading-digital-world (last visited Feb. 12, 2015) ("Baron and her colleagues surveyed over 300 university students in the U.S., Japan, Germany, and Slovakia, and found a near-universal preference for print, especially for serious

An informal survey of our current students reveals that they use both the print and the digital versions. The print version is used preparing for class, and as the text they refer to in class. The digital version allows easy searching, annotation, and commentary. We make the book available in a number of digital formats, including PDF, epub, Word and less proprietary alternatives. This means students can actually integrate their notes into the text itself, can copy and paste fragments of a case or statutory section into their outline, or can instantly find a phrase or statutory section they half remembered from class discussion. Perhaps more importantly, the digital version can be read on a tablet on the treadmill or the plane, where the bulky and heavy paper version would be impractical. We had not thought of it as a possible advantage, but students told us that having both text and free digital versions was extremely useful during holidays, interview trips and other interruptions to the normal law school schedule. Lugging six casebooks home on Thanksgiving or winter break is hardly practical. Being able to leave the casebook in your apartment, but still read it on your phone, tablet or laptop (or more realistically, *tell* yourself you will read it on those devices) allows you more flexibility.

Our experience elsewhere—one of us has published a book with Yale University Press that is also freely downloadable under a CC license,[14] and has written about other authors who do the same[15]—is that this coexistence of print and digital versions is more robust than one might think. We want a cheap, attractive print version for our own classes, but would be happy if everyone used the free digital version. That has not been the pattern so far. In fact, one possibility is that we are actually gaining some readers of the print version through the ease of free discovery of the digital

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reading. She finds that the format doesn't matter so much for 'light reading.' When students were given a choice of various media—including hard copy, cell phone, tablet, e-reader, and laptop—92 percent said they could concentrate best in hard copy.").

[14] JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (2008), *available for download at* http://thepublicdomain.org/thepublicdomain1.pdf (last visited Feb. 12, 2015).

[15] James Boyle, *Text is free, we make our money on volume(s)*, FIN. TIMES, Jan. 22, 2007, *available at* http://www.ft.com/intl/cms/s/2/b46f5a58-aa2e-11db-83b0-0000779e2340.html#axzz3RY84R4OV (last visited Feb. 12, 2015).

one.

III. CAN YOU DESCRIBE THE PUBLISHING PROCESS FOR THE PHYSICAL BOOK?

We used Createspace—Amazon's print-on-demand service. There are a number of other competing services, but this best fit our needs. To make the book visually attractive, one has to spend some time formatting it nicely—though the print-on-demand services do offer "templates" that make this relatively easy. One uploads the completed digital file and selects the format. We chose a 7 x 10 paperback with a glossy color cover (a colleague at the Center, Mr. Balfour Smith, supplied the design) and black and white interior. One then previews digital and paper proofs and publishes the final approved version—at which point the book becomes available on Amazon and potentially available through all the distribution channels you have selected, ranging from brick and mortar stores to university library distribution systems. (In practice, the vast majority of our sales came through Amazon.) The entire process is absurdly fast, at least to someone used to the leaden pace of academic publishing. It took about ten days to go from the final digital file to a print version being commercially available.[16] The quality is generally very good. It looks like a professionally produced proprietary book, though we noticed a couple of flaws—text slightly askew on a page, for example—in the very first books ordered. Amazon replaced these, and the problem seemed to disappear after that.

It is worth noting that because this is simply a print-on-demand edition of a digital file, there is no limit to the number of black and white pictures or illustrations that one can include; a welcome contrast to the grudging and sometimes expensive process of putting illustrations into commercially published casebooks. We included full-page comic strips, photos of objects involved in the cases we were discussing, the complete text and illustrations of a patent, and many other illustrations. The only limitation was the

[16] The print version can be found at http://amzn.to/1Nz1N68 (last visited Aug. 2, 2015).

quality of the original digital image. As another benefit, print-on-demand allows authors to quickly update their books in response to new legal developments by uploading a new version, as opposed to waiting for the conventional publisher to issue the next edition, or rely on piecemeal supplements.

One interesting note: after the book is published, if a user orders it, it is generally printed on demand—there is no large stock sitting in Amazon's warehouses. (Though as we sold more copies, we saw that Amazon kept a larger reserve.) We had expected this to be a major bottleneck, but it was not. Our experience, and those of our students, is that the speed of delivery for books that had to be printed on demand was close to that for books that Amazon had in stock. The time from order to delivery seemed to average around 3–4 days. To put it another way, if you finish the digital version of an open coursebook or coursepack for your students on August 10, the book could be in their hands on the first day of classes.

IV. WHAT KINDS OF DIGITAL RIGHTS MANAGEMENT OR LICENSING RESTRICTIONS ARE THERE?

No Digital Rights Management! The casebook is under a CC BY:NC:SA license.[17] It requires attribution, permits any non-commercial use and tells those who modify that they must share the freedoms they were given. After that? It is free to download. Free to copy. Free to modify.

The statutory supplement is under a CC BY license,[18] allowing unlimited reproduction and modification, including for commercial purposes. We would be delighted if you can undercut our commercial price on the statutes. Of course, the underlying statutes and treaties are in the public domain. You can use those without any restrictions. But if you want our preface, chart and editorial comments, you have to give attribution.

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[17] Creative Commons Attribution-NonCommercial-ShareAlike 3.0 United States license, *available at* https://creativecommons.org/licenses/by-nc-sa/3.0/us/ (last visited Feb. 12, 2015).

[18] Creative Commons Attribution 3.0 United States license, *available at* https://creativecommons.org/licenses/by/3.0/us (last visited Feb. 12, 2015).

V. SO YOU ARE AGAINST PROFESSORS WHO WANT TO BE PAID FOR THEIR WORK AND TIME?

On the contrary. In fact, one of the things we have learned in this process is how poorly *both* authors and students are being treated by the current system. The authors of casebooks and statutory supplements are generally:

a.) unable to give their students digital access to the very book they have just written—unless it is fettered by digital rights management and time-limited so that it expires after a defined period,

b.) unable to customize the material—omitting unwanted chapters or statutes for a new version of the class, or adding in new material on the fly, and

c.) despite the obscene prices on the books, are given a relatively low share of the proceeds.

All the disadvantages of profiteering with none of the advantages! Personally, we chose to keep the cost as low as possible, but we are fully aware of the labor and creativity required to put together a casebook—we just created one. It does not seem unreasonable to expect a reward to encourage that kind of activity in the future.

VI. YOU MEAN I COULD MAKE MONEY DOING THIS?

That was not *our* goal, but the answer is clearly "yes." Suppose a professor chose to self-publish with a print-on-demand service. As we said earlier, we used Createspace—Amazon's print-on-demand firm—but there are others with comparable pricing. Suppose she wanted to create an 825-page paperback, 7 in. x 10 in. casebook of her own. For reference purposes, those are the same dimensions as the typical statutory supplement, and about twice as many pages. Suppose she decided to price it at $60—which would be $90–$140 cheaper than the current casebook she assigns. Though that, to be fair, is both in hardcover and larger. We calculate that her per-book royalty would be about $25 if bought on Amazon, and $13 if bought in a bricks and mortar store; comparable to or larger than her royalty in a conventional publishing contract. The chart below, drawn from Createspace's

royalty estimation tool,[19] details the royalties that would accrue in each sales venue. ("Expanded distribution" means conventional sales through bookstores, to university libraries and so on.)

Book Details: 825 page, 7x10, black and white interior, color cover, $60 list price.

List Price	Channel	Royalty
USD $ 60	Amazon.com	$25.24
	eStore	$37.24
	Expanded Distribution	$13.24
GBP £ 38.53	Amazon Europe For books printed in Great Britain	£14.15
EUR €54.53	Amazon Europe For books printed in continental Europe	€22.20

Values vary, but to us, saving your debt-strapped students $100 each, while getting that degree of editorial control and that breadth of dissemination, seems like a pretty good deal.

We will be honest. We want very much to tip the norm towards free, unregulated digital access—so the whole world and not just her class can learn from her materials. And we think $60 is high—though not as bad as $160 or $200! But the author could require the purchase of a paper copy, which her students could resell when the class is over, while also giving her students free digital access, and get much wider dissemination of and impact from her ideas.

But what if the author wanted *only* to spread her ideas and teaching methods, or more calculatingly, to profit from increased professional visibility rather than royalties? Pricing right at the break-even point in expanded distribution, she could distribute the book for $26.99 which, at least at our law school, is actually

[19] https://www.createspace.com/Products/Book (click on "Royalties" tab) (last visited Aug. 2, 2015).

cheaper than a photocopied packet of materials of the same length—while being considerably more likely to be kept, or resold, after the semester is over. The chart below details the royalties at the expanded distribution break-even point.

List Price	Channel	Royalty
USD $ 26.99	Amazon.com	$5.43
	eStore	$10.83
	Expanded Distribution	$0.03
GBP £ 17.33	Amazon Europe	£1.43
EUR € 24.53	Amazon Europe	€4.20

A professor who did not care about the book being available in bookstores, but merely wanted a cheap paper copy available on Amazon, could actually get the price as low as $18 for the paper copy. In all of these examples, of course, the digital copy remains free. In our own case, we were trying to distribute very close to the cost of production while still making it available in both bookstores and on Amazon because we want readers to have a choice about where to purchase. Our book was under $30 on Amazon[20] and available free for download in as many formats as we could produce. It was released in August of 2014. So far we have made $1,500 in royalties. The fact that someone who is trying to provide the book close to cost makes that much money, *effectively by accident*, says a great deal about the current price premium in the proprietary textbook market—students are paying much more per book, but the casebook authors are not the ones capturing most of the surplus.

[20] We hold no brief for Amazon. This is for illustration purposes and there are other competing services (Lulu, https://www.lulu.com; Xlibris, http://www.xlibris.com; etc.). In fact, we would be delighted if there were more competition in this area.

VII. WHAT EFFECT WILL EFFORTS LIKE THIS HAVE ON THE TEXTBOOK INDUSTRY?

Our efforts alone will have zero effect. Our initiative is utterly insignificant, less than a fleabite—just a proof of concept. But we actually hope that the inexorable multiplication of projects such as this will be an aid to those still publishing with conventional textbook publishers and—long term—a benign influence on the textbook industry as a whole. To the casebook author trapped in contracts with an existing publishing house: remember when you said you needed an argument to convince them to price your casebook and your supplement more reasonably? Or an argument to convince them to give you more options in making digital versions available to your students in addition to their print copies, but without taking away their first sale rights? Here is one such argument. There are many more either already out there or in the pipeline, all offering slightly different versions of lower cost educational material that can be freely customized. Traditional textbook publishers can compete with free. But they have to try harder. We will all benefit when they do.

VIII. BUT WHAT ABOUT A SALESFORCE?

The single most common question we faced was "How would an author be able to get others to adopt her book without mailing it to everyone or having insistent salespeople pounding the halls?" The answer is simple. They can read it, instantly, freely anywhere, just by downloading it! They can browse it on the exercise bike or on the train, scan through it on their tablet, or read it in their office. That's *much* more efficient than the current system. In the world we imagine, professors will be able instantly to browse, search within and assess the pedagogical suitability of a free digital version of a casebook online. Perhaps this will put a merciful end to the never-ending cascade of free but unread casebooks in cardboard mailing boxes and charming but unwelcome casebook representatives in natty business suits; the 1950's distribution mechanism for the casebook in the halls of the twenty-first century law school. That mechanism needs to go the way of the whale oil merchant, the typing pool and the travel agent. To the extent that

the "justification" offered for today's prices is that they are needed to pay for the last century's distribution methods, we would have to disagree politely but emphatically.

IX. WHAT ARE THE DOWNSIDES AND DRAWBACKS OF OPEN PUBLISHING?

Inevitably, there are some. The principal ones we encountered had to do with permissions and with format and page limitations.

A. Permissions for Third-Party Material:

We wanted our book to be freely available, freely translatable, freely adaptable. We were not sure that we would be able to secure permissions from authors of other works that would cover all of those uses. We also faced page constraints and—to keep the price down—we could not pay licensing fees. Thus, we made a decision only to use material that (1) was in the public domain, (2) was original material written by us for this book, (3) came from prior work to which we held the rights ourselves, (4) was published under an open license that would not preclude any of our activities with this book or (5) was protected as a fair use under section 107 of the Copyright Act. We reasoned that if professors wanted to assign other secondary material from articles or monographs, they could easily do so in the form of a supplement. This was also our first attempt. With more effort, the author of an open casebook could include a much wider range of material.

B. Format and Page Limitations:

The print-on-demand service we used did not provide hardbacks—or more accurately, it provided hardbacks with price and distribution limitations that made that option undesirable. Thus, the book is a—relatively high quality—paperback. There are other services that provide hardback print-on-demand, but again the prices were higher and the distribution options were not as good. In addition to format limitations, the print-on-demand service came with a page limitation. The 7 x 10 option we chose was limited to 828 pages. Those who wanted to have a longer

casebook would have to divide the work into two volumes. Finally, as we mentioned before, there were occasional minor flaws in the first few books produced, such as text being slightly askew.

C. Prestige and Scholarly Reputation:

To what extent are there prestige benefits in publishing with an established proprietary press? Individual authors can assess this as they will. All of the casebook authors we have asked confirm that the proprietary presses provide essentially no editorial help beyond the most ministerial. Perhaps the curation function of a press suggests a signal as to the underlying quality of the work, but our experience is that the signal is a weak one at best. It is here that the accessibility and customizable nature of the open casebook are particularly important. If one's book gains acceptance or interest—even if a few chapters are used by colleagues around the country—it is likely to provide more benefits in terms of scholarly reputation than the dusty unopened, unread casebooks that clutter the shelves of most faculty offices. Finally, this is a transitional moment. As more colleagues experiment with these kinds of options, they will presumably come to seem the norm rather than the exception.

X. WHAT NEXT?

This is the first in a series of free or low-cost legal educational materials to be published by Duke's Center for the Study of the Public Domain—starting with statutory supplements aimed at the basic classes. The goal of this project, and that of other ones such as the Berkman Center's fascinating H2O project,[21] or eLangdell,[22] is to creatively improve the pricing and access norms of the world of legal textbook publishing, while offering the flexibility and possibility for customization that unfettered digital access provides. We hope it will provide a pleasant, restorative, competitive pressure on the commercial publishers to lower their prices and improve their digital access norms.

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[21] BERKMAN CENTER INTERNET & SOC'Y, *supra* note 11.

[22] *About eLangdell*, CENTER FOR COMPUTER-ASSISTED LEGAL INSTRUCTION (CALI), http://www.cali.org/elangdell/about (last visited Feb. 12, 2015).

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THE IDEA OF THE CASEBOOK: PEDAGOGY, PRESTIGE, AND TRUSTY PLATFORMS[†]

Joseph Scott Miller[*] *& Lydia Pallas Loren*[**]

Cite as: 11 Wash. J.L. Tech. & Arts 31 (2015)
http://digital.lib.washington.edu/dspace-law/handle/1773.1/1473

ABSTRACT

Independently published, electronically delivered books have been the future of the law school casebook for some time now. Are they destined to remain so? We sketch an e-casebook typology then highlight some features of law professor culture which suggest that, although e-casebook offerings will surely expand, the trust credential that the traditional publishers provide plays a durable, central role in the market for course materials that law professors create.

[†] With a tip of the hat to Michael J. Madison, *The Idea of the Law Review: Scholarship, Prestige and Open Access*, 10 LEWIS & CLARK L. REV. 901 (2006).

[*] Professor, University of Georgia School of Law.

[**] Robert E. Jones Professor of Advocacy & Ethics, Lewis & Clark Law School.

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INTRODUCTION

In 2015, it is easier than it has ever been for a casebook author to produce and to distribute that casebook electronically *and* independently, without the aid of one of the large, traditional publishers (Aspen, Carolina Academic Press, Foundation-West, Lexis-Nexis). More authors are doing so now than were a decade ago. But it is still a niche phenomenon, given the thousands of courses offered at hundreds of law schools every year. Have conventional casebooks proved to be—as one might have thought possible, even likely, more than a decade ago—"toast"?[1] Decidedly not.

Why, then, has the independently produced, web-delivered casebook failed to sweep the field? After all, many production and distribution costs have fallen quite dramatically. Consider, on the input side: sites such as Google Scholar make vast bodies of federal and state caselaw electronically available, and readily findable, outside the cloak of an end-user license agreement that could inhibit re-use of the case text to make one's own book,[2] while other public-domain federally authored materials[3] are

[1] Robert Laurence, *Casebooks Are Toast*, 26 SEATTLE U. L. REV. 1, 1 (2002).

[2] Google Scholar's "terms of use" are those of Google more generally, *available at* https://www.google.com/intl/en/policies/terms.

[3] The Copyright Act has, at least since 1976, mandated this public-domain status. *See* 17 U.S.C. § 105 (2012) ("Copyright protection under this title is not available for any work of the United States Government . . . ."). The predecessor provision was to similar effect. 35 U.S.C. § 8 (1970) ("No copyright shall subsist . . . in any publication of the United States Government, or any reprint, in whole or in part thereof[.]"). The public-domain status of federal decisional law

abundant on agency websites. Consider, on the production side: software for editing cases, writing critical interstitial matter (such as Notes & Questions), collaborating with co-authors (using web services such as DropBox or Google Drive), and producing standard formats (PDF, epbub, etc.) is cheap and abundant; the web is an easily accessible distribution platform, whether one uses a third-party site or creates one's own; and web-based payment systems, whether generalized (such as PayPal) or purposes-built for publishing (such as Gumroad), enable one to charge for the book. For die-hard fans of the paper book, print-on-demand outlets (such as Lulu) are available too. Users can download even quite large files to the tablets, laptops, or e-book readers they surely possess, over a high-speed law school network if not broadband they have at home, and open the files with standard-compliant software (*e.g.*, a PDF reader) that they already have or can easily get. Set against the world of 1995, or even that of 2005, the world of 2015 poses markedly lower entry barriers to the indie e-casebook. And there are many more such casebooks now than there were then. We know this firsthand, as both the co-authors of an e-casebook first published in 2008 and the co-founders/co-owners of the company, Semaphore Press, that publishes it.[4]

One can fairly wonder, however, why there aren't *even more* indie e-casebooks. Why isn't there an iTunes of casebooks? A Spotify or Pandora of casebooks? Why, in short, hasn't there been an obvious break-out success among new e-casebook publishers? We have asked ourselves some version of that question more than once since 2008. Perhaps some costs of independence are higher, or more durable, than one might have supposed. Perhaps some benefits of independence are smaller, or more fleeting. To highlight other costs and benefits, one must widen one's view to include some rewards and risks endemic to law-professor culture. We do so in this essay.

But before we situate the indie e-casebook in the law professor's economy of prestige, we offer a casebook typology

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was settled almost two centuries ago, in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

[4] *See generally* Lydia Pallas Loren, *The Viability of the $30 (or Less) Casebook*, 22 J. INTELL. PROP. L. 71 (2015).

broad enough to include independently published e-casebooks. The typology not only organizes the varied casebooks law professors now encounter, it also dispels the misperception—common, in our experience—that one can fairly label *all* independent e-casebooks "open source" or "open access." That assumption is mistaken.

I. THE CASEBOOK TERRAIN

One can sort casebooks into basic types using three contrasts. The contrasts are the degree to which the book is provided exclusively in print, exclusively electronically, or on a mixed basis; the degree to which the book is provided either for a fee, free of charge (beyond the means needed to obtain the book in the first instance), or on a mixed basis; and the degree to which the book's accompanying copyright license, if any, affords the end-user greater freedom to remix the book's content than the fair-use baseline provides.[5]

Print v. Electronic. The traditional casebook publishers began as print-only operations. By contrast, some authors of e-casebooks offer them exclusively electronically, leaving it to the user to decide how much, if any, of the book to print for oneself. For example, Professor Barton Beebe has published *Trademark Law: An Open-Source Casebook* on a purpose-built website.[6] The H2O casebook project,[7] based in Harvard University's Berkman Center for Internet & Society, is a web-native platform. Professor Herbert Hovenkamp has published *Innovation & Competition Policy: Cases & Materials* as a series of interlinked manuscripts on the Social Science Research Network ("SSRN"),[8] perhaps more

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[5] *See* 17 U.S.C. § 107 (2012) (codifying the fair use defense).

[6] Barton Bebe, *Trademark Law: An Open-Source Casebook*, http://tmcasebook.org (last visited May 20, 2015).

[7] *H20*, BERKMAN CENTER INTERNET & SOCIETY, http://cyber.law.harvard.edu/node/1112 (last visited May 20, 2015).

[8] The opening chapter, which also contains links to all the other chapters and thus organizes the book, is available at http://ssrn.com/abstract=1936964. Much like Professor Hovenkamp, one of us distributes a collection of edited patent cases and related materials through SSRN for use as a casebook when paired with a traditional softcover hornbook. Joseph Scott Miller, *Patent Law: Cases & Materials, Version 1.4* (Dec. 11, 2014) (for use with Janice M. Mueller,

familiar as a repository for working papers not yet in finally published form. None of these casebooks, so far as we can tell, uses digital rights management ("DRM") to limit users' capabilities.

Some indie e-casebooks take a mixed approach. For example, Semaphore Press publishes its titles principally as DRM-free PDFs, but it also makes one of its titles available on a print-on-demand basis through Amazon.com.[9] The e-Langdell casebook project, hosted by CALI, also offers both DRM-free e-books and print-on-demand versions.[10] Similarly, as they describe elsewhere in this volume, Goldman & Tushnet publish their casebook, *Advertising & Marketing Law: Cases & Materials*, in both electronic and print forms,[11] as do Boyle & Jenkins with their casebook, *Intellectual Property: Law & the Information Society*.[12] The traditional publishers, for their part, have also made moves toward offering electronic versions of, or complements to, their print books. By sharp contrast to the indies, however, the traditionals heavily encumber these electronic products with DRM, limits on printing, and other restrictions.[13]

Fee v. Free. The traditional casebook publishers distribute their titles to students strictly on a fee-for-book basis, whatever campus bookstore or other retailer (*e.g.*, Amazon.com, Powells.com) might stand in the middle and regardless of whether the format is print or electronic. At least one independent publisher (Goldman & Tushnet) takes the same approach, *i.e.*, the book can be obtained

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Patent Law (4th ed. 2012)), *available at* http://ssrn.com/abstract=2408843.

[9] *See About Semaphore Press*, SEMAPHORE PRESS, http://www.semaphorepress.com/about.html (describing Semaphore Press) (last visited July 6, 2015); JAMES GRIMMELMANN, INTERNET LAW: CASES & PROBLEMS, http://www.amazon.com/Internet-Law-Problems-James-Grimmelmann/dp/1943689008/ref=sr_1_1?s=books&ie=UTF8&qid=1440966046&sr=1-1 (offering a print book on demand).

[10] *About eLangdell*, CALI, http://www.cali.org/elangdell/about (last visited May 20, 2015).

[11] Eric Goldman & Rebecca Tushnet, *Self-Publishing an Electronic Casebook Benefited Our Readers—And Us*, 11 WASH. J.L. TECH. & ARTS 49 (2015).

[12] JAMES BOYLE & JENNIFER JENKINS, INTELLECTUAL PROPERTY: LAW & THE INFORMATION SOCIETY (2014).

[13] *See* Loren, *supra* note 4, at 80-83 (describing some of these offerings).

only in exchange for a fee.[14] Other indies sit at the opposite pole, offering the electronic forms of their casebooks at no cost (beyond that of retrieving and storing it). The Beebe, Hovenkamp, and H2O project titles occupy this position. Others take a mixed approach. Both the eLangdell titles and the Boyle & Jenkins IP law book shift from free to fee when the book shifts from e- to print.

Semaphore Press, for its part, is unique in casebook pricing. From its launch in 2008 to now, it has used the same approach for all of its titles: for the e-books, which are DRM-free PDFs, we suggest a price of $30 (which works out to about $1 per class session at the typical law school), but the student chooses the price s/he wants to pay. That price can be as low as $0, if the student opts for that, because every Semaphore Press author agrees to one overriding principle—no matter what, even if s/he can't or won't pay, *the student always gets the book*. (This is all fully explained at the Semaphore Press website.[15]) Interestingly, our experience over the last seven years is that about 80% of students pay something, and, of those who pay, about 85% pay $30.[16] The print-on-demand books, which Semaphore Press began to offer only recently, do require payment and are priced to cover the cost of printing and delivery plus $30 for Semaphore Press.[17]

All Rights Reserved v. Broad User License. The traditional casebook publishers include copyright notices in the front matter stating that the publisher reserves all its copyright-law rights, thereby maximizing the protection that copyright law affords the copyright owner. For example, the back of the title page of *Telecommunications Law & Policy* (4th ed.), by Professors Stuart Minor Benjamin and James B. Speta, states as follows:

> Copyright © 2015
> Carolina Academic Press
> All Rights Reserved

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[14] Goldman & Tushnet, *supra* note 11, at 51-52.

[15] *Professors*, SEMAPHORE PRESS, https://www.semaphorepress.com/professors.html (last visited May 20, 2015).

[16] *See* Loren, *supra* note 4, at 86-87 (reporting sales data).

[17] Semaphore Press evenly splits a title's net revenues with its author. Out of $30 Semaphore Press receives, the author receives $15.

This is quite typical for a traditional publisher of hard-copy titles.

Some indies sit at the opposite pole, broadly authorizing end-users to make copyright-law-relevant uses of the content. Professor Beebe's trademark law book, for example, is "made available under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License."[18] As the website for the book explains,

> [i]n slightly simpler terms, this means that you are free to copy, redistribute, and modify the casebook in part or whole in any format provided that (1) you do so only for non-commercial purposes, (2) you comply with the attribution principles of the license (credit the author, link to the license, and indicate if you've made any changes), and (3) in the case of modified versions of the casebook, you distribute any modifications under the same license.[19]

Similarly, the Berkman Center's H2O casebook project uses a Creative Commons attribution-noncommercial-share-alike license,[20] as does the eLangdell series from CALI.[21]

Semaphore Press, by contrast, provides the user a more limited license: one can download the DRM-free PDF for one's personal use, download a replacement file if an earlier-downloaded copy is lost, and make a print copy of the PDF if desired.[22] While this is more generous than the traditional publisher's standard "All Rights Reserved" statement, it is *not* an "open source" license or Creative Commons license.

As with the *Print v. Electronic* dimension and the *Fee v. Free* dimension, we see a wide array of approaches to the *All Rights*

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[18] Bebe, *supra* note 6.

[19] *Id.*

[20] *See Welcome to H2O*, H2O, https://h2o.law.harvard.edu (last visited May 20, 2015) ("Share and Adapt Content. All the content on H2O is licensed for sharing and adaptation under a Creative Commons license (CC BY-NC-SA 3.0). You can clone content created by other H2O users, and they will be able to do the same with any materials you add.").

[21] CALI, *supra* note 10.

[22] *FAQs*, SEMAPHORE PRESS, http://www.semaphorepress.com/FAQs.html (last visited May 20, 2015).

Reserved v. Broad User License dimension. At the same time, these variations appear to cluster into shared patterns. We can summarize the patterns as three basic casebook types:

Traditional — Print, Required High Fee, All Rights Reserved

Maverick — Electronic, Low or Optional Fee, Some Rights Licensed
(*Examples:* Semaphore Press, Goldman & Tushnet)

Open Access — Electronic, Free, Creative Commons License
(*Examples:* eLangdell, H2O, Beebe, Boyle & Jenkins)

Additionally, for all the variations, there is one constant: to obtain a hardcopy book, some fee is required, although the prices charged do vary dramatically.

One final word about independently published casebooks, beyond the foregoing typology: It appears—to us, at any rate—that casebooks about intellectual property law and closely related topics are over-represented among the indies. Perhaps they would not be were one to take a complete census of the full population of indie e-casebooks and authors. If they *are* over-represented, even in a full census, perhaps that is so because intellectual property law professors are better positioned, by virtue of their training, both to manage the rigors of copyright law as it affects casebook inputs, and to navigate the full range of licensing choices for the casebooks they create. In any event, our typology, with its examples, is provisional. No one, so far as we know, curates a comprehensive census of indie e-casebooks, though law school librarians seem well positioned to do so. Such an on-going census would be quite helpful to the legal academy, if kept up to date.

II. PEDAGOGY

The casebook is a teaching tool. In U.S. law schools, for more than a century, it has been *the* teaching tool of choice.[23] It

[23] *See* Matthew Bodie, *The Future of the Casebook*, 57 J. LEGAL EDUC. 10,

dominates doctrinal courses, and doctrinal courses predominate in the law school curriculum. Independently published e-casebooks transform the way law professors and their students produce and consume casebooks, but do far less to change casebook content.

"Casebooks are of vital importance: they dictate the content of and approach to the course materials."[24] Law professors, like professors generally, want to use the teaching materials that help them make their classes the best that they can be. One *could* build a set of course materials entirely from scratch. Most professors, however, do not; instead, they adopt one of the many casebooks that are usually available for a given course. In selecting from among available casebooks, with helpful advice from trusted colleagues (whether at one's home institution or elsewhere), what a law professor looks for is this: the best book for the course at hand. The question returns the next time the course rolls around again: Is this *still* the best book for this class, given the way I plan to teach it?

Of course, law professors, like professors generally, can be a fussy bunch. Even the best casebook can fall short of one's ideal, to a greater or lesser degree: "unless the professor has written the text her- or himself, no casebook completely maps what the professor wants to cover or the pedagogical approach the professor favors."[25] Perhaps a favorite case isn't included; or a key secondary source is excerpted, but infelicitously so; or the new blockbuster decision has just been handed down, months or years after the book's contents were finalized, and so hasn't been seamlessly presented. But these shortcomings typically prompt nothing more than small-scale responses, such as an individual professor's preparation of an additional edited case or two for distribution to the class. After a few years into an edition's run, the authors themselves may prepare a supplement for adopters, either for sale or for electronic distribution by PDF.

Traditional publishers appear to design a print casebook edition to last at least two or three years. As a result, print books may present more significant drawbacks of the sort just described. An

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11-13 (2007).

[24] *Id.* at 13.

[25] *Id.* at 14.

electronic casebook, depending on how one designs it, can sidestep some of conventional print's problems. Indeed, Professor Matthew Bodie detailed these advantages back in 2007:

> The shift of legal materials from books to online databases has opened up the potential for a completely computerized version of the casebook. Instantly, a number of the problems with casebooks could be solved. Electronic materials can be quickly and easily edited. A case can be included as soon as it is published, a statute included as soon as it is passed. Moreover, individual professors could easily add to and subtract from the materials. Students could access these materials from wherever they have Internet access or a copy of the relevant data file; no more worrying about whether the book is at home or whether the photocopied materials have been lost.[26]

Perhaps, in light of these advantages, one would have expected the rapid arrival of a newly dominant form of electronic casebook. Professor Bodie, like many others, did: "Despite its privileged position, the casebook as we know it is probably on its way to extinction."[27] But those early reports of the print casebook's death were, it turns out, exaggerated.

It is *not* that the benefits of e-casebooks proved illusory; far from it. Looking at the actual offerings that became available after Professor Bodie's 2007 piece, independently published e-casebooks are superior to traditional publishers' print offerings (as well as their recent web-based offerings) along many dimensions. First, none are disabled with comprehensive, pervasive DRM that limits such activities as annotation, printing, creation of back-up copies, and the use of text-to-speech software to create audio files. These actions are plainly desirable to the end user, which means that DRM-encased e-books from traditional casebook publishers are, by contrast, delivered broken. Second, all are easier for authors to update in light of new developments. Third, all are dramatically

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[26] *Id.* at 16.
[27] *Id.* at 10.

less expensive for the students assigned to use them, with no loss in the quality of the content. Why do traditional textbooks survive—indeed, thrive?

Tastes differ, of course. The eBook price advantage may not be salient to professors because professors do not pay for such books; they receive their copies gratis. This creates a pricing disconnect that is endemic to textbook markets for college and graduate school: The person choosing doesn't pay, and the people paying don't choose.[28] Some of an e-casebook's other advantages may strike some professors as bugs, not features. For example, some professors may conclude that students will not learn as much or as well from reading materials in electronic, rather than paper, form, although the current studies show mixed results.[29] Or an adopter may view the more frequent updates in light of new developments as a nuisance, causing more disruption than the new material merits. These problems do not, however, strike at the heart of the indie e-casebook project. A professor who thinks print is better than an e-form can direct students to print the readings, or to buy the print-on-demand version. And just as a professor can do with a traditional book, an adopter can use the prior edition of electronic casebook if its content is better for that adopter's purposes.

Some, however, may see indie e-casebooks' very independence from the traditional publishers as a drawback. Traditional publishers provide a deeply familiar quality-control signal about

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[28] *See* Ethan Senack, *Fixing the Broken Textbook Market: How Students Respond to High Textbook Costs and Demand Alternatives*, U.S. PIRG EDUC. FUND & STUDENT PIRGS 6 (2014) ("The underlying cause for high prices comes from a fundamental market flaw in the publishing industry. In a typical market, there is a direct relationship between consumer and provider. The consumer exercises control over prices by choosing to purchase products that are a good value, and the competition forces producers to lower costs and meet demand. In the textbook industry, no such system of checks and balances exists. The professor chooses the book, but the student is forced to pay the price. Because of this, the student is, in essence, a captive market. Without the ability of the student to choose a more affordable option, publishers are able to drive prices higher without fear of repercussion[.]"), *available at* http://www.uspirg.org/reports/usp/fixing-broken-textbook-market.

[29] *See* Ferris Jabr, *The Reading Brain in the Digital Age: The Science of Paper versus Screens*, SCI. AM. (Apr. 11, 2013), *available at* http://www.scientificamerican.com/article/reading-paper-screens.

the titles they publish, both to potential adopters and to potential authors, as well as to potential adopters' and authors' colleagues. Indeed, we call the long-established casebook publishers "traditional" precisely because they have played this quality-control function for decades, building up a large reservoir of trust among law professors veteran and new (virtually all of whom also used the books—sometimes earlier editions of *the very same* books—in their formative years as law students). To explore the notion that the potential-adopter or potential-author professor views independence from traditional publishers as a cost, we must turn our attention to the economy where such costs are reckoned: the economy of prestige.

III. PRESTIGE

Part of a casebook's value comes not from what fills it, but from what surrounds it. Part of that surrounding is the cover *and* what that cover announces—namely, the publisher's identity. The publisher's brand embodies cultural capital, a reputation among one's peers, upon which an adopter or would-be author can rely.

The "right" publisher, esteemed and trusted, can subtly cloak the book's content with credibility among scholars. Essayist Louis Menand, himself an English professor at Harvard,[30] made just this point in his review of James English's study of literary prizes[31]:

> In an information, or "symbolic," economy . . . the goods themselves are physically worthless: they are mere print on a page or code on a disk. *What makes them valuable is the recognition that they are valuable.* This recognition is not automatic and intuitive; it has to be constructed. A work of art has to circulate through a sub-economy of exchange operated by a large and growing class of middlemen: publishers, curators, producers,

[30] His faculty biography is available at http://english.fas.harvard.edu/faculty/menand.

[31] JAMES F. ENGLISH, THE ECONOMY OF PRESTIGE: PRIZES, AWARDS, AND THE CIRCULATION OF CULTURAL VALUE (2005).

> publicists, philanthropists, foundation officers, critics, professors, and so on.[32]

Note that "publishers" top Menand's list of credentialing middlemen.

Recognition that a work is trustworthy, because others treat it as trustworthy, is critical to scholarly publishing. Indeed, it helps define the very essence of what it means to have published: "When a scholarly document is effectively published within a scholarly community, it seems to satisfy three criteria: *publicity*, *access*, and *trustworthiness*."[33] We can see these facets of scholarly publishing in the casebook context.

An independently published e-casebook may lack the robust credence signal that a traditional publisher provides. This is not to say that the indie e-book has *no* trust-signaling markers, for all have at least two, and some have three or four.[34] The two signals of trustworthiness that every casebook has, even if only in small measure, are (1) the reputation the author enjoys among law professors, especially those who teach the subject,[35] and (2) the reputation the author's home institution enjoys among other law

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[32] Louis Menand, *All That Glitters: Literature's Global Economy*, NEW YORKER, Dec. 26, 2005 & Jan. 2, 2006, at 136 (emphasis added), *available at* http://www.newyorker.com/magazine/2005/12/26/all-that-glitters.

[33] Rob Kling & Geoffrey McKim, *Scholarly Communication and the Continuum of Electronic Publishing*, 50 J. AM. SOC'Y INFO. SCI. 890, 897 (1999) (emphasis in original).

[34] *See id.* ("Peer review is a particular form of vetting that is distinctive of the academic communities. However, scholars use other signs to assess the value of a document as well, often in combination—such as the *reputation* of a journal or publishing house as indicators of reliability.… At the lower end of a scale of trustworthiness lie practices such as self-publishing, publishing in nonreviewed (or weakly reviewed) outlets (such as the working paper series of an academic department), or publishing in edited (but not refereed) journals. Even in nonreviewed or weakly reviewed venues, the reputation of the author (as perceived by the reader) may be a major factor in determining trustworthiness.") (emphasis in original).

[35] *See id.* at 899 ("The trustworthiness of a self-posted Web document depends almost entirely upon the author's reputation within a particular scholarly community. For example, a nonpeer-reviewed posting on a Web site by a high-status and well-respected scholar may well be trusted more than a peer-reviewed journal article by someone not well known in the community.").

professors. An indie e-casebook that others have already used has a third trust marker, (3) the reputation the book itself enjoys among its adopters. Finally, if the independent publisher offers multiple titles (*e.g.*, CALI's eLangdell project), each of those casebooks has a fourth, analytically distinct trust marker, (4) the reputation the publisher enjoys among law professors. These features signal that one can trust the book to some degree.

But anxieties may remain for both the potential adopter and the would-be casebook author. Choices reflect on the chooser, in casebooks as in life. It is no surprise, then, that "the perceived status differences between publication venues as viewed by academic search and screen committees, tenure and promotion committees, grant review panels, and departmental chairs and deans plays a major role in selection of publication venue by a scholar."[36] In this environment, the traditional publisher may simply be the safer choice.

For example, consider a junior professor who is selecting a casebook with which to teach a newly assigned course. Imagine that it is *not* a course the professor took in law school. As we noted earlier, the professor tries to identify the best materials for the course. A ready-made casebook is almost always the path taken. The choice of casebook will be driven, in part, by what the adopter can discern about the book's specific content. Not having taught the course before, or even taken the course before, the professor cannot be sure about the book's quality from content alone. This is where other trust markers, including the publisher's reputation, come to the fore. But it is not merely reputation with the adopter that matters, and adopters know this (even if they never fully articulate the point). The publisher's reputation among one's *colleagues* has an influence as well. For, if the course goes badly—and some do, especially on the first go-round—a professor may fear aggravating the matter by having picked a strange-seeming casebook. In the professor's bad dream, the associate dean (who is, in reality, caring and helpful) sneers, "Were you even *trying* to teach this course well? Why did you choose *this* book? I've *never heard* of this publisher . . . ." Indeed, a professor may fear that the

[36] *Id.* at 896 n.6.

unfamiliarity of a little-known publisher could send the course sideways in the minds of anxious *students*. ("Why did Professor Miller choose this book from Schmedlap & Dingbat? None of my other classes use a book published by S&D, and none of my friends' classes do either. Miller can't even choose the right book. Miller *really* does *suck*!") If two books offer comparable content, the book from the traditional publisher is plainly the less risky choice.

Consider, too, the professor who has a set of materials ready to publish as a casebook. Assuming more than one publisher is willing to publish it, how should the professor choose among them? Contract terms, including royalty rates, are undoubtedly important. But the publisher's reputation as a trusted brand among one's colleagues can be significant as well. Why not opt for the casebook publisher that one's peers and one's dean will recognize instantly? The prospective publisher's reputation, and basic function as a third-party validator, may have meant more in the past, when casebook authorship was celebrated,[37] than it means today, when professors (especially at the pre-tenure stage) are actively discouraged from working on casebooks by the many law professors who do not view casebooks as a scholarly form.[38] But

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[37] *See*, *e.g.*, Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1904 ("Prosser commanded the field of torts. As noted earlier, he authored many of the most-influential articles and the leading treatise and casebook. He also served as the reporter for the *Second Restatement of Torts*. As a functional matter, Prosser was as close to a law-maker in torts as a legislator or judge might have been.").

[38] *See*, *e.g.*, Erwin Chemerinsky, *Foreword: Why Write?*, 107 MICH. L. REV. 881, 887 (2009) ("[S]cholarship directed at the audience of law students and practitioners (and I regard casebooks and treatises as a form of scholarship) is no longer highly valued in the academy. If I were advising a young colleague who wanted to advance within or move to an elite institution, I would frankly say that there are many rewards to doing casebooks and treatises, but recognition within the academy of law professors is not among them. Time and again as I have heard appointments candidates discussed, no weight whatsoever has been given to casebooks or treatises in the evaluation. Writing for the audience of law students and practitioners just doesn't count."); Richard A. Posner, *Foreword: What Books on Law Should Be*, 112 MICH. L. REV. 859, 865 (2014) ("As law schools have multiplied and law school faculties have grown, the number of law professors has increased to a point at which the legal

publisher reputation has not vanished; it still exists and factors into at least some publication decisions.

A traditional publisher's trustworthiness is, of course, no guarantor of success. Some casebooks undoubtedly fail, never making it to a second edition due to lackluster performance. Equally, the *absence* of traditional publication is not a sign that the casebook is weak or unimportant. One of the most successful, influential casebooks of all time—Hart & Sacks' *The Legal Process*[39]—was not formally published[40] until after, one might say

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professoriat has become an autonomous profession, the members of which write for each other. They still churn out casebooks and treatises, but no longer can a legal academic build a national reputation exclusively on such works, as was once the case (think of Austin Scott's treatise on trust law or the Hart and Sacks legal-process text)."); Carol S. Steikerd, *Promoting Criminal Justice Reform Through Legal Scholarship: Toward a Taxonomy*, 12 BERKELEY J. CRIM. L. 161, 164 (2007) ("The publication of scholarly articles, and to a lesser extent of scholarly books, is the central requirement for obtaining an entry-level academic appointment and for promotion to tenure. Casebooks, treatises, and work on law reform commissions simply do not count (or at least they do not count nearly as much as they used to) either for these quite concrete assessments or, more abstractly, for garnering scholarly standing in the wider scholarly community."); G. Edward Wright, *From the Second Restatements to the Present: The ALI's Recent History and Current Challenges*, 16 GREEN BAG 2d 305, 315 (2013) ("When I entered law school in the late 1960s the overwhelming number of scholars at elite law schools worked on doctrinally oriented scholarly articles, treatises, and casebooks. They were rewarded for those efforts: to author a leading casebook or treatise was to cement one's scholarly reputation and visibility . . . . Although legal scholars continue to write journal articles which feature doctrinal and policy analysis, many of those articles also contain applications of the work of other disciplines, some of which are unintelligible to persons lacking training in the discipline in question. At the same time, while treatises and casebooks continue to be produced, they are not given the degree of scholarly 'credit' they once were, and junior scholars at elite law schools are not encouraged to write them.").

[39] *See* SCOTT SHAPIRO, LEGALITY 6 (2011) ("The Legal Process School led by the lawyers [and Harvard Law School professors] Henry Hart and Albert Sacks was an extremely influential approach to the American legal system that analyzed the law through an organizational lens."); Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637, 666 (2013) (observing that Hart & Sacks' "compilations of materials on the legal process influenced generations of jurists and scholars").

[40] Forty years ago, in the midst of reviewing the then-latest edition of Professor Gerald Gunther's constitutional-law casebook, Professor J.D. Hyman

well after, law professors had stopped using it regularly.[41]

For all their advantages, indie e-casebooks lack the strong trust signal that traditional publishers provide. This deficit, moreover, is definitional. An independent e-casebook publisher that has become well-known enough to signal trust on a par with the decades-old Big Four won't be independent any more; it will have passed into the ranks of the traditionals.

IV. TRUSTY PLATFORMS

Production and distribution tools for e-casebooks have proved themselves already. And people will continue to develop new tools tailored to this use, as well as put tools built for other uses to work in the e-casebook market. But will independent, low-cost, DRM-free e-casebooks ever fully displace the traditional publishers' products, whether print or electronic? That is a possible future, but not, we think, a very likely one.

The traditional publishers' books will continue to radiate trustworthiness. The publisher's brand is, in a sense, a platform for sustaining and signaling that a book is reliable and trustworthy. The common hardcover casebook has been used successfully in many law school classrooms, over many decades. It is an authority, and that trusted authority dispels the adopter's doubt and anxiety. If one publishes a casebook, it is easy enough to take one's place in that network of trusted authorities. That lawyers in the Anglo-American tradition—including law professors—should take comfort in a trusted, traditional authority should surprise no one.[42]

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called *The Legal Process* "the most influential book not produced in movable type since Gutenberg." J.D. Hyman, *Constitutional Jurisprudence and the Teaching of Constitutional Law*, 28 STAN. L. REV. 1271, 1286 n.70 (1976).

[41] *See* William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, *in* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS, *at* li-lii, cxxv-cxxix, cxxxiv-cxxxvi (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (recounting their decision to produce, for the first time, a formally published version of the famed Hart & Sacks *Legal Process* materials).

[42] Common law lawyers have used authority to persuade decision-makers for as long as they have operated. "In comparison with other legal traditions, the common law is said to be obsessed with the citation of authorities. This

Indie e-casebook publishers that build a trusted brand may also play this trust-signaling function, given the passage of enough time. And specific indie titles will gain a following, based on author reputation and user experience. The traditional publishers' trust-signaling advantage is likely, however, to endure, giving them time to adapt, as needed, to the far more user-friendly quality challenge that the indies present. A century of reputation-building has its advantages.

CONCLUSION

All caselaw is born free, and yet everywhere casebooks are bound in costly buckram-covered boards.[43] How did this come to pass? Will it change? Surely the economy of prestige has played a part in producing this state of affairs: Publishers, validating quality to at least some degree, allay anxious law professors at both the publishing stage ("All your colleagues will understand who you're publishing with . . . everyone knows Tradition Corp.") and the adopting stage ("All your colleagues will understand who you're adopting . . . everyone knows Tradition Corp."). New publishing models, disrupting the established signaling system to at least some degree, appeal to mavericks less attuned or attentive to the most traditional casebook mechanisms. The traditionals will try to adapt, and the indies will continue, as they already have, to push past settled norms. We do not yet know what the next stable equilibrium in casebook provision will be. But we do know that prestige and its discontents will animate the moves and countermoves that take us there.

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obsession is reasonable given the common law's reliance on the doctrine of stare decisis. Judges, lawyers, and academics use citations to precisely communicate the authority they are relying on." Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J.L. & TECH. 1, 36 (2009) (footnote omitted).

[43] "Man is born free, and everywhere he is in chains." JEAN-JACQUE ROUSSEAU, ON THE SOCIAL CONTRACT 17 (Donald A. Cress trans., Hackett Publishing Company 1987) (1762).

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SELF-PUBLISHING AN ELECTRONIC CASEBOOK BENEFITED OUR READERS—AND US

Eric Goldman[*] *& Rebecca Tushnet*[**]

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http://digital.lib.washington.edu/dspace-law/handle/1773.1/1474

ABSTRACT

Self-publishing our electronic casebook, Advertising and Marketing Law: Cases & Materials, *wasn't some grand ambition to disrupt legal publishing. Our goal was more modest: we wanted to make available materials for a course we strongly believe should be widely taught in law school. Electronic self-publishing advanced that goal in two key ways. First, it allowed us to keep the price of the materials low. Second, we bypassed gatekeepers who may have degraded the casebook's content and slowed the growth of an advertising law professors' community.*

[*] Professor, Santa Clara University School of Law. egoldman@gmail.com. http://www.ericgoldman.org.

[**] Professor, Georgetown University Law Center. http://www.tushnet.com. rlt26@law.georgetown.edu.

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INTRODUCTION

We were invited to participate in this mini-symposium because we self-published a casebook, *Advertising and Marketing Law: Cases and Materials*.[1] Though we knew we were diverging from traditional publication models, our decisions weren't driven by some ambitious plan to disrupt legal publishing.[2] Instead, we simply wanted to help people teach a course we strongly believe should be widely taught in law school.

Electronic self-publishing advanced our goal in two key ways. First, it allowed us to keep the price of the materials low. Second, we bypassed gatekeepers who could have degraded the casebook's content and slowed the growth of an advertising law professors' community.

Part I highlights the benefits we've seen from electronic self-publishing. Part II discusses some of the challenges we've

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[1] REBECCA TUSHNET & ERIC GOLDMAN, ADVERTISING & MARKETING LAW: CASES & MATERIALS (2d ed. 2014), *available at* https://gum.co/vnCkL.

[2] As Evgeny Morozov (among others) has cautioned, it can be dangerous to valorize disruption as the thing that's valuable about innovation. Evgeny Morozov, *When Wall Street and Silicon Valley Come Together – A Cautionary Tale*, GUARDIAN (Oct. 25, 2014 5:18 PM), http://www.theguardian.com/commentisfree/2014/oct/25/darker-side-pay-per-laugh-innovations-silicon-valley (criticizing rhetoric that valorizes "disruption" but does not consider what is being disrupted and for whose benefit).

encountered by self-publishing. Part III concludes by contemplating our book project's future.

I. THE BENEFITS OF AUTHORIAL CONTROL

When we first started the book project in 2007,[3] we implicitly assumed that we would publish the book through a traditional law school publisher. However, by the time we had a rough first draft of the book in 2011, it became increasingly clear that traditional publishers weren't likely to be the right choice for us. We don't categorically oppose the traditional publication model. Instead, we recognized that retaining control over the project would increase the odds that we'd accomplish our goals. We've obtained numerous benefits from retaining control over the project and self-publishing principally in electronic form. We will briefly summarize the key advantages of this method of dissemination.

A. Keeping Prices Low

Students pay an alarming amount for casebooks and other class-related learning materials,[4] and we did not want to contribute to that problem. As Eric wrote when we first released the book, "[m]any print casebooks of comparable size cost $150 or more. In an era of rising tuition and hyper-competition for jobs, we just couldn't justify asking students to pay that much."[5]

As a result, we deliberately chose a relatively low price point for the casebook. We currently offer an electronic PDF version of the casebook, without any digital rights management (DRM), for $11.50.[6] We offer ePub[7] and Kindle[8] versions for about the same

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[3] We first exchanged emails about the book on December 16, 2007.

[4] *See*, *e.g.*, Ann Carrns, *Putting a Dent in College Costs With Open-Source Textbooks*, N.Y. TIMES (Feb. 25, 2015), http://www.nytimes.com/2015/02/26/your-money/putting-a-dent-in-college-costs-with-open-source-textbooks.html.

[5] Eric Goldman, *Announcing a New Casebook: "Advertising & Marketing Law: Cases & Materials" by Tushnet & Goldman*, TECH. & MARKETING LAW BLOG (July 16, 2012), http://blog.ericgoldman.org/archives/2012/07/announcing_a_ne.htm.

[6] Eric Goldman, *Advertising & Marketing Law Casebook (2014 Edition)*, GUMROAD, https://gum.co/vnCkL (last visited May 17, 2015). We offered the

price. We also offer a print-on-demand version for $45 plus shipping and taxes[9] (the higher price reflects, in part, the lack of economies of scale in manufacturing and shipping individual books). These prices are a small fraction of the prices for casebooks from mainstream publishers, even their eBook versions.[10]

Although we priced the casebook with students in mind, our pricing isn't totally altruistic. As Eric has explained, we think our earnings are within striking distance of the royalties we would have earned with a traditional publisher.[11]

2012 edition for $10.00. Eric Goldman, *Advertising & Marketing Law Casebook (2012)*, GUMROAD, https://gum.co/zPsX (last visited May 17, 2015). We increased the 2014 edition's price to reflect that the book was more polished.

[7] Eric Goldman, *EPub Version of Advertising & Marketing Law Casebook (2014 Edition)*, GUMROAD, https://gum.co/MJwn (last visited May 17, 2015).

[8] Amazon sets a mandatory price cap for Kindle books, so the Kindle edition is $9.99 in the United States. *See Advertising & Marketing Law: Cases and Materials*, AMAZON, http://www.amazon.com/dp/B00MRHG3UK (last visited May 15, 2015). It sells for about the same price in some International Kindle stores.

[9] At 1,400 pages, the book was too long to be printed-on-demand in a single volume. As a result, we had to split the book in two volumes, which further raised buyers' costs. *See Advertising and Marketing Law: Cases and Materials (Volume 1)*, CREATESPACE, https://www.createspace.com/4953960 (last visited May 17, 2015); *see also Advertising and Marketing Law: Cases and Materials (Volume 2)*, CREATESPACE, https://www.createspace.com/5001930 (last visited May 17, 2015).

[10] *See*, *e.g.*, Walter Klowers' "Connected Casebook" program, marketed under the "Barrister Books" brand. On May 17, 2015, the popular Dukeminier et al. Property casebook had a list price of $229.95, while the Connected Casebook print-version book rental plus lifetime eBook access was "only" $177.95. *See Property (Connected Casebook)*, BARRISTER BOOKS, http://www.barristerbooks.com/dukeminier-8e-property-connected-casebook.9781454837602.htm#.VKRDCCvF98E (last visited May 17, 2015). *See generally* Lydia Pallas Loren, *The Viability of the $30 Casebook: Intellectual Property, Voluntary Payment, Open Distribution, and Author Incentives*, 22 J. INTELL. PROP. L. 71, 80-83 (2014) (surveying the major legal casebook publishers' ebook offerings).

[11] Eric Goldman, *Self-Publishing A Legal Casebook: An Ebook Success Story*, FORBES (Sept. 18, 2013 8:39 AM), http://www.forbes.com/sites/ericgoldman/2013/09/18/self-publishing-a-legal-casebook-an-ebook-success-story.

One reason is that the book's low price helped expand the market beyond law students. The book is cheaper than the many reference texts targeting practicing lawyers, so we made numerous sales to working lawyers who wanted a good introductory text on the advertising law issues they encounter in their practices. The price was also low enough to gain interest from non-law students and businesspeople.

Furthermore, the book also appeals to professors in non-legal academic disciplines who are teaching courses such as business law or media law. Because it's so reasonably priced, professors don't feel guilty about making students buy the book, even if they only use it as a supplement or for a chapter or two.

B. Rapid Versioning

Because we don't have to recoup any investments in editing, layout, or physical inventory, we can iterate new editions more quickly than traditional publishers. As a result, we issued a second edition just two years after the first version. A quick new edition meant we could fully integrate the Supreme Court's first two Lanham Act false advertising cases[12] into the main text rather than relegating them to a supplement. We also revamped the privacy chapter—a much-needed improvement given the fast-moving nature of this area of the law.

Rapid versioning typically hurts hard-copy casebook buyers by undermining the secondary resale market for the version they own.[13] Because there is no secondary market for electronic

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[12] POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228 (2014); Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

[13] As one economics text asserted, "the basic reason for a revised edition is to kill off the existing used book market." CHARLES E. FERGUSON, MICROECONOMIC THEORY vii (rev. ed. 1969); *see also* John B. Thompson, *Survival Strategies for Academic Publishing*, 21 PUBLISHING RES. Q. 3 (2005) (endorsing this theory); MERRIAH FAIRCHILD, CALPIRG, RIPOFF 101: HOW THE CURRENT PRACTICES OF THE TEXTBOOK INDUSTRY DRIVE UP THE COST OF COLLEGE TEXTBOOKS 12 (Jan. 2004), *available at* http://calpirg.org/sites/pirg/files/reports/textbookripoff.pdf (discussing the losses students suffer when they can't resell older editions). *See generally* Loren, *supra* note 10, at 75-78 (discussing the competition between new and used casebooks).

versions of casebooks, our rapid versioning generally doesn't hurt our readers.

For us as authors, rapid versioning does mean that the casebook feels like it will forever be a work-in-progress, which is a little frustrating.[14] Because it's so easy to revise the text, it's very hard to walk away from it.

C. No DRM

We mentioned the absence of DRM on our book above, but it's worth elaborating on its significance. Traditional casebook publishers are slowly expanding their eBook offerings, but they are hobbling their eBooks' functionality. Using DRM, their eBook files expire after a period of time, can't be copied or printed, and may have arbitrary limits on printing.

In contrast, we published electronic versions without those annoying technological restrictions. Our eBook readers can conduct keyword searches, cut-and-paste material, see graphics and photos in color without paying extra for color printing, view photos at a larger size, and install the file on multiple devices. Plus, our eBook files never expire. For eBook readers who later decide they prefer to read in print, we provide a letter authorizing copy shops to print the book for them.[15]

Without DRM, perhaps we become more vulnerable to illegitimate copying. However, many consumers make illegitimate copies because the content publishers, fixated on controlling their works, resist giving consumers what they want.[16] By letting our

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[14] It's been said that a creative work is never finished, only abandoned, which is a phrase that has been attributed to many people, including Leonardo da Vinci and Paul Valéry. *See Art Is Never Finished, Only Abandoned*, http://www.quoteyard.com/art-is-never-finished-only-abandoned (last visited May 26, 2015).

[15] Eric Goldman, Letter Dated July 16, 2012, SANTA CLARA UNIVERSITY, *available at* http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1102&context=historical.

[16] *See, e.g.*, Joseph M. Eno, *What Motivates Illegal File Sharing? Empirical and Theoretical Approaches*, 69 N.Y.U. ANN. SURV. AM. L. 587, 612 (2013) (pointing out that DRM "can often make it much more difficult to enjoy the legal copy of a good, leading some users to seek alternative, DRM-free

readers enjoy the materials on their own terms at a reasonable cost, we expect that most readers will choose to pay rather than copy.[17] We're willing to risk some revenue if we're wrong about that.[18]

D. Proliferating Advertising Law Courses

When we started the book project, we hoped to increase the number of schools offering an advertising law course to their students.[19] We estimated that only a dozen courses were offered around the country in academic year 2010-11. Before our book, no

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versions") (footnote omitted); Dana B. Robinson, *Digital Rights Management Lite: Freeing E-Books from Reader Devices and Software*, 17 VA. J.L. & TECH. 152, 155 (2012) ("[C]onsumers complain about DRM as a hassle that they do not want to deal with. In the current state of affairs, those who are intent on getting at the media free of DRM can do so easily, but honest consumers are impaired and maddened by DRM measures that complicate their free use of a legitimate purchase.") (footnote omitted); xkcd, *Steal This Comic*, https://xkcd.com/488 (explaining the logic: unauthorized downloads are guaranteed to work; DRM-protected content can fail unexpectedly and restoring access is illegal; thus the rational consumer should download unauthorized versions).

[17] *See* Jessica Litman, *Readers' Copyright*, 58 J. COPYRIGHT SOC'Y U.S.A. 325, 351-52 (2011) (discussing general consumer consensus in favor of flexibility in using copies they've purchased, and arguing that allowing such flexibility improves public acceptance of copyright law); Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People To Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 712-14 (2006) (discussing role of perceived fairness in consumers' choice to pay for authorized versions instead of unauthorized versions). *See generally* Loren, *supra* note 10, at 89-92 (hypothesizing why students choose to pay for Semaphore Press-published electronic casebooks despite a free option).

[18] In our preface, we do advise students:

> To make this book as accessible and easy-to-use for readers as possible, we have deliberately priced this casebook low and provided a DRM-free e-book. If you think your friends and colleagues would like their own copies, we'd appreciate it if you encouraged them to buy their own low-cost copies rather than sharing your copy with them.

TUSHNET & GOLDMAN, *supra* note 1, at i.

[19] *See generally* Eric Goldman, *Why You Should Consider Teaching Advertising Law (Including Comments from Felix Wu of Cardozo)*, TECH. & MARKETING LAW BLOG (Jan. 23, 2013), http://blog.ericgoldman.org/archives/2013/01/why_you_should.htm.

published casebooks supported those courses;[20] each professor individually compiled his/her own materials.

The casebook's availability has made it easy for teachers to tackle the course without incurring the heavy cost of preparing their own teaching materials. As a result, we've seen new advertising law courses offered throughout the country. A traditional publisher would have also helped proliferate the course, but we didn't need that help.

E. Better Content

Traditional publishers are notoriously risk-averse and regularly decline to rely on fair use (even when the defense is obvious).[21] Instead, they insist on authors' obtaining permission for every quotation of copyrighted material—even fragments of song lyrics.

We wanted to incorporate examples of actual ad copy in the book. Allowing students to examine litigated ads for themselves has crucial pedagogical advantages. Students cannot truly understand the scope of the cases without knowing what was at issue.[22] As a result, our text doesn't skimp on showing images of ads.

Because most ads are copyrightable, a traditional publisher would have required us to obtain copyright clearance for each ad we wanted to include—a virtually impossible challenge given the number of ads, the difficulty in identifying copyright owners (especially for older ads), and the licensing fees that some owners would have unreasonably demanded.

We don't think that these permission requirements make sense

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[20] Some published textbooks supported advertising law courses in business schools, communications departments, journalism schools and related disciplines, but none of those textbooks were easily adapted to law school courses.

[21] *See, e.g.*, Christina Bohannan, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083, 1100 (2010); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 583-84 (2004).

[22] *See* Rebecca Tushnet, *Sight, Sound, and Meaning: Teaching Intellectual Property with Audiovisual Materials*, 52 ST. LOUIS U. L.J. 891 (2007).

for the copyright system.[23] Relying on fair use to protect transformative, educational uses helps preserve a robust culture of fair use and keeps us from transitioning to a permission-only society.[24] Thus, self-publishing allowed us to opt-out of the permissions-driven norm.

F. More Content

Publishers often impose highly restrictive space limitations on book projects. Much of that is driven by the economics of printing books, but other resource constraints (such as editing capacity) play a role as well. In contrast, we had complete discretion to decide the book's length.[25] We didn't have to leave anything on the cutting-room floor.

Then again, being free to write as much as we want is both a blessing and a curse. Realistically, students can read and master only a finite amount per week—indeed, our students routinely complain that the book requires too much reading! Getting the chapters to a manageable size remains an ongoing and not entirely successful struggle.

G. We Set Our Deadlines

For some authors, completing writing projects on someone else's schedule sucks the joy out of writing. Fortunately, as self-publishers, we set our own deadlines. Thus, our deadlines are driven by our desire to maximize the project's quality, not a compulsion to hit a publication cycle or a line item in a publisher's revenue projections.

Not having a publisher pressuring us on deadlines required us to be self-disciplined, but ultimately we feel a lot less guilt missing

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[23] *See* Jim Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007).

[24] *See* PETER JASZI & PAT AUFDERHEIDE, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT (2011).

[25] We ran into size constraints with our print-on-demand publisher. We worked around the constraint by dividing the book into two volumes, which probably is not ideal for readers.

our self-imposed deadlines than someone else's deadlines. Still, without pressure from an outside publisher, we've also been slow to complete the entire project. Our unfinished tasks include the final chapter, which currently has two case studies but should have more, and a detailed teachers' manual.[26]

II. SOME CHALLENGES OF SELF-PUBLISHING

While electronic self-publishing has been the right choice for us, it's not without pitfalls. We've already mentioned a few, such as self-managing deadlines and respecting self-imposed word limits. Some other challenges we've encountered include:

Picking Vendors. Although we say we self-published, we didn't host the electronic files or print the books-on-demand ourselves. Instead, we use vendors who assist self-publishers like us.

For our first edition, we used Scribd as our eBook platform,[27] but Eric—who did the heavy lifting of dealing with these entities—ultimately found it unsatisfying.[28] With the second edition, we dropped Scribd and moved everything to another e-commerce site called Gumroad.[29] Gumroad's fees are so low—five percent plus twenty-five cents per transaction[30]—that they make the economics of self-publication even more attractive.

However, if we become dissatisfied with Gumroad, we'll have to find a replacement, and the other options may be sub-optimal. Then again, traditional publishers don't always act in the best

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[26] In the interim, we happily share our notes and slides with anyone interested in teaching the course. If that describes you, please email us.

[27] Eric Goldman, *Advertising and Marketing Law Casebook July 2012*, SCRIBD, https://www.scribd.com/doc/99904133/Advertising-and-Marketing-Law-Casebook-July-2012-SEE-NOTE (last visited May 17, 2015).

[28] Eric Goldman, *Scribd Botches Its Frictionless Sharing Implementation...AGAIN*, FORBES (Nov. 9, 2012 10:56 AM), http://www.forbes.com/sites/ericgoldman/2012/11/09/scribd-botches-its-frictionless-sharing-implementation-again.

[29] *Eric Goldman*, GUMROAD, https://gumroad.com/ericgoldman (last visited May 17, 2015).

[30] Pricing Information, GUMROAD, https://gumroad.com/features/pricing (last visited May 17, 2015).

interests of their authors, and the publishers' control of the copyright (typically the case) handcuffs the authors from responding.

Formatting. It took us a lot of time to format and prepare the different book versions, including an acceptable ePub version and a two-volume version for the hard-copy edition. Traditional publishers typically would handle those tasks for their authors.[31]

Marketing Support. Most casebook authors gripe about their publisher's marketing support, but usually the publisher does try to generate buyers. In contrast, we get zero marketing help from anyone.[32] We decided we could do our own marketing because we already personally knew many of the professors who might teach the course. Their word of mouth has also identified a number of new professors we did not know ourselves.

Because our book does not face any direct competition, it is unlikely that the marketing of traditional publishers would have brought many new adoptions our way. The need for marketing assistance might well differ in a crowded field with a lot of existing casebook choices, such as casebooks for first year courses like Property or Contracts. Then again, a low-priced DRM-free eBook might help a new entrant stand out from the existing competition.

As an alternative to traditional marketing, we can easily hand out free copies or excerpts as marketing because we retained the copyright. For example, we put a full chapter online for free[33] so people could get a good preview.

No Publication Credit. It is unlikely that we get much, if any, peer credit for a "publication." Even today, many colleagues don't

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[31] Most of the book's formatting and editing was done by Georgetown Law's faculty manuscript editor Susanna McCrea. Without her help, we would have outsourced formatting and editing to someone else (a professional freelancer or RAs) at a substantial cost, or we would have spent substantial amounts of our time doing it ourselves to achieve inferior results.

[32] Even Gumroad, our e-commerce platform, does not undertake any marketing efforts to promote the book's availability.

[33] We posted Chapter 13, "Featuring People in Ads," to the Social Science Research Network (SSRN). Eric Goldman & Rebecca Tushnet, *Featuring People in Ads (2014 Edition)*, SOC. SCI. RES. NETWORK (Sept. 4, 2014), http://ssrn.com/abstract=2479635.

afford a self-published eBook the same respect they'd give a traditional casebook publication.[34] For example, we imagine a tenure committee might scratch its head trying to decide how to credit the book for tenure purposes. Because both of us are already tenured, this consideration really doesn't matter to us.

III. THE FUTURE

Writing and publishing a casebook is a substantial project on its own, but for us, it's just the start of a larger and longer-term effort to organize and expand the community of teachers and scholars in advertising and marketing law. After all, a casebook is a pedagogical tool, and all professors using that tool share some common interests that casebook authors are best able to serve. As a result, we eventually plan to build out additional support tools for our community of teachers, including:

- A website[35] to supplement the book, including teaching materials, links to audio and video ads that weren't included in the electronic book, and more.
- A moderated email list for advertising law professors.[36]
- A new AALS section.
- A new SSRN subject matter eJournal.
- A work-in-progress conference and other regular face-to-face opportunities for scholarly and pedagogical exchanges.

As this list illustrates, authoring a casebook is effectively the first step in a lifetime project. But we're not complaining. We enthusiastically chose to climb this mountain because of our passion for the topic. We look forward to continued engagement

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[34] *See generally* Joseph Scott Miller & Lydia Pallas Loren, *The Idea of the Casebook: Pedagogy, Prestige, and Trusty Platforms*, 11 WASH. J.L. TECH. & ARTS 31 (2015), http://digital.lib.washington.edu/dspace-law/handle/1773.1/1473.

[35] *Advertising & Marketing Law: Cases and Materials*, http://www.advertisinglawbook.com (last visited May 17, 2015).

[36] To be operated at forum@advertisinglawbook.com. To join the email list, contact egoldman@gmail.com.

with current and potential teachers of advertising law classes, through the casebook and other means.