

OPEN LEGAL EDUCATIONAL MATERIALS: THE
FREQUENTLY ASKED QUESTIONS

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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

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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through substitution and through competition—particularly as the conventional publishing model becomes increasingly outdated, rigid, and overpriced.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 them³ 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

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*).

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 Bluebook⁶—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 casebook⁷—also freely downloadable, although this time under a CC BY:NC:SA license.⁸

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

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

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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 IYOSHI & 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 *H2O*, BERKMAN CENTER INTERNET & SOCIETY, <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

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 same¹⁵—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

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.

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://wwwcreatespace.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 Amazon²⁰ 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.

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).

