

2021

LEGAL EDUCATION—OPEN YOUR CASEBOOKS PLEASE: IDENTIFYING OPEN ACCESS ALTERNATIVES TO LANGDELL'S LEGACY

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Recommended Citation

Emma M. Wood and Misty N. Peltz-Steele, *LEGAL EDUCATION—OPEN YOUR CASEBOOKS PLEASE: IDENTIFYING OPEN ACCESS ALTERNATIVES TO LANGDELL'S LEGACY*, 43 W. New Eng. L. Rev. 103 (2022), <https://digitalcommons.law.wne.edu/lawreview/vol43/iss1/5>

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WESTERN NEW ENGLAND LAW REVIEW

Volume 43

2021

Issue 1

LEGAL EDUCATION — OPEN YOUR CASEBOOKS PLEASE: IDENTIFYING OPEN ACCESS ALTERNATIVES TO LANGDELL’S LEGACY

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Nonprofits, academic institutions, and educators have collaborated, at all academic levels, to create quality Open Educational Resources (OER) since that term was defined by UNESCO in 2002. These open-source educational materials are in the public domain and published under an open license, meaning that they can be freely copied, used, adapted, and re-shared with the public. They include not only textbooks but supplemental educational materials in various media formats. Their value is such that even federal and state legislatures are taking note and passing laws to incentivize the creation and use of OER in both secondary and higher education. Despite the momentum in academics toward the adoption of open textbooks and supplemental materials, legal academia has been slower to embrace open casebooks. By design, OER offers a great deal of flexibility for educators and the promise of cost savings for academic institutions and students. This paper examines the modern history of casebooks and the OER movement, as well as the various OER platforms ideally suited to create open content for law courses. The authors posit that a greater understanding of OER will give law professors and students a wider range of choice and ownership in course materials.

INTRODUCTION

Law professors are changing the way they create and select teaching materials.¹ For many, this change is reflected in their decision to assemble

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1. See, e.g., Carol L. Chomsky, *Casebooks and the Future of Contracts Pedagogy*, 66 HASTINGS L.J. 879, 892–95 (2015); Robert Laurence, *Casebooks Are Toast*, 26 SEATTLE U. L.

their own casebooks.² For others, it means modifying existing open-source casebooks or, in some instances, self-authored casebooks to meet the needs of their students.³ For nearly all, it means incorporating multimedia resources and tools into course materials to enhance learning objectives.⁴ Does this signal the end of the casebook? Probably not. But this new reality clearly demonstrates the need for changing our perspective on casebooks. We need to move away from thinking that a casebook can only be available as a printed book that is offered through traditional publishers.

Scholars have criticized the casebook, and more broadly the case method, since it gained acceptance in the late nineteenth century as the predominant pedagogical tool in legal education.⁵ More recently, this criticism is primarily centered around its usefulness, or lack thereof, in the context of the modern classroom.⁶ While casebooks remain the preferred resource for teaching law,⁷ professors and lecturers are increasingly supplementing their courses with multimedia materials that are better tailored to their pedagogical methods.⁸ Some professors are leaving

REV. 1, 2–5 (2002).

2. See, e.g., Matthew Bodie, *The Future of the Casebook: An Argument for an Open-Source Approach*, 57 J. LEGAL EDUC. 10, 15–18 (2007). The transition toward electronic casebooks has been slow but owes its origins to the early 1990s when Ron Staudt is credited with creating the first such text—a coursebook in computer law—at the Chicago-Kent Center for Law and Computing. Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 637 (1997) (citing The Center for Law and Computers: The Electronic Publishing Initiative, 4th Annual Conference for Law School Computing Professionals: Conference Materials (Chi.-Kent & CALI Project eds. 1994). That first electronic casebook was saved on the hard disk drive of the notebook computers issued to students at Chicago-Kent. Ronald Staudt, *An Essay on Electronic Casebooks: My Pursuit of the Paperless Chase*, 68 CHI.-KENT L. REV. 291, 303 (1992).

3. See Bodie, *supra* note 2, at 16–22.

4. See Chomsky, *supra* note 1, at 892–93; see also Laurence, *supra* note 1.

5. See James Eagar, Comment, *The Right Tool for the Job: The Effective Use of Pedagogical Methods*, 32 GONZ. L. REV. 389, 395 (1996) (citing Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 521 (1991)).

6. See Eagar, *supra* note 5, at 400–04; see also Arthur D. Austin, *Is the Casebook Method Obsolete?*, 6 WM. & MARY L. REV. 157, 164–65 (1965) (arguing that the case method fails to expose students to the techniques necessary to practice law); Pierre R. Loiseaux, *The Newcomer and The Case Method*, 7 J. LEGAL. EDUC. 244, 246 (1955) (noting the limitations of the case method while supporting it generally).

7. Stephen M. Johnson, *The Course Source: The Casebook Evolved*, 44 CAP. U. L. REV. 591, 617 (2016) (citing Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 623 (1997)) (“The casebook determines much of what faculty members teach and how they teach, and, at the turn of this century, almost 90% of faculty members continued to rely on casebooks as their primary course materials.”).

8. See generally Laurence, *supra* note 1; Chomsky, *supra* note 1, at 892.

traditional, print casebooks behind altogether in favor of creating their own course materials. By offering students digital casebooks, professors provide a two-fold benefit that ensures customized course material that meets their ideal specifications while offering greater savings for their students.⁹

The debate over coursebooks and materials is not unique to legal educators.¹⁰ Education advocates have long argued for increased availability of low cost or open-source course materials for both secondary and post-secondary institutions.¹¹ Open Educational Resources (OER) projects seek to accomplish that objective by promoting the sharing of openly licensed course materials.¹² OER projects are not necessarily designed to eliminate the use of print books.¹³ Rather, these projects aim to make educational materials available at lower costs in easily adaptable formats to meet the needs of both educators and individuals.¹⁴ Although OER projects, as a concept, only date to the mid-1990s,¹⁵ studies clearly demonstrate that Open Educational Resources offer tangible benefits to students and educational institutions,¹⁶ the most striking being that they improve student enrollment and performance.¹⁷

Despite the relative success of OER projects in other academic communities, the legal community has been slow to adopt them, with a couple of notable exceptions, which speaks more to the legal academic community than to the value of open educational resources themselves.¹⁸ The print casebook has been a staple in legal education for nearly a century, and it imbues a certain degree of prestige on its authors and their

9. See Eric Goldman & Rebecca Tushnet, *Self-Publishing An Electronic Casebook Benefited Our Readers—And US*, 11 WASH. J. TECH. & ARTS 49 (2015).

10. See Nicole A. Nguyen, *Not All Textbooks Are Created Equal: Copyright, Fair Use, and Open Access in the Open College Textbook Act of 2010 Legislative Update*, 21 DEPAUL J. ART, TECH & IP LAW 105, 106–112 (2010).

11. *Id.* at 113, 117.

12. See *id.*; see also Benjamin Grimes, *Chapter 621: Using Open-Source Textbooks to Lower the Cost of Education*, 44 MCGEORGE L. REV. 619, 632–33 (2013) (discussing open-source initiatives at the federal level and in California).

13. See Nguyen, *supra* note 10, at 108–10.

14. *Id.*

15. See *id.* at 110.

16. Lane Fischer et al., *A Multi-Institutional Study of the Impact of Open Textbook Adoption of the Learning Outcomes of Post-Secondary Students*, 27 J. COMPUT. HIGHER EDUC. 159, 165–69 (2015); see *infra* Part II.D.

17. *Id.*

18. See generally Bodie, *supra* note 2, at 14–16. CALI's publications, through its eLangdell Press, are often considered notable examples of casebooks published under a Creative Commons license. Johnson, *supra* note 7, at 637.

parent institutions.¹⁹ Furthermore, legal educators often lack the knowledge and incentive to create or adopt open-source casebooks.²⁰ However, as faculty become more acquainted with, and have a better understanding of, open-source resources, it is highly probable that OER materials will be used in the classroom with greater frequency.²¹

When the Spring 2020 semester was hijacked by the COVID-19 pandemic, free digital access to educational materials became a necessity.²² Educators and students were faced with a sudden transition to the online teaching and learning environment. Many found themselves sheltering in place without access to print materials. Numerous legal publishers aided blindsided educational institutions by allowing online access to their content at no cost to users.²³ The crisis showed the vital importance of utilizing educational material that is accessible regardless of geographic and socioeconomic constraints. It also showed the convenience of digital platforms and the ability of students and faculty to quickly adapt to using such resources.

The transition to a remote learning environment included its own struggles.²⁴ Librarians had to step in to facilitate access.²⁵ Students and

19. See Laurence, *supra* note 1, at 9–10. *But see* Johnson, *supra* note 7, at 648–50 (stating that authoring a casebook is not considered serious scholarship for the purpose on tenure and promotion on many faculties).

20. See Johnson, *supra* note 7, at 648–50.

21. See *id.*

22. Lindsay McKenzie, *Textbooks in Short Supply Amid COVID Quarantines*, INSIDE HIGHER ED (Oct. 13, 2020), <https://www.insidehighered.com/news/2020/10/13/covid-19-forces-college-libraries-quarantine-textbooks-hitting-low-income-students>.

23. For example, Wolters Kluwer and other publishers made their e-books freely accessible on the VitalSource platform. West Academic provided requesting students with complimentary online access to its materials, as did the publishers of *The Bluebook*. *Wolters Kluwer Response to COVID-19 Impact on Higher Education Community*, LEGAL EDUC. WOLTERS KLUWER, <https://support.wklegaledu.com/hc/en-us/articles/360041178611-Wolters-Kluwer-Response-to-COVID-19-Impact-on-Higher-Education-Community> [<https://perma.cc/UMN7-KA7M>]; *Distance Learning Resources from West Academic*, WEST ACAD. FAC. RES. CTR., <http://www.lawfacultyresources.com/information.asp?ID=13&title=Distance+Learning+Resources#scroll> [<https://perma.cc/N9R4-8H83>]; Email from The Bluebook Team, Editors, to Emma Wood, Associate Librarian, UMass Dartmouth School of Law (Friday, March 27, 2020 4:41 PM) (on file with author).

24. Emma Pettit, *A Side Effect of the Covid-19 Pandemic? Reading Got a Lot Harder*, CHRON. HIGHER EDUC. (Apr. 20, 2020), <https://www.chronicle.com/article/A-Side-Effect-of-the-Covid-19/248568> [<https://perma.cc/Z4UA-V5BX>].

25. Christopher Cox & Elliot Felix, *Visions of Success: Academic Libraries in a Post COVID-19 World*, LIBR. J. (Dec. 16, 2020), <https://www.libraryjournal.com/?detailStory=Visions-of-Success-Academic-Libraries-in-Post-COVID-19-World>

faculty needed to rapidly learn new platforms mid-semester. The circumstances revealed the unique advantage of adopting or creating OER. Educators, who were already in control of their own teaching materials, could easily adapt and make them accessible to students without the need to rely on the generosity of traditional publishers. While weathering this pandemic, we have been forced to embrace change of all kinds including a shift in how we perceive both remote learning and access to educational materials.

This Article explores the benefits of OER for students and educators, as well as select OER projects that are adaptable to needs of the legal academic community. Part I discusses the history of the casebook and legal pedagogy with emphasis on current trends toward open educational resources and the use of adapted, mixed media in the classroom. Part II continues with a history of OER, legislative initiatives in support of OER, and an evaluation of OER project studies conducted in other academic contexts. The focus of Part III is on current OER projects, particularly those that appear readily adaptable for use by the legal academic community. It argues the value of increasing the use of OER platforms to create and share course content with the legal academic community.

I. THE CASEBOOK IN CONTEXT

A. *The Place of Casebooks in Modern Legal Education*

The casebook, once revolutionary,²⁶ is now a constituent of the law course rather than the exclusive teaching resource.²⁷ Formerly the keystone of a law course, casebooks will likely fall in rank similar to the importance of rivets in manufacturing. While casebooks are still instrumental for class structure, they are no longer a critical element. This falling-in represents cooperation rather than demotion because, despite the projections and criticisms,²⁸ educators have integrated aspects of the traditional casebook with nontraditional resources to create a modernized approach to legal education. A typical law syllabus incorporates casebooks as one of many tools that are designed to support blended, modern instruction.²⁹ Legal professors will combine a number of different

26. See Rosamond Parma, *The Origin, History and Compilation of the Casebook*, 4 AM. L. SCH. REV. 741, 745 (1922) (discussing the revolutionary qualities of the casebook and the emergence of the case method).

27. See Warren H. Binford, *Envisioning a Twenty-First Century Legal Education*, 43 WASH. U. J. L. & POL'Y 157, 170 (2013).

28. See *id.*

29. See *id.*

sources that contribute to a dynamic and engaging learning experience for students.³⁰ There are academic theories and frameworks that can be credited for these diversified teaching methods,³¹ but for some legal educators, these supplements to the casebook have crept into courses without pedagogical resolve.³² Faculty members are incorporating supplemental and open access materials into their courses through deliberate class restructuring and, in some cases, by reason of pedagogical evolution or resource availability.³³

An example of deliberate course restructuring is the flipped classroom concept.³⁴ The idea gained steam early in the 2010s, but caught fire during the COVID-19 pandemic when asynchronous and synchronous learning became not just buzzwords, but critical concepts.³⁵ In the flipped or inverted classroom, students watch videos of lectures on their own, and educators spend class time deepening their students' understanding of

30. See *id.* at 164 (such materials include articles, videos, supplemental books, blogs, guest speakers, and online forums).

31. See, e.g., Shailini Jandial George, *Move Over Millennials, Gen Z is Coming!*, BEST PRACTICES FOR LEGAL EDUC. (Aug. 8, 2018), <https://bestpracticeslegaled.albanylawblogs.org/2018/08/08/move-over-millennials-gen-z-is-coming/> [<https://perma.cc/X7DT-E57T>] (attributing the use of technology, podcasts, and video in the classroom to a shift to reach Generation Z students); *Teaching Methods: An Alternative Vote*, THE ECONOMIST (May 14, 2011), <https://www.economist.com/science-and-technology/2011/05/12/an-alternative-vote> (describing a study designed to test “deliberate practice,” a teaching style where “[c]lass time is spent on problem-solving, discussion and group work, while the absorption of facts and formulae is left for homework.”); *Why we created LegalED*, LEGALED, <http://lealedweb.com/why-we-created-lealed> [<https://perma.cc/H2EK-JUQR>] (“LegalED facilitates flipped learning – where part of the teaching is online and part is in a classroom – which a U.S. Dep’t of Education meta-analysis found is as effective and in some cases even more effective for adult learners than classes taught entirely in a classroom”).

32. Chomsky, *supra* note 1, at 893.

More significantly, and consistent with other forces of change... law school publishers have been looking for “value added” from an educational perspective—companion websites, exercises students can use on their own as well as for class, related case studies, review tools, and video enhancements. The publishers find adopters (faculty instructors) increasingly looking for “value added” as well, to help them incorporate more active and experiential learning in their classes without needing to start from scratch to develop new exercises of their own.

Id.

33. Binford, *supra* note 27, at 162.

34. “The term ‘flipping’ comes from the idea of swapping homework for class work. Students typically are assigned the video-watching for homework, freeing up class time that used to be spent listening to lectures for hands-on activities and application of knowledge, which used to serve as homework.” Katie Ash, *Educators Evaluate ‘Flipped Classrooms,’* EDUC. WK. (Feb. 21, 2019), <https://www.edweek.org/teaching-learning/educators-evaluate-flipped-classrooms/2012/08>.

35. Colleen Flaherty, *Zoom Boom*, INSIDE HIGHER ED. (April 29, 2020), <https://www.insidehighered.com/news/2020/04/29/synchronous-instruction-hot-right-now-it-sustainable> [<https://perma.cc/4YDQ-8XD5>].

subject matter.³⁶ This is a spin on the Socratic method as the lecture format is still critical to relaying content, but the lecture is essentially homework and face-to-face class time is dedicated to discussion and engaged learning. Casebooks generally remain the focal point in this new structure, but it provides greater opportunities for incorporating technology and supplemental videos, simulations, and secondary sources to augment the main text.

Some educators have critiqued the flipped classroom for potentially being a fad rather than a new way of teaching due to the difficulty in ensuring that students actually view and reflect upon lectures at home.³⁷ During the COVID-19 crisis, the tenets of the flipped classroom were given an opportunity to demonstrate their value.³⁸ Whether a lasting teaching method or not, the foray into classroom restructuring speaks to the modern interest in diversifying the resources presented on syllabi and engaging students by utilizing instructional tools in multiple formats.

Videos and the multitude of other sources that supply a course with information and structure have made their way into legal education in less salient ways than the flipped classroom. Some professors only occasionally employ pre-class videos and audiovisual resources to enhance the classroom experience and appeal to the desire of students to be connected to popular culture and each other through common interests.³⁹ Discussion boards and blogs have transformed the way students and their professors communicate, as well as the way feedback is provided.⁴⁰ Articles and supplemental treatises are utilized for the same goals of appealing to students through variety and appeasing demands to adopt new teaching methods that address reported shifts in the needs of students in the legal landscape.⁴¹

Although the casebook is still used in most law courses,⁴² the rise of “other” educational resources in those courses, whether by slow incursion

36. Valerie K. Couch et al., *Adapting to Change in Legal Education*, 85 OKLA. BAR J. 2247, 2248 (2014).

37. See Anne E. Mullins, *The Flipped Classroom: Fad or Innovation?*, 92 OR. L. REV. ONLINE 27, 31–32 (2015).

38. See Yvonne Dutton & Seema Mohapatra, *COVID-19 and Law Teaching: Guidance on Developing an Asynchronous Online Course for Law Students*, 65 ST. LOUIS U. L.J. (forthcoming 2021).

39. See generally Roger Baron, *Providing a Dynamic Classroom Experience*, 61 S.D. L. REV. 1 (2016).

40. See Chomsky, *supra* note 1 at 893.

41. See Johnson, *supra* note 7.

42. Joseph Scott Miller & Lydia Pallas Loren, *The Idea of the Casebook: Pedagogy, Prestige, and Trusty Platforms*, 11 WASH. J. L. TECH. & ARTS 31, 39 (2015).

or swift overhaul, exemplifies the reality of a less centralized role for the traditional casebook.⁴³ Librarians, through course management and electronic reserve systems, have answered the call to organize alternative educational resources that ultimately comprise courses.⁴⁴ In addition, educators can enhance their courses by providing links to subscription digital tools like Core Grammar, Computer Assisted Legal Instruction (CALI), and Lexis's Interactive Citation WorkStation, to name a few.⁴⁵ Supplemental materials can be stored in a central location with syllabi and course schedules, whereas, by their nature, traditional coursebooks are separate entities that are only accessible in person and by the person who has physical possession. As a result of the casebook being elbowed slightly off-center, legal publishers have experimented in modernizing the format by digitizing casebooks. It is clear that open access and modern technology are center stage in the dialogue about modern legal education.⁴⁶

B. *The Casebook in Contemporary History*

Various authors have widely discussed the storied origins of the casebook,⁴⁷ so this article seeks to primarily focus on modern uses rather than their early history. However, regarding the origin of the casebook, law librarian Rosamond Parma expressively noted, "it is to the glory of Harvard University and to Christopher Columbus Langdell in particular, to have created and developed the casebook."⁴⁸ Langdell is credited with being the first to teach from a collection of judicial opinions, thus sparking the "case method" and the need for publishers to produce bound collections of cases to be marketed to law professors and their students. The first casebook is said to have been *A Selection of Cases on the Law of Contracts*, published in 1871 by Little, Brown & Co.⁴⁹ Parma made another rather apt statement in 1922, saying that "[w]hat the next step in the evolution of the casebook is to be remains to be seen. But at present the essential requisites are abundant and well-selected material, carefully

43. Binford, *supra* note 27, at 186.

44. See, e.g., Aj Blechner, *Free Legal Research Resources*, <https://guides.library.harvard.edu/free> [<https://web.archive.org/web/20190901184052/https://guides.library.harvard.edu/free>], (last visited Aug. 6, 2019).

45. *Id.*

46. See, e.g., *id.*; Johnson, *supra* note 7; Miller & Loren, *supra* note 42.

47. See, e.g., Sheppard, *supra* note 2; Johnson, *supra* note 7.

48. Parma, *supra* note 26, at 741.

49. Johnson, *supra* note 7, at 618 (discussing CHRISTOPHER COLUMBUS LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (Boston, Little, Brown & Co. 1871)).

edited and annotated.”⁵⁰ We have only just begun to move beyond those abundant, annotated books. The next step is uncertain.

The evolution of casebook publishing has been more dramatic than the changes to the casebook form itself. From the start, the casebook was an assemblage of significant court decisions with editor commentary and indexing.⁵¹ That remains the basis of its format today.⁵² Most law professors still require print casebooks for their doctrinal courses,⁵³ and many students express a preference for print books.⁵⁴ The legal academic community has long believed that electronic casebooks were poised to take over the law classroom and casebook market.⁵⁵ But the introduction of electronic casebooks has come at a trickle rather than a deluge. If there has been a gradual uptick in e-casebook usage, many professors report that their students still prefer print.⁵⁶ E-casebooks are more likely than not to be bundled in a package, as an alternative format, along with print casebooks,⁵⁷ or rented to students at a slightly reduced rate over the print version.⁵⁸ Launched in 2014,⁵⁹ Wolters Kluwer offers an electronic or digital casebook, called Connected Casebook. It promises lifetime online access to digital versions of title when the purchaser buys the print version

50. Parma, *supra* note 26, at 745.

51. See Bodie, *supra* note 2, at 12–13.

52. Eric L. Muller, *A New Law Teacher's Guide to Choosing a Casebook*, 45 J. LEGAL EDUC. 557, 558 (1995) (citing Robert A. Sedler, *Constitutional Law Casebooks: A View From the Podium*, 79 MICH. L.R. REV. 1020, 1026 (1981)) (discussing “cases and substantive commentary;” and books that contain “cases and commentary with direction and probing”).

53. Binford, *supra* note 28, at 161.

54. James Boyle & Jennifer Jenkins, *Open Legal Educational Materials: The Frequently Asked Questions*, 11 WASH. J. L. TECH. & ARTS 13, 20 (2015) (“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.”).

55. See Bodie, *supra* note 2.

56. Chomsky, *supra* note 1, at 894 (“The publishers are promoting e-books and electronic supplements. But those of us with e-editions of our books have not found student use to be high or rising, and my unscientific sample of students said decidedly that they want everything to be in the book—the hardcopy book.”).

57. Curtis Silver, *How Wolters Kluwer's Connected Casebook is Disrupting Classic Textbooks from the Inside Out*, FORBES (Dec. 13, 2016, 10:24 AM), <https://www.forbes.com/sites/curtissilver/2016/12/13/how-wolters-kluwers-connected-casebook-is-disrupting-textbooks-from-the-inside-out/#1ee6efa95120> [https://perma.cc/V39E-H96Q].

58. Stephanie Rabiner, *Law Students Can Rent Their Casebooks with Online Access for Less*, FINDLAW BLOG (Aug. 19, 2011, 7:48 AM), https://blogs.findlaw.com/greedy_associates/2011/08/law-students-can-rent-their-casebooks-with-online-access-for-less.html [https://perma.cc/9ANL-QBMS].

59. Silver, *supra* note 57.

of the casebook.⁶⁰ More than a digital copy of the print casebooks, this concept represents a shift toward a “show the ball”⁶¹ style of teaching which focuses on transparency and guidance.⁶² Further, West Academic sells an Interactive Casebook, which they dubbed a “new breed of casebook”; it hyperlinks to materials from the Westlaw database and advertises a unique visual display for hypotheticals and additional information.⁶³

Legal publishing has experienced several takeovers and mergers over the years.⁶⁴ The duopoly that still exists between Westlaw (Thomson) and Lexis (Elsevier) is sometimes humorously referred to as *Wexis*.⁶⁵ Their competitive relationship is akin to food franchises, offering parallel products, each purporting to have the edge on the other.⁶⁶ Such has been the approach with casebooks, overt domination of the market by a few publishers has inspired a slow, analogous transition. However, Thomson Reuters removed themselves from the casebook franchise in 2013, when they sold their legal publishing business and announced that they would

60. WOLTERS KLUWER, *CasebookConnect*, <https://www.casebookconnect.com/> [<https://perma.cc/RKF4-FQNP>] (last visited June 10, 2019) (“The Connected Casebook is an all-in-one learning solution that combines your print casebook with lifetime access to CasebookConnect.com at no additional cost.”).

61. “‘Hide the ball’ is a method of instruction where professors ask questions and direct the arguments, but deliberately confuse the discussion rather than guide students to an understanding of the rule, case, or theory.” Rebecca Flanagan, *Lucifer Goes to Law School: Towards Explaining and Minimizing Law Student Peer-to-Peer Harassment and Intimidation*, 47 WASHBURN L.J. 453, 463 (2008).

62. Tim Conneally, *5 Ways Law School is Changing*, FORBES (Feb. 11, 2016, 10:10 AM), <https://www.forbes.com/sites/timconneally/2016/02/11/5-ways-law-school-is-changing/#6e8d0d146088> [<https://perma.cc/9XU8-L3A7>].

63. INTERACTIVE CASEBOOK SERIES, <http://www.interactivecasebook.com> (last visited June 10, 2019).

64. In the nineties, most American legal publishing was owned by Thomson Corporation (Canadian), Reed Elsevier PLC (English-Dutch), and Wolters Kluwer (Dutch). Elsevier acquired Lexis in 1994 and The Thomson Company purchased West Publishing, subsequently Westlaw, in 1996. John Hasko, *The State of Legal Publishing in the United States*, 45 ADVOCATE, Mar. 2002, at 35; *Company News; A Name Change is Planned for Mead Data Channel*, N.Y. TIMES (Dec. 2, 1994), <https://www.nytimes.com/1994/12/02/business/company-news-a-name-change-is-planned-for-mead-data-central.html?src=pm> [<https://perma.cc/Z6MJ-ENPQ>]; Iver Peterson, *The Media Business, West Publishing Purchase by Thomson is Approved*, N.Y. TIMES (June 20, 1996), <https://www.nytimes.com/1996/06/20/business/the-media-business-west-publishing-purchase-by-thomson-is-approved.html> [<https://perma.cc/WBJ4-23BE>].

65. Jon R. Cavicchi, *Lexis v. Westlaw for Research - Better, Different, or Same and the Qwerty Effect*, 47 IDEA 363, 366 (2007).

66. *Id.*

no longer publish casebooks.⁶⁷ This transaction could foreshadow the demise of casebooks. In 2016, Eureka Growth Capital took over West Academic and its' imprints Foundation Press and Gilbert.⁶⁸ Eureka sold West Academic to an affiliate of Levine Leichtman Capital Partners, LLC in 2018.⁶⁹ Thomson Reuters publishes legal treatises under their Legal Solutions brand, but steers clear of casebooks.⁷⁰

Royalties are generally minimal from casebooks.⁷¹ In addition to the low financial incentives, authoring a casebook offers nominal professional or scholarly merit.⁷² Meanwhile, the price of casebooks for students continues to rise. RELX, the parent company of LexisNexis Legal reports a decline in print revenue overall, but the figures still indicate profitability.⁷³ Their legal publishing in North America produced high values when compared to other geographic locations, and print legal revenue significantly surpassed that of their business analytics resources.⁷⁴ Wolters Kluwer reports,

67. Legal Skills Prof., *Thomson Reuters Sells Law School Publishing Operation*, LEGAL SKILLS PROF BLOG (Feb. 4, 2013), http://lawprofessors.typepad.com/legal_skills/2013/02/thomson-reuters-sells-law-school-publishing-operation.html [<https://perma.cc/M9FS-HFF3>].

68. *Eureka Growth Recapitalizes West Academic Publishing*, WSJ PRO PRIV. EQUITY (Mar. 1, 2016, 2:40 PM), <https://www.wsj.com/articles/DJFLBO0120160301ec3lizmpg>.

69. *Id.*

70. See Jennifer Smith, *Thomson Reuters Bids Adieu to Law School Publishing*, WALL STREET JOURNAL (Feb 4, 2013), <https://blogs.wsj.com/law/2013/02/04/thomson-reuters-bids-adieu-to-law-school-publishing/> [<https://perma.cc/P2DW-EWQ2>].

71. Danielle Kurtzleben, *How Your Textbook Dollars Are Divvied Up: New Editions and High-tech Supplements Help Drive Up the Cost of Textbooks*, U.S. NEWS (Aug. 28, 2012, 3:25 PM), <https://www.usnews.com/news/articles/2012/08/28/how-your-textbook-dollars-are-divvied-up> (stating that 11.7 cents of every dollar went to textbook authors as of 2008); Jill Moely, *Writing the Textbook: Why Professors Assign Their Own Publications*, THE DAILY PENNSYLVANIAN (Mar. 20, 2015, 2:00 PM), <https://www.thedp.com/article/2015/03/professors-assign-own-publications-as-class-readings>. Annenberg Professor Joseph Turow, who assigns his own text in the "Mass Media and Society" course, an introductory communications class. *Id.* He estimates that he makes about \$5 per book sold, and other professors report similarly low royalties. *Id.* In some cases, the cost of permissions for reproduction of articles and images in textbooks is so high that authors do not receive pay for years. *Id.*

72. Lydia Pallas Loren, *The Viability of the \$30 Casebook*, 22 J. INTELL. PROP. L. 71, note 11 (2014) (stating that "[a]dmittedly, at some institutions, being a casebook author is not helpful for one's prestige, as it may not be seen as 'real' scholarship").

73. RELX, ANNUAL REPORT AND FINANCIAL STATEMENTS (2018), <https://www.relx.com/~media/Files/R/RELX-Group/documents/reports/annual-reports/2018-annual-report.pdf> (stating that revenue for the North American legal market is £1,083m of a total £4,091m while print legal publishing shows a revenue of £270m vs. £51m for Risk Business Analytics).

74. *Id.*

Our U.S. Legal & Regulatory unit drove 2% organic growth, marking a clear improvement on recent years. Digital solutions, such as the Cheetah legal research platform, grew well, more than compensating for the ongoing decline in print subscriptions in this region. In U.S. legal education, we realized growth reflecting an increase in legal textbook sales and the benefits of our digital learning platform for law students, Connected Casebook.⁷⁵

Online casebooks are on a path to be hyperlinked, highlight-able, searchable, and in other ways clickable or malleable. This interactivity is the prime difference between electronic and traditional casebooks. A common complaint against traditional casebooks is that most do not exactly meet student expectations for content and structure.⁷⁶ Scholars have proposed a complete overhaul to the print casebook design.⁷⁷ A heavy focus on experiential and hands-on learning has emerged by means of ABA standards⁷⁸ and observed needs in the field. The typical casebook is deeply academic and devoid of images.⁷⁹ Print casebooks tend to be weighty, and students plan their days around the size of these tomes and their convenience for transport (i.e. leave Con Law in the car until necessary). E-casebooks, and e-books in general, alleviate this issue by being portable and accessible from multiple devices.

Students commonly rent their casebooks from various vendors.⁸⁰ These digital books dissolve at the close of the semester or the print must be returned by mail. Aspen Publishing was criticized for their new casebook policy in 2014, when they sought to sabotage the used book market by requiring students to return their print books at the end of each

75. WOLTERS KLUWER, WOLTERS KLUWER 2017 FULL-YEAR REPORT (2018), <https://www.wolterskluwer.com/-/media/project/wolterskluwer/oneweb/www/investors/files/pdf-and-excel/2018/20180221-wolters-kluwer-2017-full-year-results.pdf?rev=03c8a1a2d6aa4ca9a8759e77c1fef046&hash=39F94FB85D86625E1D1EDA65940F13CD>.

76. Michael H. Schwartz, *Improving Legal Education by Improving Casebooks: Fourteen Things Casebooks Can Do to Produce Better and More Learning*, 3 ELON L. REV. 27, 30–31 (2011).

77. *Id.*

78. Brian Sites, *Experiential Learning: ABA Standards 303 and 304*, BEST PRACS. FOR LEGAL EDUC. BLOG (Sept. 13, 2015), <https://bestpracticeslegaled.com/2015/09/13/experiential-learning-aba-standards-303-and-304/> [https://perma.cc/G84S-NQME].

79. Michael Asimow & Ticien Marie Sassoubre, *Introduction to the Symposium on Visual Images and Popular Culture in Legal Education*, 68 J. LEGAL EDUC. 2, 2 (2018) (“[p]ictures in casebooks were so rare they deserved protection under the Endangered Species Act”).

80. *See, e.g.*, BARRISTERS BOOKS, <https://www.barristerbooks.com/> [https://perma.cc/9M74-D9V3] (last visited Oct. 2, 2020).

semester.⁸¹ It was essentially an imposed form of rental.⁸² Unfortunately, renting removes the opportunity for students to keep their books or to recoup any money through resale. Renting also leaves students susceptible to fees, particularly fees for late returns.⁸³ Even with the Connected Casebook promise of “lifetime access” to electronic books, one wonders if perpetual availability is possible in the ever-changing digital world.

C. *Crossing the Threshold of Open Access*

Law students could irrefutably benefit from a break on their bookstore bills each semester. The open access movement, among other goals, seeks to reduce the financial burden on students through freely accessible textbooks.⁸⁴ Fortunately, the law lends itself to open access. “All caselaw is born free”⁸⁵ in the sense that cases are primary sources of law to which the public has rights and investment, and the points of access to primary law are becoming increasingly more abundant.⁸⁶

Primary sources of law are intended to exist in the public domain and can be published or modified by any business entity or member of the public.⁸⁷ “It is a long established principle that the ‘law’— judicial opinions, statutes, and administrative regulations—is not copyrightable.”⁸⁸ Open access to sources of law encourages citizens to openly and actively participate in their government.⁸⁹ Copyright

81. See Joe Patrice, *Casebook Publisher Has Aggressive New Plan to Rip Off Law Students*, ABOVE THE LAW (May 8, 2014, 11:12 AM), <https://abovethelaw.com/2014/05/casebook-publisher-has-aggressive-new-plan-to-rip-off-law-students/?rf=1>.

82. *Id.*

83. Tally Goldstein, *Renting College Textbooks Can Be An Even Bigger Ripoff Than Buying Them*, HUFFPOST, (Jan. 12, 2019), https://www.huffpost.com/entry/textbook-renting-buying-college_n_5c2fd6ede4b0d75a9830b7a4 [<https://perma.cc/4JEV-NPC2>].

84. Kyle Mcentee, *Law Books For The Price Of Printing?*, ABOVE THE LAW (June 30, 2016, 3:08 PM), <https://abovethelaw.com/2016/06/law-books-for-the-price-of-printing/> (estimating that law students spend between \$3000 and \$4000 on books while attending law school).

85. Miller & Loren, *supra* note 42, at 48.

86. Michael Whiteman, *The Death of the Twentieth Century Authority*, 58 UCLA L. REV. DISCOURSE 27, 32 (2010) (“The dissemination of primary and secondary authority via the internet has opened up a universe of once hard-to-find information. A simple Google search allows access to documents that were once unavailable to most researchers . . .”).

87. Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215, 216 (2002) (stating that judicial opinions and statutes are not protected by copyright law).

88. Elizabeth Scheibel, *No Copyright in the Law: A Basic Principle Yet a Continuing Battle*, 7 CYBARIS INTELL. PROP. L. REV. 350, 350 (2016).

89. *Id.*

challenges and attempts to introduce licensing restrictions for primary law have primarily resulted from arrangements in which private publishers produce the official versions of law and then lay claim to authorship rights based on their original pagination and annotations.⁹⁰

The most notorious recent example of a copyright challenge to the open publishing of a state code arose in Georgia, which sued a non-profit organization for publishing the official state code on their website.⁹¹ Even though the code was an annotated version, pursuant to an arrangement with a private publisher, the non-profit argued that the Copyright Act's protection for "original works of authorship" does not extend to annotations contained in Georgia's official annotated code.⁹² The Supreme Court agreed.⁹³ Thus, the general principle that "the law" is free and open is still firmly applicable.

As present, case law, both federal and state, is readily available on the internet through resources like Google Scholar,⁹⁴ Findlaw,⁹⁵ Justia,⁹⁶ and Free Law Project.⁹⁷ Several organizations have made great strides in removing obstacles to public access. One such organization is the Free Law Project, a non-profit with the goal of freeing up primary law from proprietary restraints of publishers.⁹⁸ Indeed, to this end, the Free Law Project is responsible for the free legal research website, Court Listener, which not only provides free access to court opinions but to court documents and oral arguments.⁹⁹

There is nothing barring legal educators from editing primary sources of law, adding annotations and comments, and employing it for use in their course materials. The current Covid-19 crisis is opening up a vibrant

90. Nicholas Gaffney, *From the Free Law Trenches an Interview of Tim Stanley on the Free Law Movement to Justia and Beyond*, 40 LAW PRAC. 58 (2014).

91. Scheibel, *supra* note 88, at 351–52.

92. *Georgia v. Public.Resource.Org., Inc.*, 140 S. Ct. 1498, 1503 (2020) (precluding the copyright of judicial opinions, statutes, or annotations prepared and adopted by the legislature).

93. *Id.*

94. See GOOGLE SCHOLAR, <https://scholar.google.com> [<https://perma.cc/DHC4-BDEW>].

95. See FINDLAW, <https://findlaw.com> [<https://perma.cc/V7L4-F94B>].

96. See JUSTIA, <https://justia.com> [<https://perma.cc/6GZP-EXK3>].

97. See FREE LAW PROJECT, <https://free.law/> [<https://perma.cc/HC29-BLQK>].

98. See, e.g., FREE LAW PROJECT, <https://free.law/> [<https://perma.cc/HC29-BLQK>]; CASELAW ACCESS PROJECT, <https://case.law/> [<https://perma.cc/QM45-ZTNG>].

99. See COURT LISTENER, <https://www.courtlistener.com/> [<https://perma.cc/3RBQ-WD9M>] (last visited Oct. 2, 2020) (the court documents are PACER documents available through the open-source Recap Archive); see generally PACER, <https://pacer.uscourts.gov/> [<https://perma.cc/DV64-MYUG>] (last visited Oct. 2, 2020) (PACER is operated by the US Government and provides public access to available, federal court documents.)

conversation among educators and publishers about open access to resources.¹⁰⁰ This time in our history may very hasten a broader acceptance of Open Educational Resources (OER), where digital content could serve a powerful role in making such resources a preferred method of creating and distributing content in the classroom.

II. OER BACKGROUND

Any type of educational material that is in the public domain or created with an open license are OER.¹⁰¹ The nature of these open materials means that anyone can legally and freely copy, use, adapt, and re-share them.¹⁰² OER range from textbooks to curricula, syllabi, lecture notes, assignments, tests, projects, audio, video, and animation.¹⁰³

A. *The Basics*

The term open educational resources (OER) derives from the 2002 UNESCO Forum on the Impact of Open Courseware for Higher Education and include materials of any format that are freely accessible for educational purposes.¹⁰⁴ By definition, OER must be both free or low-cost and published in an openly licensed format that will “grant the creator and users the 5R Permissions,” which include the right to “[r]etain, [r]euse, [r]evise, [r]emix, and [r]edistribute” the material.¹⁰⁵ The OER movement is a response to the realities of modern day education, which is marked by a lack of access to affordable course materials. For some, expensive courses materials make an education out of reach.¹⁰⁶ Only thirty-three percent of college-age Americans are currently enrolled in

100. Jack Grove, *Open-Access Publishing and the Coronavirus*, INSIDE HIGHER EDUC. (May 15, 2020), <https://www.insidehighered.com/news/2020/05/15/coronavirus-may-be-encouraging-publishers-pursue-open-access> [https://perma.cc/59FS-E4R7].

101. *Open Educational Resources (OER)*, UNESCO, <https://en.unesco.org/themes/building-knowledge-societies/oeer> [https://perma.cc/3QX8-YALL].

102. *Id.*

103. See UNESCO, UNESCO FORUM ON THE IMPACT OF OPEN COURSEWARE FOR HIGHER EDUCATION IN DEVELOPING COUNTRIES, UNESCO, PARIS, 1–3 JULY 2002: FINAL REPORT 24 (2002), <https://unesdoc.unesco.org/ark:/48223/pf0000128515> [https://perma.cc/Q5GN-F33K].

104. *Id.* (the term includes text, video media, or other digitally born content).

105. Stacy Katz, *Opening the Conversation: An Introduction to Open Educational Resources*, 2 J. NEW LIBRARIANSHIP 110 (2017).

106. James W. Johnson, A Comparison Study of the Use of Paper Versus Digital Textbooks by Undergraduate Students (May 2013) [hereinafter 2 Johnson] (unpublished Ph.D. dissertation, Indiana State University) (on file with Indiana State University Library).

either a two-year or four-year education program.¹⁰⁷ That low number is, in part, reflective of the cost barriers to education.¹⁰⁸

While it is common knowledge that college is getting more expensive, the cost of books and materials often come as a bit of a shock to first time students and their parents. The additional expense is prohibitive for many students, forcing them to either withdraw from courses or incur additional debt to pay for books.¹⁰⁹ With the price of traditionally published books rising at roughly four times the rate of inflation,¹¹⁰ college administrators and educators are counting on OER to reduce, if not eliminate, some of the financial burden on students and their academic institutions.¹¹¹ In the context of casebooks, the problem is exacerbated by the fact that expensive casebooks have very little value in the used book market and are virtually useless to law school graduates.¹¹²

However, the OER Movement is about more than providing free resources.¹¹³ It also reinforces the concept that educational materials should be easily adaptable to different contexts as well as future innovations, updates, and modifications.¹¹⁴ Educators understand that every course and group of students is different, and that there is power in being able to adapt materials to meet the specific needs of their students.¹¹⁵

107. NATIONAL CENTER FOR EDUCATION STATISTICS, *Nontraditional Undergraduates: Definitions and Data*, <https://nces.ed.gov/pubs/web/97578e.asp> [<https://perma.cc/XVQ9-MQD6>] (last visited Oct. 2, 2020) (describing nontraditional undergraduates as those over the age of twenty-four and traditional undergraduates as students twenty-four and younger).

108. *Id.*

109. 2 Johnson, *supra* note 106 (discussing a program implemented at Virginia State University, a historically black university, after finding that a large percentage of their students struggled to pay for course materials).

110. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-368, COLLEGE TEXTBOOK: STUDENTS HAVE GREATER ACCESS TO TEXTBOOK INFORMATION 6 (2013), <https://www.gao.gov/assets/660/655066.pdf> [<https://perma.cc/94GQ-AFX8>] (finding, utilizing data collected in the decade between 2002 and 2012, that the price of textbooks rose eighty-two percent); *see also* Katz, *supra* note 106, at 110 (citing E. SENACK & R. DONOGHUE, COVERING THE COST: WHY WE CAN NO LONGER AFFORD TO IGNORE THE HIGH TEXTBOOK PRICES (2013), at 1, <https://www.uspirg.org/sites/pirg/files/reports/National%20-%20COVERING%20THE%20COST.pdf>) (stating that the price of textbooks rose seventy-three percent between 2006–2016).

111. Katz, *supra* note 105, at 110–11.

112. The possible exception is that former casebooks can be utilized as bookshelf filler for new attorneys. Laurence, *supra* note 1, at 4.

113. Karen Fasimpaur, *4 Steps to Getting Started with OER: Open Educational Resources Provide Benefits Beyond Cost Savings, Including the Ability to Differentiate the Learning Experience—Here Are Some Essential Elements of a Successful OER Implementation*, 39 TECH. HORIZONS IN EDUC. 37 (2012).

114. *Id.*

115. *Id.*

This is no less true in the legal community, where educators continue to trend toward evolving pedagogical methods to produce better prepared and more practice-ready students.¹¹⁶ In addition, OER give legal educators the ability to modify and update materials to reflect the current state of the law their jurisdictions or in their respective subject areas. OER are typically published under Creative Commons licenses.¹¹⁷ And, these licenses “were developed as a response to a challenge presented by online creativity; how can an author distribute creative material that is protected by copyright in a way that adds to, rather than detracts from, the commons?”¹¹⁸ In this way, authors retain credit for their academic contributions while ensuring the public open access to it.¹¹⁹

People have been inclined to share creative works online since the birth of the internet, but OER seem to owe their origin to open access innovations and, specifically, to developments in open and distance learning projects.¹²⁰ It makes sense that educational institutions began to

116. See generally Schwartz, *supra* note 76; Eagar, *supra* note 5.

117. Kincaid C. Brown, *Creative Commons: An Explainer*, 97 MICH. B.J. 52, 52 (2018) (Creative Commons is a nonprofit organization that provides six standardized licenses that may be applied to any material eligible for copyright protection save computer software); see also CREATIVE COMMONS LICENSES, <https://creativecommons.org/licenses/> [<https://perma.cc/WC6F-4CUR>]. Each Creative Commons license has “three layers: the legal code of the license, a license deed (a summary for nonlawyers), and machine-readable metadata.” Brown, *supra*. The purpose of these layers is to ensure that licenses, licensees, and the computers themselves understand the concepts, as opposed to the legal terminology of copyright most readily understood by lawyers. *Id.* Utilizing a creative commons license is as simple as stating the intent to use it with a link to the standard license language and it is also possible to post the image associated with the selected license. CREATIVE COMMONS, *supra*. The most accommodating license gives user the standard 5R permissions, including the ability to use the resource commercially, as long as the original author is attributed. See *id.*

118. Susan Corbett, *Creative Commons, Licenses, the Copyright Regime and the Online Community: Is There a Fatal Disconnect?*, 74 MOD. L. REV. 503 (2011), at 503 (citing S. Dusollier, *The Master’s Tool’s v. The Master’s House: Creative Commons v. Copyright*, 29 COLUMBIA J.L. & ARTS 271, 274 (2005)) (defining “Commons” to mean “content that can be used by the public and potential future creators.”).

119. Tony Simmonds, *Common Knowledge? The Rise of Creative Commons Licensing*, 10 LEGAL INFO. MGMT. 162–65 (2010).

120. Christopher J. Ryan Jr., *Not-So-Open Access to Legal Scholarship: Balancing Stakeholder Interests with Copyright Principles*, 20 RICH. J.L. & TECH. 1, 6 (2014). The MIT OpenCourseWare project is credited with sparking the global movement in open access educational content when it launched in 2001 with the goal of making every course offered at the university openly accessible online. Hal Abelson, *The Creation of OpenCourseWare at MIT*, 17 J. SCI. EDUC. & TECH. 164, 164–165 (2008) (citing UNESCO, UNESCO FORUM ON THE IMPACT OF OPEN COURSEWARE FOR HIGHER EDUCATION IN DEVELOPING COUNTRIES, UNESCO, PARIS, 1–3 JULY 2002: FINAL REPORT 24 (2002), <https://unesdoc.unesco.org/ark:/48223/pf0000128515>). As of August 2018, MIT reports having an offering of 2,438 courses. MITOPENCOURSEWARE, MASSACHUSETTS INSTITUTE OF

see the internet as a convenient tool for publishing and distributing information and educational materials to students, of all ages and backgrounds, from around the world.¹²¹ The earliest and, perhaps, most well-known of these projects is the Massachusetts Institute of Technology OpenCourseWare project, which aims to unlock knowledge and empower minds by providing a platform whereby instructors and educational institutions improve their courses; “students find additional resources to help them succeed; and independent learners enrich their lives and use the content to tackle some of our world’s most difficult challenges, including sustainable development, climate change, and cancer eradication.”¹²²

Although MIT OpenCourseWare pioneered open courses, these days the MIT OpenCourseWare project is hardly unique. There are so many open course projects that they now have a name—Massive Open Online Courses or MOOCs for short. More than 700 universities around the world have launched free online courses using a variety of platforms.¹²³ “By the end of 2020, more than 180 million learners had signed up for at least one MOOC.”¹²⁴ While the academic community was relatively quick to accept and develop open course ware, it was a little slower to recognize the need for OER and developing platforms for their widespread dissemination.¹²⁵ However, OER projects are becoming increasingly common and finding support from both state and federal legislatures.

B. *Early OER Projects*

There are two primary methods of publishing OER; the author either

TECHNOLOGY DASHBOARD REPORT (Aug. 2018), https://ocw.mit.edu/about/site-statistics/monthly-reports/MITOCW_DB_2018_08_v1.pdf [<https://perma.cc/5P99-UUAE>].

121. Ryan, Jr., *supra* note 120, at 6–7.

122. *About OCW*, MIT OPENCOURSEWARE, <https://ocw.mit.edu/about/> [<https://perma.cc/9EXB-ZG7D>].

123. Dhawal Shah, *Massive List of MOOC providers from Around the World: Where to Find MOOCs: The Definitive Guide to MOOC Providers*, CLASS CENTRAL (June 15, 2017), <https://www.class-central.com/report/mooc-providers-list/> [<https://perma.cc/B7EE-NN2A>] (specifically listing Coursera and edX as two of the commonly used MOOC platforms available in the United States). This list only provides for traditional online courses and not the myriad of platforms that are freely available to interactively teach users a specific skill such as foreign languages. *E.g.*, Jakob Gibbons, *52 Free Language Learning Websites That are Almost Too Good to Be True*, FLUENTU BLOG, <https://www.fluentu.com/blog/free-language-learning-websites/> [<https://perma.cc/AN6G-5EYN>].

124. Shah, *supra* note 123.

125. Jane K. Winn, *Can Law Students Disrupt the Market for High-Priced Textbooks*, 11 WASH J. L. TECH & ARTS 1, 11 (2015) (“[t]he 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.”).

uploads it to an online repository or self-publishes the material through a distributor that provides access to it at cost.¹²⁶ The OER projects noted here do not include the course materials created by educators and provided directly to their students in electronic format.¹²⁷ Although such materials are highly beneficial to students, they cannot be considered openly accessible while they remain unavailable to a wider range of public users.

In the past decade, OER projects have sought to make it easier for educators to make their educational content widely available. The first large-scale attempts at OER projects were intended to address access to educational materials in the K-12 context. They were created with the ardent support of cash strapped school districts looking for ways to provide their students quality materials at a lower price.

The California-based cK-12 project,¹²⁸ launched in 2007 by the CK-12 Foundation,¹²⁹ is an example of a successful project that was later adopted by school districts internationally and throughout the U.S.¹³⁰ It is frequently lauded as the most robust provider of open-source K-12 STEM content.¹³¹ Dedicated to an open access mission, the foundation recruited teachers from across the country to author K-12 textbooks and publish them on the cK-12 website under Creative Commons licenses.¹³² Neeru Khosla, a founder of CK-12, when explaining the decision to create the platform, said, “[w]e can’t make all kids get an education, . . . but we can

126. See Lauri M. Aesoph, *Adoption Guide: A reference of instructors, institutions, and students on adopting open textbooks 2nd Ed.*, BC CAMPUS OPEN EDUC. (2019), at 5–6, <https://opentextbc.ca/adoptopentextbook/>.

127. Laurence, *supra* note 2, at 4 (author argues for the use of electronic, web-based materials generally rather than for the adoption of his specialized materials, which he claims are “quirky, idiosyncratic, and Arkansized.”).

128. CK-12 FOUND., <https://www.ck12.org/student/> [https://perma.cc/VV5M-BHHT] (last visited Oct. 2, 2020). The web-based digital textbooks were originally called flexbooks because they “utilize[d] a web-based collaborative model, include[d] open educational resources, and enable[d] educators to customize and produce their own textbooks.” Rebecca Hill, *Turning the Page: Forget About Those Bulky Backbreakers, Digital Textbooks are the Future*, 56 SCH. LIBR. J. 24 (2010), at 26.

129. Katia Savchuk, *Wife of Billionaire Venture Capitalist, Wants to Fix Education with Software*, FORBES (June 29, 2015, 10:00 AM), <https://www.forbes.com/sites/katiasavchuk/2015/06/29/neeru-khosla-wife-of-billionaire-venture-capitalist-wants-to-fix-education-with-software/#2b4943846cd1> [https://perma.cc/84QW-6H6Y] (Husband and wife, Neeru and Vinod Khosla, teamed up to create the foundation with the assistance of partner, Murugan Pal, who lent the project much needed technical and entrepreneurial skills).

130. *Id.*

131. OPEN WASHINGTON: OPEN EDUCATIONAL RESOURCES NETWORK, <http://www.openwa.org/category/textbooks/> [https://perma.cc/3296-EG2L].

132. CK-12 FOUND., <https://www.ck12.org/student/> [https://perma.cc/VV5M-BHHT] (last visited Oct. 2, 2020).

make it simpler, easier, and more affordable. That's the philosophy behind the openness as far as I'm concerned."¹³³

The project has received favorable accolades for its dedication to open access principles and willingness to invest in innovative teaching techniques.¹³⁴ It has been an undeniable success given that "the site now has a footprint in thousands of schools across districts in every state."¹³⁵ In addition, many CK-12 users are international with materials being translated into other languages.¹³⁶ Given its success with middle and high school course materials, it should come as no surprise that cK-12 recently started publishing open-source college level textbooks on its website.¹³⁷

Although districts across the country use cK-12, other states have invested in their own OER projects to fully capitalize on the potential of locally created educational materials.¹³⁸ The Utah State Board of Education piloted an open-source textbook program in 2010 that was so successful that the department expanded statewide.¹³⁹ Schools distributed print copies of textbooks in the project to avoid disadvantaging students without access to electronic devices.¹⁴⁰ Even taking printing expenses into account, the Utah State Board of Education anticipated saving fifty percent in curriculum costs in the piloted districts.¹⁴¹ Content and teaching experts also designed the textbooks and materials in this project to support

133. Sara Bernard, *The "Living Book" Movement: Free Education for All*, KQED (Jan. 3, 2011), <https://www.kqed.org/mindshift/5900/the-living-book-movement-free-education-for-all> [<https://perma.cc/5BMJ-ELQH>].

134. See CK-12, *supra* note 128 (program employs concept-based learning, whereby materials are organized to meet the needs of students with different goals and learning styles). CK-12 also provides educators with the flexibility to use one topic or many topics in the context of any given course. *Id.*

135. Savchuk, *supra* note 129.

136. See *Partners, CK-12 FOUND.*, https://www.ck12info.org/about/partners/?_ga=2.178691428.1572985245.1562771264-797491144.1562771264 [https://web.archive.org/web/20201006145316/https://www.ck12info.org/partners/?_ga=2.178691428.1572985245.1562771264-797491144.1562771264]. (last visited Oct. 6, 2020) (language translation is provided courtesy of a partnership with Intel).

137. Only a handful of college level textbooks are available at this point. CK-12, *supra* note 128.

138. See Fasimpaur, *supra*, note 113.

139. *Id.* at 37.

140. John K. Waters, *OER and the Common Core: Will the New State Standards Push More Districts to Start Using Open Educational Resources?*, 40 TECH. HORIZONS EDUC. J., Feb. 2013, at 34, 35.

141. *Id.*

Utah Core Standards, instruction, and teaching.¹⁴²

Although the Utah project never expanded to include college level textbooks, the state legislature has been supportive of digital projects.¹⁴³ The Utah Education Network (UEN), although not a new organization, currently operates under the mission to connect “all Utah school districts, schools, and higher education institutions to a robust network and quality educational resources.”¹⁴⁴ In this role, UEN has sought to bring the internet and video based education to all Utah students.¹⁴⁵ It readily provides information and links to OER projects focused on college level content.¹⁴⁶

While some of the earliest strides in OER came from the K-12 sector, this head start was short lived. Like MOOCs, there are now so many repositories dedicated to open-source college textbooks that figuring out which one to use can be quite overwhelming.¹⁴⁷

Today, there are at least three OER repositories dedicated to law-related materials: The Center for Computer-Assisted Legal Instruction (CALI), H2O, and LawCarta.¹⁴⁸ CALI is a long-time staple in legal

142. UTAH EDUC. NETWORK, <https://www.uen.org/> (last visited July 10, 2019) (university faculty, district and school specialist, teachers, and Utah State Board of Education staff collaborated in groups to create the original content).

143. *Id.*

144. *About UEN*, UTAH EDUC. NETWORK, <https://www.uen.org/ueninfo/> [<https://perma.cc/L5HC-6B5C>].

145. *U.S. West/Utah Education to Bring the Internet and Video Based Education to Utah Students*, 27 TECH. HORIZONS IN EDUC. 20–22 (1999).

146. UTAH EDUC. NETWORK, <https://www.uen.org/>. Critics argue that while Utah’s efforts are steps in the right direction, they fail to truly harness the value of OER; Jeff Mao, Learning Technology Policy Director for Maine’s Department of Education, says “[t]he cost savings in a situation like Utah’s is significant, But it’s a short-term thing, a first-blush adaptive strategy. OER isn’t just about providing a PDF of the book. It’s about creating compelling digital materials that can be customized and improved over time.” Waters, *supra* note 140, at 35.

147. Some of the most common providers of open-source materials online are OPENSTAX, <https://openstax.org/> (last visited Mar. 25, 2021); WASH. STATE OPEN COURSE LIBR., <http://opencourselibrary.org/> (last visited Mar. 25, 2021); MINN. OPEN TEXTBOOK LIBR., <https://open.umn.edu/opentextbooks/> (last visited Mar. 25, 2021) (provides a clearinghouse of open textbooks and includes faculty reviews of these materials); John Hilton III, *Open Educational Resources and College Textbook Choices: A Review of Research on Efficacy and Perceptions*, 64 EDUC. TECH. RES. DEV. 573, 574 (2016). In addition to these providers, there are many other repositories contain supporting OER materials. *See, e.g.*, MERLOT, <http://www.merlot.org> [<https://perma.cc/6XP4-VGNA>] (Merlot purports to have a collection that “consists of tens of thousands of discipline-specific learning materials, learning exercises, and Content Builder webpages, together with associated comments, and bookmark collections, all intended to enhance the teaching experience of using a learning material.”).

148. *The eLangdell Bookstore*, CTR. FOR COMPUT. ASSISTED LEGAL INSTRUCTION, <https://www.cali.org/the-elangdell-bookstore> [<https://perma.cc/GE6R-QB27>]; H2O,

education, providing study aids and learning modules. The site now maintains a library of coursebooks that it published digitally through eLangdell Press.¹⁴⁹ Although law schools pay a subscription fee for other CALI products, the coursebooks are openly accessible under a Creative Commons license and can be downloaded and modified without cost.¹⁵⁰ H2O, a Harvard Innovation Lab project, and LawCarta are open-source repositories that give users the ability to write and publish coursebooks.¹⁵¹ Users can also create syllabi and custom courses using either their own materials or those found in the repository.¹⁵² And, lastly, users can view, edit, and save materials in folders for future use.¹⁵³ The stated mission of both repositories is to reduce the cost of education and to improve the effectiveness of educators by giving them more options in selecting and distributing educational materials.¹⁵⁴

Over the past couple of decades, the dramatic increase in available OER, including both textbooks and supporting materials, has given rise to questions that the academic community is now in a much better position to answer. Academics are now determining the advantages and disadvantages of OER and considering how to best support and promote further adoption.

C. Legislative Efforts

Congress introduced, but failed to pass, legislation to support OER in the Open College Textbook Acts (OCTAs) of 2009 and 2010.¹⁵⁵ Both bills authorized the Secretary of Education “to award grants, on a competitive basis, to eligible entities to carry out [] activities . . . including creating, updating, or adapting open textbooks.”¹⁵⁶ Under both

<https://opencasebook.org/> [<https://perma.cc/954G-DX59>]; LAW CARTA, <https://lawcarta.com/> [<https://perma.cc/9KCG-ESKJ>].

149. *The eLangdell Bookstore*, CTR. FOR COMPUT. ASSISTED LEGAL INSTRUCTION, <https://www.cali.org/the-elangdell-bookstore> [<https://perma.cc/GE6R-QB27>].

150. *Id.* (although the materials are available without cost, the Creative Commons license requires attribution and prohibits any commercial use); see generally *Attribution-NonCommercial-ShareAlike 3.0 Unported (CC BY-NC-SA 3.0)*, CREATIVE COMMONS, <https://creativecommons.org/licenses/by-nc-sa/3.0/> (last visited Mar. 6, 2021) (identifying the rights permitted under a Creative Commons 3.0 license).

151. H2O, *supra* note 148; LAW CARTA, *supra* note 148.

152. H2O, *supra* note 148; LAW CARTA, *supra* note 148.

153. H2O, *supra* note 148; LAW CARTA, *supra* note 148.

154. H2O, *supra* note 148; *About Us*, LAW CARTA, <https://lawcarta.com/about-us/> [<https://perma.cc/T5UN-RRBT>].

155. Open College Textbook Act of 2009, S. 1714, 111th Cong. (2009); Open College Textbook Act of 2010, H.R. 4575, 111th Cong. (2010).

156. H.R. 4575 § 4(a); S. 1714 § 4(a).

versions of the OCTA, eligible entities included higher education institutions, professors at higher education institutions, and nonprofit or for-profit organizations that produce open textbooks.¹⁵⁷ The bills further stipulated that the grant recipients must meet specific conditions pertaining to the creating, updating, adaption, licensing, and accessibility of the digital materials.¹⁵⁸ To ensure grant recipient complied with these conditions, the Secretary of Education was tasked with the development of a peer review and evaluation process.¹⁵⁹ Another aspect of the OCTAs is that they addressed educational materials created using grant funding from other federal agencies and required materials “for use in elementary, secondary, or postsecondary courses shall be licensed under an open license.”¹⁶⁰

While neither bill passed through Congress, they helped garner much needed attention to the issues of textbook access and costs.¹⁶¹ These bills prevented public interest from waning after Congress passed amendments to the Higher Education Opportunity Act (HEOA) in 2008.¹⁶² Becoming effective on July 1, 2010, the HEOA amendments required publishers to “unbundle” textbooks from supplemental materials and separately price everything.¹⁶³ While the HEOA was a valuable step in forcing textbook publishers toward more transparency, it was not intended to support the development of OER in accord with the OCTA.¹⁶⁴

Undeterred, advocates of the OCTAs introduced another bill in 2013, the Affordable College Textbook Act.¹⁶⁵ This bill aimed to reduce the cost of college textbooks by supporting OER with grant initiatives along with other means. This bill has never been enacted into law either, but it has been reintroduced in each successive session of Congress; the latest

157. H.R. 4575 § 4(b)(1)–(3); S. 1714 § 4(b)(1)–(3).

158. H.R. 4575 § 4(f)(1)–(3); S. 1714 § 4(f)(1)–(3).

159. H.R. 4575 § 4(g); S. 1714 § 4(g).

160. H.R. 4575 § 5(a); S. 1714 § 5(a).

161. *Nguyen, supra* note 10, at 113–17.

162. Higher Education Opportunity Act, Pub. L. No. 110-315, § 3, 122 Stat. 3078, 3083 (2008) (codified in scattered sections of 20 U.S.C.).

163. *Id.* § 133(c)(a)(A)–(D), 122 Stat. at 3109 (codified in 20 U.S.C. § 1015b) (requires publishers to be transparent about pricing but also about previous textbook editions and content revisions).

164. *See generally* 155 CONG. REC. 9850 (statement of Sen. Richard Durbin) (in his comments, Senator Durbin hoped to do more than the HEOA by providing “cheap alternatives to professors and students”).

165. Affordable College Textbook Act, S. 1704, H.R. 113th Cong. (2013) (sponsored by Sen. Richard J. Durbin); *see also* H.R. 3538, 113th Cong. (2013) (sponsored by Rep. Ruben Hinojosa).

version was reintroduced in the spring of 2019.¹⁶⁶

In 2018, Congress was able to enact a bipartisan appropriations bill that funded the Open Textbook Pilot.¹⁶⁷ Administered by the Department of Education, the Open Textbook Pilot is a federal grant program which supports projects at institutions of higher education that create or expand the use of OER.¹⁶⁸ The program was renewed for a second year in 2019.¹⁶⁹ In addition to these modest efforts by Congress, state legislatures have initiated many of the OER projects that currently exist.

State legislatures have approached OER options in vastly different ways. As of October 2020, Twenty-one states have no existing or pending legislation dealing directly or indirectly with OER.¹⁷⁰ Of the remaining states, some are just beginning their foray into OER, passing legislation to create OER councils, or other similar programs, to investigate the feasibility of incorporating OER into either their secondary or post-secondary classrooms, or both.¹⁷¹ Others are creating concrete policies to support OER in their academic institutions.¹⁷² Although policies vary from state to state, there are striking similarities in the types of measures that states are employing to support OER.

Perhaps the simplest policy that has passed in at least five states, most recently in Virginia, requires state universities and colleges to notate

166. Affordable College Textbook Act, S. 1036, 116th Cong. (2019) (sponsored by Sen. Richard J. Durbin); *see also* H.R. 2107, 116th Cong. (2019) (sponsored by Rep. Joe Neguse).

167. Consolidated Appropriations Act, 2018, H.R. 1625, 115th Cong. (2018).

168. *Id.*

169. Consolidated Appropriations Act, 2019, H.R. 648, 116th Cong. (2019).

170. *See OER State Policy Tracker*, SPARC, <https://sparcopen.org/our-work/state-policy-tracking/> [<https://perma.cc/77D2-8Y64>] (last visited Oct. 2, 2020) (states without any activity are absent from this tracker and those states are: Alabama, Alaska, Arizona, Idaho, Indiana, Kansas, Kentucky, Maine, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, Oklahoma, Pennsylvania, South Carolina, South Dakota, Vermont, Wisconsin, and Wyoming).

171. *See, e.g.*, 2019 La. Acts 125; 2019 N.J. Laws 768; 2018 Va. Acts 752; *Open Educational Resources*, MASS. DEP'T OF HIGHER EDUC. (2018), <http://www.mass.edu/strategic/oer.asp> [<https://perma.cc/Z8X5-N4ER>] (last visited Jul. 24, 2019); 2017 CONN. ACTS No. 130 (Reg. Sess.) (differing from the others on this list in that it is essentially a "digital discount" bill supported by publishers to promote partnerships between publishers and institutions).

172. *See, e.g.*, CAL. EDUC. CODE § 66408 (West 2021) (establishing the California Digital Open-Source Library, under the administration of the California State University, in coordination with the California Community Colleges, for the purpose of housing open-source materials while providing an Internet Web-based way for students, faculty, and staff to easily find, adopt, utilize, or modify course materials for little or no cost).

courses that use OER in their course catalogs.¹⁷³ This simple policy gives budget conscious students the ability to choose courses and sections that use OER. Another popular policy state legislators utilizes involves offering grants as a monetary incentive for educators to develop OER for their respective states similar to the OCTA proposal.¹⁷⁴ A small minority of states have legislated the development of OER repositories to support educational institutions.¹⁷⁵

In response to OER legislation, some big publishers have declared their intentions to “embrace” Open Education Resources.¹⁷⁶ Despite the seemingly noble message, there is some concerning speculation that these declarations lack sincerity.¹⁷⁷ For example, MacMillan Learning recently launched Intellus Open Courses and, in a marketing campaign, boasted “open” educational materials.¹⁷⁸ But, on closer inspection, their course materials are hidden behind a \$14.99 paywall for students or an institutional licensing cost.¹⁷⁹ Nicole Allen, Director of Open Education at the Scholarly Publishing and Academic Resources Coalition, likened this model to inclusive access rather than open access, stating that “if all this program amounts to is charging students \$14.99 for access to flexible content, that’s a step up from the status quo. But we should not be calling it OER.”¹⁸⁰ Publishers like Lumen Learning and McGraw Hill have developed similar products charging “course support fees” while using

173. 2018 Va. Acts 590. Similar bills have also passed in Oregon, Texas, California, and Washington. See 2015 Or. Laws 727; 2017 Tex. Gen. Laws 581; 2016 Cal. Stat. 343; 2017 Wash. Sess. Laws 332. The Washington law only covered technical and community colleges, but there is a pending bill that would extend the policy to state universities and colleges. H.R. 1701, 66th Leg., Reg. Sess. (Wash. 2019).

174. See 2018 Colo. Sess. Laws 186; 2019 Minn. Laws 64.

175. See 2012 Cal. Stat. 622; CAL. ED. CODE § 66408 (2019); 2018 Mich. Pub. Acts 265; 2019 Tex. Gen. Laws 902.

176. See Lindsay McKenzie, *A Big Publisher Embraces OER*, INSIDE HIGHER ED (Oct. 10, 2017), <https://www.insidehighered.com/news/2017/10/10/cengage-offers-new-oer-based-product-general-education-courses> [<https://perma.cc/R48R-2TE3>] (Macmillan Learning, Pearson, and McGraw Hill “have been talking about the benefits of using OER, offering help in doing so or adding business lines focused on OER”).

177. *Id.*

178. See Kinsley Stocum, *MacMillan Learning Launches Intellus Open Courses, an Enriched OER Course Solution*, MACMILLAN LEARNING (Feb. 13, 2018), <https://www.macmillanlearning.com/college/us/our-story/news-and-media/launches-intellus-open-courses> [<https://perma.cc/5EJW-5877>].

179. See *id.*

180. Doug Lederman, *Another Publisher Expands OER Footprint*, INSIDE HIGHER ED (Feb. 14, 2018), <https://www.insidehighered.com/digital-learning/article/2018/02/14/another-publisher-macmillan-expands-footprint-open-textbook> [<https://perma.cc/JYL5-NURG>].

buzzwords like *OER*, *affordable*, and *open-license*.¹⁸¹ These misleading practices have potential to obscure educators' view of open access.

D. *Advantages and Disadvantages of OER*

At all educational levels, cost savings is the most often cited advantage to OER, but it is particularly relevant for college students, who invest “an average of \$1200 per year on textbooks and course supplies.”¹⁸² For some community college students, the cost of their textbooks and supplies, will be the same if not greater than the cost of their tuition. In 2013, it was reported that “65% of [the 2,039 college students surveyed from more than 150 campuses] decided against buying a textbook because it was too expensive.”¹⁸³ In 2016 a similar study was conducted in Florida, this study involved 22,000 students from forty public colleges and universities and found nearly identical results.¹⁸⁴ Open educational resources give institutions and educators the means to eliminate a barrier to education for students who struggle to afford educational expenses.

Another advantage of OER is their flexibility and ease of customization. It can take months, if not years, for a traditional print textbook to make its way through the publishing process. Open educational resources can be updated instantaneously and adapted to meet the needs of a specific community of students. For example, if a STEM professor has a classroom of students with varying or mixed language skills, they can incorporate open, mixed media-content into their textbook to aid in teaching complex ideas with the purpose of, ultimately, overcoming language barriers to learning.¹⁸⁵

181. *Id.*

182. Ozgur Ozdemir & Christina Hendricks, *Instructor and Student Experiences with Open Textbooks from the California Open Online Library for Education (Cool4Ed)*, 29 J. COMPUTING HIGHER EDUC. 98, 99 (2017) (citing ETHAN SENACK, FIXING THE BROKEN TEXTBOOK MARKET: HOW STUDENTS RESPOND TO HIGH TEXTBOOK COSTS AND DEMAND ALTERNATIVES (Student PIRGs, 2014), <https://studentpirgs.org/2014/01/27/fixing-broken-textbook-market/> [<https://perma.cc/Q6W2-XEB8>]).

183. ETHAN SENACK, FIXING THE BROKEN TEXTBOOK MARKET: HOW STUDENTS RESPOND TO HIGH TEXTBOOK COSTS AND DEMAND ALTERNATIVES (Student PIRGs, 2014), at 4, <https://studentpirgs.org/2014/01/27/fixing-broken-textbook-market/> [<https://perma.cc/Q6W2-XEB8>].

184. Ozdemir & Hendricks, *supra* note 182 at 99–100 (citing FLA. VIRTUAL CAMPUS, 2016 STUDENT TEXTBOOK AND COURSE MATERIALS SURVEY 5 (2016), <https://www.flvc.org/documents/96858/931951/2016+Student+Textbook+Survey.pdf/591cf5b0-bbe8-406d-acd8-b23d89b8577f> [<https://perma.cc/P9MF-X53E>]) (finding that 67% of post-secondary students did not purchase a textbook due to the price).

185. This concept has been adopted in the past especially in the context of K-12 education. In 2010, San Francisco began customizing textbooks from the CK-12 database to

Thinking more globally, OER can be used to create textbooks designed to teach to students of different learning styles by presenting concepts in writing and using mixed-media methods. The use of OER also allows educators to share their textbooks with colleagues to aid in collaboration efforts or projects within institutions. These OER projects push educators and institutions beyond being passive consumers of content to being proactive creators, who are directly responsible for what their students learn and how they learn it.¹⁸⁶

Lastly, it is at least arguable that the rise of OER has pushed traditional print publishing companies to innovate and expand their focus to learning services. There is an unfortunate assumption in the academic community that while access to OER is improving, the traditional publishing industry is remaining stagnant. However, “there’s a lot of innovation among the textbook publishers in conjunction with, in parallel to and, in some cases, on very different avenues from—where the OER pieces are going right now.”¹⁸⁷ Traditional textbook publishers will be around for the near future, but “they will need to think hard about how to leverage OER, the internet, and crowdsourcing.”¹⁸⁸ When educators can create and distribute content, it leaves publishers to adapt and offer something to the educational community that only they are uniquely positioned to provide. Publishers should provide

better platforms that allow for ease of iteration of content in order to provide personalization and customization for individual learners . . . and that leverage data to help connect learners to the right content. What the publishing industry needs to do is to help all of us become better publishers. That’s a service . . . people would buy.¹⁸⁹

Legal publishers might not face quite the same pressure as other academic publishers because the sale of legal casebooks makes up only a percentage of legal publishing sales.¹⁹⁰ However, legal publishers are adapting to the same market shifts affecting other textbook publishers, and they are innovating to provide materials and casebooks that offer

teach rigorous content to high school students with low literacy skills using mixed media. Fasimpaur, *supra* note 113.

186. *Id.*

187. Waters, *supra* note 140, at 38 (quoting Jeff Mao who oversees the Maine Learning Technology Initiative as the learning technology policy director for Maine’s Department of Education).

188. *Id.*

189. *Id.*

190. See generally Olufunmilayo B. Arewa, *Open Access in a Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market*, 10 LEWIS & CLARK L. REV. 797 (2006).

personalization and customization for individual learners.¹⁹¹

While there are clear advantages to OER, it is equally clear that they come with their fair share of concerning realities. Academic professionals are most often apprehensive about the question of quality assurance—are OER reliable? Textbooks created by traditional publishers are imbued with authority because of the general presumption that they receive rigorous editing to ensure accuracy. This presumption prevails even though the public frequently finds errors and inconsistencies in textbooks, often to the embarrassment of publishers and academic institutions.

Although traditional college textbooks undergo an editing process, it is minimal because they are often written by subject matter experts.¹⁹² In such cases, the editing that does occur, if any, is limited to the technical details of the textbook format.¹⁹³ The quality of the substantive content in college textbooks is, therefore, directly correlated to the subject matter expertise of authors. The same is essentially true for OER. Their reliability relies on the expertise of their authors.

In the case of OER, the platforms and the users ascertain author reliability and content quality. Some open-source platforms, such as CK-12 and CALI, maintain control over the content that is published on their platforms.¹⁹⁴ They select the authors and content to contribute to their repositories. Many other platforms are far more open when it comes to contributing content to their platforms.¹⁹⁵ These variables make it slightly more challenging to select and create textbooks utilizing OER, requiring educators to take ownership of the materials they select for their courses.

Indeed, law faculty often select their text based on the recommendation of colleagues.¹⁹⁶ Sometimes professors go through a

191. Legal academic publishers are now offering products that allow users to create individual accounts and customize the materials that they have either purchased or have access to through personal or library subscriptions. *See* Conneally, *supra* note 62.

192. *See generally* MARY E. LEPIONKA, *WRITING AND DEVELOPING YOUR COLLEGE TEXTBOOK: A COMPREHENSIVE GUIDE TO TEXTBOOK AUTHORSHIP AND HIGHER EDUCATION PUBLISHING* (2nd ed. 2008).

193. *Id.* at 36–39.

194. *Become an Author*, CTR. FOR COMPUT. ASSISTED LEGAL INSTRUCTION, <https://www.cali.org/elangdell/become-author> (last visited Mar. 26, 2021); *Meet the Team, Authors*, CK-12, https://www.ck12info.org/team/?_ga=2.106150403.1455723707.1616798877-320035102.1616798877 (last visited Mar. 26, 2021).

195. *See* sources cited *supra* note 147.

196. Muller, *supra* note 52, at 55 (suggesting “[w]hen you consult with your new colleagues, you may learn that one or another casebook is used by others who teach in your area. You may feel yourself under some pressure, spoken or unspoken, to choose that same book. There is certainly some value in this: you will have someone with whom you can discuss

rigorous process of reading reviews, requesting and reading review copies, and employing the assistance of librarians. On other occasions, there is a single question of whether to use the same casebook used to teach the course in the past. The law is governed by precedent, and, likewise, it is human nature to feel empowered by the choices or opinions of other professionals.¹⁹⁷

Some would say that the prestige of the casebook is a thing of the past, but the slow pace of change from its original form is rooted in tradition and trust. The visual and tactile attributes of traditional casebooks are ingrained in the law school experience. We even have the tendency to refer to book series by color. The Aspen Casebook Series is commonly known as the “red and black books,” just as West Academic’s Hornbook Series is known as the “green books.”¹⁹⁸ The most recent editions of the American Casebook Series are gray, black, and dignified in appearance. This uniform branding offers comfort and confidence to readers because it satisfies the expectation of how a casebook should appear. The trust held in print casebooks goes beyond monolith publishers and prolific authors. It is a psychosomatic connection between a reliable image and the prospect of an equally reliable result in learning outcomes.

These reasons are the basis of the resistance toward change. Despite a downplay in the stature of legal publishing, the contention with open access options comes from a lack of trust in their quality.¹⁹⁹ Instructors only have three options for selecting a casebook. They can either: choose a casebook available through traditional publishers; author a casebook through a self-publishing platform; or adopt an open-source casebook. The benefits of open access alternatives are widely acknowledged, as is the reluctance on the part of some to adopt them.²⁰⁰

Creating and updating OER materials requires a significant investment of time and can be a challenging undertaking. Legal educators, who create their own casebooks or other supplemental materials, are likely to expend considerable effort for incongruent

the book in detail. But do not give in to this sort of pressure without first examining the book to make sure it is right for you.”).

197. *Id.*

198. See e.g., Fritz Snyder, *A Horse of a Different Color*, 10 LEGAL REFERENCES SERV. Q., Issue 3, 1990, at 138, 138 (book review) (describing a newly published book as “green—hornbook green”).

199. Miller & Loren, *supra* note 42, at 43.

200. Stephanie L. Plotin, *Legal Scholarship, Electronic Publishing, and Open Access: Transformation or Steadfast Stagnation?*, 101 LAW LIBR. J. 31, 42 (2009) (discussing the disadvantages of open access initiatives such as their time-consuming nature, quality concerns, copyright issues, and relatively few incentives for authors).

scholarly status.²⁰¹ Many simply lack the time in their schedules to seek open access alternative to traditional print casebooks. Even if time is no impediment, the noted advantages may not be of sufficient incentive to spend countless hours customizing a casebook. Thus, crafting a casebook or similar resource becomes something that remains indefinitely unchecked on a to-do list.

However, modern circumstances have proven, at least to some degree, the value of investing time into OER. As classrooms moved universally online this past spring, the inherent flexibility of OER made them quickly adaptable to the online environment, allowing educators to make changes to their educational content to suit a remote learning environment. Educators that use OER could rest easy in the knowledge that their students had easy access to their course materials.

Furthermore, it is also inaccurate to say that OER are free. While they are typically free or low cost for educators and students, it takes investment to create and maintain the platforms that make them accessible. For OER to be considered a meaningful alternative to traditional textbooks, educational institutions would need to support faculty development programs designed to teach educators about OER. This is to say nothing of the expense associated with ameliorating the digital divide. Not all students and faculty have the technical skills necessary to create and download digital content; and, of more pressing concern, not all students have access to computers, tablets, or smart phones that are necessary to access digital content.²⁰² These are undoubtedly solvable concerns, but they do require the willingness of educational institutions to invest in the future of OER.²⁰³ to provide faculty and students with the support they need to make OER a reality in the majority of classrooms.²⁰⁴

III. SOLUTIONS

As casebook alternatives have emerged in recent years, the traditional casebook is clearly ripe for a change. It is yet to be determined whether that change will take the form of innovations in traditional publishing, increased use of OER platforms, or a combination of both. One certainty is that legal educators have an increasingly wide range of

201. Bodie, *supra* note 2 (describing the author's general dissatisfaction with casebooks that led him to write his own).

202. Waters, *supra* note 140.

203. *Id.*

204. *Id.*

options when it comes to selecting, creating, and distributing their course materials. These include self-publishing platforms, open-source repositories, and course management solutions.

A. *Self-Publishing*

It may sound daunting, but it is now easier than ever to self-publish a book. It is an option worth considering for educators that want to prepare a traditional casebook or supplemental text, while keeping the cost as low as possible for students.²⁰⁵ The self-publishing process is relatively simple. The author creates an account on a print-on-demand service—Amazon’s CreateSpace²⁰⁶—is probably one of the most well-known services amidst a crowded field of competitors.²⁰⁷ CreateSpace includes Kindle Direct Publishing (KDP), which is the self-publishing arm of the company.²⁰⁸ After creating an account, the author formats the text of their book, and uploads the digital file.²⁰⁹ KDP, and similar services, support a variety of popular file formats and provides free formatting and cover creation tools.²¹⁰ Not to mention, KDP conveniently provides free ISBNs.²¹¹ The entire process is designed to allow authors to quickly format and upload their digital content, which is made available for public download and use within a matter of days.²¹² Because Kindle is such a widely available application, the e-books created with KDP are accessible on most devices, whether e-reader, tablet, computer, or cellphone.

Self-publishing platforms tend to make the publishing process as

205. Boyle & Jenkins, *supra* note 54 (discussing the motivation of authors for self-publishing a supplemental statutes volume and process involved in using Amazon’s CreateSpace).

206. See KINDLE DIRECT PUBLISHING, https://kdp.amazon.com/en_US/ (last visited Mar. 26, 2021).

207. See, e.g., BLURB, <http://www.blurb.com/volume-printing> (last visited Jul. 29, 2019); INGRAM, LIGHTNING SOURCE, <https://www.ingramcontent.com/publishers/print> (last visited Jul. 29, 2019) [<https://perma.cc/7LHU-T3C3>]; LULU, https://www.lulu.com/?gclid=EAJalQobChMI98zRoL-J4AIVgUwNCh1z5wOdEAAYASAAEgJOLfD_BwE [<https://perma.cc/RM9H-VENB>]. These companies have different features but, essentially, all work with a variety of distributors to sell books including Amazon, who owns CreateSpace.

208. See KINDLE DIRECT PUBLISHING, https://kdp.amazon.com/en_US/ (last visited Mar. 26, 2021) (CreateSpace also includes a Media on Demand service for creators of music and film as well as a print of demand service for publishers).

209. *Create a Book*, KINDLE DIRECT PUBLISHING, https://kdp.amazon.com/en_US/help/topic/G202172740 (last visited Mar. 26, 2021).

210. *Id.*

211. *Id.*

212. *Id.*

simple and convenient as possible. They offer various advantages to authors. First and foremost, they are flexible and cost effective for authors and students. Authors can widely publish their books in both e-book and print formats.²¹³ Self-publishing platforms have global distribution, which gives authors the ability to reach a worldwide audience. E-books are typically available for purchase a couple of days after being formatted and uploaded to the self-publishing platform. Print books are prepared as orders are placed, and the process from printing to delivery is typically completed within a week.²¹⁴ Self-publishing platforms maintain the option of keeping some titles in stock if they prove popular, which decreases the time required for delivery.²¹⁵ This convenient distribution is available to authors at no cost, which makes it an attractive alternative for authors who are primarily concerned with quickly getting publications to students.

In addition, the self-publishing model can be very cost efficient for students. Self-publishing platforms give authors a great deal of flexibility when it comes to setting the purchase price for their publications. While authors have the ability to earn a profit for their work, the purchase price can be set at cost or at the minimum amount required to produce or print the title. E-books published by KDP are priced at a minimum rate of \$.99 to \$2.99 depending on the length of the book or the size of the digital file.²¹⁶ The price of print books is largely based on the cost of printing the book. The formula is calculated by adding a small, fixed rate (\$.85) to the per page rate.²¹⁷

Basic OER goals are also supported by self-publishing. Authors can publish material in the public domain as long as it is unique in some way. Thus, cases and statutory materials can be published if they are annotated. In addition, authors retain the rights for their work and that makes it

213. Alice Robb, *92 Percent of College Students Prefer Reading Print Books to E-Readers*, THE NEW REPUBLIC (Jan. 14, 2015), <http://www.newrepublic.com/article/120765/naomi-barons-words-onscreen-fate-reading-digital-world> [<https://perma.cc/XG8F-4EA6>] (noting that recent evidence supports the reality that, if given a choice, students still prefer to read material in print format).

214. See, e.g., *Timelines*, KINDLE DIRECT PUBLISHING, https://kdp.amazon.com/en_US/help/topic/G202173620 (last visited Mar. 7, 2021).

215. On average, Print on Demand books are delivered within 3 to 4 days. Boyle & Jenkins, *supra* note 54, at 23.

216. See *List Price Requirements*, KINDLE DIRECT PUBLISHING, https://kdp.amazon.com/en_US/help/topic/G200634560 [<https://perma.cc/6RH5-5EE5>].

217. See *Print Price Page*, KINDLE DIRECT PUBLISHING, https://kdp.amazon.com/en_US/help/topic/G8BKPU9AGVZSF9QF [<https://perma.cc/H5RU-ZAFW>] (“Applicable Printing Cost calculation: \$0.85 (Fixed Cost) + (300 (Page Count) * \$0.012 (Per Page Cost)) = \$4.45 (Printing Cost)”).

possible to publish under a Creative Commons license. Depending on the license, the author can permit non-commercial use with attribution or unlimited reproduction and modification even for commercial uses.²¹⁸ As previously discussed, these types of licenses give other educators the ability to modify a text or educational materials as needed for their own classrooms and students.

The main disadvantage to self-publishing platforms is that they entail some cost to students, even if those costs are substantially reduced.²¹⁹ In addition, the platforms are best designed to publish books with original content, material in the public domain, or published under an open license. Materials created by other authors, and not in the public domain, may increase costs due to licensing fees. Self-publishing platforms are primarily designed to publish print material. For educators that put together course materials consisting of various multi-media resources, a traditional OER platform might be the most effective place to make those materials available to students. However, some self-publishing platforms also offer the flexibility of adding multi-media resources to texts as well as traditional OER materials.

B. *Open-Source Repositories*

There are open-source repositories that lend themselves particularly well to law courses and legal educational materials. Although open casebook repositories offer different types of features, at their core, they give casebook authors a space to freely and easily upload their books for use at no cost or at a price within their control. However, they typically give legal educators the latitude to craft unique, individualized casebooks from the materials authored by other educators. If these platforms gain widespread use, they will serve as powerful tools to equip educators with the ability to craft courses and materials to meet their specific teaching style and student needs.

LawCarta and H2O (OpenCasebook.org) are typical examples of open-source casebook repositories.²²⁰ They were both designed to facilitate access to the law, casebooks, and related materials. A relatively

218. See *About The Licenses*, CREATIVE COMMONS, <https://creativecommons.org/licenses/> [<https://perma.cc/WC6F-4CUR>] (last visited Jul. 30, 2019) (“All Creative Commons licenses have many important features in common. Every license helps creators — we call them licensors if they use our tools — retain copyright while allowing others to copy, distribute, and make some uses of their work — at least non-commercially.”).

219. See *supra* notes 215–216 and accompanying text.

220. See *generally* H2O, <https://opencasebook.org/> [<https://perma.cc/954G-DX59>]; LAW CARTA, <https://lawcarta.com/> [<https://perma.cc/9KCG-ESKJ>].

new platform, LawCarta, gives users the ability to create and publish books in digital or print format, to include creating new editions and derivative books anytime, as well as the ability to create custom courses and syllabi utilizing original content or materials available in the repository.²²¹ As such, LawCarta embodies elements of both self-publishing platforms as well as open-source repositories. Users can search for content in the LawCarta Catalog. The content can then be modified to suit the specific needs of faculty and students.²²²

At present, the LawCarta repository has a long way to go in terms of available content. Since its creation by a private publishing company,²²³ the platform has only served a handful of contributors in addition to the open-source resources housed on other platforms. For instance, LawCarta provides access to the casebooks published in digital format by CALI's eLangdell Publishing.²²⁴

After creating and formatting a casebook on LawCarta, authors can make that book or other materials available for free or for some alternative cost.²²⁵ This gives authors the ability to earn a royalty from their work.²²⁶ But, it also gives authors the ability to fully embrace the greater principles of open access and all without the hassle of the traditional publishing process. If educators prefer to use the service to cobble together course content using either their own materials, materials published by other professors, or a combination of both, then they can create an account and a space for working their selected content into a cohesive course. These platforms permit users to incorporate personalized annotations, multimedia supplements, webpage links, and notes into course materials for what is essentially a customized casebook.

Flexibility and ease of use are the most notable advantages to the LawCarta platform. The developers clearly wanted to create a versatile

221. LAW CARTA, <https://lawcarta.com/> [<https://perma.cc/9D9H-PLZQ>]. "Our mission is to help reduce the cost of education and boost the effectiveness of distributing and delivering learning materials. This is achieved by increasing the ease and efficiency of publishing and using editable books, and digital casebooks." *About Us*, LAW CARTA, <https://lawcarta.com/about-us/> [<https://perma.cc/T5UN-RRBT>].

222. *See Features*, LAW CARTA, <https://lawcarta.com/features/> [<https://perma.cc/7WNM-DXWT>].

223. *Terms of Use*, LAW CARTA, <https://lawcarta.com/terms-of-use/> [<https://perma.cc/M6RG-749Y>].

224. *See Catalog*, LAW CARTA, <https://app.lawcarta.com/catalog/search>, [<https://perma.cc/5QQY-ZVZV>].

225. *See Features*, LAW CARTA, <https://lawcarta.com/features/> [<https://perma.cc/7WNM-DXWT>].

226. *Id.* (LawCarta also gives students the ability to create customized learning materials).

platform that could seamlessly support faculty, authors, and students in accomplishing various goals. There is an obvious focus on getting educational content into the hands of users while maintaining agreeable terms with the content creators.

It is also clear that effort went into the design of the platform with the intent of making it as user friendly and intuitive as possible. The platform even offers an editor tool for authors to seamlessly create content from start to finish.²²⁷ It is also a great advantage that content creators can make their content available for free in its digital form. In addition, the authors' ability to select more permissible, open licenses for their contributions creates an open access friendly environment even though the platform is owned by a private corporation. Finally, because LawCarta is focused on law related content, most of the guesswork is removed from the platform selection process.

H2O was first attributed to the Berkman Klein Center for Internet and Society at Harvard, but it is currently developed and maintained by the Library Innovation Lab at the Harvard Law School Library.²²⁸ One of the tools created by the team, Collage, enabled faculty to annotate cases and view each other's annotations.²²⁹ As of August 2014, H2O housed nine sets of course materials called "playlists"²³⁰ which are essentially "a way of packaging groups of links together."²³¹

The H2O website describes print casebooks as "heavy, expensive and way too difficult to use."²³² Open casebooks solve this problem by bringing casebook content online so that it can easily be changed, annotated, and shared. In a video promoting the project, Professor Jonathan Zittrain states that the aspiration of the project is to "replace the legal casebook" to help to financially unencumber students.²³³

227. *Id.*

228. *About, H2O*, <https://opencasebook.org/pages/about> [<https://perma.cc/C8ZZ-6Q5N>] (last visited Mar. 26, 2019) (announced in 2010 as an innovative concept by Harvard Law Professor, Jonathan Zittrain with developer Dan Collis-Puro, and project manager Laura Miyakawa). H2O was unveiled via livestream at a Berkman Center luncheon. Alexis Madrigal, *Reimagining the Stodgy Law School Casebook for the Digital Age*, THE ATLANTIC (Sept. 20, 2010), <https://www.theatlantic.com/technology/archive/2010/09/reimagining-the-stodgy-law-school-casebook-for-the-digital-age/63290/> [<https://perma.cc/UF2Y-PX79>].

229. *Id.*

230. Loren, *supra* note 72, at 95.

231. Madrigal, *supra* note 227.

232. *Help Guide, H2O*, <https://about.opencasebook.org/> [<https://perma.cc/B42T-5DE5>] (last visited Mar. 26, 2019).

233. Dustin Lewis, *Prof. Zittrain on H2O*, H2O (Apr. 24, 2013), <https://about.opencasebook.org/blog/2013/04/24/prof-zittrain-on-h2o/> [<https://perma.cc/2AWX-QP7G>].

Presently, the open casebook project gives faculty the ability to collect material, remix and reorganize to preference, and distribute their digital casebook to students. All materials are protected by a Creative Commons license.²³⁴ Users can build their own casebook anew with their own resources or they can adopt or edit the casebooks in the H2O library.²³⁵ Users can add collaborators to construct a casebook jointly.²³⁶ At the time of writing this article, H2O housed 232 casebooks, 3283 cases, and had 92 authors. Casebooks on the platform vary from traditional first year subjects to more niche subjects such as Food Law, Animals and the Law in Canada, and The Anthology of Swiss Legal Culture. The practicality and necessity for customization is evident in these specialized texts, solving a persistent gripe about the inability to tailor traditional casebooks.

To ensure usage by only students and faculty members, H2O restricts registration to .edu email addresses. By way of support, H2O offers a video demonstration of creating a new casebook, an online user's guide, and an FAQ page. Librarians can email H2O to request "specialized training and assistance" to bolster their efforts to assist faculty.²³⁷ Clear benefits to H2O are the easy-to-use tools and its legal specialization. Considering the way that law professors select print casebooks based on trust in author or publisher, H2O has an edge on the potential shift toward open access in legal education with its Harvard parentage. Some professors indicate a lack of confidence in OER quality so this familiar, renowned branding may be what is needed to encourage change.²³⁸ If faculty members find themselves overwhelmed and deadlocked by the abundance of options for establishing or selecting an open casebook, the emergence of highly visible and renowned resources can help.²³⁹

C. Course Management Systems and Other Adaptable Solutions

There are some alternatives to the traditional casebook that do not fall within the definition of open access. They do, however, alleviate cost

234. See *Attribution-NonCommercial-ShareAlike 3.0 Unported (CC BY-NC-SA 3.0)*, CREATIVE COMMONS, <https://creativecommons.org/licenses/by-nc-sa/3.0/> [<https://perma.cc/5P89-48TP>] (ability to share and adapt with attribution for noncommercial purposes).

235. *Help Guide*, H2O, <https://about.opencasebook.org/> [<https://perma.cc/B42T-5DE5>] (last visited Mar. 26, 2019).

236. *Id.*

237. *See id.*

238. Miller & Loren, *supra* note 42, at 43.

239. Winn, *supra* note 125, at 11.

for students, provide flexibility for faculty, and are digitally accessible. These casebook substitutes have some open qualities and can be used in conjunction with open-source materials. Course management systems (CMS) or learning management systems (LMS) are efficient platforms for uploading course material, and they can fill the role of an online casebook.

For example, Westlaw's TWEN is a widely-used course management system for law schools, but any CMS, such as Blackboard or Lexis Classroom, can be used to make documents available to students.²⁴⁰ Most course management systems come at a subscription cost to the university, and the content requires an account and permissions for access. Moodle, an open-source CMS, remedies the cost problems for institutions, but a user account is still required in order to become part of a class or to view documents.²⁴¹

In the article *Casebooks are Toast*, Robert Laurence refers to the ease and convenience of the "virtual classroom" a CMS creates.²⁴² Prof. Laurence nixed the casebook for his Debtor-Creditor Relations classes and uploaded cases and statutes with commentary and made them available to students through Lexis.²⁴³ In 2002, this was considered a novel approach, but at present, faculty members do this with regularity to the point that it no longer necessitates fanfare.²⁴⁴ There are professors who continue to use a hardcopy book, but they supplement obsolete material with updates posted to their online course.²⁴⁵ To the diligent professor keeping abreast of legislative change, this method enables students to use a superseded casebook edition with guidance and caution.

A CMS casebook alternative can consist of a compilation of links and downloadable cases, or a CMS can be the point of access for an unpublished or informally published casebook. For example, a UMass Law professor assembled his own casebook, a PDF document of a few

240. See TWEN, THOMSON REUTERS, <https://lawschool.thomsonreuters.com/twen/> [https://perma.cc/EB6J-DNHV]; *Feature Guide*, BLACKBOARD HELP, https://help.blackboard.com/Blackboard_Instructor/Feature_Guide [https://perma.cc/5NA8-5RAH]; *Creating and Deleting a Course in Lexis Classroom*, LEXISNEXIS CUST HELP, http://lexisnexis.custhelp.com/app/answers/answer_view/a_id/1100069/~/-/creating-and-deleting-a-course-in-lexis-classroom [https://perma.cc/QSX2-VLMC].

241. See MOODLE, <https://moodle.org/> [https://perma.cc/V2AB-W5Y5].

242. See Laurence, *supra* note 1.

243. *Id.* at 1–3.

244. Larry A. DiMatteo, *Contract Stories: Importance of the Contextual Approach to Law*, 88 WASH L. REV. 1287, 1293 (2013) (stating that course packets created by professor was the third most popular "casebook").

245. Marie Stefanini Newman, *Not the Evil TWEN: How Online Course Management Software Supports Non-Linear Learning in Law School*, 5 J. HIGH TECH. L. 183, 203–4 (2005).

hundred pages that includes cases and personal commentary.²⁴⁶ He uses TWEN to give students the ability to download the file.²⁴⁷ Similarly, a faculty member at the University of New Hampshire School of Law makes a casebook available through the Social Science Research Network (SSRN).²⁴⁸ Another professor at NYU School of Law uses a personal website as an access point to his trademark casebook.²⁴⁹ The Duke University School of Law website offers free downloads, in PDF format, of an intellectual property casebook assembled by two of their faculty members.²⁵⁰

These portals are not open, but they are easily accessible and confront the challenges of casebook cost for students and casebook limitations for faculty. The Library Guide (Libguide) format by Springshare, like TWEN, is an example of an instructional tool that is not a deliberate or expressed textbook alternative, but can nevertheless, substitute or supplement a casebook.²⁵¹ LibGuides are templates for librarians to design online research guides that organize a variety of information and links to augment courses.²⁵² LibGuides that promote OER are abundant,²⁵³ but there are also examples of LibGuides as textbook alternatives.²⁵⁴ This divergent usage has been adopted primarily in undergraduate settings, but library guides are versatile and can be optimized for any course type.²⁵⁵ LibGuides provide an opportune

246. Jeremiah A. Ho, Contracts Playlist 1 and 2 (unpublished casebook) (on file with the authors).

247. *Id.*

248. Thomas G. Field, Jr., *Introduction to Administrative Process: Cases & Materials*, SSRN (Dec. 5, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1195322.

249. See, e.g., BARTON BEEBE, TRADEMARK LAW: AN OPEN-SOURCE CASEBOOK (7th ed. 2020), <http://tmcasebook.org/> [<https://perma.cc/U88G-YYX6>].

250. JAMES BOYLE & JENNIFER JENKINS, OPEN INTELLECTUAL PROPERTY CASEBOOK (2014), <https://law.duke.edu/cspd/openip/> [<https://perma.cc/4A8R-LE93>].

251. See *Libguides*, SPRINGSHARE, <https://www.springshare.com/libguides/> [<https://perma.cc/Z4Q8-QRWT>] (last visited Mar. 26, 2021).

252. See Jennifer J. Little et al., *Interdisciplinary collaboration: A faculty learning community creates a comprehensive LibGuide*, *Reference Services Review*, 38 REFERENCE SERVICES REVIEW 431, 431-44 (2010) <https://digitalcommons.brockport.edu/drakepubs/8/>.

253. See *Open Education Resources*, UMASS DARTMOUTH, <https://guides.lib.umassd.edu/oer> [<https://perma.cc/YPA3-QD8Z>]; see also *Open Education Resources*, UMASS AMHERST, <https://www.library.umass.edu/oer/> [<https://perma.cc/2B4U-P6PH>].

254. *Law Commons*, DIGITAL COMMONS NETWORK, <https://network.bepress.com/law/> [<https://perma.cc/93W7-7RER>] (the Law Commons contains 458,503 law-related articles for free download).

255. Erin O'Toole et al., *The Impact of Physically Embedded Librarianship on Academic Departments*, PORTAL: LIBR. & THE ACADEMY 529 (2016) (The education librarian at

environment for faculty members and librarians to collaborate in designing OER materials for the classroom.

CONCLUSION

The traditional print casebook may always be part and parcel of legal education. After all, casebooks have been with us for almost 150 years and publishers are rapidly innovating and changing their functionality to meet the needs of modern educators and students. The advent of open access alternatives to casebooks can coexist with their traditional counterparts, while providing educators with a wider range of choice regarding the materials they select and integrate into their courses. However, to have a meaningful choice, educators must become more aware of their OER options and be more amenable to exploring their function and various benefits.

The stagnation of open access in legal academia and applicable solutions to that issue are topics of frequent discussion among law librarians, professors, and administrators. However, resistance to OER persists for a multitude of reasons and a surplus of excuses.²⁵⁶ Without the burn of necessity,²⁵⁷ it is more difficult to overcome the obstacles inherent in change. The concept of open access is murky. The tangentially related concept of intellectual property rights is equally opaque. The catalyst for making OER a reality in legal education will come from a deeper understanding of these subjects and an awareness of available tools and resources. We can take a lesson from the monopolies of legal publishing.

Today, a traditional, print casebook is likely to come from one of three major publishers.²⁵⁸ These publishers are trusted entities that have a history of producing quality casebooks that are used by legal academics, easily obtained by students, and formatted in a manner that is familiar to anyone that has studied or taught law. What if the same could be said for OER platforms? Perhaps, open access concepts would appear less obscured after a closer look at prominent, reputable platforms used with ease by law faculties at other institutions that are designed to house casebooks and supplemental materials that can embody the interactivity that students desire.

University of Northern Texas worked with faculty who decided to “drop a required textbook and use a reading list of linked articles and books in the course guide as the textbook.”).

256. E.g., time-consuming, arduous, uncharted, ill-defined, unknown return on investment.

257. There is no urgency to replace traditional casebooks.

258. Thomson West, Aspen, and LexisNexis.

This past year provided the necessity for change on various fronts. Within a matter of weeks, the classroom became a completely online experience. Educators and students had to quickly adapt to online platforms regardless of their level of experience with such resources. Those online platforms have included video conferencing tools, teaching platforms and tools, and digital educational materials. Instead of breaking under the deluge of new information, they rose to the challenge, and in the process, proved that educational institutions can exist and thrive in a more digital environment by utilizing digital resources. As it becomes increasingly unlikely that the education of students will completely go back to the physical classroom in the next year, with most institutions teaching entirely online or in a hybrid environment, the use of OER could offer several benefits.

OER are flexible and quickly adaptable, making them ideal for both online and hybrid teaching environments. Given that educators and students have lately become accustomed to using online tools and digital resources, it makes OER platforms more accessible to potential users. In addition, both students and educational institutions are suffering economic strain. For students, suffering financial hardships, OER means spending less money on educational materials. For educational institutions, many anticipating budget reductions, the use of OER reduces the burden on libraries.

The reality is that libraries must often purchase educational materials for reserve loan by faculty request to provide some, minimal onsite access to students who do not have the materials on hand. Given the current concerns about virus transition, the loaning of print material is impracticable, and for many libraries, the acquisition of unlimited access to digital materials from publishers is unaffordable. OER has the potential to greatly reduce financial burdens, while making it possible for libraries to provide access to digital content from publishers as needed.

The primary sources used to teach law are available for free.²⁵⁹ The commentary and analysis included in casebooks, in addition to primary sources, are often supplemented and improved to meet the needs of specific educators. While it might be somewhat unrealistic to expect law professors to author all their commentary and supplemental materials for a course, it is another matter to expect them to borrow and build upon the materials authored by other law professors.

Over the past couple of decades, OER initiatives and repositories

259. *Georgia v. Public.Resource.Org., Inc.*, 140 S. Ct. 1498, 1503 (2020) (precluding the copyright of judicial opinions, statutes, or annotations prepared and adopted by the legislature).

have brought together educational materials that are openly accessible to educators and students at all academic levels. Legal scholars have started to utilize platforms that make their scholarship openly accessible for download.²⁶⁰ Today, open-source platforms make legal educational materials, including course plans, casebooks, and other supplemental materials, available to students and law faculty. These platforms already exist, but they need understanding and buy-in from legal academia to become a sustainable method of distributing material to the classroom.

OER initiatives are most successful when they receive global support from lawmakers, administrators, information professionals, and educators. There is also an argument that a student led transition to OER may increase their adoption.²⁶¹ An organized student demand would motivate institutions to take OER alternatives seriously, particularly those alternatives that are easy to use²⁶² and able to overcome faculty reservations. While OER platforms for law-related materials are here, they are few and have thus far attracted a limited number of author contributors.

The legal community needs to invest in these platforms to create a critical mass of user-friendly, quality open-source platforms and resources, thereby incentivizing academic professionals to both use OER and share their own materials in the OER Commons. The investment could yield a community that can weather any academic environment, in normal times and during crisis, where law professors and students have the benefit of greater choice and ownership over their educational materials.

260. See, e.g., *Homepage, SSRN*, <https://www.ssrn.com/index.cfm/en/> [https://perma.cc/2JG3-8PZ3]; *Homepage, DIGITAL COMMONS*, <https://bepress.com/products/digital-commons/> [https://perma.cc/H8VU-C2NF].

261. Winn, *supra* note 125, at 11 (2015) (“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.”).

262. Binford, *supra* note 27.