

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

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ABSTRACT

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

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INTRODUCTION

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

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

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

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

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

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

I. SALES LAW FOR A NEW CENTURY AND AGREEMENTS SUPPLEMENT

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

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

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

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

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

management the right way are almost entirely absent from reported judicial decisions. Careful study of recent sales law cases can only illustrate what not to do; it provides little or no information about what contracting parties should be doing.

- It is almost impossible to get a copy of the actual sales contracts at issue in litigated disputes because of the widespread practice of parties to commercial disputes requesting that courts seal records. Teaching sales contract drafting and negotiation from cases without access to the entire contract tends to frame issues from an *ex post* perspective rather than simulating the *ex ante* perspective within which contract negotiation and drafting actually occur.³

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

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

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

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

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

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

II. LOCK-IN TO PRINCIPAL-AGENT CONFLICTS

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

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

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

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

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

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

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

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

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

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

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

III. SHARING OWNERSHIP OF THE PROBLEM

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

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

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

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

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

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

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

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

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

CONCLUSION

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

