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The Viability of the \$30 Casebook: Intellectual Property, Voluntary Payment, Open Distribution, and Author Incentives

Lydia Pallas Loren

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THE VIABILITY OF THE \$30 CASEBOOK: INTELLECTUAL PROPERTY, VOLUNTARY PAYMENT, OPEN DISTRIBUTION, AND AUTHOR INCENTIVES

*Lydia Pallas Loren**

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* Robert E. Jones Professor of Advocacy and Ethics, Lewis & Clark Law School. Professor Loren is also the co-founder and president of Semaphore Press Inc., the company described in this Article. I would like to thank Professor Joe Miller, not only for feedback on an earlier draft of this Article, but for his willingness to partner with me in founding Semaphore Press and in authoring the first casebook published by the company. I would also like to thank participants at the third annual Internet Law Scholars Works-in-Progress conference, and particularly Eric Goldman, along with H. Tomás Gómez-Arostegui for their helpful feedback on this project, as well as Scott David, Maggie Chon, and Zahr Said, who were participants in the first annual "IP in the Snow" event. I also express my appreciation to Tricia Juttemayer for her outstanding research that contributed to this project.

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I. INTRODUCTION

The utilitarian-based rationale for providing protection for intellectual property posits that without legal rights to exclude copying, the limited ability to recoup investment in the creation of an intellectual property asset, such as a new book or an invention, will result in a sub-optimal level of investment in the creation of new intellectual property assets. The constitutional grant of authority to Congress to adopt our patent and copyright laws is based on this rationale¹ and, it appears, that system has served us well for over 200 years. Digital technology, however, has significantly reduced the ability of copyright owners to effectively control the reproduction of their copyrighted works. This reduction has led some copyright owners to seek greater legal protections, higher available penalties, and increased criminal sanctions for infringement. At the same time, some copyright owners have experimented with other mechanisms to recoup investment and turn a profit. This Article concerns one of those experiments, exploring the traditional casebook publishing market and reporting on the experiences with voluntary payment of a new digital casebook publisher: Semaphore Press.

In the fall of 2013, the sixth edition of the popular casebook, *Contracts & Related Obligations* by Robert Summer and Robert Hillman, sold for a list price of \$211.² It is not uncommon for a new hardbound copy of today's law school casebooks to exceed \$200.³ And, each year, the prices inch ever higher. Why hasn't the reality of widespread digital technology brought down prices for casebooks? Is there a different way for students to obtain their required reading materials for their law school classes that will help to reduce the crushing debt that obtaining a J.D. currently entails?⁴ While tuition is the driving force behind the cost of obtaining a legal education, the cost of books can add significantly to the debt a student takes on. If a student is enrolled in just four classes every

¹ U.S. CONST. art. I, § 8 cl. 8.

² West Academic Publishing Catalog (2014). Fifteen years ago, the second edition of that same book listed at \$50.50. Historical price list on file with author.

³ Other titles with list prices exceeding \$200 include, for example: BRIAN A. BLUM & AMY C. BUSHAW, *CONTRACTS: CASES, DISCUSSION, AND PROBLEMS* (3d ed. Aspen 2012) (\$203); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *TORTS AND COMPENSATION, PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* (6th ed. West 2009) (\$215); STEPHEN C. YEAZELL, *CIVIL PROCEDURE* (8th ed. Lexis/Nexis 2012) (\$210).

⁴ "The average education debt for law grads at private schools [in 2011] was nearly \$125,000, while the average for grads of public law schools was more than \$75,700." Debra Cassens Weiss, *Average Debt of Private Law School Grads Is \$125K; It's Highest at These Five Schools* (Mar. 28, 2012), http://www.abajournal.com/news/article/average_debt_load_of_private_law_grads_is_125k_these_five_schools_lead_to_m. See also Deborah L. Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437, 441 (2013).

semester for six semesters with an average cost of materials of \$200 per course (some will be less, but some courses will require statutory or other supplements, offsetting the lower-cost books), almost \$5,000 will be required to purchase the assigned reading.

Part II of this Article explores various dynamics in the traditional publishing market that have led to the current prices for casebooks. The current and next generation of law students are being raised digital, inducing changes in the way that content is distributed to students. Slowly the traditional casebook publishers are employing digital distribution models. Those current digital distribution models, described in Part II, still result in access prices close to \$200 per student per course.

Part III of this Article describes the experiences of Semaphore Press, a publisher of law school casebooks that offers a very different approach to pricing and distribution. Semaphore Press offers digital copies of required textbooks for law school classes at a suggested price of \$30. In addition, a student can pay less (or more) than the suggested price, or even download a copy of a required casebook for free. Semaphore Press's commitment, embodied in this design, is that, whatever else happens, the student obtains access the course materials. Is this a viable model? Will students pay for their books or will they freeride? As detailed in Part III, the answer is clear: The model is viable; overwhelmingly students pay for their books. In fact, approximately 83% of students enrolled in courses in which a Semaphore Press book was assigned paid for the book. Part III also details the amounts of their payments and explores why students may be paying for digital books that they know they can obtain for free. What this might say about the future of law school educational publishing and the viability of the \$30 casebook is the subject of Part IV.

II. THE TRADITIONAL CASEBOOK PUBLISHING MODEL

The experience with a \$30 casebook must be put in its appropriate context. That context includes hardbound casebook prices that now routinely exceed \$200, not including any statutory or case update supplement. That context also includes a lack of buyer control over the purchasing decision. The professor selects the book, but for the most part does not face the cost of her choice. In fact, professors often are not even aware of the price of any particular book they are considering for adoption.⁵ This lack of price sensitivity means that publishers set the price of textbooks with little direct input from their actual

⁵ Many of the publication catalogs sent to law school professors do not provide the list price. See, e.g., LEXISNEXIS® LAW SCHOOL PUBLICATIONS SUMMER–FALL 2014.

purchasers: students. In general, students can't comparison shop for cheaper alternatives.⁶ They must buy the assigned books chosen by the professors.⁷

A. DEAD TREES AND MARKETS

A lot of resources go into the business of casebook publishing. First, of course, are the efforts of the authors. They plan the organizational content of the book, select and edit the cases included, and write the additional content contained in the book. On the publishers' end, editors must be employed to seek out and select which books to publish. Additional editors are needed to review the written material, format the text, prepare the indexes, and complete the layout. In the print world, the books then have to be printed and bound. The published casebooks then have to be marketed to professors for potential adoption. That marketing includes not only mass mailings advertising individual titles, as well as complete catalogs, but also providing free "review copies" to hundreds of professors. Additionally, publishers pay sales representatives to visit professors at their schools and sponsor lavish sales booths at law professor conferences, complete with prizes offered to professors who take the time to visit their booths.⁸ Finally, once adopted as required texts at various law schools, the books need to be shipped to bookstores and customers across the country. All told, this operation costs quite a bit, and one can begin to understand what might lead to prices exceeding \$200.⁹

Additionally, the vibrant used book market, made lawful by the "first sale doctrine" in copyright law,¹⁰ prods publishers to try to obtain in the sale of a single book a profit that takes account of three or four different students using

⁶ Some alternatives to the hardbound books do exist. They include used copies, looseleaf copies, casebook rental programs, and digital copy access programs. See *infra* Part II.C exploring these dynamics.

⁷ Jeffrey R. Young, *With 'Access Codes,' Textbook Pricing Gets More Complicated Than Ever*, CHRON. HIGHER EDUC. (Sept. 3, 2012), <http://chronicle.com/article/What-Is-an-Access-Code-Worth-/134048/>.

⁸ Indeed, the author of this Article was the lucky winner of a Kindle Fire from Aspen publishers at the January 2012 AALS Annual conference.

⁹ [A]s recently as 2008, [the National Association of College Stores] provided that cost breakdown. At that time, around 15.4 cents of every dollar went toward marketing the textbooks, 11.7 cents went to the authors, and the largest chunk—32.2 cents—went to the basics: paper, printing, and paying publishers' employees.

Danielle Kurtzleben, *How Your Textbook Dollars Are Divvied Up*, U.S. NEWS & WORLD REP. (Aug. 28, 2012), <http://www.usnews.com/news/articles/2012/08/28/how-your-textbook-dollars-are-divvied-up>.

¹⁰ Copyright Act, 17 U.S.C. § 109(a) (2006). See also *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013) (affirming the applicability of the first sale doctrine to authorized textbooks bought overseas and imported into the United States).

that same physical book over several years. Even those review copies that are sent to professors for free (some of which are stamped with “Review Copy Not To Be Resold”) are often sold into the used book market.¹¹ Bruce Hildebrand, executive director of higher education at the Association of American Publishers, recently asserted that “[t]he single greatest contributor to the price of a textbook is a used textbook.”¹² When a publisher prices a book, it is factoring in the competition and lost sales opportunities that the resold books embody.

Competition normally drives prices down. The consolidation in the publishing industry is well known, leading to less competitive pressure on prices.¹³ For assigned textbooks, one cannot easily substitute a different book, but competition also includes competition with “used” versions of the same product.¹⁴ However, competition from the used book market in the traditional textbook publishing world, at least according to Hildebrand, is part of what drives casebook prices up. It is hard to imagine an alternative world where there are no used books, but some would have us believe that, magically, in that world, we would see lower prices for books once the competition from used books was eliminated. As we move to digital books that are wrapped securely inside of technological protection measures, often referred to as Digital Rights Management (DRM) technologies, we may be entering that magical world.¹⁵ It remains to be seen what the effect on prices will be from the lack of competition from used versions of textbooks. One suspects, however, the effect will not be downward price pressure.

The used book trade also has another effect on traditional publishers—it creates pressure for the release of new editions of casebooks, even if there have not been sufficient changes in the legal topic addressed by a particular book to warrant a new edition on pedagogical grounds. Some professors, recognizing that the prior edition is perfectly acceptable, have been known to assign the earlier edition or provide a syllabus that contains page numbers for the prior edition along with the current edition, thus facilitating the use of a used copy of the prior edition. Eventually, however, an insufficient number of used copies of the prior edition are in circulation, and the publisher’s tactic of releasing a

¹¹ These sales are likely lawful, regardless of the label. *See* *Bobbs-Merrill v. Straus*, 210 U.S. 339 (1908); *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175 (9th Cir. 2011).

¹² Kurtzleben, *supra* note 9.

¹³ Just five publishing companies control over 80% of the textbook publishing market in the United States. U.S. Public Interest Research Group, *Fixing the Broken Textbook Market* 6 (Jan. 2014), available at <http://uspirg.org/sites/pirg/files/reports/NATIONAL%20Fixing%20Broken%20Textbooks%20Report1.pdf>.

¹⁴ *See* Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577 (2003).

¹⁵ *See infra* notes 53–54 and accompanying text.

new edition will have the effect of forcing more sales of the more recent edition.

Rental programs also exist.¹⁶ These rental programs, some of which are even run by the publishers,¹⁷ provide alternatives for students. Rentals also increase the pressure for new editions: if a student is going to rent a copy of the assigned text, it needs to be the current edition, assuming that is the edition that is assigned.

In addition to rental programs, the traditional casebook publishers have also experimented with providing lower cost alternatives to sales of casebooks. Some are offering discounted loose-leaf versions of the casebooks. Printed on 8.5 x 11 paper and three-hole punched, these loose-leaf versions are sold at 40% off of the list price for the hardbound volume.¹⁸ The traditional publishers are also experimenting with electronic versions of casebooks, discussed more fully below.

Reports continually show that textbook prices rise at a rate that outpaces the general rate of inflation.¹⁹ And prices continue to climb. According to the “Labor Department, textbook prices as of July [2012] were 8.1 percent higher than in July 2011, while prices for all goods only grew by 1.4 percent overall.”²⁰ The fact remains that in January 2014, the list price for some of the most popular casebooks tops \$200, not including any statutory or update supplement.²¹ The example mentioned in the opening paragraph of this Article involved a casebook that more than quadrupled in price over fifteen years.²²

¹⁶ See, e.g., Amazon.com’s textbook rental program, <http://www.amazon.com/textbooks> (last visited Oct. 8, 2014).

¹⁷ A program offered by Thomson Reuters in 2011–2013 offered the books at a 38% discount off the list price. See Stephanie Rubiner, *Law Students Can Rent Their Casebooks with Online Access For Less*, FINDLAW.COM (Aug. 19, 2011, 6:48 AM), http://blogs.findlaw.com/greedy_associates/2011/08/law-students-can-rent-their-casebooks-with-online-access-for-less.html. That program appears to no longer be available.

¹⁸ See Lisa Fairfax, *The Loose-Leaf Alternative Course Book*, THE CONGLOMERATE (June 21, 2010), <http://www.theconglomerate.org/2010/06/the-looseleaf-alternative-course-book.html> (citing prices in 2010).

¹⁹ Kurtzleben, *supra* note 9 (“A 2005 Government Accountability Office report showed that college textbook prices grew at twice the rate of inflation from 1986 to 2004.”).

²⁰ *Id.* The General Accountability Office reported that textbook prices in the last decade increased by 82%. General Accountability Office, *College Textbooks: Students Have Greater Access to Textbook Information* 6 (2013), <http://www.gao.gov/assets/660/655066.pdf>.

²¹ Prices for those books range from \$30 to \$50. See, e.g., BANKRUPTCY CODE, RULES AND OFFICIAL FORMS, JUNE 2012 LAW SCHOOL EDITION (2012 ed. West) (retail list price \$48); GRAEME B. DINWOODIE ET AL., INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY DOCUMENT SUPPLEMENT (2012 ed. Lexis) (retail list price \$51).

²² In 1998 the second edition of CONTRACTS & RELATED OBLIGATIONS by Robert Summer and Robert Hillman listed for \$50.50. In 2014 the sixth edition of that same title has a list price

That is a compound annual growth rate in price of 10.37%. Had the book's price merely kept pace with inflation from 1998 to 2012, by comparison, it would cost \$71.34 today.

Law professors report stories of students not buying the required books because they just cannot afford them. These students—who want to learn just as much as those who can afford the books—borrow a classmate's book some days, read the copy that is on reserve in the library other days, and some days simply can't do the reading. Some may even turn to other methods to obtain their copies. Photocopiers or scanners are a means for obtaining copies of assigned reading, albeit infringing copies. Additionally, a variety of peer-to-peer file sharing networks may contain unlawful digital copies.

B. THE CHANGING NATURE OF LAW STUDENTS: DIGITAL NATIVES, RAISED WITH THE TEMPTATIONS OF PIRACY

Professors sometimes lament the idea of reading text in digital form, arguing that one cannot read as quickly or retain as much if the work is in digital form versus paper form. While some early studies support these intuitions,²³ more recent studies suggest that humans are adapting quickly to digital delivery of text and information.²⁴ A review of literature observed that “[e]xaminations of learning or comprehension, measured in terms of correct answers, have tended not to find differences between materials presented in the two forms.”²⁵

Additionally, while most law professors completed their education without ever reading a textbook in digital form, the same cannot be said for our students and the newest of the law professors among us. The vast majority of applicants to law school are between the ages of twenty-two and twenty-nine.²⁶ The largest bulk of students entering law school in the fall of 2014 were in middle school and high school when the peer-to-peer file sharing of the

of \$211. Note that over fifteen years the publisher has released four new editions of this casebook.

²³ A. Dillon, *Reading from Paper Versus Screens: A Critical Review of the Empirical Literature*, 35 *ERGONOMICS* 1297 (1992).

²⁴ Jan M. Noyes & Kate J. Garland, *Computer- vs. paper-based tasks: Are they equivalent?*, 51 *ERGONOMICS* 1352 (Sept. 2008).

²⁵ *Id.* at 1357.

²⁶ The most recent data from the Law School Admission Council relating to the age of law school applicants examines applicants to ABA law schools between 2005 and 2009. See Kimberly Dustman & Phil Handwerk, *Analysis of Law School Applicants by Age Group: ABA Applicants 2005–2009*, available at <http://www.lsac.org/docs/default-source/data-%28lsac-resources%29-docs/analysis-applicants-by-age-group.pdf>. During that time the percentages remained relatively constant with just less than 50% of applicants in the twenty-two to twenty-four age group and just less than 30% of applicants in the twenty-five to twenty-nine age group. *Id.* at 3.

Napster era was in full swing.²⁷ Today, students are required to prepare PowerPoint presentations for class—in elementary school. Chances are that in high school and college they worked with digital materials in an educational setting. These students are accustomed to reading their news online.²⁸ They often read lengthy assignments online and respond to questions online as well. In short, they are digital natives.²⁹

This changing nature of law students' common background and experience is, not surprisingly, changing their willingness to use, and desire for, digital casebooks. Data from the Book Industry Study Group notes that the percentage of students who prefer print textbooks declined from 75% in 2011 to 59% in 2012.³⁰ Those numbers represent a sixteen percentage point decline *in one year*. And there is good reason for students to desire digital casebooks. Digital versions of casebooks can give students more options—so long as those digital versions are not encumbered with technological protections that impede flexibility, or if the digital versions (DRM laden as they may be) come pre-packaged with extra functionality. Additional advantages of digital versions include instant availability, searchability, portability, and durability.³¹

The ability to instantly download a purchased book means no more waiting for a book to arrive from an online supplier, waiting for the law school's bookstore to get its next shipment, or even having to make the trip to the school's bookstore at all. The student can do their reading for class immediately upon finalizing their purchase and downloading their copy. Digital searching permits the student to quickly find other references in the book to the same concept or same case, which may lead to greater synthesis of the course material. The cumbersome and incomplete index is replaced with thorough and exact text searching.

The convenience of not having to lug a big heavy book around can mean that students actually review the material more often; they are simply more likely to bring their books with them to more places. Nor should the potential durability of digital casebooks be overlooked. Unlike the hardbound versions

²⁷ Napster began operating in 1999. *Napster's High and Low Notes*, BUS. WK. (Aug. 14, 2000), http://www.businessweek.com/2000/00_33/b3694003.htm. The RIAA brought its lawsuit to shut down the file-sharing service in December 1999. *Id.*

²⁸ In 2010, 76% of millennials and 79% of Gen-Xers reported that they get their news online. *Generations 2010*, PEW INTERNET & AMERICAN LIFE PROJECT (Dec. 16, 2010), available at http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Generations_and_Tech10.pdf.

²⁹ See JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES (2008).

³⁰ Marc Parry, *Students Get Savvier About Textbook Buying*, CHRON. HIGHER EDUC. (Jan. 27, 2013), <http://chronicle.com/article/Students-Get-Savvier-About/136827/>.

³¹ See C. Steven Bradford & Mark Hautzinger, *Digital Statutory Supplements for Legal Education: A Cheaper, Better Way*, 59 J. LEGAL EDUC. 515, 517–20 (2010).

that can get ripped, stained, or begin to fall apart, the digital version will remain intact.³² The risk of loss of the digital copy can be mitigated by maintaining a back-up copy, so long as the copy is not laden with technological locks that prevent such copying, or by having the digital copy stored remotely. The durability is only a potential benefit, however, because some sellers have the ability to design a digital product that will eventually vanish (as has reportedly happened, for example, with Amazon's Kindle books).³³

Once the considerations turn to copying, one must acknowledge that the existence of digital versions of casebooks can lead to piracy. Many textbooks can be found through Pirate Bay, TextbookNova and other unauthorized sharing sites.³⁴ Even if the publisher does not offer an authorized digital version of a casebook, the pages can be scanned and assembled into a single downloadable and sharable file. In one recent survey of 6,000 undergraduate students, 34% "reported downloading course content from an unauthorized website, up from 20% in 2010."³⁵ Some of those undergraduate students are now law students. The high prices of college textbooks and law school casebooks may be partly to blame, creating the conditions that lead to a disrespect for the intellectual property rights of authors and publishers.³⁶

C. TRADITIONAL CASEBOOK PUBLISHERS' "EMBRACE" OF DIGITAL TECHNOLOGY

There remains a deep fear of massive infringement and of the massive disrespect for publishers' intellectual property rights that exists in society today.³⁷ Likely in part because of their deep fear, casebook publishers have resisted digital publishing. However, they have finally succumbed, slowly

³² *Id.*

³³ Brad Stone, *Amazon Erases Orwell Books From Kindle*, N.Y. TIMES (July 18, 2009), http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html?_r=0.

³⁴ Jeff Stone, *Pirate Bay Goes To College: Free Textbook Torrent Downloads Soar Amid Rising Costs*, INT'L BUS. TIMES (Sept. 19, 2014, 6:15 PM), <http://www.ibtimes.com/pirate-bay-goes-college-free-textbook-torrent-downloads-soar-amid-rising-costs-1692247>.

³⁵ David Schick & Mary Beth Marklein, *College Students Say No to Costly Textbooks*, USA TODAY (Aug. 20, 2013), <http://www.usatoday.com/story/news/nation/2013/08/20/students-say-no-to-costly-textbooks/2664741/> (citing a study by the Book Industry Study Group).

³⁶ "Content distributors have fostered this alliance between the Lawless and the Merely Frustrated by placing the most draconian access and copy restrictions on seemingly everything they market in digital form." Annemarie Bridy, *Why Pirates (Still) Won't Behave: Regulating P2P in the Decade After Napster*, 40 RUTGERS L.J. 565, 570 (2009); see also Kurtzleben, *supra* note 9 ("According to Student Monitor data, students buy only around 77 percent of all required textbooks.").

³⁷ Bridy, *supra* note 36, at 567 ("[C]orporate rights owners have attempted to 'govern' file sharing aggressively at three discrete points of intervention: the content level, the network level, and the user level. Their efforts have failed at each of these points, however, because they have failed to grasp Foucault's insight . . . that coercion alone cannot ensure compliance.").

releasing titles on a variety of digital formats. All of these digital formats rely on Digital Rights Management systems of one kind or another that limit users' capabilities.

LexisNexis publishes an increasing number of its titles in digital formats.³⁸ Prices for the digital versions remain well above \$100.³⁹ The hardbound copy of the same text can list for closer to \$200.⁴⁰ Additionally, in 2010 LexisNexis introduced its "Coursebook Support Communities" (CSC), which contain supplemental online material for its titles. However, this resource is provided only for professors, not students.⁴¹ Professors can use material from the CSC to create their own course websites, but that material is not automatically updated if the CSC material is updated.⁴²

In 2009 West introduced its "Interactive Casebook Series" that gives purchasers of a new hardbound casebook an access code for twelve-month access to a digital copy in a closed environment.⁴³ The accompanying digital version contains "extensive hyperlinking to Westlaw versions of legal materials, Black's Law Dictionary definitions, supplementary online resources and more."⁴⁴ The early versions of the Interactive Casebooks required internet access to access the text; texts were not downloadable or printable except for single page printing and the printing of notes.⁴⁵ The 2014 versions of the interactive casebooks permit some printing. If a student purchases a used copy of a hardbound casebook in the series, the student can purchase the digital code separately. For most casebooks, the current price for a twelve-month digital access code is \$110.⁴⁶

Aspen (aka Wolters Kluwer Law & Business) offers digital copies of casebooks through what it calls its "SMARTE editions."⁴⁷ SMARTE is a

³⁸ Lexis/Nexis currently offers its books in epub and mobi format. Lexis/Nexis Books Frequently Asked Questions, *available at* <http://www.lexisnexis.com/ebooks/questions>.

³⁹ *See, e.g.*, RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS (6th ed. 2012) (epub format price \$129).

⁴⁰ *See, e.g., id.* (list price \$213).

⁴¹ *See* Introduction to: Coursebook Support Communities (2010), <http://www.lexisnexis.com/pdf/LSP/LA13033-0%20Inst%20card%20CSC.pdf>.

⁴² *Id.*

⁴³ David Holt, *West's New Interactive Casebook Series*, LAW LIBRARY TECH. BLOG (last visited Sept. 3, 2013), <http://lawlibrarytech.wordpress.com/2009/09/03/wests-new-interactive-casebooks/>.

⁴⁴ *See* WEST INTERACTIVE CASEBOOK SERIES, <http://www.interactivecasebook.com/> (last visited Feb. 1, 2014).

⁴⁵ *Id.* (allowing purchaser "the right to print insubstantial portions . . . solely for use (appropriately cited and credited) by Licensee in the regular course of Licensee's Educational Purposes") (license agreement on file with author).

⁴⁶ *Id.*

⁴⁷ *See* SMARTE EDITIONS, <http://www.aspenlaw.com/pages/smart>e (last visited Oct. 8, 2014).

platform that relies on Flash⁴⁸ and gives a student access for twelve months to an electronic copy that is stored on Aspen-controlled servers.⁴⁹ The SMARTe edition may differ from the print version of the book. It may contain additional material added by the author, or even material added or modified and re-worked by the professor who has assigned the book. The student who purchases a SMARTe edition is also permitted to download *one* digital copy of the casebook using Adobe Digital Edition, a digital rights management program that prohibits annotating and prohibits copying to other devices. Aspen is clear that the downloaded version “does not include the dynamic online features.”⁵⁰ Aspen’s apparent fear of copying is further abated by limiting students’ ability to print, and even to cut and paste content: the Adobe Digital Edition software is set so that only ten pages can be printed at a time, and “[u]sers are limited to 4,500 characters of copy/pasting per day of the SMARTe edition content.”⁵¹ Aspen offers the SMARTe Edition of casebooks, by themselves, for around \$100.⁵²

In 2014 Aspen introduced its “Casebook Connect” publishing model.⁵³ Through this model, students obtain both a print version of the book and “lifetime” access to a digital version. The promised “lifetime” access to the digital copy is further qualified by the end-user license that permits the publisher to stop providing a title and, if it does so, to provide the customer with a minimum of thirty days advance notice. If the customer requests a copy of the title within thirty days of such notice, the license agreement provides that the publisher will provide a copy and a “non-transferable, nonexclusive, limited license to access and use the applicable Ebook on a perpetual basis for the Permitted Use”

Interestingly, Aspen priced the Casebook Connect model that provides *both* a hard copy and access to a digital copy lower than the price of *only* the hard copy. For example, the Casebook Connect price for *Dukeminier, Krier, Alexander, Schill, Property* (8th ed. 2014) is \$177.95, versus the hard copy only price of \$217.95. The print version is only a rental, and must be returned after the conclusion of the semester. One suspects that such print versions will be

⁴⁸ See SMARTe: How To Guide and FAQs (Student Version) 15 (explaining that because of this, it is not compatible with the iPad) (on file with author and with *Journal*).

⁴⁹ *Id.* at 18–19.

⁵⁰ *Id.*

⁵¹ *Id.* at 19.

⁵² See, e.g., JOSEPH W. GLANNON, ANDREW M. PERLMAN & PETER RAVEN-HANSEN, CIVIL PROCEDURE: A COURSEBOOK (2011) SMARTe \$101. The list price for this same title in hardbound copy is \$214.

⁵³ CASEBOOK CONNECT, <https://www.casebookconnect.com/> (last visited Oct. 8, 2014).

clearly marked as such and if resold the re-seller could face copyright infringement claims.⁵⁴

The launch of Casebook Connect generated unfavorable initial reactions by some law school professors, resulting in an online petition.⁵⁵ These professors objected that the titles being offered in the Casebook Connect program were not available through a traditional print version.⁵⁶ Shortly after the petition was circulated, Aspen announced that all books in the Casebook Connect program would also be available in a traditional print copy, albeit at a higher price.⁵⁷

III. SEMAPHORE PRESS: AN ALTERNATIVE PUBLISHING MODEL

When prices are “too high,” that can be a prime time for competition to work its magic and bring prices down. Consolidation in the publishing industry has led to an oligopoly for law school casebooks. Currently, the vast majority of quality titles are published by three publishers: Aspen (owned by Wolters Kluwer Law & Business), West and Foundation Press (both owned by Thomson Reuters⁵⁸), and Lexis/Nexis (owned by Reed Elsevier). Incumbents, especially in a concentrated market such as this, are less likely to innovate and take advantage of the cost savings that new technology can provide.⁵⁹

A. BASICS OF THE MODEL

Semaphore Press was founded to provide a simple and convenient distribution model for high-quality law school casebooks at a reasonable price.⁶⁰

⁵⁴ The first sale doctrine only permits an *owner* of a copy of a work to resell that work. 17 U.S.C. § 109. By renting books, no one is an *owner* of those copies and thus a sale would implicate the copyright owner’s right to control the distribution of copies to the public. *Id.* § 106(2).

⁵⁵ James Grimmelmann, *Let Students Keep Their Casebooks*, CHANGE.ORG, <http://www.change.org/p/wolterskluwer-let-students-keep-their-casebooks> (last visited Oct. 8, 2014).

⁵⁶ Josh Blackman, *Aspen Casebook Connect Textbooks Must Be Returned at End of Class, Cannot Be Resold*, JOSH BLACKMAN’S BLOG (May 5, 2014), <http://joshblackman.com/blog/2014/05/05/aspen-casebook-connect-textbooks-must-be-returned-at-end-of-class-cannot-be-resold/>.

⁵⁷ *Id.*

⁵⁸ See THOMSON REUTERS, <http://www.thomsonreuters.com> (last visited Oct. 8, 2014). In early February, 2013, Thomson Reuters announced that it had completed the sale of its law school publishing business, including its West Academic, Foundation Press and Gilbert imprints, to Eureka Growth Capital. See Paul Caron, *Thomson Reuters Sells Foundation Press, West to Eureka Growth Capital*, TAXPROF BLOG (Feb. 4, 2013), http://taxprof.typepad.com/taxprof_blog/2013/02/thomson-reuters.html.

⁵⁹ CLAYTON CHRISTENSEN, *THE INNOVATORS DILEMMA* 47–48 (1997).

⁶⁰ Seeking a lower-cost alternative for students to obtain high-quality casebooks in light of the advances in digital technologies led the author of this Article, together with Professor Joseph S. Miller, to create an online publishing company called Semaphore Press in 2008. Our experience with Semaphore Press has given us a front-row seat from which to experience how digital

The company seeks to leverage digital technology to significantly reduce the costs associated with traditional casebook publishing but still provide a way for authors to receive compensation for their work in writing and updating high-quality casebooks. At the same time, the company seeks to ensure that all students have access to the material assigned for their courses without turning them into law-breakers in their efforts to become lawyers.⁶¹

Semaphore Press presents students with the following value proposition: Use its website to download a personal copy of the material that the professor has assigned for a class, paying a suggested price of \$30. The student obtains a digital copy of the book, in pdf format with no technological restrictions or DRM. That pdf copy can be loaded onto whatever device or devices that the student uses for studying. It can be annotated in the pdf file itself, and those annotations can be saved to the file—technological capabilities that the pdf format supports and with which Semaphore Press does nothing to interfere.

Semaphore clearly states that once the student has obtained a digital copy, the student is welcome to print out as much of the book as the student desires. The company provides a permission letter that a student can take to a local copy shop or printer authorizing the student to have their digital copy printed and bound with the binding type of the student's choice. It does not, however, generally provide hardbound copies of its titles.⁶²

Semaphore Press begins with the proposition of a suggested price of \$30 for its casebooks. A student can elect to change that price—paying less (or more) if the student desires. Additionally, the website also permits students to download a copy of its books for free. To do so the student must click on a

distribution can work and to consider the future potential of the different technological platforms available for distribution.

⁶¹ Traditional casebook publishers have sought to enlist the help of deans and professors to remind students that photocopying casebooks, and certainly downloading them through peer-to-peer file sharing networks constitutes copyright infringement. See COPYRIGHT LAW AND SCANNING CASEBOOKS, AKRON LAW ANNOUNCEMENTS (Sept. 13, 2012), <http://blogs.uakron.edu/law/2012/09/13/copyright-law-and-scanning-casebooks/>.

⁶² See *Downloads*, SEMAPHORE PRESS, http://www.semaphorepress.com/downloads/Letter_to_copyshops.pdf (last visited Oct. 8, 2014). In the fall of 2012, as an informal exploration of the option, Semaphore Press offered one of its books through the print-on-demand service of LuLu Press. As explained on the company's website:

The price of this bound version is \$57. This price includes LuLu's cost of printing (\$19.48), LuLu's 20% "cut" of any amount charged above the printing cost (\$7.51) and the base price (\$30) that Semaphore Press suggests be paid for the digital copy of the book. Because the LuLu price has the \$30 suggested price built in, after you purchase a printed copy of the book from LuLu, you should absolutely feel free to download a digital copy of the book from Semaphore Press using the "freeride" button at the bottom of the book's payment page.

FAQs, SEMAPHORE PRESS, <http://www.semaphorepress.com/FAQs.html> (last visited Oct. 8, 2014).

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button that clearly states “Freeride: I won’t pay now but want to download anyway.” Doing so provides the student with the same DRM-free pdf copy of the book. This button is located underneath the button for submitting a charge on a credit card:

The screenshot shows a checkout form for Semaphore Press. On the left, under the heading "Publication", is the text "Intellectual Property Law: Cases and Materials". To the right are input fields for "Country*" (set to "United States"), "Card Type*" (set to "Visa"), "Card Number *", "Expiration*" (set to "01" and "2011"), and "3 or 4 Digit Security Code*". Below the form is a line of text: "Please only press 'Charge My Credit Card' button below once and wait for confirmation page with further instructions." Below this text are two buttons: "Charge My Credit Card" and "Freeride - I won't pay now but want to download anyway". The "Freeride" button is circled in red. At the bottom, there is a link: "Problems or Questions? Contact customerservice@semaphorepress.com."

Semaphore Press suggests that professors adopting a Semaphore Press published book include the following statement in their syllabus:

Required text: <author(s)>, <title>, (Semaphore Press)

This required text is available for download only at www.semaphorepress.com. Semaphore Press uses a publishing model different from the traditional law school casebook publishers. I encourage you to read about Semaphore Press’s publishing approach on its website. This book has a suggested price of \$30. I urge you to pay the suggested retail price in order to keep high-quality legal educational material available at reasonable prices.⁶³

The hope is that with an urging from the professor, students will pay for the book.

B. DO STUDENTS PAY?

Given that students can pay less (or more) than the suggested price, and that they also have the option of downloading a copy of the book without paying

⁶³ See *Professors*, SEMAPHORE PRESS, <http://www.semaphorepress.com/professors.html> (last visited Oct. 8, 2014).

anything, the most obvious question one might have is: Do students pay? Semaphore Press now has four full school years' worth of information on that front.

Semaphore Press asks professors who adopt one of its textbooks to provide it with the final enrollment number for the course. When a student makes a payment for a book on the Semaphore Press website, the student is required to indicate the school at which he or she is enrolled and the class for which the book is assigned. With this data, Semaphore Press can track payment rates.

Semaphore Press does not track "freeriders," for a variety of reasons. If a student has made a payment for a book and then loses that copy, or her computer crashes or is stolen, Semaphore encourages the student to come back to the website, use the "freerider" option, and download another copy.⁶⁴ Thus, tracking freeriders could result in over-counting the number of students that are not paying for access to the book. Additionally, professors considering adopting a book are encouraged to use the "freerider" option to obtain a copy for review,⁶⁵ again contributing to over-counting if the company tracked freeriders.

During the fall 2012 semester, Semaphore Press books were used in twenty-six different classes at twenty-three different law schools. Professors for twenty-four of those classes provided final enrollment data,⁶⁶ indicating that 618 students were assigned Semaphore Press books for that semester. From those twenty-four classes, Semaphore Press received a total of 511 payments.⁶⁷ This represents a payment rate of 83%.⁶⁸ Payment rates in individual classes ranged from a low of 62.5% to a high of 100%.⁶⁹ In fact, seven different

⁶⁴ The student receives this message from the company in the e-mailed receipt for any payment the student makes. This message is also contained in the copyright notice on the inside title page of the books. Additionally, this message is on the company's list of FAQs. *FAQs*, *supra* note 62.

⁶⁵ Despite the suggestion to professors to use the "freerider" option to obtain a review copy (see <http://www.semaphorepress.com/professors.html>), Semaphore Press has received payments from some professors. Why those professors pay is uncertain, but the choice is entirely theirs.

⁶⁶ Despite the request for this information on the professors' information page at the website, see *id.*, and direct e-mails to the professors listed on school websites as teaching the relevant course, two professors made no contact with the company.

⁶⁷ One of the books offered was also available for purchase as a softbound copy, printed by LuLu Press. See *supra* note 62. Professors reported a total of twenty-five LuLu Press copies purchased in the various classes. The price of the LuLu press copy of the book included the suggested price of \$30 for Semaphore Press. Thus, in these numbers, those LuLu Press softbound copies are counted as payments of \$30.

⁶⁸ Earlier experiences with the company's first book, over the course of four semesters (Fall 2008–Spring 2010), the overall payment rate was 77%. This sample involved 321 enrolled students in seven different courses.

⁶⁹ The classes that experienced a 100% enrollment rate had enrollments ranging from nine enrolled students to thirty-four enrolled students. One of the professors experiencing a 100% payment rate among enrolled students volunteered that the professor had "pushed pretty hard on

classes had payment rates of 100%. Size did not appear to be a factor in the payment rates—some small classes had relatively low payment rates, some larger classes had relatively high payment rates.⁷⁰ The classes that experienced a 100% payment rate ranged in size from nine enrolled students to thirty-four enrolled students.⁷¹ An appendix to this article contains the detailed breakdown of the payment statistics.

An 83% payment rate is impressive. Over four out of every five students paid something for access to their books. However, because students can vary the price from the suggested \$30 price, looking at the actual amount paid is also important, and again, impressive. Of the courses in which the suggested price of the book was \$30,⁷² 87% of the paying students paid the suggested price. This fact indicates that, in effect, the choice students make is whether to pay or not pay, rather than what to pay.⁷³ A large majority of students appear to be economizing on the choice question, asking only whether to pay or not. Only a handful of students, 13%, made the further choice of “what to pay,” at a price point other than \$30. While 1.5% of the paying students paid less than \$5, 1.1% of them paid more than the suggested price.⁷⁴

C. WHY ARE STUDENTS PAYING?

The data from the fall 2012 semester indicates that only 17% of students elected to “freeride.”⁷⁵ Why do an overwhelming majority of students pay for

the moral duty to pay” the suggested price. While 100% of this class paid something, 22.2% paid something less than the suggested price, and all of those 22.2% paid \$5 or less.

⁷⁰ The smallest class had a reported enrollment of eight and payment rate of 100%. The largest class had a reported enrollment of eighty-seven and a payment rate of 72%.

⁷¹ Of the seven classes that had 100% payment rates, two were taught by authors of the assigned texts. Two other author-taught classes had payment rates of 80% and 81%.

⁷² During the fall semester of 2012, two classes in which Semaphore Books were assigned did not use the book for the entire semester. In those situations, Semaphore Press asks professors to calculate a fair price, using \$1/one-hour class session as a rough guide, and then inform their students what that price is. One of those two classes experienced a 100% payment rate, and all of the students in that class paid the price suggested by the professor, or more. The payment amounts from these two classes are not included in the data concerning payment amounts in the text, although they are included in the data concerning payment rates.

⁷³ This payment percentage has remained consistent with the earlier sample, see *supra* note 68, where 88% of the paying students paying the suggested \$30 price.

⁷⁴ The remaining paying students paid \$20.00–\$29.99 (4.3%); \$10.00–\$19.99 (4.5%); \$5.00–\$9.99 (1.7%).

⁷⁵ It is possible that these students obtained a copy from a classmate or from a file-sharing service, although given that one can obtain a copy without paying from the Semaphore Press website, the incentive to use an alternative access method is low. It is also possible that a student may have obtained a “used” copy of the book, for example if a student had printed out a copy of

something that they can get for free? A variety of theories might explain why students elect to pay for a digital copy of their books. Semaphore Press undertook to discover student attitudes about payments by surveying 188 students enrolled in six different classes using a Semaphore Press book, asking about their experience.⁷⁶ One hundred twenty-six students completed the survey, a 67% response rate. Those responses help illuminate why students might be paying for digital books they can technically obtain for free.

1. *\$30 is a Fair Price.* When asked which of the following represented why they paid what they paid, of the 126 students that responded, eighty-three students indicated that they felt the “suggested price seemed about right.” In a context in which casebooks for their other classes top \$200, paying \$30 for access to a digital copy apparently seems like a good deal.⁷⁷ So would paying nothing, but again, only 17% of the students opted to pay nothing. In the survey, only three students responded that “freeriding is something I like to do” while an additional ten students answered that “freeriding is okay with me when I can do so legally.”

the book and then chose to sell that copy. Semaphore Press books contain a copyright legend in the front matter that reads:

COPYRIGHT AND YOUR RIGHTS:

The authors retain the copyright in this book. By downloading a copy of this book from the Semaphore Press website, you have made an authorized copy of the book from the website for your personal use. If you lose it, or your computer crashes or is stolen, don't worry. Come back to the Semaphore Press website and download a replacement copy, and don't worry about having to pay again. Just to be clear, Semaphore Press and the Authors of this case-book are not granting you permission to reproduce the material and books available on our website except to the extent needed for your personal use. We are not granting you permission to distribute copies either.

We ask that you not resell or give away your copy. Please direct people who are interested in obtaining a copy to the Semaphore Press website, www.semaphorepress.com, where they can download their own copies. The resale market in the traditional casebook publishing world is part of what drives casebook prices up to \$150 or more. When a publisher prices a book at \$150, it is factoring in the competition and lost opportunities that the resold books embody for it. Things are different at Semaphore Press: Because anyone can get his or her own copy of a Semaphore Press book at a reasonable price, we ask that you help us keep legal casebook materials available at reasonable prices by directing anyone interested in this book to our website.

See, e.g., LYDIA PALLAS LOREN & JOSEPH SCOTT MILLER, *INTELLECTUAL PROPERTY LAW: CASES & MATERIALS* (ver. 3.2 2014).

⁷⁶ This survey was conducted during the 2009–2010 academic year.

⁷⁷ When compared with many ebooks that cost \$10, on the other hand, a price of \$30 may not seem so fair. The point is that the comparison is a relative one.

The \$30 suggested price reflects an estimate that students would believe \$1 per one-hour class session is a reasonable requested payment.⁷⁸ Students are accustomed to the price of a song download hovering around \$1 per song.⁷⁹ As most classes meet for approximately thirty hours over the course of a semester, Semaphore Press suggests a price of \$30. Fair pricing is important, especially when the students are not given a choice of what material to purchase. Because the professor assigns the material, being forced to buy something that is overpriced may frustrate students even more than high prices in general. When given the option to pay nothing, in this context beginning with a suggested price that is fair is likely critical to the willingness of students to pay.⁸⁰

Related to fairness may be a sense of professionalism that law students are beginning to develop. These students may understand that, as a professional, it is appropriate to pay a fair price for the communication of necessary information. A model that provides a suggested price, while also permitting freeriding, offers students a concrete object lesson in professionalism.

2. *Students Don't Realize that they Can Pay Less, or Nothing at All.* The Semaphore Press website doesn't hide the fact that the suggested price can be modified. A student need merely read the website to understand the model. The suggested text for a professor to use in her syllabus also doesn't hide that the Semaphore Press model is different.⁸¹ At the same time, the website doesn't affirmatively encourage freeriding.⁸² On the payment page for any

⁷⁸ The company's website page directed at students contains the following Q and A:

WHAT DO YOU HAVE TO PAY?

Each publication has a suggested price. We price full casebooks based on our belief that it is fair to ask a student pay about \$1 for the reading material for each one-hour class session. Different schools use different calendars and credit hours, so we've settled on a suggested price for most of our casebooks of \$30. We ask that you pay the suggested price either with a credit card (by clicking the appropriate link on our page), or by sending us a check, and then download a digital copy of the casebook. Note that if your professor has assigned, e.g., only 10 class sessions of material from a Semaphore Press book, then we suggest that you pay \$10.

Students, SEMAPHORE PRESS, <http://www.semaphorepress.com/students.html> (last visited Oct. 8, 2014).

⁷⁹ Indeed, the move to make individual songs available at the reasonable price of approximately \$1 per song combatted the rising norm of illegal file-sharing. See Mark F. Shultz, *Reconciling Social Norms and Copyright Law: Strategies for Persuading People to Pay for Recorded Music*, 17 J. INTELL. PROP. L. 59, 79–80 (2009).

⁸⁰ See Mark F. Shultz, *Copynorms: Copyright and Social Norms*, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 207–09 (Peter K. Yu ed., 2007) (suggesting how fairness matters when gauging whether people behave cooperatively or opportunistically).

⁸¹ See *supra* note 63 and accompanying text.

⁸² See *Professors*, *supra* note 63.

book, the company presents the payment amount with a checkbox next to \$30. A student would need to take the affirmative step of entering an amount in the empty box:

Thus, it is possible that students are paying the suggested amount because they don't realize, or don't take the time to inform themselves of, their options. When surveyed, however, only five of the 126 responding students indicated that they "did not realize" they could pay an amount other than the suggested amount. While students might under-report an admission of their ignorance, even on an anonymous survey, the small number of students who indicated that they were unaware of their options suggests that this is not the reason they choose to pay for a digital copy.

3. *Students Want to Contribute to the Success of An Alternative, Lower Cost Model.* Students may be paying because they like the model and would like to see it continue.⁸³ Semaphore Press is transparent about its business model and the threat of freeriding to that model. At the top of the payment page for any Semaphore Press book, the company states: "Semaphore Press encourages customers to pay for their downloads . . . Free riding will ultimately limit the availability of high-quality materials at reasonable prices."⁸⁴ In the portion of the website directed at students, the company goes into more detail:

⁸³ See Mark F. Shultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651 (2006) (describing the complicated assertion and relinquishment of control by owners of copyrighted content that leads community norms and, ultimately, to successful distribution models).

⁸⁴ *Payment*, SEMAPHORE PRESS, <http://www.semaphorepress.com/Pay1.php> (last visited Oct. 8, 2014).

WHAT DO YOU HAVE TO PAY?

Each publication has a suggested price. . . .

We have expenses that we need to cover. Our authors hope, and deserve, to receive some royalty revenue from the works that they've created. But we also recognize that law school is expensive. We've heard stories of students not buying the required books because they just can't afford them. These students—who want to learn just as much as those who can afford the books—borrow a classmate's book some days, read the copy that is on reserve in the library other days, and some days simply can't do the reading. We think that is not the best way to go about obtaining, or offering, an excellent legal education. Download the required reading and pay what you can, or what you think is fair.

THE RISK OF FREERIDERS

We know that the biggest risk to our business model is freeriders. If too many students pay little or nothing for the materials they download, Semaphore Press won't be able to pay its bills over the long run, and we won't be able to attract authors to publish their casebooks with us. Put simply, we need a critical mass of students to pay for the materials they download. Be a part of the solution to \$180 casebooks, by fostering the creation of \$30 casebooks: Please pay the suggested price. If you can't pay it, please at least pay something to help Semaphore Press succeed.⁸⁵

Semaphore Press routinely receives appreciative e-mails from students who want the company to succeed.⁸⁶ These e-mails suggest that the alternative model and its approach resonates with students. The students seem to understand freeriding and its risks and want to help the model succeed.⁸⁷ The “pay-what-you-want” model is something with which the newer generation of law students is increasingly familiar.⁸⁸

⁸⁵ *Students*, *supra* note 79.

⁸⁶ E-mails on file with author.

⁸⁷ In this sense, the students that pay may reflect an acknowledgement of the utilitarian based model of intellectual property—the payment for content creates the incentive to produce and distribute the content. See JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 6–10 (3d ed. 2010).

⁸⁸ See Jon M. Garon, *What if DRM Fails?: Seeking Patronage in the iWasteland and the Virtual O*, 2008 MICH. ST. L. REV. 103.

One interesting aspect of our payment data comes from a professor whose class had a 100% payment rate among enrolled students. This professor volunteered that the professor had “pushed pretty hard on the moral duty to pay” the suggested price.⁸⁹ It may help explain the 100% payment rate, although six other classes also had 100% payment rates and those professors did not report any particular effort to convince students to pay. However, while 100% of this particular class paid something, 20% paid something less than the suggested price, and 10% paid \$5 or less. As discussed above, among all paying students in the fall of 2012, only 11% paid something less than the suggested price and only 1.7% paid \$5 or less.⁹⁰ While this one class is a small sample size,⁹¹ the pattern might indicate that “guilting” students into paying may result in a high payment rate, but a lower payment amount.

While expressing support for the model, the unsolicited e-mails Semaphore Press has received directly from students also express an appreciation for obtaining a digital copy that does not come encumbered with DRM, which can negatively affect the user experience. All the digital versions offered by the traditional publishers rely on DRM to restrict copying, restrict printing, and in the case of Aspen’s SMARTe editions, even restrict cutting and pasting with a daily usage cap.⁹²

Finally, the unsolicited e-mails indicate that students appreciate not being treated like criminals. Instead of treating students like the potential copyright infringers some publishers fear, Semaphore Press explains its position on the webpage directed at professors:

[W]e’re not interested in turning law students into copyright infringers, or future lawyers into potential felons. Digital downloads are notorious for their ease of unauthorized reproduction and “sharing.” The Copyright Act has very low thresholds for criminal infringement. [See] 17 U.S.C. § 506. We just don’t want to go down that path. We would rather let students choose what to pay and have access to the assigned material.⁹³

Treating law students like the future mature and law-abiding professionals we hope they will become is an important part of the model established by Semaphore Press.

⁸⁹ E-mail from professor, on file with author.

⁹⁰ See *supra* note 74.

⁹¹ The class in question had twenty enrolled students.

⁹² See *supra* note 51 and accompanying text.

⁹³ *Professors*, *supra* note 63.

IV. THE FUTURE VIABILITY OF THE MODEL

A. THE MODEL “WORKS”

As the payment rate and amounts indicate, the voluntary payment model appears to be working. Semaphore Press is able to pay its expenses and has been able to provide its authors with royalty checks that satisfy the authors’ desires for some level of remuneration. The authors have chosen to update their books as the law changes, keeping the material current and pedagogically relevant. Professors who have adopted the books have chosen to use the books again.

B. CHALLENGES TO THE MODEL

1. *Student Awareness of Payment Rates.* It is possible that disclosing payment rates will affect student willingness to pay. If students see that a sufficient number of students are paying, they may be more tempted to freeride and pay nothing. However, awareness of peer behavior can help ensure compliance with a social norm.⁹⁴ Thus, awareness that the overwhelming majority of their peers pay for casebooks with a suggested price of \$30 may encourage more students to pay.⁹⁵

2. *Expanding Topic Breadth.* The bulk of the titles available in the fall 2012 semester were designed for classes in which the issue of paying for digital content is at least in some way an object lesson for some of the course content. The two books with the widest adoptions are *Intellectual Property: Cases & Materials* and *Internet Law: Cases & Problems*. An additional third book on *Interstate Compacts* has had limited adoptions in classes with very small enrollments, although it has experienced payment rates consistent with the overall payment rates reported above. Will the model work when the topics of the books do not involve the regulation of intellectual property or of digital technology?

Semaphore Press plans to release a casebook on property law in the fall of 2013 and is open to publishing other titles. Only with a broadened topic base

⁹⁴ See *supra* note 63.

⁹⁵ When individuals perceive that others are behaving cooperatively, individuals are moved by honor, altruism, and like dispositions to contribute to public goods even without the inducement of material incentives. When, in contrast, they perceive that others are shirking or otherwise taking advantage of them, individuals are moved by resentment and pride to withhold their own cooperation

Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71 (2003).

of titles will we know if the model's success is dependent on the content of the digital books offered.

3. *Changing Prices.* The success of the model with a suggested price of \$30 is context-dependent. When other books cost over \$200 for printed versions and digital access options wrapped in DRM that are not as user-friendly or convenient cost over \$100, a suggested price of \$30 seems reasonable and fair. In fact, it seems like quite a bargain. If prices by the traditional publishing companies were to drop significantly, the suggested price of \$30 might be called into question by students and, more importantly, by professors pondering their adoption choices. However, the risk of significant reduction in traditional publisher prices seems unlikely.

Some professors have begun offering self-published materials with far lower prices. For example, Professors Eric Goldman and Rebecca Tushnet offer their *Advertising & Marketing Law: Cases and Materials* through Scribd.com for \$10.⁹⁶ Lower priced self-published materials present competition for the \$30 voluntary-payment model.

4. *Open Source Alternatives.* Competitive pressure from the opposite end of the price spectrum is also possible: some casebooks are available at a price of \$0. Known as the Open Education Resources (OER) movement, educators are creating teaching materials and releasing them digitally with an open access license, such as creative commons. OER materials are offered for free with no DRM.

Currently the OER movement in the U.S. is mostly focused on creating educational materials for grades K–12 and basic college courses. Non-profit foundations are providing some of the funding for the creation of content, while some state government funds and even limited federal funds have been used to create content that is released under open licenses. Additionally, individual educators, of their own initiative, create material that they make freely available online with open licenses.

In the law school arena, in 2009 the Center for Computer-Assisted Legal Instruction (CALI) launched its eLangdell project.⁹⁷ CALI is non-profit consortium funded by member law schools.⁹⁸ In turn, it has provided some

⁹⁶ ERIC GOLDMAN & REBECCA TUSHNET, *ADVERTISING & MARKETING LAW: CASES AND MATERIALS*, available at <http://www.scribd.com/doc/99904133/Advertising-and-Marketing-Law-Casebook-July-2012-by-Tushnet-and-Goldman>. Scribd offers different options for people publishing materials, including formats that contain technological protections that prevent downloading or printing as well as formats that permit downloading in pdf with no DRM as well as downloading in other “native” file formats such as .doc or .xls. Helpfully, the Goldman Tushnet book is available as a pdf with no DRM.

⁹⁷ Available at <http://www.cali.org/the-elangdell-bookstore>.

⁹⁸ Thus, indirectly CALI is paid for by student tuition dollars at law schools across the country. See CALI, <http://www.cali.org> (last visited Oct. 9, 2014).

funding for the creation of books that are published digitally in a variety of formats for free. As of February 2014, eLangdell has available full casebooks on four basic topics (contracts, property, tax and land use), and a variety of shorter publications addressing different aspects of certain topics.⁹⁹

In 2013 Harvard's Berkman Center for Internet & Society, in collaboration with the Harvard Law School Library, launched a free platform for creating, sharing and adapting open course materials, called H2O.¹⁰⁰ As of August 2014, the H2O project was hosting nine different sets of course materials, called "playlists."¹⁰¹ All material published through the H2O platform is released under a Creative Commons license that permits reproduction and modification.¹⁰²

Outside of CALI's eLangdell and Harvard's H2O project there are examples of professors who have created casebooks and released digital versions available for free downloads. Professor Herbert Hovenkamp authored his textbook *Innovation and Competition Policy: Cases and Materials* and released it on SSRN in 2011.¹⁰³ Offered for free with an open license,¹⁰⁴ SSRN download statistics indicate that this book has been downloaded over 2,000 times.¹⁰⁵ Professor Tom Field offers his texts *Introduction to Administrative Process: Cases & Materials*¹⁰⁶

⁹⁹ See *supra* note 65.

¹⁰⁰ H2O, <http://blogs.law.harvard.edu/h2oharvard/2013/03/06/h2o/> (last visited Oct. 9, 2014).

¹⁰¹ H2O, <http://h2o.law.harvard.edu/playlists?featured=true> (last visited Oct. 9, 2014).

¹⁰² The specific Creative Commons license employed by the H2O project (the CC BY-NC-SA 3.0 license) allows for adaptation of the material under a "share-alike" requirement, meaning that if the adapted material is further distributed, it must be distributed under the same Creative Commons license permitting further reproduction and adaptations. See Creative Commons: About the Library, <http://creativecommons.org/licenses/> (last visited Oct. 9, 2014). The Creative Commons license used by the H2O platform also restricts use of the material to "non-commercial" uses.

¹⁰³ HERBERT J. HOVENKAMP, *INNOVATION AND COMPETITION POLICY: CASES AND MATERIALS*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937026.

¹⁰⁴ *Id.* The 2013 open license grant provided in chapter 1 of this text reads as follows:

License Agreement: The Author hereby grants You a royalty-free, nonexclusive, license to (a) reproduce this Original Work in copies for any purpose including classroom use; (b) prepare derivative works based upon the Original Work; and (c) distribute electronic or printed copies of the Original Work and Derivative Works to others; provided that, acknowledgement of the original author be made on all distributions of the original or derivative works; and distribution shall be noncommercial and without charge, except that reasonable costs of printing and distribution may be passed on. No copyright is claimed in unedited government or other public domain documents.

¹⁰⁵ *Id.*

¹⁰⁶ THOMAS G. FIELD, JR., *INTRODUCTION TO ADMINISTRATIVE PROCESS: CASES & MATERIALS* (Oct. 11, 2010), available at <http://ssrn.com/abstract=1195322>. The abstract states that "[t]he second page grants a royalty-free license for noncommercial reproduction." As of October 2014, SSRN statistics indicate this title has been downloaded over 580 times.

and *Fundamentals of Intellectual Property: Cases & Materials*¹⁰⁷ through SSRN. Also, Professors James Boyle and Jennifer Jenkins released *Intellectual Property: Law & The Information Society: Cases & Materials* using a Creative Commons license.¹⁰⁸ These authors are not receiving any direct compensation for making these works available.

If more authors create full casebooks and offer them for free it is possible that no professors would be interested in adopting digital books that are offered with a suggested price. If the \$30 casebooks are not adopted, then the model will fail. Competing with free can be difficult if the free product is of a competitive quality. Who wouldn't choose to adopt a casebook for which their students will not have to pay anything? These free casebooks are also a competitive challenge for the traditional publisher, but so far they do not seem to have had much of an effect on the market.

5. *Publishing High Quality Texts.* Writing a quality casebook takes time and effort. Professors have choices concerning how to spend their time. For many, money can influence that choice. Even a professor who desires, in one year, to release an entirely free casebook on the Internet may not have sufficient incentive, in a future year, to update that casebook as the law changes.¹⁰⁹ Providing some remuneration to authors is an important part of providing an incentive, not only to write high quality material in the first instance, but to also keep those materials updated. Additionally, good teacher's manuals can provide other professors with ideas about teaching with the material the author has selected but requires even more investment of time by authors.

Semaphore splits all revenues received with its authors 50/50. Traditional casebook publishers typically provide a royalty rate ranging from 10%–15%.¹¹⁰ On a book that costs students \$200, the author nets anywhere from \$20 to \$30. Of course, as discussed above, the author nets nothing from used book sales. With Semaphore Press the author will receive \$15 for every \$30 payment. There may be more payments overall than there would be for the traditionally published hardbound casebooks, allowing for the fact that used books account for some percentage of the students' purchasing choices. As the traditional

¹⁰⁷ THOMAS G. FIELD, JR., *FUNDAMENTALS OF INTELLECTUAL PROPERTY: CASES & MATERIALS* (June 24, 2012), *available at* <http://ssrn.com/abstract=1172142> or <http://dx.doi.org/10.2139/ssrn.1172142>. As of October 2014, SSRN statistics indicate this title has been downloaded over 5,100 times.

¹⁰⁸ *See* OPEN INTELLECTUAL PROPERTY CASEBOOK, <http://web.law.duke.edu/cspd/openip> (last visited Oct. 9, 2014).

¹⁰⁹ Open licensing of the type offered by Creative Commons or the simple license statement used by Professor Hovenkamp, see *supra* note 103, at least create the possibility that if someone else is interested in updating the text, that would be possible.

¹¹⁰ Anecdotal evidence of royalty rates is discussed on this CHRON. OF HIGHER EDUC. forum, *available at* <http://chronicle.com/forums/index.php?topic=73372.0> (last visited Oct. 9, 2014).

publishers utilize digital publishing, with a variety of inconvenient DRM tools to combat copying, the “used” book market may be a thing of the past and author royalties may in fact rise, making publishing with Semaphore less financially attractive. Those royalties may, however, fall. Current online access prices are hovering between \$120–\$150. With a typical 10%–15% royalty rate, professors will receive \$12 to \$20 per student purchase. Thus, the difference between what authors receive from Semaphore Press and what they receive from traditional publishers may not, in fact, be that great.

Authors that are interested in publishing with Semaphore Press, however, are likely not interested in making the most money possible. If they were, they would likely seek a traditional publisher with its heavy investments in marketing the titles it publishes. Semaphore Press authors, instead, are looking to be part of the solution to the high cost of educational materials while at the same time receiving some level of compensation for their efforts.

Why some professors continue to publish with the three major publishers is, on the one hand, easy to understand. These long-established publishers bring with them a marketing machine and sales force that significantly assist in garnering adoptions for new and existing titles. With adoptions come royalty earnings. As the revenue pours in for successful titles, so does the prestige.¹¹¹ Greater adoptions are a sign of a casebook author’s success which can, for some authors, lead to increased salaries as well as lateral offers.¹¹² That success typically is not portable to a different publisher due to the initial contract signed by the author in which the author assigns the copyright in the casebook to the publisher. Additionally, some publishers include a non-competition clause in their agreements that prevents the authors from writing a different book for a different publisher.¹¹³

Semaphore does not insist upon an assignment of copyright; nor does it seek a non-competition agreement. Instead, authors grant Semaphore a five-year license to distribute the book.¹¹⁴ For professors interested in some remuneration for their efforts,¹¹⁵ this may make publishing with Semaphore a more attractive alternative than the traditional publishers.

¹¹¹ Matthew Bodie, *The Future of the Casebook: An Argument for an Open-Source Approach*, 57 J. LEGAL EDUC. 10, 25 (2007) (acknowledging that “royalties and the prestige of having one’s own book are important incentives”).

¹¹² Admittedly, at some institutions, being a casebook author is not helpful for one’s prestige, as it may not be seen as “real” scholarship.

¹¹³ See, e.g., Aspen form contract. On file with author.

¹¹⁴ At the end of those five years, both the author(s) and Semaphore Press can revisit whether it makes sense to continue publishing the book through this model. Either party can walk away, or enter into a new agreement, at that time.

¹¹⁵ Professors who are not interested in direct compensation may elect to publish openly. See *supra* Part IV.B.4.

V. CONCLUSION

Professors who author casebooks face different publishing options. Professors who adopt casebooks for their classes also face different options—not only based on content of the casebooks but based on delivery methods and the prices they are imposing on their students. The Semaphore Press experience with digital casebooks containing no DRM suggests that, for now at least, a voluntary payment model with a suggested \$30 price is not only a model welcomed by law students but is a viable option both for authors and adopting professors. Further, the Semaphore Press experience with providing a suggested price perceived as reasonable in the relevant market, while offering options for different prices (including free), indicates that voluntary payment models can succeed.

2014]

THE VIABILITY OF THE \$30 CASEBOOK

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APPENDIX

	Number of Students			Payment Amounts					
	Enrolled	Paid	payment rate	>\$30	\$30.00	\$20-29.99	\$10-19.99	\$5-9.99	\$.01-4.99
	87	63	72.4%	0	54	2	3	2	2
**	51	35	68.6%	0	7	7	14	4	3
	46	33	71.7%	0	32	1	0	0	0
	45	31	68.9%	1	22	5	2	1	0
*	43	35	81.4%	0	30	1	4	0	0
*	38	38	100.0%	0	35	1	0	1	1
*	34	34	100.0%	1	30	1	1	1	0
	32	26	81.3%	0	18	2	4	0	2
	29	29	100.0%	1	24	1	2	1	0
	22	22	100.0%	0	22	0	0	0	0
	22	20	90.9%	0	20	0	0	0	0
	18	16	88.9%	0	15	1	0	0	0
	18	18	100%	0	14	0	1	1	2
	17	14	82.4%	1	12	1	0	0	0
	17	15	88.2%	0	14	0	1	0	0
	16	10	62.5%	0	9	0	1	0	0
	15	11	73.3%	0	11	0	0	0	0
	13	9	69.2%	0	7	1	0	1	0
**	13	13	100.0%	0	2	0	2	9	0
	11	10	90.9%	1	8	1	0	0	0
	9	8	88.9%	0	6	1	1	0	0
	9	9	100.0%	0	9	0	0	0	0
	8	8	100.0%	0	7	0	1	0	0
*	5	4	80.0%	0	3	1	0	0	0
TOTAL	618	511	82.7%						

*author taught

**less than \$30 recommended

