



Not All Textbooks Are Created Equal: Copyright, Fair Use, and Open Access in the Open College Textbook Act of 2010

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NOT ALL TEXTBOOKS ARE CREATED EQUAL: COPYRIGHT, FAIR USE, AND OPEN ACCESS IN THE OPEN COLLEGE TEXTBOOK ACT OF 2010

I. INTRODUCTION

One of the quintessential college experiences is sticker shock at the price of textbooks. It seems that in classes with only one required textbook, such as a math or science class, the price of a single book can easily surpass the total cost of several smaller books in a humanities or literature class. The average college student spends between \$805 and \$1,229 per year on textbooks and supplies.¹ With steady tuition increases and rising cost of room and board in many college campuses, increases in textbook prices only add to the seemingly insurmountable debt that students accrue while pursuing college degrees. In 2007-2008, the average graduate of a four-year undergraduate program had \$23,186 in debt and the average graduate and professional students racked up \$52,000 and \$79,836, respectively, in addition to undergraduate debt.²

The purpose of this Article is to explore The Open College Textbook Act of 2010 (“OCTA”), which aims to make college more affordable.³ Section II of this article will discuss the background of the bill, beginning with Part A, which describes the landscape of spending on college textbooks. Part B will consider the background of open licensing in relation to textbooks, including a related college affordability law, The Higher Education Opportunity Act of 2008. Part C will explore the impact of open license textbooks on the fair use doctrine in higher education.

Section III will examine the OCTA itself. Part A will discuss

1. See Open College Textbook Act of 2010, H.R. 4575, 111th Cong. (2010); THE COLLEGE BOARD, TRENDS ON COLLEGE PRICING, 1 (2007), *available at* http://www.collegeboard.com/prod_downloads/about/news_info/trends/trends_pricing_07.pdf [hereinafter COLLEGE BOARD].

2. The SmartStudent™ Guide to Financial Aid | Student Loans, <http://www.finaid.org/loans/>, (last visited July 25, 2010).

3. Open College Textbook Act of 2010, H.R. 4575, 111th Cong. (2010).

the provisions that aim to reduce college spending by spearheading a federal initiative to create open access textbooks. Part B will discuss the provision regarding the licensing of materials with a federal connection. Part C will examine the economic implications of the Act. Part D will discuss the bill's supporting arguments, and Part E will address the arguments of the bill's opponents.

Section IV will analyze potential problems with implementation of the Act. Part A will discuss the challenge of quality assurance. Part B will discuss the potential copyright implications associated with the Act, looking specifically at the problematic terminology used to describe the required licensing, and will examine how the open source software movement can be viewed as a model in this respect. Part B will also consider work-for-hire issues and will discuss how the Act will impact fair use in education.

II. BACKGROUND

A. Spending on College Textbooks

Congress has found that the cost of college textbooks is a significant barrier for many students in obtaining higher education.⁴ In 2004, Congress commissioned a study to examine college textbook prices, influenced by concern for the overall cost of college attendance and the impact of higher priced textbooks on federal spending for financial aid.⁵ The Government Accountability Office examined available data sources on college textbook prices and sought perspectives of publishers, retailers, and wholesalers of new and used textbooks "to determine (1) what has been the change in textbook prices, (2) what factors have contributed to changes in textbook prices, and (3) what factors explain why a given U.S. textbook may retail outside the United

4. *Id.* § 2(5).

5. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, COLLEGE TEXTBOOKS: ENHANCED OFFERINGS APPEAR TO DRIVE RECENT PRICE INCREASES 1 (2005), *available at* <http://www.gao.gov/news.items/d05806.pdf> [hereinafter GAO].

States for a different price.”⁶

In its background section, OCTA notes that for the 2007-2008 academic year, the average college student spent between \$805 and \$1,229 on textbooks and supplies.⁷ The Government Accountability Office (“GAO”) has indicated that college textbook prices have risen at twice the rate of inflation over the last 20 years.⁸ The GAO found that many factors contribute to the rising price of textbooks; in particular, publisher investment in new features, such as the creation of websites and supplemental materials, was cited as adding significantly to increases in production costs, which are passed along to students in the form of higher textbook prices.⁹ Additionally, the relatively short time of three to four years between new editions limits the ability of students to reduce costs by purchasing used textbooks.¹⁰ Another key Congressional finding was that over 80 percent of the millions of jobs created in the next ten years will require postsecondary education, but that only 36 percent of 18- to 24-year-olds are currently enrolled in postsecondary education.¹¹ The increasing cost of textbooks serves only to further widen the gap between the number of students who can afford to attend college and those who cannot. A study performed by the Advisory Committee on Student Financial Assistance found that for students in low- and middle-income families, grant aid from all combined sources does not usually cover textbooks expenses, or even room and board expenses, at two- or four-year colleges, therefore representing a significant barrier to access of postsecondary education.¹²

Once a textbook has been developed, the publisher markets the

6. *Id.*

7. Open College Textbook Act of 2010, H.R. 4575, 111th Cong. § 2(6) (2010); COLLEGE BOARD, *supra* note 1, at 1.

8. GAO, *supra* note 5, at 1.

9. *Id.* at 7.

10. Ten years ago, the standard time between textbook revisions was four to five years. *Id.*

11. Open College Textbook Act of 2010, H.R. 4575, 111th Cong. § 2(4) (2010).

12. ADVISORY COMMITTEE ON STUDENT FINANCIAL ASSISTANCE, TURN THE PAGE: MAKING COLLEGE TEXTBOOKS MORE AFFORDABLE, 9 (2007), *available at* <http://www2.ed.gov/about/bdscomm/list/acsfa/turnthepage.pdf>.

textbook to instructors in higher education; often this is done by sending sales representatives directly to professors' offices and giving away sample copies.¹³ Professors then choose textbooks for their classes and send this information to textbook retailers, which can include both on and off campus book stores, online retailers, and print on demand services.¹⁴ Retailers usually make both new and used copies available to students, and with the Internet, students have many options available from which to purchase their books.¹⁵ At the end of the term, students can sell their books—either to the bookstore, to other classmates, or online, all for a fraction of the sticker price.

B. Open Licenses in Publishing

The Act defines “open license” as an “irrevocable intellectual property license that grants the public the right to access, customize, and distribute copyrighted material,”¹⁶ and “open textbook” as a textbook or set of course materials in electronic format designed for use in a college course at an institution of higher education that is licensed under an open license.”¹⁷ These definitions follow the basic outlines for open access and open license projects in the academic world, but the Act seems to be intentionally vague. Open content generally involves Internet publication with the additional right to modify the work; many open content works employ Creative Commons (“CC”) licenses to specify the kind of modification allowed.¹⁸ Open educational resources (“OER”) are an off-shoot specifically relating to educational materials, such as textbooks.¹⁹

13. GAO, *supra* note 5, at 10.

14. *Id.*

15. *Id.* at 11.

16. Open College Textbook Act of 2010, H.R. 4575, 111th Cong. § 3(3) (2010).

17. *Id.* § 3(4).

18. See Creative Commons in Education, http://creativecommons.org/education?utm_source=ccorg&utm_medium=cceedu (last visited Aug. 6, 2010) [hereinafter CC in Education].

19. See *id.*

1. College, University, and Private Sector Initiatives

Perhaps one of the best known open license projects in the United States is Creative Commons. This nonprofit organization was founded in 2001 and its first project created a set of copyright licenses inspired in part by the Free Software Foundation's GNU General Public License ("GNU GPL").²⁰ Since then, Creative Commons has grown to include the Science Commons, devoted to fostering more efficient web-enabled scientific research, and ccLearn, a program that focuses on minimizing "legal, technical, and social barriers to sharing and reuse of educational materials."²¹ Creative Commons also has a significant presence in open educational resources; CC educational licenses aim to provide educational resources that are accessible, adaptable, discoverable,²² and able to be used on all platforms. As the name suggests, CC licenses aim to foster an "open commons" as a space not only for publication of open access materials, but also as space for collaboration and communication.²³

In 2007, the nonprofit Institute for the Study of Knowledge Management in Education created the OER Commons to "provide support for and build a knowledge base around" OERs.²⁴ The website allows member organizations to upload open textbooks and educational material under licenses that vary in the conditions of use, ranging from "No Strings Attached" (which allows noncommercial derivatives) to "Share Only" (which does not allow any derivative uses), to "Read the Fine Print" (which includes fully copyrighted materials).²⁵

Universities across the country have begun their own OER initiatives with similar goals. Such programs include MIT OpenCourseWare, launched in 2002²⁶; OpenCourseWare

20. See History | Creative Commons, <http://creativecommons.org/about/history/> (last visited July 25, 2010).

21. *Id.*

22. See CC in Education, *supra* note 18.

23. *Id.*

24. About | OER Commons, <http://www.oercommons.org/about#about-oer-commons> (last visited Aug. 31, 2010).

25. See generally OER Commons, <http://www.oercommons.org/>.

26. See MIT OpenCourseWare, <http://ocw.mit.edu/index.htm>.

Consortium (“OCWC”), launched in 2003²⁷; Rice Connexions, a program at Rice University²⁸; and MERLOT (Multimedia Educational Resource for Learning and Online Teaching), developed by California State University in 1997.²⁹ MERLOT, for example, emphasizes its no-fee library and peer review of teaching materials, and has editorial boards in 19 disciplines to ensure that quality materials are included in the program.³⁰ Community colleges started the Community College Open Textbook Project (CCOT) in March 2008.³¹ Most of these programs utilize the range of Creative Commons licenses for their educational materials.³² The existence of these programs in higher education demonstrates both the awareness of the high cost of textbooks and a desire to alleviate the burden on students while maintaining quality in teaching materials.

Open license textbooks have also found a place in the commercial sector. One such company is FlatWorld Knowledge, a publisher of open license textbooks, which allows students to access an online-only version of a textbook for free, with options to print or download copies for nominal prices.³³ All materials on FlatWorld Knowledge are licensed under a Creative Commons Attribution-Noncommercial-Share Alike license.³⁴

27. See OpenCourseWare Consortium, <http://www.ocwconsortium.org/>.

28. See Connexions, <http://cnx.org/>.

29. See MERLOT, <http://www.merlot.org/merlot/index.htm>.

30. See Natsuko Hayashi Nicholls, *The Investigation into the Rising Cost of Textbooks*, Scholarly Publishing Office, University of Michigan Library, 26 (April 2009), available at <http://www.lib.umich.edu/spo/staffpubs/SPOTextbookBackground.pdf>.

31. See Community College Open Textbook Project (CCOT), <http://collegeopentextbooks.org/> (last visited Aug. 5, 2010).

32. See MERLOT Acceptable Use Policy, <http://taste.merlot.org/acceptableuserpolicy.html>; Connexions About Us, <http://cnx.org/aboutus/>; MIT OpenCourseWare Privacy and Terms of Use, <http://ocw.mit.edu/terms/>.

33. See Press Release, FlatWorld Knowledge, 150,000 College Students to Save \$12 Million Using Flat World Knowledge Open Textbooks for 2010/2011 Academic Year, <http://www.marketwire.com/press-release/150000-College-Students-Save-12-Million-Using-Flat-World-Knowledge-Open-Textbooks-2010-1307980.htm> (last visited Aug. 28, 2010).

34. See FlatWorld Knowledge Authors, <http://www.flatworldknowledge.com/authors> (last visited Oct. 23, 2010); Creative Commons Legal Code,

2. Federal and State Initiatives

Another type of initiative to make higher education more affordable includes legislation at federal and state levels that requires publishers to inform professors of the real cost of the textbooks and unbundle materials that are usually sold with the textbooks, such as CDs and workbooks.³⁵ States including New York and California have adopted laws to this effect.³⁶ OCTA comes on the heels of the implementation of the federal Higher Education Opportunity Act (“HEOA”),³⁷ which went into effect on July 1, 2010.³⁸ The HEOA requires that publishers “unbundle” materials and inform professors of the price of textbooks.³⁹ The

<http://creativecommons.org/licenses/by-nc-sa/3.0/>. A Creative Commons Attribution-Noncommercial-Share Alike license provides that users may copy, distribute, transmit, and remix the work, but must do so while attributing the work in a way specified by the author. Additionally, the work may only be used for noncommercial purposes, and if you redistribute the work, it must be distributed under the same license as the original work.

35. Nicholls, *supra*, note 30, at 10.

36. *Id.*

37. 20 U.S.C. § 1015b (2006).

38. *Id.*

39. 20 U.S.C. § 1015b provides, in relevant part:

(c) Publisher requirements

(1) College textbook pricing information. When a publisher provides a faculty member or other person or adopting entity in charge of selecting course materials at an institution of higher education receiving Federal financial assistance with information regarding a college textbook or supplemental material, the publisher shall include, with any such information and in writing (which may include electronic communications), the following:

(A) The price at which the publisher would make the college textbook or supplemental material available to the bookstore on the campus of, or otherwise associated with, such institution of higher education and, if available, the price at which the publisher makes the college textbook or supplemental material available to the public.

(B) The copyright dates of the three previous editions of such college textbook, if any.

(C) A description of the substantial content revisions

purpose is to “ensure that students have access to affordable course materials by decreasing costs to students and enhancing transparency and disclosure with respect to the selection, purchase, sale, and use of course materials.”⁴⁰ However, while these initiatives and laws require information about textbook prices to be made clear to consumers, they do not go as far toward making college affordable as OCTA proposes.

C. Open License and Fair Use in Higher Education

The Copyright Act of 1976 provides for an affirmative defense to a claim of infringement in the form of the fair use doctrine, which states that use by reproduction for purposes such as criticism, teaching, scholarship, or research does not constitute copyright infringement.⁴¹ The fair use exception makes available a means of balancing the public interest in dissemination of information with the copyright owner’s individual rights.⁴²

made between the current edition of the college textbook or supplemental material and the previous edition, if any.

(D) (i) Whether the college textbook or supplemental material is available in any other format, including paperback and unbound; and

(ii) for each other format of the college textbook or supplemental material, the price at which the publisher would make the college textbook or supplemental material in the other format available to the bookstore on the campus of, or otherwise associated with, such institution of higher education and, if available, the price at which the publisher makes such other format of the college textbook or supplemental material available to the public.

(2) Unbundling of college textbooks from supplemental materials. A publisher that sells a college textbook and any supplemental material accompanying such college textbook as a single bundle shall also make available the college textbook and each supplemental material as separate and unbundled items, each separately priced.

40. *Id.*

41. 17 U.S.C. § 107 (2006).

42. *See id.*

Additionally, the Library of Congress announced a new Digital Millennium Copyright Act (“DMCA”)⁴³ exemption regarding teaching: motion pictures on DVDs that are lawfully made and acquired that are protected by the Content Scramble System⁴⁴ may be circumvented for the purposes of educational uses by college and university professors and by college and university film and media studies students.⁴⁵

D. The Proposed Legislation

In 2009, a bill identical to OCTA was proposed in the Senate by Senator Dick Durbin, the sponsor of HEOA.⁴⁶ Senator Durbin proposed this legislation in an effort to do more than HEOA, as enacted, did “to provide cheap alternatives to professors and students.”⁴⁷ The Senate version was referred to the Committee on Health, Education, Labor, and Pensions.⁴⁸ The House bill referred to the House Judiciary and referred to the Committee on Education and Labor, the Committee on the Judiciary, and the Subcommittee on Higher Education, Lifelong Learning, and Competitiveness.⁴⁹ As of September 30, 2010, neither bill has been voted on.⁵⁰

43. 17 U.S.C. §§ 501, 1201-05, 1301-32 (2006).

44. Content Scramble System is digital rights management system installed on digital media, such as DVDs, CDs, and software, which utilizes an algorithm to prevent users from accessing the digital content without a key or authentication code. *See* DVD Copy Control Association, <http://www.dvcca.org/css/> (last visited Aug. 31, 2010).

45. *See* Marybeth Peters, Recommendation of the Register of Copyrights in RM 2008-8; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, *available at* <http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf> [hereinafter Register of Copyrights Recommendation].

46. *See* S. 1714, 111th Cong. (2009).

47. 155 CONG. REC. S9842, *9850 (2009).

48. Bill Summary & Status – 111th Congress (2009-2010) – H.R.4575 – THOMAS (Library of Congress), <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR04575>: (last visited Oct. 29, 2010).

49. *Id.*

50. *Id.*

III. THE OPEN COLLEGE TEXTBOOK ACT OF 2009

A. Provisions to Reduce the Cost of Attending College

OCTA, as introduced in the House in February 2010, is a concise bill. Section 4 authorizes creation of a grant program—one-year grants would be awarded on a competitive basis to institutions of higher education (“IHEs”), professors or groups of professors at an IHE, and nonprofit organizations who create, update, or adapt open textbooks.⁵¹ Additionally, the grant recipients must make the complete contents of the textbook digitally accessible to the general public, free of charge, and must be able to be “downloaded, redistributed, changed, revised, or otherwise altered.”⁵² The bill provides that grant recipients must identify to the Secretary of Education the web site upon which the textbook will be posted.⁵³ Section 4 also states that the Secretary of Education shall develop a system of peer review for ensuring that textbooks produced with grant funds are of the highest quality.⁵⁴ Special consideration will be afforded to applications that demonstrate the greatest potential to produce open textbooks that meet specific college course needs, textbooks that are easily utilized by faculty at colleges, and textbooks created in partnership with organizations to assist in marketing and distribution.⁵⁵ All textbooks created, updated, or adapted with grant funding must have an open license that grants the public the right to access, customize, and distribute the material.⁵⁶

B. Licensing Materials with a Federal Connection

Section 5 of OCTA deals with other educational materials

51. Open College Textbook Act of 2010, H.R. 4575, 111th Cong. §§ 4(a)-(c) (2010).

52. *Id.* §§ 4(f)(3)(A)-(B).

53. *Id.* § 4(f)(3)(A).

54. *Id.* § 4(g).

55. *Id.* § 4(e).

56. *Id.* § 4(f)(2).

created using grants from other federal agencies, and requires that all such materials for elementary, secondary, or postsecondary course have an open license.⁵⁷ This particular provision expands the scope of the bill to far beyond the grant program created by Section 4 of the bill. Not only must textbooks created under OCTA grants have open licenses, but so too must all other textbooks and educational materials created under federal grants, including the National Science Foundation.⁵⁸

C. Economic Implications

Given the already unstable publishing industry, a successful implementation of the OCTA grant program likely stands to have a significant, negative impact on academic publishing—if professors and students are utilizing free resources, rather than spending hundreds of dollars each year buying textbooks, the industry will surely suffer.⁵⁹

Opponents argue that academic standards are a powerful countervailing force here, as opening up authorship of college textbooks to the general public could seriously decrease the quality or reliability of the content. However, Linux is an equally powerful example of resource creation and authorship that is both reliable and up-to-date. The Linux kernel, an open source computer operating system licensed under GNU GPL,⁶⁰ is

57. Open College Textbook Act of 2010, H.R. 4575, 111th Cong. §5(a) (2010).

58. *Id.*

59. According to a June 2010 press release by the Association of American Publishers, while nearly all book categories experienced growth in the past 12 months, the higher education division sales represented the second most growth, after e-books. Press Release, Association of American Publishers, AAP Reports 10.6% Increase in June Book Sales, (Aug. 19, 2010), http://www.publishers.org/main/PressCenter/Archives/2010_August/June2010Statistics.htm.

60. The Linux kernel is currently licensed under GNU GPL version 2, which allows distribution and sale of modified versions, but requires that those versions be licensed with the exact same license and the all of the corresponding source code. See GNU General Public License v2, <http://www.gnu.org/licenses/gpl-2.0.html> (last visited Oct. 14, 2010). However, a more current version of the license exists, GNU General Public License v3, which contains different, more expansive provisions. GNU General Public License v3,

developed and updated on a daily basis by numerous volunteers world-wide.⁶¹ Individuals and organizations have used the Linux kernel to build several different versions of the operating system, called distributions—and because these versions are based on the open source kernel, each system is also offered under the same license.⁶² Despite the open source nature of the Linux kernel, several companies have found ways to profit from the software. Red Hat, one of the most prominent Linux distributors, offers free downloads of a customized Linux distribution package, and also offers extensive, subscription-based customer support, training, and integration services.⁶³

Another aspect of OCTA with potential economic implications is the lack of discussion on derivative works, and whether or not creators of these textbooks can attempt to profit from them. As noted above, OCTA does not specify the kind of license that must be used, which leaves open the possibility that a grant recipient, *A*, could choose, for example, a Creative Commons Attribution Share-Alike license.⁶⁴ Because this particular license does not include a provision restricting derivative uses to non-commercial uses, a subsequent user, *B*, could create some kind of derivative work, and then sell it. However, because of the share-alike provision in the license of the original work, *B* would be required to license the derivative work with the exact same license—

<http://www.gnu.org/licenses/gpl-3.0.html> (last visited Oct. 29, 2010); Frequently Asked Questions about the GNU Licenses, <http://www.gnu.org/licenses/gpl-faq.html#v2OrLaterPatentLicense> (last visited Oct. 29, 2010). In the Linux development communities, there is debate over whether future modifications of the Linux distribution can be changed to GNU GPL v3, and whether such modifications should be legally considered derivative works. This debate is comparable to debate surrounding the limitations of the Creative Commons Share Alike licenses. *See Id.*

61. *See* The Linux Foundation Frequently Asked Questions, <http://www.linuxfoundation.org/about/faq> (last visited Oct. 14, 2010).

62. *See* GNU General Public License v2, *supra* note 60.

63. *See generally* Red Hat Overview, <http://www.redhat.com/about/redhat/index.html?id> (last visited Aug. 28, 2010).

64. *See* Creative Commons Attribution-ShareAlike 3.0 Unported, <http://creativecommons.org/licenses/by-sa/3.0/> (last visited Oct. 14, 2010); Creative Commons Attribution-ShareAlike, Legal Code, <http://creativecommons.org/licenses/by-sa/3.0/legalcode> (last visited Oct. 14, 2010).

meaning that *B* could not prevent third parties from creating and profiting from derivative works based on *B*'s creation, rather than on the original work.

D. Supporting Arguments

Senator Dick Durbin introduced the OCTA in the Senate with the clearly stated goal of reducing the cost of attending college.⁶⁵ He noted that the Higher Education Opportunity Act of 2008 would help increase transparency in the textbook creating and buying process, and that OCTA represents an even greater effort by the government to reduce the burden on college students.⁶⁶ Open license textbooks can “improve learning and teaching through course materials that are more flexible, adaptable, and accessible for professors.”⁶⁷ According to a study conducted by the University of Michigan Library, e-textbooks cost approximately 50 percent less than traditional textbooks to produce because these publishers do not incur any physical printing and production costs.⁶⁸ By fostering a program that encourages the development of open educational resources higher education can be accessible to more students, particularly non-traditional⁶⁹ students.

E. Opposing Arguments

The most likely opposing argument relating to the OCTA is the difficulty in assuring that the open textbooks produced would be of

65. Press Release, Dick Durbin, Durbin Introduces Legislation to Make College Textbooks More Affordable (Sept. 24, 2009), *available at* <http://durbin.senate.gov/showRelease.cfm?releaseId=318279>.

66. *Id.*

67. *Id.*

68. Nicholls, *supra* note 30, at 20.

69. A non-traditional student is generally one who delays enrollment in a postsecondary institution, is a part-time student or works full time while enrolled, has dependents other than a spouse (such as children), or is a single parent. See National Center for Education Statistics, Special Analysis 2002 – Nontraditional Undergraduates, <http://nces.ed.gov/programs/coe/2002/analyses/nontraditional/sa01.asp> (last visited Sept. 23, 2010).

the highest quality. Opponents cite Wikipedia as a prime example of an unreliable open source project.⁷⁰ Anyone can write or edit an article on Wikipedia at any time, and while this egalitarian system is considered by its supporters as one of its greatest features, it also can lead to misinformation.

Another argument advanced by opponents is that enough free textbooks are already available that there is no need for a government grant program, or alternatively, that government has no business regulating the textbook industry.⁷¹ Leaving production of open, accessible materials to academic institutions eliminates the need for development of an additional (or alternative) peer review and evaluation system, and allows market forces (as much as such forces exist in academia) to determine how, when, and by whom such educational resources are created.

IV. ANALYSIS

A. Quality Assurance

In general, the open textbook movement also tends to favor advancing technology over more traditional means of creating educational resources—if widely used, OCTA could become the basis for a general adoption of the “commons” model of education. The “commons” refers to resources that are collectively owned and shared, and in the educational context, tends to promote open

70. *See, e.g.*, Flores v. Texas, No. 14-06-00813-CR, 2008 Tex. App. LEXIS 8010, at *5 n.3 (Tex. App. Oct. 23, 2008) (declining to take judicial note of a Wikipedia article because such articles are inherently unreliable because they can be written and edited anonymously by anyone); Mark E. Moran, The Top 10 Reasons Students Cannot Cite or Rely On Wikipedia, Finding Dulcinea, <http://www.findingdulcinea.com/news/education/2010/march/The-Top-10-Reasons-Students-Cannot-Cite-or-Rely-on-Wikipedia.html> (last visited Dec. 3, 2010).

71. *See generally*, John Soares, Textbook Publishers and Colleges Affected by Higher Education Opportunity Act, The Writing College Textbooks Supplements Blog, July 24, 2010, <http://writingcollegetextbooksupplements.com/blog/2010/07/24/textbook-publishers-colleges-higher-education-opportunity-act/> (last visited Aug. 31, 2010).

discussion forums and collaboration in the interest of advancing knowledge.⁷² One of the main obstacles to achieving long-term success lies in OCTA's need to balance the reliance on the traditional peer review system, against the need for maintaining the ease of access for which the bill strives.

Though the bill requires grant applicants to detail a plan for ensuring accurate and high quality textbook content, and contains a requirement for the Secretary to develop a peer review and evaluation process for universal quality assurances across the grant recipients, these measures alone are insufficient. Once the textbook has passed the peer review process and posted to an accessible website, the text is still open to modification by any member of the general public. As the bill exists now, it does not require subsequent modifications of textbooks to be subject to additional peer reviews before the modified textbook is used in a classroom, or other setting. However, adding such a requirement in the interest of quality assurance would be counter-productive to the aim of the bill because requiring subsequent peer review would significantly reduce the ease of access. Approval of subsequent revisions would be as at least as lengthy a process as the initial peer review, thus delaying the immediacy of access that the bill contemplates. Though Senator Durbin's statement before the Senate indicated that the bill envisions wholesale adoptions of open textbooks in college classrooms,⁷³ the openness of the license would also allow members of the general public to make modifications at sentence level, thereby potentially altering facts and compromising the integrity of the original content.

B. Copyright Implications

1. Problematic Terminology: "Open" v. "Free" in the Open Source Software Model

OCTA defines an open license as "an irrevocable intellectual

72. See Rice Connexions, <http://cnx.org/aboutus/> (last visited Oct. 14, 2010). This philosophy is representative of the use of commons in education.

73. 155 CONG. REC. S9850-51 (daily ed. Sept. 24, 2009).

property license that grants the public the right to access, customize, and distribute a copyrighted material.”⁷⁴ The bill uses the term “open” to describe the required license,⁷⁵ but the definition itself is more akin to the generally accepted definition of “free” content. While these two ideas are not directly at odds with one another, free content and open access content are not always synonymous, and proponents of each camp would argue that more precise terminology must be used to avoid confusion.⁷⁶ Ideologically, “open” and “free” are two very different schools of thought—and the two communities take pains to make this distinction known.⁷⁷ The legislature would be wise to carefully consider the implications of choosing one term over the other.

These two terms are most often used in relation to software, such as Linux,⁷⁸ or wiki-type resources, such as Wikipedia.⁷⁹ Open access generally refers to scholarly material that can be accessed free of charge; such materials are typically licensed to include use and re-use rights via a Creative Commons, or similar, license.⁸⁰ Open source software, and by extension, open content, can refer either to material that is generally accessible or to the copyright

74. Open College Textbook Act of 2010, H.R. 4575, 111th Cong. §3(3) (2010).

75. *Id.*

76. The GNU Operating System, in particular, maintains a webpage with several different explanations of what “free” software is and should be, as well as a description of why “open source” is not sufficient. *See* The Free Software Definition, <http://www.gnu.org/philosophy/free-sw.html> (last visited Oct. 15, 2010). On the other end of the spectrum, the Open Source Initiative maintains a similar definition page. *See* The Open Source Definition, <http://opensource.org/docs/osd/> (last visited Oct. 15, 2010).

77. *See generally* The Free Software Definition, <http://www.gnu.org/philosophy/free-sw.html>. On the other end of the spectrum, the Open Source Initiative maintains a similar definition page; *see also* “The Open Source Definition,” <http://opensource.org/docs/osd/>.

78. Linux is a free and open source software collaboration, released under a GNU/General Public License, which can be used as an operating system. *See generally* <http://en.wikipedia.org/wiki/Linux>; <http://www.linuxfoundation.org/>.

79. *See generally* Wikipedia, <http://www.wikipedia.org/> (last visited Oct. 15, 2010).

80. *See* The Open Source Definition, *supra* note 77.

freedoms that are afforded to the user.⁸¹

Free content, however, is generally considered more expansive than open content and concentrates not only on accessibility to the information (in the context of software, the source code), but on freedom as a matter of liberty.⁸² To be considered “free” software, the users must be able to enjoy the following “essential freedoms”: (1) freedom to run the program for any purpose; (2) freedom to study how the program works and make changes to how it works; (3) freedom to redistribute copies; and (4) freedom to distribute copies of modified versions.⁸³

However, such terminology and ideas are not limited to software resources—they can be, and have been, applied to educational resources as well. FreedomDefined.org has borrowed from the software definition of “freedom” to create a definition applicable to cultural works, including educational materials.⁸⁴ The definition of free cultural works requires that a work’s license must grant users the: (1) freedom to use and enjoy the benefits of the work; (2) freedom to study the work and apply the knowledge acquired from it; (3) freedom to make and redistribute copies of the information or expression; and (4) freedom to make changes and improvements and to distribute derivative works.⁸⁵

As it stands, the OCTA definition of “open license” meets all of the requirements of a “free” license. Despite this, the use of “open,” rather than “free,” in the bill remains problematic. OCTA does not contain a list of appropriate licenses or state that the Secretary of Education must approve the choice of license; rather, the text only requires that the grant recipient use “an open license.”⁸⁶ The blanket term “open license” can mean many

81. See The Free Software Definition, *available at* <http://www.gnu.org/philosophy/free-sw.html>; Definition of Free Cultural Works, <http://freedomdefined.org/Definition> (last visited Oct. 15, 2010).

82. The Free Software Definition, *supra* note 77 (The GNU encourages users to distinguish between concepts of “free” by thinking “‘free’ as in ‘free speech,’ not as in ‘free beer’”).

83. *Id.*

84. See Definition of Free Cultural Works, *supra* note 81.

85. *Id.*

86. Open College Textbook Act of 2010, H.R. 4575, 111th Cong. §4(f)(2) (2010).

things; for instance, all of the Creative Commons licenses are called “open licenses,” though only some of the available CC licenses fulfill all of the OCTA requirements. Additionally, with Creative Commons licenses, the creator has the option of specifying a “commercial” or “non-commercial” license, as well as choosing the “share-alike” option.⁸⁷ Such restrictions, while still technically falling within the OCTA requirements, necessarily restrict the derivative works in ways that OCTA may not contemplate. For example, a grant recipient, *A*, could choose a Creative Commons Attribution Share Alike license,⁸⁸ which allows derivative works, but does not restrict them to non-commercial uses. A subsequent user, *B*, could create a derivative work, and then sell it. However, because of the share-alike provision in the license of the original work, *B* would be required to license the derivative work with the exact same license—meaning that *B* could not prevent third parties from creating and profiting from derivative works based on *B*’s creation, rather than on the original work. Conversely, the original creator could choose a license containing a non-commercial provision, and thus limit subsequent users in a similar way.

2. *Work for Hire Issues*

Another issue that OCTA brings to the forefront is the potential conflict between the work-for-hire doctrine⁸⁹ and the works created by teachers and faculty members. Most university faculty contracts include some kind of provision claiming ownership of intellectual property for everything but patents, and those

87. Licenses – Creative Commons, <http://creativecommons.org/about/licenses> (last visited Sept. 22, 2010).

88. Creative Commons Attribution Share-Alike Legal Deed, *available at* <http://creativecommons.org/licenses/by-sa/3.0/> (last visited Oct. 15, 2010); *see also* Creative Commons Attribution Share-Alike legal code, *available at* <http://creativecommons.org/licenses/by-sa/3.0/legalcode>.

89. *See* 17 U.S.C. § 201(b) (2006) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”).

agreements that do not have explicit provisions tend to rely on the work for hire doctrine to secure those rights.⁹⁰ The legislative history of the work for hire doctrine indicates that the “works made for hire” definition represents a carefully crafted compromise and balance between works that were “commissioned,” and thus made for hire, and those that do not fall under this category.⁹¹ One of the categories specifically enumerated in the statute is “instructional texts,” which includes textbooks and similar materials, suggesting that *any* textbooks created by a professor while under the employment of a university fall under work for hire.⁹² Additionally, parties must expressly agree in writing that the work is one made for hire.⁹³

Some have argued that a “professor” or “academic freedom” exception be added to the work-for-hire doctrine, so that academics could retain their intellectual property rights to materials that they create as part of their posts as professors, especially in the context of creating and selling lesson plans,

90. *See generally* The Media Institute, Intellectual Property Issues: Academic Freedom, Copyright, and Work for Hire, The Media Institute, http://www.mediainstitute.org/new_site/IPI/2010/042910_AcademicFreedom.php (last visited Sept. 23, 2010).

91. H.R. REP. NO. 94-1476 (1976).

92. 17 U.S.C. § 101 (2006). “A ‘work made for hire’ is--
(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.”

93. 17 U.S.C. § 107(b) (2006).

though no such exception has been implemented so far.⁹⁴ In the absence of such an exception, applicants for OCTA grants would necessarily be limited to institutions of higher education, nonprofit organizations, or for-profit organizations—individuals or groups of professors and faculty members would not be able to fulfill the open license requirement of the grant if they do not own their intellectual property. While this does not foreclose the possibility of a professor or a group of professors from seeking permission from their university to apply for the grant and effectively waive the university's intellectual property rights to the textbook created as a result, it does reduce the likelihood of this occurring. Much of the academic value of an institution of higher education rests with the intellectual property of its brightest and most prolific faculty members. To participate in a grant whose sole objective is the creation and distribution of open license textbooks, removes not only intellectual property rights, but also, to some extent, name recognition for the university, if grant recipients choose licenses that do not require attribution.

It is unclear from the text of the bill whether the creators of the open license textbooks would be able to retain *any* rights in the works created under the OCTA grants. Similarly, it is unclear whether authorship should actually be a concern, given the tendency of open license works to be frequently edited and otherwise transformed. Unlike Wikipedia or Linux, two of the most widely cited examples of successful open projects, the OCTA grant program seems to represent an attempt at preserving the traditional methods of creation of educational resources, while utilizing a novel, modern, and inexpensive way means of distribution.

3. *Fair Use*

The fair use doctrine states that use by reproduction for purposes such as criticism, teaching, scholarship, or research, does not

94. See generally Intellectual Property Issues: Academic Freedom, Copyright, and Work for Hire, The Media Institute, http://www.media.institute.org/new_site/IPI/2010/042910_AcademicFreedom.php (last visited Sept. 23, 2010).

constitute copyright infringement.⁹⁵ Whether a use is considered fair under the Copyright Act depends on a four-factor analysis: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and(4) the effect of the use upon the potential market for or value of the copyrighted work.”⁹⁶ The fair use doctrine aims to strike a balance between the exclusive rights of copyright holder with the interest of the public in dissemination of information.⁹⁷ Given the fact-dependent nature of fair use, and despite the guidelines set forth by the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision,⁹⁸ many professors have difficulty determining whether a

95. 17 U.S.C. § 107.

96. *Id.*

97. *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977).

98. H. REP. NO. 94-1476. 98. The Ad Hoc committee set forth, in relevant part:
“Guidelines.

II. Multiple Copies for Classroom Use.

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; provided that:

A. The copying meets the tests of brevity and spontaneity as defined below;

[. . .]

Definitions.

Brevity.

(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words. [. . .]

(iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such

particular use will fall under the fair use doctrine.⁹⁹ While the fair use exception clearly describes “teaching (including multiple copies for classroom use), scholarship, or research” as “not an infringement of copyright,” the precise boundaries of what activity falls under these categories have not yet been examined.¹⁰⁰ The penalty provided by Section 504 for engaging in activity that does not qualify as fair use is fairly large,¹⁰¹ such that professors are obliged either to play it safe by using *only* materials that surely fall under fair use (thus limiting their universe of available teaching materials), or live on the edge, so to speak, by using whatever materials their lesson plans require and crossing their fingers that no trouble comes to them for that use.

In July 2010, the Library of Congress announced a new Digital Millennium Copyright Act (“DMCA”)¹⁰² exemption regarding teaching: motion pictures on DVDs that are lawfully made and acquired that are protected by the Content Scramble System may be circumvented for the purposes of educational uses by college and university professors and by college and university film and media studies students.¹⁰³ This new DMCA exemption, coupled with existing fair use practices in higher education will likely have only limited effects on teaching materials available in higher education, given the exemption applies only to professors and film and media studies students.

"special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

Spontaneity.

(i) The copying is at the instance and inspiration of the individual teacher, and

(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.”

99. See Heather B. Siegelheim, *Is There Anything Fair About Fair Use? Edutainment's Place in the Courts*, 20 DEPAUL J. ART, TECH. & INTELL. PROP. L. 327, 351 (2010).

100. 17 U.S.C. § 107.

101. *Id.*

102. 17 U.S.C. §§ 501, 1201-05, 1301-32 (2006).

103. Register of Copyrights Recommendation, *supra* note 45.

Either way, fair use only goes so far in alleviating the increasing costs of pursuing higher education. Open license textbooks go farther toward that goal, particularly if grant recipients adopt models similar to those already used by universities such as MIT and Rice University. Production of open textbook materials that include teaching tools supplemental to the traditional textbook has the potential to reduce fair use-related confusion by providing a greater universe of materials from which to gather teaching materials. Open license depositories allow professors to have confidence in their ability to use materials found there, which, in turn, fosters a more open classroom, free from (some) fears of copyright infringement.

However, OCTA creates serious questions regarding use of copyrighted materials in the creation of open license textbooks. History, science and mathematics textbooks may benefit from availability of facts or material already in the public domain, but textbooks serving the arts may not. Contemporary literature and visual arts textbooks, in particular, would suffer because the desired content for those textbooks would likely still be under copyright, and would require some sort of licensing agreement or permission from the copyright holder in order to be included in the textbook. Even if the use of a copyrighted material is considered fair use in the initial creation of the textbook, once that textbook is posted to a website and becomes available to the general public for access, customization, and distribution under an open license, is the use still “fair”? The principles of the fair use doctrine, as applied in educational settings, generally provide for classroom copies,¹⁰⁴ but under the OCTA posting requirements, the creator of the textbook would not be able to control, or even know, how the material is subsequently used. To avoid potential copyright infringement claims, the creator of the OCTA textbook would necessarily have to avoid use of materials under fair use, thus severely limiting the universe of materials from which to draw. Such precautionary measures would frustrate the goals of the bill—while a large collection of open license textbooks could be made available through OCTA grants, the principles of fair use

104. Regarding educational settings, the principles of brevity and spontaneity restrict application of fair use. *See* H. REP. NO. 94-1476, *supra* note 98.

and copyright law would restrict the content of those textbooks to information and materials that are not subject to copyright restrictions (either by virtue of being in the public domain, or by being already open licensed).

It is important to note that one of the primary goals of copyright law in the United States is to encourage the continued production of creative works by providing economic incentive to authors or creators.¹⁰⁵ In light of this, the endorsement of either “open” or “free” textbooks by the government seems problematic. In the relevant intellectual property spectrum, copyright operates to secure the pecuniary interests of the creator at one end, fair use strikes a balance between the exclusive rights of the author and the right of the public to be informed, and at the other end, “open” or “free” licenses wholly serve the public, with little consideration of author rights. In attempting to achieve a stated goal of reducing the cost of attending college, OCTA represents a shift to the far left in intellectual property policy. When considered in conjunction with the lack of guidance concerning appropriate licensing schemes, and the provision requiring that the open textbooks be accessible to “any member of the general public,” this shift could likely impact far more than the higher education sector. Interestingly, Section 5 of OCTA also represents a large step in educational policy and greatly expands the universe of available material for use.¹⁰⁶ However, it is telling that this provision extends to elementary, secondary, and postsecondary courses, while the main grant program is only for college courses. Considering that elementary and secondary curricula are usually determined at the state level¹⁰⁷ and the influences that certain states

105. U.S. CONST., art. 1 § 1, cl. 8; *see also* 17 U.S.C. § 101.

106. Open College Textbook Act of 2010, H.R. 4575, 111th Cong. § 5 (2010).

107. States fall into one of two categories regarding textbook adoption practices: “textbook adoption” states, and “open territory” states. In a “textbook adoption” state, school districts use state money to buy textbooks from a list of options decided upon by the state board of education; California and Texas are examples of “textbook adoption” states that have large-scale purchasing power that gives them influence over the content of textbooks. In “open territory” states, individual school districts may select any textbook they like. *See* State Textbook Adoption, National Association of State Boards of Education Policy

have in determining the content of textbooks,¹⁰⁸ instituting a more general open license requirement for elementary and secondary textbooks would prove more than difficult to implement.

While OCTA takes an admirable approach to reducing the cost of attending college, it faces many challenges in implementation that could reduce its potential effectiveness. The Act attempts to utilize the traditional peer review method of assuring the quality of the textbook content, seemingly without consideration for the fact that such a method is poorly suited for the novel, technologically advanced, and fast-paced re-mixing and re-publishing that the Act describes. Additionally, potential ideological conflicts between “open” and “free” may hinder widespread adoption of textbooks created under this grant project. Finally, the ambiguous treatment of authors’ rights raises many questions. These issues, while not insurmountable, pose a significant obstacle in achieving widespread adoption of open textbooks, thus limiting the OCTA’s ability to have a real impact on the cost of attending college.

V. CONCLUSION

The Open College Textbook Act of 2010 stands to have a significant impact in the way that educational resources are created and used in the future. However, the current proposed legislation raises many more policy issues than it resolves. A future draft of this bill should strive to find more of a balance between the ideological extremes of “open” and “free” content and the principles of copyright protection that dominate intellectual property in the United States. The doctrine of fair use addresses this issue and achieves a sort of balance, but cannot fully address the potential issues that government funding for the production of open textbooks creates. By looking toward the practices involved

Update, Vol. 11, No. 15, Sept. 2003, available at <http://www.nasbe.org/index.php/component/remository/Education-Issues/Curriculum/Policy-Briefs/State-Textbook-Adoption/> (last visited Dec. 3, 2010).

108. See generally James C. McKinley, Jr., *Texas Conservatives Win Vote on Textbook Standards*, N.Y. TIMES, March 13, 2010, at A10; Mark Memmott, *Texas School Board to Consider Alleged ‘Pro-Islamic’ Bias in Textbooks*, N.P.R. News Blog, Sept. 23, 2010, available at <http://www.npr.org/blogs/thetwo-way/2010/09/23/130067736/texas-islam-textbooks>.

in sustaining the open source software movement, the legislature may be able to craft a more workable plan for incorporating open textbooks into a scheme for reducing the cost of attending college.

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