

## Against the Grain

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# Legally Speaking – The Complications of Open Educational Resources

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# LEGAL ISSUES



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## Legally Speaking — The Complications of Open Educational Resources

by **Anthony Paganelli** (Western Kentucky University) <Anthony.Paganelli@wku.edu>

OER began in 1994 through a **National Science Foundation** grant by **James Spohrer** that would create and develop a way to engage and share educational information, which eventually led to the **California State University's** creation of the **MERLOT** organization that would provide reduced or free online resources for higher education. Following the MERLOT project, the **University of Georgia System**, the **Oklahoma State Regents of Higher Education**, and the **University of North Carolina System** joined the **California State University** in a consortium in 1999 to increase the collection. Other institutions began implementing other OER programs, such as **Rice University's** OpenStax.

Since the inception of the OER, the movement has grown significantly in education. According to **Grimaldi**, et al., the leading producer of OER textbooks OpenStax stated that the “adoption of OER textbooks has saved students an estimated \$500 million dollars since 2012.” **Ruth** also noted that 2.2 million students saved approximately \$177 million with OpenStax's textbooks in 2017, which 5,100 educational institutions are utilizing the resources that includes 48 percent of colleges in the United States.

Open Educational Resources (OER) are becoming more common at educational institutions as budgets continue to decrease for education and students continue to struggle to afford educational textbooks and resources. The OER movement continued in 2002 as a **Massachusetts Institute of Technology (MIT)** initiative to provide open access to educational resources for universities in developing countries. The **United Nations Educational, Scientific, and Cultural Organization (UNESCO)** was also involved in the OER movement and in 2002 defined OER as “The open provision of educational resources, enabled by information and communication technologies, for consultation, use and adaptation by a community of users for noncommercial purposes.”

In addition to savings for the students, **Ruth** added that the **U.S. Department of Education's National Center for Education Statistics** stated that there was a decrease in textbook prices, which was the first time in over 50 years. While there is no information regarding the reason for the decrease in text-

books, **Ruth** noted that the decrease in prices could be attributed to the increased usage of OER. Regardless, the costs of textbooks are issues for universities, students, libraries, and publishers as several legal issues regarding the prices of textbooks have reached the court systems.

For instance, the U.S. Supreme Court made a decision regarding the First Sale Doctrine of the U.S. Copyright Law Section 109 in the **Kirtsaeng v. John Wiley & Sons** case, which mentioned the price discrimination of textbooks internationally and the outcomes of reselling textbooks. In 2013, the Supreme Court reviewed the matter of a graduate student from Thailand that attended school at **Cornell University** and the **University of Southern California**. While in the United States, **Kirtsaeng** imported textbooks from Thailand that were similar to the textbooks published by **John Wiley & Sons** at a lower cost. He created a business that resold the books through Ebay for profit.

According to **Einhorn, Wiley & Sons**, they sold the textbooks in Thailand at lower prices than in the United States, which is a general business practice, “because economic conditions and demand for particular goods vary across the globe, copyright owners have a financial incentive to charge different prices for copies of their works in different geographic regions.” Yet, the U.S. Supreme Court “reversed the Second Circuit to hold that the first sale doctrine extended to distributions of copies of copyrighted works originally and lawfully produced outside of U.S. borders.”

The courts' ruling had an impact on libraries and campus bookstores, because both utilize the First Sale Doctrine. Libraries and museums import books and materials to lend to their patrons. College campus bookstores, as well as publishers would have an issue if the Supreme Court had allowed publishers to prevent the resale of copyrighted books from international sources. **Einhorn** noted a 2005 study by the U.S. Government Accountability Office that campus bookstores “buy used books from students and wholesalers at purchase prices that are 50% of the retail price of a new book, and resell their purchases at 75% of retail. The store markup is then 50% above purchase price, or a profit margin from its shelf price of 33%.”

Based on these practices by the bookstores and publishers, students are seeking other ways to obtain their class materials, which is the primary purpose for the increased use of OER. Universities are seeking the affordable textbooks and materials to not only assist students with the financial burden of a college education, but to increase retention and graduation rates. Yet, several studies regarding student learning outcomes by students using OER and commercial textbooks have varied results. **Grimaldi**, et al. reviewed numerous studies and concluded that the content of OER and commercial textbooks did not differ. Therefore, regardless of the books or materials, students received pertinent and relevant resources for course completion.

However, providing OER can be complicated, such as a collaboration with third parties. Issues with third parties and affordable educational resource providers has also been introduced to the courts, as noted in the lawsuit filed by **Greater Minds** against **FedEx** in March 2016 in the U.S. District Court for the Eastern District of New York, which **Greater Minds** cited that **FedEx** violated copyright laws. **Greater Minds** is a non-profit organization that provides educational resources through public licenses and **Creative Commons**, which includes the reproduction of materials for non-commercial uses. **Greater Minds** noted that **FedEx** was reproducing materials in Michigan and New York for public schools without paying royalties.

**Greater Minds** claimed that the school districts paid **FedEx** to reproduce the copies for faculty and students, thereby the transaction was for commercial use that **FedEx** made a profit by reproducing materials. The district and the appellate courts both agreed that the non-exclusive public license agreement did not prevent the school districts in utilizing a third-party from reproducing the materials for the school districts.

While the courts' decision was in favor of **FedEx**, the lawsuit raised issues of how educational institutions and third parties will need to carefully contend with providing resources to faculty and students based on public licensing agreements. For instance, the agreement with **Greater Minds** and the school districts, stated

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that the institutions had the right to “reproduce and share,” however this also pertains to the statement of sharing based on the statement, “that requires permission under the Licensed Rights.” Based on **Greater Minds’** argument the school districts acted as licensing agents between the copyright holders and **FedEx**. Based on the court decision, the possibility of further interpretation of public licensing may become an issue in reproducing and providing materials.

Of course, a major issue of OER is between the publishers and several OER organizations providing OER materials for students and educational institutions. In 2012, **Pearson Education, Inc., Cengage Learning, Inc., and Bedford Freeman & Worth Publishing Group, LLC d/b/a Macmillan Higher Education** filed suit against **Boundless Learning, Inc.** based on copyright infringement. The plaintiffs provide textbooks for higher education, which in this case produced introductory textbooks for economics, biology, and psychology for college courses. The defendant, **Boundless Learning, Inc.**, is an organization that provides electronic textbooks, which includes textbooks for the three introductory college courses.

The plaintiffs claimed in the document filed with the U.S. District Court for the Southern District of New York that **Boundless Learning, Inc.**, “The Boundless textbooks copy the distinctive selection, arrangement, and presentation of Plaintiffs’ textbooks, along with other original text, imagery, and protected expression of Plaintiffs and their authors, all in violation of the *Copyright Act*.” In 2013, all parties came to a confidential settlement, which **Boundless Learning, Inc.** changed how the materials were produced and accessed.

In this case, the issue is content used for the introductory type course was not the major issue, because the content is basic and standard. However, the materials used in the OER were similar to the information provided in the publishers’ works. Therefore, the information is primarily the same no matter the resource for certain subjects, yet the materials used to convey the subject content can be a legal issue.

Despite these legal issues, legislatures have taken notice of the rising costs of higher education that includes the cost of textbooks and other materials needed for students to complete their degree programs. In 2018, Congress approved a five million dollar pilot program to support funding for OER. On April 4, 2019, the U.S. House of Representatives introduced the H. R. 2107 Bill regarding OER, the bill is known as the **Affordable College Textbook Act**. The bill is designed “to expand the use of open textbooks in order to achieve savings for students and improve textbook price information.” The bill currently resides in the Committee of Health, Education, Labor, and Pensions.

According to the findings, students spend an average of \$1,240 annually on textbooks at a public four-year university, due to an 82% increase in textbooks from 2002-2012. Furthermore, Congress addressed the issue of U.S. taxpayers’ investment in education, by noting that the high costs of textbooks was a barrier for students obtaining a four-year degree and that the bill would allow for an efficient use of funds in supporting OER. The findings also noted that OER could save billions annually.

The bill is created to provide an Open Textbook Grant Program. For those institutions qualified, the grant program is designed “to support projects that expand the use of open textbooks in order to achieve savings for students while maintaining or improving instruction and student learning outcomes.” In addition to the U.S. Congress, several states are already investing in OER, which will place more pressure on textbook publishers to take legal actions regarding OER.

Based on the OER movement, educational resources will begin to change drastically, especially with the government initiatives to combat the rising cost of textbooks and materials for not only higher education, but primary and secondary educational institutions, as well. The change will also complicate the way publishers and authors create content for education, which may involve copyright laws.

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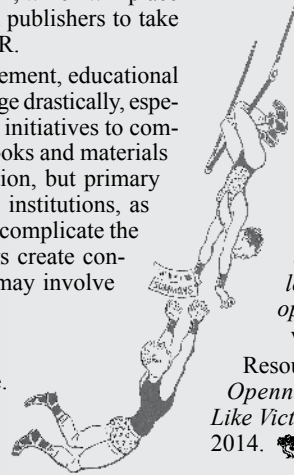
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## Cases of Note — Immoral Trademarks

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**IANCU, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE V. BRUNETTI.** SUPREME COURT OF THE UNITED STATES (June 24, 2019).

Following up from our insightful analysis of *Matal v. Tam*, 582 137 S.Ct. 1744 (2017)

(*ATG* April 2019, v.31#2) your esteemed column editor and retired scholar will be allowed to say “I could see this coming.”

*Matal* struck down the *Lanham Act’s* bar on “disparaging” trademarks (the band called “The Slants” if you recall) on the basis of viewpoint discrimination. Here we deal with “immoral or scandalous” trademarks.

**Erik Brunetti** pioneered an early brand of streetwear with the trademark FUCT. He says the brand name is pronounced one letter after the next: F-U-C-T. And of course, there is another way to read it as ... ahem ... profanity.

**Brunetti** says it is an acronym for **Friends U Can’t Trust**. He and a skateboarder pal founded

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