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Self-Publishing an Electronic Casebook Benefited Our Readers—and Us

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SELF-PUBLISHING AN ELECTRONIC CASEBOOK BENEFITED
OUR READERS—AND US

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ABSTRACT

Self-publishing our electronic casebook, Advertising and Marketing Law: Cases & Materials, wasn't some grand ambition to disrupt legal publishing. Our goal was more modest: we wanted to make available materials for a course we strongly believe should be widely taught in law school. Electronic self-publishing advanced that goal in two key ways. First, it allowed us to keep the price of the materials low. Second, we bypassed gatekeepers who may have degraded the casebook's content and slowed the growth of an advertising law professors' community.

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INTRODUCTION

We were invited to participate in this mini-symposium because we self-published a casebook, *Advertising and Marketing Law: Cases and Materials*.¹ Though we knew we were diverging from traditional publication models, our decisions weren't driven by some ambitious plan to disrupt legal publishing.² Instead, we simply wanted to help people teach a course we strongly believe should be widely taught in law school.

Electronic self-publishing advanced our goal in two key ways. First, it allowed us to keep the price of the materials low. Second, we bypassed gatekeepers who could have degraded the casebook's content and slowed the growth of an advertising law professors' community.

Part I highlights the benefits we've seen from electronic self-publishing. Part II discusses some of the challenges we've

¹ REBECCA TUSHNET & ERIC GOLDMAN, *ADVERTISING & MARKETING LAW: CASES & MATERIALS* (2d ed. 2014), available at <https://gum.co/vnCKL>.

² As Evgeny Morozov (among others) has cautioned, it can be dangerous to valorize disruption as the thing that's valuable about innovation. Evgeny Morozov, *When Wall Street and Silicon Valley Come Together – A Cautionary Tale*, *GUARDIAN* (Oct. 25, 2014 5:18 PM), <http://www.theguardian.com/commentisfree/2014/oct/25/darker-side-pay-per-laugh-innovations-silicon-valley> (criticizing rhetoric that valorizes “disruption” but does not consider what is being disrupted and for whose benefit).

encountered by self-publishing. Part III concludes by contemplating our book project's future.

I. THE BENEFITS OF AUTHORIAL CONTROL

When we first started the book project in 2007,³ we implicitly assumed that we would publish the book through a traditional law school publisher. However, by the time we had a rough first draft of the book in 2011, it became increasingly clear that traditional publishers weren't likely to be the right choice for us. We don't categorically oppose the traditional publication model. Instead, we recognized that retaining control over the project would increase the odds that we'd accomplish our goals. We've obtained numerous benefits from retaining control over the project and self-publishing principally in electronic form. We will briefly summarize the key advantages of this method of dissemination.

A. Keeping Prices Low

Students pay an alarming amount for casebooks and other class-related learning materials,⁴ and we did not want to contribute to that problem. As Eric wrote when we first released the book, “[m]any print casebooks of comparable size cost \$150 or more. In an era of rising tuition and hyper-competition for jobs, we just couldn't justify asking students to pay that much.”⁵

As a result, we deliberately chose a relatively low price point for the casebook. We currently offer an electronic PDF version of the casebook, without any digital rights management (DRM), for \$11.50.⁶ We offer ePub⁷ and Kindle⁸ versions for about the same

³ We first exchanged emails about the book on December 16, 2007.

⁴ See, e.g., Ann Carrns, *Putting a Dent in College Costs With Open-Source Textbooks*, N.Y. TIMES (Feb. 25, 2015), <http://www.nytimes.com/2015/02/26/your-money/putting-a-dent-in-college-costs-with-open-source-textbooks.html>.

⁵ Eric Goldman, *Announcing a New Casebook: “Advertising & Marketing Law: Cases & Materials” by Tushnet & Goldman*, TECH. & MARKETING LAW BLOG (July 16, 2012), http://blog.ericgoldman.org/archives/2012/07/announcing_a_ne.htm.

⁶ Eric Goldman, *Advertising & Marketing Law Casebook (2014 Edition)*, GUMROAD, <https://gum.co/vnCkL> (last visited May 17, 2015). We offered the

price. We also offer a print-on-demand version for \$45 plus shipping and taxes⁹ (the higher price reflects, in part, the lack of economies of scale in manufacturing and shipping individual books). These prices are a small fraction of the prices for casebooks from mainstream publishers, even their eBook versions.¹⁰

Although we priced the casebook with students in mind, our pricing isn't totally altruistic. As Eric has explained, we think our earnings are within striking distance of the royalties we would have earned with a traditional publisher.¹¹

2012 edition for \$10.00. Eric Goldman, *Advertising & Marketing Law Casebook (2012)*, GUMROAD, <https://gum.co/zPsX> (last visited May 17, 2015). We increased the 2014 edition's price to reflect that the book was more polished.

⁷ Eric Goldman, *EPub Version of Advertising & Marketing Law Casebook (2014 Edition)*, GUMROAD, <https://gum.co/MJwn> (last visited May 17, 2015).

⁸ Amazon sets a mandatory price cap for Kindle books, so the Kindle edition is \$9.99 in the United States. See *Advertising & Marketing Law: Cases and Materials*, AMAZON, <http://www.amazon.com/dp/B00MRHG3UK> (last visited May 15, 2015). It sells for about the same price in some International Kindle stores.

⁹ At 1,400 pages, the book was too long to be printed-on-demand in a single volume. As a result, we had to split the book in two volumes, which further raised buyers' costs. See *Advertising and Marketing Law: Cases and Materials (Volume 1)*, CREATSPACE, <https://www.createspace.com/4953960> (last visited May 17, 2015); see also *Advertising and Marketing Law: Cases and Materials (Volume 2)*, CREATSPACE, <https://www.createspace.com/5001930> (last visited May 17, 2015).

¹⁰ See, e.g., Walter Klowers' "Connected Casebook" program, marketed under the "Barrister Books" brand. On May 17, 2015, the popular Dukeminier et al. Property casebook had a list price of \$229.95, while the Connected Casebook print-version book rental plus lifetime eBook access was "only" \$177.95. See *Property (Connected Casebook)*, BARRISTER BOOKS, <http://www.barristerbooks.com/dukeminier-8e-property-connected-casebook.9781454837602.htm#.VKRDCCvF98E> (last visited May 17, 2015). See generally Lydia Pallas Loren, *The Viability of the \$30 Casebook: Intellectual Property, Voluntary Payment, Open Distribution, and Author Incentives*, 22 J. INTELL. PROP. L. 71, 80-83 (2014) (surveying the major legal casebook publishers' ebook offerings).

¹¹ Eric Goldman, *Self-Publishing A Legal Casebook: An Ebook Success Story*, FORBES (Sept. 18, 2013 8:39 AM), <http://www.forbes.com/sites/ericgoldman/2013/09/18/self-publishing-a-legal-casebook-an-ebook-success-story>.

One reason is that the book's low price helped expand the market beyond law students. The book is cheaper than the many reference texts targeting practicing lawyers, so we made numerous sales to working lawyers who wanted a good introductory text on the advertising law issues they encounter in their practices. The price was also low enough to gain interest from non-law students and businesspeople.

Furthermore, the book also appeals to professors in non-legal academic disciplines who are teaching courses such as business law or media law. Because it's so reasonably priced, professors don't feel guilty about making students buy the book, even if they only use it as a supplement or for a chapter or two.

B. Rapid Versioning

Because we don't have to recoup any investments in editing, layout, or physical inventory, we can iterate new editions more quickly than traditional publishers. As a result, we issued a second edition just two years after the first version. A quick new edition meant we could fully integrate the Supreme Court's first two Lanham Act false advertising cases¹² into the main text rather than relegating them to a supplement. We also revamped the privacy chapter—a much-needed improvement given the fast-moving nature of this area of the law.

Rapid versioning typically hurts hard-copy casebook buyers by undermining the secondary resale market for the version they own.¹³ Because there is no secondary market for electronic

¹² *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

¹³ As one economics text asserted, "the basic reason for a revised edition is to kill off the existing used book market." CHARLES E. FERGUSON, *MICROECONOMIC THEORY* vii (rev. ed. 1969); see also John B. Thompson, *Survival Strategies for Academic Publishing*, 21 *PUBLISHING RES. Q.* 3 (2005) (endorsing this theory); MERRIAH FAIRCHILD, *CALPIRG, RIPOFF 101: HOW THE CURRENT PRACTICES OF THE TEXTBOOK INDUSTRY DRIVE UP THE COST OF COLLEGE TEXTBOOKS* 12 (Jan. 2004), available at <http://calpirg.org/sites/pirg/files/reports/textbookripoff.pdf> (discussing the losses students suffer when they can't resell older editions). See generally Loren, *supra* note 10, at 75-78 (discussing the competition between new and used casebooks).

versions of casebooks, our rapid versioning generally doesn't hurt our readers.

For us as authors, rapid versioning does mean that the casebook feels like it will forever be a work-in-progress, which is a little frustrating.¹⁴ Because it's so easy to revise the text, it's very hard to walk away from it.

C. *No DRM*

We mentioned the absence of DRM on our book above, but it's worth elaborating on its significance. Traditional casebook publishers are slowly expanding their eBook offerings, but they are hobbling their eBooks' functionality. Using DRM, their eBook files expire after a period of time, can't be copied or printed, and may have arbitrary limits on printing.

In contrast, we published electronic versions without those annoying technological restrictions. Our eBook readers can conduct keyword searches, cut-and-paste material, see graphics and photos in color without paying extra for color printing, view photos at a larger size, and install the file on multiple devices. Plus, our eBook files never expire. For eBook readers who later decide they prefer to read in print, we provide a letter authorizing copy shops to print the book for them.¹⁵

Without DRM, perhaps we become more vulnerable to illegitimate copying. However, many consumers make illegitimate copies because the content publishers, fixated on controlling their works, resist giving consumers what they want.¹⁶ By letting our

¹⁴ It's been said that a creative work is never finished, only abandoned, which is a phrase that has been attributed to many people, including Leonardo da Vinci and Paul Valéry. *See Art Is Never Finished, Only Abandoned*, <http://www.quoteyard.com/art-is-never-finished-only-abandoned> (last visited May 26, 2015).

¹⁵ Eric Goldman, Letter Dated July 16, 2012, SANTA CLARA UNIVERSITY, available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1102&context=historical>.

¹⁶ *See, e.g.,* Joseph M. Eno, *What Motivates Illegal File Sharing? Empirical and Theoretical Approaches*, 69 N.Y.U. ANN. SURV. AM. L. 587, 612 (2013) (pointing out that DRM "can often make it much more difficult to enjoy the legal copy of a good, leading some users to seek alternative, DRM-free

readers enjoy the materials on their own terms at a reasonable cost, we expect that most readers will choose to pay rather than copy.¹⁷ We're willing to risk some revenue if we're wrong about that.¹⁸

D. Proliferating Advertising Law Courses

When we started the book project, we hoped to increase the number of schools offering an advertising law course to their students.¹⁹ We estimated that only a dozen courses were offered around the country in academic year 2010-11. Before our book, no

versions") (footnote omitted); Dana B. Robinson, *Digital Rights Management Lite: Freeing E-Books from Reader Devices and Software*, 17 VA. J.L. & TECH. 152, 155 (2012) ("[C]onsumers complain about DRM as a hassle that they do not want to deal with. In the current state of affairs, those who are intent on getting at the media free of DRM can do so easily, but honest consumers are impaired and maddened by DRM measures that complicate their free use of a legitimate purchase.") (footnote omitted); xkcd, *Steal This Comic*, <https://xkcd.com/488> (explaining the logic: unauthorized downloads are guaranteed to work; DRM-protected content can fail unexpectedly and restoring access is illegal; thus the rational consumer should download unauthorized versions).

¹⁷ See Jessica Litman, *Readers' Copyright*, 58 J. COPYRIGHT SOC'Y U.S.A. 325, 351-52 (2011) (discussing general consumer consensus in favor of flexibility in using copies they've purchased, and arguing that allowing such flexibility improves public acceptance of copyright law); Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People To Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 712-14 (2006) (discussing role of perceived fairness in consumers' choice to pay for authorized versions instead of unauthorized versions). See generally Loren, *supra* note 10, at 89-92 (hypothesizing why students choose to pay for Semaphore Press-published electronic casebooks despite a free option).

¹⁸ In our preface, we do advise students:

To make this book as accessible and easy-to-use for readers as possible, we have deliberately priced this casebook low and provided a DRM-free e-book. If you think your friends and colleagues would like their own copies, we'd appreciate it if you encouraged them to buy their own low-cost copies rather than sharing your copy with them.

TUSHNET & GOLDMAN, *supra* note 1, at i.

¹⁹ See generally Eric Goldman, *Why You Should Consider Teaching Advertising Law (Including Comments from Felix Wu of Cardozo)*, TECH. & MARKETING LAW BLOG (Jan. 23, 2013), http://blog.ericgoldman.org/archives/2013/01/why_you_should.htm.

published casebooks supported those courses,²⁰ each professor individually compiled his/her own materials.

The casebook's availability has made it easy for teachers to tackle the course without incurring the heavy cost of preparing their own teaching materials. As a result, we've seen new advertising law courses offered throughout the country. A traditional publisher would have also helped proliferate the course, but we didn't need that help.

E. Better Content

Traditional publishers are notoriously risk-averse and regularly decline to rely on fair use (even when the defense is obvious).²¹ Instead, they insist on authors' obtaining permission for every quotation of copyrighted material—even fragments of song lyrics.

We wanted to incorporate examples of actual ad copy in the book. Allowing students to examine litigated ads for themselves has crucial pedagogical advantages. Students cannot truly understand the scope of the cases without knowing what was at issue.²² As a result, our text doesn't skimp on showing images of ads.

Because most ads are copyrightable, a traditional publisher would have required us to obtain copyright clearance for each ad we wanted to include—a virtually impossible challenge given the number of ads, the difficulty in identifying copyright owners (especially for older ads), and the licensing fees that some owners would have unreasonably demanded.

We don't think that these permission requirements make sense

²⁰ Some published textbooks supported advertising law courses in business schools, communications departments, journalism schools and related disciplines, but none of those textbooks were easily adapted to law school courses.

²¹ See, e.g., Christina Bohannon, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083, 1100 (2010); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 583-84 (2004).

²² See Rebecca Tushnet, *Sight, Sound, and Meaning: Teaching Intellectual Property with Audiovisual Materials*, 52 ST. LOUIS U. L.J. 891 (2007).

for the copyright system.²³ Relying on fair use to protect transformative, educational uses helps preserve a robust culture of fair use and keeps us from transitioning to a permission-only society.²⁴ Thus, self-publishing allowed us to opt-out of the permissions-driven norm.

F. More Content

Publishers often impose highly restrictive space limitations on book projects. Much of that is driven by the economics of printing books, but other resource constraints (such as editing capacity) play a role as well. In contrast, we had complete discretion to decide the book's length.²⁵ We didn't have to leave anything on the cutting-room floor.

Then again, being free to write as much as we want is both a blessing and a curse. Realistically, students can read and master only a finite amount per week—indeed, our students routinely complain that the book requires too much reading! Getting the chapters to a manageable size remains an ongoing and not entirely successful struggle.

G. We Set Our Deadlines

For some authors, completing writing projects on someone else's schedule sucks the joy out of writing. Fortunately, as self-publishers, we set our own deadlines. Thus, our deadlines are driven by our desire to maximize the project's quality, not a compulsion to hit a publication cycle or a line item in a publisher's revenue projections.

Not having a publisher pressuring us on deadlines required us to be self-disciplined, but ultimately we feel a lot less guilt missing

²³ See Jim Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007).

²⁴ See PETER JASZI & PAT AUFDERHEIDE, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT (2011).

²⁵ We ran into size constraints with our print-on-demand publisher. We worked around the constraint by dividing the book into two volumes, which probably is not ideal for readers.

our self-imposed deadlines than someone else's deadlines. Still, without pressure from an outside publisher, we've also been slow to complete the entire project. Our unfinished tasks include the final chapter, which currently has two case studies but should have more, and a detailed teachers' manual.²⁶

II. SOME CHALLENGES OF SELF-PUBLISHING

While electronic self-publishing has been the right choice for us, it's not without pitfalls. We've already mentioned a few, such as self-managing deadlines and respecting self-imposed word limits. Some other challenges we've encountered include:

Picking Vendors. Although we say we self-published, we didn't host the electronic files or print the books-on-demand ourselves. Instead, we use vendors who assist self-publishers like us.

For our first edition, we used Scribd as our eBook platform,²⁷ but Eric—who did the heavy lifting of dealing with these entities—ultimately found it unsatisfying.²⁸ With the second edition, we dropped Scribd and moved everything to another e-commerce site called Gumroad.²⁹ Gumroad's fees are so low—five percent plus twenty-five cents per transaction³⁰—that they make the economics of self-publication even more attractive.

However, if we become dissatisfied with Gumroad, we'll have to find a replacement, and the other options may be sub-optimal. Then again, traditional publishers don't always act in the best

²⁶ In the interim, we happily share our notes and slides with anyone interested in teaching the course. If that describes you, please email us.

²⁷ Eric Goldman, *Advertising and Marketing Law Casebook July 2012*, SCRIBD, <https://www.scribd.com/doc/99904133/Advertising-and-Marketing-Law-Casebook-July-2012-SEE-NOTE> (last visited May 17, 2015).

²⁸ Eric Goldman, *Scribd Botches Its Frictionless Sharing Implementation...AGAIN*, FORBES (Nov. 9, 2012 10:56 AM), <http://www.forbes.com/sites/ericgoldman/2012/11/09/scribd-botches-its-frictionless-sharing-implementation-again>.

²⁹ Eric Goldman, GUMROAD, <https://gumroad.com/ericgoldman> (last visited May 17, 2015).

³⁰ Pricing Information, GUMROAD, <https://gumroad.com/features/pricing> (last visited May 17, 2015).

interests of their authors, and the publishers' control of the copyright (typically the case) handcuffs the authors from responding.

Formatting. It took us a lot of time to format and prepare the different book versions, including an acceptable ePub version and a two-volume version for the hard-copy edition. Traditional publishers typically would handle those tasks for their authors.³¹

Marketing Support. Most casebook authors gripe about their publisher's marketing support, but usually the publisher does try to generate buyers. In contrast, we get zero marketing help from anyone.³² We decided we could do our own marketing because we already personally knew many of the professors who might teach the course. Their word of mouth has also identified a number of new professors we did not know ourselves.

Because our book does not face any direct competition, it is unlikely that the marketing of traditional publishers would have brought many new adoptions our way. The need for marketing assistance might well differ in a crowded field with a lot of existing casebook choices, such as casebooks for first year courses like Property or Contracts. Then again, a low-priced DRM-free eBook might help a new entrant stand out from the existing competition.

As an alternative to traditional marketing, we can easily hand out free copies or excerpts as marketing because we retained the copyright. For example, we put a full chapter online for free³³ so people could get a good preview.

No Publication Credit. It is unlikely that we get much, if any, peer credit for a "publication." Even today, many colleagues don't

³¹ Most of the book's formatting and editing was done by Georgetown Law's faculty manuscript editor Susanna McCrea. Without her help, we would have outsourced formatting and editing to someone else (a professional freelancer or RAs) at a substantial cost, or we would have spent substantial amounts of our time doing it ourselves to achieve inferior results.

³² Even Gumroad, our e-commerce platform, does not undertake any marketing efforts to promote the book's availability.

³³ We posted Chapter 13, "Featuring People in Ads," to the Social Science Research Network (SSRN). Eric Goldman & Rebecca Tushnet, *Featuring People in Ads (2014 Edition)*, SOC. SCI. RES. NETWORK (Sept. 4, 2014), <http://ssrn.com/abstract=2479635>.

afford a self-published eBook the same respect they'd give a traditional casebook publication.³⁴ For example, we imagine a tenure committee might scratch its head trying to decide how to credit the book for tenure purposes. Because both of us are already tenured, this consideration really doesn't matter to us.

III. THE FUTURE

Writing and publishing a casebook is a substantial project on its own, but for us, it's just the start of a larger and longer-term effort to organize and expand the community of teachers and scholars in advertising and marketing law. After all, a casebook is a pedagogical tool, and all professors using that tool share some common interests that casebook authors are best able to serve. As a result, we eventually plan to build out additional support tools for our community of teachers, including:

- A website³⁵ to supplement the book, including teaching materials, links to audio and video ads that weren't included in the electronic book, and more.
- A moderated email list for advertising law professors.³⁶
- A new AALS section.
- A new SSRN subject matter eJournal.
- A work-in-progress conference and other regular face-to-face opportunities for scholarly and pedagogical exchanges.

As this list illustrates, authoring a casebook is effectively the first step in a lifetime project. But we're not complaining. We enthusiastically chose to climb this mountain because of our passion for the topic. We look forward to continued engagement

³⁴ See generally Joseph Scott Miller & Lydia Pallas Loren, *The Idea of the Casebook: Pedagogy, Prestige, and Trusty Platforms*, 11 WASH. J.L. TECH. & ARTS 31 (2015), <http://digital.lib.washington.edu/dspace-law/handle/1773.1/1473>.

³⁵ *Advertising & Marketing Law: Cases and Materials*, <http://www.advertisinglawbook.com> (last visited May 17, 2015).

³⁶ To be operated at forum@advertisinglawbook.com. To join the email list, contact egoldman@gmail.com.

with current and potential teachers of advertising law classes, through the casebook and other means.

