

Chapter 161: Digital Textbooks to the Rescue

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Code Section Affected

California Education Code § 66410 (new).
SB 48 (Alquist); 2009 STAT. Ch. 161.

I. INTRODUCTION

When postage stamps were first introduced in the United States,¹ a patron could mail a letter anywhere within three hundred miles for just five cents.² Today, it would cost forty-four cents to mail that same letter.³ When Jimmy Carter took office in 1977, a gallon of unleaded gasoline averaged sixty-three cents.⁴ Just over thirty years later, the national average jumped above three dollars.⁵ American consumers today are so accustomed to inflation and price increases that they consider them to be little more than inevitable annoyances. People groan when they find out that the price of their favorite cup of coffee has gone up by a nickel, then promptly forget about it and move on with their lives.⁶ So why should there be any uproar over the fact that college textbook prices continue to rise year after year?⁷

According to a 2005 study conducted by the Government Accountability Office (GAO), college textbook prices nearly tripled between December 1986 and December 2004.⁸ While overall annual inflation during this period averaged

1. Congress first authorized United States postal stamps on March 3, 1847. U.S. Postal Service, Stamps and Postcards: Treasures Sent by Mail, <http://www.usps.com/postalhistory/stampsandpostcards.htm> (last visited Feb. 28, 2010) (on file with the *McGeorge Law Review*).

2. U.S. Postal Service, Rates for Domestic Letters, 1792-1863 (2008), http://www.usps.com/postalhistory/_pdf/DomesticLetterRates17921863.pdf (on file with the *McGeorge Law Review*). By 1883, the rate had dropped to two cents. U.S. Postal Service, Rates for Domestic Letters, 1863-2009 (2009), http://www.usps.com/postalhistory/_pdf/DomesticLetterRates1863-2009.pdf [hereinafter Postal Rate 1863-2009] (on file with the *McGeorge Law Review*).

3. Postal Rate 1863-2009, *supra* note 2.

4. U.S. Bureau of Labor Statistics, Consumer Price Index—Average Price Data, <http://data.bls.gov/PDQ/outside.jsp?survey=ap> (last visited June 3, 2009) (on file with the *McGeorge Law Review*).

5. *Id.*

6. See Laura Petrecca & Sue Kirchhoff, *Coffee King Starbucks Raises Its Prices*, USA TODAY, July 24, 2007, available at http://www.usatoday.com/money/industries/food/2007-07-19-starbucks-raising-prices_N.htm (describing recent price increases at Starbucks and the unlikelihood that such increases will cause consumers to cut back on coffee).

7. MERRIAH FAIRCHILD, CALIFORNIA PUBLIC INTEREST RESEARCH GROUP (CALPIRG), RIPOFF 101: HOW THE CURRENT PRACTICES OF THE TEXTBOOK INDUSTRY DRIVE UP THE COST OF COLLEGE TEXTBOOKS 8 (2004), available at http://www.calpirg.org/uploads/Dy/yy/Dyun8TFrsyHZ63Bz_eY9w/textbookrippo.pdf (on file with the *McGeorge Law Review*).

8. See U.S. GOV'T ACCOUNTABILITY OFFICE, REP. NO. GAO-05-806, COLLEGE TEXTBOOKS: ENHANCED OFFERINGS APPEAR TO DRIVE RECENT PRICE INCREASES 2 (2005), available at <http://www.gao.gov/new.items/d05806.pdf> (last visited June 3, 2009) [hereinafter COLLEGE TEXTBOOKS] (on

2010 / Desktop Publishing Example

three percent,⁹ college textbook prices rose twice as fast, climbing an average of six percent each academic year.¹⁰ And while six percent in a single year might not seem exorbitant at first blush, imagine paying \$628.81 to mail a single letter.¹¹ This is the amount consumers would be paying today if the price of stamps had climbed at the same rate as college textbooks.¹²

II. LEGAL BACKGROUND

In 2004, the California Public Interest Research Group (CalPIRG) attempted to shine a spotlight on the issue of rising textbook prices by publishing a report titled “Ripoff 101: How the Current Practices of the Textbook Industry Drive up the Cost of College Textbooks.”¹³ Based on surveys of University of California students, the report concluded that “Textbooks are Expensive and Getting Even More Expensive.”¹⁴ The report cited various reasons for this escalating costliness, but as the title suggests, it sought to cast most, if not all, of the blame on “the textbook industry.”¹⁵ According to the report, one of the primary reasons behind the problem was the industry’s bundling of textbooks with superfluous “bells and whistles,” like CD-ROM programs and workbooks rarely used by students or professors.¹⁶ Another reason cited was the industry’s practice of routinely publishing new editions of textbooks, which rendered older versions obsolete, even when no new content had been added.¹⁷ In the words of one anonymous UCLA professor quoted in the report: “The subject of calculus [has] not change[d] much in the last 100 years! . . . [T]here are no reasons why the textbooks have to be updated every five years or even more frequently.”¹⁸

The assertions and recommendations of CalPIRG’s report did not go

file with the *McGeorge Law Review*) (describing the increase in textbook prices).

9. U.S. Bureau of Labor Statistics, Consumer Price Index—All Urban Consumers (Current Series), <http://data.bls.gov:8080/PDQ/outside.jsp?survey=cu> (last visited Mar. 24, 2010) (on file with the *McGeorge Law Review*).

10. COLLEGE TEXTBOOKS, *supra* note 8; *see also* KATE RUBE, STATE PUBLIC INTEREST RESEARCH GROUPS, RIPOFF 101: 2ND EDITION 7 (2005), available at http://www.uspirg.org/uploads/_H/rF/_HrFuXAYUQ-KUSZ8Y80bAQ/ripoff2005.pdf (on file with the *McGeorge Law Review*) (indicating that recent growth rates of textbook prices are closer to four times the rate of inflation).

11. *See* Shauna Carther, *Understanding the Time Value of Money*, INVESTOPEDIA, <http://www.investopedia.com/articles/03/082703.asp> (last visited Mar. 12, 2010) (on file with the *McGeorge Law Review*) (explaining the time value of money). $FV = PV \times (1 + r)^t$, where FV = future value, PV = present value, r = rate of return, and t = time (i.e. number of years). In this example, PV = \$0.05, r = .06, t = 162, giving us a Future Value of \$628.81107. *Id.*

12. *Id.* This statement assumes a six percent annual growth rate between 1847 and 2009. Granted, the introduction of U.S. stamps occurred many years ago, but some of us will be paying for the educational expenses of children and grandchildren many years in the future.

13. FAIRCHILD, *supra* note 7.

14. *Id.* at 8.

15. *See generally id.* (describing the textbook industry’s contribution to the increase of textbook prices).

16. *Id.* at 9-12.

17. *Id.* at 12-14.

18. *Id.* at 14.

unnoticed.¹⁹ Just nine months after the report's publication, Governor Arnold Schwarzenegger signed legislation declaring that "[t]extbook publishers should provide students with the option of buying materials that are 'unbundled,' disclose to faculty the cost to students of purchasing textbooks, and disclose to faculty how the new edition is different from previous editions."²⁰ Further, the new law encouraged the Regents of the University of California—and *required* the directors of the California State Universities and Community Colleges—to implement a number of measures to keep the price of textbooks to a minimum.²¹ Some of those measures included reviewing bookstore processes for ordering and stocking textbooks, implementing textbook rental programs, and encouraging students "to consider on-campus and online book swaps."²²

Yet despite the good intentions of California lawmakers, textbooks did not become more affordable overnight.²³ Nearly three years later, the federal Advisory Committee on Student Financial Assistance estimated that college textbooks still cost students between \$700 and \$1,000 annually.²⁴ Hoping to sling one more stone into the forehead of Goliath-like textbook prices, it appears that once again legislators took their cues from CalPIRG's report.²⁵ The fifth finding of the report declares that "Online Textbooks Hold Promise for Lowering the Cost of Textbooks."²⁶ With great faith in that promise,²⁷ the California Legislature drafted and passed Chapter 161.²⁸

III. CHAPTER 161

Chapter 161 mandates that "to the extent practicable," publishers who sell

19. See 2004 Cal. Stat. ch. 556, § 1(c)(1) (attempting to curb the rising price of college textbooks through disclosure methods).

20. *Id.*

21. CAL. EDUC. CODE § 66406(c) (West Supp. 2008).

22. *Id.*

23. See ADVISORY COMMITTEE ON STUDENT FINANCIAL ASSISTANCE, TURN THE PAGE: MAKING COLLEGE TEXTBOOKS MORE AFFORDABLE 5 (2007), available at <http://www.ed.gov/about/bdscomm/list/acsfa/turnthepage.pdf> [hereinafter TURN THE PAGE] (on file with the *McGeorge Law Review*) (describing the cost of college textbooks).

24. *Id.* Although the data gathered for another report did not specifically focus on prices in California, the findings reflected textbook prices nationwide. Based on this estimate, the price of textbooks amounted to nearly sixteen percent of the cost of tuition and fees being paid by in-state students at public four year colleges during the 2007-2008 academic year. COLLEGE BOARD, TRENDS IN COLLEGE PRICING 6 (2008), available at <http://professionals.collegeboard.com/profdownload/trends-in-college-pricing-2008.pdf> (on file with the *McGeorge Law Review*).

25. See Fact Sheet from the Office of California State Senator Elaine Alquist, Senate Bill 48 (Alquist): Teaching the Digital Generation [hereinafter SB 48 Fact Sheet] (on file with the *McGeorge Law Review*) (describing the importance of digital textbooks and the necessity of curbing textbook price increases).

26. FAIRCHILD, *supra* note 7, at 16.

27. See SB 48 Fact Sheet, *supra* note 25 ("Digital textbooks are the future of the textbook market and have the potential to significantly reduce costs . . .").

28. CAL. EDUC. CODE § 66410 (enacted by Chapter 161).

textbooks at California colleges must also offer those textbooks for sale in an electronic format “in whole or in part.”²⁹ This e-book requirement takes effect on January 1, 2020, and specifically applies to “any individual, firm, partnership, or corporation that publishes textbooks offered for sale at the University of California, the California State University, the California Community Colleges, or a private postsecondary educational institution in the state”³⁰ The content of the e-book must be identical to that of the printed textbook and may be copy-protected.³¹

Chapter 161 applies only to “textbooks” as defined in section 66406.7 of the California Education Code.³² Chapter 161 does not apply to novels³³ and does not authorize the use of any materials that would violate the Copyright Revision Act of 1976.³⁴

III. ANALYSIS OF CHAPTER 161

Proponents of Chapter 161 are confident in the new legislation’s ability to keep textbook prices under control.³⁵ They aver that mandating the publication of e-books will provide students with a more affordable option by reducing or eliminating costs associated with materials, printing, and conventional publication.³⁶ Secondly, proponents argue that Chapter 161 has the potential to further drive down prices by promoting competition in the textbook market.³⁷ As

29. *Id.* § 66410(a) (enacted by Chapter 161). The “in whole or in part” language was the result of revisions to the legislation as originally drafted, and seems to conflict with a requirement stated later in the same section: “The electronic version of any textbook shall contain the same content as the printed version” *Id.*

30. *Id.*

31. *Id.*; see also *supra* note 29 (noting electronic copy requirements).

32. CAL. EDUC. CODE § 66410(b) (enacted by Chapter 161). “‘Textbook’ means a book that contains printed material and is intended for use as a source of study material for a class or group of students, a copy of which is expected to be available for the use of each of the students in that class or group. ‘Textbook’ does not include a novel.” *Id.* § 66406.7(b)(6) (West Supp. 2008).

33. *Id.* § 66406.7(b)(6). A “novel” is generally defined as “a fictitious prose narrative of considerable length and complexity, portraying characters and usually presenting a sequential organization of action and scenes [e.g. Don Quixote, Lord of the Rings, Atlas Shrugged, etc.]” Dictionary.com, <http://dictionary.reference.com/browse/novel> (last visited Feb. 28, 2010) (on file with the *McGeorge Law Review*).

34. CAL. EDUC. CODE § 66410(c) (enacted by Chapter 161).

35. See Associated Students, Univ. of Cal., Davis, ASUCD Senate Resolution #26 (Apr. 9, 2008) (on file with the *McGeorge Law Review*) (declaring that digital textbooks will help keep textbook prices low).

36. See *id.* (declaring that digital textbooks will help keep textbook prices low); see also Letter from Olgalilia Ramirez, Dir. Gov’t Relations, Cal. State Student Assoc., to Elaine Alquist, Senator, Cal. State Senate (Apr. 8, 2009) (on file with the *McGeorge Law Review*) (stating that digital textbooks will help keep textbook prices low); see also NICOLE ALLEN, STUDENT PUBLIC INTEREST RESEARCH GROUPS, COURSE CORRECTION: HOW DIGITAL TEXTBOOKS ARE OFF TRACK, AND HOW TO SET THEM STRAIGHT 7 (2008), available at http://cdn.publicinterestnetwork.org/assets/Ssqbm6MoN_C41mISms8qQ/course-correction.pdf (on file with the *McGeorge Law Review*) (stating that digital textbooks will help keep textbook prices low).

37. See SB 48 Fact Sheet, *supra* note 25 (describing the importance of digital textbooks and the necessity of curbing textbook price increases); see also ALLEN, *supra* note 36, at 7 (stating that digital textbooks

students and professors become increasingly comfortable with digital textbooks, the market will open wide to a multitude of smaller, digital publishers who lack the capital or resources necessary for traditional textbook publishing.³⁸

Some enthusiasts contend that digital textbooks are superior to traditional page-turners in a number of ways, even beyond reduced costs.³⁹ The search feature inherent in most digital textbook software makes it possible for students to quickly look up a topic or a word of interest.⁴⁰ The ability to cut-and-paste text makes note-taking and writing term papers less cumbersome.⁴¹ Online access allows students and professors to make suggestions to authors and enables authors to update books instantaneously rather than at the next printing, which could be years later.⁴² Proponents claim that digital books offer students greater mobility,⁴³ embedded multi-media,⁴⁴ essential technological training for tomorrow's workforce,⁴⁵ a clean environmental conscience,⁴⁶ and even relief from premature chronic back pain.⁴⁷ However, not everyone agrees with this image of the digital book as an immaculate panacea.⁴⁸

One important argument made by opponents of Chapter 161 is that mandating digital textbooks may create significant constitutional problems.⁴⁹ The First Amendment of the U.S. Constitution states that "Congress shall make no

will help keep textbook prices low).

38. SB 48 Fact Sheet, *supra* note 25. *But see* Letter from Assoc. of American Publishers, to Gloria Romero, Senator, Cal. State Senate (May 3, 2009) [hereinafter American Publishers Letter] (on file with the *McGeorge Law Review*) (arguing that, in reality, the exact opposite will result, since creating a digital version of a small-run textbook order may be cost-prohibitive).

39. *See* SB 48 Fact Sheet, *supra* note 25 (describing the importance of digital textbooks and the necessity of curbing textbook price increases).

40. *See* Press Release, CourseSmart, One Third of Textbooks Now Available as eTextbooks (Aug. 27, 2008), available at <http://www.coursesmart.com/aboutus?aboutview=media#presstextbooks> [hereinafter CourseSmart Press Release] (on file with the *McGeorge Law Review*) (describing the unique benefits of digital textbooks).

41. *Id.*

42. *See* Letter from Julia Blair, Legislative Dir., Cal. Postsecondary Educ. Comm'n, to Gloria Romero, Senator, Cal. State Senate (Apr. 10, 2009) (on file with the *McGeorge Law Review*) (describing the unique benefits of digital textbooks).

43. *See* CourseSmart Press Release, *supra* note 40 ("[E-Textbooks] can be accessed at anytime, anywhere.").

44. SB 48 Fact Sheet, *supra* note 25.

45. *Id.*

46. *See* CourseSmart Press Release, *supra* note 40 ("Selective printing is more environmentally-friendly than buying print texts.").

47. *See* Top Colleges, RIP: The Textbook, <http://www.top-colleges.com/blog/2009/08/13/kindle-textbook/> (last visited Mar. 12, 2010) (on file with the *McGeorge Law Review*) ("[T]he days of overloaded backpacks and textbook-induced back pain seem to be on the way out.").

48. *See* Gale Holland, *Digital Textbooks May Not Be Cheaper, Report Finds*, L.A. TIMES, Aug. 26, 2008, available at <http://articles.latimes.com/2008/aug/26/local/me-books26> (explaining that digital textbooks might not save students money).

49. Senate Floor Alert from Assoc. of American Publishers, to California State Senate (May 15, 2009) [hereinafter Senate Floor Alert] (on file with the *McGeorge Law Review*).

law . . . abridging the freedom . . . of the press.”⁵⁰ The Association of American Publishers sees it this way: “Under First Amendment protection, publishers cannot be told what to publish, when to publish or how to publish the books they create for the market.”⁵¹ If digital textbooks really are the future of education, they argue, why not let the free market and the demands of consumers dictate the conditions of the transition and the pace at which it takes place?⁵² Even prior to the threat of meddlesome government intervention, publishers had already taken strides toward providing students with the option of digital textbooks.⁵³ For example, one group of major publishers joined forces to create a website where students can buy digital textbooks online.⁵⁴ Several other publishers have already made textbooks available for Amazon.com’s e-book reading device, the Kindle.⁵⁵

Another problematic issue with Chapter 161 is the current price of digital textbooks.⁵⁶ While digital textbooks might be more mobile or high-tech, the idea that they save students a significant amount of money seems to be wishful thinking, at least for now.⁵⁷ According to a study conducted in 2008, digital textbooks often cost just as much as their paper-and-ink counterparts.⁵⁸ Because many students sell back their used books for about fifty percent of the cover price—not an option for digital textbooks—the old-fashioned textbook user can actually wind up with more money in his pocket at the end of the year than the tech-savvy, digital textbook user.⁵⁹

Of course, those who look at education as an investment might wonder why anyone is even upset about the cost of textbooks in the first place.⁶⁰ The value of

50. U.S. CONST. amend. I.

51. Senate Floor Alert, *supra* note 49. *But see* Letter from Stephen Rhoads on behalf of the Assoc. of American Publishers, to Anthony Portantino, Chair, Cal. State Assembly Higher Education Committee (July 1, 2009) (reversing the Association’s official position and supporting the bill after the wording was amended from “shall” to “shall to the extent practicable . . . in whole or in part”) (on file with the *McGeorge Law Review*). It remains to be seen whether other opponents of Chapter 161 will challenge its constitutionality in court.

52. *See id.* (arguing that government intervention is not necessary to facilitate the transition to digital textbooks).

53. *See id.* (arguing that government intervention is not necessary to facilitate the transition to digital textbooks).

54. *See* Press Release, CourseSmart, Nebraska Book Company Partners with CourseSmart (April 14, 2008), available at <http://www.coursesmart.com/aboutus?aboutview=media#pressrelnebraska> (on file with the *McGeorge Law Review*) (“CourseSmart is a new venture founded by six higher education textbook publishers including Pearson, Cengage Learning, McGraw-Hill Education, John Wiley & Sons Inc., Houghton Mifflin, and the Bedford, Freeman, Worth Publishing Group.”).

55. Geoffrey A. Fowler & Ben Worthen, *Amazon to Launch Kindle for Textbooks*, WALL ST. J., May 5, 2009, available at <http://online.wsj.com/article/SB124146996831184563.html>.

56. *See* Holland, *supra* note 48 (explaining that digital textbooks might not save students money).

57. *See id.* (explaining that digital textbooks might not save students money).

58. *See* ALLEN, *supra* note 36, at 11 (discussing the inadequacies of digital textbooks compared to textbooks in print).

59. *See* Holland, *supra* note 48 (explaining that digital textbooks might not save students money).

60. *See generally* SANDY BAUM & KATHLEEN PAYEA, COLLEGE BOARD, EDUCATION PAYS 2004 (2005), available at http://www.collegeboard.com/prod_downloads/press/cost04/EducationPays2004.pdf (on file with the *McGeorge Law Review*) (proposing that any costs associated with a college education are far

a college education extends beyond elusive concepts like “enlightenment” and “self-actualization.”⁶¹ Having a college degree can literally be the difference between driving a Porsche 911 GT3 and driving a used Ford Fiesta.⁶² On average, college graduates earn anywhere from \$19,000 to \$65,000 more annually than workers with only high school diplomas.⁶³ Over a forty-year working career, those with professional degrees have the potential to earn a \$2.6 million return on their investment.⁶⁴ Standing next to these tall figures, the \$1,000 spent on textbooks each year⁶⁵ starts to look more like Gary Coleman than Goliath.⁶⁶

IV. CONCLUSION

Chapter 161 represents a well-intentioned effort to modernize California colleges and to save students money.⁶⁷ Whether or not it will accomplish these goals effectively remains to be seen.⁶⁸ Even if textbook prices are effectively reined in, laissez-faire capitalists are certain to argue, with credibility, that the result is due to competitive market forces already active and not due to legislation.⁶⁹ Perhaps the best advice for young, aspiring college students is to start saving now. Even if they will not need the extra money for textbooks, they just might need it for coffee, or for postage to write home to mom and dad when their loans are depleted.⁷⁰

outweighed by its benefits).

61. *Id.* at 7.

62. See U.S. Dep’t of Educ., Why Go: Boost Your Earnings: More Education = More Opportunity, http://www.college.gov/wps/portal/!ut/p/c1/04_SB8K8xLLM9MSSzPy8xBz9CP0os_jgoGDnQG8nY0MDFws3AyPz0BB_Q2cfQwMDM_1wkA48Kgw8gY4gKOBvp9Hfm6qfkF2dpqjo6liAG5GOwk/dl2/d1/L0IDU0IKS Wdra0EhIS9JTIJBQUlpQ2dBek15cUEhL1CskoxTkExTk1MC13ISEvN19TUINDUUtCMzE4VEc1MEkwV VRFRzFGMDA1Nw!!/?WCM_PORTLET=PC_7_SRSCQKB318TG50I0UTEG1F0057_WCM&WCM_GLOBAL_CONTEXT=/wps/wcm/connect/college/college/whygo/boostyourearnings (last visited Feb. 28, 2010) (on file with the *McGeorge Law Review*) (“[A] college graduate can afford to buy a large, flat-screen TV in 1-2 months while a non-college graduate might have to work for 3-4 months to buy the same TV.”).

63. BAUM & PAYEA, *supra* note 60, at 10 fig.1.

64. *Id.* at 10. This figure does not reflect the deduction of the costs of college (\$65,000 per year x 40 years = \$2.6 million).

65. See *supra* note 24 and accompanying text.

66. Granted, the cost of textbooks may at times be prohibitive, keeping some people out of college in the first place.

67. See SB 48 Fact Sheet, *supra* note 25 (describing the importance of digital textbooks and the necessity of curbing textbook price increases).

68. See TURN THE PAGE, *supra* note 23, at 5 (describing the cost of college textbooks).

69. See Senate Floor Alert, *supra* note 49 (arguing that government intervention is not necessary to facilitate the transition to digital textbooks).

70. See *supra* notes 6, 11.