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TOPIC:

Adopting Open Educational Resources (OER)

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INTRODUCTION:

Increasingly, faculty—and sometimes entire colleges and universities—are eschewing traditional textbooks in their courses and instead adopting Open Educational Resources (OER) as instructional materials.[2] Proponents point to their potential for improving the affordability of a college education, promoting classroom engagement, and enhancing student access to required course materials as reasons for wide-scale adoption initiatives.[3] At one time these materials were more closely associated with massive open online courses (MOOCs), but their presence has become more and more common in traditional face-to-face and distance learning classrooms alike.

The term “OER” is a deceptively broad category of instructional materials. Virtually any resource that can be put to use in the classroom can be OER if it is free of typical copyright restrictions. For example, textbooks, streaming content, software, tests and quizzes, and entire course modules can all be OER.

The rate at which institutions and individual faculty utilize OER is poised for even further growth. A number of states have enacted legislation that supports, and sometimes imposes strict compliance requirements on, the use of OER.[4] Some institutions and systems have established pilots and larger initiatives centered on OER, with a few going so far as to form OER publishers.[5] Additionally, in March 2018, Congress appropriated $5 million for a pilot program administered by the Department of Education to create OER at select institutions.[6]

Despite the many benefits of OER, there are numerous questions that must be resolved in advance of a successful OER adoption strategy. This NACUANOTE will break down the concept of OER and discuss the legal, administrative, and pedagogical issues involved in adopting OER for classroom use. Specifically, it will provide practical information and advice on the issues of copyright, course design, accessibility, contracts, and compliance in the adoption process.

DISCUSSION:

I. Definitions and Distinctions

OER exist among, and overlap with, a number of other types of copyright-permissive material, sharing some but not all attributes. Therefore, an introduction to various concepts and terms is in order to better understand the qualities that make OER unique. Further expanding the scope of vocabulary in this field are OER-supportive organizations throughout the world and the United States that employ their own variations of relevant terms.[7] Disagreement among some organizations exists.

This NACUANOTE brings some of these terms to the reader's attention, but the following definitions are not authoritative. As will be discussed, attorneys, administrators, and faculty must look past labels and instead inspect the specific rights assigned to OER and similar materials in order to ascertain permissible uses.

A. Definitions

"Electronic and Information Technology," or "EIT," refers broadly to hardware, software, operating systems, websites, web-based content, digital content, applications, systems, equipment, and devices "used in the creation, conversion, or duplication of data or information."[8] Under most definitions, OER can be considered a type of EIT.

"Free" content may refer to (1) material provided without charge and akin to "open access" content as defined below (also referred to as *gratis*) or (2) material made available to the public via a permissive usage license and akin to "open" content as defined below (also referred to as *libre*). Some definitions of "free" in the *libre* sense are restricted to content with licenses that permit the user complete freedom in his or her use of the work, and therefore, would exclude any open content with limited restrictions on commercial or for-profit usage.

"Open" content generally includes material that is no-cost, freely accessible, and licensed by the copyright holder so as to grant users expansive permission to use, reuse, adapt, create derivative works or content, and share the material (*libre*). The expansive license attached to open content is necessarily perpetual, irrevocable, and granted to the public at large. Open content in electronic or digital format is distributed without digital rights management, or DRM, which is embedded technology that limits the use of digital works, such as that found in compact discs to prevent copying. Some limitations on sharing or adaptation may exist, such as restrictions on commercial or for-profit usage.

"Open access" content describes a narrow category of materials. This term generally refers to peer-reviewed material published in scholarly journals that can be accessed at no cost (*gratis*). Open access materials are not open content unless they are accompanied specifically by the appropriate license terms.

"Open Educational Resources," or "OER," is a broad category and includes educational materials—in any media—that fall under the umbrella of "open" (*libre*) content. The materials may be intended for any number of teaching, learning, and/or research purposes. Accordingly, some OER will be EIT. Typically, these materials are published on the Internet, but some may exist or be converted to hard-copy format (such as OER textbooks) or other media. Like open content generally, limited restrictions on for-profit or commercial usage may accompany OER licenses, and sometimes attribution to the original creator or licensor is required when using, adapting, or remixing the work.

"Open source" may be used synonymously with "open" to describe any content with *libre* licensing mechanisms, but often refers specifically to software and source code.

B. Distinction: Open Licenses versus Fair Use

Attorneys, administrators, and faculty can be forgiven for finding the distinction between open licensing and fair use to be confusing. Although the use of copyrighted materials under an open license may be functionally similar in some cases to the use of copyrighted materials under fair use, it is important to distinguish those uses. Both concepts are rooted in copyright law and may be purposed for educational uses of copyrighted material. However, open licensing and fair use exist on different ends of a spectrum. Open licensing is a method for a copyright owner to grant explicit permission to others to use copyrighted materials, whereas fair use is an affirmative defense available to users facing a copyright owner's allegation of infringement for using copyrighted materials without permission.[9] Compared to the potentially unfettered use of copyrighted material under an open license, a fair use scenario will generally require a cautious and limited approach in accordance with statutory guidelines[10] and applicable case law.

Notwithstanding their significant differences, both open licensing and fair use may be bases for distributing educational material in the classroom. It is unlikely that all pedagogically desirable materials will be available to an educator under an open license, and so he or she may choose to rely on fair use for certain content. Therefore, institutions would do well to continue educating faculty on fair use and related copyright concepts to facilitate a blended content adoption strategy.[11]

II. Variations

There is no particular type of content that makes up OER. OER can consist of a single image or video, a data file, a lecture or lesson module, and even an entire courseware package. Essentially, OER are anything with an open license that can be purposed for educational use.

Sources from which OER can be found are equally varied, and there is a wide range in pedagogical quality and production value. Some OER are produced by professional entities, while some originate as content developed by university faculty for use in their respective courses and later distributed with an open license. Some OER may be professionally edited or peer reviewed in the same manner as a traditional textbook, while others may be less polished yet pedagogically sound.

Professional sources of OER include both publishers and repositories. OER publishers may provide services and direction akin to traditional textbook and courseware publishers, such as contracting with subject matter experts to author materials, editing (or, depending on the resource, soliciting peer review), issuing updated editions, and ensuring that content aligns with commonly used curricula.[12] Repositories, on the other hand, are websites that curate and/or

host OER. Although repositories typically play no role in the creation of OER, they may provide value-added services such as link checking within submitted content and search engine functionality for locating relevant materials.[13]

Professionally sourced OER should significantly reduce the risk of claims of copyright infringement. For example, publishers may require content authors to obtain clearance for any third-party intellectual property contained in submitted works.[14] Further, many repositories' terms of use prohibit users from uploading infringing content and require them to indemnify the repository against resulting claims.[15]

OER publishing and distribution are no longer exclusively non-profit endeavors. Commercial publishers have begun packaging OER with proprietary content and features. This supplemental, proprietary content may include exercises, test questions, and enhancements such as interactive modules. Other value-added features may include customer support, analytics, professional editing and/or peer review of the OER, and content updates.[16] The proprietary materials included in such offerings may come with more restrictive license terms than the OER they supplement, such that modification and sharing may be prohibited.

OER are, certainly, available through non-professional sources, such as general Internet searches or distribution among colleagues. The content and quality of such materials may vary widely, and understanding the production path of such materials—including questions such as whether the contents have licensing restrictions—may be especially difficult. For a variety of reasons, non-professionally sourced OER may require additional vetting before they are utilized.

III. Legal Issues and General Considerations

A. Selecting Courses for OER Adoption

Many institutions with OER adoption initiatives target courses with high enrollments or costly textbooks to maximize the impact OER can have on students. However, copyright, as more fully discussed in Section IV.B.3 *infra*, will impact the specific courses an institution realistically may select for OER adoption.

A geometry curriculum, for example, generally draws from mathematical concepts and theorem, and students learn through exercises and memorization. Under copyright law, concepts and theorem receive no copyright protection.[17] Although written exercises based on those concepts may be creative enough to receive copyright protection, their concise, adaptable nature make them precisely the type of content creators are distributing under open licenses. Therefore, an instructor will likely find abundant OER to utilize in this field.

A contemporary literature course, on the other hand, centers on 20[th] and 21[st] century novels, drama, and poetry. These are expansive, labor-intensive, and highly creative works generally entitled to copyright protection.[18] Although excerpts of these works may be used in the classroom in accordance with fair use parameters and other explicit statutory exceptions for teaching,[19] it is highly unlikely that an instructor will find them available under an open license.

B. Considerations During the Vetting Process

Just like any other instructional material, OER must be vetted prior to their adoption and use in the classroom. Special considerations arise with OER, however, that can require a robust and resource-intensive pre-adoption analysis.

1. Pedagogical Sufficiency and Quality

A primary consideration when adopting instructional materials is whether they possess the depth and breadth to sufficiently cover the course content. When gathering OER, faculty and course designers must be granted enough time to map and adapt those materials cohesively to a previously established curriculum. Taking the reverse approach of designing a course curriculum around whatever OER happen to be at hand may violate accreditation and academic quality standards if not performed according to accepted practices.[20] For that reason, an OER adoption strategy must take into account the amount of time available for course building; a compressed timeframe may necessitate the use of complete textbooks or all-inclusive courseware-type OER in lieu of a more customized approach. Distance education providers must further ensure their courses retain sufficient "regular and substantive interaction" between instructors and students to satisfy federal student aid requirements,[21] related accreditation standards, and relevant institutional policies.

An equally important consideration in course building is whether instructional materials are of acceptable quality. By their nature, OER are subject to regular revision by different users who may further share the revised content. In contrast to traditional textbooks, which are authored and revised under the oversight of a publisher, issued in new editions, and attributed to their authors and editors, OER may be created and revised anonymously and without any sort of versioning. Without restrictions on who may create or revise OER, there are bound to exist examples that contain inaccuracies, advance polemic arguments, promote commercial products, or are otherwise not appropriate for the classroom. Faculty have good reason to subject OER to appropriate scrutiny prior to adoption, the extent of which may depend on the source. To be sure, there are many OER providers that enlist eminently qualified authors, offer peer-reviewed materials, and label resources by edition or notate substantial revisions.

2. Accessibility

Titles II and III of the Americans with Disabilities Act of 1990 (ADA) require public and private colleges and universities, respectively, to provide reasonable accommodations to students with disabilities.[22] Likewise, Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits the exclusion from or denial of benefits of a program receiving federal financial assistance, such as Title IV funds, on the basis of a person's disability.[23]

Public and private institutions' legal obligation to make available accessible materials or auxiliary aids to enrolled students is well settled.[24] As college and university attorneys well know, adopting materials for classroom use without first ensuring the availability of accessible versions may result in an unplanned expenditure of resources to convert them to an accessible format if a student later requires accommodation. In the case of OER and other EIT, the need for proactive measures is reinforced by recent civil rights enforcement actions.

OER in their original format may not be accessible to students with disabilities. For example, the creator of audiovisual materials may not have included closed captioning, or the author of an open textbook may not have produced a version compatible with audio technology. Because OER are often created without compensation and shared at no cost, there can be little incentive for authors to develop OER using universal design principles[25] or to create accessible versions. Indeed, creating accessible OER can be a difficult task due to the wide scope of technology, platforms, and content formats comprising OER and the EIT sometimes required to utilize them.

Despite the absence of specific accessibility standards applicable to OER and other EIT under the ADA[26] and Section 504, the federal government has taken the position that web content hosted by colleges and universities must be accessible.[27] To the advantage of institutions, the Office for Civil Rights (OCR) has provided technical guidance on web and online program accessibility.[28] As an enforcement measure, OCR has negotiated settlement agreements with a number of institutions that provide insight into the federal government's expectations for accessibility of electronic resources in the classroom.[29]

A recent NACUANOTE provides a fuller discussion and analysis of EIT accessibility requirements, recent regulatory and enforcement activity, and practical considerations for institutionalizing a process for ensuring that all new and existing electronic resources meet certain accessibility standards.[30] Suffice it to say, the risk associated with inaccessible OER and other EIT is real. In light of the well-established obligation to ensure equal access under the ADA and Section 504, institutions that adopt OER without an adequate and proactive accessibility strategy do so at their own peril.

3. Copyright

Ascertaining copyright permissions and restrictions is probably the most important legal element of the OER vetting process. The degree to which typical copyright restrictions apply to a particular piece of instructional material will determine the extent to which it can be used as OER, if at all. It is common for creators of OER and other open content to retain the copyright to their works but license the works so freely that there are few apparent conditions or restrictions. Some OER may instead exist in the public domain and have no attendant copyright restrictions, either because the copyright has lapsed or because the material was placed there deliberately.[31]

Once the necessary open license terms are confirmed and understood, a user may operate within the scope of that license and worry about little else. Still, it is important for attorneys, administrators, and faculty to understand what makes OER "open." Like the topic of accessibility, an entire article could be devoted to the intricacies of copyright in OER. This NACUANOTE attempts to provide a brief, practical overview of copyright and typical license terms.

i. Open License Elements

OER should first and foremost be *shareable*.[32] Copyright generally restricts a third party user's ability to share or reproduce a copyrighted work, such that the user is limited to using the work personally and no further (except within fair use parameters).[33] OER, on the other hand, are generally distributed by their creators with an accompanying permission for users to reproduce and share those works further, such as in the classroom or with other educators.[34] Even subscription- or fee-based courseware containing OER often preserves the open, sharing-permissive license terms of the OER therein.[35]

For many instructors, it is also necessary that OER permit the *sharing of adaptations*,[36] or modified versions of the content. Copyright law grants to the copyright owner the exclusive right to adapt a work.[37] Although a user may permissibly create adaptations for personal or other limited use within fair use parameters, there is no explicit right to share the adaptation of a copyrighted work. Instructors may wish to adapt OER by reason of pedagogical preference or perhaps more out of necessity in order to make the best use of an available resource. Adaptation may be as simple as removing an extraneous chapter from an open textbook or as

intensive as adding or rewriting a chapter. Regardless, sharing the adapted work is often necessary to achieve educational objectives and thus an explicit license to do so is preferred.

ii. Common Conditions

Two common conditions found in open licenses are that attribution to the creator and a description of any modifications must accompany the work.[38] Although these conditions create affirmative obligations for users, they do not restrict users' ability to adapt and share the works so long as they abide by the conditions.[39]

Other, more restrictive conditions are also common. As discussed above, copyright grants no explicit right to share adaptations of someone else's work, except within fair use parameters.[40] Some open licenses specifically prohibit the sharing of adaptations.[41] Other licenses contain a more palatable restriction that permits users to share adaptations only if they attach a license that is at least as permissive as the license attached to the original work.[42] In other words, this type of license prohibits a user who adapts and shares someone else's work from restricting others' ability to further adapt and share the work.[43]

An additional restrictive condition often contained in OER licenses is that the work may not be used commercially.[44] Unfortunately, there is no single, all-inclusive definition of "commercial use" across all available licenses. However, one widely held interpretation is that educational use would not violate the terms of a non-commercial license.[45] In contrast, incorporating OER into a custom textbook or course pack that is sold to students above cost may, under some interpretations, constitute a commercial use.[46] Ultimately, the specific terms of each licensed work should be examined and clearly understood. Because of this variance, in some cases it may be beneficial to utilize a single OER provider that applies the same license to all of its works.

iii. The Right to License Openly

Instructors and course designers should exercise caution when utilizing OER from unfamiliar or anonymous sources. As discussed *supra*, OER may contain third-party intellectual property for which permission must be received before distributing the content openly.[47]

Instructors relying on multimedia works in their courses may face a similar dilemma. Multimedia works combine two or more forms of media, each typically eligible for independent copyright protection (*e.g.*, a popular song synchronized to a series of images). Limited use of a copyrighted work within an otherwise original multimedia work may be permissible under fair use. However, the mere combination of two or more copyrighted works into a multimedia work does not transfer copyright of the individual works or grant copyright in the multimedia work to the multimedia work creator.[48] Therefore, the copyright will remain with the creators of the individual works and, without consent from each, the multimedia work may not be further distributed under an open license. In other words, it would not be useable as OER. To be sure, there are myriad multimedia works appropriately distributed as OER. Their use simply merits additional diligence.

A healthy dose of training, combined with the use of trusted providers and an established process for removing infringing content, should go a long way. When in doubt, providing students a hyperlink to the material will virtually eliminate the risk of infringing another's copyright.[49]

4. Terms of Service and Treatment of Student Data

A web-based OER provider or repository may require users to accept an end user license agreement (EULA) or similar terms of service to access its materials. These "click-thru"-type agreements may bind students or the institution to any number of contractual terms. Some terms may not align with institutional standards or, worse, may put student privacy and intellectual property at risk.[50]

Common examples of EULA terms that often do not align with institutional standards are those that designate governing law of the agreement in a foreign jurisdiction (and require the institution to submit to the jurisdiction of courts in the foreign jurisdiction) and those that require the institution to indemnify the provider against certain third-party claims.

Objectionable terms or practices pertaining to student privacy may involve the collection of personally identifiable information for the provider's commercial/proprietary purposes, such as data-mining, marketing, and resale. An institution should consider whether and how to require such a web-based OER provider to abide by the Family Educational Rights and Privacy Act (FERPA) as a school official.[51] Similarly, an institution should review the provider's EULA or terms of service for provisions that require the institution to share personally identifiable information from students' education records, which under FERPA would require student consent or the existence of an established school official relationship.[52]

Interactive or collaborative OER hosted by a third-party provider are particularly prone to privacy concerns, depending on the nature of information solicited. Students' intellectual property rights to content submitted through a hosted platform should also be considered with relevant institutional policies in mind. Providers may claim ownership of any submitted content, which although ultimately harmless in many instances, may prove problematic if this practice (and any conflict with institutional policies) is not disclosed to students in advance.

IV. State and Federal Compliance

The adoption of OER as required course materials may also present compliance obligations. Several states have enacted statutory initiatives that support or require the adoption of OER and mandate that subject institutions also abide by specific labeling requirements.[53] For example, Oregon requires specified public universities and community colleges to "prominently designate courses" utilizing OER in registration materials and bookstore listings.[54] Similarly, Washington requires its community and technical colleges to display or link to textbook cost information in a course's online description during the registration period and to identify whether a course uses OER.[55]

At the federal level, the Higher Education Opportunity Act (HEOA) contains textbook and cost reporting requirements for all institutions that receive Title IV funds.[56] These requirements—like the growing utilization of OER—were born out of concern over the textbook costs incurred by students.[57] However, the HEOA's requirements were established without mention, and years prior to the rise, of OER. Consequently, the extent to which certain HEOA provisions apply to OER is unclear.

The HEOA's textbook provisions generally apply to "college textbooks," "supplemental material," and "publishers," as those terms are (vaguely) defined in the Act.[58] An institution's primary obligation is to publish in the online course schedule the International Standard Book Number (ISBN) and price of all textbooks and supplemental materials.[59] If such information is not yet available during the course registration period, the institution must disclose the textbooks' or

supplemental materials' respective author, title, publisher, and copyright date.[60] Alternatively, if needed, the institution may designate those materials as "to be determined" in the online course schedule.[61]

The question that must be answered by the institution's counsel is whether OER qualify as textbooks or supplemental materials as defined by the HEOA. Although many examples of OER do not fit the common definition of a "textbook," some examples are virtually indistinguishable, except for the retail price. Further, in many instances, OER do not originate from a "publisher" and are not assigned an ISBN.[62] Many OER are not designed specifically to "accompany" a separate textbook, which would seem to remove them from the HEOA's definition of "supplemental material."[63] On the other hand, proprietary materials developed and distributed by commercial OER publishers, discussed in Section III *supra*, may fit squarely within this definition. Accordingly, an institution should carefully evaluate the HEOA's textbook provisions against the OER it adopts to determine whether compliance obligations are triggered.

Finally, an institution that includes the costs of OER as a component of tuition and fees and applies Title IV student aid funds to those costs should abide by federal cash management regulations and document that the costs for the materials are lower than the competitive market rate for the same materials (or that the materials are not available elsewhere), provide access to the materials in a timely manner, and (if the materials are available elsewhere) allow students a means to opt out of the program in conjunction with a corresponding reduction in tuition.[64]

V. The Institution's Role

OER adoption may occur in a centralized manner, led and supported by the central administration of the institution, or in a decentralized manner initiated by individual faculty on a course-by-course basis. Regardless, centralized involvement in any substantial OER adoption effort likely is inevitable due to the high-risk nature of accessibility, copyright infringement, and other issues.[65] At least one state requires centralized institutional coordination and the creation of OER adoption guidelines.[66]

An institution is wise to take a proactive stance and establish uniform accessibility standards for OER and other course materials to be adopted. Even without centralized support or encouragement for OER adoption, the institution is ultimately accountable for ensuring access to its programs. In the absence of a proactive accessibility campaign, an institution may otherwise mitigate risk by coordinating periodic accessibility assessments of course materials and directing appropriate corrective action.

Similarly, an institution's interest in copyright compliance is best served by delivering coordinated education and guidance pertaining to open license terms and other copyright concepts; this education and guidance must be delivered in a clear, simplified, and easy-to-follow format to ensure maximum compliance. Ensuring the existence and effectiveness of a Digital Millennium Copyright Act take-down policy will also assist in responding to, and avoiding liability for, claims of copyright infringement.[67]

Decentralized adoption efforts present issues related to contracting and signature authority. Individual faculty may encounter and accept the terms of click-thru agreements, discussed *supra*, when sourcing OER from online providers or repositories.[68] Faculty may not possess formal authority to enter into these contracts on behalf of the institution, a fact that may or may not actually prevent them from proceeding. Depending on state law, they may possess the indicia of apparent authority to enter into the contract, meaning that even if the institution challenges it (by asserting that the faculty member acted outside of the scope of their delegated

authority), the contract may be enforceable. Education and outreach to faculty about established contracting processes are well worth the time to help avoid such a scenario.[69]

Certain institutional units should be consulted as part of any centralized or decentralized adoption strategy, particularly the campus library and bookstore. The library's traditional role as manager of journal subscriptions and other licensed content may make it an appropriate unit to source, contract for, and house OER as a service to academic departments. Moreover, library staff are often uniquely qualified to provide training on copyright, licenses, and the evaluation of OER scholarly quality. The campus bookstore, often operated as an auxiliary service, may possess a contractual right to sell all required textbook and electronic resource adoptions. Therefore, certain OER may need to be distributed or sold through the bookstore, in particular fee-based OER that require the purchase of an individual access code. Finally, an institution that incorporates OER costs in tuition and fees should ensure the financial aid and business offices have up-to-date information on the costs assigned to the OER.

In addition to the foregoing legal issues, there are numerous other practical issues an institution should consider before undertaking and supporting an OER adoption effort.

Institutional considerations:

Would the institution benefit from piloting OER and its adoption strategy in select courses before commencing wide-scale adoption?

- Has the existing Learning Management System been evaluated for desired features that allow for optimal use of various OER and other EIT?
- Does the information technology infrastructure exist for mass storage of, and ready access to, OER?
    - If an institutional repository of OER will not exist, has the institution (i) prepared faculty or course designers for the need to periodically verify links to hosted OER, or (ii) entered into provider agreements that warrant the availability of OER for the necessary amount of time?

Student considerations:

- Does the student population possess the necessary hardware (*i.e.*, laptops and mobile devices) for convenient access to OER?
- Will the institution's reliance on OER require students to purchase data plans in order to access course materials?
    - Would this be a hardship for some students?
    - Is reliable Wi-Fi access available throughout campus?
- If the institution provides devices to enrolled students, have these devices been evaluated for compatibility with common forms of OER and EIT?
- Is the student population generally equipped with the necessary skills to utilize OER?
    - Is training available?

Faculty considerations:

- What professional development opportunities and tools exist to enhance faculty members' comfort and skill in using and customizing OER?[70]
- Are there incentives for faculty to adopt or develop OER over traditional materials?

- Are there workload adjustments available to account for the effort needed to obtain, evaluate, and customize OER?
- Can the adaptation or creation of OER fulfill service or research requirements?

CONCLUSION:

As colleges and universities increase the rate at which they are adopting OER as instructional materials, they must be mindful of various statutory and compliance obligations that attach to their use of OER, as well as attendant practical considerations. With sound policies and thoughtful practice, OER assist colleges and universities in offering students a quality education at an affordable cost.

ADDITIONAL RESOURCES:

A. Websites

Inside Digital Learning: News and opinion on digital teaching and learning, including substantial coverage of OER.

OER State Policy Tracker: Weekly updates on state OER policy.

The Open Education Research Hub (OER Hub): OER Hub is a UK-based organization that studies the impact, and advances the use, of OER.

NACUA's Copyright and Fair Use Resource Page

B. Documents

Lucy France and Hannah Ross, *Building an Accessible Digital World: The Obligation to Make Digital Resources Accessible*, NACUANOTES, Vol. 14, Iss. 7 (July 28, 2016).

Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices, Privacy Technical Assistance Center (Feb. 2014).

Protecting Student Privacy While Using Online Educational Services: Model Terms of Service, Privacy Technical Assistance Center (Jan. 2015).

END NOTES:

[1] James T. Koebel is Assistant General Counsel at the University of North Carolina at Wilmington. Thank you to the NACUA staff and colleagues who reviewed and provided substantive comments on this NACUANOTE.

[2] *See generally* Doug Lederman, *The OER Moment*, INSIDE HIGHER ED (June 22, 2017) (compiling news and opinion articles regarding the rise of OER); *Open Educational Resources at UMUC*, UNIV. OF MD. UNIV. COLL. (last visited July 10, 2018) ("We've replaced nearly every textbook for undergraduate courses with no-cost electronic resources and we plan to replace nearly every graduate textbook with no-cost eResources as well."); *Textbook-Free Degree*, TIDEWATER CMTY. COLL. (last visited July 10, 2018) ("Currently, TCC offers a textbook-free Associate of Science in Business Administration.").

[3] *See, e.g.*, Lindsay McKenzie, "Free Digital Textbooks vs. Purchased Commercial Textbooks," *Inside Higher Ed* (July 16, 2018) (citing a study at the University Of Georgia that found that college students provided with free course materials at the beginning of a class get better academic results than students that do not); Ann Fiddler, "Open Educational Resources Bring Huge Cost Savings. Here Are 4 More Ways They Benefit Students and Teachers," *The 74* (Apr. 22, 2018); Jean Dimeo, "Trial and Error: Cutting Textbook Costs," *Inside Higher Ed* (Mar. 29, 2017).

[4] *See infra* Section V.

[5] *See* Carl Straumsheim, "Scaling Up OER," *Inside Higher Ed* (June 22, 2016) (discussing OER programs in Arizona, New Hampshire, New York, and Virginia).

[6] Mark Lieberman, "Feds Come Around to OER – Slowly," *Inside Higher Ed* (Mar. 28, 2018). In October 2018, the Department of Education awarded the funds. Mark Lieberman, "Single Project Earns Federal OER Pilot Grant," *Inside Higher Ed* (Oct. 2, 2018).

[7] *See* "Additional Resources" at the end of this NACUANOTE (providing websites and documents about OER).

[8] The accessibility of EIT in the classroom was the subject of a resolution agreement between OCR and the University of Montana. University of Montana Resolution Agreement ("Montana Resolution Agreement"), Case No. 10122118 (Mar. 10, 2014). In that agreement, OCR provided the following definition of EIT, which is an expansion of the definition established under Section 508 of the Rehabilitation Act for purposes of creating accessibility standards for the federal government (36 C.F.R. § 1194.4):

> "Electronic and information technology" or "EIT" includes information technology and any equipment or interconnected system or subsystem of equipment that is used in the creation, conversion, or duplication of data or information. The term electronic and information technology includes, but is not limited to, the internet and intranet websites, content delivered in digital form, electronic books and electronic book reading systems, search engines and databases, learning management systems, classroom technology and multimedia, personal response systems ("clickers"), and office equipment such as classroom podiums, copiers and fax machines. It also includes any equipment or interconnected system or subsystem of equipment that is used in the automatic acquisition, creation, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. This term includes telecommunications products (such as telephones), information kiosks, Automated Teller Machines (ATMs) transaction machines [sic], computers, ancillary equipment, software, firmware and similar procedures, services (including support services), and related resources.
> *Id*. at 1-2.

[9] *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (explaining that because fair use is an affirmative defense, "its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.").

[10] 17 U.S.C. § 107 (2016).

[11] For example, faculty may utilize content available in their library's collections or through its subscriptions, or pursuant to the Copyright Act's face-to-face teaching exception (17 U.S.C. § 110(1) (2016)) and TEACH Act provisions for digital transmission (17 U.S.C. § 110(2) (2016)), or materials in the public domain.

[12] *See, e.g.*, *FAQ*, OPENSTAX, (last visited July 10, 2018) ("OpenStax textbook projects are developed and peer-reviewed by educators to ensure they are readable and accurate, meet the scope and sequence requirements of each course, are supported by instructor ancillaries, and are available with the latest technology-based learning tools.").

[13] *See, e.g.*, *Policies and Practices*, MERLOT [hereinafter MERLOT Policies and Practices] (last visited July 10, 2018) ("MERLOT checks all material links in the catalog monthly using a web link validation system. The system produces a list of materials with invalid URLs. Each of these is tested by following the URL provided on the material's Detail View page. When a valid URL is found, the detail view page in MERLOT is updated.").

[14] *See, e.g.*, *Become an Author*, THE CTR. FOR COMPUTER-ASSISTED LEGAL INSTRUCTION (CALI) (last visited July 10, 2018) ("Third Party IP in final versions of accepted chapters or books must be cleared by Author and must permit distribution with a Creative Commons license.").

[15] *See, e.g.*, MERLOT Policies and Practices, *supra* note 13 (see sections 3.5 and 11.9); *Khan Academy Terms of Service*, KHAN ACAD. (last visited July 10, 2018).

[16] *See, e.g.*, *Philosophy*, BARNES & NOBLE EDUC. COURSEWARE (last visited July 10, 2018) (advertising that it provides analytics, among other features, for its fee-based "turnkey" courses, which incorporate OER); *Bringing Value to OER*, CENGAGE (last visited July 10, 2018) (advertising "bringing value to OER" by pairing it with curated content, instructor resources, and assessment tools).

[17] 17 U.S.C. § 102(b) (2016) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

[18] 17 U.S.C. § 102(a) (2016). In general, a work created on or after January 1, 1978 is subject to copyright during the life of the author and lasting for 70 years after his or her death. *Id*. at § 302(a). Some 20[th] century works created before 1978 are still entitled to copyright protection, depending on several factors. *Id*. at § 304.

[19] *See supra* note 11.

[20] *See, e.g.*, S. ASS'N OF COLLS. AND SCHS. COMM'N ON COLLS., RESOURCE MANUAL FOR THE PRINCIPLES OF ACCREDITATION: FOUNDATIONS FOR QUALITY ENHANCEMENT (2018) **(**detailing standards for evaluation of the role of faculty (Section 6) and educational program structure and content (Section 9)).

[21] 34 C.F.R. § 600.2 (2014) (defining "correspondence course" and "distance education" for purposes of establishing federal student aid eligibility).

[22] Title II at 42 U.S.C. §§ 12131-12134 (1990), and its implementing regulations at 28 C.F.R. Part 35; Title III at 42 U.S.C. §§ 12181-12189 (1990), and its implementing regulations at 28 C.F.R. Part 36.
[23] 29 U.S.C. § 794 (2015).

[24] *See* Laura Rothstein, *The Americans with Disabilities Act and Higher Education 25 Years Later: An Update on the History and Current Disability Discrimination Issues for Higher Education*, 41 J.C. & U.L. 531, 551-52 (2015).

[25] "Universal design" refers to methods of instruction and content design that address the needs of learners "regardless of ability, disability, age, gender, or cultural and linguistic background." *TEAL Center Fact Sheet No. 2: Fact Sheet: Universal Design for Learning*, LITERACY INFO. & COMMC'N SYS. (last visited October 8, 2018).
[26] The Department of Justice withdrew ADA accessibility rulemaking efforts in December 2017. 82 Fed. Reg. 60,932 (Dec. 26, 2017). Some states, however, maintain web or EIT accessibility standards that apply to state institutions, including public universities. *See, e.g.*, Information Technology Accessibility Act, Ill.

Pub. Act No. 095-0307 (2007); Electronic and Information Technology Accessibility Act, OKLA. STAT. ANN. tit. 62, §§ 34.28-.30 (2010).

[27] *See* Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 81 Fed. Reg. 28,660-28, 661 (May 9, 2016) ("There is no doubt that the programs, services, and activities provided by State and local government entities on their Web sites are covered by title II of the ADA. . . . Similarly, Web sites of recipients of Federal financial assistance are covered by section 504 of the Rehabilitation Act."). Moreover, institutions should be mindful of adopting OER in accordance with any institutional policies and aspirational statements on accessibility and non-discrimination.

[28] Press Release, U.S. Dep't of Educ., U.S. Department of Education Launches New Website Accessibility Technical Assistance Initiative (May 17, 2018).

[29] *See* Montana Resolution Agreement, *supra*, note 8; Louisiana Tech University, Board of Supervisors for the University of Louisiana System Settlement Agreement, Civil Rights Div., U.S. Dep't of Justice, No. 204-33-116 (July 23, 2013); University of Phoenix Resolution Agreement ("Phoenix Resolution Agreement"), Case No. 08-15-2040 (June 12, 2015).

[30] Lucy France and Hannah Ross, *Building an Accessible Digital World: The Obligation to Make Digital Resources Accessible*, NACUANOTES, Vol. 14, Iss. 7 (July 29, 2016).

[31] Creative Commons—a non-profit organization that publishes licenses for content creators to apply to their works at no cost—for example, allows authors and creators to apply a "no rights reserved" license ("CC0") to their works in lieu of other open license options. *CC0*, CREATIVE COMMONS (last visited July 11, 2018).

[32] Equally important, though rarely an issue, is that the license applied to OER be non-exclusive and perpetual.

[33] *See* 17 U.S.C. § 106 (2016) (granting exclusive rights to reproduction, distribution, and other uses to the copyright owner).

[34] All Creative Commons licenses, for example, permit users to further share a work. *About the Licenses*, CREATIVE COMMONS (last visited July 11, 2018).

[35] *See, e.g.*, *Securities & Investments*, BARNES & NOBLE EDUC. COURSEWARE, (last visited July 10, 2018) ("The content of this course was created by BNED. Unless otherwise noted, it is under CC BY-NC-SA 4.0 Attribution License."); *OpenNow*, CENGAGE, (last visited July 10, 2018) ("CC-BY-licensed (5Rs), so instructors and institutions can adapt and reuse all narrative and assessment content as needed.").

[36] Edit, modify, customize, remix, repurpose, and build upon, among other terms, are all generally synonymous with "adapt." *See, e.g.*, *Attribution 4.0 International*, CREATIVE COMMONS, (last visited July 11, 2018) ("Adapted Material means material . . . that is derived from or based upon the Licensed Material and in which the Licensed Material is translated, altered, arranged, transformed, or otherwise modified . . . .").

[37] 17 U.S.C. § 106(2) (2016). *See Gilliam v. Am. Broadcasting Cos.*, 538 F.2d 14, 21 (2d Cir. 1976) ("[T]he ability of the copyright holder to control his work remains paramount in our copyright law [and] therefore, [the] unauthorized editing of the underlying work, if proven, would constitute an infringement of the copyright in that work . . . .").

[38] All Creative Commons licenses, for example, require attribution. *Licensing Types*, CREATIVE COMMONS (last visited July 11, 2018). *See generally Jacobsen v. Katzer*, 535 F.3d 1373, 1379 (Fed. Cir. 2008) (considering "the ability of a copyright holder to dedicate certain work to free public use and yet enforce an 'open source' copyright license to control the future distribution and modification of that work.").

[39] *See Jacobsen*, 535 F.3d at 1381-82 (holding that an open license created enforceable copyright conditions by permitting copying, modification, and distribution of the work "provided that" the author of the modified work give attribution to the original author and a description of the modifications).

[40] *See supra* note 33 and accompanying text.

[41] *See, e.g.*, *Attribution-NoDerivatives 4.0 International*, CREATIVE COMMONS, (last visited July 11, 2018) (providing an agreement for the licensee to "reproduce and Share the Licensed Material, in whole or in part; and . . . produce and reproduce, but not Share, Adapted Material.").

[42] *See, e.g.*, *Attribution-ShareAlike 4.0 International*, CREATIVE COMMONS (last visited July 11, 2018) ("You are free to: Share [and] . . . Adapt – remix, transform, and build upon the material for any purpose, even commercially.").

[43] *See Wallace v. IBM Corp.*, 467 F.3d 1104, 1105 (7th Cir. 2006) (examining the GNU General Public License, which permits software users to "make and distribute derivative works if and only if they come under the same license terms as the original work").

[44] *See NonCommercial Interpretation*, CREATIVE COMMONS (last visited July 11, 2018) ("The NonCommercial ('NC') element is found in three of the six CC licenses: BY-NC, BY-NC-SA, and BY-NC-ND.").

[45] *See, e.g.*, *Open Yale Courses: Help*, YALE UNIV. (last visited July 10, 2018) (explaining that a user "can use all or a portion of the Open Yale Courses materials to teach" in accordance with its non-commercial license restriction); *Tufts OpenCourseWare*, TUFTS UNIV. ("Under the Creative Commons [Attribution-Noncommercial-Share Alike 3.0 Unported] license, the website provides open sharing of free, searchable course content to educators, students, and self-learners throughout the world.") (Website retired on June 30, 2018; archived copy on file with author); *UMass Boston OpenCourseWare*, UNIV. OF MASS. BOS. (last visited July 10, 2018) ("UMass Boston OCW is a free and open educational resource for faculty, students, and self-learners world wide.").

[46] *See MIT OpenCourseware: Privacy and Terms of Use*, MASS. INST. OF TECH. (last visited July 10, 2018) ("Recovery of nominal actual costs for copying small amounts (under 1000 copies) of OCW content on paper or CDs is allowed for educational purposes so long as there is no profit motive and so long as the intended use of the copies is in compliance with all license terms."); *Open Yale Courses: Terms of Use*, YALE UNIV. (last visited July 10, 2018) ("Yale considers any use of Open Yale Courses and its content for the purpose of deriving profit or promoting a profit-based enterprise to be prohibited commercial use.").

[47] *See* 17 U.S.C. § 103(b) (2016); *Gilliam*, 538 F.2d at 21 ("[A] grantor may not convey greater rights than it owns . . . .").

[48] *See id*. *See generally* Joseph Storch, Stephanie Morrison and Jack Bernard, *Synching Your Teeth Into Copyright Law: Legal and Practical Considerations for Public Performances of Video and Photos Synchronized to Copyrighted Music*, NACUANOTES, Vol. 15, Iss. 8 (May 8, 2017) ("[F]aculty and students also increasingly use multi-media as part of teaching and learning activities, actions that may raise synchronization issues and attendant responsibilities when course materials, assignments or scholarly works are destined for posting on the Internet.").

[49] *See* 17 U.S.C. § 512(d) (2016). The Digital Millennium Copyright Act (Pub. L. No. 105-304, 112 Stat. 2860 (1998)) shields entities from liability for copyright infringement when using hyperlinks to infringing material hosted elsewhere if the entity:

> (1)
> (A) does not have actual knowledge that the material or activity is infringing;
> (B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.
17 U.S.C. § 512(d).

This method does, of course, depend on the safety and reliability of the hyperlinked source.

[50] *See generally* John W. Calkins, et al., "Storm Cloud Computing: A Practical Checklist of Issues to Consider for Universities Acting in the Cloud" (NACUA Annual Conference 2015) (listing contractual issues and risks that may be encountered in third party service provider agreements).

[51] *See* 34 C.F.R. § 99.31(a)(1) (2011) (permitting disclosure of protected information without student consent to other school officials with legitimate educational interests); § 99.7(a)(3)(iii) (1996) (requiring institutions that have a policy of disclosing information to school officials to specify criteria "for determining who constitutes a school official and what constitutes a legitimate educational interest"); *See generally* PROTECTING STUDENT PRIVACY WHILE USING ONLINE EDUCATIONAL SERVICES: REQUIREMENTS AND BEST PRACTICES, PRIVACY TECHNICAL ASSISTANCE CTR. (Feb. 2014) (explaining that some types of online educational services use FERPA-protected information).

[52] § 99.30(a) (2004); § 99.31(a)(1) (2011). The Family Policy Compliance Office has found FERPA violations where institutions have required student consent to disclose their protected information as conditions of attendance or receipt of educational services. *See* Letter from Dale King, Director of the Family Policy Compliance Office to Agora Cyber Charter Sch. (Nov. 2, 2017) (finding a FERPA violation where an institution required acceptance of third-party terms of service that permitted disclosure of FERPA information); Letter from LeRoy S. Rooker, Director of the Family Policy Compliance Office to Dr. Elaine Ryan, President, Coll. of S. Md. (July 26, 2005) (acknowledging an institution's ability to request student waivers of FERPA rights "provided it does not *require* the waiver, i.e., that it is knowing and voluntary, and the waiver is in writing and signed by the student") (emphasis in original).

[53] *See* Mark Lieberman, "OER and Affordable-Textbook Labeling Gains Ground," *Inside Higher Ed* (Dec. 6, 2017).

[54] H.B. 2871, 78th Leg. Assemb., Reg. Sess. (Or. 2015).

[55] WASH. REV. CODE § 28B.50.789(1) (2017).

[56] 20 U.S.C. § 1015b (2008). A bill entitled the Affordable College Textbook Act was unsuccessfully introduced in the 115th Congress, which would have specifically addressed OER in higher education. Among other provisions, it would have amended the HEOA's textbook provisions to include OER. H.R. 3840, 115th Cong. (1st Sess. 2017).

[57] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-368, COLLEGE TEXTBOOKS: STUDENTS HAVE GREATER ACCESS TO TEXTBOOK INFORMATION 1 (2013).

[58] 20 U.S.C. § 1015b(b) (2008). Several provisions impose compliance requirements on textbook publishers, which this NACUANOTE will not discuss. A "publisher" is defined as a "publisher of college textbooks or supplemental materials involved in or affecting interstate commerce." *Id*. at § 1015b(b)(7).

Given the cost-free availability of many examples of OER, whether OER publishers are involved in or affect interstate commerce and thus subject to the HEOA provisions requires further analysis.

[59] 20 U.S.C. § 1015b(d)(1) (2008). The institution must also provide the same information to its bookstore. *Id*. at § 1015b(e).

[60] *Id.* at § 1015b(d)(1)(A).

[61] *Id.* at § 1015b(d)(1)(B).

[62] OpenStax textbooks, which are published by Rice University and assigned ISBNs, are one exception. OPENSTAX (last visited July 10, 2018).

[63] 20 U.S.C. § 1015b(b)(9) (2008).

[64] 34 C.F.R. § 668.164(c)(2) (2016).

[65] Likewise, existing university-wide policies that address accessibility, copyright, and signature authority may need to be updated to better align with the institution's OER stance and strategy. A recent NACUANOTE offers a number of practical steps and recommendations for the development of policies and practices related to accessible technology, many of which can be applied successfully to other topics. France & Ross, *supra* note 30, at Section II.

[66] *See* H.B. 454 (Va. 2018).

[67] *See* 17 U.S.C. § 512(c) (2010) (providing safe harbor from liability based in part on a service provider's expeditious removal of allegedly infringing material upon receiving notice). For a small sampling of the many excellent DMCA policies and resource pages available at colleges and universities of all types and sizes, see *Digital Copyright and DMCA*, CARNEGIE MELLON UNIV. (last visited July 12, 2018); *Guidelines for DMCA Agents*, UNIV. OF MO. SYS. (last visited July 12, 2018); *Information Security at UVA: Digital Millennium Copyright Act*, UNIV. OF VA. (last visited July 12, 2018).

[68] *See supra* Section IV.B.4.

[69] *See generally* WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 257-62 (5th ed. 2014); Robert J. Haverkamp, "A Primer on Procurement: Policy, Process, and Problems," 4-11 (NACUA Annual Conference 2012).

[70] *See* UNESCO & COMMONWEALTH OF LEARNING, GUIDELINES FOR OPEN EDUCATIONAL RESOURCES (OER) IN HIGHER EDUCATION APPENDIX 1 (2015).

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