

The professor's ethical dilemma: selling to textbook buyers

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ABSTRACT

Krohn (1991) wrote decades ago of a “new business has developed that has forced professors to make ethical decisions regularly—the door-to-door complimentary textbook buyer. As far back as the 1980s, losses in sales attributable to sales of complimentary texts were estimated at \$80 million annually (Veliotes, 1987; Ladd, 1988). The New York Times published a highly critical piece on titled, “How Professors Help Rip Off Students,” in 2019 arguing that textbook prices are too high (Wu, 2019). Part of the cause of textbook price increases of over 1,000 percent since the 1970s (Wu, 2019) is the built in complementary professorial copies and reselling to textbook buyers. This case is appropriate for ethics courses, business ethics courses, or for professional development for university faculty. The case can be used to illustrate how differing ethical theories are applicable for making informed and ethical decisions. This case details an actual situation with the identifiable names disguised.

Teaching Notes are available by request from the lead author smetts@SE.edu.

Keywords: ethics, first sale doctrine, copyright, royalty, publisher, author, textbook, buyer, prices, professors, cost, complementary, examination copies, textbook prices, university texts

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INTRODUCTION

Dr. Howard Stevens, a professor in the School of Business at State University sat awaiting the start of a committee meeting called to consider creating a policy that would ban any type of solicitation on the University campus. As he waited, he considered the impact the solicitation ban would potentially have on independent book buyers and on some of his colleagues. Professor Stevens doesn't believe that the process is ethical, but understands that for many of these independent book buyers the practice is their livelihood. Likewise, for many of his colleagues, the practice is a means to supplement their income. He also considered the impact the practice has on students in that the losses incurred by publishers from the sales of the text are passed on to them through inflated textbook prices.

BACKGROUND

Textbook publishers regularly send professors complimentary copies—free-of-charge. These free copies of their most recent textbooks are provided as part of the textbook marketers' hopes that professors will adopt their company's books in their respective courses. When this happens, the companies are guaranteed to receive income from the required purchases of the texts. Oftentimes, professors request desk copies of textbooks but many times receive unsolicited copies of texts from publishers. The issue that troubles Professor Stevens though is what happens to those complimentary texts that are not ultimately adopted for a professor's own course.

Several times a semester, independent book buyers visit campuses all over the United States, including Professor Steven's university. They visit individual professors, office by office to inquire if the professors have any unused textbooks they would like to sell. By scanning the bar codes of the books, a professor indicates he or she does not want to keep, book buyers can ascertain the current selling price and based on this then offer the professor an amount of cash for the text. Since the professor did not purchase the text but was gifted it as a review copy, and because he or she has determined not to use it for the class they teach, they may decide to accept the cash offer (rarely if ever is this transaction reported as personal income). The buyer in turns resells the books to other resellers or wholesalers for profit, and they in turn sell to other students at other universities where the respective text has been adopted as a required text. The result is that authors are deprived of royalties, publishers are deprived of profit, and the textbook reseller is in the eyes of the industry and others may have committed an ethical breach of conduct.

The issue is not new. Krohn (1991) pointed out that a "new business has developed that has forced professors to make ethical decisions regularly. The new business makes its presence known through the door-to-door complimentary textbook buyer (Krohn, 1991, p. 99). As far back as the late 1980s, losses in sales attributable to the sales by professors of complimentary texts were estimated at \$80 million per year (Veliotis, 1987; Ladd, 1988). The New York Times published a highly critical piece on titled, "How Professors Help Rip Off Students," in 2019 arguing that textbook prices are too high (Wu, 2019). While not specifically addressing the reselling of complementary texts, the article addresses the rapid rise in textbook costs over the last several years and the exploitative prices that students are required to pay through the system that has emerged for textbook selection. No doubt, part of that system and contribution to textbook prices increases of over 1,000 percent since the 1970s (Wu, 2019) is the built in complimentary professorial copies and reselling to textbook buyers.

THE DILEMMA

Dr. Stevens is a salaried faculty member of the university and feels he has a moral obligation to not profit from the sale of anything he receives as part of his job and didn't purchase with his own money. Even though book publishers legally relinquish all property rights to the textbooks they send him and other faculty, and the publishers are aware that the textbooks may be sold on the secondary market, Dr. Stevens declines to sell his books to these independent book buyers. Instead, he either normally returns the books to the publishers or sets older editions out for students to take. However, he has many colleagues who do not feel the same. Many of them do not have a problem selling books to the independent book buyers arguing that they have a right to do so under any circumstances. Others feel a professor should not sell a copy of a text that they requested from the publisher but believe that it is completely acceptable to sell unsolicited textbooks sent to them by the publishers.

Positions Overview

In his article on the ethics of selling complementary copies of textbooks, Klaus posited three alternative views on the subject:

Position 1: Complementary copies of textbooks are gifts, and therefore a person is free to do whatever they want with their own property. More to the point, it would be hard to deny that your property is yours to do with as you see fit...In a way, though...it's good for professors to sell comped books because it puts more pressure on the publishers to lower exorbitant prices.

Position 2: Textbook re-selling is wrong because sellers are paid nothing. A person may have a legal right to dispose of their property, but that does not mean that they have a moral or ethical right to do so. Therefore, professors should keep these books for the common reference of their students, or give them away.

Position 3: Selling complementary textbooks is not entirely wrong but if sold, they should be sold at a heavily discounted price. Should a professor sell a complementary textbook, they should sell it through a company that deals in discount textbooks (Klaus, 2018).

Robie, Kidwell, and Kling pointed out that a mitigating factor may be whether or not the complementary book is sent to a professor who did not first request it (Robie et al., 2003 p. 64). Their study concluded that professors are most likely to perceive book selling as ethical when the books in question are given to them without being solicited from the publisher and when money gained from the sale of the books is used to fund student activities. Furthermore, they indicated that the practice of book selling is a moderately accepted and expensive proposition that can possibly be controlled through situation manipulations, that very few institutions have policies that govern the practice of books selling, and that more careful screening of examination book distribution could significantly reduce the practice of book selling (Robie et al., 2003, p. 72).

Others are more adamant in their opposition arguing that selling complimentary copies is unethical. "Publishers give complimentary (sic) copies of their books in the reasonable expectation that the teacher will adopt or recommend the book for the entire class and thus promote hundreds of sales throughout the life of the book. Whether or not the book is adopted, the teacher should not divert the complimentary copy into the commercial market that was not intended by publisher (ScotDir.com, 2021). Others have argued that the morality of textbook

(reselling) is governed by the answer to one question: “Is it good for students or bad for students? Does the professorial practice of selling comp copies lead to higher prices for students overall, or not?” (Woolley, 2021).

Other University’s Policies

In preparation of the university meeting to consider the banning of any type of solicitation on his own campus, Dr. Stevens researched other university’s policies on the topic of selling complementary textbooks. In conducting his research, he found that some of the institutions prohibit the sale of the textbooks entirely while others restrict the proceeds of any such sales. For instance, academic policies at the University of Alabama indicate that faculty may sell complementary copies of textbooks given to them to review only if they give the proceeds from the sale to the university for departmental use. According to a Washington State Executive Ethics Board ruling, faculty at the Community Colleges of Spokane Washington are prohibited to sell complimentary copies of textbooks regardless of how the proceeds are used. At the University of Kansas, examination copies given to faculty are considered state property. An April 22, 2021 memo sent to the faculty from the Vice Provost for Faculty Development, entitled “Sale of Examination Copies of Textbooks” states the “Kansas Governmental Ethics Commission opined that faculty may accept examination copies of textbooks valued at \$40 or more on behalf of the state and have them become state property” (University of Kansas, 2021). Thus, the Kansas Governmental Ethics Commission ruling (1997) turns the faculty into custodians of the property for the State. As custodians, the faculty may not sell state property and upon leaving employment with the university are not allowed to take the examination copies with them. A copy of the memo and the Kansas Governmental Ethics ruling are shown in Figure 1 and Figure 2, respectively.

Minnesota state colleges and universities are allowed to accept complementary copies of textbooks but may not sell them for personal gain. At the University of North Carolina at Charlotte, faculty members may sell books that were sent to them personally and not to the department/position title. The State of Colorado’s Independent Ethics Commission (2009) under Advisory Opinion No. 09-01 states “A professor may accept an “examination copy” of a textbook that sells for more than \$50 if it was unsolicited. Solicited copies may also be accepted as a gift to the University. Regardless of whether the professor decides to use the book for his or her courses, he or she may not sell it to a student, another professor or a book-buyer.”

Figure 1: University of Kansas Office of Provost Memo

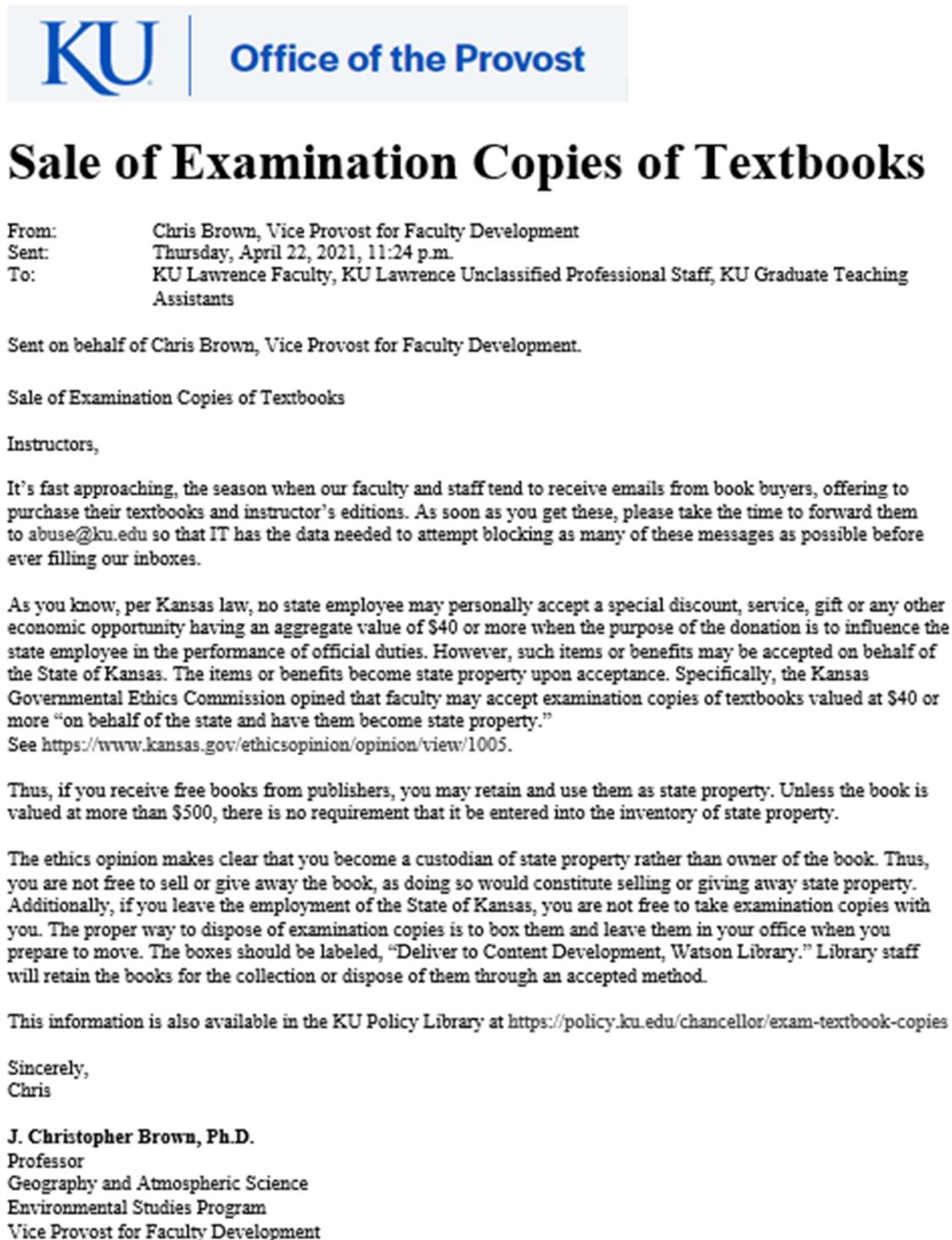


Figure 2: Kansas Governmental Ethics Commission Ruling



December 4, 1997

Opinion No. 1997-49

Arthur L. Morin
Assistant Professor
Fort Hays State University
600 Park St
Hays, Kansas 67601-4099

Dear Mr. Morin:

This opinion is in response to your letter of September 15, 1997, in which you request an opinion from the Kansas Commission on Governmental Standards and Conduct concerning the state level conflict of interest laws (K.S.A. 46-215 et seq.). We note at the outset that the Commission's jurisdiction is limited to the application of K.S.A. 46-215 et seq., and whether some other statutory system, common law theory or agency rule and regulation applies to your inquiry is not covered by this opinion.

FACTUAL STATEMENT

We understand you request this opinion in your capacity as an Assistant Professor with Fort Hays State University. You advise us that you are in charge of selecting textbooks to be used in your class. Publishers often send you free copies of books to look at before you make your selection, and desk copies of books and newspapers used in your classroom are usually supplied to you free of charge. The Commission's staff was notified by telephone that your position is in the unclassified service of the Kansas civil service act, and your salary is not subject to direct approval by the Governor.

QUESTIONS

1. Is it a violation for you to keep copies of books sent to you by publishers who want you to then order the books for your classroom?
2. Is it a violation for you to receive a free desk copy of newspapers and books used in your classroom?

OPINION

Because you are in the unclassified service and your salary is not subject to direct approval by the Governor, K.S.A. 46-237, rather than Section 4 of HB 2064 found in Chapter 155 of the 1997 Session Laws of Kansas, applies to your questions. K.S.A. 46-237(a) in pertinent part states:

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"(a) No state officer or employee...shall accept, or agree to accept any economic opportunity, gift, loan, gratuity, special discount, favor, hospitality, or service having an aggregate value of \$40 or more in any calendar year from any one person known to have a special interest, under circumstances where such person knows or should know that a major purpose of the donor is to influence such person in the performance of their official duties or prospective official duties."

K.S.A. 46-237(c) states:

"No person licensed, inspected or regulated by a state agency shall offer, pay, give or make any economic opportunity, gift, loan, gratuity, special discount, favor, hospitality, or service having an aggregate value of \$40 or more in any calendar year to such agency or any state officer or employee, candidate for state office or state officer elect of that agency."

In applying this language to your questions, since you make the decisions on which textbooks are to be used in your classroom, each publisher would have a "special interest" in you. In addition, the books and newspapers are being provided to you in order to influence you in the performance of your official duties in selecting books and newspapers. Therefore, you could not accept these items as your personal property. However, since your university does not license, inspect or regulate the publishers, you could accept the items on behalf of the state and have them become state property.

Sincerely,

Diane Gaede, Chairwoman

By Direction of the Commission

DG:WCS:dhw

Legal Aspects

Dr. Stevens also wanted to inquire about the legalities behind the practice. He reached out to his good friend and local attorney, Hamilton Burgered. Hamilton informed Dr. Stevens there were several areas to consider. First, was the first sale doctrine. Hamilton explained the first sale doctrine basically says that once there is a purchase of a copyrighted work, the bona fide purchaser for value may dispose of it as they see fit. However, there are a few caveats to this such as, the purchaser may not make copies and resale those copies. Also, the destruction of works of art is discouraged for we do not want someone buying up all the Monet's and then burning them to deprive humanity of viewing them ever again. Hamilton stated the first sale doctrine never applies to reproductions; it applies to a particularly singular item. The U. S. Constitution states in Title 17, Chapter 1, Section 109(d), "The privileges prescribed ... do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without

acquiring ownership of it.” (The United States Department of Justice Archives, n.d.). Dr. Stevens questioned what does that all mean? Hamilton replied that basically, if you buy a copy of a textbook, you may use that particular book as you wish.

Dr. Stevens asked what if I didn't buy the book, but it was given to me? Hamilton informed Dr. Stevens that according to LegalMatch.com (2021), “a gift is defined as “a definite, voluntary transfer of property from [one] to another”, without consideration or “an expectation of receiving compensation in return,” Thus, he said, brings up an interesting dilemma. If the book was transferred from the publisher, with the expectation that the professor would assign the book to his students, thus increasing the sales of the publisher, then that is consideration. This means it cannot be a gift. Dr. Stevens said well, everything is clear as mud right now. Hamilton chuckled and replied, exactly as it should be with this discussion. Hamilton added that following the true letter of the law, when a publisher gives a professor a book, it is not a gift, and it is not subject to the first sale doctrine because it was not purchased. This means that the professor cannot dispose of it in any manner they choose, because it does not fall under the legal definition of personal property belonging to the professor.

Hamilton added, now, we all know how things actually work in practice is not a true derivative of the written law. My advice in this matter is to look to society. If society deems it perfectly fine to sell “donated” textbooks. Then sell the book if you want to. Just be careful to watch the winds of change, and make sure you stop selling books if the direction changes.

Independent Textbook Buyer Perspective

Prior to the meeting, Dr. Stevens also spoke to Bill Smith, an independent textbook buyer that frequents the university and his department. He questioned Mr. Smith about his experiences with other institutions and their policies on soliciting and textbook buying. Mr. Smith informed Dr. Stevens that in his 27 years in the business, it is only recently that he has encountered a few institutions in his sales region that have restrictions on faculty selling textbooks. He stated that often the policy is not university-wide but differs by department on a given campus depending upon that department's administration (the dean or department chair). He stated that he has yet to be denied access to any university but a few of them require that he sign in and out through their campus security. He said that at one institution he must request to be added to the administration's approved vendors list prior to seeking out any of the faculty on their campus. He also stated he had encountered a few institutions that require that the proceeds from the sales of the textbooks go either in a student scholarship fund or be collected and designated for departmental use.

Dr. Stevens informed Mr. Smith of the no solicitation policy that the university was considering and questioned the impact this would have on him and other independent contractors. Mr. Smith stated that such a policy would be detrimental to him and others like him. He informed Dr. Stevens that he is currently an independent contractor with Booktown and receives a set rate (25 – 35% commission?) based upon the level of his sales volume. He stated as an independent contractor he has to up-front all cash payments made for the purchase of the books and his company direct deposits his commission into his personal checking account. He added that Booktown provides him with a buying guide, prepaid shipping labels, and all the supplies (boxes, tape, etc.) to ship the books to them. Mr. Smith stated that when he started in the business 27 years ago, he worked for a company that paid him a base salary of \$16,500 plus bonuses depending upon his sales volume. He said that when he left this company seven years

ago, he had a sales region stretching from Texas to as far north as the Ohio area and east to the Tennessee region and was drawing in over \$100,000 a year.

The Textbook Author

Dr. Stevens knew of a former colleague, Dr. George White, who had authored several college textbooks and spoke with him to get an author and publisher's perspective on textbook buyers. Dr. White informed Dr. Stevens that the textbook buyers create problems for authors in addition to bookstores and publishers. He stated the first problem is that the textbook copies purchased by the textbook buyers are available very soon on the market and at lower prices than that charged by bookstores thus robbing sales from the bookstores, publishers who sell the books to the bookstore, and robbing royalties from the authors. The bookstores buy them at wholesale, mark them up, and then resell them to students. In most cases, a share of the profits goes back to the universities or in some cases, the universities own the bookstore and the reduction in those profits hurt university budgets.

Dr. White stated also that the author is paid a percentage of the wholesale price for each book sold by the publisher, and in the case of reselling complementary texts, they therefore earn no royalties from the book buyers' operations. This contributes to textbook price increases for after about a year, new books are released and competing with used copies and copies bought by textbook buyers. Finally, Dr. White stated that this affects the publisher's investment in a new textbook, which may be several hundred thousand dollars for a best-selling principles or introductory text. They have to produce enough copies to cover demand and if it is a four-color book with all the ancillaries, this is soon lost as used books and textbook buyers' books flood the market. Thus, they keep raising textbooks prices to cover these costs.

The Approaching Meeting

As the meeting commences, Dr. Stevens is still undecided about how to vote on this issue. If the committee votes to ban all soliciting on campus, this will not only affect the independent textbook buyers and faculty but all organizations on campus and community organizations such as Rotary, Lions Club and the Kiwanis who hold fundraisers throughout the year. Additionally, employees will no longer be able to solicit their colleagues to purchase candy or other fundraising items for their children's' school fundraisers. The decision to ban all on campus soliciting would financially impact all of the parties. Book buyers would most likely see a reduction in their yearly income with the reduction in purchases and sales volume. The faculty who normally sold their books would lose their supplemental income and the organizations on and off campus would have to seek out other avenues to meet their fundraising goals.

Dr. Stevens is also aware of the emerging eBook/Rental market which will affect the buyback and resell market. Additionally, he considers whether his first allegiance is to the students in helping them obtain their textbooks at the lowest price possible or to the university through directing the students to the campus bookstore because the university receives a portion of the funds collected from textbook purchases.

In informal discussions with others on the committee, he thought his vote could change the recommendation the committee made to the university's Faculty Senate. Of course, the Faculty Senate would have to approve the recommendation and then the entire faculty would

vote on the issues if it were to be officially implemented, but his vote might determine whether or not a recommendation was made.

QUESTIONS

1. Contrast *utilitarianism* with *the rights principle*. Are there any cases where it would be acceptable for a faculty member to sell a textbook, solicited or non-solicited, and if so, when? Explain your answer.
2. If the book publisher sends the textbooks, solicited or non-solicited, with the stipulation that the faculty must return all unused textbooks to them via downloading a prepaid shipping label from their website, is it ethical for the faculty to sell the textbooks? If so, when? Explain your answer.
3. Do you think that Dr. Stevens should try to project his moral philosophy onto his fellow committee members? Can virtue be taught? Explain your answer.
4. Are the independent textbook buyers providing a service beyond just making a living for themselves? Explain your answer.
5. Offer guidelines for making ethical decisions? Should the committee ban all solicitations on campus? Explain your answer.

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