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Who owns educational products that are developed with public dollars, and the rights to distribute them?

By Benjamin M. Superfine and Rachel A. Gordon

The growth of standardized testing in schools—and the broader school improvement industry supplying products for educational use—are widely recognized.

For example, the average student takes eight standardized tests per year, averaging to about 112 such tests over the course of their schooling.

More than 80 percent of all U.S. school districts contract with over 3,700 outside organizations annually for professional or technical services, some of whom take on central leadership roles and responsibilities in implementing initiatives.

Whether and how such activities are good or bad for students, teachers, and principals has already been extensively debated. In relation to the educational testing:

- Some critics have expressed concern about the time students spend taking such tests, and the ways test preparation can divert from other types of learning.
- Some stakeholders have been concerned about how student scores have been aggregated to the classroom and school levels as part of teacher and principal evaluations.
- Standardized testing has also been expanding beyond academic testing to non-academic areas, like children’s social and emotional growth and school climate, which some see as beneficial and others do not.

Less widely discussed are the federal, state and local policies that importantly affect the school improvement industry industry.

- Yet understanding these policies is important because they govern who owns educational products that are developed and purchased with public dollars and the rights to sell them.
- Recently, changes in some federal regulations reflect a growing momentum toward open source measures and foreshadow issues state and local policymakers will likely face in the coming years.

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- These policies may influence the many and varied ways educational products and their associated services (like test scoring) are licensed.
- And, these policy changes – and related licensing decisions – may influence the cost and quality of educational products, including local schools’ and districts’ abilities to access and adapt them.

The recent changes shift away from decades of federal policy.

- In 2017, the U.S. Department of Education (ED) adopted regulations that allow the public to use or adapt educational products created wholly or partly with ED competitive grant funds, without paying a licensing fee or obtaining approval.
- Prior to this change, ED regulations granted unlimited intellectual property rights and royalty income to grantees and their institutions.
- More broadly, the federal Bayh-Dole Act, which passed in 1980, legally allows the kinds of closed source and private returns to federally-funded patents that ED permitted for its copyrighted products until recently.

The education field has not yet considered the implications of these policies.

- Broader literature about the Bayh-Dole Act’s effects in other fields (like biomedical patents) and the general history of educational products suggests several possible implications relevant to state and local governments.

Cost

- On the one hand, the cost of educational products could increase under an open source regime, if businesses leave the school improvement industry because they can no longer reap as large returns on intellectual property rights.
- On the other hand, the cost of educational products could decrease if monopoly opportunities are reduced and competition goes up once innovations are freely available.

Quality

- Possibly, quality could drop when private rights and returns are eliminated, because the largest companies in the school improvement industry with the greatest expertise may turn away from educational products and because developers may be less able to control how their products are used.
- At the same time, open access may lead to greater transparency about educational products, such as tests’ reliability and validity evidence and greater independent evaluation of tests.

Adaptability

- Open source could reduce adaptability of educational products, to the extent that those developers who have the greatest capacity for tailoring products to meet local needs may leave the marketplace.
- Open source could improve adaptability of educational products by giving users the source materials that they might use on their own, or in partnership with experts, to create local versions.

Broadly, the pendulum swing back toward open source reflects longstanding ideological debates in the field of education. Stakeholders should be attentive to such underlying issues as they seek to understand the cost and quality – and related local adaptability – of tests and other educational products.

Public vs. Private Action

- Some hold that private entities have greater capacities to ensure the delivery of quality goods and services to the public than do government agencies.
- Others raise myriad concerns that many private entities have significant incentives to act in their own interests (e.g. generating profit) at the expense of the public.

Equity

- Some contend that it is fair and appropriate for individual inventors and investors to receive and maximize profits for their labor, even if it means increasing costs to society.
- Others argue that because all knowledge creation relies on prior discoveries and broader infrastructure it is fair and appropriate for all to share in the benefits, and that this is especially so when discoveries also directly received investments from taxpayer dollars.

Educational Expertise

- Some maintain that only highly trained individuals who possess the needed knowledge and authority can properly engage in research and development of educational interventions.
- Others hold that the expertise needed for educational inquiry and improvement is much more distributed across product and service developers and end-line users.

Although it is unclear what outcomes will emerge from shifts toward open source regimes for educational products, federal, state and local governments can adopt practices to monitor and address them.

- Consistent with recent efforts toward continuous improvement and “open and frugal” strategies, monitoring what products schools and districts use (including their licensing agreements, costs, quality, and adaptations) is an important first step.
- Such monitoring can help states and localities identify which educational product suppliers are active in the state; sharing such information would also allow for comparisons with other states and localities.
- Partnership with the local education community in such monitoring would also be important in order to understand local needs and concerns in relation to access, quality, and adaptability, and how these issues change over time.
- Connecting the dots across such efforts, new strategies might be identified for matching either commercially distributed or locally created products to local needs.
- With continuous improvement, these matches can be regularly revisited for adjustment, when needed.
- Support for such efforts might be sought from foundations that have invested in education and in open source efforts, such as the Gates Foundation and the Hewlett Foundation.

This brief is based on a longer paper, available from the authors, which provides extended discussion and citations.

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