

Legal Issues in MOOCs

This brief summarizes the EDUCAUSE webinar “Legal Issues in MOOCs,” held on September 26, 2013, as part of an *EDUCAUSE Live!* Game Changers Spotlight Series focusing on higher education in the connected age. The speaker was Madelyn F. Wessel, Associate General Counsel, University of Virginia.

If your institution is considering producing MOOCs, or consuming them, understand that many legal and ethical gray areas remain unresolved. Uncharted territory is considerable, and it is unclear how some U.S. laws and regulations pertain in MOOC environments. Also, when coursework is beamed across the world, for profit, to “consumers” versus “students,” in countries with unfamiliar laws and regulations, it’s a whole new world of potential institutional liability.

Before venturing very far into MOOCs, institutions should seek to understand as many of the areas of risk as possible. They should also clarify up front the rights and responsibilities of all those involved, develop MOOC strategies and policies, and make certain that all faculty involved in course development are willing participants.

Context

Drawing on her experiences as counsel handling the University of Virginia’s MOOC implementation, Madelyn Wessel provided a wealth of recommendations and caveats for institutions considering a MOOC initiative.

Key Takeaways

Venture into MOOCs with eyes wide open.

If your institution is considering producing or consuming MOOCs, you’ll want to get a thorough handle on what could possibly go awry. Advance planning is a must. Some things to realize and act on include:

- **Clarify your goals.** MOOCs can support diverse institutional objectives, such as improved

teaching, new revenue streams, or brand enhancements. Or a foray into MOOCs might be led by a provost or CIO. Understand what is driving the initiative to ensure that it achieves intended goals.

- **Be aware of the costs.** MOOCs are not cheap to produce. Direct costs can approximate \$3,000 per hour. Long courses can cost as much as \$100,000 to produce.
- **Figure out a MOOC strategy.** Should you go with an internal or external hosting provider? For-profit or nonprofit?
- **Formulate institutional MOOC polices.** Don’t assume that existing policies will be sufficient to cover the unique situations that MOOCs present. For instance, will new policy be needed to address faculty IP rights over coursework they produce? What about faculty compensation/credit for MOOC course development? Word to the wise: Faculty efforts should be voluntary. Involve only the willing and enthusiastic.
- **Think about institutional oversight.** Who will run your MOOC initiative?
- **Consider institutional controls.** At what level will authority over MOOCs reside?

Risks can be minimized and possible legal difficulties circumvented with these best-practice approaches:

- **Involve faculty early and often.** MOOCs can generate much misunderstanding on campuses, especially among faculty who create the courses.
- **Approach the initiative from a beta framework.** Start with a modest number of courses and an experimental attitude. See what opportunities the space offers relative to the challenges it presents. Develop broader, long-term policies once MOOCs are better understood.

- **Negotiate an agreement with external platform providers that preserves the institution's flexibility.** Retain the ability to adjust the contract as higher education dynamics change, hosting providers evolve, and business models change. Nonexclusive contracts are best. You will want portability rights, content deal rights (e.g., with publishers), a say over the course's technology features, and data control.

“In our negotiation, we made clear that we were entering this as a beta, and we can terminate our agreement at any time. If we become uncomfortable, we're in a position to re-up negotiations or pull out.”

—Madelyn F. Wessel

- **Recognize that the platform provider's EULA matters greatly to the institution.** End-user licensing agreements (EULAs) should treat the course participants' data in ways that are consistent with your institution's expectations and norms. Be certain that the EULA conforms to U.S. law and laws in all countries where the course will be offered.

Clarify IP rights up front with both faculty and platform provider.

Different institutions take different approaches to faculty ownership of course materials. Some institutions give faculty ownership rights to everything that they produce, including course materials; some institutions only grant faculty ownership of their scholarly articles and books. Absent other agreements, the Copyright Act includes a powerful assumption of employer ownership.

Whatever your institution's existing copyright policies, these policies will affect faculty expectations regarding participation in MOOC development. Faculty with ownership rights over everything that they produce may expect the same with MOOC courseware. But the institution may wish to implement a policy that takes into account university resources that are invested in a particular piece of copyrightable IP. It is critical that

faculty understand what they are getting into up front and want to be involved.

“It's absolutely essential that faculty participation in these [MOOC] experiments be voluntary, be affirmative. . . . At my institution, some faculty were unhappy with university ownership or some aspect of what was necessarily part of the deal.”

—Madelyn F. Wessel

Notably, copyright ownership rights and copyright usage rights for the same material can be held by different parties. That is often the case with MOOC course materials, given that MOOCs often are a compilation of multiple contributors' works. There is no problem if everyone involved understands how the rights are assigned.

“Copyrights can be co-owned. They can be shared. None of this creates problems except when not clearly understood up front.”

—Madelyn F. Wessel

Platform providers typically don't seek ownership or exclusive rights; they just want distribution and use rights. However, evolving business models have caused some to seek more and more rights from institutions, including redistribution, derivative, accreditation, and resale rights. Providers have even attempted to gain rights to authorize textbooks and other course materials. Seeing an institution sign away such rights to a third party wouldn't sit well with most faculty.

These issues need to be discussed openly and agreed upon by the institution, faculty, and platform provider. Course development agreements, or CDAs,

can help align everyone's expectations about responsibilities and rights.

Use copyright-protected third-party content sparingly and with care.

MOOC course production represents yet another set of possible liability risks. The legal terrain is still cloudy, and the structural dynamics of MOOCs increase the potential for complications. All parties involved, particularly faculty, need to understand that a global learning environment differs from a conventional classroom in some important ways. Some issues that institutions must examine and discuss include:

- **Different copyright constraints may apply to different course materials.** All audible, viewable, and downloadable third-party content, in lecture videos and in all supporting materials, is subject to copyright law. Faculty need to understand that they cannot use copyright-protected third-party materials as freely online as in their classrooms.
- **MOOC platform providers must treat the institution as a publisher.** Most contracts will state that the university is responsible for reviewing and obtaining any necessary licenses, waivers, or permissions for use of third-party content.
- **Copyright knowledge gaps may pertain to teaching and learning activities that go on in the MOOC environment.** The copyright law exceptions permitting generous display of educational materials (i.e., Section 110 (1) and (2) of the Copyright Act) are limited to nonprofit educational institutions. They don't apply to for-profit MOOC platform providers.
- **MOOC course developers should not count on Fair Use to protect them.** Importantly, Fair Use (Section 107, Copyright Act) is applicable to MOOCs. However, determining what constitutes fair use of protected materials is tough. It requires case-by-case evaluation. Challenges are far more likely to arise in an online versus a campus environment. There have been no MOOC-related fair-use cases yet to provide a precedent, but among a court's considerations are two that pose particular challenges for MOOCs:
 - **Whether the purpose and character of the material's use is educational or commercial.** MOOC materials often could fit either description.

- **The impact of the use on the market for or the value of the work.** Given MOOCs' distribution to potentially tens of thousands of users, such impact could be considerable.

However, recent fair-use legal precedents unrelated to MOOCs suggest that courts are becoming more comfortable allowing transformative uses of protected materials and may be rethinking the role of copyright in a creative culture.

Other trouble-prone areas include compliance with privacy/data use regulations and online conduct.

Platform providers' terms-of-use agreements clarify that MOOC participants are not students of the university. However, faculty might blur the lines, for example by:

- **Requiring students to access MOOC materials online.** That is problematic, as access would mean students waive their FERPA rights, which the Family Policy Compliance Office (FPCO) has ruled they can't be required to do.
- **Bringing the on-campus classroom out to the MOOC by uploading recorded class sessions.**
- **Other ways not yet realized.**

FPCO hasn't yet indicated its stance on FERPA's applicability in the open-course learning environment. As a result, privacy and data represent another gray area, presenting potential risk for institutions.

Online conduct is yet another area where institutions must examine risks. Participants can have variable tolerance for speed and quality of faculty responses. A less-patient user could respond by "flaming" the institution in social media, though platform hosts can cut off a participant if notified.

"These real-life examples will show up three weeks after your faculty have already started doing them."

—Madelyn F. Wessel

Strategies for MOOC Production and Content Creation

A platform provider's agreement will hold the institution responsible for copyright compliance and course quality, so institutions should have strategies for MOOC production that will help avert potential problems.

Decide

- Is the instructor solely responsible for course creation, or is there an online course support team or media services center?
- Is there a clear budget that instructors understand?
- Who is in charge of filming/video? Vetting copyright permissions?

Always

- Use materials in the public domain.
- Link to materials on authorized sites; be wary of using downloads.
- Adhere to licensing terms of use (e.g., on Wikipedia Commons or Creative Commons).
- Attempt "trades" with content owners, such as obtaining permission to use *X* amount of material if the course links to the content owner for possible student purchases.
- Target specific textbooks for permission deals.