Overview - Webinar Topics

- Big Picture **Campus Legal & Policy Issues**
- Intellectual Property Ownership
- Course Production/Copyright
- Privacy, ADA and related compliance concerns
- Other Legal Concerns
Poll # 1: My institution is -

- producing massive open online courses
- consuming/using MOOCs produced elsewhere as part of our instruction/curriculum
- considering one or both options
Big Picture

Campus Legal & Policy Issues

- Advance planning
- Goals
- Institutional policy framework
- Working with faculty
- Negotiations with the platform provider
Advance Planning—Big Picture Overview

- MOOCs aren’t cheap
  - Outright costs (videotaping, permissions, staffing, GA’s)
  - Institutional infrastructure costs (program management, course relief)
- Institutional policy infrastructure
- Institutional oversight (e.g. who is running your initiatives?)
- Anticipating faculty issues
- Institution, school/dean, or other level of controls?
What are your goals?

- Flipped classroom/teaching enhancements?
- Revenue?
- Name/brand?
- Proving you can play in this space?
- Random decisions by your Provost or CIO?
Involving your faculty early and often

- (the MOOC “death star”)
- “I own my courses”
- “What will I make?”
- “Why can’t I sell it to Udacity?”
- What, we just agreed to let our best course run for the next ten years without any controls?

Recommenda explicit beta framework; volunteers only; fasten your seatbelts.
Institutional Policies

- What does your campus policy say about copyright ownership of courses?
- Do you have a **Conflict of Interest** policy that addresses faculty disposition of University IP or use of University resources for personal gain?
- How do you handle faculty consulting?
- Do you have a **Conflict of Commitment Policy**?
Platform Hosting Strategy (internal versus external platform hosting)

- External partners
  - For profit versus non-profit
    - Coursera
    - EdX
    - 2U
  - Shops enticing your faculty with individual course export “options”
    - Udacity
- If internally hosted—how different from “regular” online education?
Negotiating Platform Agreements that Maintain Flexibility

- Good to maintain your ability to adjust approach as higher education dynamics change; hosting providers evolve; business models change
- Non-exclusive arrangements
- Ability to pull content out and manage course duration; content portability
- Influence over technology features
- Data control
- Provider’s content business deals
- Compliance responsibilities
The Provider’s EULA Matters to You

- Is the provider treating participant data in a way that is congruent with your institution’s expectations and norms?
- Will your deal enable your students, faculty, staff to access course materials without agreeing to the provider EULA if the terms of service do not comply with FERPA?
- Do provider ancillary products or services have data sharing rights with commercial parties that you are comfortable with?
- Will the provider terms for participants provide required (both as far as US and international law) notices and consent provisions?
- Does your agreement cover transmission and use of data to university partners for research and other activities that are important to you?
Poll #2:
- My institution has already negotiated deals with a MOOC platform provider
  - Yes
  - No

Poll #3:
- Did you have any leverage in negotiating an acceptable agreement?
  - Yes
  - No
Intellectual Property Ownership

Issues to get clarity on up front with both faculty and the platform provider
Different Institutions take varying approaches to faculty ownership of course materials – typically a “Copyright” or “IP” Policy call. (Hint: scholarly articles and books may be treated differently than course materials, courseware, software, videos, etc.)

The determination of ownership is not wholly dispositive of the use and distribution of course materials: Copyright ownership and usage rights can be held differently. CopyRIGHTS can be shared.

MOOC course materials may be a compilation of multiple contributors’ works.
Copyright Act Work for Hire

- Some institutional policies expressly recognize the “work for hire” doctrine, providing that works made during the scope of the creator’s employment belong to his or her employer. Copyright Act of 1976, 17 U.S.C. Section 201(b).
- The institution may assert ownership over all works and then transfer copyright ownership to the faculty for scholarly works, but not course materials.
- Other institutions “grant” faculty broader academic copyrights to all scholarly work products.
Significant University Resources

- University policies set ownership based on the degree to which institutional resources are used, using phrases such as “significant,” “substantial” or “exceptional” as a standard.
- Since distance and online education can involve significant university resources through instructional and web designers, videographers, teaching assistants and administrative support, the university claims ownership.
- Some policies have expressly asserted ownership over online course materials tying the ownership claim to the use of resources; or tie use to COI or COC policies.
Platform Providers Want Clear Rights

- Usually not ownership or exclusive rights to course materials
- Distribution and use rights
- May seek third party rights; derivative rights
- May seek hosting rights beyond your active course;
- May seek accreditation rights, resale rights
- May seek right to create “course packs” or “textbooks” from MOOC materials
Institution Can Only Give What It Has

- Platform providers require and institutions are well advised to ensure they have signed Course Development Agreements ("CDA") with faculty, in part because of internal policy vagaries.
- CDAs and course guidelines can also help align expectations for faculty teaching in a new environment and allay concerns about control of pedagogy.
- CDAs also make clear other course production and quality standards (from copyright compliance to ADA accessibility)
Faculty Compensation & Credit Issues

- Supplemental pay for faculty?
- Royalties and revenue sharing?
- Release time/teaching credit?
- Promotion/tenure considerations?

MOOCs take a lot of time and energy to produce and staff—faculty often amazed at just how time consuming. Critical to anticipate this and have fairly aligned expectations.
At my institution…

**Poll # 4:** My institution has campus copyright policies that clearly afford our institution ownership rights to course materials including MOOCs
- Yes
- No

**Poll # 5:** At my institution, our faculty are never cranky about anything
- Yes
- No
Course Production*

Copyright Issues

*Or why you haven't seen any entertaining slides as of yet
Course Materials Include:

- The recorded lectures themselves, which will typically focus on the instructor, but may include talking head background material such as images, audio, or video that are viewable or audible.
- Full-focus images or video occupying the complete screen in a recorded lecture; such material being potentially downloadable by course participants.
- Power points or lecture notes uploaded to the course website that may contain third party content such as images, audio, video, etc.
- Reading materials such as articles, book chapters, or other content that the instructor would like course participants to read.

*Different copyright constraints may apply to different materials.*
Campus Versus Wide Open Learning Environments

**Thesis:** MOOCs are just a bigger batch of yeast exploding the bread:

- Copyright knowledge gaps affect other teaching and learning activities (social media course interactions, website construction, use of multi-media materials in course assignments, etc.)
- But the structural dynamics of MOOCs (MOOC partnership agreements, institution directly responsible for content delivery, size of courses and access worldwide) escalate the legal risks and complications.
MOOC Platforms Treat You Like a Publisher

“As between University and Company, University will be responsible for reviewing and obtaining any necessary licenses, waivers or permissions with respect to any third-party rights to Content provided by University or Instructors.” [Coursera]

“Institution will be responsible for ensuring that all content (including third party content contained in InstitutionX Courses) provided by Institution or its instructors to edX may be used and made available via the Platform, including without limitation, the edX.org website without infringing or violating any copyright or other intellectual property rights of any third party. EdX may take down content that is the subject of an actual or reasonably anticipated claim by a third party and, to the maximum extent permitted by applicable law, Institution will indemnify and hold edX harmless for any such claim.” [edX]
“Regular” Copyright Exceptions N/A

- Section 110 (1) of the Copyright Act protects generous displays of educational materials in face-to-face teaching.
- Section 110 (2) (the “TEACH Act”) allows delivery of considerable content in support of distance learning initiatives, although the rights defined there are more limited than those applicable to in-classroom face-to-face teaching.
- Both of these sections are specifically limited to teaching activities or a class sessions offered by nonprofit educational institutions. [Not obviously applicable to a Coursera, Udacity or edX]
Section 107 – Fair Use

- Is applicable, but is probably more limited in scope than in academy-internal teaching and learning (plus your chances of getting busted are a lot higher).
- Requires case by case, fact specific evaluation.
  - Purpose and character of the use including whether the use is for educational versus commercial purposes.
  - The nature of the copyrighted work – is it a factual or creative work?
  - The amount and substantiality of the portion to be used in relation to the work as a whole.
  - The effect or impact of the use upon the potential market for or value of the work.
Nonetheless, a Short Segue - Hello, Transformative Fair Uses

- We are seeing case after case in recent years which courts are upholding fair use, especially when the use is deemed transformative.

  “[t]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright…. and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use”

--Campbell v Acuff Rose Music (U.S.1994)
Rogers v Koons 1992: Koons loses

Art Rogers - "Puppies"

Jeff Koons - "String of Puppies"
Rogers v Koons

- Full copying
- Insufficient parody of underlying work itself (social commentary not adequate justification)
- Koons’ profit motive too clear; harm suffered to plaintiff’s potential market for derivative or adaptation rights ("Here there is simply nothing in the record to support a view that Koons produced "String of Puppies" for anything other than sale as high-priced art. Hence, the likelihood of future harm to Rogers' photograph is presumed, and plaintiff's market for his work has been prejudiced.")
Blanch v Koons 2006: Koons wins

Copied just a piece, changed elements, “transformative”
“Copyright law thus must address the inevitable tension between the property rights it establishes in creative works, which must be protected up to a point, and the ability of authors, artists, and the rest of us to express them— or ourselves by reference to the works of others, which must be protected up to a point. The fair-use doctrine mediates between the two sets of interests, determining where each set of interests ceases to control.”
More New Cases, New Principles

- Copying of whole works may be transformative and justified even when copying is decidedly against the personal interest of the creator. *A.V. ex rel Vanderhye v iParadigms (4th Cir. 2009)*

- Courts are getting more comfortable in thinking about new forms of art. They seem to be thinking more openly about the role of copyright in a creative culture in light of the central purposes of copyright. *Bill Graham Archives (2d Cir. 2006)*
Bill Graham Archives

- Poster images of the Grateful Dead were used in greatly reduced size, integrated in an “artistic” collage format, scattered throughout a 480 page book, and the amount taken without permission was not excessive.

- Fact that DK sought a license and did not agree to the price did not kill the case. “A copyright holder cannot prevent others from entering fair use markets merely by developing or licensing a market for parody, news reporting, educational or other transformative uses of its creative work.”
EXAMPLE: “A concert poster for the Grateful Dead, Jefferson Airplane, and Big Brother and the Holding Company, playing at the Hollywood Bowl.”
Ok, So I Just Tried to Prove

- I’m not afraid of fair use.
- But the rest of this talk is still going to be boring without images.
- Because use of images, audio, video in open online education is a pretty uncertain space despite the clear and present role of fair use.
- And the use of images for decorative or similar uses (“wake up and laugh!”) is simply more limited.
Developing Guidance in the Face of Uncertainty in Application of Fair Use

- What are the rules when it comes to delivering content to tens of thousands of individuals worldwide?
- Does it matter if the platform provider is explicitly for profit?
- Does an institution’s not-for-profit status as the content creator continue to supply fair use points under the first fair use factor?
- Does it matter if content will be beamed to a country without fair use principles in its copyright regime?
Figure Out a Campus Approach to Creating the Course

- Is the instructor solely responsible?
- Online course support team or media services center?
- Do you have a clear budget including for rights clearance if necessary?
- Does the instructor know what the budget is?
- Who is doing the filming/video?
- Who is vetting permissions?

The agreement with the platform provider is going to make the institution responsible for copyright compliance and course quality, so plan ahead.
Specific Content Strategies

- **Always**: Use public domain materials.
- Link to materials on authorized sites—but watch out for downloads. Many websites (Wikipedia Commons) & Creative Commons licensing have terms of use that allow uses (including downloads) of posted resources only for “non-commercial” uses.
- 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, such as obtaining permission from a publisher to use Y amount of material from a textbook that is being recommended for use in the course.
Copyright and Fair Use Guidelines

- Sample Copyright Guidelines available through your legal counsel/NACUA (summer 2013 conference session), need to be constantly under review.
- Third party content more viable where the focus of instructor commentary rather than “decorative” or “fun.”
- “Transformative” uses are important—heart of scholarly commentary; education.
- Make technology your friend (thumbnails, low resolution images, download inhibitions)
- Uses that don’t wreck the market opportunities for sales are more supportable
- Fair use is not generally going to support delivery of substantial in-copyright content to students without a license.
New Copyright Content Strategies of the Platform Providers

- Coursera and edX (and probably other platform providers) are entering into deals with publishers for textbooks and other educational materials for their course participants.
- Most of these deals seem aimed at enabling participants to gain access to a “light” version of publisher textbooks, a valuable educational resource for many who could not afford such content otherwise.
- In exchange, publishers gaining the ability to market other publisher materials to students, and to obtain rich usage data/learning analytics.
- Institutions not parties to these agreements; terms may be a concern. (Academic choice, FERPA, faculty & student privacy)
- If rights are tied to a specific deal, your courses may be locked into a specific platform forever.
Poll # 6

If a faculty member uses an image of in-copyright art in a recorded lecture and discusses the painting, there’s a case to be made that the use is fair and permission is not required.

(a) True
(b) False
(c) It doesn't matter, because my institution would be afraid to assume copyright liability for the choice.
Privacy, ADA
and related compliance concerns
Data Use and Privacy Issues

Coursera:

- **Disclaimer of Student-University Relationship**
  - You agree and acknowledge that nothing in these Terms of Use or otherwise with respect to your access or use of any Online Course or Site (a) establishes any relationship between you and any university or other educational institution with which Coursera may be affiliated, (b) enrolls or registers you in any university or other educational institution, or in any course offered by any university or other educational institution, or (c) entitles you to access or use the resources of any university or other educational institution beyond the Online Courses provided by the Sites.
Data Use and Privacy Issues

- edX: specifically acknowledges the status of its participants as being that of “students” and edX generally uses nomenclature more consistent with on-campus norms, see https://www.edx.org/terms.
- edX specifically acknowledges FERPA in its Privacy Policy “to the extent applicable”

FPCO has not indicated what its stance will be on FERPA’s applicability in the open course learning environment, and the position taken should vary as between the platform provider that is actually enrolling “participants” and the individual institutions that are simply providing course contents.

*But your institution of your faculty can blur the lines fast.*
Data Use and Privacy Issues

- Most institutions are acting with some caution in the nomenclature they will allow platform providers in issuing “certificates” or other confirmations of course achievements.
- All make clear in their agreements that the MOOCs being offered do not constitute enrollment at the institution, or academic credit from the institution but this will likely change as monetization strategies become more important than pure experimentation.
- You can also run into issues where faculty want your students to use the MOOC platform to receive lectures, assignments, or participate in discussion boards, etc.
Flipping Courses at Home Can Quickly Bring FERPA back into the Picture

- FPCO has ruled that students cannot be required to waive their FERPA rights as a condition of participation in an educational program or activity.
- Requiring students to enroll with a MOOC provider that is not explicitly committing to FERPA might well be seen as just such an involuntary waiver.
- Issues also where faculty may seek to bring the on-campus classroom “out” to the MOOC by recording on campus class sessions for uploading to the MOOC platform.
- All of these real life examples will show up three weeks after your faculty have already started doing them.
Data Privacy and Security Concerns

- While FERPA is a key concern, international privacy regulations are also relevant and will likely become ever more so as the MOOC space expands.
- How will your platform provider comply with domestic and international privacy regulations? Will the provider stay on top of developing law in this area?
- The EU already has a comprehensive (and more rigorous than US) privacy framework, but is considering expansions. In the past, EU member states have also developed different national laws based on the EU law.
- The hosting providers must continue to evaluate how international regulations apply to the platform and cloud software and to data and metadata.
Online Conduct Issues

- Terms of service (EULA) of the platform provider governs the legal relationship with course participants.
- Faculty can occasionally run into difficult situations while teaching (threats, obscenity, insults, complaints, online “interpersonal” problems between participants).
- Participants have variable tolerance for speed (and quality) of faculty response to questions, discussion boards, etc.
- Providers tend to act quickly to respond to behavior that violates terms of service if notified – can cut a participant off if necessary.
Online Conduct, continued

- That won’t stop a disgruntled participant from flaming your faculty or your institution in social media.
- Unclear what this new world may bring with respect to claims of discrimination/sexual harassment/other regulated norms.
- Unclear how governments will see provider and institution “responsibilities.”
Poll # 7

- Can one student sexually harass another student in a MOOC, leading to institutional liability under Title IX?
  
  (a) Yes
  
  (b) No
  
  (c) I wish you hadn’t asked that question
Poll # 8

- What responsibilities does the institution have if an instructor gathers from a MOOC discussion board that one student intends to harm another, or undertake some other act of violence?
Accessibility of Course Materials

- What accessibility requirements apply?
- Expect DOJ and OCR to be all over this.
- Coursera and edX both articulating clear commitments and a shared responsibility paradigm.
- Platform = MOOC provider responsibility.
- Coursera provides captioning; faculty or their helpers need to review same for accuracy and completeness.
- Other content descriptors (images, audio) = instructor.
- Institutions have explicit and somewhat open-ended duty under platform agreements to respond to participant accessibility needs that arise during a course.
Other Legal Issues

- **Title IV**
  - Eligibility/compliance implications for institutions that award credit for MOOCs?
  - Dept. of Education “Dear Colleague” Letter (March 19, 2013)
  - Eligibility for Direct Assessment (Competency-Based Programs)

- Individual state authorization
- International rules and standards
- Accreditation
- MOOC revenue can UBIT (tax) issues
- Other “Titles” (VI, IX)
A Little Advice

- Why is your institution interested?
- Don’t minimize legitimate faculty concerns about the role of MOOCs as a disruptive force.
- What institutional policies are applicable to MOOCs and are they any good?
- Good to characterize MOOCs as experiments until you know what you’re doing. (Don’t commit to more than a 1-2 year deal with an individual platform provider.)
- Don’t commit your courses for more than a single run; preserve option of pulling a course (protects faculty and institutional IP).
- Faculty participation needs to be voluntary.
Faculty responsibilities need to be cemented in a specific course development agreement.

Anticipate that some of your best, and also some of your most difficult faculty will be early volunteers.

Copyright issues will be a special burden; lawyer time will be significant.

Assume this will cost three times more than you initially think and be twice as aggravating to roll out.

($3,000 per completed hour direct costs; some longer courses have cost $100,000 to produce.)
Click and Clack, the Tappet Brothers

“The formula for happiness is reality minus expectations.”