Working Group on Intellectual Property Materials in MOOCs

Final Report

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“What’s a jazz class without jazz? What’s a Picasso class without seeing some Picasso? What’s a poetry class without poems? It is absolutely necessary to use, analyze, criticize, and adapt intellectual property materials, to serve pedagogical goals in MOOCs.....”


**Table of Contents**

I. Introduction  
   a. How This Document Was Created  
   b. What This Is  
   c. What This Isn’t  

II. The Two Tracks  
   a. Track One: Syllabus Materials  
      i. Practice 1: Participant Discovery  
      ii. Practice 2: Collaborative Agreements  
      iii. Practice 3: Make a Deal  
      iv. Practice 4: Permissions  
      v. Practice 5: Create Your own  
   b. Track Two: Presentation Materials  
      i. Practice 1: Fair Use (Jurisdiction specific)  
      ii. Practice 1: Fair Dealing (Jurisdiction specific)  
      iii. Practice 3: Permissions/Licensing  

III. Conclusion and Recommendations  
   a. Conclusions for Track One: Syllabus Materials  
   b. Conclusions for Track Two: Presentation Materials  
   c. Challenges  
   d. Recommendations: OA and OER  

IV. Appendix A: Charge of the Working Group on 3rd Party Intellectual Property  

V. Appendix B: Selected OA/OER Common Resources for MOOC Content
I. INTRODUCTION

The mission of edX-affiliated librarians is to support MOOC teaching, learning, and research.

Because of their massive online, open nature, the global reach of MOOCs comes with unique challenges for developing and delivering course content. The expanded learning community of MOOCs presents complex copyright issues related to the use of third-party course materials. Those uses that are second nature in the traditional classroom and standard on syllabi give pause when moved to the MOOC environment.

As institutions launch MOOC initiatives, libraries naturally have a significant stake in the way their parent and partner institutions approach implementation. From sourcing and digitizing content to preserving course deliverables, the library serves as a meaningful collaborator in MOOC development. In these roles, libraries are uniquely situated to address critical strategic concerns about copyright, open access, and accessibility. Staff and services are leveraged to support this digitally rich 21st-century endeavor, and materials in library collections are being incorporated, either under the protection of law or policy, into MOOCs that have a global reach. Librarians at edX institutions have become the trusted experts to whom MOOC instructors turn for help in successfully identifying, vetting, and incorporating these third-party educational resources. This document aims to help new programs implement already tested practices to encourage the use of well-considered recommendations when embarking on providing MOOC support.
A. HOW THIS DOCUMENT WAS CREATED

This document is the result of the collaborative effort of librarians from 8 institutions from 5 countries to address rights issues associated with using third-party material in MOOCs. This group has diverse perspectives related to the role of third-party material in their institution’s MOOC endeavors, which they shared and then filtered into a usable form.

There is strength in multiple voices in this arena, and “best” practices have been identified from common approaches that have proven to be successful in established MOOC programs.

B. WHAT THIS IS

This is a code of best practices for the use of copyrighted third-party material in MOOCs devised specifically by and for the edX library community.

The recommendations that follow are distilled from the analysis and assimilation of the diverse views from the edX library community, which identify acceptable practices about how third-party rights should be applied in certain recurrent situations. The committee may wish to revisit this process in the future to deliberate on emerging and evolving issues and uses.

C. WHAT THIS ISN’T

This code of best practices does not exhaust the application of other practices where third-party copyrighted MOOC material is concerned. Although the code
incorporates consensus-based community standards relating to commonly experienced conflicts between library practices and perceived third-party MOOC material constraints, this is not intended to serve as a comprehensive or exhaustive guide to all possible applications. Institutions may be able to make persuasive arguments for use of third-party copyrighted materials that go beyond the shared norms expressed here. Likewise, edX institutions engaging in their own “risk management” may choose policies that do not take full advantage of these consensus principles.

II. THE TWO TRACKS

Many edX library partners have developed courses of action related to two specific tracks of MOOC content that intersect with copyright:

1) third-party syllabus readings or course reserves (syllabus materials) and
2) third-party materials in lectures and slides (presentation materials).

Because the rights and risk analysis for these two kinds of materials differ in important ways, the code has developed separate best practice guidelines for each category. The following two distinct approaches to these categories of content are based on the law and policy to date.¹

¹ This decision is based on the world-wide litigation and uncertainty in the law surrounding “coursepacks” or “e-coursepacks” or “e-reserves.” There isn’t even a consensus on the use of those particular words, which have distinct meanings under the law. As a result, we will simply separate the syllabus material best practices into a unique track.
In working with our edX colleagues, the committee notes that both tracks are subject to three particular exceptions that could free a community from worrying about rights, high risk, or law: 1) edX or affiliate owned materials, 2) public domain materials, 3) Open Access/Open Educational Resource materials (discussed in detail in the conclusion and recommendations).

It should be emphasized that these options are the absolute safest way to avoid infringement. Material that is of the MOOC’s own creation (created by the library, the instructor, or the institution launching the MOOC) or that is wholly owned by the institution has no rights issues.

Public domain materials are creative materials that are not protected by intellectual property laws such as copyright, trademark, or patent laws. The public owns these works, not an individual author, artist, or publisher. Anyone can use a public domain work without obtaining permission, but no one can ever own it.

Lastly, Open Access/Open Educational Resource materials are created to allow the widest possible amount of sharing and use, typically through licensing, such as Creative Commons licensing schemes. These tools are discussed in greater detail in the conclusion and recommendations section.

A. Track One: Syllabus Materials

MOOCs often contain syllabus materials, that is, materials participants² use independently to further their understanding of the coursework. Oftentimes this takes

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² In the early days of MOOC terminology, the word “participants” was used frequently. However, the word participant carries some financial and legal definitions. “Participants” are typically paying customers at an academic institution, and therefore can
the shape of assigned readings, and more often than not these readings are found in licensed, third-party works.

**Practice 1: Participant Discovery ("Let their fingers do the walking.")**

PRINCIPLE: If the syllabus material (article or otherwise) is available online for free through an open link, then we encourage simple linking.

An edX partner can simply post the citation to the material with the expectation that participants will acquire it for themselves (by purchasing it, borrowing it from a library, or finding it online). It is worth noting that many participants (even MOOC participants) expect to be able to acquire course readings, textbooks, or articles for free, or with as little burden as possible. One MOOC that was cancelled midstream this year cited the participants’ dissatisfaction with the decision to assign a textbook that was not free.

LIMITATIONS: This method has its drawbacks. Frequently, faculty do not have syllabus materials that are open access (OA) and/or linkable.

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take advantage of the various privileges provided by the university – access to libraries, databases, and online networks. Additionally, the word “participants” indicates mandatory compliance with various privacy laws, especially about educational data. Laws like the Family Educational Rights and Privacy Act (“FERPA”) and the Higher Education Opportunity Act protect participant information, and require schools, colleges, universities and other educational institutions to take steps to comply. MOOC “participants” are not matriculated into a particular college or university simply by taking a MOOC run by that university. They do not take class for credits, pay tuition, or have access to the libraries, databases, or other privileges reserved for participants. As a result they should be called “participants” which denotes the voluntary and free nature of the MOOC course, and the fact that FERPA, and other higher education participant rights, do not apply to the MOOC context.
ENHANCEMENTS: The edX library can support participants’ efforts to find licensed, third-party syllabus materials by providing links to WorldCat to facilitate interlibrary loan (ILL) where open content is not available.

If the material is not available via any open link or ILL, and may be nearly impossible for participants to obtain, some edX libraries have asked the faculty to consider either substituting material that is openly available, or retaining a citation to the third-party material but making it supplemental rather than required reading.

**Practice 2: Collaborative Agreements**

PRINCIPLE: If possible, partner with publishers to provide either limited amounts or “lower-quality” versions of the syllabus content for a course’s learners.

An edX partner can negotiate with publishers to secure the critical subset of the licensed content OA for the duration of the MOOC. Similarly, an edX partner can negotiate to have a licensed work delivered to MOOC learners with less functionality, for example, the full text of an ebook as a read-only version.

LIMITATIONS: The clear limitation of this method is that the MOOC institution must rely on the publisher to be a willing partner.

ENHANCEMENTS: In exchange for the publisher providing the content, the edX partner may embed a link to the full text or enhanced version of the work, which may encourage participants to purchase the larger text. There have been documented instances of similar such agreements increasing sales of the licensed content. A potential
route for starting discussion about such agreements is to work through the publisher’s marketing department, which is often highly motivated to increase sales.

**Practice 3: Make a Deal**

PRINCIPLE: Work with faculty to ensure that their publications are available for reuse in MOOCs. This may require education and outreach to faculty about licensing agreements and publisher negotiation.

LIMITATIONS: There are two clear limitations to this method. First, this approach only works for material that is in development. Previously published works will already be subject to legacy licensing agreements, which may or may not support an author’s reuse of their work in a MOOC. Additionally, this may require multiple rounds of negotiation with the publisher, for which some authors will not have the time or inclination.

ENHANCEMENTS: In addition to securing author rights to reuse in MOOCs, it may be possible to negotiate for additional enhancements to be built into the publication, for example, enhanced multimedia content, versioning, and annotation support. This may require some sacrifice on the author’s part, for example, reduced royalties.

**Practice 4: Permissions**

PRINCIPLE: If all of the other practices have failed and the faculty member feels a licensed work is essential to the MOOC’s success, then approach the rightsholder to secure permission.
LIMITATIONS: There are several downsides to permission seeking. First, it is a labor- and time-intensive process. Additionally, by seeking permission, the content will likely come with restrictions or conditions. More often than not, there may also be an associated permission fee.

ENHANCEMENTS: In instances where permission is sought, it is best to start from a place of free permission, perhaps in exchange for limited-time use.

This process can also be enhanced by starting with the marketing/publicity units rather than a permission unit. The permission unit in any publisher will expect a fee or payment, while marketing/publicity will occasionally provide a free article/chapter for a link to their work. In the past, these types of arrangements have led to solid sales of the material, which pleases the publishers, and gives the MOOC participants access to the necessary materials.

**Practice 5: Create Your Own**

PRINCIPLE: MOOC instructors can write their own open access e-textbooks for use in the course.

LIMITATIONS: This is a labor- and time-intensive process. Writing an entire book or several chapters can be much more than an instructor is willing to do for a MOOC.
ENHANCEMENTS: If time and labor is not an immediate concern, this open textbook writing initiative will ensure that MOOC participants have access to the materials they need to complete the class - and, additionally, updates to the text and MOOC class can be handled rather smoothly, and on the timeline dictated by the instructors, and there are no rights or permissions needed to be sought.

B. Track Two: Presentation Materials

As rich, multimedia experiences, MOOCs often contain presentation material that includes licensed, third-party content, for example, images, music, film, or text in a slide deck associated with a lecture.

Practice 1: Fair Use (jurisdiction specific)

PRINCIPLE: When possible, employ a fair use assessment on third-party content for potential use in presentation materials. The content may be used if the use is deemed fair, that is, if the four factors are met with the instructor’s use – the purpose and character of use, the nature of the work, the amount used, and the effect of the use on the market.

LIMITATIONS: While a provision of copyright law, fair use does have limits. Creative and unpublished works have greater copyright protection, which can constrain the use of third-party materials in some disciplines. Additionally, works that are highly marketable may present a greater risk. If a use does not meet the four factor test, then
the instructor will need to substitute or remove the content. Fair use is also limited to a few jurisdictions.

ENHANCEMENTS: In the U.S., if a use of third-party material is transformative, then that helps to bolster the argument for its use. For example, if the MOOC instructor is analyzing, critiquing, or explaining the content, which is essential to the pedagogical goal of the course, then the fair use argument is further strengthened. It should be noted that the instructor should only use the amount necessary to the educational purpose and should always appropriately credit the material’s author.

**Practice 2: Fair Dealing (jurisdiction specific)**

PRINCIPLE: When possible, employ a fair dealing assessment on licensed content for potential use in presentation materials. The content may be used if the use is deemed fair.

LIMITATIONS: Fair dealing is less generous to the user than fair use. There are limits to the type of use that is deemed fair, which, again, depends on jurisdiction. For example, in England, fair dealing applies to uses of study, research, criticism, review, or journalism. Use of third-party material beyond these cases would be infringing. Some institutions apply fair dealing guidelines, which further self-restricts the amount of third-party content used.
ENHANCEMENTS: Here, too, it should be noted that the instructor should only use the amount necessary to the educational purpose and should always appropriately credit the material’s author.\(^3\)

**Practice 3: Permissions/Licensing**

**PRINCIPLE:** As with syllabus materials, if all of the other practices have failed and the faculty member feels a licensed work is essential to the MOOC’s success, then approach the rightsholder to secure permission.

**LIMITATIONS:** Again, there are several downsides to permission seeking. First, it is a labor- and time-intensive process. Additionally, by seeking permission, the content will

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\(^3\) For example, the law of India does not include a “fair use” provision – it includes something called “fair dealing.” The Indian laws related to “fair dealing” (Section 52 of the Indian Copyright Act) is considered slightly more rigid as it provides an exhaustive list and any use falling out of the statutory list is considered as an act of infringement.

“The following acts shall not constitute an infringement of copyright, namely:

(a) a fair dealing with a literary, dramatic, musical or artistic work for the purposes of —
- (i) research or private study;
- (ii) criticism or review, whether of that work or of any other work;
(b) a fair dealing with a literary, dramatic, musical or artistic work for the purpose of reporting current events —
- (i) in a newspaper, magazine or similar periodical or
- (ii) by broadcast or in a cinematograph film or by means of photographs.

However, recently, talking with edX partners in India, Indian courts have been citing cases and articles on the United States’ transformative fair uses. For example, in *Chancellors, Masters and Scholars of Oxford University v. Narendera Publishing House* the High Court of Delhi used the balancing test from U.S. fair use to resolve the issue whether Indian Copyright Law Section 52, which encapsulates the “fair dealing” doctrine, applied. The court stated that while grappling with the issue of fair dealing, a court should ask whether the *purpose served by the subsequent work is substantially different (or is the same) from the purpose served by the prior work*. To be called transformative, the subsequent work must be different in character; it must not be a mere substitute, in that, it not sufficient that only superficial changes are made, the basic character remaining the same. This determination, according to the Court, is closely knit with the other three fair use factors from the U.S., and therefore, central to the determination of “fair use”, i.e., if the work is *transformative*, then it might not matter that the copying is whole or substantial. Again, if it is transformative, it may not act as a market substitute and consequently, will not affect the market share of the prior work.
likely come with restrictions or conditions. More often than not, there may also be an associated permission fee.

ENHANCEMENTS: In instances where permission is sought, it is best to start from a place of free permission, perhaps in exchange for limited-time use.

III. Conclusions and Recommendations

Conclusions for Track One: Syllabus Materials

No school, library, or institution has used only one method for helping with the Syllabus Materials. Some were fortunate enough to have public domain readings available on the Internet Archive or Google Books, some had open access versions available, and some publishers granted access with no terms but a simple citation requirement. The answers vary as much as the strategies.

Grappling with the syllabus problems for the MOOC courses helped drive a particular mission librarians feel very passionate about: getting the faculty authors to understand the modern, contract, copyright, and license-bounded world we live in today, and how it affects education. Online classes, like MOOCs, will suffer greatly, and will continue to lack the rich and vast resources necessary for true learning if we don’t change the nature of where our scholarship ends up or who has access. These strategies were developed as a means of both solving a problem and educating the faculty authors. An opportunity to educate faculty authors about these access issues arises each time an edX MOOC is proposed, and a syllabus or reading list is assembled. edX Librarians need to be there. It is our job as librarians to “spread the gospel” about copyright, Open
Access, and licensing to make future MOOCs a place where the high level of analysis and lecture can be paired with the most interesting and thought-provoking scholarship we have available in the world today.

**Conclusions for Track Two: Presentation Materials**

This chart outlines the different methods for optimizing use of third party materials, while still maintaining low-to-moderate risk:

- **Public Domain**
- **MOOC/Institution**
- **Open Access/OER**
- **Fair Use/Fair Dealing**
- **Permission**

**Challenges**

Discussing potential risk-taking MOOC activities involving third party materials does potentially raise the specter of future legal issues. In drafting a document for this particular charge, not every edX partner was able to truly quantify their activities involving 3rd party materials. The committee acknowledges such legal realities, and has...
anonymized much of the information shared regarding risk and strategy at any edX partner’s requests.

The edX Library Committee exists in interesting times: university presses have sued university libraries; DMCA takedowns are rampant, mass digitization projects involve complex litigation, and there is fear among the community about the future of MOOC education, as it is separated from the traditional legal protections afforded to the academy in general.

**Recommendations: OA and OER**

The difficulties with 3rd party materials, whether syllabus materials or presentation materials, does, however, have a solution that allows individuals to side-step difficult concepts like fair dealing, fair use, or negotiation. This solution is found in the Open Access (OA) and Open Educational Resources (OER) movements.

Open Access was defined at the Budapest Open Access Initiative in 2002 as “free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself.”4 By its very definition, we can see how using open access materials would be of enormous value to libraries working with MOOCs. There are very few problems with licensing, rights, access, or cost when using open access materials.

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Imagine all the work that could be saved by using materials that can be freely shared, modified, adapted, or revised to serve the MOOCs pedagogical purpose.

OERs are those materials supporting teaching, learning and research that are in the public domain or that have a creative commons license that allows use and adaptation by others. Examples might include learning objects like video tutorials, open textbooks, digitized library and archival collections.

MOOC participants themselves may also benefit from such OA/OER materials. Openly licensed works are often the drivers of future innovation. If the MOOC participants can utilize the MOOC materials to create their own new, transformative works, the cycle of open access can continue as it should: allowing creation by building upon the work from the past and taking full advantage of the free and openly licensed materials. MOOC participants do not have to worry about rights, they can get right to work with their own unique innovative plans using the lessons they learned from the MOOC along with the materials provided. If we insist that our MOOCs use OA/OER materials, we are increasing opportunities for innovation. In this way libraries are helping to build future innovators and scholars by simply making the MOOC material open.

Librarians, strong leaders in the open access movement, are typically in the best position to point out the wealth of material available through open access — through research guides, classroom instruction, catalog integration, and more. Many librarians working with MOOCS are compelled by the mission and vision of MOOCs to make readings, textbooks, and other materials free to access for all participants worldwide.
Requiring a textbook for purchase is part of the on-ground course, but typically not part of a free MOOC.

Many scholarly communications librarians, copyright librarians, and open access librarians have acknowledged that the MOOC revolution can be a great catalyst for further action towards understanding and realizing the true potential for open educational materials. Kevin Smith, at Duke University, shared this brief story about open access materials and MOOCs:

“One story will illustrate this growing interest in open access. A faculty member who was recently preparing to teach his first MOOC wanted his students to be able to read several of his own articles. When we asked his publisher for permission on his behalf, it was denied. A rude awakening for our professor, but also an opportunity to talk about open access. As it turned out, all of the articles were published in journals that allowed the author to deposit his final manuscripts, and this author had them all. So we uploaded those post-prints, and he had persistent, no-cost links to provide to the 80,000 students who were registered for his course. An eye-opener for the author, a missed opportunity for the publisher, and a small triumph for our OA repository. Enough of a triumph that this professor has begun asking colleagues if they could deposit post-prints of their own articles in the repositories at their institutions so that he can use those for his MOOC students as well.”5

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While there may be a wealth of information on the internet about open access, included in Appendix B are some of the most common, most accessible, and most thorough links and sites for finding and using open access materials for a MOOC or other open educational resource.
Appendix A: Charge of the Working Group on 3rd Party Intellectual Property

(February 2015)

MOOC instructors, like their on-ground counterparts, frequently rely on third party content in online courses. The use of these materials typically comes in two categories: 1) to illustrate key points in their lectures/presentations and 2) to extend participant learning through recommended syllabus-like readings.

Libraries and other campus units contribute to the development of courses and providing access to course materials that support the educational and research missions of our institutions, from a continuum that spans from traditional courses to large-scale, fully-online MOOCs. Library roles include managing, acquiring, reviewing, licensing, and/or assessing this content. As institutions encounter specific questions, some common issues have arisen. On the lecture side, edX partner institutions have developed best practices for use of license-free or public domain materials. Other edX partners have explored using fair use or fair dealing analysis as a means of including copyrighted resources in the lectures. On the syllabus side, other issues include: use of open access or other rights-free readings, the amount of lead time needed to negotiate and secure permissions if necessary, and the scope of permissions to request to make reuse of the course.

Lastly, for both the lecture and syllabus materials, other common issues have arisen such as the best ways to document and track uses, permissions granted, and the expectations of the agencies that take responsibility for handling these arrangements.
The edX Library community sees value in identifying real-world questions, shared issues, possible methods and processing, and good practices in this area.

**Charge:**

The Working Group on 3rd Party Intellectual Property will:

- Gather information about current edX library policies regarding:
  - Use of 3rd party materials in lectures and presentations
  - Use of syllabus readings
- Based on the information gathered from edX libraries, articulate the pros and cons of current policies and identify if there are emerging “best practices”

**Questions that might be explored include (samples):**

- What are the best practices for syllabus materials?
- What are best practices for copyrighted material used in presentations?
- Who in the library or outside partners are in the best position to develop best practices/guidelines at each institution?
- Who will ultimately manage guidelines/best practices at our institutions?
- What are best practices for working with publishers or rightsholders?
- How does the library handle fringe cases that fall outside of the best practices?
- How does a library move from “best practices” to actual workflow?
- How do you educate, train, and inform staff, and other involved MOOC parties, about the best practices?
• How do you ensure accountability to the best practices?

**Timetable:**

The working group will provide an update of their progress to share with the edX Libraries Coordinating Committee on May 1, 2015, and plan to participate in a discussion on the topic as part of the 2015 edX Global Forum. A final public version of the report is expected a month after the Global Forum.

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Appendix B: OA/OER Common Resources for MOOC Content
(October 2015)

Open access books

- HathiTrust Digital Library (http://www.hathitrust.org/)
- Directory of Open Access Books (DOAB) (http://www.doabooks.org/)

Open access textbooks

- University of Minnesota Open Textbook Catalog
  (https://open.umn.edu/opentextbooks/)

Open access journals and articles

- Directory of Open Access Journals (http://www.doaj.org/)
- CreativeCommons attribution licensed journals
  (http://en.wikipedia.org/wiki/Category:Creative_Commons_Attribution-licensed_journals)
- PubMed Central (http://www.ncbi.nlm.nih.gov/pmc/)
- Proceedings of the National Academy of Sciences (PNAS) (http://www.pnas.org/)
- Public Library of Science (PLOS) (http://www.plos.org/)
Other open access media

Additionally, Carli Spina, former Emerging Technologies and Research Librarian at Harvard Law School Library (now at Head Librarian of Assessment and Outreach at Boston College Libraries), and Kyle Courtney, Copyright Advisor at Harvard University, have developed a basic LibGuide for the MOOC communities to help them find OA, Creative Commons, public domain, and other freely licensed media. Titled “Finding Public Domain & Creative Commons Media,” this frequently updated and repeatedly cited guide is one of the best sources available for open material. It divides the guide into the database resources most sought after by MOOCs: audio, video, and images. Each database is annotated by Spina and Courtney, who denotes the true “openness” of each instance. They also advise users to use different search methodologies for particular databases, in order to find content in the public domain or freely licensed.

Spina and Courtney, and now with the help of Meg Kribble, Research Librarian & Outreach Coordinator at Harvard Law Library, have consistently kept the guide updated, reflecting the changing open access policies at museums, archives, libraries, and other content-heavy organizations. If the resource is free of rights, and available on the web, Spina, Courtney, or Kribble most likely will have cataloged it in their database guide. Have a look at: http://guides.library.harvard.edu/Finding_Images - you will probably bookmark it for your open access MOOC work.