

SESSION 5G
**MASSIVE OPEN ONLINE COURSES (MOOCS):
INTELLECTUAL PROPERTY AND RELATED ISSUES**

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I. Introduction

With the advent of Massive Open Online Courses (“MOOCs”), higher education institutions and faculty are confronting new opportunities and challenges associated with the creation, production and distribution of online courses. MOOCs are free or low cost online courses, which may be available to thousands of people around the world. The courses typically involve video lectures accompanied by assignments, assessments or problem sets and discussion forums. Upon completion of the course, the participant may receive a statement or certificate, which may or may not confer some form of credit, depending on the course offering and institutional policy. While online education has been offered for many years through a model that reflects traditional classroom teaching methods, the introduction of MOOCs has triggered the potential commoditization of courses on a broader scale. The transition from the traditional classroom environment to online courses offered broadly to the public has triggered considerations of whether teaching can be re-engineered, as well as a reexamination of legal and policy issues relating to intellectual property rights, conflict of interest policies and processes to address the complexity of offering courses beyond the classroom.

II. University Policies on Course Ownership

A. Work for Hire versus Academic Tradition

If course content is created with the intent to distribute it to a public audience, commercialize it or license it to a third party for distribution, the determination of ownership has significant legal consequences. Institutions historically have taken varying approaches to determining ownership of course materials created by individual faculty members. Some institutions follow the “work for hire” doctrine, providing that works made during the scope of the creator’s employment belong to his or her employer. See Copyright Act of 1976, 17 U.S.C. Sections 201(b); “University of Virginia Policy: Ownership Rights in Copyrightable Material” (2004) (asserts university ownership interest under work for hire doctrine and cedes ownership of scholarly works “such as journal articles, books and papers” but does not include course

materials); “Stanford University Research Policy Handbook” Section 9.2 (includes work for hire doctrine and provides that courses taught and courseware developed for teaching at Stanford belong to the university); University of Chicago, Copyright Policy for Faculty and Other Academic Appointees (2012) (concerning copyrightable works involving new information technologies, the university owns the intellectual property the faculty create at the University). These institutions have determined that, since course materials are prepared within the scope of the faculty member’s teaching duties, they are owned by the institution.

Other universities follow an academic tradition of permitting faculty members to own academic works that would otherwise be viewed as works for hire, which may include course materials, if the work is not a specifically commissioned work or funded by grants. See e.g. “Intellectual Property Policy of Carnegie Mellon University” (1985) (the creator retains all rights to “educational courseware”); “Ownership of Copyrighted Works created at or in Affiliation with the University of Michigan” (2002) (transfers university copyright to faculty for scholarly works, citing as examples lecture notes and case examples); University of Texas System “Regents’ Rules and Regulations” (2002) (multimedia courseware products and distance learning materials may be considered a jointly-authored work, owned by the university and the faculty member); University of Minnesota “Copyright Policy: Background and Resource Page” (2008) (faculty member owns copyright to all academic works, specifically identifying online materials created by a faculty member); University of North Carolina Policy Manual (Rev. 2011) (“traditional work or non-directed work” may include fixed lecture notes and distance learning materials).

However, courts and commentators have expressed divergent views on the applicability of this academic tradition and the weight to be given to university policies.¹ Some courts have supported the view that certain works created by faculty, teachers or staff members are works for hire. See e.g. *The University of Colorado Foundation, Inc. v. American Cyanamid*, 880 F. Supp. 1387 (D.Colo. 1995) (published research article deemed work for hire); *Vanderhurst v. Colorado Mountain College District*, 16 F. Supp. 2d 1297 (D.Colo.1998) (course outline prepared by a professor on his own time was part of his teaching duties and therefore was work for hire); *Manning v. Board of Trustees of Community College District No. 505 (Parkland College)*, 109 F.Supp.2d 976 (C.D. Ill. 2000) (work of former university photographer was work for hire despite broad policy vesting ownership of works with employee); *Shaul v. Cherry Valley-Springfield Central School District*, 363 F.3d 177 (2nd Cir. 2004) (high school teacher did not have an ownership interest in tests, assignments and course materials prepared as part of his classroom duties); *Rouse v. Walter & Assocs.*, 242 F.R.D. 519 (S.D. Iowa, 2007) (software created by research professors deemed work for hire); *Roop v. Lincoln College*, 803 F. Supp. 2d 926 (C.D. Ill. 2011) (curriculum and materials developed by a former college instructor deemed work for hire since the materials were created within the scope of employment); *Molinelli-Freytes v. University of Puerto Rico*, 2012 U.S. Dist. LEXIS 143314 (D.P.R. Feb. 15, 2012)

¹ For commentators’ perspectives on the applicability of the “teacher exception”, see Eric Priest, *Copyright and the Harvard Open Access Mandate*, 10 NW J. TECH & INTELL.PROP. 377 (2012); Nathaniel Strauss, *Anything but Academic: How Copyright’s Work-For-Hire Doctrine Affects Professors, Graduate Students and K-12 Teachers in the Information Age*, 18 RICH. J. L. & TECH. 4 (2011) and Kenneth Crews, *Instructional Materials and ‘Works Made for Hire’ at Universities: Policies and Strategic Management of Copyright Ownership*, THE CENTER FOR INTELLECTUAL PROPERTY HANDBOOK, Kimberly M. Bonner, ed., Neal-Schuman Publishers, Inc. (2006).

(work for hire doctrine applied to proposal for a new academic program, notwithstanding the time, place and manner of creation).

Other courts have opined in various contexts that the faculty or staff member owns the academic work. *Hays v. Sony Corporation of America*, 847 F.2d 412 (7th Cir. 1988) (in a case involving an instructional manual prepared by high school teachers, the court observed in dicta that the 1976 Copyright Act is held to have extinguished the “teacher exception” but treating academic work as work for hire would create havoc in existing practices); *Weinstein v. University of Illinois*, 811 F.2d 1091 (7th Cir 1987) (rejecting work for hire doctrine and finding that article was owned by faculty member under the university policy); *Bosch v. Ball-Kell*, 80 *U.S.P.Q.2d (BNA)1713*, (C.D. Ill. 2006) (court left open the possibility that a general university policy placing the copyright with the creator of the course materials could be enforceable).

B. Substantial Resources

University policies may also determine ownership based on the degree to which institutional resources were used in the creation of online course materials. A phrase such as “significant” or “substantial” may describe circumstances in which university resources, beyond those normally available to faculty, are used. Alternatively, the policy may frame use that does not trigger university ownership as no more than “incidental” or “minimal”. In contrast to the development of textbooks, the creation of online course materials can involve a significant investment of university resources through institutionally licensed software, instructional and web designers, videographers, teaching assistants and administrative support. Thus, the university claims ownership as a result of the significant contribution of university resources to the creation of course materials. See *Indiana University Intellectual Property Policy (Rev. 2009)* (on-line instructional materials are considered traditional works of scholarship owned by the faculty member unless they were specifically commissioned or created using “exceptional” university support.) Over time, as it becomes less costly to produce digital course materials and videos, the relevance of this resource-based distinction could be in question.

C. Unbundling Rights

The determination of ownership is not wholly dispositive of the use and distribution of course materials. Ownership rights and control of course content are not only governed by general copyright law and related university policy but also may be governed by the university’s policies governing conflict of interest and use of the university name, state law, and traditional academic uses which support the mutual interests of the university and its faculty. Additionally, the course materials may be a compilation of multiple contributors’ works, including readings from multiple creators, guest lecturers, tools created by staff and student contributions. Other contributors may need a nonexclusive license to use, to update, or share in commercialization of the work.

A policy that acknowledges the interests of various stakeholders and unbundles the traditional rights associated with ownership can provide a more practical framework for managing online courses. Universities asserting ownership of course materials may provide the creator(s) with a license to use such materials for their personal non-profit educational and research purposes. See e.g. “*Indiana University Intellectual Property Policy*” (2009) (“University grants Creators non-exclusive rights to non-commercial use and distribution of University Works they have authored.

Creators who leave the University may continue to use such works at another non-profit institution for teaching, research, and other non-commercial purposes.”). Conversely, universities with policies providing for ownership of course materials by the creator(s) may retain a license and may require that any commercial use must be approved under the university’s conflict of interest policies. See e.g. “Columbia University Copyright Policy” (2002)

III. Faculty Agreements and Guidelines for Course Development

Colleges and universities have avoided uncertainty regarding ownership by entering into contracts with instructors in advance of the development of online courses. Such agreements can also serve to align expectations regarding course production, and may be particularly important to address faculty concerns about pedagogy and control of content when working with third-party content hosting providers. Prior to preparation of the course, it is prudent to confirm that the faculty member understands the arrangements with the hosting provider and its status as a for-profit or non-profit entity. The hosting provider may also require a separate agreement with the instructor and/or the institution. Some of the elements that may be included in an online course development agreement (“CDA”) or in instructional policies and guidelines are discussed below. An example of an online course agreement is provided as Exhibit #1 to this paper.

A. Ownership and Rights of the Instructor(s)

Some institutions are specifically commissioning MOOCs or asserting institutional ownership in light of the significant resources required to produce the courses. The CDA can document the university’s ownership interest as well as specify any rights that will be licensed to the instructor(s). Depending on the university’s strategic interests and the technical feasibility, the rights granted to the instructors may include: making reproductions and derivative works for use in academic activities; using portions of the work in other works for outside activities; modifying or updating the work; using the work with a new employer, and benefiting from commercialization of the work.

B. Joint Works

When individuals collaborate to create a joint work, the creators jointly hold rights to use the work. Accordingly, if non-employee contributors, such as adjuncts, consultants, contractors or faculty from other institutions, participate in developing online course material, the agreement should specify the ownership, licensing and commercialization rights among the parties. For joint works the parties may also include indemnification clauses for claims arising from their respective content contribution to the course.

C. Warranty/Third-Party Contributions

The university may request that an instructor represent that s/he is the sole creator and has the authority to enter into the CDA and confirm that the content is not subject to restrictions under any grant or third party contract. To the extent the course features contributions from guest lecturers, the instructor should agree to obtain appearance and intellectual property releases that permit distribution to the public on the Internet. Similarly, if student work is included in the course materials, the instructor must seek permission from the student for use and distribution of

the materials, unless the student created the work as an employee. If the instructor previously received a release for distribution of the third party work for teaching and research, s/he should confirm that the release covers the anticipated MOOC use (distribution to the public and commercial use, if applicable).

D. Course Development

It is easy to underestimate the effort required to transition a course to the online environment for the first time. The parties should have clear expectations about how the course will be structured and managed. See Young, Jeffrey, “Udacity Cancels Free Online Math Course Citing Low Quality” *Chronicle of Higher Education*, August 21, 2002, Requirements for course content and specifications should be clearly identified, as well as due dates for such materials. Third party hosting providers may also impose deadlines for uploading course materials and block submissions after those deadlines.

E. Technology Standards and Tools

In a MOOC, the instructor assumes the added responsibility of acquiring the technical knowledge to manage the course online. Instructors and TAs must be willing to learn a new online course management system and may be required to incorporate a new approach to assessments, manage group discussions in an online forum and otherwise communicate with students online. The instructor and the university will want to anticipate potential technical issues and be willing to adapt the course as it encounters technical issues that may be inherent in an untested setting). See Jasckick, Scott, “MOOC Madness,” *Inside Higher Ed*, February 4, 2013 (course crashed due to technology and design problems).

Faculty may choose to incorporate a variety of tools, which may include blogs, wikis, RSS feeds, video and photo sharing and social media. However, instructors need to carefully review tools provided by third parties to make sure they are designed to meet applicable laws and policies with regard to data privacy, security, protection of intellectual property rights, and records retention obligations. The “click-through” agreements required of third-party providers, including content hosting providers, may require the student to agree to a waiver of copyright, indemnification and submission to foreign law and jurisdiction for dispute resolution.

F. Instruction

Issues relating to equal treatment of students, academic freedom, privacy and professionalism are present in the online classroom, but with the added challenges of delivering to a more diverse audience. The CDA can provide a reminder of relevant university policies and the appropriate code of conduct for online exchanges with a broader base of end users. Hosting providers typically provide a code of conduct in their terms of service with participants. See Coursera Terms of Service, <https://www.coursera.org/#about/terms>.

The CDA can also provide guidance on the nature and level of engagement required of the instructor. An online course can present a challenge for an instructor accustomed to the more uniform population of a university setting. See Kolowich, Steve “Professor Leaves a MOOC in Mid-Course in Dispute Over Teaching,” *Chronicle of Higher Education*, February 18, 2013

(professor withdraws over disagreements on how to conduct the course and the level of student engagement); “San Jose State's Online College Course Experiment Reveals Hidden Costs,” *Oakland Tribune*, June 3, 2013 (professors surprised when teens didn't have computers and high-speed Internet connections at home and needed personal attention to make it through the course.)

To align expectations, the agreement or guidelines can specify the duration of active involvement by the instructor, i.e. is the instructor responsible for engaging with students in the online forum for the entire term of the course? Are there expectations for communicating by email or virtual office hours? The instructor should also understand the activities he or she may no longer perform. Will the faculty member's traditional duties (content creation, teaching, assessment and grading) be disaggregated and completed by staff from the hosting provider or by an automated process? See Rivard, Ry “The Fine Print,” *Inside Higher Ed*, May 28, 2013 (faculty express concern over contract with hosting provider which will supply “course assistants” to help with exercises and assessments).

G. Resources

An instructor preparing his or her first online course may also underestimate the work required and later request additional resources. The extent to which the instructor will receive institutional support for course development can be documented in the agreement. The instructor may have expectations regarding instructional and web design support, videographers and teaching assistant support for participant inquiries, accessibility accommodations and forum monitoring.

H. Compensation/Teaching Credit

Arrangements for supplemental compensation for creating and teaching the course, if any, should be specified in the agreement. Any exclusion to the compensation arrangement, such as work done prior to entering into the CDA, should be specified. Alternatively, if the faculty member will receive teaching credit for the course, leave credits or relief from other duties, such arrangements can be specified in the agreement. University policies should also address whether, for junior faculty, the creation of an online course will be considered along with other teaching activities in connection with the promotion review process.

I. Royalties and Revenue Sharing

Agreements and policies should include clear statements about the distribution of revenues (or not) for all individuals and university units involved in developing the course, which may include, faculty, staff, the department and the university. Any revenue share retained by the hosting provider may be covered in a separate hosting agreement, but the creators should be aware of the arrangement. In the agreement with the hosting provider, the university may preserve its discretion to determine the revenue share for its faculty and staff, rather than permitting the provider to dictate terms or negotiate directly with the creators.

J. Term of course and reruns

The agreement can specify the length of time that the course will be hosted online and any rights and obligations of the faculty member to update course content and, depending on university policy, the right of the university to offer the course if the faculty member is no longer employed at the institution. See Basu, Kaustuv, "Loss of Control," *Inside Higher Ed*, March 14, 2012 (two faculty members sued their former employer for offering an online course they had created after termination of their employment). If the course will be offered multiple times, the instructor should understand the level of engagement required for subsequent offerings.

K. Approval

Depending on the governance structure of the institution, it may be appropriate for the department chair and dean to sign off on releasing the course. The department may prefer to retain some institutional content for the benefit of enrolled students, rather than producing it for the public. Consent by the department chair may also be appropriate if the department is committing resources to the production of the course, providing teaching relief or managing teaching assignments. The institution may wish to develop separately a governance process for the selection and approval of online courses in light of the limited resources that may be available for course development.

L. Compliance Requirements

Faculty members preparing a MOOC may not understand that the compliance issues are materially different than in the traditional classroom context. The CDA can include a provision to ensure the instructor agrees to comply with university guidelines on relevant compliance matters such as copyright clearance, privacy, disability access and defamation.

III. Potential conflict of interest and commitment concerns

With the introduction of MOOCs, academic institutions are exploring existing policies regarding conflict of commitment and interest that impact teaching policies and the use and distribution of course content. A conflict of commitment may arise when a full time faculty member's primary commitment of time and intellectual energies is not dedicated to the education and research programs of the university. A conflict of interest may occur when there is a divergence between an individual's private interests and his or her professional obligations to the university to such a degree that it appears the individual's professional actions or decisions are determined by considerations of personal financial gain. Existing conflict of commitment and interest policies often address the propriety of teaching at other institutions or the amount of time faculty may devote to outside consulting activities. The policies may not impose specific restrictions on the nature of work permitted but may require prior institutional approval.

Universities and colleges are evaluating the extent to which traditional conflict of commitment and interest rules apply in the online world. Institutions are taking a variety of approaches, ranging from adapting policies in light of the expanded role of universities in providing outside teaching opportunities for the faculty to imposing a moratorium on MOOC activities until the a strategy is developed. See "For Comment," *University of Pennsylvania*

Almanac, May 6, 2013; “A MOOC Moratorium at American U,” *Chronicle of Higher Education*, May 9, 2013, Memo from Provost Bass to AU Faculty and Staff.

In general, the policies applicable to online activities may have the same elements that have been applied to consulting activity involving research: consulting activities and the associated agreements must be consistent with university policies; faculty should disclose to the university all consulting activities as required under university policy; and faculty should inform the party for whom they are consulting of the faculty member’s obligations under the university’s intellectual property and conflict of interest policies. There are, however, some additional limitations that may be appropriate in the teaching context.

A. Outside Teaching

Universities may consider whether existing policies limiting outside teaching should apply, regardless of whether the teaching is provided in person or through an electronic format. Such outside teaching activities can be at odds with university policies on conflict of commitment and interest by diverting attention from the faculty member’s work at the institution, competing with existing programs offered by the university, or undermining the development of new programs. In addition, such activities may inappropriately rely upon university resources (including staff and students) that are funded by tuition payments and by contributions from donors and extramural funders for the non-profit teaching and research activities of the university. The activities may also be at odds with the university’s strategic objectives to enhance its brand and/or reserve content for select audiences through professional development, executive education and alumni programs. Universities may adopt a variety of approaches to address these potential concerns:

- requiring disclosure to the dean or provost before undertaking any outside teaching for commercial gain;
- preserving traditional non-profit academic teaching activities, but requiring prior approval for recording lectures or a course that would be used by the other university after the faculty member departs;
- barring any outside teaching that is not sponsored by the university or provided through an entity endorsed by the university;
- placing a cap on the number of days of involvement for a single program; and
- reserving a “right of first refusal” to determine whether the institution would prefer to pay the faculty member to teach the course for the university.

B. Creation of course materials for third parties

The creation of works as a consultant presents challenges when the subject matter of the work relates directly to the faculty member’s teaching duties at the university. The development of materials may be perceived as usurping an opportunity that would otherwise inure to the benefit of the university and its students. See “Miller’s Online courses Spark Review of Policy,” *Harvard Crimson*, November 24, 1999. (Harvard University claimed that Arthur Miller violated university policy by videotaping his lectures and selling them to Concord University without

permission.) If the materials are being developed for a client that has an existing relationship with the faculty member's school, such as through an executive education or professional development program, the course development may be viewed as usurping an opportunity that belongs to the school.

Analysis of whether faculty are permitted to create instructional materials and transfer rights to a third party may include a variety of factors, including whether the faculty member will be prohibited from creating and using related course materials for the university. Additionally, the incorporation of university course materials in works commissioned by third parties can create ownership conflicts. Policies should address situations in which work developed for clients may also be used for institutional purposes, such as course materials and training programs.

C. Use of University Resources and Personnel

Policies that permit outside consulting typically forbid the use of institutional resources, staff, students or confidential information for personal financial gain. These policies should continue to apply in the online context, particularly since course development for a client, if permitted, may require a higher level of staff and technical support. Faculty members may wish to use video footage created for MOOCs but must be aware of institutional policies limiting use of resources, as well as restrictions in in hosting agreements and third party releases on use of course materials outside of the academic context.

Beyond creating courses, faculty members are being recruited as consultants to provide strategic and pedagogical advice to hosting providers, educational media companies and firms investing in the edtech companies. Faculty must be particularly attentive not to use or disclose confidential university information relating to regarding programmatic need, budget plans and data regarding enrolled students and MOOC participants.

D. Limits on Consulting Time

Existing policies that limit the number of permissible consulting days may need to be clarified if the faculty member is creating online courses for MOOCs, either specifically commissioned by the institution or under an agreement between the institution and a hosting provider. Will the definition of "outside teaching" include activities sponsored by the university but not primarily benefitting the university's enrolled students? If the faculty member will receive additional compensation will this work count against the faculty member's consulting limits?

E. Management Role or Equity Interest in Hosting Provider

University policies may restrict faculty from holding an executive or managerial position in an outside organization unless the faculty member takes a leave of absence. Policies also may require that any personal equity interest in an outside educational course provider be disclosed to the university. To the extent that there is either an institutional equity interest in a hosting provider or a personal investment by individuals in leadership positions, care should be taken to avoid any concerns that faculty are being pressured into creating online courses. Individuals with such an interest should be recused from decisions involving the company to avoid the appearance

of a conflict of interest. See *The University of Chicago Chronicle*, May 27, 1999 (faculty members questioned the involvement of the university with a commercial course provider in which a trustee, a dean and three faculty members were investors and members of the board.)

F. Exploitation of the University Brand

Policies can protect against the use of institution's name and brand to promote the teaching activity at another institution or to imply that there is institutional sponsorship of consulting activity. To the extent faculty are permitted to teach elsewhere, faculty can be advised to limit use of their employer's name to identification in a biographical statement. Faculty members can also be advised to prevent the other institution from using the name or insignias of their employer or making statements that imply that the institution sponsors or endorses the activity.

IV. Content Hosting Agreements

Content hosting providers provide a vehicle for distribution of course content that may be attractive to faculty and institutions seeking to enhance the impact of their scholarship, generate additional revenues and to serve the public by making content more broadly available. Adoption of a specific platform should be driven by the university's strategy and objectives. The hosting provider selected may vary depending on whether the goal is to serve a worldwide audience with "as is courses," experiment with a customized course in a "flipped classroom" for enrolled students, offer courses for credit, or inter-institutional licensing of content (or all of the above).

Hosting providers may not have the same expertise or perspective as faculty with respect to pedagogy or may have a model for distribution of the course material that is at odds with the standards and goals of the faculty or the academic institution. The hosting provider may require that courses be constructed to meet its own objectives, resulting in constraints on academic freedom and an adverse impact on the quality of course and reputation of the institution. Recently, faculty at several institutions have expressed concerns about allowing hosting providers to exert control over course materials and pedagogy. See e.g. "Letter from 58 Professors to Smith Addressing edX" *Harvard Crimson*, May 23, 2013; "An Open Letter to Professor Michael Sandel from the Philosophy Department at San Jose State U," *Chronicle of Higher Education*, May 2, 2013; CUCFA President Robert Meister Open Letter to Coursera Founder Daphne Koller, May 10, 2013. In order to protect the rights of faculty and the university, the university can incorporate terms in the hosting agreement to preserve control over the content in a manner that is consistent with its strategic objectives.

A. Content Ownership and Use

The university or faculty creator should retain ownership of the course and control over course materials. The content license can restrict the hosting provider from further distribution of the course materials and from creating derivative works. To the extent permission is granted to create enhancements required for hosting, such as captioning and translations, the university can claim ownership of such derivative works and grant the hosting provider a narrow license for the sole purpose of hosting the course.

Universities should examine the hosting providers terms of service offered to participants to understand both the protections and limitations that will impact the university's control of its content. The terms of service should limit the end-users' right to use and copy the university course content for personal use and should not permit commercial exploitation and creation of derivative works of the course content. See Kolowich, Steven, "How Open Are MOOCs?" *Inside Higher Ed*, November 8, 2012, (comparison of content licenses in the terms of various hosting providers.) Conversely, the terms of service may be at odds with the university's strategic objectives by restricting use of the content. For example, some providers prohibit the for-credit use of courses by peers without a separate licensing arrangement through the provider. See Coursera "Terms of Service" at <https://www.coursera.org/about/terms>

B. Content Placement

The license can specify whether the hosting provider may unilaterally determine the location of the university content on the website. The university may want to restrict co-locating the course content with the content, branding or advertising of third parties. The agreement should also be clear as to whether the content may be hosted on alternative web pages, sites of affiliates or business partners of the hosting provider. To the extent the hosting provider has international affiliates that may be subject to government restrictions on content, the agreement should include provisions regarding the parties' rights in that jurisdiction, including with respect to removal of content.

C. Content Selection, Modification and Removal

Consistent with the principles of academic freedom, the right to select, edit, update and remove course content should be reserved for the faculty member and the university, not the hosting provider. Any modification rights of the hosting provider should be limited to those necessary for technical adjustments required for hosting and should not be based on vague qualitative content standards or unspecified course criteria. Any indexing of the content should not materially alter the sequence of the videos or the nature of the content. The university can also reserve the right to remove content should the presentation of the course by the hosting provider adversely impact the reputation of the institution or the faculty member or if the faculty member leaves the institution.

D. Attribution and Branding

The agreement should include provisions ensuring that the faculty member and the university receive proper attribution for the course and that the course materials include the appropriate proprietary legends. Equally important is the protection of the university brand from exploitation by the hosting provider for unauthorized purposes, such as marketing ancillary services unrelated to the course. The agreement should specify that the university brand is the sole and exclusive property of the university and preserve rights in any goodwill generated from the brand for the university.

The agreement may include a license specifying the use of the brand, which may be limited to the relevant university course description page(s). Including a screen shot of the brand features can be helpful to avoid disputes regarding presentation and placement as the hosting

provider adjusts site content in the future. The university will also want express approval rights for any branding that would accompany a statement of accomplishment or completion certificate and any statements regarding the type of credit (or lack thereof) associated with the certificate. See Rivard, Ry “EdX Rejected,” *Inside Higher Ed*, April 19, 2013 (Amherst College faculty express concerns over exploitation of brand and potential loss of control over certificates).

E. Flexibility

In light of the rapidly evolving nature of online education, preserving flexibility is a critical objective. Additionally, a variety of platform features may be desired for different disciplines, varying approaches to pedagogy and the specific needs of registered students. Accordingly, it is prudent to preserve options for content hosting. The hosting agreement can be a non-exclusive arrangement to allow the university and the faculty member the right to provide the online course through other distribution partners, as well as to permit the faculty to provide video lectures in connection with their traditional academic and consulting activities, as permitted by university policy. The university may wish to avoid requirements for any minimum or maximum number of courses to be hosted on any single platform. Finally, the university can retain the right to take its content and “walk” in the event of a change in control of the hosting provider.

V. Use of Third Party Materials in Massive Online Open Courses

A. Introduction – Campus Versus Open Learning Environments

Thoughtful use and display of third-party intellectual property (texts, images, photographs, drawings, graphs, multimedia works, media or sound files, articles, book chapters, etc.) is fundamental to the educational process on campus. But, the rules are different in the context of open courses (including MOOCs) in ways faculty do not intuitively understand. This copyright “knowledge gap” has become increasingly significant as more of the student educational experience has migrated to the web through integration of third party media sites, blogging, and other publicly accessible tools. Development of course materials for massive open online courses renders acute the many legal distinctions between the traditional (closed circuit) academic teaching environment and the challenges of the open web.

For example, Section 110 (1) of the Copyright Act protects generous displays of educational materials in **face-to-face teaching**, typically without the need to obtain permission or pay fees to a copyright owner. 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. Neither would appear to apply to courses offered by an entity such as Coursera² which is not an educational institution and is for-profit and the applicability to an

² “Coursera is an education company that partners with the top universities and organizations in the world to offer courses online for anyone to take, for free. Our technology enables our partners to teach millions of students rather than hundreds.” <https://www.coursera.org/about>. Coursera is a for-profit company.

entity such as edX³ appears to be tenuous as well. Section 107 – Fair Use of the Copyright Act (discussed further below), allows delivery of restricted amounts of print and digital course materials to students without permission or payment of fees, as long as the amounts supplied are reasonable in light of the guidance emanating from cases such as *Cambridge University Press v Becker*, 863 F. Supp. 2d 1190 (N.D. Ga 2012). However, the applicability of fair use is clearly more limited given the public access to open course materials and where a university’s role is that of content provider to a third party for profit platform provider such as Coursera.

B. Materials Licensed for Campus Use

Faculty and students also have access to rich databases, maps, image collections, and the like through university libraries. These resources are typically licensed to limit who may access and what may be done with the licensed materials; for example, enabling access to “students, faculty and staff” of the institution, along with ‘walk-in” library patrons accessing content from a library terminal. Licenses generally do not allow copying and redistribution of content outside of the University environment. These contractual limitations are not obvious in a campus environment of ubiquitous availability where journals and data sets are available through “invisible” IP authentication. Faculty understandably encourage innovative scholarship through harvesting of map or GIS data from digital resources, textual analysis overlaid on an in-copyright literary text, or repurposing of licensed images, sound or video materials for classroom projects.

While contractual constraints are unlikely to be problematic where scholarly activities and student projects are kept within the classroom, the ability to use these licensed resources in such ways is simply not a given in the land of MOOCs. Librarians can assist in exploring new licensing options, but this constitutes another area where faculty building MOOCs need considerable institutional assistance and as they face a non-intuitive set of barriers to teaching and learning.

C. What MOOC Course Materials Are We Talking About, Anyway?

Third party copyright issues can be involved in many different ways in the production of course materials for MOOCs, including but not limited to:

- (1) 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.
- (2) Full-focus images or video occupying the complete screen in a recorded lecture; such material being potentially downloadable by course participants.
- (3) Power points or lecture notes uploaded to the course website that may contain third party content such as images, audio, video, etc.

³ “EdX is a not-for-profit initiative composed of over 20 leading global institutions, the xConsortium. We offer the highest quality education, both online and in the classroom. Founded by the Massachusetts Institute of Technology (MIT) and Harvard University, edX offers online learning to on-campus students and to millions of people around the world. EdX is building an open-source online learning platform and hosts a web portal at www.edx.org for online education. <https://www.edx.org/org-faq>

(4) Reading materials such as articles, book chapters, or other content that the instructor would like course participants to read.

All of these content types involve choices that can be managed with relative ease in on-campus teaching and learning activities. None of them are easy when it comes to utilizing third party materials in a massive open online course.

D. Contractual Copyright Responsibilities to the Platform Provider

Institutions signing agreements with companies such as Coursera or EdX will find that these entities require participating content providers to warrant that the course materials uploaded are free from copyright constraints. In this, platform providers are no different from other publishers, whose standard agreements include substantial warranties and representations along with indemnification or other statements of legal responsibility.

Coursera “Copyright Clearance” requirements per contract:

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. To the extent that Company provides any accommodations for the Content, as provided in Section 11.2 below, the Parties acknowledge and agree such accommodations are being provided solely to make such Content accessible to persons who otherwise would not be able to access or use such Content, and are not intended to be modifications to, or derivative works of, any underlying Content.

edX “Content” requirements per contract:

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.

E. The Role for Fair Use in MOOCs

U.S. copyright law provides an extremely important exception to the exclusive rights of a copyright holder in Section 107 “Fair Use” and neither Coursera nor edX preclude reliance on fair use in development of course materials. Fair use is a case-by-case inquiry that requires balancing of the following four factors:

- **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.

Fair use analysis is always fact dependent and courts emphasize that each case is to be considered on its specific merits. Nonetheless, as noted previously, in “closed” campus life, fair use is considered to enable generous use of short excerpts of text, music, video, or images in power points, lecture notes, or other materials delivered to students. Fair use enables delivery of reasonable, limited amounts of reading materials to students through course reserves systems. Faculty don’t think about screening whole films or enabling students to view other works in the context of face to face teaching. But 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? The answers to all of these questions are both important and in many cases simply unknown.

F. Developing Guidance in the Face of Uncertainty

Institutions participating in early MOOC experiments are certainly requiring faculty to work hard to obtain permissions wherever possible for use of third party content, whether the content will be embedded in a lecture, a set of power points, or viewed close up on screen. Institutions are engaging librarians and other campus resources to assist faculty with permissions processes and identification of freeware or public domain content. Faculty are being encouraged to:

- Use public domain materials.
- Link to materials on authorized sites. *But note* that many websites have terms of use that allow uses (including downloads) of posted resources only for “non-commercial” users, making the question of whether an institution’s participation with Coursera is “non-commercial” or “commercial.” This issue affects much content posted via Creative Commons and other open source licensing which make distinctions between “commercial” and “non-commercial” uses.
- Do “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.

Counsel at most institutions are taking the position that fair use is not lost in the open course environment; it may simply be more limited in its scope. Counsel should consider developing and asking faculty to follow Guidelines that incorporate the institution’s copyright culture and sense of risk tolerance. Such a guidance template in use at UVA is attached as Exhibit #2.

G. Managing Rights

Making explicit decisions about rights and responsibilities with respect to copyright and permissions issues can be important, especially since the underlying agreements put the institution in the role of certifying copyright compliance and the quality of the instructional materials delivered to the platform provider. Does the institution “delegate” sole responsibility back to individual instructor? (If yes, then be sure your written agreement with the faculty is

absolutely clear about this point.) Will the institution be providing support through the library, graduate assistants, a media team, or other mechanisms?

Institutions are approaching this in many different ways at present, from requiring detailed spread sheets with all third party content precisely documented for each course to enabling individual instructors to handle these issues on their own (typically with the assistance of a graduate student at a minimum). Some institutions that had existing depth in the online education space are simply expanding support centers and services to encompass all developmental needs for MOOCs, including clearing rights and permissions. Whichever model best aligns with institutional culture and resources, it is important to be transparent about these responsibilities as it is the institution which is warranting the quality and lack of infringement of its courses to the platform provider.

H. Copyright Content Strategies of the Platform Provider

Both Coursera and edX 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 may be gaining the ability to market other publisher materials to students, and to obtain rich usage data that can enable them to assess how students and faculty utilize the publisher materials, a learning analytics area of increasing interest to this industry sector and others as well. The specifics of the business deals being struck are not presently public. These deals appear to be strongly cognizant of accessibility requirements, but the degree of actual compliance has not been possible to ascertain.⁴

Counsel for participating institutions have been clear in pointing to the data protection provisions of the institutional agreements with these respective platform providers to ensure that neither faculty nor course participants are being subjected to improper data mining activities. Nonetheless, these agreements (to which institutions are not parties), have the potential to influence faculty selections of texts as well as institutional permissions processes in both positive and negative ways. For example, publisher deals that might effectively limit what texts can be utilized by faculty will trigger concerns about academic freedom and course quality. Deals that compel participant end users to agree to terms that an institution considers unreasonable, will again limit use of that publisher’s texts unless the deals are non-exclusive and publishers remain willing to negotiate individual terms with interested faculty or their institutions.

Many institutions currently experimenting with MOOCs remain agnostic about the platform, and some are participating with both Coursera and edX. A specific platform provider deal with publishers that ties rights and content to a particular platform, will inhibit an institution’s ability to use (often quite expensively produced) course materials in multiple environments. For example, if a faculty member has populated power points, lectures, and other course materials with images from a textbook tied to a Coursera publisher agreement, use of the same materials on campus or with another platform provider may not be possible. Institutions entering into this space may therefore want to carefully consider whether use of platform-

⁴ Given the U.S. Department of Justice focus on both content and platform accessibility in the context of the Kindle enforcement actions (*see also* Section VII herein), this will be an area to watch.

provider enabled third party materials is worth the long term cost of locking down resultant courses to that particular provider.

VI. Data Use and Privacy Issues

A. Coursera and FERPA

Each platform provider is addressing issues such as FERPA in its own way, with important implications for participating institutions. For this reason, any institution contemplating entering into a partnership should carefully review the Terms of Service of the platform provider as these will determine the rights and responsibilities of the thousands, or tens of thousands of participants who will be signing up for the institution's MOOC-offered "courses." As is discussed further below, the Terms of Service will also have an impact on the institution's integration of MOOC courses into on-campus learning activities, where FERPA responsibilities cannot be avoided.

Coursera explicitly disclaims that its participants have student status and does not affirmatively agree to comply with FERPA in its management of participant or end user data. See <https://www.coursera.org/about/terms>:

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.

B. edX and FERPA

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.

DESCRIPTION OF EDX

EdX offers online courses that include opportunities for professor-to-student and student-to-student interactivity, individual assessment of a student's work and for students who demonstrate their mastery of subjects, a certificate of mastery.

CONFIDENTIALITY & SECURITY OF PERSONAL INFORMATION

We care about the confidentiality and security of your personal information. We will use commercially reasonable efforts to keep your Personal Information secure. ("Personal Information" is defined below.) However, no method of transmitting or storing electronic data is ever completely secure, and we therefore cannot guarantee the security of information transmitted to or stored by the edX Website. (As used in this Privacy Policy, "we," "us" and "our" refer to edX.)

This Privacy Policy only applies to information that we collect through the edX Website (the “Site,” which consists of all content and pages located within the edX.org web domain) and does not apply to information that we may collect from you in other ways (for example, this policy does not apply to information that you may provide to us over the phone, by fax or through conventional mail). In addition, please note that your education records are protected by the Family Educational Rights and Privacy Act (“FERPA”) to the extent FERPA applies. <https://www.edx.org/privacypolicy>

The FPCO has not indicated what its stance will be on FERPA’s applicability in an open course learning environment, and the position taken may well vary as between the platform provider that is actually enrolling “participants” and the individual institutions that are simply providing course contents. In these early phases of exploration, most institutions are also acting with caution in the nomenclature they will allow platform providers to use in issuing “certificates” or other confirmations of course achievements. All make clear in their platform agreements that the MOOCs being offered do not constitute enrollment at the institution, or academic credit from the institution. While FERPA is a key concern, other issues outside the scope of this session such as state authorization and institutional accreditation to name but two, are at play here.

C. FERPA and Privacy Implications for Flipping Concurrent Courses on Campus

Legal counsel are well aware that FERPA prohibits sharing certain personally identifiable student information and records without permission from the student. Importantly, FPCO has ruled that *students cannot be required to waive their FERPA rights as a condition of participation in an educational program or activity.*⁵ Thus, if personally identifiable student participation in a class is being captured with the intent of public distribution, their written consent must be documented and options for students unwilling to provide such consent should be afforded.⁶ This presents a challenge where instructors want on-campus students to log into a Coursera MOOC to receive lectures, participate in discussion boards, or upload course assignments as part of a concurrently running course. This also raises concerns where faculty may seek to bring the on-campus classroom out to the MOOC by recording students at the home institution for uploading to the MOOC platform.⁷ Making execution of a FERPA non-compliant platform provider’s Terms of Use a condition of participation in a class taken at “institution X,” would seem to run afoul of FPCO’s position on waiver.

For now, it therefore seems important to ensure that faculty and administrators understand that the institution’s own courses need to remain structurally distinct from a related MOOC, even if students will be offered certain voluntary opportunities to engage with both. Institutions should consider whether lectures and course materials distributed through a platform provider are also

⁵ (<http://www2.ed.gov/policy/gen/guid/fpc/ferpa/library/nduniv081505.html>).

⁶ As NACUA’s Steve McDonald has pointed out, it is possible that FPCO would conclude that consent can be required in specific circumstances where essential pedagogic purposes cannot not be fulfilled without public exposure and review of student work; or where the very purpose of a particular course is focused on interactive web activities. However, such a rationale seems less viable where an institution’s students would be getting asked to waive FERPA rights in order to access course lectures via a platform provider that has disavowed a student relationship and has not agreed to comply with FERPA.

⁷ All of these are real life examples...

being made independently available and being digitally preserved on campus. Ideally, students should retain the ability to choose whether to log into the campus course reserves system or repository to obtain course lectures and materials, or migrate to the platform provider.

Further, uploading pictures of persons taken without their permission can create problems unless the individuals are in a public place, at a public meeting such as a political event,⁸ or the image does not focus in on the person clearly enough for the individual to be personally identified.⁹ Many states have explicit prohibitions on use of an individual's name or image for "commercial" or "trade purposes." If MOOC projects will involve "publication" of personally identifiable images, it is important for faculty to be aware that they should get a signed release. In the case of children (less than 18 years of age), written consent from a parent should be obtained. Coursera and edX require appropriate care of instructors in obtaining signed releases from persons portrayed in MOOC lectures. Nonetheless, faculty accustomed to looser and more flexible practices (including use of guest lecturers) clearly need help negotiating these waters.

D. Student Intellectual Property Issues

Under many university policies, students own the intellectual property rights in their papers and projects unless their work is created with "significant University resources" (labs, high tech equipment, special funding, grants, etc.).¹⁰ Both Coursera and edX require (as do most web site owners) that "users" provide a non-exclusive use license to any intellectual property that the user deposits on the website or platform.

edX policy states:

USER POSTINGS

User Postings Representations and Warranties. *By submitting or distributing your User Postings, you affirm, represent and warrant (1) that you have the necessary rights, licenses, consents and/or permissions to reproduce and publish the User Postings and to authorize edX and its users to reproduce, modify, publish and otherwise use and distribute your User Postings in a manner consistent with the licenses granted by you below, and (2) that neither your submission of your User Postings nor the exercise of the licenses granted below will infringe or violate the rights of any third party. You, and not edX, are solely responsible for your User Postings and the consequences of posting or publishing them.*

License Grant to edX. *By submitting or distributing User Postings to the Site, you hereby grant to edX a worldwide, non-exclusive, transferable, assignable, sublicensable, fully paid-up, royalty-free, perpetual, irrevocable right and license to host, transfer, display, perform, reproduce, modify, distribute, re-distribute, relicense and otherwise use, make*

⁸ See *Everett v. Carvel*, 334 N.Y.S.2d 922 (1972) (official participation in a public event).

⁹ See J. Thomas McCarthy, *The Rights of Publicity and Privacy* §3.17 (2d ed. 2008).

¹⁰ See, e.g. University of Virginia Non-Academic Regulations "*Intellectual Property*"

http://records.ureg.virginia.edu/content.php?catoid=17&navoid=462#inte_prop; University of Minnesota, *Intellectual Property Policy* § IV, Subd. 1, <http://www1.umn.edu/usenate/policies/intelproperty.html>; Washington University in Saint Louis, *Intellectual Property Policy* § I(3)(a), <http://www.wustl.edu/policiesintelprop.html>; California Polytechnic State University, *Intellectual Property Policy* § II(B)(4)(a), <http://www.calpoly.edu/~RGP/intelprop.html>.

available and exploit your User Postings, in whole or in part, in any form and in any media formats and through any media channels (now known or hereafter developed).
License Grant to edX Users. *By submitting or distributing User Postings to the Site, you hereby grant to each user of the Site a non-exclusive license to access and use your User Postings in connection with their use of the Site for their own personal purposes.*

Coursera provides:

User Material Submission

The Sites may provide you with the ability to upload certain information, text, or materials, including without limitation, any information, text or materials you post on the Sites' public forums such as the wiki or the discussion forums ("User Content"). With respect to User Content you submit or otherwise make available in connection with your use of the Site, and subject to the [Privacy Policy](#), you grant Coursera and the Participating Institutions a fully transferable, worldwide, perpetual, royalty-free and non-exclusive license to use, distribute, sublicense, reproduce, modify, adapt, publicly perform and publicly display such User Content. To the extent that you provide User Content, you represent and warrant to Coursera and the Participating Institutions that (a) you have all necessary rights, licenses and/or clearances to provide and use User Content and permit Coursera and the Participating Institutions to use such User Content as provided above; (b) such User Content is accurate and reasonably complete; (c) as between you and Coursera, you shall be responsible for the payment of any third party fees related to the provision and use of such User Content and (d) such User Content does not and will not infringe or misappropriate any third party rights (including without limitation privacy, publicity, intellectual property and any other proprietary rights, such as copyright, trademark and patent rights) or constitute a fraudulent statement or misrepresentation or unfair business practice.

The enthusiasm of many early faculty pioneers to merge their on-campus classes and their developing MOOCs (including encouraging students to participate in concurrent MOOCs and upload assignments and other contributions to the platform), may need calibration with the rights students have under existing institutional IP policy. Here too, the central issues seem to be transparency and preserving opportunities for students to make informed choices.

VII. Accessibility Responsibilities

Institutions and the platform provider offering public services and programs each have responsibilities for ensuring that course materials are accessible to participants with disabilities. The U.S. DOJ and the U.S. DOE Office of Civil Rights have repeatedly made clear that accessibility responsibilities apply to implementations of new technologies within higher education under both Title II of the ADA and Section 504 of the Rehabilitation Act of 1973. *See, e.g.* the agencies' Dear College or University President Letter dated June 20, 2010,¹¹ and their enforcement actions related to experiments with the Amazon Kindle and other tools.

¹¹ "The Departments of Justice and Education share responsibility for protecting the rights of college and university students with disabilities. The Department of Justice is responsible for enforcement and implementation of title III of the ADA, which covers private colleges and universities, and the Departments of Justice and Education both have

Coursera allocates ADA/accessibility responsibilities under its institutional agreements roughly as follows, making both itself and participating institutions responsible for compliance:

*ADA COMPLIANCE*¹²

11.1 University Responsibilities. University will be responsible, at its expense, for providing Content that is accessible to End Users with disabilities, including End Users with visual impairments using a screen reader technology, to enable compliance with the applicable laws and regulations of the Americans with Disabilities Act (“ADA”). University and its Instructors, as part of the Course preparation, will provide the materials required to be provided by University and its Instructors as provided in the ADA Compliance Protocol, including: (i) copies of any slides used in the video lectures and (ii) text description files for any material images used in quizzes or problem sets. Upon request of an End User with a disability, and as further set forth in the ADA Compliance Protocol, University will, consistent with and to the extent required under applicable laws and regulations pertaining to disability access, use commercially reasonable efforts to provide appropriate accommodations in a reasonable timeframe with respect to the Course and will bear costs associated with such accommodations during the Course Lifespan. Upon request, Company will provide assistance to University in providing such accommodations, for a fee to be mutually agreed upon. University shall further cooperate with Company with respect to requests for accommodations from End Users with disabilities as further set forth in the ADA Compliance Protocol. In the event University concludes that the expense of additional requested accommodations is incompatible with University’s budget allotted to performance of this agreement, University shall have the right to request the withdrawal of the Course.

11.2 Company Responsibilities. Company will: (i) use commercially reasonable efforts to make the Platform reasonably accessible to End Users with disabilities, (ii)

enforcement authority under title II of the ADA, which covers public universities. In addition, the Department of Education enforces Section 504 with respect to public and private colleges and universities that receive federal financial assistance from the Department of Education. As discussed below, the general requirements of Section 504 and the ADA reach equipment and technological devices when they are used by public entities or places of public accommodation as part of their programs, services, activities, goods, advantages, privileges, or accommodations.”

“Under title III, individuals with disabilities, including students with visual impairments, may not be discriminated against in the full and equal enjoyment of all of the goods and services of private colleges and universities; they must receive an equal opportunity to participate in and benefit from these goods and services; and, they must not be provided different or separate goods or services unless doing so is necessary to ensure that access to the goods and services is equally as effective as that provided to others. Under title II, qualified individuals with disabilities may not be excluded from participation in or denied the benefits of the services, programs, or activities of, nor subjected to discrimination by, public universities and colleges. Both title II and Section 504 prohibit colleges and universities from affording individuals with disabilities with an opportunity to participate in or benefit from college and university aids, benefits, and services that is unequal to the opportunity afforded others.³ Similarly, individuals with disabilities must be provided with aids, benefits, or services that provide an equal opportunity to achieve the same result or the same level of achievement as others. A college or university may provide an individual with a disability, or a class of individuals with disabilities, with a different or separate aid, benefit, or service only if doing so is necessary to ensure that the aid, benefit, or service is as effective as that provided to others.”

¹² The Coursera ADA Compliance protocol is attached as Exhibit #3.

ensure that a text description file is associated with all material images in quizzes or problem sets provided by University or Instructors, (iii) proactively provide captioning for University Courses offered to the public whose initial enrollment is above 10,000 End Users, and provide such captioning for courses whose initial enrollment is smaller, in a timely manner, upon request by an End User with a disability, (iv) provide University with text transcripts of captions to facilitate University's creation of audio captions for visual elements of its Content, to the extent such text transcripts have been created by Company, and (v) provide a capability for collecting and displaying "crowd-sourced" annotations to Content. University will provide assistance to Company as reasonably necessary for Company to fulfill its obligations under this paragraph. Company shall further cooperate with University with respect to requests for accommodations from End Users with disabilities as further set forth in the ADA Compliance Protocol.

edX's master agreement also includes general language committing to shared legal compliance responsibilities, including accessibility:

Compliance with Laws. Institution and edX shall each comply with all applicable U.S. federal and state laws in connection with its activities hereunder, including without limitation, laws pertaining to data privacy, privacy of educational records, accessibility and laws governing Title IV eligible institutions.

edX is currently developing comprehensive accessibility guidance for institutions and their faculty.

The shared responsibility paradigm of both these platform providers (and the frank uncertainties about the actual scope of accessibility requirements that could apply to participants from every country in the world), suggest institutions should approach this space with care and deliberation. Mid-course accommodation requests could be deemed legally required and involve expensive adaptations that were not contemplated at course materials were developed. The more faculty integrate multi-media content into MOOC course materials, the more complex may become the necessary adaptations to ensure accessibility for all.

VIII. Conclusion

As universities have increasingly explored integration of the web into core teaching and learning activities, responsibilities in the areas of intellectual property ownership, copyright compliance, privacy, and accessibility have expanded significantly. The movement towards massive open online courses has escalated these issues and the legal stakes. Although most scholars clearly understand the responsibilities imposed on them by conventional publishers, a majority may not grasp the legal implications when they act as teachers to migrate classroom activities to the web. In this, they need institutional help and guidance, both being all the more critical when institutions assume direct responsibility for the course materials and programs through agreements with MOOC platform providers.

Exhibit #1

Sample Online Course Agreement

[INSERT DATE]

[INSERT NAME OF FACULTY MEMBER]

[INSERT STREET ADDRESS OF FACULTY MEMBER]

[CITY, STATE, ZIP]

Dear [INSERT NAME OF FACULTY MEMBER]:

Thank you for agreeing to develop and offer an online course to be distributed initially under the _____'s ("University") arrangement with _____ ("Hosting Provider"). In general, with the University's assistance, you will be creating and developing the syllabus and teaching materials for the course, providing the textual, audio, video, digital and other content, as well as the quizzes and other assessments. The University's agreement with Hosting Provider requires that the University, Hosting Provider and you execute a "Course Development Agreement" that describes the specifications and content for the course, and that you execute an agreement concerning use of the content provided for the course and of your name, image and likeness. The purposes of this agreement are to ensure that these contractually required documents are completed, and to address other matters between you and the University concerning your participation in this project.

The University and you agree as follows:

1. **Course Development.**

1.1 **Course Development Agreement.** Attachment A to this letter, the Course Development Agreement executed by you, Hosting Provider and the University, describes the course you will develop for online distribution (the "Course"). You agree to carry out the responsibilities of the Instructor as specified in the Course Development Agreement.

1.2 **Consultation.** In preparing the Course, you agree to consult periodically with _____ concerning the content, organization and format of the Course, as well as the technical requirements for uploading and distributing the Course through the Hosting Provider platform.

1.3 **Quality and Editorial Control.** You understand and agree that the Course is intended and expected to meet the high academic standards commensurate with traditional University courses that cover similar material. As the Course developer and instructor, you are responsible for and control the substantive content of the Course and the methods for achieving its pedagogical objectives.

1.4 **Course Content.**

1.4.1. **Definition.** “Content” means any information, data, works of authorship or other materials delivered in text, photographic, audio, visual or audiovisual format, including videos, lectures, course materials and syllabi.

1.4.2. **New Course Content.** You may include in the Course any Content that you newly author or create in connection with this Agreement and the Course (the “New Course Content”).

1.4.3. **Pre-Existing Course Content.** You may include in the Course any Content that you have previously authored or created (the “Pre-Existing Course Content”), provided that you own all of the necessary right, title and interest, including copyright rights, in the previously authored materials, to allow you to include the Pre-Existing Course Content in the Course and to grant to the University all of the rights with respect to such Pre-Existing Course Content specified in Attachment B. If you do not possess those rights, you may not use Pre-Existing Course Content unless you obtain Permission (as defined below).

1.4.4. **Third Party Materials.** If you choose to include in the Course any Content that is not New Course Content (the “Third Party Materials”), you must obtain any permissions, releases, waivers and/or licenses (“Permissions”) from third parties that are necessary for you to include that Content as part of the Course and to grant to the University all of the rights with respect to the Third Party Materials specified in Attachment B, or you must consult with and obtain the approval of _____ to include such Third Party Materials in your Course. You must obtain those Permissions or approvals before uploading or delivering your Course through Hosting Provider. If requested by the University, you will share the Permissions with the University to confirm that you have obtained all the necessary Permissions for the Third Party Materials.

1.5 **Course Development Assistance.** The University shall provide up to \$___ (___ Thousand Dollars) to pay teaching assistants hired at your request to help develop the Course and participate in the first offering of the Course through Hosting Provider.

2. **Use Rights in the Course and Course Content.**

2.1 **Agreement for Instructors and Guest Lecturers.** You have executed Attachment B, “Agreement for Instructors and Guest Lecturers,” and you acknowledge that the terms of Attachment B are incorporated into and form part of this Agreement.

2.2 **Ownership of New Course Content.** Subject to the rights granted to the University and to Hosting Provider under this Agreement and the “Agreement for Instructors and Guest Lecturers”, you retain the copyright interest in New Course Content that you create or author and you may use your New Course Content to teach, and in journal articles,

conference presentations, and other scholarly works and activities, consistent with the University's other policies.

2.3 **Use of Recorded Lectures.** You may use the audio and video recordings of lectures included in the Course in your other teaching and professional activities for the University. You may not use the recordings in any non-University activity or venture without the prior written consent of the University.

3. **Compensation.**

3.1 **Initial Compensation.** For the services you perform and all of the rights you grant under this Agreement, the University shall pay you a stipend of \$_____ (_____Dollars). This stipend will be paid to you in the month following the month in which the first lecture in the Course is offered through Hosting Provider.

3.2 **Contingent Compensation.** If the University receives revenue under the Hosting Provider agreement (or any other licensing or distribution arrangement) on account of the distribution of the Course, you may receive a share of such revenues under the terms and conditions specified in Attachment C.

4. **Miscellaneous Provisions.**

4.1 You agree to make reasonable edits and adjustments to the Course Content if Hosting Provider or the University determines that the Course does not meet the applicable technical quality standards or does not meet the requirements and standards of the Course Development Agreement.

4.2 This Agreement does not affect your other responsibilities at the University.

4.3 The University and you will comply with all applicable laws, rules and regulations in performing this Agreement and in connection with the Course, including but not limited to FERPA (the federal law and implementing regulations regarding privacy of certain educational records). If you learn or obtain confidential information about learners and/or Hosting Provider's platform technologies as a result of the Course, you will not use that confidential information for any purpose other than your obligations regarding the Course, and you will not disclose that confidential information to any third person, without the University's prior permission.

4.4 This is the final and entire agreement between the University and you about the Course, and supersedes all prior or contemporaneous understandings, discussions, negotiations or agreements, oral or written, about the Course. This Agreement cannot be amended unless it is done in a writing signed by you and an authorized University representative.

4.5 All of the provisions of Sections 2, 3, 4.3 and this 4.5 shall survive the termination or expiration of this Agreement.

This Agreement shall be legally binding on you and the University, effective as of the last day the Agreement is signed by you and an authorized University signatory.

University

[Insert name of Faculty member]

By: _____

Name: _____

Name: _____

Title: _____

Date Signed: _____

Date _____

Signed: _____



ATTACHMENT A
Course Development Agreement



ATTACHMENT B
Agreement for Instructors and Guest Lecturers

This agreement is made in reference to a course titled _____ (“**Course**”) that is being prepared for online distribution initially by _____ (“**Hosting Provider**”) under an agreement between Hosting Provider and _____ (“**University**”). For good and valuable consideration, the receipt and sufficiency of which I hereby acknowledge, I hereby irrevocably grant University the absolute right and permission to use, store, host, publicly broadcast, publicly display, public perform, distribute, reproduce and digitize any Content that I upload, share or otherwise provide in connection with the Course or my use of the Platform, including the full and absolute right to use my name, voice, image or likeness (whether still, photograph or video) in connection therewith, and to edit, modify or adapt any such Content for the purposes of formatting or making accommodations for the purposes of complying with any applicable requirements of the Americans with Disabilities Act. I also irrevocably grant University the right to grant any or all of the foregoing rights and permissions (i) to Hosting Provider for the duration such Content is offered through the Platform, and (ii) to other entities or persons in connection with any other distribution of the Course. To the extent I create or develop any software, interfaces or assessment features for use in connection with the Course or the Platform (“**New Features**”), I hereby irrevocably grant University the right to use my contributions to the New Features for any and all purposes and to grant others, including the Hosting Provider, the right to use my contributions to such New Features solely in connection with, and for the duration such entity offers the Course as authorized by University. “**Content**”

means any information, data, works of authorship or other materials delivered in text, photographic, audio, visual or audiovisual format, including videos, lectures, course materials and syllabi. “**Platform**” means Hosting Provider’s proprietary software platform and algorithms used to host, transmit and make Content available via the Internet.

I represent that to the best of my knowledge, I have all necessary right and authority to grant the rights herein granted with respect to the Content I upload, share or otherwise provide in connection with the Course or my use of the Platform. I further represent that (i) I have used, and will use, reasonable efforts not to incorporate or use any libelous, slanderous, or obscene materials or commentary in such Content, (ii) I have used, and will use, reasonable efforts to comply with all guidelines and agreements between me and the University regarding copyright clearance and the use of third-party copyrighted material in such Content; and (iii) I have used, and will use, best efforts, to the extent consistent with the pedagogical goals of the Course, to consider persons with disabilities in the preparation and presentation of Content for such Course, such as verbally describing visual elements for the visually impaired.

I hereby release, discharge, promise not to sue, and hold harmless University and its affiliates, successors and assigns and any entity, including Hosting Provider, to which University may grant any right or permission authorized hereunder, from and against any and all claims, demands, costs and/or causes of action of any nature arising out of or in connection with the exercise of any rights herein granted, including, without limitation, any claim for infringement, right of publicity, libel, slander, defamation, moral rights, invasion of privacy or violation of any other rights relating to any Content I upload, share or otherwise provide in connection with the Course or use of the Platform.

I certify and represent that I have read this Agreement, fully understand its meaning and effect, and have signed this Agreement intending to be legally bound. The provisions hereof shall be binding upon me and my successors, heirs and assigns.

(Please Print) Name: _____

Course(s): _____

Signature: _____ Date: _____

ATTACHMENT C
Contingent Compensation

The University's arrangement with Hosting Provider provides for the University to share in certain revenue Hosting Provider may generate in connection with its distribution of each course, and to share in the net revenue Hosting Provider generates, if any, across the entire portfolio of University courses offered through Hosting Provider. Because the University's arrangement with Hosting Provider is non-exclusive, it is possible that the Course might be delivered through another platform in the future that would also provide for a potential revenue stream. The University does not anticipate any significant revenue from distribution of the Course in the short term, if ever. The following contingent revenue distribution provisions are provided to address the way the University will account for and distribute revenues received from Hosting Provider or other entities that distribute the University's online courses initially developed for distribution through Hosting Provider. The governing principle is that, except as provided below, distributions will be made to a faculty course developer only after the full costs of developing the course and the full costs of administering the online course program have been recovered. The following definitions and distribution scheme apply to your Course and to the other University online courses initially developed for distribution through Hosting Provider.

1. Definitions.

“Gross Course-specific Revenues” means revenue received by the University under the Hosting Provider agreement (or any other distribution or license agreement) that are directly attributable to a specific course and accounted for as such under the Hosting Provider or other distribution agreement.

“Net Course-specific Revenues” means Gross Course-specific Revenues, minus Course-specific Costs.

“Course-specific Costs” means all costs incurred by the University in connection with the development or distribution of a course including, but not limited to, stipends or other payments for faculty or teaching assistants, video capture and editing costs, administrative support allocated to a specific course, and payments for rights clearances or permissions.

“Program Administration Costs” means all costs incurred by the University in managing and administering the online courses initially developed for distribution through Hosting Provider, including, without limitation, allocable portions of the compensation of University staff who help administer the program and compensation of consultants retained to assist with the program, licensing and marketing expenses.

“Net Program Revenues” means Total Program Revenues minus the sum of the following: Course-specific Costs for all courses, the faculty share of Net Course-specific Revenue for all courses, and Program Administration Costs.

“Total Program Revenues” means the sum of Gross Course-specific Revenues and Other Revenues.

“Other Revenues” means any revenue received by the University under the Hosting Provider agreement (or any other distribution or license agreement) other than the Gross Course-specific Revenues for all University courses developed for Hosting Provider.

2. Contingent Revenue Participation. Should the University receive royalties or other cash payments from the sale, license, transmission or other distribution of the Course through Hosting Provider or any other technology platform to individuals or entities not affiliated with the University, you will be entitled to share in the net revenues, if any, as follows:

2.1. Course-specific Revenues. You shall receive _____ percent (___%) of Net Course-specific Revenue received by the University. Within ninety (90) days after the end of each calendar year in which the Course has been offered through Hosting Provider, the University will notify you if there has been Net Course-specific Revenue in the preceding calendar year and, if so, shall distribute to you your share of such revenue.

2.2 Faculty Pool. _____ percent (___%) of the Net Program Revenues shall be set aside for distribution among all faculty members who have developed courses for distribution through Hosting Provider.

2.3 Share of Faculty Pool. As soon as practicable after the end of each calendar year, the University shall determine whether the distribution of University courses developed for Hosting Provider has resulted in Net Program Revenues and, if so, the amount of the faculty pool. If there is a faculty pool available for distribution, the University shall determine the faculty members entitled to share in the faculty pool, and the relative shares of each faculty member as follows: each course that has been offered during the preceding year will receive a number of units equal to the number of video hours in the course multiplied by the number of times the course was offered in the year. Each faculty member who has developed one or more Courses that has been delivered through Hosting Provider in the preceding year will be entitled to a share of the pool that is equal to the number of units attributed to that faculty member’s courses, divided by the total number of units attributed to all courses delivered through Hosting Provider. The University shall make reasonable efforts to distribute to you the share, if any, of the faculty pool to which you are entitled within one-hundred eighty (180) days after the end of the calendar year.

3. No Equity Participation. If the University should obtain an ownership interest in any company or entity that licenses or distributes the Course, you will not be entitled to share personally in the University’s ownership interest.

EXHIBIT #2

Sample Guidelines for Using Copyrighted Material in Massive Online Open Courses (“MOOCs”)¹³

Preliminary Comments for Faculty and Other Course Developers:

- Many of the “traditional” educational exceptions that allow classroom uses of third-party material without permission do not apply readily in MOOCs, including the Coursera or open web environment. This is difficult, as the teaching process within the University’s face-to-face classrooms and password-protected course reserves systems enables much sharing of third party materials for teaching and learning purposes under specific exceptions within the US copyright law. In addition, the University Library has licensed a vast amount of digital material (articles, books, music, video) for teaching and research purposes on Grounds, which makes use of these resources easy. Moving to the .www environment of Coursera or other MOOCs requires thinking about copyright differently.
- Coursera specifically advises in its Copyright Guidelines against the use of third-party materials in courses unless permission has been obtained. Third party materials are materials still under copyright protection, including books, videos, films, sound recordings, images, graphs, or other copyrightable works.¹⁴
- Public domain works are works that are no longer protected under US copyright. US governmental works are also not subject to copyright protection. Depending on the nature of a course, these public domain resources may be extremely useful in your courses. Library staff (consult with your subject specialist) may be very helpful in identifying public domain and licensed resources that might be used in your Coursera courses. The Coursera coordinator is also assembling a list of online resources with liberal permissions and use rights.¹⁵
- Any use of material that has been made accessible on the web must be examined carefully, as website owners routinely impose Terms of Use or other licensing on those who access their materials. Many websites allow linking, but not downloading and/or redistribution. Others make distinctions between “commercial” and “non-commercial” uses of posted materials. Faculty and other course developers must carefully track and heed applicable restrictions in their use of web-based content in developing course materials for Coursera.
- Textbook publishers are warming up to the MOOC environment, and may be willing to authorize use of the image content and other materials from a textbook in your recorded lectures, if the text is a recommended resource for the course. Some journals are also willing to authorize use of articles or content from articles in lectures or in recommended readings.

¹³ An earlier version of these guidelines was co-authored by Kevin Smith of Duke University and Madelyn Wessel of the University of Virginia.

¹⁴ The “Official Coursera” issued Guidelines are found below.

¹⁵ Selected Copyright and Permissions Resources are found below.

Faculty who are also the original authors of such articles are likely to find they are able to obtain permission for these uses.

- Coursera is developing new agreements with certain publishers that may enable use of textbooks and other content in both course materials and for course participant access. Faculty should not utilize such publisher offerings without consulting with the Coursera administrator to be sure that relevant terms of use for both faculty and participants are clearly understood and align with University privacy and related policies.
- The most likely consequence of a complaint alleging copyright infringement is that a course will suddenly be taken down from the Coursera site. Coursera has registered an agent to receive so-called “take down” notices and clearly intends to take advantage of the safe harbor provided to online service providers when they act quickly to remove contested content.
- Fair use can apply to MOOC courses, but in a more limited fashion than it does in more closed educational environments. Coursera has taken the position that fair use can apply only in very limited circumstances in their Copyright Guidelines.¹⁶ Specific guidance on fair use is provided for faculty and staff below.
- Coursera has identified the following content as “Prohibited Material” in their Copyright Guidelines: political cartoons, *Getty images, popular movies, television shows, popular songs, and trademarks*. These guidelines make clear that such content can **only be used with permission or where a fair use case for the use is strong**. (*See more* on this below under Video/Film and Music/Sound.)

Fair Use:

The guidelines below represent a judgment about when fair use in a Coursera course is most defensible. In many cases, the best decision may be to simply remove third-party copyrighted content that is not essential to the pedagogy of a course. The MOOC experience is quite different than in a classroom, and the impact of purely illustrative content may be reduced in that setting. When material is deemed essential, please carefully consider these fair use considerations for different types of content:

¹⁶ Coursera’s guidelines state: “In the context of a for-profit venture, fair use is fairly limited. Faculty may rely on fair use in two circumstances. 1) The image shown is being directly criticized. For example, in a photography course, a photo is being shown to illustrate the problems with over-exposing film. 2) The image is being used in a transformative way; that is, the purpose for use in the course is completely different than its original purpose. For example, in a course about web design it is acceptable to show web screen shots to demonstrate good and bad web design techniques. (As a footnote on screenshots, if the purpose of showing the screen shot is different than the purpose of the author of the website, e.g., your purpose is to demonstrate how a particular website works, while the purpose of the author of the website is to communicate the information on the screen, then generally the use will be transformative and the use a fair use.)”

Textual Material

- Short quotations from the literature of a discipline that are incorporated into a lecture and/or the accompanying slides are clearly fair use and do not require permission.
- Distribution of more text than a long quotation should probably only be done with the permission of the publisher.
 - Where the instructor is also the author of the work (article or portion of a book) being distributed, the publisher is more likely to grant permission.
 - A recommendation to purchase the book from which an excerpt is taken, and a link through which students can make such a purchase, will also encourage the publisher to grant permission.
 - It is worthwhile to check whether a particular article is now available through an open-access repository such PubMed Central, a society, or a university. Again, librarians can help faculty to research availability of such resources.
 - Links to purchase articles (through the CCC or the relevant society or publisher) will enable students to obtain additional content.
 - If the text you need is no longer available for purchase or permissions licensing, fair use may support using a greater portion of the work in your Coursera teaching activities. Such a determination should only be made in consultation with a librarian.

Images (including graphs and figures)

- When the use of illustrations, graphs and figures is integral to the point of the lesson, and the picture or figure is subjected to commentary and critical assessment, the case for fair use is quite strong. If such selected material comes from diverse sources and is not too numerous, permission need not be sought. Delivery of image content in a low resolution format also enhances the case for fair use.
- In many cases, a licensed substitute (such as a picture carrying a Creative Commons license or dedicated to the public domain) can be found for those pictures that depict a specific subject but where a particular picture of that subject is not required.
- When the purpose of the picture is merely to break up the text in PowerPoint slides or illustrate them, the case for fair use weakens. Such images should be removed in order to reduce the burden of clearing copyright. Experience suggests this can be done without harming the experience of an online, asynchronous course.

Video/Film

- Given Coursera's position that "popular" films/videos should not be used (without permission), use of documentary, educational, older, or historic films and videos should be a primary focus. In any use of film/video, careful case-by-case fair use evaluation is critical.

- If your course requires use of “popular” or current material, you should consult with the Coursera coordinator and a librarian regarding fair use and licensing options.
- Whenever possible, it is preferable to link out to a video. In those cases, students would be directed to follow the link, view the video, and then return to the lecture. This is especially appropriate when the entirety of a video clip must be viewed before the lecture will continue. Incorporating significant chunks of video into a lecture increases the chances that the course will be subject to a “take down” notice.
- The case for fair use is much stronger when the discussion of what students are seeing in the video clip is to be intermingled with that clip. In those cases, where the clip will be interrupted by discussion before it ends, the teaching method itself lends strength to the fair use case. Clips treated in this way, and still no longer than is needed to make the pedagogical point, can be regarded as fair use for which permission is not needed.
- When a substantial clip of video, which will not be intermingled with discussion, is incorporated into the lecture, rather than linked to, permission should be sought.

Music/Sound

- Given Coursera’s position is that “popular” music should not be used (without permission) use of older, classical, (i.e. not “current popular”) music is encouraged. In any use of sound recordings, careful case-by-case fair evaluation is critical.
- If your course requires use of “popular” or current material, you should consult with the Coursera coordinator and a librarian regarding fair use and licensing options.
- Whenever possible, it is preferable to link out to a sound file if one is available on the web. In those cases, students would be directed to follow the link, and then return to the lecture. This is especially appropriate when the entirety of a musical work must be heard before the lecture will continue. Incorporating significant amounts of a musical or sound recording into a lecture increases the chances that the course will be subject to a “take down” notice.
- The case for fair use is much stronger when the discussion of what students are hearing is to be intermingled with that sound file. In those cases, where the sound file will be interrupted by discussion before it ends, the teaching method itself lends strength to the fair use case. Sound files treated in this way, that are no longer than is needed to make the pedagogical point, can be regarded as fair use for which permission is not needed.
- When a substantial sound file, which will not be intermingled with discussion, is incorporated into the lecture, rather than linked to, permission should be sought.

Acknowledgement/Attribution

- Many of the licenses that allow use of materials without seeking further permission, including Creative Commons licenses, require that attribution be made to the original source.

Such acknowledgement is also good scholarly practice. Acknowledgement of such licensors can be made at the end of an individual lecture; it need not be included on the particular slide or at the time when the work is used, if that would harm the flow of the instruction.

- Attribution is always critical as a sound scholarly practice. Images of art or architecture should always be identified as to the artist, the owner, and the photographer where this information is known. Textual quotations should always be attributed to the author.
- As noted above, great care must be given to address licensing or other restrictions imposed on third party materials, even those made generally available by an owner on the web.

Coursea-Issued General Copyright Guidelines

Last Updated: Sep 08, 2012 07:06PM PDT

Faculty are generally used to creating course content relying on the face-to-face teaching exception and the fair use doctrine of copyright law. These are much more restrictive in the context of offering online education to the general public. To avoid copyright concerns, we ask that instructors follow these requirements with regard to use of third-party content in materials. Third party content means any content that is not self-created, such as graphs, charts, artwork, photos, screenshots, clip art, trademarks and videos.

If you find yourself using a lot of images or excerpts from a single source, please contact us to try and work out a blanket deal - it's typically easier for us to do the negotiations, as we have leverage from multiple classes and schools. Here's a more extensive document on such publisher deals.

We have prioritized the following options for the use of images and videos in presentations:

Option A: Make the content yourself. Rather than relying on an existing graph or chart, make an image yourself. (Note: Do not copy someone else's chart, as that is simply making a derivative work and the copyright stays with the original author.)

Option B: Get the content from a friend, and get permission to use it in your online course. Make sure your friend understands the scope of use you will be making of the image and make sure that your friend owns copyright (has not given it away to a journal or conference) and has the authority to give you the permission you need).

Option C: Get the content from a public domain website that allows use of images for any purpose, including for-profit purposes. Note that the license must be broad enough to permit for for-profit use. Examples of acceptable licenses are CC-CY, Creative Commons Attribution License (in which you must provide attribution to the author). You may find the following links helpful: [Reusing content outside Wikimedia] [Public Domain Clip Art] [Public domain images.com]

Option D: Link to it! Pointing your students to the source of content on the web is lawful. The only limitation here is that you should ensure that you are pointing to a legitimate source for the content. That is, the original website or poster of the content (in the case of YouTube, for example) must have or reasonably be expected to have the authority to host or post the content. Provide a soft link, so that the students view the content from the original source; do not deep embed the content.

Option E: Seek clearance from the publisher for use. If you want to request permission to use an image or other media from a publisher, you can usually find an email address to send reprint requests to on publishers' web sites. See below for a sample of what a request looks like.

Option F: Conduct a fair use analysis. In the context of a for-profit venture, fair use is fairly limited. Faculty may rely on fair use in two circumstances. 1) The image shown is being directly criticized. For example, in a photography course, a photo is being shown to illustrate the problems with over-exposing film. 2) The image is being used in a transformative way; that is, the purpose for use in the course is completely different than its

original purpose. For example, in a course about web design it is acceptable to show web screen shots to demonstrate good and bad web design techniques. (As a footnote on screenshots, if the purpose of showing the screen shot is different than the purpose of the author of the website, e.g., your purpose is to demonstrate how a particular website works, while the purpose of the author of the website is to communicate the information on the screen, then generally the use will be transformative and the use a fair use.)

Option G: Blank it out. If you are not able to make one of the options above work, please take the image out.

Prohibited Material

In addition to the above information, stay away from the following material:

- Political cartoons
- Getty Images
- Popular movies, television shows
- Popular songs
- Trademarks

For further questions regarding these guidelines, please contact us or your respective school copyright experts.

Sample Reprint Request

Here is an example of a reprint request:

-----Original Message-----

Sent: Monday, February 20, 2012 2:14 PM

To: PNAS Permissions

Subject: Permission to reprint request

[Name of Requester]

Address:

353 Serra Mall
Gates Building, Room 114
Stanford, CA 94305
Telephone: 443-255-1323
e-mail: email

Item we'd like to reprint:

PNAS volume 103, issue 38, pages 14062-14067

Article: Identifying regulatory mechanisms using individual variation reveals key role for chromatin modification

Authors: Su-In Lee, Dana Pe'er, Aimée M. Dudley, George M. Church, and Daphne Koller

We would like to reprint figure 4b.

Where it will be reprinted:

Free online machine learning course, ml-class.org

Authors / editors: Dr. Andrew Ng

Publisher: Coursera, Inc.

Retail price: Free access to material for students

Intended audience: Anyone interested in studying machine learning material

Coursera is a for-profit company.

We work closely with Dr. Daphne Koller, and already have her permission to reprint the material. Please let us know how to proceed.

Thank you,

-Name of Person making request

A. Selected Copyright and Permissions Resources:

- Obtaining Copyright Permissions, University of Michigan Copyright Office
<http://guides.lib.umich.edu/content.php?pid=302339&sid=2478381>
- Free Image sites: (Remember: ALWAYS read the license for special details/constraints/terms)
 - Freedigitalphotos.net: <http://www.freedigitalphotos.net/>
 - Freerange: <http://freerangestock.com/>
 - Stockvault: <http://www.stockvault.net/>
 - Photobucket: <http://www.cartoonstock.com/>
 - A list of other free stock photo sites with reviews:
<http://www.freestockimages.net/resource-list/>
- Sites that have some royalty-free images (you'll pay, but not as much)
 - iStockphoto: <http://www.istockphoto.com/>
 - Corbis: <http://www.corbisimages.com/>
 - Getty Images: <http://www.gettyimages.com/>
 - Cartoons: <http://www.cartoonstock.com/>

B. General Copyright Resources and Information

- The United States Copyright Office: <http://www.copyright.gov/circs/>
- Columbia University Library Copyright Advisory Office: <http://copyright.columbia.edu/>
- The University of Texas, Austin Copyright Crash Course: <http://copyright.lib.utexas.edu/>
- Association for Research Libraries (“ARL”): <http://www.arl.org/sc/copyright/index.shtml>
- Stanford University Libraries: [http://fairuse.stanford.edu/Copyright and Fair Use Overview/](http://fairuse.stanford.edu/Copyright%20and%20Fair%20Use%20Overview/)
- Website of the North Carolina State Libraries, Scholarly Communication Center
<http://www.lib.ncsu.edu/scc/main.html>
- Cornell Copyright Information Center: <http://www.copyright.cornell.edu/>
- BYU Copyright Licensing Office: <http://lib.byu.edu/sites/copyright/>
- Center for Intellectual Property, UMUC: <http://www.umuc.edu/distance/odell/cip/cip.shtml#>
- Harvard’s Berkman Center, “Copyright for Librarians”
http://cyber.law.harvard.edu/copyrightforlibrarians/Main_Page
- University of Minnesota: <http://www.lib.umn.edu/copyright/> and
<http://www.lib.umn.edu/copyright/checklist.phtml>
- Catholic University - General Counsel’s website:
<http://counsel.cua.edu/copyright/resources/guidelines/>

C. Determining the Copyright Status of a Work:

- Two excellent resources to assess whether a work has passed into the public domain are posted at Cornell and UNC http://www.copyright.cornell.edu/public_domain/
<http://www.unc.edu/~unclng/public-d.htm>
- *How to Investigate the Copyright Status of a Work*, US Copyright Office Circular: <http://www.copyright.gov/circs/circ22.pdf>
- How to Investigate the Copyright Status and Potential Fair Use of a Work: <http://www.copyright.gov/circs/circ22.html>;
[http://fairuse.stanford.edu/Copyright and Fair Use Overview/chapter13/index.html](http://fairuse.stanford.edu/Copyright%20and%20Fair%20Use%20Overview/chapter13/index.html)
- Kenny Crews, Researching the Copyright Status of a Book: Protected or Public Domain? <http://copyright.columbia.edu/copyright/files/2010/08/researching-the-copyright-status-of-books.pdf>
- From the ALA, the Digital Copyright Slider: <http://librarycopyright.net/digitalslider/>
- From the VRA, the Digital Image Rights Computator: <http://www.vraweb.org/resources/ipr/dirc/index.html>
- Copy Photography Computator: <http://www.vraweb.org/resources/ipr/computator/index.html>

D. Copyright Databases:

- US Copyright Office: <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First>
- Google: <http://booksearch.blogspot.com/2008/06/us-copyright-renewal-records-available.html>
- Stanford University's Copyright Renewal Database: <http://collections.stanford.edu/copyrightrenewals/>
- The University of Texas at Austin's Harry Ransom Center FOB (Firms Out of Business) Database <http://tyler.hrc.utexas.edu/fob.cfm>
- The University of Texas at Austin's Harry Ransom Center WATCH (Writers, Artists, and their Copyright Holders) Database: <http://tyler.hrc.utexas.edu/>
- The Visual Arts and Galleries Association (VAGA): <http://www.vaga.co.uk/>
- The Society of Authors: <http://www.societyofauthors.org/>

E. Fair Use and Digital Rights

- Stanford: <http://fairuse.stanford.edu/>
- Free Expression Policy Project at NYU Law School <http://www.fepproject.org/policyreports/fairuseflyer.html>
- Berkman Center for Law and Society at Harvard Law School <http://cyber.law.harvard.edu/home/>

- Electronic Frontier Foundation <http://www.eff.org/>
- Center for Intellectual Property and Copyright in the Digital Environment: <http://www.umuc.edu/distance/odell/cip/links.html>

F. Images, Film, Music, Multi-Media

- VRA's Copyright Resources and Image Calculator:
<http://www.vraweb.org/resources/ipr/copyright.html>
<http://www.vraweb.org/resources/ipr/dirc/index.html>
- VRA Statement on the Fair Use of Images for Teaching, Research, and Study
<http://www.vraweb.org/organization/pdf/VRAFairUseGuidelinesFinal.pdf>
- NINCH: <http://www.ninch.org/copyright/>
- Resources Library of the Center For Social Media – American University, Best Practices Guides: <http://www.centerforsocialmedia.org/resources/>
- Best Practices in Fair Use of Dance-Related Materials: <http://www.centerforsocialmedia.org/fair-use/related-materials/codes/best-practices-fair-use-dance-related-materials>
- The Code of Best Practices in Fair Use for Media Literacy Education
<http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-media-literacy-education>
- Code of Best Practices in Fair Use for Online Video: <http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video>
- Code of Best Practices in Fair Use for Open CourseWare:
<http://www.centerforsocialmedia.org/ocw>
- Code of Best Practices in Fair Use for Scholarly Research in Communication
<http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-scholarly-research-communication>
- Documentary Filmmakers' Statement of Best Practices in Fair Use:
<http://www.centerforsocialmedia.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use>
- Society for Cinema and Media Studies' Statement of Best Practices in Fair Use in Teaching for Film and Media Educators: <http://www.centerforsocialmedia.org/fair-use/related-materials/codes/society-cinema-and-media-studies-statement-best-practices-fair-use->
- Society for Cinema and Media Studies' Statement of Fair Use Best Practices for Media Studies Publishing: <http://www.centerforsocialmedia.org/fair-use/related-materials/codes/society-cinema-and-media-studies-statement-fair-use-best-practices->
- Copyright Website of the Music Library Association:
<http://www.musiclibraryassoc.org/copyright/>
- Fair Use and Video Project: http://pages.shanti.virginia.edu/Fair_Use_and_Video/
- ARL Code of Best Practices in Fair Use for Academic and Research Libraries
<http://www.arl.org/bm~doc/code-of-best-practices-fair-use.pdf>

G. Terms of Service You Need to Know About

- YouTube: <http://www.youtube.com/static?gl=US&template=terms>
 - Community guidelines: http://www.youtube.com/t/community_guidelines
 - Copyright Tips: http://www.youtube.com/t/howto_copyright
- Google: <http://www.google.com/accounts/TOS>
 - “DMCA” <http://www.google.com/dmca.html>
- Facebook: <http://www.facebook.com/terms.php?ref=pf>
- Twitter: <http://twitter.com/tos>
 - Twitter Rules: <http://support.twitter.com/articles/18311-the-twitter-rules>
- Flickr (Yahoo): <http://info.yahoo.com/copyright/us/details.html>
- Wikipedia/Wikimedia: http://wikimediafoundation.org/wiki/Terms_of_Use

H. Copyright History

- [Primary Sources on Copyright \(1450-1900\)](#) Copyrighthistory.org (This is a digital archive of primary sources on copyright from the invention of the printing press (c. 1450) to the Berne Convention (1886) and beyond.)
- Copyright Infringement Project at UCLA: <http://cip.law.ucla.edu/> (with music clips and other materials illustrating cases of alleged copyright infringement).

I. Sites Supporting Independent Distribution and Sharing:

- Creative Commons: <http://creativecommons.org/>
- Open Source: <http://www.opensource.org/>
- PubMed Central: <http://www.pubmedcentral.nih.gov/>
- Open Access Anthropology: <http://openaccessanthropology.org/>

J. Zwolle Group Comparative Analysis of World Copyright Law: Issues for University Scholarship

- http://copyright.surf.nl/copyright/files/International_Comparative_Chart_Zwolle_III_rev071306.pdf

K. And Books:

- *Permissions: A Survival Guide – Blunt Talk About Art as Intellectual Property* Susan M. Bielstein, University of Chicago Press, 2006
- *Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums* Peter Hirtle et al, Cornell University Library 2009
<http://www.library.cornell.edu/news/091029/hirtle> and available as a free download:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1495365

Exhibit #3 ADA Compliance Protocol (Coursera)

Company will use commercially reasonable efforts to make the Platform reasonably accessible to End Users with disabilities, including End Users with visual impairments using a screen reader technology.

For Content provided in any Course for which enrollment is open to the general public, without need for a registration process, University will provide the following materials proactively, at the time the Course Content is uploaded onto the Company Website:

- Any slides, with their annotations, used in the production of the videos.
- A text annotation file describing any images used in quizzes or problem sets, to allow End Users with limited vision to access these quizzes without requiring assistance; this file must be provided in a format accessible to screen reader technology (as per guidelines provided by Company).

Company will provide capability to check that these materials were uploaded onto the Company Website prior to opening the Content to the public.

Company will provide an “Audio Text Transcript” for the audio stream, as follows:

- For all University Courses offered to the public under the Coursera Monetization Model whose initial enrollment is above 10,000 End Users, the audio will be proactively captioned within seven days of the time that the Instructor uploads the video onto the Website.
- For all University Courses offered to the public under the Coursera Monetization Model whose initial enrollment is fewer than 10,000, the audio will be captioned upon request by and End User with a disability, in a timely manner, as specified below.
- For any University Courses under the University Monetization Model or the Registered Students Model for which University requests such captions, at an agreed-upon fee.

When Content is not audio captioned proactively, then upon request (by End User or by University), Company will provide captions for the first week of Content within seven days of request, and then subsequent weeks’ materials at seven days intervals thereafter.

To address accessibility needs for which the above-mentioned accommodations are insufficient, Company and University will implement the following protocol. Upon an accommodation request, Company and University will enter into a good-faith discussion with the End User to find an appropriate form of accommodation that can be provided using reasonable effort and without undue burden. Company’s contact information for such requests will be provided on the Company Website, and inquiries will be responded to in a timely manner, typically within one business day.

If Company and University determine that it is necessary, the accommodation can be up to providing a “Video Text Transcript” of the video stream, in which the audio captions are interspersed with a text description of graphical elements on the slides and other visual elements of the lecture. The Video Text Transcript for the first week will be provided within ten days of the time of the request, and then subsequent weeks’ material will be provided at seven day intervals thereafter.

Should the need for accommodations cause delays for End Users with disabilities, appropriate extensions on deadlines will be given. Extensions to deadlines will be given to End Users with learning disabilities as needed. As another option, should another offering of the Course be planned for the near future,

Company will determine whether the End User is willing to postpone enrollment in the Course until that next offering, allowing Company and University to prepare the accommodation materials proactively, so that the End User can receive the annotated materials on the same schedule as other End Users.

To prepare a Video Text Transcript, Company will provide University with the Audio Text Transcript, as specified above, to the extent such transcripts have been created by Company. Descriptions of any graphical elements in the slides or video can then be injected into the Audio Text Transcript by University or its teaching staff to complete the Video Text Transcript. Company will also provide a capability for collecting and displaying “crowd-sourced” annotations to Content, allowing End Users participating in the Course to help provide the necessary annotations. Company will use means at its disposal (such as badges and other forms of recognition) to encourage End Users to participate in this effort.