



*Using Published Content in Massive Open Online Courses (MOOCs)*

**An interview with**

**[Laura N. Gasaway](#)**

**Paul B. Eaton Distinguished Professor of Law Emeritus  
University of North Carolina School of Law**

**Q:** We're talking today about using published content in massive open online courses – MOOCs, as they're known – and joining us is Professor Laura N. Gasaway, known as Lolly. She's a professor emeritus at the University of North Carolina School of Law and a highly regarded copyright scholar. Professor Gasaway, or Lolly, I should say, welcome.

**A:** Thank you, Chris. I'm delighted to talk with you.

**Q:** We're looking forward to this chat, because MOOCs is something we've been hearing a great deal about recently at Copyright Clearance Center and, indeed, around the country, because this is a terrific way for people to get an opportunity to access college materials no matter where they are, no matter who they are. But it raises some interesting questions as to the use of this published content, and so I think we should start by helping people better understand what MOOCs are and what way you think they will change higher education.

**A:** Sure. Well, as you said in the introduction, they are massive open online courses. They are a virtual classroom, and I think they have a lot of benefits. One of the benefits is that it sort of democratizes higher education because it does give people without financial resources the ability to take courses from some pretty well-regarded instructors. They tend to be sponsored by academic institutions of higher education, but some are actually sponsored by commercial providers and are targeted at businesses and professionals.

The change I think we are seeing is that academic institutions are actually starting to accept credit for some MOOC courses, and there are just some really interesting developments that I think we'll mention as we go along. Typically, students are registered in the course, but it's not necessarily being enrolled at the educational institution. But there are a few MOOCs where a student is actually enrolled at the educational institution.



I think one of the highlights or most interesting things is the number of students that could be in an individual course. It could be as high as 230 or 250,000 students, and that is something that those of us who are educators have had a little trouble getting our minds around, having a classroom of that size (laughter) rather than – you know, in law school, it's the typical 100-person or 30-person kind of course. And that has really, I think, been pretty astounding, and especially as we think about the copyright issues.

Q: Indeed. And 250,000 students – that's a lot of papers to grade.

A: Well, it is, except that it's all online, and it has to be, instead of papers that are essay, etc., unless they are graded by other students, really has to be multiple choice and that sort of thing. It can't be any assessment other than that. It can't be the kind of typical essay questions, to deal with that many students, absolutely.

Q: Indeed. And I've read that some students, when they're applying to other colleges or, indeed, applying for jobs, are listing their participation in these MOOCs, so people really are taking this very seriously and really do see it as serious education and not simply a kind of curiosity.

A: I think you're right, although I think we have to get past the point of talking about participation and talking about completing the course, because we are now seeing that only about 10 to 12% of the people who register for a MOOC actually complete all the requirements, and so we're looking at some sort of certification to certify that the student has completed the course, since they are often ungraded. Now, sometimes they are graded, but we're having to sort of alter our language a little bit so that it's not just participation.

Q: Indeed, but whether or not there's participation or some kind of credit offered, what are some of the challenges that the instructors and the institutions have, because you're needing to use published content in the course materials, and of course permission to reuse those is part of the challenge?

A: You are absolutely right, and I think one of the challenges is that a lot of the MOOCs are actually sponsored by a nonprofit educational institution, but they are hosted by platform providers such as Coursera and edX. But there are some like MITx and – I'm not sure I'm pronouncing this right – Udemy – U-d-e-m-y – I assume it's like academy but with a U in front of it (laughter) – which is a consortium of nonprofit educational institutions. And I have even discovered that there is one nonprofit educational institution here in North Carolina that is called MOOC Campus, and it is a residential campus for students taking online courses, and many are even enrolled in degree programs. That's located at Black Mountain,



North Carolina, and I was sort of stunned to find this, because I had never heard of it.

If we look at the typical online courses that colleges have offered, these are sort of the precursors of MOOCs, and we know a great deal about how to handle those, including how to request permission for materials, etc. But it's a pretty different ballgame when, all of a sudden, we have these commercial providers and we have these enormous numbers of students. We are getting more experience. MOOCs have been around for about four years, actually, but they are still evolving. There's no doubt about that.

We're also learning that many of them, which started out to be free, have determined that it's better to charge a registration fee, and while these fees may just be \$50 or \$100 for the course, it apparently has some correlation on completing the course, and so we're seeing a way that might deal with how to collect and pay royalties and that sort of thing.

But there are a lot of challenges when it comes to doing that. First of all, it's the high number of students. Now, even though I used the quarter of a million figure, and there are some that have been that large, the typical size for a MOOC is 33,000, one expert says. Another says 25,000 or 20,000 at the start of the course. That's still an enormous number of students, an enormous number.

Q: And the implication of that, I suppose, Lolly, is that permission fees would be based on the number of students in a class and starts to really balloon at that point.

A: It really does, and that has been a way that permission fees have been charged. Some publishers have actually tried to do it with a flat fee for one semester of use. But all of a sudden, when you go from a typical class of say 50 or 60 students to 33,000, I think we're going to see more copyright holders say, no, it has to be on a per-student basis, because of the sheer enormity, which does change – when we talk about fair use, I'll even talk about how that may affect one of the fair use factors. But it's very clear to me that educational institutions are going to want to spread the cost of the royalties to students. The sponsoring institution is just very unlikely to bear that cost for reproducing copyrighted materials in the course.

Q: We are speaking today with Professor Laura N. Gasaway, professor emeritus at UNC School of Law, and a well-regarded copyright scholar, about using published content in MOOC course materials. Lolly Gasaway, as you mentioned, long-distance learning isn't very new at all, in fact, and a little more than 10 years ago, Congress passed and President Bush signed something called the TEACH Act, which is the Technology, Education and Copyright Harmonization Act, and that



addressed some of these issues. People may be familiar with it who are listening. But does the TEACH Act apply in the case of MOOCs?

- A: Actually it does, but it's in a very limited fashion. The TEACH Act was an amendment to the Copyright Act. It's found in Section 110(2) of the act, and one of the things TEACH requires is that it's available only for nonprofit educational institutions and government entities to students enrolled in a course.

Now from the language of the statute, by requiring that it be a nonprofit educational institution, I'm talking about enrollment. Also, because I was there in some of the hearings, etc., I know that the intent was enrolled in the institution. That is not actually what the statute says, but I do believe that was in the intent.

Even if it is an enrolled student in the institution, there are still a number of restrictions. For example, the performance or display that the TEACH Act covers must be part of mediated instructional activity. So that's another TEACH restriction is that the exception applies only to performance and display. It doesn't apply to reproducing materials. So even though the institution and the course might be covered for performance and display, it has nothing to do with making textual material available to students. It might allow an instructor to display a poem to the students, but that really means during a live – I shouldn't say live – during an online session. It doesn't mean providing those as background readings, etc.

Another question, I think, is, whether a MOOC course is mediated? We don't really even have a definition that helps us with that. And the receipt of the transmission by students requires that the institution take reasonable efforts to see that the material is not further downloaded or uploaded.

So even though it applies, it doesn't really give us what we're talking about with providing copyrighted materials and copies of those. That would be covered under Section 107 of the act, under the fair use section.

- Q: Well, that's a very thoughtful analysis, and if people are listening who aren't familiar with copyright, I think it's appropriate to say, as I often do, that if you're confused, you're beginning to understand the problem here. This gets very legal and very technical very quickly, and so you want to move on, I think, at this point, to looking at fair use and kind of conducting sort of a fair use analysis here to look at the implications for MOOCs. So talk us through that.

- A: Sure.

- Q: There are four fair use factors that have to be taken into consideration.



A: That's right. And the way the act is written, in Section 107, courts are directed to consider whether a use is a fair use, and that really is a legal definition of what use is fair. It doesn't mean I'm a fair person and I want to use it. It really is a legal analysis.

The first thing that a court will look at is the purpose and character of the use. And over the years courts have told us that nonprofit educational uses are favored over commercial uses. And just that alone raises one of the first issues with MOOCs – many MOOC platform providers are for-profit entities, but this may not be the critical issue. For example, many nonprofit colleges use Blackboard and other commercial course management software for face-to-face courses that have an online or transmitted portion of a course, as well as if they're offering a traditional distance education course. And these would still qualify as nonprofit educational institutions, even though the course uses a commercial platform for the online portion.

Here, we have a different situation. The student may not be enrolled in the institution, and therefore, is it still nonprofit when it is a commercial entity like Coursera or some of the other providers that is actually the platform for the course? Clearly if the course is purely commercial, and it's provided for business and that sort of thing, then it's not going to be favored as a fair use under the purpose and character of the use. But this is more complex, as you can see – even just this very first factor.

Actually, some of the other factors are easier than this one when it comes to a MOOC. The second factor is nature of the copyrighted work, which looks at the work itself. And courts have told us over time that factual works have greater fair use rights than do works that are for entertainment. So most of these materials are factual works, unless we start having something like a film criticism course where students are actually viewing films that were intended for entertainment. But most of these works used in a MOOC would be factual in nature.

Another little tiny piece of nature of the copyrighted work is whether the work is out of print. Now, that doesn't mean that if it's out of print just go ahead and use it. It doesn't mean that at all. But it means it's something that a court would consider in evaluating the nature of the copyrighted work.

The third factor is amount and substantiality used in comparison to the work as a whole. So this is both a quantitative and a qualitative test. There are few bright line things we can say about it – the smaller the portion used, the more likely it is to be a fair use. The quality portion, though, means that if one uses the heart of a work, even though it's a tiny part quantitatively, it's still too much to be a fair use.



Market effect is the last test, and it looks at the effect on the potential market for, or value of a work. This is where the huge size of the enrollment in the course may make a difference. While the reproduction of 30 copies of a portion of a work may have little market effect on the copyright owner, reproduction of 300,000 copies will make a significant difference to the market for that work for the copyright holder.

Q: Well, if someone making that kind of an analysis does come to the conclusion that fair use doesn't protect this kind of reuse in the MOOCs setting, what kind of recommendations do you have, then? What are the steps that someone can take?

A: Well, there are several steps. For example, the instructor or the institution could get permission from the copyright holder. We often refer to them as the rights holder, but I think in the academic community they are probably more often thought of as the copyright owner or copyright holder. The Copyright Clearance Center also has a MOOC content licensing solution, but it does not support commercial MOOCs. It supports the noncommercial. And that solution is with their partners SIPX or XanEdu and Study.Net.

Another possibility is to use public domain or Creative Commons content, and even that Creative Commons content needs to make sure that it has a license that permits such use, and most of them do. Public domain means, usually, that the copyright has expired on the work and that it's available to use freely.

It is also possible for the faculty member to create his or her own content, and there are many MOOCs that do have original content. One caution, though, is that often, students are assigned to create content either alone or working in a team when they are enrolled in a MOOC course, and that's great if it's all original content. But having students locate copyrighted content and then posting it within the MOOC courseware – it's the same thing as the instructor doing it without permission, so that's one caution for faculty members, to make sure that students understand their responsibilities and that the instructor review what's being posted within the course content.

Although this doesn't work for every student, courses could also use article links. Now there certainly are a lot of materials that are available free on the web, and so linking to those is no problem, because in order to take a MOOC, a student has to have access both to a computer and to the Internet. But a lot of the articles are licensed content, and so a student enrolled at an institution of higher learning may have access because the library in that institution has a license from the publisher to make that content available to their students, but that license probably does not cover someone who is registered for a MOOC but taking nothing else and is not





really a student at that campus. It's also less likely for non-U.S. students who are taking the course in a foreign country and are not actually enrolled in a U.S. institution to have such access.

Another caution is to make sure that the copyrighted content that is posted by the faculty member for the MOOC is password-protected and available only to enrolled students. This is not necessarily required directly for fair use. It is required for anything under the TEACH Act for those performances and display. But there were some old guidelines under the fair use section that permitted reproduction and distribution of limited portions of a copyrighted to students that were enrolled in a course, so, bringing that in, making sure that it's password-protected to those students makes a lot of sense. It also helps to limit the liability of an educational institution. It doesn't absolutely protect them from liability, but it would help to limit it. Initially, all MOOC content was just out there for the world, but many more of them are being protected by password now.

Q: Well, when it comes to using published content in MOOC course materials, Lolly Gasaway, you've certainly helped to raise a number of important point for us here, and we thank you for that.

A: You're very welcome.

Q: We've been speaking today with Professor Laura N. Gasaway, professor emeritus of the University of North Carolina School of Law and a well-regarded copyright scholar. Our program is produced by Copyright Clearance Center, a global rights broker for the world's most sought-after materials, including millions of books and e-books, journals, newspapers, magazines and blogs, as well as images, movies and television shows. You can follow Copyright Clearance Center on Twitter, find CCC on Facebook and learn more about our various OnCopyright education programs at our website, Copyright.com.

My name is Christopher Kenneally. From all of us at Copyright Clearance Center, thanks for listening.

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