

# Understanding open educational resource licensing in Australia

Luke Padgett

University of Tasmania

luke.padgett@utas.edu.au

**SUB-THEME:** Open Educational Resource (OER) for ODL



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## **Abstract**

One of the great barriers to the development of Open Educational Practices (OEP) and Massive Open Online Courses (MOOCs) in Australia is copyright licensing. Without a better understanding of open access licensing and its interaction with Australian copyright law, universities, including distance education providers, will be unable to develop, adopt and distribute Open Educational Resources (OER) or deliver MOOCs effectively. Sharing educational and research resources is now high on the agenda for Australian higher education institutions but there is a lack of initiatives and policies to support OEP. Without support for sustainable OEP, the Australian higher education sector will be unable to meet any form of open education agenda and Australia will not be competitive in a rapidly evolving higher and distance education environment. In this paper it is argued that the rapid development of MOOCs worldwide has caused some misunderstandings in Australia about the provision and use of educational resources under the Copyright Act. The issues are explored through the discussion of outcomes from a number of recent projects funded by the Australian Government's Office of Learning and Teaching. The discussion highlights some of the challenges inherent in educational resource provision, copyright and open content licensing.

## **Keywords**

OEP, MOOC, copyright, open content licensing, Australia

## **Introduction**

Massive Open Online Courses (MOOCs) sit outside the ordinary business model for many Australian universities. This is because a majority of educational resources used in traditional higher and distance education institution award courses are provided through a complex set of copyright exceptions and remunerated statutory licences that are paid for by the Australian higher education sector. At present third party owned educational resources used in MOOCs are provided from outside the statutory licence scheme. This seems appropriate as MOOCs provide free access to educational resources and can represent a public good by providing free access to quality education. One may expect that fair use exceptions within the Copyright Act would provide for the delivery of certain amounts of educational resources to support access to education. However, prescriptive fair dealing exceptions in Australian copyright law are not applicable to the delivery of educational resources in MOOCs. The situation is quite different in other legal jurisdictions such as the United States where broad fair use exceptions can provide for the use of such content in some teaching contexts.

## **Understanding MOOCs**

The term MOOC was introduced in 2008 by Dave Cormier to describe a concept course by George Siemens and Stephen Downes called "Connectivism and Connective Knowledge" (2008). Originally MOOCs were seen as a way of providing free university level education to as many people as possible. To this end MOOCs were seen as needing two key features. First they need to be openly accessible meaning anyone can participate in the online course at no

cost. Secondly, MOOCs need to be scalable so they can support an indefinite number of participants (Wikipedia, 2012).

Today there are many online courses which have been described as “open” and “massive” and new ones are being developed every day. How you determine a course as a MOOC can be a perplexing process. Leading discussions have mainly been fashioned under two competing ideologies: connectivist MOOCs (cMOOCs) which are based upon the Connectivism theory of learning; and content based MOOCs (xMOOCs) which follow behavioural approaches to learning. A further, but rather simplistic distinction is drawn between xMOOCs for profit and others which are designed for various purposes (Yuan & Powell, 2013).

Australian universities began offering courses as MOOCs in 2012 (Norton, 2012). The rapid development and production of MOOCs has raised serious legal, policy and practical management questions for Australian universities. Intellectual property and licencing issues are at the top of the list of concerns and remain largely unexplored from an Australian context. Universities spend about \$200 million a year on commercially licensed content and pay almost \$30 million annually to the Australian Copyright Agency Limited for the statutory licence in the Copyright Act (the “Act”) (Universities Australia, 2012). A great barrier to the development of Open Educational Practices (OEP) and Massive Open Online Courses (MOOCs) in Australia is the lack of understanding surrounding educational resource licensing. A MOOC cannot be delivered as open without addressing what content is to be provided, for what purpose and on what terms.

### **OEP developments in Australia**

Sharing educational and research materials is now high on the agenda for Australian higher education institutions. The Australian Research Council (ARC) and the Australian National Health and Medical Research Council (NHMRC, 2012) have implemented open access policies for scholarly publications derived from publicly funded research.

The lack of initiatives and policies to support OEP in Australia was recognised by the Office of Learning and Teaching (OLT) via the funding of a number of recent projects (see for example, Coles et al., 2012; Downes, 2011; Kilpatrick, 2012). In this paper I will briefly discuss some relevant findings and recommendations from two projects, *Adoption, use and management of open educational resources to enhance teaching and learning in Australia* (the *Adoption* project) (Bossu, publication pending) and *Bridging the gap: teaching adaptations across the disciplines and sharing content for curriculum renewal* (*Bridging the Gap*) (Whelehan, publication pending). Both projects have final reports due for release in 2013.

The *Adoption* project aimed to raise awareness of OER and develop recommendations to inform and assist the adoption of OER and OEP within the Australian higher education sector (Bossu, Brown, & Bull, 2011, 2012; Bossu, Bull, & Brown, 2012). A survey of university staff across 37 Australian institutions provided evidence that a lack of understanding regarding copyright and intellectual property issues poses a barrier to the use and repurposing of

OER (Bossu & Tynan, 2011). 24 survey respondents representing 18 institutions agreed to be interviewed on a number of issues including the use of Creative Commons (CC) licences for educational resources created by the staff of their institution. Most interviewees (22 of 24) were aware of CC licences and their responses suggested that many university employees from various institutions were applying CC licences to educational resources. However, the application of CC licences to educational resources most likely owned by the institutions was not formally endorsed by the institutions (Bossu, Brown, et al., 2012).

*Bridging the Gap* aimed to enhance learning and teaching in the field of Adaptation Studies by facilitating a community of practice of Adaptation Scholars (Whelehan, publication pending, p. 5). Sharing of OER was established through the use of a digital repository hosted by the University of Tasmania and a good practice guide was developed providing guidance on copyright matters for OER development. The copyright and licensing approaches adopted by the project aimed to deliver “a robust and workable approach which balanced the necessity of protecting the rights of copyright holders with the need to make resources available under licences which enabled reuse and remixing” (Whelehan, publication pending, p. 26).

The restrictive nature of copyright law in Australia was identified as a barrier to OER development in the area of Adaptation studies due to the reliance on for example the study of adaptation of literature into film. It became clear through this project that educational resources which included certain commercially available media such as film footage could not be licenced as OER. This barrier is highlighted in recommendation 4 of the project report which calls for the review of legal issues associated with OER in Australia, in particular “further work on exceptions in existing copyright law which could be used by OER repositories” (Whelehan, publication pending, p. 6).

Recommendation 5 from the *Bridging the Gap* project report calls for Australian tertiary institutions to ensure they have provisions designed to allow the sharing of learning and teaching materials in intellectual property policies. Formal endorsement by an institution, as highlighted in the outcomes from the *Adoption* project, is an important ingredient to ensure the right to release an institution’s education resources openly. However, it is submitted that endorsement (that is permission to openly licence content) alone does not by itself provide for sustainable open education practices.

### **Understanding the “Open” in MOOCs**

MOOCs will naturally require educational content to be delivered to participants. Content may be in a range of formats and media, most of which is likely to be protected by copyright. At a minimum the content must be accessible to participants. More generally content may need to be available for download and use by anyone in the world with an internet connection.

The act of making content protected by copyright openly accessible via an online course does not provide a participant with any right or licence to exercise any of the exclusive rights of the copyright owner without permission, unless a legal exception applies. Course participants located in Australia will

need to rely on exceptions within the Copyright Act to use course content if no further rights are provided to them. Universities may also be seeking to rely on exceptions within the Copyright Act to provide content to the course participants via the open online course.

The outcomes from the *Adoption* and *Bridging the Gap* projects highlight a need to promote better understanding of copyright and licensing in the Australian higher education sector. Under the Act there are no exceptions that allow for the development of OER without obtaining permission (or licence) from the copyright holder. Content in MOOCs will need to be made available openly and its use is likely to extend beyond what can be provided without permission under copyright law. To support these statements I will briefly address the relevant sections of the Act that relate to the open delivery of educational resources by Australian education institutions.

### **Understanding fair dealing exceptions in the Australian Copyright Act**

The fair dealing exceptions to infringement within the Act are unlikely to sustain large-scale use of third-party copyright materials as envisaged for OEP or MOOCs. The extent to which such exceptions may apply to individuals and universities has been commented on in some detail and I will not repeat it here (Universities Australia, 2012; Wyburn, 2006). Fair dealing exceptions arguably most relevant to the use of educational material are those for “research or study” (text and image works, s40; audio-visual items, s103C) and “criticism or review” (works, s41; audio-visual items, s103A). Under these exceptions a person may use another person’s copyright material without permission provided the use is “fair” and it is for the specified purpose (e.g. research or study). There is no relevant statutory definition of “fair”. When using copyright works such as text and graphic materials (not audio-visual items) there is some guidance provided in the Act that it is fair to reproduce an article from a periodical publication or 10% of the number of pages of an edition of a work (if not paginated 10% of the number of words) or one chapter. If the use of a work cannot be quantified in such a way then the Act provides a set of inclusive factors to be applied. The factors are:

- a) the purpose and character of the dealing;
- b) the nature of the work or adaptation;
- c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
- d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- e) in a case where part only of the work or adaptation is reproduced – the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

These factors are confined to applications of the “research or study” fair dealing exception. However, they have been recognised as elements which courts have used to consider the application of fair dealing defences generally (Copyright Law Review Committee, 2002). The factors above and case law on the subject (such as “*De Garis v Neville Jeffress Pidler Pty Ltd*,” 1990; “*TCN Channel Nine Pty v Network Ten Pty Ltd*,” 2002) suggest that the purpose for use (research or study; criticism or review) must be that of the person dealing

with (e.g. copying, adapting etc.) the copyright work. This means universities cannot deal with third party copyright content on behalf of a course participant and claim the defence that the dealing is for that course participant's research or study or criticism or review. Furthermore, it is unlikely that course participants could reproduce third party copyright material and distribute it to others for example via email, forum post or other online communication. This is because such an action is unlikely to specifically relate to the purposes of research or study or criticism or review. For example, a course participant can only rely on the fair dealing exception for criticism or review to copy and communicate a copyright work if:

- they make an evaluation or estimation of the qualities or character of the work; and
- the purpose of the criticism or review is genuine ("Commonwealth v John Fairfax & Sons Ltd," 1980, p. 56).

The participant cannot distribute copyright material with an ulterior motive to share the content or sustain the MOOC.

In a free (as in free for anyone to access) course the chances of commercial impact by uploading someone else's copyright content (such as a chapter of a textbook or audio-visual material) must be considered as such an action may be viewed unfavourably by courts when considering what is fair. It is clear that universities could not defend providing a majority of third party owned texts under the research or study, criticism or review exceptions. Moreover if Australian universities provide free courses encouraging course participants to upload third party owned content they could be found liable for "authorising" a participant's infringement under sections 36 or 101 of the Act.

In contrast section 200AB of the Act does provide that third party copyright material may be used without infringement by or behalf of a body administering an "educational institution" where the purpose for its use is "giving educational instruction" and it is "not partly for the purpose of the body obtaining a commercial advantage or profit". Before a university can apply this exception it must ensure that the use of the copyright material "amounts to a special case", does not conflict with a normal exploitation of the copyright material, and does not unreasonably prejudice the legitimate interests of the owner of the copyright. The exception cannot apply if another part of the Act applies to the use or if the use requires the circumvention of a technological lock (i.e. breaking copy protection). Australian higher education institutions cannot rely on section 200AB as systematic delivery of third party copyright material through an OER repository or MOOC is unlikely to pass all the above elements of the test.

### **Understanding Australian Statutory Licences and MOOCs**

As discussed above universities are likely to engage in a diverse range of open education practices via a MOOC. The level of "openness" in relation to educational content may range from open to course participants only to be used in accordance with the Copyright Act (the "Act"), to open to anyone to remix, repurpose and redistribute (re-licence) for most purposes including commercial purposes.

Australian Universities hold statutory licences allowing the reproduction and communication of “reasonable portions” of certain texts, images and broadcast material for “educational purposes”. The reproduction and communication can be carried out by, or on behalf of the University for their students and staff. The statutory licences do not however permit:

- Access or use of statutory licenced materials by members of the general public; or
- Redistribution, reuse or remixing of statutory licenced materials (e.g. relicensing the content under a Creative Commons licence)

Section 10(1A) of the Act defines “educational purposes” as including use in connection with a “particular course of instruction provided by the institution”. Many provisions within the statutory licences permit copying or communication of certain copyright materials “by or on behalf of the body administering an educational institution” which is “solely for the educational purposes of the institution or another educational institution”.

It can be argued that content reproduced and communicated by educational institutions under statutory licence can be made accessible to open course participants. Open course participants could be traditionally envisaged “students” of Australian educational institutions undertaking the course for award or members of the general public registered to participate in the course for no award.

It is not expressly stated within the Act that statutory licence remuneration agreements could not be applicable to open non award courses (i.e. MOOCs) provided by Australian universities. The number of higher education course participants to whom licenced content is made available online does not reflect actual access and therefore is not considered when calculating remuneration. However, the proportion that each university pays under the remuneration agreement is currently calculated on student load and enrolment unit record files for each university. MOOC participants outside the enrolled student cohort would not at present be included in this calculation.

If statutory licenced content were to be made available to MOOC participants we would likely see a substantial increase in the use of statutory licenced content leading to pressure from copyright owners to increase the statutory licence fees. It is likely that universities will provide varying MOOC types containing a range of different content, and the number of participants undertaking MOOCs is likely to be unpredictable. This would inevitably require a rethink in how statutory licence fees are apportioned. More importantly universities would not have a revenue stream from the MOOCs to meet the increased costs.

The lack of connection between use and cost, coupled with the fact that MOOCs provide free access to education distinguishes them as outside the ordinary business model for Australian universities. In this context they are a public good for the advancement of knowledge and it is not appropriate to consider the use of copyright content in MOOCs within the ‘same view’ as

traditional higher education award courses. This makes the use of in-copyright educational content under statutory licences unsuitable for MOOCs. Foreign copyright laws often include specific educational fair use exceptions that shelter providers of learning materials from liability in a similar context.

“Fair use, codified at Section 107 of the [US] Copyright Act, has played a vital role in facilitating novel online uses of copyrighted material, and should be an important tool in the context of MOOCs. Education is very clearly singled out for favorable treatment under Section 107, both in the preamble (“purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”) and in the first factor (“the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”). Assuming materials are used in reasonable amounts, and that they are not materials created and marketed specifically for in-class use, a traditional four-factor analysis should be favorable for most instructional uses of educational content on MOOC platforms. The reported difficulty, even impossibility, of obtaining a license for use in MOOC teaching may also favor fair use, as it could be argued that there simply is not a functioning market for this type of use with respect to certain kinds of materials.” (Butler, 2012, p. 5)

Australian copyright law, unlike the US, does not contain exceptions that would allow even limited open publication of copyright material by universities for educational purposes (Wyburn, 2006). The effect of not having a “fair use” exception for copyright infringement has recently been recognised by the Australian Law Reform Commission (ALRC) as placing Australian organisations and individuals “at a disadvantage compared with those in the US, or other countries that have a fair use exception” (Australian Law Reform Commission, 2013, p. 68). Moreover, the ALRC has proposed that a fair use exception should be inserted into the Act to replace certain fair dealing exceptions to provide incentive for innovation in, amongst other things, the delivery of education (Australian Law Reform Commission, 2013). This is an encouraging development for Australian higher education institutions which may enable them to rely on copyright law to deliver certain third party educational resources for freely accessible online courses. However, such recommendations from Australian government bodies have been made before and no changes to the Act have been made as yet (see for example Australian Government Attorney-General's Department, 2005; Copyright Law Review Committee, 1998).

As it stands Australian university staff wanting to use third-party copyright content in MOOCs will most likely be required to obtain additional licences. This means that Australian universities will need to either limit their MOOC offerings to materials that they own or spend significant amounts of money on commercially licenced resources that can be used for free by any MOOC participant. Alternatively, it may be time to consider more seriously how Australian universities can engage in MOOCs through the development and use of OER.

The complexities relating to the licensing of OER can be daunting for Australian universities. The *Adoption* project results demonstrate a slow move to incorporating OEP in Australia (Bossu, Bull, et al., 2012) and in the case of MOOCs, the complexities are compounded by many stakeholders with different desired outcomes for launching MOOCs ranging from altruistic endeavours to commercial advantage.

## **Conclusion**

Obtaining a clear understanding of the relationship between copyright law and the provision of educational resources is an initial step that Australian universities need to take for sustainable OEP and the development of MOOCs. Quite often approaches to MOOC development do not include what is required for the sustainable repurposing and reusing of third party copyright material. It is submitted that higher and distant education providers must deeply consider the outcomes they wish to achieve when delivering MOOCs so that they can support them with suitable open educational resource licensing schemes.

Robin Wright and Derek Whitehead (Swinburne University) and Carina Bossu and Luke Padgett (University of Tasmania) have jointly submitted a project proposal to the Australian Office of Learning and Teaching to address copyright and open content licensing issues. The project aims to identify and analyse critical copyright challenges facing Australian universities in the development of OER and MOOCs by investigating existing open education policies and practices. The data will be used to create an open education licensing toolkit for use by Australian academics and universities to develop effective OEP and make informed open licensing decisions. The project aims to ensure that Australian Universities are able to implement OEP effectively and fully exploit the benefits of these new modes of education delivery providing Australia with an entry point to showcase its higher education sector to the world.

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