

6 MANAGING COPYRIGHT IN MOOCs: THE VIABILITY OF THE TEACHING EXCEPTION

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ABSTRACT

Massive Open Online Courses (MOOCs) are becoming a new trend in the international development of education. MOOCs offer various resources online across the globe with the expectation that this will help towards reducing costs, widening access and increasing productivity. The scope of teaching is thus expanded since technological development enables easy access to information, to publishing, and to reusing and to sharing resources. Hence, it is important for policy makers, legal authorities and legal scholars to rethink the copyright exceptions that are currently available for teaching purposes, and whether they support teaching practices in the context of MOOCs. This paper first provides a brief overview of MOOCs. It then outlines some concerns and challenges concerning copyright and MOOCs. It analyses whether the teaching exceptions under Article 10(2) of the Berne Convention apply in the context of MOOCs. It also look examines the relation between the teaching exception and the three-step test. Finally, it discusses the relation between copyright protection and public interest and argues that flexibilities in interpreting the copyright exception are pertinent to serving the public interest.

Keywords: MOOC, copyright; online courses; three-step test, teaching exceptions.

I. INTRODUCTION

Massive Open Online Courseware essentially refers to the capacity to enrol a large number of course participants with adequate Internet connection in a different variety of courses, where open content for all to use and learn from is provided. While most MOOCs are free of charge at present, some do impose minimal fees either with or without any academic credit. The open content normally offers a

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coherent set of resources and follows a sequence of activities organized by an instructor in order to address specific learning objectives or goals bounded within a certain time period.¹ Further activities involve registration; a learning environment based on a set of curriculum and assessment; and communication, including interaction, collaboration, and sharing.² Access to materials, mainly scholarly publications on the Internet, will be in such a way that the materials are free for all to read, use, and reuse to a certain extent.

Since then emergence of MOOCs in 2012, this latest trend in online learning is well accepted by various universities around the world and outsourcing companies have been launched to provide the infrastructure for it. Malaysia, for instance was the first country in the world to implement a nationwide strategy that integrates MOOCs with its public on-campus university classes. Through the deployment of the Digital Malaysia 354 Roadmap in 2013, Malaysia focuses on MOOCs as one of the ways to transform the country into a digital economy by 2020. Through MOOCs, it is hoped that institutions will enhance the quality of graduates, enable more customized and remote learning opportunities, reduce costs for higher education, raise productivity and provide a holistic approach to the public.

Despite such aims, Malaysia, however, does not have a proper copyright licensing system like Australia, the United Kingdom or the United States. Some students still photocopy textbooks in order to save their limited educational loans to support their studies. Most lecturers are still vague about the issue of copyright in an educational setting. When using a traditional method of teaching, these problems may not be easily transparent but in MOOCs, where the courses will be offered globally, universities may leave themselves open to copyright infringement claims. Teaching is becoming more transparent and will be subject to criticism and copyright claims if proper copyright management is not put into place.

II. STUDIES ON MASSIVE OPEN ONLINE COURSES (MOOCs)

While MOOCs seem to offer free access to information and resources at present, MOOCs are ultimately meant to earn revenue within the formal higher education system as content licensed for use

¹ Fiona M Hollands and Devayani Tirthali, 'MOOCs: Expectations and Reality' (Center for Benefit-Costs Studies of Education, 2014) <https://oerknowledgecloud.org/sites/oerknowledgecloud.org/files/MOOCs_Expectations_and_Reality.pdf> accessed 27 October 2015.

² Xin Chen, Deborah R Barnett and Casheena Stephens, 'Fad or Future: The Advantages and Challenges of Massive Open Online Courses (MOOCs)', *Research-to Practice Conference in Adult and Higher Education* (2013) <<https://www.lindenwood.edu/r2p/docs/ChenBarnettStephens.pdf>> accessed 27 October 2015.

by institutions awarding degrees. Open educational resources have become 'try before you buy' marketing tools that provide a way of leveraging scale in a new, potentially highly profitable educational industry.³ Some have even found that MOOCs are creating heavy debts for students.⁴ The educational industry is leaning more towards privatization leading to the question of whether such teaching is for profit or for non-profit purposes. While reusable educational resources are being created and disseminated, development in technology has managed to expand the scope of teaching by facilitating access to information, to publishing and to sharing.⁵

Various studies have shown that MOOCs present various complex copyright issues that can challenge the relationship between a higher education institution, its faculty, learners and MOOC providers.⁶ Dames questioned the situation when MOOC participants contributed copyrighted materials, either with or without any licence to do so.⁷ Thomson⁸ discussed the challenge of copyright compliance in MOOCs, stating that the global nature of MOOCs makes copyright difficult. Arnold viewed copyright as a challenge for MOOCs, especially with the commercialization of open resources that is underway.⁹ Some viewed it as being unlikely that the teaching exception or the fair use exception in the context of classroom teaching can be applied in the MOOC environment.¹⁰ The fair use defence may not apply on the basis that most MOOC providers are for-profit companies, MOOC are open to the mass¹¹

and not confined to certain group of students¹², and that some students access the content from jurisdictions where fair use or fair dealing principles are either weaker or entirely absent.¹³ It was viewed impossible for MOOCs to pass the three-step test elements.¹⁴

It is a concern that MOOCs lack the rich and vast resources necessary for true learning if resources and materials continue to be in the hands of publishers.¹⁵ In 2013, there was a call in Australia to reform the Copyright Act 1968 in order to allow more Australian university competence in world online education.¹⁶ Courtney¹⁷ focusses on different strategies to deal with copyright and access problems associated with MOOCs materials. However, it is arguable whether other institutions that might have lesser expertise and fewer resources can easily adopt the same strategies. Courtney's view is that the difficulties in creating MOOCs contents have led faculty authors to understand the pitfalls that a particular contract may involve, copyright issues, licence bounded restrictions and how this can impact education.¹⁸ In short, with MOOCs it is crucial for policy makers to begin rewriting rules about copyright and its impact on scholarship.

A normal course of teaching in MOOCs may include different acts of exploitation of copyright works. Different works such as journal, articles and books, sound recording of lectures, visual recordings, news or broadcasts may be made available online; sometimes translations of works may be necessary in certain circumstances. This article will examine to what extent the teaching exceptions provided by international conventions, particularly Article 10(2) of the Berne Convention, permit exploitations of copyright works in these different acts.

³ Richard Wellen, 'Open Access, Megajournals, and MOOCs: On the Political Economy of Academic Unbundling' (2013) 3 SAGE Open <<http://sgo.sagepub.com/lookup/doi/10.1177/2158244013507271>> accessed 4 June 2014.

⁴ Helen Hu, 'MOOC Migration' (2013) 30 Diverse: Issues in Higher Education 10 <<http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=86441058&site=ehost-live>> accessed 27 October 2015

⁵ *ibid.*

⁶ Educause, 'Copyright Challenges in a MOOC Environment' (2013) <<https://net.educause.edu/ir/library/pdf/PUB9014.pdf>> accessed 27 October 2015

⁷ K Matthew Dames, 'Copyright Norms Clash With MOOCs Learning by Example' (2013) 30 Intellectual Property 24.

⁸ Helen Thomson, 'Copyright, Compliance, and the Big Wide World of MOOCs' (2013) 34 Incite 30.

⁹ Stephen E Arnold, 'GADZOOKS, It's MOOCs.' (2013) 37 Online Searcher 10.

¹⁰ Meredith Schwartz, 'Massive Open Opportunity: Supporting MOOCs in Public and Academic Libraries' (*Library Journal*, 2013) <<http://li.libraryjournal.com/2013/05/library-services/massive-open-opportunity-supporting-moocs/#>> accessed 27 October 2015.

¹¹ Derek Whitehead and Luke Padgett, 'The Myth of MOOCs', *The Higher Education Technology Agenda* (THETA

2013) (2013) <https://www.caudit.edu.au/system/files/Media_library/Resources_and_Files/Presentations/THETA_2013_-_The_Myth_of_MOOCs_-_D_Whitehead_L_Padgett_-_Presentation.pdf> accessed 1 November 2015.

¹² *ibid.*

¹³ *ibid.*

¹⁴ Charis Palmer, 'Universities Seek Copyright Law Reform to Enable MOOCs' (*The Conversation*, 2013) 6 <<http://theconversation.com/universities-seek-copyright-law-reform-to-enable-moocs-11524>> accessed 1 November 2015, p6.

¹⁵ Kyle K Courtney, 'The MOOC Syllabus Blues Strategies for MOOCs and Syllabus Materials' (2013) 74 College and Research Libraries News 514 <<http://crln.acrl.org/content/74/10/514.nhttp://crln.acrl.org/content/74/10/514.full.pdf>> accessed 27 October 2015.

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ *ibid.*

III. RELATED INTERNATIONAL CONVENTIONS

As one of the 14 multilateral trade agreements in the World Trade Organization (WTO), the Agreement on Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) is considered a comprehensive international Agreement on copyright and intellectual property that is binding on all WTO Members.¹⁹ Under TRIPS, Contracting States are required to comply with most of the provisions of the Berne Convention, irrespective of whether the country is a signatory to that Convention, by virtue of TRIPS Article 9, which provides that all Members shall comply with Articles 1 to 21 of the Berne Convention 1971. In other words, the Berne Convention is a source of rights and obligations for all WTO Members. Some commentators even conclude that the Berne Convention, to the extent incorporated, is a source of law.²⁰

The Berne Convention, before the revision of its substantive copyright provisions (Articles 1 to 20) at the Stockholm Conference 1967 has only provided for special copyright exceptions, as contained in Articles 10, 10*bis*, 11*bis*(3) and 13(1). Back then, different copyright exceptions in favour of various public and cultural interests were widespread and available in domestic laws. Recognition of the need for information and knowledge appears to constitute one of the most frequent exceptions recognized in various domestic laws; for instance those related to works used in public speeches, quotations, school books and chrestomathies, newspaper articles, reporting of current events, as well as reproduction by photocopying in libraries.²¹

IV. SPECIFIC COPYRIGHT EXCEPTION FOR TEACHING PURPOSES

Article 10(2) of the Berne Convention specifically permits utilizing copyright work for the purpose of teaching, by stating:

It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or

sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

Article 10(2) of the Berne Convention is not mandatory in nature since it left the matter for national legislation or for bilateral agreements between Union members to decide on²² by using the words 'it shall be a matter for legislation'.²³ Nevertheless, should a country opt to use the specific teaching exception, it must do so within the ambit of Article 10(2) of the Berne Convention and this can be analysed as follows:

A. 'TO PERMIT THE UTILIZATION'

Article 10(2) uses a general term, namely it permits the 'utilization' instead of the term 'borrowing' used in the Brussels Act 1948. By using a general term, it covers a broad range of utilization.²⁴ It was viewed that Article 10(2) is an 'open, flexible and technology-neutral exception'.²⁵ The word is considered neutral enough to cover not only reproduction, but also other kinds of economic rights granted under the Berne Convention, namely the right of adaptation, translation, distribution or communication to the public, making available to the public and even extendable to the use of digital means in teaching.²⁶ Ultimately, it is left for each national legislation to determine what 'utilization' means²⁷ and this includes all the exploitation acts

¹⁹ Sam Ricketson and Jane C Ginsburg, 'International Copyright and Neighbouring Rights: The Berne Convention and Beyond' (Second, Oxford University Press 2006) 791.

²⁰ Samuel Ricketson, 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment' (World Intellectual Property Organization 2003) 14.

²¹ Ruth L Okediji, 'The International Copyright System: Limitations, Exceptions and Public Interest Considerations to Developing Countries' (UNCTAD-ICTSD 2006) 13.

²² Raquel Xalabarder, 'On-Line Teaching and Copyright: Any Hopes for an EU Harmonized Playground?' in P Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar Publishing 2007) 379.

²³ Raquel Xalabarder, 'Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel' (World Intellectual Property Organization 2009)1 15 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130393>.

²⁴ Samuel Ricketson, 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment' (World Intellectual Property Organization 2003) 14; Raquel Xalabarder, 'Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel' (World Intellectual Property Organization 2009) 15 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130393>. accessed 27 October 2015

¹⁹ Adrian Sterling, *World Copyright Law* (Sweet and Maxwell 2003).

²⁰ Mitsuo Matsushita, Thomas J Schoenbaum and Petros C Mavroidis, *The World Trade Organization: Law, Practice and Policy* (Second Edition, Oxford University Press 2006) 58.

²¹ WIPO, 'Records of the Intellectual Property Conference of Stockholm' (1971) 112.

envisaged under the Berne Convention, TRIPS and later, by the WIPO Copyright Treaty (WCT).

B. 'OF LITERARY OR ARTISTIC WORKS'

Article 10(2) also specifies that only 'literary or artistic works' may be used under the copyright exception for the purpose of teaching. A very wide and broad definition of the term 'literary and artistic works' is found in Article 2(1) of the Berne Convention, where it includes 'every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression'.

Although digital technology may pose greater risks to authors' interests compared to works used in face-to-face teaching²⁸, it has been well accepted that digital technologies are also covered under the exception.²⁹ The reason behind all the subsequent Berne Convention revisions³⁰ show that such wording was to enable educators 'to take full advantage of the new means of dissemination provided by modern technology'³¹, and that it should extend to digital fixations of works.³² Acceptance for the exceptions to be applied to digital technology can also be seen in the Agreed Statement concerning Article 10 of the WCT, where member states may '... appropriately extend into the digital environment limitations and exceptions in their national laws ... [and] devise new exceptions and limitations that are appropriate in the digital networked environment.'³³ Thus, the law made it clear that whatever mode of literary, scientific and artistic works that may be used in MOOCs, it will still be covered under the specific exceptions for teaching purposes.

²⁸ Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Second, Oxford University Press 2006) 794.

²⁹ Raquel Xalabarder, 'The Liability of Internet Service Providers (ISP) for the Infringements Committed by Their Clients and Users' [2006] IDP. Internet, Law and Politics E-Journal 378–379 <<http://journals.uoc.edu/index.php/idp/article/view/n2-xalabarder>> accessed 27 October 2015.

³⁰ That provides for 'publications destined for educational or scientific purposes' as in the Berne Act 1886, 'educational or scientific publications' as in the Brussels Act 1948, 'publications intended for teaching or having a scientific character or in chrestomathies' as proposed in the Programme for the Stockholm Conference 1967, and the current text which added 'recordings and broadcasts'.

³¹ Raquel Xalabarder, 'Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel' (World Intellectual Property Organization 2009) 14 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130393>. accessed 27 October 2015

³² Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Second, Oxford University Press 2006) 793.

³³ WIPO, *Records of the Intellectual Property Conference of Stockholm* (1971) 112.

C. 'BY WAY OF ILLUSTRATION'

Article 10(2) uses the phrase 'by way of illustration', whose ordinary meaning refers to:

The action or fact of illustrating, (1) Lighting up, illumination, enlightenment; (2) The action of making or fact of being made illustrious, brilliant, or distinguished; distinction. Also, an example, means or cause of distinction; (3)(a) The action or fact of making clear or evident to the mind; setting forth clearly or pictorially; elucidation; explanation; exemplification; (b) That which serves to illustrate or make clear, evident, etc.; an elucidation, explanation; an example, instance; (4)(a) The pictorial elucidation of any subject; the elucidation or embellishment of a literary or scientific article, book, etc., by pictorial representations; (b) An illustrative picture; a drawing, plate, engraving, cut, or the like, illustrating or embellishing a literary article, a book, etc.³⁴

Based on the Proposal of the Working Group on Excerpts from Protected Works, 'by way of illustration,' was to be understood 'in the sense of subsidiary reproduction'.³⁵ On this basis the exception only applies when the copyright work is used for supplementing other work and is only regarded as secondary or of lesser importance.³⁶ For instance, a short video used in a MOOC to illustrate the conflict happening in Syria for its International Law students may fall under the Article 10(2) exception since the video is simply reproduced to support or demonstrate the lesson. Similarly, a journal article is reproduced for students' further reading so as to provide further clarification in the lesson.

The word 'illustration' refers to works that could make things clearer or evident to the mind, not just by giving a mere example, but also including setting forth clearly or pictorially, elucidating or explaining a matter in question, which can commonly be done by posting journal articles or chapters that better define, clarify or explain the subject matter in detail. Moreover, the Working Group dealing with Article 10(2) describes 'by way of illustration' to be understood only 'in the sense of subsidiary

³⁴ *Oxford English Dictionary* (Second, University Press 1989).

³⁵ WIPO, *Records of the Intellectual Property Conference of Stockholm* (1971) 885.

³⁶ Ratnaria Wahid, 'Exploring Flexibilities within the International Copyright System for Teaching, Research and Study' (DPhil thesis, University of East Anglia 2011).

reproduction', which means that the copyright work is used to assist or supplement the main teaching material, which is normally the lecturer's notes.³⁷

Moreover, the phrase 'by way of illustration' was not intended to restrict the term 'educational purposes' previously used in the earlier version of the Berne Convention, but to ensure that the reproductions used are indeed 'illustrating' the teaching.³⁸ However, when a journal article is reproduced for students to analyse and comment in a MOOCs' online forum, this may arguably not constitute mere 'illustration'. However, such argument is not valid because the work will be at the centre of discussion and thus becomes primary in ensuring success of the teaching activities, and therefore would not surpass the requirement of 'by way of illustration' under Article 10(2).

It was also accepted at the Stockholm Conference that the words 'by way of illustration' do impose some limitation on the size of the borrowing, but would not exclude the use of the whole of a work in appropriate circumstances.³⁹ For example, it may be necessary to reproduce a short literary work or artistic work such as case summaries or photographs in order for it to be properly utilized for teaching purposes.

D. 'PUBLICATIONS, BROADCASTS OR SOUND OR VISUAL RECORDINGS'

Article 10(2) further specifies that utilization is permitted by way of illustration 'in publications, broadcasts or sound or visual recordings for teaching'. These expressions were not meant to exhaust the full range of permissible utilizations, but instead to accommodate new technology.⁴⁰ Hence,

³⁷ WIPO, *Records of the Intellectual Property Conference of Stockholm* (1971) 885.

³⁸ Raquel Xalabarder, Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel (World Intellectual Property Organization 2009) 15 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130393>. accessed 27 October 2015.

³⁹ Lucie Guibault, *The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights with Regard to General Interest Missions for the Transmission of Knowledge: Prospects for their Adaptation to the Digital Environment* [2003] e-Copyright Bulletin 1, 15; Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Second, Oxford University Press 2006) 791.

⁴⁰ Raquel Xalabarder, 'The Liability of Internet Service Providers (ISP) for the Infringements Committed by Their Clients and Users' [2006] IDP. Internet, Law and Politics E-Journal 378 <<http://journals.uoc.edu/index.php/idp/article/view/n2-xalabarder>>. accessed 27 October 2015

'distance learning', correspondence courses, 'teaching on demand' or 'broadcasting'⁴¹ or any kind of teaching and learning conducted online⁴², which are very common in MOOCs environment, are all covered under the Article 10(2) provision. By including the term 'broadcasts' it also shows that Article 10(2) includes wire transmission. Based on the records of the Brussels Conference, the delegates have accepted that broadcast was one means of wireless communication to the public, as interpreted in the Rome Convention Article 3(f) to be 'the wireless transmission for public reception of sounds or images and sounds of the representations'.⁴³

When utilizing copyright works in broadcast, it may be difficult to ensure that the utilization is used for teaching purposes only, since it is not easy to control the destination when a work is broadcasted. Hence, an educational broadcast may be made to a larger group of people other than those for whom the instruction is intended. This approach is acceptable when the Study Group rejected a proposal that seeks to limit the scope of the teaching exception to only educational broadcasts carried out within teaching establishments or inside schools.⁴⁴ Moreover, Article 10(2) encompasses not only the making of broadcasts but also the performances of broadcasts in schoolrooms or lecture theatres.⁴⁵ The phrase 'by way of illustration in publications, broadcasts or sound or visual recordings for teaching' does not constitute an exhaustive list.⁴⁶ Based on these

⁴¹ Daniel Seng, WIPO Study on the Copyright Exceptions for the Benefit of Educational Activities for Asia and Australia (World Intellectual Property Organization 2009) 10 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130249> accessed 27 October 2015

⁴² Raquel Xalabarder, 'Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel' (World Intellectual Property Organization 2009) 14 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130393> accessed 27 October 2015.

⁴³ Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Second, Oxford University Press 2006) 732; Raquel Xalabarder, 'Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel' (World Intellectual Property Organization 2009) 9 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130393>. accessed 27 October 2015.

⁴⁴ WIPO, *Records of the Intellectual Property Conference of Stockholm* (1971) 886.

⁴⁵ Claude Masouye, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971)* (World Intellectual Property Organization 1978) 60.

⁴⁶ Raquel Xalabarder, 'Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel' (World Intellectual Property Organization 2009) 14

arguments, wireless transmission of works to public as adopted in MOOCs is covered under the teaching exception of Article 10(2).

It is debatable whether Article 10(2) facilitates the use of teaching compilations under the exception. Digital educational compilations, which are fundamental in online teaching, consisting part of the instruction itself compiled on a web page, may pose far greater risks against the legitimate interests of authors compared to non-digital educational compilations.⁴⁷ The application of Article 10(2) to teaching compilations was derived from its reference to 'publication' as well as the express reference to 'chrestomathies'⁴⁸ which might be rendered as 'educational compilations'⁴⁹ in the earlier version of the Berne Convention. This is particularly provided for in Article 8 of the Berne Act of 1886, which was later reorganized into Article 10(2) of the Brussels Act 1948.⁵⁰ The Working Group, however, recommended deleting the word 'chrestomathies' on the ground that it was no longer necessary due to the number of exceptions to the right of reproduction already available in the Convention.⁵¹

Ricketson in his early edition rationalizes that chrestomathies and anthologies, in many instances, would naturally fall within the scope of publications for teaching purposes under Article 10(2).⁵² This position was later altered, stating that it is unlikely that chrestomathies and anthologies would fall within the scope of publications intended for teaching purposes under Article 10(2), as 'it will be a distortion of language to describe an anthology of poetry (with the complete texts of the poems) or a 'course pack' consisting of chapters taken from various books about the subject to be covered in the course, as being used 'by way of illustration [...] for

teaching' .⁵³ Australia, for instance, has subjected its compilation of copyright materials to voluntary licensing arrangement or compulsory licensing schemes.⁵⁴

Others, however, contended that Article 10(2) did refer to 'publications' (as well as the original reference to 'chrestomathies' in the Berne Act), which favours the acceptance of teaching compilations provided that it fulfils further conditions i.e. 'to the extent justified by the purpose' and that 'such utilization is compatible with fair practice'.⁵⁵ Hence, it is not a straightforward case but should be decided on a case-by-case basis.

E. 'FOR TEACHING'

Article 10(2) specifically allows copyright exceptions for 'teaching', which includes 'teaching at all levels - in educational institutions and universities, municipal and State schools and private schools'.⁵⁶ The Stockholm Report however excludes education outside these institutions, for instance, general teaching available to the general public.⁵⁷ Thus, Article 10(2) only refers to formal education at elementary, intermediate and tertiary institutions of learning, or something that is of an 'official' degree.⁵⁸ Nevertheless it could be argued that such a view may be disadvantageous to informal educational setting, since the development of technology has opened up the opportunities for anyone to pursue distance learning. Applying this to the context of MOOCs, teaching can still be considered as classroom-based since it will comprise the same registered students, studying a subject matter provided by trained lecturers, guided by a specified curriculum that lasts for a certain period of time. MOOC students still need to register, follow a certain syllabus within a certain time frame, complete certain activities and are also expected to participate and contribute to forums and online discussions. Thus, MOOCs should also be considered as falling

<http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130393>. accessed 27 October 2015.

⁴⁷ *ibid.*

⁴⁸ According to the Oxford English Dictionary, the term 'chrestomathy' refers to 'a collection of choice passages from an author or authors, esp. one compiled to assist in the acquirement of a language'.

⁴⁹ Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Second, Oxford University Press 2006) 784.

⁵⁰ Article 10(2) of the Brussels Act 1948 provides as follows: 'The right to include excerpts from literary or artistic works in educational or scientific publications or in chrestomathies, in so far as this inclusion is justified by its purpose, shall be a matter for legislation in the countries of the Union, and for special Arrangements existing or to be concluded between them.'

⁵¹ WIPO, *Records of the Intellectual Property Conference of Stockholm* (1971) 885.

⁵² Samuel Ricketson, 'The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986' (Kluwer 1987) 499.

⁵³ Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Second, Oxford University Press 2006) 794.

⁵⁴ *ibid.*

⁵⁵ Raquel Xalabarder, 'Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel' (World Intellectual Property Organization 2009) 14 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130393>. accessed 27 October 2015

⁵⁶ WIPO, 'Records of the Intellectual Property Conference of Stockholm' (1971) 293.

⁵⁷ *ibid.*

⁵⁸ Raquel Xalabarder, 'On-Line Teaching and Copyright: Any Hopes for an EU Harmonized Playground?' in P Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar Publishing 2007) 378.

under the scope of formal education that could benefit from the teaching exceptions.

The word 'teaching' should not be interpreted restrictively⁵⁹, since it will exclude adult education programmes⁶⁰ which are beneficial for a country's development. In interpreting the scope of 'teaching', the focus should be on the nature of the instruction, not just on the award itself.⁶¹ It is important that in this information technology era different modes of teaching and learning are acknowledged and recognized. There is no reason to limit the scope of 'teaching' to the classroom only for the purposes of Article 10(2), and the word 'teaching' should extend to correspondence courses or Web-based courses where students receive no face-to-face instruction from a teacher.⁶²

F. 'TO THE EXTENT JUSTIFIED BY THE PURPOSE' AND 'UTILIZATION IS COMPATIBLE WITH FAIR PRACTICE'

Article 10(2) requires that the use of copyright works under the teaching exception must be justified and compatible with fair practice. At this point, commentators differ as to whether Article 10(2) as a special rule, which comes much earlier, should exist in an unqualified form or need to be applied cumulatively with the three-step test⁶³, which specifies three conditions that need to be fulfilled in order to qualify as exceptions to the reproduction right, namely that: (a) it must be a certain special

case; (b) that it does not conflict with a normal exploitation of the work; and (c) that it does not unreasonably prejudice the legitimate interest of the author.

The first possibility is that the three-step test does not need to be applied to the exception for teaching purposes. In interpreting the text of the Berne Convention, the Main Committee I⁶⁴ remarked as follows:

The Drafting Committee was unanimous in adopting, in the drafting of new texts, as well as in the revision of the wording of certain provisions, the principle *lex specialis legi generali derogat*: special texts are applicable, in their restricted domain, exclusive of texts that are universal in scope. For instance, it was considered superfluous to insert in Article 9, dealing with some general exceptions affecting authors' rights, express references to Articles 10, 10*bis*, 11*bis* and 13 establishing special exceptions.

This line of interpretation demonstrates that the operation of the specific teaching exception within its specific sphere is unaffected by the more general provision contained in Article 9(2).⁶⁵ The uses allowed under the teaching exception are thus not bound by the requirement of the three-step test.⁶⁶ Applying the principle of *lex specialis legi generali derogat*, which means that specialized law prevails over general law, the teaching exception continues to exist in an unqualified form because it provides, in effect, a special rule, where the three-step test would not be applicable.⁶⁷

Thus, although the three-step test appears to apply to all types of exceptions, there is a general rule of interpretation that where there is a specific rule in an earlier treaty, then that earlier treaty continues and is not replaced by the general provision of a later treaty. Moreover, in discussing Article 9(2) of the Berne Convention, the study group pointed out that 'the provisions already existing for certain special purposes (Articles 10, 10*bis* and 11*bis*, paragraph (3) must be regarded as rules exercising

⁵⁹ WIPO, *Records of the Intellectual Property Conference of Stockholm* (1971) 886.

⁶⁰ Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Second, Oxford University Press 2006) 792; Raquel Xalabarder, 'Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel' (World Intellectual Property Organization 2009) 14 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130393> accessed 27 October 2015.

⁶¹ Daniel Seng, 'WIPO Study on the Copyright Exceptions for the Benefit of Educational Activities for Asia and Australia' (World Intellectual Property Organization 2009) 8 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130249> accessed 27 October 2015.

⁶² Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Second, Oxford University Press 2006) 793.

⁶³ The three-step test is provided for in Article 9(2) of the Berne Convention and Article 13 of the TRIPS Agreement, which bears the same three conditions. Article 9(2) of the Berne Convention provides that: 'It shall be a matter for legislation in the countries of the [Berne] Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.'

⁶⁴ WIPO, *Records of the Intellectual Property Conference of Stockholm* (1971) 1134.

⁶⁵ Richard K Gardiner, *Treaty Interpretation* (Oxford University Press 2008) 297–298.

⁶⁶ Samuel Ricketson, 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment' (World Intellectual Property Organization 2003) 21.

⁶⁷ Richard K Gardiner, *Treaty Interpretation* (Oxford University Press 2008) 297–298.

limits on the questions with which they deal'.⁶⁸ On this basis, the teaching purposes exception continues to exist in an unqualified form because it provides, in effect, a special rule, and thus the three-step test does not need to be applied in this particular situation.

Based on this structure of the Berne Convention, states may freely enact legislation on subjects covered under the specific exceptions without the restrictions of the three-step test.⁶⁹ Hence, it is up to member countries to consider what is regarded as 'fair practice' and 'justified by the underlying purpose'.⁷⁰ The expression 'fair practice' implies that 'the uses in question can only be accepted after an objective appreciation'.⁷¹ The requirement of 'fair practice' is essentially a question for national tribunals to determine in each particular instance. Using copyright works without permission or not paying compensation for work used for the purpose of teaching in a private university, may not be considered 'justified by the purpose'. Similarly, utilizing a substantial amount of copyright works, even for the purpose of teaching, may not be considered as fulfilling the condition of 'compatible with fair practice'.

Despite these two conditions, an analysis of the specific teaching exception provision in the Berne Convention shows that it is quite an open, flexible and technology-neutral exception, in the sense that it does not limit copying to any specific quantitative or qualitative restrictions on exempted uses.⁷² The provision also does not require any payment of remuneration; it is up to member states to implement it either as a free exception or limitation, as a remunerated legal licence, or as a combination of both.⁷³ Such flexibilities certainly provide an opportunity for member countries to find the right balance between the public interest (education) and that of the author, according to their different circumstances.

⁶⁸ WIPO, *Records of the Intellectual Property Conference of Stockholm* (1971) 112.

⁶⁹ Ruth L Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations to Developing Countries* (UNCTAD-ICTSD 2006) 14.

⁷⁰ Raquel Xalabarder, 'On-Line Teaching and Copyright: Any Hopes for an EU Harmonized Playground?' in P Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar Publishing 2007) 380.

⁷¹ WIPO, *Records of the Intellectual Property Conference of Stockholm* (1971) 117.

⁷² Raquel Xalabarder, 'On-Line Teaching and Copyright: Any Hopes for an EU Harmonized Playground?' in P Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar Publishing 2007) 378.

⁷³ Raquel Xalabarder, 'On-Line Teaching and Copyright: Any Hopes for an EU Harmonized Playground?' in P Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar Publishing 2007) 380

The second possibility is where Article 13 of the TRIPS Agreement applies the three-step test to all exceptions to exclusive rights, as it is clearly expressed, and thus should be applied in addition to the exception for teaching purposes. It was viewed that the specific exceptions are supported by the open-formulated three-step test, which acts as an additional safeguard.⁷⁴

Thus, a national legislature that wants to exempt the utilization of a work by way of illustration for teaching must fulfil not only the conditions under Article 10(2) of the Berne Convention, but also the abstract criteria of the three-step test. The exception must also be limited to certain special cases, not conflict with the normal exploitation of a work, and not unreasonably prejudice the legitimate interests of the right holder. All specific limitations provided under the Berne Convention, including teaching exceptions, can automatically be regarded as a 'special case'.⁷⁵ In terms of the application of the two conditions to MOOCs, it depends on the facts and circumstances of the case.

Without clear interpretation and in the context of the TRIPS Agreement, WCT and WPPT, it was viewed as advisable to employ the proportionality test inherent in the three-step test in determining whether the use of certain copyright work is 'fair'.⁷⁶ To this extent, one may need to consider the kind and amount of work used, the quantity of copies made, and the specific implications of the technology, in order to find the right balance between the copyright owners' and the users' interest.

It may well be that when a person applies the three-step test in addition to the teaching purposes exception, he may find himself going through the same exercise twice because he is only considering the same factors in relation to the teaching purposes exception and the three-step test, but in a different

⁷⁴ Martin Senftleben, 'Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law' (Kluwer Law International 2004) 155.

⁷⁵ *ibid.* 157.

⁷⁶ Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Second, Oxford University Press 2006) 793; Martin Senftleben, 'Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law' (Kluwer Law International 2004); Raquel Xalabarder, 'On-Line Teaching and Copyright: Any Hopes for an EU Harmonized Playground?' in P Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar Publishing 2007)

language.⁷⁷ Bringing the teaching purposes exception and the three-step test together, it can be seen that although the two exceptions are not identical, there are compromises between those.⁷⁸ Article 10(2) reiterates factors that are similar to the three-step test, which are thus not likely to yield a different outcome in normal circumstances; both exceptions seem to have similar philosophies.

When the three-step test and the inherent requirement of the teaching purposes exceptions are applied cumulatively, in effect the TRIPS Agreement may conceivably narrow the scope of the teaching purposes exception under the Berne Convention. This may occur based on a narrow reading of TRIPS on the assumption that Article 10(2) of the Berne Convention does not oblige States to comply, but leaves it to countries to decide as a matter of national legislation.⁷⁹

G. ACKNOWLEDGEMENT

Article 10(2) is further subject to the requirement in Article 10(3) of the Berne Convention which requires that the source and the name of the author be mentioned when copyright works are used for teaching purposes. The attribution of the source and authorship is consistent with common practice in educational scholarship.⁸⁰

However, there are inconsistent views regarding the question of whether the right of integrity or moral rights as referred in Article 6*bis* of the Berne Convention also applies.⁸¹ Ricketson initially viewed

that the moral right under Article 6*bis* does not apply in respect of Article 10, as for practical reasons, there is a need for flexibility to modify and alter a work where necessary when it is quoted or utilized for teaching purposes.⁸² However, on the basis of the report of the Main Committee I, which notes that delegates generally agreed that Article 6*bis* applied in respect of exceptions authorized by the Convention, including Article 10⁸³, it was later viewed that 'while modifications within reason may be required when works are utilized for teaching purposes, this should not give *carte blanche* to educators to make deleterious, reputation-damaging alterations'.⁸⁴

V. CONCLUSION

In short, Article 10(2) of the Berne Convention can facilitate the teaching of courses in universities via MOOCs provided that it is flexibly interpreted. The wording under Article 10(2) is purposely couched to be open and flexible, so as to allow national lawmakers to take advantage of its flexibility and to apply the scope of the teaching exception according to their circumstances. The rights cover a broad use of works for teaching exceptions. Based on a flexible interpretation, the exception may apply when a work is copied, reproduced, translated, adapted or performed for the purpose of teaching. The exception may also apply when the copyright work is communicated or made available to the public. Thus, flexibly interpreted, Article 10(2) seems to support various activities conducted on copyright works, which are commonly undertaken by lecturers when teaching their students and this includes MOOC as a new form of delivery in teaching and learning.

The phrase 'justified by the purpose' and 'compatible with fair practice' under Article 10(2) was also worded in general terms and necessitates further

⁷⁷ Ratnaria Wahid, 'Exploring Flexibilities within the International Copyright System for Teaching, Research and Study' (DPhil thesis, University of East Anglia 2011).

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ Daniel Seng, 'WIPO Study on the Copyright Exceptions for the Benefit of Educational Activities for Asia and Australia' (World Intellectual Property Organization 2009) 11 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130249>. accessed 27 October 2015.

⁸¹ Article 6*bis* of the Berne Convention reads:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those

countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

⁸² Samuel Ricketson, 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment' (World Intellectual Property Organization 2003) 16.

⁸³ WIPO, *Records of the Intellectual Property Conference of Stockholm (1971)* 1165.

⁸⁴ Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Second, Oxford University Press 2006) 796.

interpretation by the courts. Hence, the provision still allows for national law to take advantage of the inherent flexibilities. Arguably, the three-step test may or may not necessarily be employed. It is for the national law to determine the exempted use of works for teaching purposes, within the limits of Article 10(2).⁸⁵ The exceptions provided under international agreements are purposely couched in general terms, so as to pose as guidance and as a yardstick for member countries to make laws that suit their needs and circumstances.

The teaching exception is important since it is based on major public interest considerations, such as the promotion of education and culture.⁸⁶ Copyright exceptions also prevent monopoly control⁸⁷ and exploitation not just by authors or inventors, whose creativity are supposed to be rewarded, but by large information-based corporations.⁸⁸ In rapid technological development, various works can easily be made available, benefiting the public by way of reducing costs for innovation, encouraging the exchange of ideas as well as enhancing networking, public funding and support.⁸⁹ Often, it is in the interest of authors to disseminate and make known his or her creations. Copyright exceptions play an important role as a mechanism of access and

contribute to the dissemination of knowledge, which in turn is essential for a variety of human activities and values, including liberty, the exercise of political power, and economic, social and personal advancement ... open up rapid advances in information and communication technologies that are fundamentally transforming the processes of production, dissemination and storage of information.⁹⁰

⁸⁵ Raquel Xalabarder, 'On-Line Teaching and Copyright: Any Hopes for an EU Harmonized Playground?' in P Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar Publishing 2007) 380.

⁸⁶ Lucie Guibault, 'Contracts and Copyright Exemptions' in PB Hugenholtz (ed), *Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management* (Kluwer Law International 2000) 137.

⁸⁷ Adrian Sterling, *World Copyright Law* (Sweet & Maxwell 2003).

⁸⁸ S Picciotto, 'Defending the Public Interest in TRIPS and the WTO' in Peter Drahos and R Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Palgrave 2002) 1–2.

⁸⁹ *ibid.* 1.

⁹⁰ PB Hugenholtz and Ruth L Okediji, 'Conceiving an International Instrument on Limitations and Exceptions to Copyright' (2008) 10–11. <<https://www.opensocietyfoundations.org/reports/conceiving-international-instrument-limitations-and-exceptions-copyright>> accessed 27 October 2015.

A successful implementation of MOOCs will only materialize through sufficient understanding of the role of copyright law and utilizing the flexibilities permitted under the copyright exceptions, taking into consideration the need of the people. It is important for every country to address the issue of access and sharing of information for the purpose of education that considers the interests of both copyright owners and users. However, public interest in education should be given more weight, as education is not a luxury, nor a mortgage nor a business, but a right to be upheld. In a time when education could be delivered across borders instantly with minimal costs, copyright law should not be seen as posing a risk or a hindrance. While some aim to profit from education by means of technology, one should not take for granted the shared responsibility in supporting education, which is considered a basic human right for all.

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