Higher Education Policy Institute

Who owns online lecture recordings?

Alexis Brown

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Strikes are once again on the horizon for UK universities, with staff at 58 universities to begin industrial action over pensions, pay and working conditions on 1 December 2021.[1] This will be the latest in a connected series of strikes that began in 2018 around changes to the Universities Superannuation Scheme (USS).[2] However, unlike previous strikes, the pandemic has meant that there is an unprecedented wealth of online teaching materials that were created after universities moved teaching online in 2020.

Given the calls for tuition fee refunds that plagued universities during lockdown, not to mention those that have followed in strikes past, universities will be keen to minimise any further disruption to students' education.[3] It is not impossible to imagine a scenario in which lectures and seminar materials are re-used to see students through the majority of strike action, while seminars and marking become the remit of, perhaps, graduate student labour or part-time, short-term contracted staff. Such a move could seriously hamper the impact of any industrial action.

But who owns this recorded material, and has the right to disseminate it – the lecturers who authored it, or the universities that employ them? This has already become a live issue at the University of Exeter as of July 2021, after the University introduced a new policy in which it aimed to retain licence over recorded materials for five years.[4] Exeter UCU is now seeking a licensing agreement for all recorded materials, with an initial licensing period of no longer than one academic year or until the end of resits, which can then be extended on an annual basis with the express consent of the academic(s).[5]

While this particular dispute is ongoing, many like it may emerge across the sector in the coming months and years. A recent survey by UCU in spring 2020 showed that, of over 18,000 responses, 48.8% reported that their institutions were planning a long-term move to online teaching for some courses, including recording of these sessions.[6] High-profile cases from abroad have also highlighted the risks of reusing lecture recordings – for instance, when a student at Concordia University, Canada went to email his professor only to find that he had died two years previously.[7]

This HEPI Policy Note explores the degree to which lecturers may retain control over the educational recordings they produce, or whether the rights to these materials reside with the universities that employ them, from a copyright, licensing, intellectual property (IP) policy and GDPR perspective. It concludes with concrete recommendations for how universities and staff can approach these issues moving forward.

Existing guidance

Both UCU and Jisc have produced public guidance on this topic, with UCU guidance broadly favouring the rights of employees and Jisc falling more on the side of employers owning the rights to lecture recordings.

The Jisc guidance begins from the assertion that materials made in the course of employment belong to them:

> *Where materials are produced by a lecturer (employee) as part of his / her job, copyright is generally owned by the employer (college or university) and permission is not needed to include them in a recording.*[8]

This position stems from a clause in the Copyright, Designs and Patents Act 1988 (CDPA), specifically section 11(2), which states that:

> *Where a literary, dramatic, musical or artistic work ... is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary.*[9]

Following this subsection of the law, the Jisc guidance states that unless there is an agreement that states otherwise, even the lecture notes underpinning a lecture would belong to employers if made in the course of an academic's work. There is, however, an exception within section 11(2) of the CDPA when it comes to sound recordings; for sound recordings alone made by a lecturer, the lecturer will retain copyright over the recording – and while the Jisc guidance says that a 'university might argue that recordings carried out by the lecturer "on behalf of" the college or university are owned by the institution', in order to avoid risk and uncertainty, 'the lecturer's permission should be obtained to make further use of the recording'.[10]

Separate to copyright issues, the Jisc guidance also explores 'performer's rights', as for the purposes of the law lectures are also considered 'performances', and lecturers 'performers'. Citing CPDA (s.182A-B), according to the Jisc guidance, a performer's rights can be infringed in three ways:

1) when a recording of performance is made without consent;
2) where a copy of that recording is made without consent; or
3) where copies of that performance are disseminated to the public without consent.

The guidance suggests there are certain exceptions to needing consent, however. One of the exceptions is for the 'specific purpose of illustration for instruction (s.32 CDPA)', as long as the use constitutes 'fair dealing, for a non-commercial purpose, carried out by someone giving or receiving instruction and be accompanied by a sufficient acknowledgment'. Under this definition, the Jisc guidance says, the re-use of a lecture recording to teach further classes of students is likely to be lawful, though no precise definition of 'fair dealing' exists and would be to some extent contextual and subjective.[11]

By contrast, UCU anchors its defence of lecturers' rights firstly in claims around General Data Protection Regulation (GDPR), understanding lecture recordings as employers holding lecturers' personal data.[12] Because, this line of reasoning goes, lecture recordings can contain personal data about academics – for example, their race or sexual orientation – handling these lecture recordings must be treated as handling sensitive data about staff, and in accordance with GDPR legislation, universities must identify a specific justification for processing this data (for instance, explicit consent of the subject or it being in the public interest).

While the UCU guidance says that universities may argue that sharing the Special Category Data in a lecture has made that information public and therefore no longer protected, it further argues that lectures are not open to the public and should remain closed in the interest of academic freedom. The guidance did not explain whether GDPR issues can apply to lectures in which no such protected data is shared.

UCU further make the point that for casualised staff, subsection 11(2) may not apply. This is because these staff paid by the hour for lecturing may not be paid for their lecture preparation, in which case their lectures are not necessarily created in 'the course of employment', but rather in their own unpaid time.

What the experts say

Four legal academics who specialise in IP law were interviewed for this Policy Note – Professor Sir Robin Jacob (UCL), Dr Matt Fisher (UCL), Professor Justine Pila (University of Oxford) and Professor Andreas Rahmatian (University of Glasgow) – as well as UCU's Bargaining and Negotiations Official, Jenny Lennox, who leads on the union's IP issues and worked on the recent licensing case at the University of Exeter.

Copyright

The Jisc guidance maintains that copyright in lecture materials remain with universities because of subsection 11(2) of the CPDA – but several academics cite case law to say differently. Professor Sir Robin Jacob, Director of the Institute of Brand and Innovation (IBIL) at UCL, describes the issue as consisting of three elements: 1) what copyrights are involved?; 2) who owns those copyrights?; and 3) does the university have licence over any of those copyrights?

The nature of copyright, Jacob is keen to emphasise, is above all a negative right – a right to prevent others from doing something with a work (such as copying or distributing it), rather than a prerogative to override the rights of others to that work. He cited the example of an anthology of poems, in which ownership over the copyright of the anthology did not prevent that author from still being required to seek licence for each poem within it.

Jacob describes the issue as one of overlapping copyrights. For instance, a video-recorded lecture would contain:

i. the lecturer's notes (which has literary copyright);

ii. slides from the lecturer (literary copyright);

iii. the actual words uttered by a lecturer (literary copyright);

iv. the 'performance' of the lecturer, as lectures are considered 'performances' under the law (a performer's right);

v. the video recording itself (film copyright).

Jacob asserts the lecturer will own the copyright to i-iv, despite subsection 11(2) in the CDPA that states material created in the course of employment belongs to the employer. This does not apply in the case of lecture recordings, Jacob says, because the 'test is not merely whether or not a person is employed – the university has no or no sufficient control over what or how the lecturer teaches'. In other words, because the university does not direct precisely how a lecturer gives their lectures, or in what fashion, clause 11(2) does not apply in this context.

Professor Andreas Rahmatian, Professor of Commercial Law at the University of Glasgow, concurs on this point. The phrase 'in the course of employment' is 'interpreted narrowly' by the courts. Several academics – Jacob, Rahmatian, and Justine Pila – cite the case Stevenson, Jordan & Harrison Ltd v. MacDonald & Evans (1952), which used the example of a legal scholar's lecture notes to illustrate this point:

> *[P]rima facie I should have thought that a man, engaged on terms which include that he is called upon to compose and deliver public lectures or lectures to some specified class of persons, would in the absence of clear terms in the contract of employment to the contrary be entitled to the copyright in those lectures. That seems to me to be both just and commonsense. The obvious case to which much reference by way of illustration was made in the course of the argument is the case for the academic professions. Lectures delivered, for example, by Professor Maitland to students have since become classical in the law. It is inconceivable that because Professor Maitland was in the service at the time of the University of Cambridge that anybody but himself, one would have thought, could have claimed the copyright in those lectures.*[13]

Rahmatian interprets this legal example as meaning 'that an academic's duty for the purpose of copyright is to teach and to do research in general terms', rather than 'to carry out a determinable kind of research, ordered in advance, that is to be expressed in a particular form capable of attracting copyright protection'.[14] Employers do not specifically dictate the form and content of lecture materials enough for them to qualify for copyright protection in this argument. Pila further noted even where a university does own the film copyright of a lecture recording (in virtue of having produced the relevant video recording), any use of that recording in exercise of its copyright will be subject to authorisation by the owner of copyright in the recorded content i-iv – in this instance, by the lecturer who authored the recorded lecture and slides.

In line with UCU's guidance, Rahmatian also made the point that it would be especially difficult to apply section 11(2) of the CPDA to precariously employed academics (such as those paid on hourly contracts), who are 'essentially commissioned to teach', rather than employed, and could not be said to be producing lecture materials in the course of employment. More generally, Jacob argues that 'would be intolerable if a university owned the copyright in its lecturers' notes – how would they [lecturers] ever change universities if that were so?' Not all, however, were convinced that teaching materials produced in the course of employment would not belong to universities; Dr Matt Fisher (also of IBIL, UCL) saw no reason why section 11(2) could not apply in the case of academics, depending on the precise circumstances.

Licensing

Separate but related to the issue of copyright is licensing over a work or recording. A licence in this context essentially grants consent for another to use recordings (included the recorded content) for particular purposes, such as reproducing or distributing it further to support the delivery of a course. However, a licence does not need to be specifically written out or formalised in a contract but can be verbal or implicit.

Because a licence can be implicit, other factors may be used to determine what kind of licence (or consent) was given in relation to lectures recorded during lockdown in 2020/21. Jacob contends that although many lecturers and universities will not have explicitly discussed a licence when teaching materials were put online last year, 'license to use will be implied through conduct'. While the lecture recordings made under lockdown were clearly made and used with the licence of the lecturer, he says, 'the law will imply a licence to use only such extent as was necessary under the circumstances'. Therefore, there is 'no reason whatever for the law to imply a licence for some purpose wholly unrelated to Covid such as strike action'.

Pila says the licence in these materials may come down to precisely what was communicated between staff and management when the pandemic first arose. When determining what licence was given around lecture materials created during the pandemic, she says, 'it will depend very much on what was in emails and communication that had gone out from the relevant faculty … to understand on what basis these people understood and were providing recorded lectures'. For example:

> *If faculty said all teaching has to be online because of the Government restrictions … the implication there would be that those recordings are only to be used during periods in which, because of Government restrictions, teaching could not take place in person and had to be done online.*

Any use beyond that, according to Pila, would be absolutely outside the scope of that agreement.

Jenny Lennox, UCU's Bargaining and Negotiations Official, also states that lifting parts of the performance and using it out of context can affect the integrity of the work, thereby creating a breach of the licensing agreement. Situations in which anyone is able go in and lift parts of recorded lectures to use elsewhere 'could be hugely problematic for performance rights'.

University IP policies

The IP policies of universities also bear on what rights each party can claim to lecture materials, as employment contracts will often require academics to abide by these policies. In 2017, Elizabeth Gadd and Ralph Weedon published a content analysis of 70 UK university IP policies and found that 77% of these universities claimed ownership of internal teaching materials, while 84% of these institutions claimed ownership of e-learning materials.[15] Where such policies exist, Pila notes, they will normally be binding, either statutorily or contractually, unless the argument can be made that they are somehow insufficient – for instance by being too vague, or by offending fundamental rights and academic freedom.

Lennox says that technological innovation and the rapidly rising prevalence of online material has meant that some universities are scrambling to develop IP policies that keep pace. Due to the increased prevalence of online materials, some IP policies developed prior to the pandemic now constitute a 'massive rights grab', in her words, because many staff are performing additional labour to record their materials without any right of ownership over that work.

Collective action is not the only way to approach this issue for staff unhappy with their university's IP policy, however; she believes there is ample space for staff and management to work together on iterative policies that respond to the rights of both parties and – just as importantly – the needs of students. 'At the end of the day', she says, 'we've got to be talking to students about what they want', and IP policies around recordings should first and foremost reflect what students find pedagogically useful, as opposed to creating and holding recordings for their own sake. One way to avoid collective action was to have these conversations between staff, students and management early on and regularly to develop policies that maintain trust between all parties.

Pila pointed to additional options. Many university IP policies will make exceptions for research, for example, by waiving any claim to IP rights in books, articles and other scholarly work.[16] If academics are concerned about maintaining copyright ownership of their materials, according to Pila, they could make it clear where their lectures draw on their own research, which may help strengthen an academic's claim to ownership of that material. She also recommended that academics use every opportunity to assert their copyright – for example, writing out explicitly in emails and on slides under what circumstances they consent for these materials to be used.

Fisher notes that several years ago his own university changed their IP policy from an exclusive licence to one that can now be sub-licensed to others as well, possibly commercially – a move that may become common as these policies evolve over the coming years. He alternatively contends that academics concerned over how their lecture materials may be used are well within their rights to delete the material entirely at the end of term: 'Say you recorded a lecture, kept it on your own machine, and linked to it via the university VLE [virtual learning environment] page – you could technically destroy it' without being in breach of any licensing restrictions, he says. This, he continues, is because while universities may have rights in terms of controlling the copying and dissemination of the recordings, these are negative rights – rights to keep others *from* doing something – and there is nothing within those rights to ensure that the material itself continues to exist. That right still rests with the author.

GDPR

UCU's guidance on the subject highlights GDPR concerns as the main line of reasoning for lecturer's rights over recorded materials. Justine Pila highlighted that GDPR issues are of particular concern for seminar recordings where students are involved: 'This can be a sensitive issue with people from some jurisdictions … who may be anxious about having their views on certain issues recorded'. She cites the example of a seminar-based course that she teaches at the University of Oxford on Regulation, which considers the use of surveillance technologies by different states and typically attracts a diverse student audience from different countries and political systems. She also notes that

her own University encourages staff to be aware of the security issues raised by recording discussion on such matters. For example, its staff training on Information Security and Data Privacy emphasises the threat posed by 'hostile state actors … targeting UK universities to steal personal data, research data and intellectual property … to help their own … authoritarian interests'. Lennox further raises concerns over how GDPR issues might affect what staff feel comfortable to teach and speak about in lectures, for example their sexuality or trade union membership. She is unconvinced that many universities have the data record-keeping mechanisms in place to keep track of where staff's recorded data are kept and what they are used for – particularly if staff or former staff members request that the institution produce their data, as they are entitled to under GDPR law.

However, Pila, Jacob, Fisher and Rahmatian believe that the GDPR issue is largely beside the point in the case of academics recording only their own voice (and not others') for their online teaching materials, as the act of recording and uploading their lectures would offer consent for their own personal data contained in the recording to be processed. 'Unless there's some kind of surreptitious recording', Fisher says, 'there will be consent of some kind' – for example, through posted notices at the entrance to lecture halls, in which case just entering the hall constitutes consent for recording. In these instances, then, we are brought back to the issues of licensing and consent explored in the previous section.

Conclusions and recommendations

While lecture recordings have become standard practice in UK universities, there is still significant ambiguity over how and when these recordings can be used. In part, Fisher says, this is because academic practice has not kept pace with technological changes in pedagogy; actors, for instance, charge higher fees when they know their performances are being recorded, precisely because of the issues discussed in this piece – but what is the equivalent practice for academics? Without appropriate policies and practices in place, academics may essentially become 'low-rent YouTube stars', in Fisher's words.

Legal precedent suggests that, despite the CPDA, copyright for lecture materials likely still rests with the academic who created them. Things are murkier for licensing and may well come down to what was either agreed or implied in emails. University IP policies often make claims to ownership of lecture materials, but these can be objected to on several fronts if they are for example too vague or present an affront to academic freedom. These policies remain a point of negotiation and tension in universities across the country, as policy struggles to keep pace with online teaching's increasing prevalence. GDPR issues are of particular concern when students are involved in recordings – but less so when the academic's presence is the only one involved.

Three recommendations emerge from these conclusions:

- **University management and lecturers should be explicit about when and for what purposes any teaching materials may be used, ideally in writing.**
- **University IP policies should be developed iteratively and in collaboration with both staff and students to ensure that these policies reflect the needs of all involved. Because of the increased breadth of online materials created throughout the pandemic, and the increasing prevalence of online teaching more generally, universities without explicit IP policies should develop them, and those who have policies already should revisit their policies to consider whether they are still fit for purpose.**
- **Lecturers should familiarise themselves with their university's existing IP policies. Lecturers who are concerned or unclear about how their materials could be used may consider drawing more explicitly on their research in their lectures to strengthen their IP claim over these teaching materials, as many university policies waive IP claims over research outputs produced by staff. Lecturers may also consider removing access to their materials from virtual learning environments at the end of term to hinder their reuse.**

More work in this field is needed, particularly around employment and data protection law, to explore the issues at stake here. But more conversation between staff, students and university management is clearly needed on this issue too as the digital landscape continues to reshape university teaching.

Endnotes

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13 Stephenson, Jordan & Harrison Ltd v. MacDonald & Evans (1952), *Reports of Patent, Design and Trade Mark Cases*, Volume 69, Issue 1, 23 January 1952, p. 18.

14 Andreas Rahmatian, 'Make the Butterflies Fly in Formation? Management of Copyright Created by Academics in UK Universities', *Legal Studies,* Volume 34, Issue 4, 1 December 2014, pp.709-735 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755007

15 Elizabeth Gadd and Ralph Weedon, 'Copyright ownership of e-learning and teaching materials: Policy approaches taken by UK universities', *Education and Information Technologies,* Volume 22, pp.3231–3250, 4 February 2017 https://link.springer.com/article/10.1007/s10639-017-9583-4#citeas

16 For example, Manchester Metropolitan University's IP policy from February 2019 that states university employees will own the copyright in 'any scholarly work produced in furtherance of their professional career. A scholarly work includes books, contributions to books, articles and conference papers and shall be construed in the light of the common understanding in higher education of this phrase'. See https://www.mmu.ac.uk/media/mmuacuk/content/documents/research/CC_1402_MMU_Intellectual_Property_Policy_Updated-260319.pdf

hepi
Higher Education Policy Institute

99 Banbury Road, Oxford OX2 6JX
Tel: +44 (0) 1865 284450
admin@hepi.ac.uk
www.hepi.ac.uk