

Guidance on GDPR, moral & performance rights and accessibility in recorded lectures/lessons

This guidance applies during recorded teaching sessions, and where live sessions are recorded for future use by students.

For the purposes of the guidance, the following terms are used:

Video or video recording – when a lecturer records their image (including audio) whilst delivering a session.

Audio or audio recording – when a lecturer records their voice only whilst delivering slides, a presentation, or when delivering a podcast style recording. No image of them appears in the recording.

The General Data Protection Regulations (GDPR) and Data Protection Act 2018

Personal data

When audio and video of your teaching/lectures are recorded for repeat or future use, then your employer is holding your personal data. As such they must comply with the GDPR and identify a legal basis for processing this data.

An employer can rely on the consent of those involved in the recording to meet its obligations. However, that consent must be informed and freely given, and can be withdrawn at any time.

If your employer doesn't want to rely on consent, then the Act does still allow them to process your personal data if it is: 'Necessary for the purposes of the legitimate interests pursued by the controller [*employer*] or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject'. It is likely to be in the legitimate interests of the university and students for students to be able to access lectures online, and in order to achieve that it will be necessary to process lecturer's personal data.

All six lawful reasons for processing from Article 6 of GDPR can be found here:

<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/>

Your employer must inform teaching staff about the processing of their personal data and set out the purposes for which they are processing that data and the legal basis on which they rely. The branch must challenge the employer where they have not made the position clear or relied on a basis which does not appear to be appropriate.

Special Category Data

The GDPR specifies some data which can be more sensitive and these are given extra protection as Special Category Data. These are:

- personal data revealing racial or ethnic origin
- personal data revealing political opinions
- personal data revealing religious or philosophical beliefs
- personal data revealing trade union membership
- genetic data
- biometric data (where used for identification purposes)
- data concerning health
- data concerning a person's sex life; and
- data concerning a person's sexual orientation.

Some of this sort of data could easily be captured in a video recording through the appearance of teaching staff, and also verbally if a lecturer shared some of this data if it is pertinent to the session.

In order to process recordings with Special Category Data in it, the college/university must also identify another legal basis under Article 9 of the GDPR. These are:

- explicit consent
- employment, social security and social protection law
- vital interests
- not-for-profit bodies
- made public by the data subject
- legal claims and judicial acts
- substantial public interest conditions
- health or social care
- public health
- archiving, research and statistics.

It is possible that a university may seek to argue that by sharing the Special Category Data in a lecture, then the data subject has made that information public. However, lectures are not open to the public, and staff (and students) should be able to speak freely in the interests of academic freedom.

We have sought legal opinion on these different legal bases for processing Special Category Data, and we believe that the only appropriate legal basis for processing Special Category Data would be **explicit consent**. That consent must be informed and freely given, and can be withdrawn at any time.

Your employer must inform teaching staff about the processing of their Special Category Data and set out the purposes for which they are processing that data and the legal basis on which they rely. The branch must challenge the employer where they have not made the position clear or relied on a basis which does not appear to be appropriate.

Students' data

If students are captured in recordings of lectures or teaching sessions, then the university will also be holding their personal data, and this could potentially include Special Category Data. As such the university must make it clear to students the lawful reasons for processing this data (as outlined above).

Students should be made aware that recording is taking place before any recording commences, and lecturers should be able to pause recording (or subsequently edit a recording) to remove the student from it if they so wish.

Branches should seek a clear statement from the university which will be posted on the doors of teaching rooms where recording is taking place, or will automatically appear on online sessions if they are to be recorded, making it clear that the session will be recorded, and that students can request recording is paused/edited to remove their contributions.

Branches should ensure that the technology provided by the employer allows for the pausing of recordings, or that enough time is provided to the lecturer to subsequently edit the recording if students don't consent to the processing of their personal data.

How long can this data be held?

The university should have a policy which sets out how long this data can be held for, but they should not hold it for any longer than it is needed for the purpose for which it is held.

If the employer cites 'legitimate interests pursued by the controller' to provide access to lectures for students and 'explicit consent' for the processing of personal data and Special Category Data respectively, then it would seem appropriate for this data to be held for no longer than the end of the academic year/end of re-sits if later. If there are reasons why a lecture would be used beyond this time or might be re-used these should be spelt out clearly in the policy.

Once a lecturer leaves a university, then the personal data should be deleted. If a policy allows for the retention of data after someone leaves the institution then this could be legally challenged.

Branches must challenge the employer where they have no policy or no clear policy on the storage of data. Any policy should seek to automate the deletion of personal data after the agreed period, or where that isn't possible, allow for deletion by the lecturer after the agreed period. A process for deleting the personal data of a departing lecturer should be agreed with the branch.

It is important for branches to challenge the retention of recordings for more than one academic year.

What can recordings be used for?

Personal data should be processed as follows:

(b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; [Article 5(1)(b) of the GDPR]

It should then not be processed further in a manner incompatible with this purpose. So, if a university cites 'legitimate interests pursued by the controller' to provide access to lectures for students for the processing of personal data then it shouldn't be used for performance monitoring processes or disciplinary procedures for example.

Since the recordings are made specifically for the teaching of a particular cohort of students, it would be reasonable to expect that the recordings wouldn't be available to a larger group of students.

Your employer must inform teaching staff about the processing of their personal data and set out the purposes for which they are processing that data and the legal basis on which they rely. The branch must challenge the employer where they have not made the position clear or relied on a basis which does not appear to be appropriate.

Data controller

The university will be the data controller for the purposes of the Data Protection Act 2018. This is likely to apply in all work situations, whether located on a campus or working remotely, because the employer 'determine[s] the purposes and means of the processing of personal data'.

The Equality Act 2010

Existing lecture recording policies often cite the need for the organisation to meet their obligations around equality of access for students under the Equality Act.

UCU believes it is crucial that universities recognise their obligations to both students and staff when delivering teaching online.

In particular, the employer has obligations to make reasonable adjustments for staff with a disability (<https://www.gov.uk/definition-of-disability-under-equality-act-2010>). The university must minimise the disadvantage to the lecturer whilst still meeting its obligations to any students with a disability.

Branches should ensure that any lecture recording policy allows for reasonable adjustments for staff with disabilities.

Performance rights and copyright

Copyright for recordings

Branches should begin the process of considering how to approach the issue of intellectual property rights, by checking what their contracts say on copyright for academic works made in the course of employment. All contracts for staff affected by the policy, including those for staff on casualised contracts, should be reviewed.

Most universities will retain copyright for any video recordings created in the course of employment.

For sound recordings (including videos of powerpoint slides with narration) copyright vests in the person who made the arrangements necessary for the production of the sound recording (section 178 of the Copyright, Designs and Patents Act 1988 (as amended)). In most cases the person who would be regarded as making the arrangements for the sound recording would be the employer. Where a university/college provides equipment and directs the employee to make the recording, it seems likely that the employer would be regarded as the person 'making the arrangements' and the lecturer merely the person 'making the recording'.

However, the arrangements for the production of audio-recordings at home could in some cases be found to be undertaken by an employee. One factor might be the provision of equipment, such as microphones, recording software, etc. If so, there may

be cases in which employees therefore own copyright in sound recordings, when they would not own copyright in films.

Although some branches may see it as desirable to retain copyright of sound recordings, it might be preferable to use this issue as leverage to ensure lecturers who are being asked to make audio recordings of their teaching are provided with proper equipment to undertake this work.

Branches should ensure all staff making video and audio recordings of their lectures at home have been provided with the necessary equipment by their employer. This should be included in any lecture recording policy.

Staff on casualised contracts and copyright

If the lecturer is regarded as an independent contractor (working under a contract for services), then the starting point is that the lecturer retains copyright of the materials as outlined in sections 9 and 11 the Copyright, Designs and Patents Act 1988 (as amended). Materials in this case would include handouts for students or slides for the recording.

If the lecturer is an employee, it might be arguable that these materials were not made 'in the course of' employment. If the materials were created 'in their own time' they might have been created outside the course of employment. In the case of an hourly paid lecturer, not paid for preparation, the argument might be made that all that is made 'in the course of' employment is the output (the lecture). The preparatory materials such as slides remain distinct even if they are used during the employment. Therefore, the recording, even if initiated by the lecturer, would be in the course of employment, but not the slides.

Even if the materials were said to be created 'in the course of employment', there might be an express or implicit agreement that copyright in such materials remain with the lecturer. If both parties expected that the lecturer might teach or give lectures elsewhere, it could well be that the implicit agreement is that copyright remains vested in the lecturer and the university is merely an implied licensee. The possibility of establishing such an agreement from practice has been recognized in circumstances where an employer allowed employees to assign copyright in the research outputs (Noah v Shuba [1990] FSR.)

While the copyright in the materials might be retained by the lecturer on a casualised contract, it seems likely that the copyright in the recording of the lecture would belong to the college/university, as the person who made the arrangements necessary for the production of the film.

There is, however, no difficulty, in legal terms, with a lecturer giving a very similar (or even identical) lecture for Institution B as they gave for Institution A. The giving of the second lecture does not infringe copyright in the film copyright held by Institution A. Nor is

there any difficulty with the idea that Institution B holds copyright in the recording of that later lecture. This recording is not regarded, in copyright terms, as a 'copy' of the recording of the first lecture.

Branches should seek an agreement on copyright for staff on casualised contracts which ensures they retain copyright for materials they produce for online lectures, acknowledging that they may be delivering similar teaching for multiple employers.

Performance rights

Giving a lecture is regarded as a 'performance' for the purpose of intellectual property law.

There are two important rights when making a recording of a lecture/teaching session: the right to make a recording of the performance and the right to make available the performance. These rights are outlined in section 182 of the Copyright, Designs and Patents Act 1988 (as amended).

The first right is a 'non-property right' and is not assignable to another person/organisation. However, a performer can consent to recording in advance (by contract or otherwise). There are no formal requirements for consent here - it can be explicit or implicit (e.g. through action). Without consent the recording cannot be made, however refusing consent may be a breach of a reasonable management instruction.

Some institutions have policies which talk about opting-out of lecture recording. In order for such policies to work there must be consistency and equality of treatment behind the opting-out processes, and those opting-out should not experience detrimental treatment as a result of exercising their right in the policy.

The making-available right is a 'property right' and is therefore assignable or something that can be licensed to someone else.

However, if the recording is not yet in existence, where a university asks a lecturer to agree to assign rights for the forthcoming academic year, such an assignment is possible, but must be in an a legally enforceable agreement, such as in a contract or in a deed. Section 191C of the Copyright, Designs and Patents Act 1988 (as amended) allows for assignment from the performer to another person e.g. from the lecturer to the employer. Where 'an agreement made in relation to a future recording of a performance, and signed by or on behalf of the performer, the performer purports to assign his performer's property rights (wholly or partially) to another person', then the statute vests the rights, as soon as they come into existence, in the assignee or his successor in title. So, if you agree to assign your performance rights they will transfer to the employer once the performance is undertaken.

A lecture recording policy however need not involve an assignment. A more appropriate means of achieving the same ends would involve a simple licence, particularly if the university owns the copyright for the recording itself.

Branches should seek to licence the performance rights attached to audio and video recordings in any recorded lecture policy. This licence should only be for the length of the current academic year; ensure distribution of the recording is limited to the relevant cohort of students and prevent the use of recordings in substitution for lectures/seminars etc during industrial disputes.

Moral rights

Section 77 of the Copyright, Designs and Patents Act 1988 (as amended) establishes the right for an author or director of a work to be identified as such when it is made available to the public. That right includes the right to be identified in an adaptation of the work as the author of the work from which the adaptation was made.

If the author or director in asserting their right to be identified specifies a pseudonym, initials or some other particular form of identification, that form shall be used.

This requirement would apply to recordings of lectures, and should be part of any agreement between a branch and an employer.

Branches should ensure that a lecture recording policy establishes a means for the identification of the creator of a lecture recording when it is made available to students, e.g. on the streaming platform, and that this identity is one agreed with the member of teaching staff concerned.

Consent

Consent to recordings of lectures lessons doesn't have to explicit, in can be implied by the lecturer's action, i.e. pressing the record button. However, consent must be informed to the extent that the lecturer 'must actually be informed of the future use of his work by a third party and the means at his disposal to prohibit it if he so wishes' (Case C-301/15, Soulier & Doke, EU:C:2016:878, [38]-[40]. This was held applicable to performers in Case C-484/18, SPEDIDAM v INI, EU:C:2019:970, [40]-[42]).

To ensure that consent is informed any policy covering the recording of lectures should be available on the university intranet; be brought to the attention of existing employees by email; and included in starter-packs and induction courses for new employees. There should also be a reminder which appears when sessions are recorded.

The branch should agree how any lecture recording policy is distributed and brought to the attention of current and new employees. The policy should include provision for reminders of the policy to appear on screen when recordings take place.

Transcripts and captions

Transcripts or captions of lectures are reproductions of the lecture as a literary work, but not reproductions of the recording of the performance. As a result, the employer is entitled to provide transcripts as long as it holds copyright for the lecture.

The default position under section 11(2) of the Copyright, Designs and Patents Act 1988 (as amended) is that the employer owns copyright in works (such as lectures) created in the course of employment. So, unless the contract (or traditional practice) indicates a contrary agreement, the captioning does not require the employee's permission.

Misuse of recordings

Section 80 of the Copyright, Designs and Patents Act 1988 (as amended) allows for authors or directors to object to the derogatory treatment of their work, and since it is likely that the university will hold the copyright for any video or sound recording, then they should put in place measures to minimise the likelihood of such misuse in the first place.

Students should be made aware about the permissible and impermissible use of recordings, including respect for moral rights and rights management information, linked to sanctions should they break those rules.

Careful consideration should be given to the format in which recorded material is made available to students. Downloading of recordings can allow for further copying of recordings, so password-protected access to streaming platforms may be a more appropriate method of access.

Branches should ensure there is a clear policy in place to discourage students from misusing recordings. Branches should also ensure that their employer has given proper thought to how recordings will be accessed to protect the staff and students involved.

Captioning and accessibility

Captioning

The Public Sector Bodies (Websites and Mobile Applications) (No.2) Accessibility Regulations 2018 place a legal duty on public sector organisations to ensure that their websites and mobile apps are accessible to everyone, including those with disabilities.

Government guidance states that 'most higher and further education providers are considered to be in scope for the regulations, due to their dependence on government funding.'

There are 2 main requirements of the regulations:

- to meet accessibility standards - this means making any public sector website 'perceivable, operable, understandable and robust' for all users. This can be achieved by meeting the international accessibility standard, **WCAG 2.1 AA** or its European equivalent, **EN301 549**
- publish an accessibility statement.

However, the requirements relating to accessibility of websites only came into effect on 23 September 2020 and the requirement for mobile applications will not come into force until June 2021.

Pre-recorded videos (including lectures) published after 23 September will need to comply with the new requirements. Such videos should be accessible to those only able to access the visual aspect of the video (for example by providing live captions or a transcript) and for those only able to access the audio aspect of the video (for example by providing an audio description of any visual content of the video e.g. graphs).

These requirements will not apply to live videos – such as live lectures or seminars. But if these events are recorded and made available through the university's website, then the requirements will apply.

Whilst the legal requirement to comply with the regulations sits with the employer (and individual members of staff should resist any implication that the legal duty falls to them), this could have a significant impact on the workload of UCU members – both those who are producing such materials and those responsible for recording / distributing such materials.

Branches should ask their employer the following questions:

- *what plans have been made for the employer to meet their legal requirements under the regulations in relation to pre-recorded teaching materials?*
- *what are the expectations on staff producing pre-recorded video resources to caption/transcribe/audio-describe them?*
- *if the captioning/transcribing/audio describing is done automatically/externally, what checks and balances will be in place to ensure the captioning/transcripts/audio descriptions are accurate?*
- *if there is any requirement on staff to caption/transcribe/audio describe or to check any captioning/transcriptions, how will this be reflected in their workload allocation?*

It should be made clear to employers that it is not appropriate to expect staff to undertake this this work in addition to their current workload.

- *what is the resource implication of this requirement? **We should be pushing for additional resources to meet this new duty.** Where jobs are at risk (or have already been lost) – including fixed-term contract and casually employed jobs – branches should be using this new workload requirement to resist cuts and argue for additional resources.*
- *have you carried out an Equality Impact Assessment for this new area of work? Branches should be looking particularly at demanding that any EIAs are shared and paying particular attention to the impact of this new requirement on different groups of staff.*

Accessibility

Members are concerned about the best ways to ensure that online learning is accessible for all students, and are keen to know what best practice looks like.

Obviously practice in this area is developing, but the key thing branches must pursue for members is proper training on the platforms staff are asked to use, and regular updates on best practice.

Branches should ensure that all staff who are delivering teaching online are given appropriate training, even if that is retrospective, and that regular training on updated practice and technology is provided to those staff to ensure that online delivery is effective.

For recorded lectures here are a few suggestions to help with accessibility:

- separate provision of electronic versions of PowerPoint slides with alternative text descriptions of any graphics is probably more useful than audio description.
- provide word versions of PowerPoint slides, as PowerPoint is not accessible to all screen readers.
- provide an audio or written description of the lecture at the start of a video recording.
- for graphics, tactile versions to supplement the description are useful if they can be sent out in advance of the lecture/session.
- audio description is helpful when a demonstration is being carried out.
- for people who lipread it would be useful to have subtitles integrated into the video so that the audio and visual information can be used together to facilitate comprehension.

Some of these suggestions will require extra personnel. Employing those on fixed-term contracts, which are coming to an end, or in casually employed work to check captions or

correct transcripts, as well as taking on more of the teaching caseload of other staff will ensure that lecturers have the time to undertake online teaching in a way that allows for meaningful learning.

Branches should be asking universities how this extra work and training necessary for good online delivery will be factored into lecturers' workloads, and what additional staffing they will be putting in place to make this possible.

October 2020