

Capturing the Uncapturable: The Relationship between Universities and Copyright through the Lens of the Audio-Visual Lecture Capture Policies

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“This ability to capture the previously uncapturable creates a fundamental change in the nature of the resource.”

Hess & Ostrom, *Understanding Knowledge as a Commons*

Abstract. The COVID-19 pandemic has consolidated a double move. On the one hand, universities are becoming increasingly aware of the strategic value of copyright. On the other hand, the necessity to embrace distance education is making universities realise that there is a wealth of issues that go beyond ownership of research outputs and reprography rights. Understanding the role of universities as copyright subjects today requires understanding the rise of the ‘platformisation’ of learning, which this chapter does by analysing the audio-visual lecture capture policies of the largest universities in the United Kingdom, Ireland, Italy and France. The rules on lecture capture represent a meaningful entry point to investigate strengths and weaknesses of the universities’ approach to the creation and use of protected content online. Through this lens, it is possible to reflect on both the underlying exacerbated power imbalance between universities and teachers, and the diverging approach towards copyright law across the European higher education landscape. First, the chapter considers whether the selected universities had a specific policy on lecture capture, and, if so, what it covered, and where the default rule sat in the continuum between opt-out and opt-in. Then, it investigates issues of ownership of the lecture recordings, including the incorporated slides and other materials as well as the performance rights. Ownership rules significantly affect who can exploit the recordings and under which conditions, thus raising delicate and timely questions on the management and commercialisation of recorded lectures, the protection of moral rights and the retention of economic ones. Despite stark differences between the selected countries’ approach, the clear trend towards an increased expectation that teachers have to record their lectures epitomises the digital dispossession that is inherent to the platformisation of education. Nonetheless, the oft-forgotten rights in performances can still play a role in pursuing a fairer balance between the competing interests at play.

Keywords. Audio-visual lecture capture; lecture capture policies; universities as copyright subjects; opt in; opt out; platformisation of education.

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1. Introduction

From this book's perspective, universities are a peculiar subject. They can be regarded both as users of protected works and as copyright managers. This has become all the more true with the shift in value of copyrighted materials currently exacerbated by the COVID-19 pandemic. Traditionally, the interest of universities for intellectual property (IP) primarily focused on the management and commercialisation of employees' inventions, and on the bargaining with collective management organisations and publishers to stock libraries and obtain the relevant rights (e.g., reprography). Most recently, the pandemic has consolidated a double move. On the one hand, universities are becoming increasingly aware of the strategic value of copyright. On the other hand, the necessity to embrace distance education is making universities realise that there is a wealth of issues that go beyond ownership of research outputs and reprography rights.

Understanding the role of universities as copyright subjects today requires answering partly novel questions. Who owns and controls the learning contents shared on proprietary platforms that are increasingly used despite their not always being specifically designed for teaching activities? How do algorithmic filters and other technological measures interact with teachers' and students' legitimate interests and needs? Can universities force teachers to record their lectures and re-use them without their consent? As we observed the rise of the 'platformisation' of learning, we have agreed that the most pressing questions facing universities today can be answered through the lens of the audio-visual lecture capture policies.

In January 2021, Concordia University student Aaron Ansuini was in shock when he found out that one of the professors who had been teaching him had died in 2019.¹ This was made possible by the fact that students were «learning from lectures recorded before his passing»². The unsettling fact that the dead can replace living faculty members has been regarded as the «perfect metaphor for what is happening across higher education»³ during the COVID-19 pandemic. In the light of this, the rules on lecture capture represent a meaningful entry point to investigate strengths and weaknesses of the universities' approach to the creation and use of protected content online.⁴

In selecting audio-visual lecture capture policies as our research prism, we have included in our sample the universities with the highest number of enrolled students at the time of writing in the countries where we are based, namely the UK, Italy, Ireland, and France (n=20). We have then mapped relevant policies. This was also made possible by conversations with gatekeepers as the policies were often not

¹ 'Professor Emeritus François-Marc Gagnon 1935 - 2019' (*Memoria*, 7 April 2019) <<https://www.memoria.ca/obituary-francois-marc-gagnon.html?disparuID=MjAwNzU%3D>> accessed 1 March 2021.

² Aaron Ansuini, tweet of 20 January 2021, available at <https://twitter.com/AaronLinguini/status/1352010172697350147>.

³ Monica Chin, 'If you're starting an online class, check to make sure your professor is alive' (*The Verge*, 4 February 2021) <<https://www.theverge.com/22262230/online-college-class-covid-professor-dead>> accessed 1 March 2021.

⁴ The shift pre-dates the pandemic. For example, in April 2018, after some universities had argued that academic staff must agree to their recorded lectures being edited and the recordings being used when academics have been exercising their right to strike, a group of legal scholars attending the annual conference of the British and Irish Law Education and Technology Association (BILETA) enlivened a conversation on the topic. This led to JISC (the UK higher, further education and skills sectors' not-for-profit organisation for digital services and solutions) to update their guidance *IRecording lectures: legal considerations*, available at <https://www.jisc.ac.uk/guides/recording-lectures-legal-considerations>. BILETA also developed its own policy; see BILETA, *Teaching recording policy*, September 2018, available at <https://www.abdn.ac.uk/law/documents/BILETA%20lecture%20policy%20Sept%202018%20on%20letterhead.docx>.

easily, if at all, accessible. Gatekeepers included librarians, trade unions, in-house legal teams, heads of learning, and colleagues working at the identified institutions. Based on our systematic compilation of the relevant policies, text analysis, and semi-structured conversations, we have focused on two main copyright aspects: scope and ownership. First, we considered whether the selected universities had a specific policy on lecture capture, and, if so, what it covered, and where the default rule sat in the continuum between opt-out and opt-in. Then, we investigated issues of ownership of the lecture recordings, including the incorporated slides and other materials as well as the performance rights. Ownership rules significantly affect who can exploit the recordings and under which conditions, thus raising delicate and timely questions on the management and commercialisation of recorded lectures, the protection of moral rights and the retention of economic ones. The following sections will adopt the aforementioned scope/ownership structure and will take the form of country reports, setting the ground for further legal and empirical investigation.

2. The United Kingdom

The largest universities in the UK are the Open University, the University of Manchester, Leeds University, the University College London (UCL), and the University of Birmingham. All of them have publicly accessible lecture capture policies, although they are not always easy to find, as they are sometimes hidden within longer documents,⁵ or the available version is no longer up to date.⁶ Alongside issues of access, some of the policies conflict with other internal policies, leaving the reader confused as to which terms will prevail.⁷

Starting off with issues of scope, the analysed policies cover a wide range of subject matter. In general, they tend to cover virtually all educational activities. Paradigmatic of this trend is Leeds University that provides the recording of all «activities with an educational purpose (...) in all media»⁸. At the other end of the spectrum there is the Open University whose policy covers the recording of «the learning points laid out»⁹ in online tutorials and learning events, with the express exclusion of events open to the public, events held on social media, breakout rooms, Q&A, and face to face tutorials.¹⁰ Importantly, the policy also sets out a right not to record, namely if a tutorial is delivered to more than

⁵ For example, UCL's *Lecturecast Policy* is part of the *UCL Academic Manual 2020-21*, Chapter 11: Teaching and Learning, effective as of August 2020, available at <https://www.ucl.ac.uk/academic-manual/chapters/chapter-11-teaching-and-learning>.

⁶ See UNIVERSITY OF MANCHESTER, *Policy on the Recording of Lectures and other Teaching and Learning Activities*, approved on 26 June 2013 by the Senate, owned by the Director of Teaching and Learning Support, available at documents.manchester.ac.uk/display.aspx?DocID=16559. Approved in 2013, set to be reviewed in 2019, it is still being drafted.

⁷ For example, alongside the aforementioned Lecturecast policy, UCL makes available the guidance document *Lecture Capture and Lecturecast: IP implications* (2015), available at <https://www.ucl.ac.uk/library/ucl-copyright-advice/lecture-capture-lecturecast-and-copyright>. The relevant rules on performance rights and moral rights are inconsistent, with the guidance document being more favourable to the teacher, and the policy favouring the university.

⁸ UNIVERSITY OF LEEDS, *Policy on Audio or Video Recording for Educational Purposes* (unknown date), para 1, available at https://www.leeds.ac.uk/secretariat/documents/avr_policy.pdf. Fn 1 clarifies that “(e)ducational purpose means any purpose related to taught student education at the University, and may include research activity or the repurposing of research activity as appropriate” although pure research is excluded.

⁹ OPEN UNIVERSITY, *Policy for the Recording of Online Tutorials*, version 1.1, effective from October 2020, approved by the Education Committee, date for review 1 October 2021, para 2.1.1, available at <https://help.open.ac.uk/documents/policies/recording-online-tutorials>.

¹⁰ *Ibid*, para 3.

one group of students, at least one of the iterations will have to be non-recorded.¹¹ While this ‘right not to record’ is not replicated, the other universities tend to concede that interactive learning activities will fall out of the scope of the policy,¹² with the partial exception of the University of Manchester that includes group-based learning activities.¹³

These provisions clearly signal the attempt from universities to appropriate, at least potentially, all learning activities. Much depends on which default rule universities adopt. Traditionally opt-in was the general rule. This meant that it was within the teacher’s discretion to take the positive action of deciding to record some or all of the lectures. With the growth of distance learning, even pre-pandemic, teachers have been increasingly expected to record their lectures. The analysis of the policies of the selected universities confirms that there is a clear trend towards some form of opt-out and that there are a variety of approaches along the spectrum between ‘pure’ opt-in and ‘nominal’ opt-out (fig. 1).

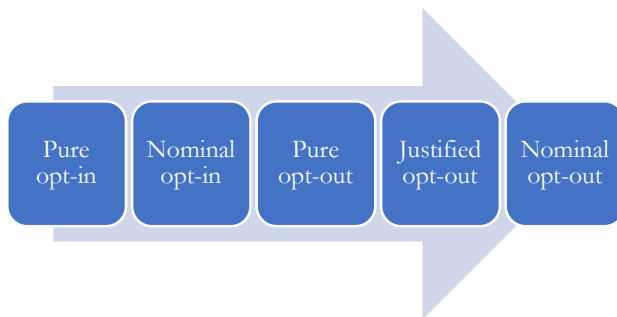


Figure 1. The lecture capture default spectrum

The University of Birmingham maintains a pure opt-in system, which means that it is entirely up to the teachers to decide whether or not to record the lectures.¹⁴ It is the only one, however.

UCL professes to provide lecture capture as an opt-in service; however, it states that the choice may be up to the teaching leads, not the individual lecturers, and departments will have to decide who is responsible for managing the process.¹⁵ We can call this ‘nominal’ opt-in, as it can be regarded as a de facto opt-out. However, as a positive side note, this policy provides that, should departments adopt

¹¹ Ibid, para 2.1.1.

¹² For example, the University of Birmingham covers only the recording of “appropriate teaching and learning activities (...) more interactive student-led sessions -such as flipped lectures –(are regarded as) less suitable” (UNIVERSITY OF BIRMINGHAM, *Code of Practice on Lecture Capture* (2021-22), para 1.3, available at <https://intranet.birmingham.ac.uk/as/registry/legislation/documents/public/cohort-legislation-2021-22/cop-lecture-capture-21-22.pdf>. Leeds University includes in the pedagogic reasons that can justify an exception to the recording requirement “educational activities where it is unlikely that value will be derived from a recording “e.g. fully interactive session with lots of voices which won’t be captured, breakout rooms, or paired discussions” (UNIVERSITY OF LEEDS, *Policy on Audio or Video Recording for Educational Purposes. Guidance for Heads of School*, available at http://www.leeds.ac.uk/secretariat/documents/avr_guidance.pdf)

¹³ UNIVERSITY OF MANCHESTER, *Policy on the Recording*, cit., supra note 6, para 1.1.

¹⁴ UNIVERSITY OF BIRMINGHAM, *Code of Practice*, cit., supra note 12, para 2.1.

¹⁵ UNIVERSITY COLLEGE LONDON, *Lecturecast Policy*, cit., supra note 5, para 2.

an opt-out policy, this would have to be done «in consultation with staff affected»,¹⁶ and it would seem that currently the trade unions have been consulted and no change has been approved.¹⁷

Along the spectrum between pure opt-in and nominal opt-out we then find the University of Manchester. The default here is pure opt-out as teachers can decide not to record the lectures simply by stating their wish to opt out, without the need to justify the reasons for the choice.¹⁸ Whilst pure opt-out is less conducive to academic freedom and autonomy than pure opt-in, it provides more clarity compared to the nominal opt-in.

An even less favourable system is the justified opt-out embraced by Leeds University. The default is that in principle all non-interactive educational activities must be recorded, and it empowers the heads of school with the ultimate decision on the matter. Nonetheless opt-out is still regarded as a right that teachers can exercise «with the agreement of the Head of School (for) sound pedagogical, legal or other *justifiable reason* based on their particular situation»¹⁹. This approach is open to criticism as it delegates to a separate guidance document targeted at heads of school the explanation of what these justifiable reasons may be.²⁰

Finally, the Open University represents a model that we can call nominal opt-out as teachers are so discouraged to opt out that the default may be regarded as equivalent to mandatory recording. Indeed, «default position is for students to have access to a recording of each learning event made available to them»²¹, unless «*exceptional circumstances* mean it is not appropriate for such tutorials to be recorded or made available»²². The reference to ‘exceptional circumstances’ seems to require somewhat more than the ‘justifiable reasons’ of the justified opt-out model. Content-wise, the exceptional circumstances are not dissimilar to the justified reasons, as they refer to sensitive subject matter, practice of aspects of the students’ experience, and interactive activities. However, in procedural terms, it is harder to opt out as there is a two-step process whereby first the teacher must discuss with the line manager and then justify to a faculty representative.²³ Moreover, this process must be completed before teaching starts, an explanation must be provided in advance to students, and an alternative format (e.g. empty room tutorial recording) must be made available.²⁴ It is reasonable to expect that this system will discourage teachers, already swamped with administrative tasks, from actually opting out, hence ‘nominal’ opt-out.

The move towards some form of opt-out is justified by universities mainly in terms of student satisfaction and digital accessibility.²⁵ However, we tracked the student satisfaction levels of these

¹⁶ Ibid, para 2.

¹⁷ UCU UCL, *Recording and Lecturecast advice*, available at <https://www.ucl.ac.uk/ucu/news/2020/sep/recording-and-lecturecast-advice>.

¹⁸ UNIVERSITY OF MANCHESTER, *Policy on the Recording of Lectures*, cit., supra note 13, para 3.2.

¹⁹ UNIVERSITY OF LEEDS, *Policy on Audio or Video Recording*, cit., supra note 8, para 17, italics added.

²⁰ UNIVERSITY OF LEEDS, *Guidance for Heads of School*, cit., supra note 12, para 5.

²¹ OPEN UNIVERSITY, *Policy for the Recording*, cit., supra note 9, para 2.1.5.

²² Ibid, para 2.1.5, italics added.

²³ Ibid, para 2.1.5.

²⁴ Ibid, para 2.1.5.

²⁵ OPEN UNIVERSITY, *Policy for the Recording*, cit., supra note 9, para 4; UNIVERSITY OF MANCHESTER, *Policy on the Recording of Lectures*, cit., supra note 13, para 1.2; UNIVERSITY OF LEEDS, *Policy on Audio or Video Recording*, cit., supra note 8, para 2; UCL, *Lecture Capture and Lecturecast*, cit., supra note 7, preamble; UNIVERSITY OF BIRMINGHAM, *Code of Practice*, cit., supra note 12, para 5.1.

universities and there is no clear relation between the type of lecture capture default adopted and student satisfaction, at least not in the sense that students are more satisfied where recording is mandatory.²⁶ On the contrary, the best performing university is the University of Birmingham, which adopted the pure opt-in model. Equally, inclusivity-related rationales are not convincing; indeed, they do not justify generalised opt-out defaults. In this sense, a model to follow to strike a balance between freedom of expression and digital accessibility is provided by the University of Manchester. The latter restricts the right to opt out if there are students with disabilities and learning difficulties and a reasonable adjustment for their specific style of learning is the provision of recorded material. Under these circumstances, recordings will only be made available to those students.²⁷

Moving on to ownership, our analysis evidenced that ownership matters as teachers have an interest in preventing universities from using recordings to measure performance and to replace staff (e.g., in the event of industrial action, or not to renew staff on precarious contracts); as well as in preventing students from re-using them outwith the virtual learning environment (e.g., uploading them on publicly accessible hosting sites).

At the same time, both universities and teaching staff have an interest in re-using the recordings should the employee be hired by another HEI.

Disentangling ownership is no easy task as UK copyright law provides a multi-layered protection. When dealing with the ownership of a lecture recording, one needs to consider the following layers (or categories of ‘work’) potentially shared between a number of rightsholders:

- (i) The lecture as a performance;²⁸
- (ii) The MP3 file, which will be protected as a sound recording;²⁹
- (iii) The video, if any, which qualifies as a film;³⁰
- (iv) The speech as a ‘spoken’ literary work;³¹
- (v) The content of the slides, that will typically be a mix of literary works (text), artistic works (images), and possibly musical works and films (e.g., YouTube clips), some of which created by the teacher, some sourced from third parties, some reproduced, and some communicated via hyperlinks;³²
- (vi) The preparatory materials (e.g., lecture notes), normally a mix of self-produced and third-party literary works;³³

²⁶ We have used data from the latest National Student Survey, made available at <https://www.timeshighereducation.com/student/news/national-student-survey-2020-overall-satisfaction-results>. The Open University does not appear to be included in the ranking.

²⁷ UNIVERSITY OF MANCHESTER, *Policy on the Recording of Lectures*, cit., supra note 13, para 1, fn 3.

²⁸ CDPA, ss 180 ff.

²⁹ Copyright, Designs and Patents Act 1988 (CDPA), s 5A.

³⁰ CDPA, s 5B.

³¹ CDPA, s 3(1). Spoken word qualifies for copyright protection as long as it has been recorded in writing or otherwise (CDPA, s 3(2)). Unrecorded speech is not protected by copyright and falls within the public domain. Cf LIM, *Spontaneous oral communications, impromptu speeches and fixation in copyright law: a comparative analysis*, in *JIPLP* 2018, 13, 806 ff.

³² CDPA, ss 3 and 4; on linking as communication to the public see Case C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff*, EU:C:2018:634, paras 27-28; Case C-160/15 *GS Media v Sanoma*, EU:C:2016:644, para 29; C-348/13 *BestWater*, EU:C:2014:2315, para 14; C-466/12 *Svensson*, EU:C:2014:76, paras 24-28. On unconventional linking, namely ‘framing’, see most recently Case C-392/19 *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz*, EU:C:2021:181.

³³ CDPA, s 3(1).

- (vii) Automatically generated captions, which may qualify as a computer-generated work.³⁴

Layers (ii)-(vii) fall within the scope of copyright, which means that the ‘employee exception’ is likely to apply.³⁵ Therefore, works listed under those numbers are owned by the employer in as much as they are made in the course of the employment, unless there is an agreement to the contrary. The key factor that courts consider when assessing whether a work was made in the course of the employment is whether it falls within the types of activities that the employer can reasonably expect or demand; this can depend on the contract or on the factual duties of the employee.³⁶ Teaching is at the core of academic employees’ duties and recording is increasingly expected if not demanded of teachers. This is all the more the case with the COVID-related move towards online, and the post-pandemic embracing of blended learning.³⁷ Accordingly, this requirement is likely to be made out. The ‘agreement to the contrary’ can be express or implied by custom.³⁸ Universities tend to agree to ‘lift’ the employee exception for research outputs but not for teaching-related works. It seems customary for UK universities not to interfere with the ownership of research outputs such as journal articles and books (save the ownership of the relevant inventions and trade secrets). For example, the Open University Employee Terms and Conditions provide that journal articles, books, book reviews, design drawings and illustrations, shall belong to staff «notwithstanding that such work may have been produced in the course of his/her employment, except that the member of staff may be required to assign such copyright or design rights to the University where this is necessary to support patent applications»³⁹. Conversely, of the sampled universities, only UCL provided that «teaching materials shall belong to the UCL staff member»⁴⁰. No other universities provided similar exceptions to the ‘employee exception’ with regards to teaching materials, including audio-visual lecture recordings. On the contrary, they expressly claim ownership over these materials.⁴¹ Therefore, as a rule, the works described in (iii)-(vii) will be owned by the universities.

³⁴ CDPA, s 9(3). The UK is the only country in Europe to protect computer-generated works. By contrast, automatically generated captions are unlikely to qualify as original in the other jurisdictions. See NOTO LA DIEGA, *Machine rules. Of drones, robots and the info-capitalist society*, in *Italian Law Journal* 2016, 367 ff.

³⁵ CDPA, s 11(2).

³⁶ *Stevenson Jordan v McDonald & Evans* (1952) 69 RPC 10, 10 TLR 101.

³⁷ That is why we suggested to refer to remote teaching rather than emergency remote teaching when talking about the online provision of education during the pandemic. See PASCAULT, JÜTTE, NOTO LA DIEGA, and PRIORA, *Copyright and Remote Teaching in the Time of Coronavirus: A Study of Contractual Terms and Conditions of Selected Online Services*, in *EIPR* 2020, 548 ff.

³⁸ *Noah v Shuba* [1990] 2 WLUK 236.

³⁹ OPEN UNIVERSITY, *Terms and Conditions of Service. Academic Staff Group*, last updated in February 2013, clause 19. See also UNIVERSITY OF MANCHESTER, *Intellectual Property Policy*, as of 1 January 2015, available at <http://documents.manchester.ac.uk/display.aspx?DocID=24420>, para 5. Other universities retain ownership but pledge not to assert it «in respect of material such as books, journal articles, and musical compositions where there is no substantial commercial interest» (UNIVERSITY OF BIRMINGHAM, *Code of Practice for Research*, effective as of March 2020, available at https://www.birmingham.ac.uk/Documents/university/legal/research.pdf?_ga=2.43621987.755878510.1615551559-1593279503.1611662236, para 6.3).

⁴⁰ UCL, *Intellectual Property Policy*, updated in September 2019, available at <https://www.ucl.ac.uk/enterprise/about/governance-and-policies/ucl-intellectual-property-ip-policy>, para 2.1.2. This is a qualified exception as it does not apply to films, broadcasts, and sound recordings. As we will see below, sound recordings have to be considered separately as the employee exception does not apply to them.

⁴¹ OPEN UNIVERSITY, *Research Intellectual Property*, as of July 2019, available at [http://www.open.ac.uk/research/sites/www.open.ac.uk.research/files/files/Documents/Research-IP-Policy-2019-\(FINAL\).pdf](http://www.open.ac.uk/research/sites/www.open.ac.uk.research/files/files/Documents/Research-IP-Policy-2019-(FINAL).pdf), clause 2.2(a); UNIVERSITY OF MANCHESTER, *Policy on the Recording of Lectures*, cit., para 3.5; LEEDS

The employee exception applies to literary, dramatic, musical, artistic works, and films. It does not apply to sound recordings, where the author and owner is the producer, that is the «person by whom the arrangements necessary for the making of the sound recording are undertaken».⁴² This is usually interpreted as meaning that the author and owner is the person that coordinates, control, and organised the production of the recording, as opposed to the person who operates the recording system. Whilst in principle this could be a natural person, it often is a legal person.⁴³ Unless teachers can prove that they have direct organisational control over the recording⁴⁴ – which depends on how centralised the university is – then the university will be regarded as the producer and owner of the sound recording (layer (ii) above).

This means that in most instances, copyright law will give teachers little if any power to prevent further exploitation of the recordings by universities. In other jurisdictions, moral rights may rebalance the relationship. For example, the re-use of the recording without acknowledging the author would fall foul of the paternity right.⁴⁵ However, in the UK moral rights exist only if they are asserted in writing and they can be waived.⁴⁶ To the best of our knowledge, no such assertions have been made in the sampled universities. Positively, Leeds « seeks to respect student and staff rights to be acknowledged as authors»⁴⁷ and Birmingham recognises «the author’s moral rights to be identified as the author»⁴⁸. So, provided that teachers asserted their paternity rights, they will have some recourse. However, no reference is made to the other moral rights, namely the right to object to derogatory treatment (integrity), the right to object to the false attribution of a work, and the right to privacy of certain photographs and films.⁴⁹ The former is the most relevant as it would otherwise allow teachers to object to the exploitation of the recording that would be «prejudicial to the(ir) honour or reputation».⁵⁰ Whereas Manchester and the Open University do not have express provisions about moral rights, one of UCL policies⁵¹ provides that the university does not interfere with teachers’ rights to paternity and integrity. This conflicts with another UCL policy whereby «(t)o the extent that any member of UCL staff does hold any moral rights in any teaching materials under English law (or any broadly equivalent rights anywhere in the world), he/she shall be deemed to unconditionally and irrevocably waive such rights in favour of UCL, its licensees and assignees (to the extent legally possible)».⁵² While such overly broad provisions are open to criticism, and may surprise the continental reader, they are in line with the Copyright, Designs and Patents Act 1988 (CDPA), whereunder moral rights waivers can be conditional, unconditional, relate to specific works or to works generally, and relate to existing or future

UNIVERSITY, *Policy on Audio or Video Recording*, cit., para 36; UNIVERSITY OF BIRMINGHAM, *Code of Practice on Lecture Capture*, cit., para 4.1.

⁴² CDPA, s 178.

⁴³ *Henry Hadaway Organisation Ltd v Pickwick Group Ltd* [2015] EWHC 3407 (IPEC); *Slater v Wimmer* [2012] EWPC 7; *Adventure Films v Tully* [1993] EMLR 376.

⁴⁴ *Adventure Films*, cit.,

⁴⁵ CDPA, s 77.

⁴⁶ CDPA, ss 78 and 87.

⁴⁷ Para 38.

⁴⁸ UNIVERSITY OF BIRMINGHAM, *Code of Practice for Research*, effective as of March 2020, available at https://www.birmingham.ac.uk/Documents/university/legal/research.pdf?_ga=2.43621987.755878510.1615551559-1593279503.1611662236 [6.3]

⁴⁹ CDPA, ss 80, 84, 85.

⁵⁰ CDPA, s 80(2)(b).

⁵¹ UCL, *Lecture Capture and Lecturecast: IP implications*, cit., 2.

⁵² UCL Intellectual Property Policy [2.4.6].

works.⁵³ In the time of COVID-pandemic, with the rise of work from home, it may well happen that employees of UK universities are based in jurisdictions where moral rights exist without assertion and cannot be waived. This is likely to give rise to intricate private international law issues. For example, in *Huston v TV5*,⁵⁴ the *Cour de cassation* held that moral rights are a matter of public policy, and therefore, waivers that would be lawful under US copyright law were not enforceable in France.

While UK copyright law vests copyright ownership of most authorial works made in the course of the employment with the employers, the ‘employee exception’ does not apply to the performers’ rights that protect the first of the aforementioned teaching layers – the lecture as a performance. Parallel to copyright narrowly construed, we have the so-called related or neighbouring rights, which include the rights in performances. Performers are the owners of their performances.⁵⁵ Performances include «reading or recitation of a literary work»⁵⁶; hence, lectures will own their lectures-performances. First, teachers have the right to authorise the recording of the performance.⁵⁷ This is a non-property right, which belongs to the employee and is not transmissible except on death.⁵⁸ Employees can consent to the recording and consent does not have to be express, but it must be informed⁵⁹. Arguably, information buried in long and inaccessible IP policies does not meet this standard of consent. Therefore, if universities attempt to force teachers to make recordings of their performances-lectures, teachers could object by relying on this right. Second, there are the rights to reproduction, distribution, rental, lending and making available the recording of the performance to the public.⁶⁰ Being property rights, they are transmissible (typically by assignment) and can be licensed.⁶¹ The assignment has to be in writing and signed by or on behalf of the assignor.⁶² As IP policies are not usually signed by teachers, they are not suitable to transfer these rights to the university.⁶³ Therefore, the following policy clause is unenforceable: «(t)o the extent that a UCL staff member benefits from performers’ rights in any performance in connection with their duties, such rights are (...) assigned to UCL, in respect of proprietary rights».⁶⁴ Whereas Leeds and the Open University do not provide anything with regards to rights in performances – which are to be assumed as owned by the teachers – Manchester and Birmingham positively and expressly provide that lecturers retain performance rights.⁶⁵ Manchester in particular constitutes best practice as it merely requires a non-exclusive license to use the teachers’ rights in performances for the administrative, promotional, educational, teaching and research purposes of the University.⁶⁶ This strikes a balance between the interest of the university to exploit

⁵³ CDPA, s 87(3).

⁵⁴ Cour de Cassation, Chambre civile 1, 28 May 1991, 89–19.522 89–19.725 [1991] RIDA 149.

⁵⁵ There is a limited exception for recording of performances authorised before December 1996 (Copyright and Related Rights Regulations 1996/2967, reg 31(b)), but this is unlikely to be particularly relevant for our discussion.

⁵⁶ CDPA, s 180.

⁵⁷ CDPA, s 182 ff.

⁵⁸ CDPA, s 184

⁵⁹ *Bourne v Davis (t/a Brandon Davis Publishing)* [2006] EWHC 1567 (Ch); [2006] 6 WLUK 341 (Ch D).

⁶⁰ CDPA, s 191A.

⁶¹ CDPA, s 191B.

⁶² CDPA, s 191B(3).

⁶³ They may however be included in the employment contracts and, if the latter are signed by the teachers, then the university may claim to own these property rights. No such terms were identified.

⁶⁴ UCL, *Intellectual Property Policy*, cit., para 2.2.6. Similarly to what we have seen above with regards to moral rights, this provision is inconsistent with UCL, *Lecture Capture and Lecturecast*, cit., 1.

⁶⁵ UNIVERSITY OF MANCHESTER, *Intellectual Property Policy*, cit., para 2.5; UNIVERSITY OF BIRMINGHAM, *Code of Practice on Lecture Capture*, cit., para 4.1.

⁶⁶ University of Manchester, *Intellectual Property Policy*, cit., para 2.5.1.

the recordings of the lectures if the employee moves jobs, and teachers' right to retain control over their performances.

Finally, there are the performers' moral rights to paternity and integrity.⁶⁷ Introduced in 2006 to enable the UK to ratify the WIPO Performers and Phonograms Treaty,⁶⁸ these rights cannot be assigned but are of little help for the same reasons presented above with regards to assertion and waivers; moreover, they are available only when the recording is embodied in a sound recording as opposed to a film,⁶⁹ which further limits the usability of the provision in our context.

3. Ireland

The Irish university landscape is relatively small compared to the UK and most other European countries. The country is host to seven major institutions providing third-level education as well as some more specialised universities and colleges. As one of only a few EU Member States,⁷⁰ Ireland introduced a teaching exception into its national copyright act that expressly applies to distance teaching. Section 57A of the Copyright and Related Rights Act 2000 (CRRA), as amended by the Copyright and other Intellectual Property Law Provisions Act 2019⁷¹ permits educational establishments to communicate protected works through telecommunication and students to make such copies to enable them to listen or view the work at a more convenient time. Section 57B provides further that education establishments can make copies of works available through the internet for educational purposes. The exception supplemented an existing exception «for the illustration for education, teaching or scientific research activities» in s. 57 as well as the more general fair dealing defence for research and private study in s. 53 CRRA.⁷² However, similar to the override introduced by Article 5 of the Copyright in the Digital Single Market (CDSM) Directive,⁷³ s. 57C provides that, amongst others, ss. 57, 57A and 57B shall not apply if certified licensing schemes are in place.

Following a nationwide consultation with staff and a review of digital teaching and learning policies in Ireland and abroad,⁷⁴ the National Forum for the enhancement of Teaching and Learning in Higher Education (NFTLHE) published, in 2018, a «Guide to Developing Enabling Policies for Digital Teaching and Learning» (hereafter 'the 2018 Guide').⁷⁵ The 2018 Guide examines five policy areas

⁶⁷ CDPA, s 205C, 205D, and 205F.

⁶⁸ Explanatory Notes to the Performances (Moral Rights, etc.) Regulations 2006/18.

⁶⁹ CDPA, s 205C, 205D, and 205F.

⁷⁰ See for similar exceptions with comparable or functionally equivalent scopes: Art.70(1bis) Italian Copyright Act as last amended in 2008, see also below at footnote 94; Art.27(2) Polish Copyright Act as last amended in 2015; Art. L.122-5(3°)(e) French Code of IP as last amended in 2013; Section 34(3b) Hungarian Copyright Act as last amended in 2020.

⁷¹ Copyright and Related Rights Acts 2000 to 2019, No. 19 of 2019, s. 1(5).

⁷² O'DELL, 'Coronavirus and copyright – or, the copyright concerns of the widespread move to online instruction – updated' (15 March 2020), <http://www.cearta.ie/2020/03/coronavirus-and-copyright-or-the-copyright-concerns-of-the-widespread-move-to-online-instruction/>

⁷³ See JÜTTE, 'Uneducating copyright: Member States can choose between "full legal certainty" and patchworked licensing schemes for digital and cross-border teaching' (2020) EIPR 41, 669.

⁷⁴ <https://www.teachingandlearning.ie/publication/a-review-of-the-existing-higher-education-policy-landscape-for-digital-teaching-and-learning-in-ireland-2/>

⁷⁵ NFTLE, 'A Review of the Existing Higher Education Policy Landscape for Digital Teaching and Learning in Ireland' (July 2018), available at: <https://www.teachingandlearning.ie/publication/guide-to-developing-enabling-policies-for-digital-teaching-and-learning/>.

with strong implications for the development of institutional digital teaching and learning policies. One of the policy areas identified is «Copyright and Intellectual Property Rights».⁷⁶ The consultation identified four main concerns that related to copyright specifically and IP more generally. First, a lack of clarity in relation to the use of third-party material as part of teaching material made available online; second, the use and sharing of students' information with third parties, third, the exercise of ownership rights by universities when making educational resources available online; and fourth, how digital access to teaching material should be managed.⁷⁷

The 2018 Guide provide general and topic specific guidelines for universities to develop policies for digital teaching and learning with a focus on procedure rather than substance. It does, however, identify key question that should help universities to formulate institutional policies and, moreover, provides examples for policy formulation. In relation to copyright, the 2018 Guide provides general guidance on IP-related policies as well as more specific advice about ownership, licensing, and sharing of digital content.⁷⁸

As a reaction to the COVID-19 pandemic, in June 2020 the NFTLHE published a reflection document on the experiences with regard to the move to distance education in Irish higher education⁷⁹ in which it recognised the increased importance and scrutiny of certain topics, including copyright.⁸⁰

Relevant policies were obtained for selected Colleges of University College Dublin (UCD) as well as for University College Cork (UCC). NUI Galway makes a policy on student recording of lecture publicly available but does not provide publicly available policies on lecture recordings by staff.⁸¹ Other institutions, such at the University of Limerick, provide general guidelines on copyright with reference to the applicable law and express contractual provisions.⁸²

The 2018 Guide provides universities with three example of ownership polices that grant staff and universities respectively different degrees of ownership rights. The first policy suggestion (taken form the *UCL Staff IPR Policy*) recognises the IP of staff with a few exceptions,⁸³ an intermediate approach

⁷⁶ The other policy areas are Technology-enabled Assessment, Curriculum Design, Managing Artefacts on a virtual learning environment, Student Digital Footprint and Digital Wellbeing.

⁷⁷ <https://www.teachingandlearning.ie/publication/a-review-of-the-existing-higher-education-policy-landscape-for-digital-teaching-and-learning-in-ireland-2/>, p. 8.

⁷⁸ 2018 Guide, pp. 12-14.

⁷⁹ NFTLHE, 'Reflecting and Learning: The move to remote/online teaching and learning in Irish higher education' (June 2020), available at:

<https://www.teachingandlearning.ie/publication/reflecting-and-learning-the-move-to-remote-online-teaching-and-learning-in-irish-higher-education/>

⁸⁰ Ibid. p. 9.

⁸¹ NUI GALWAY, 'Library – For Staff' <https://nuim.libguides.com/4staff/copyright> (accessed 24 April 2021).

⁸² UNIVERSITY OF LIMERICK, 'Guide to Copyright: Copyright and UL – Overview', <https://libguides.ul.ie/c.php?g=510928&p=3492510> (accessed 24 April 2021).

⁸³ The exceptions are: "i. Institutional materials including reports, syllabuses, curricula, papers commissioned by UCL for administrative purposes etc. ii. Materials generated by prior agreement, for which UCL provides resources which are in excess of these normally available to members of staff. iii. Materials which are generated by prior agreement as ventures which involve sharing of copyright ownership between UCL and members of staff. iv. Copyright in any software programme generated during the normal course of University employment v. Copyright in any designs, specifications or other works which may be neces

(taken from the IPR Policy of the Dublin Institute of Technology) «recognises the IP of staff and students, but retains a royalty-free right to use such IP», and the most restrictive policy (taken from a policy from the University of Manchester) «lecture capture policy with an opt-out clause and clarification on the IPR of the recording». These policies demonstrate the classical spectrum of full ownership of teaching material created by staff with some reasonable exceptions to a default institutional-ownership position which enables staff to opt-out.

The policies which are accessible, or which have been obtained upon request, all indicate that teachers do not ‘own’ their lecture recordings but have certain degree of control over them.

For example, UCC determines in its general IP Policy⁸⁴ that all IP created by its employees in the course of their employment is owned by UCC, unless otherwise agreed.⁸⁵ Subject to exceptions, UCC waives its rights in relation to ‘Scholarly Materials’ but retains «a perpetual, irrevocable, royalty-free licence to use such copyright in its promotional, educational and training purposes».⁸⁶ Whether ‘Scholarly Material’ included material created exclusively for teaching purposes is not absolutely clear,⁸⁷ however the institutional Lecture Recording Usage Policy⁸⁸ provides that recordings of lectures are retained only until the teacher removes the content from the VLE during an annual review as part of a module rollover exercise. Unless the teacher updates the module, the content is deleted automatically at the end of each examinable year.⁸⁹

Guidelines for Faculty Using the Virtual Classroom at UCD address ownership indirectly by stipulating that a member of the institution who has created digital teaching content has the right to exploit this content, while content created by non-permanent teaching staff can only be exploited after express permission has been obtained.⁹⁰ Although this seems to suggest that teachers have ‘control’ over their teaching material, copyright of such material belongs to the university by virtue of UCD’s IP Policy.⁹¹

The general guidance provided by NFFLHE has been implemented differently by the major Irish HEIs. Given the relative compactness of the Irish higher education sector the different

sary to protect rights in commercially exploitable intellectual property.”

⁸⁴ UCC, ‘Intellectual Property Policy’, <https://www.ucc.ie/en/media/support/techtransfer/UCCIntellectualPropertyPolicyApprovedbyGB201020.pdf> (accessed 24 April 2021)..

⁸⁵ Ibid., Rule 4.3

⁸⁶ Ibid., Rule 4.5

⁸⁷ UCC’s IP Policy defines “Scholarly Materials as “including] academic articles, conference papers, textbooks, theses and dissertations, works of fine art, video and film materials and novels and poems.”

⁸⁸ UCC, ‘Lecture Recording Usage Policy University College Cork February 2019’, https://www.ucc.ie/en/media/support/academicsecretariat/policies/learningandteachingpolicies/LRU_COVID-2020v41.pdf

⁸⁹ Ibid., p. 3

⁹⁰ UCD, ‘Guidelines for Faculty Using the Virtual Classroom’, https://www.ucd.ie/teaching/t4media/vc_faculty_guidelines.pdf (accessed 24 April 2021), Rule 6.

⁹¹ UCD, ‘Intellectual Property Policy’, https://sisweb.ucd.ie/isis/!W_HU_MENU.P_PUBLISH?p_tag=GD-DOCLAND&ID=157 (accessed 24 April 2021), Rule 1.1

implementation models, their structure and substance, might seem surprising. It does indicate a relative autonomy of individual HEIs, and at a micro-level colleges and schools in setting the framework in which lecture capturing and related policies operate.

4. Italy

The relationship between Italian universities and copyright law is ambivalent, to say the least. On the one hand, the country is home to over 90 universities firmly considered «temples of knowledge» offering a vast array of educational, research, and social impact activities, thus entailing manifold copyright implications. On the other hand, the protection of copyright entitlements involved in the university's activities is typically a matter of secondary importance in the internal policies and regulations, if not completely missing – the management of the teachers' rights over their original materials and lecture performances being a glaring example. As a result, uncertainty and confusion about the role and management of copyright entitlements are distinctive features of Italian academic environments.⁹²

Interestingly, the Italian copyright legal system shows a rather straightforward approach towards educational settings and teaching activities. On the one side, it is uncontested that original teaching materials produced by educators – including their oral presentations and lectures – can qualify as subject matter protected by the Italian Copyright Act.⁹³ On the other side, Italian copyright law explicitly provides room for exceptions derogating from the exclusive rights of public performance, reproduction, and communication to the public of third-party works for the purpose of illustration for teaching.⁹⁴ Moreover, Italy stands out in the European context by way of a specific copyright exception tailored to set the use of low-resolution images and music works in digital teaching activities free from the need of the rightsholders' authorisation.⁹⁵

Despite the seeming legislative clarity, the interplay between copyright law and higher education activities in real-life scenarios is far from settled. Following the methodology illustrated above, the study has taken into close considerations the universities of Bologna, Milano La Statale, Napoli Federico II, Roma La Sapienza, and Torino.⁹⁶

The analysis shows how, contrary to the remarkable developments relating to the promotion of the open access culture in scientific research,⁹⁷ significantly less attention has been paid to the copyright

⁹² See also COMBA and TURCHI, *Il diritto d'autore e i learning objects: risultati di un gruppo di lavoro presso l'Università di Bologna*, in *Sie-L 2008: e-learning tra formazione istituzionale e lifelong learning*, Trento, 8-11 October 2008.

⁹³ See SPEDICATO, *Il Diritto d'Autore in Ambito Universitario*, Simplicissimus BookFarm, Ancona, 2011, 85 ff. On the originality criterion, see also the decision of the Appeal Court of Perugia, 23 February 1995 asserting that the level of creativity required by a university lecture to enjoy copyright protection shall be assessed on the sole basis of the forms of expression involved, such as the course design and didactical structure of the contents.

⁹⁴ Artt.15(2) and 70(1) Italian Copyright Act.

⁹⁵ Art.70(1-bis) Italian Copyright Act. Introduced in 2008 in the aftermath of an iconic controversy between Siae, Italy's main collecting society, and Homolaicus, a website making cultural works freely available to the public, this provision anticipated to some extent the current developments stemming from Art.5 Directive EU 2019/790 on copyright and related rights in the Digital Single Market [2019] OJ L130.

⁹⁶ ITALIAN MINISTRY OF EDUCATION UNIVERSITY AND SCIENTIFIC RESEARCH (MIUR), *Iscritti per Ateneo (Portale dei Dati dell'Istruzione Superiore, Academic year 2019/2020)*, <http://dati.ustat.miur.it/dataset/iscritti/resource/32d26e28-a0b5-45f3-9152-6072164f3e63> (21/4/2021).

⁹⁷ For an overview see the information compiled by the ITALIAN ASSOCIATION FOR THE PROMOTION OF OPEN SCIENCE (AISA), "Politiche", <https://aisa.sp.unipi.it/politiche/> (21/4/2021).

implications on teaching activities.⁹⁸ University websites and publicly accessible policy documentation hardly provide guidance on how educators and students should behave vis-à-vis their own or others' protected material, nor do they encourage the consultation of copyright legislation or other relevant informative sources. It remains therefore vague who owns the copyrights over teaching materials and lecture recordings, and how these rights are managed by faculty members and/or their universities. With particular regards to lecture recordings and their digital uses, such practices are often perceived as something too new to be specifically addressed by internal policies and contractual regulations.⁹⁹

In turn, significant discretion is left to educators in the management of lecture recordings and teaching materials. Suggestions and guidelines issued by the selected universities primarily concern the choice of online services and platforms with the aim to safeguard IT security and data protection.¹⁰⁰ Best practices are consolidating across the national territory, not without divergences. Among the most widespread interventions at the hands of university administrations is the imposed restriction over the access to virtual classes and teaching materials solely to the members having an institutional email account from the university.¹⁰¹ However, the universities of Bologna, Napoli Federico II, and Roma La Sapienza have undertaken proactive steps towards a larger-scale promotion of higher education across society, developing an in-house online repository for teaching materials,¹⁰² or envisioning the possibility of free access by the public to the Moodle platform.¹⁰³ In both scenarios, teachers are allowed to choose the degree of 'openness' of their contents and recordings, thus also deciding how students and the public can access and use such materials.

By and large, regardless how explicitly the universities show their sensitivity towards protecting copyrights and IP rights in general,¹⁰⁴ educators retain a considerable control over their materials and lectures. The case of the University of Napoli, which states on its e-learning website that «for the purpose of enhancing the learning process, [the University] can modify the teaching materials» and «it retains the right to modify, suspend, or delete contents, freely and without prior notice, entirely or partially»¹⁰⁵ represents an anomaly in the sample. More often, the educators' autonomy prevails over

⁹⁸ Among the doctrinal analyses touching upon this specific topic, see SPEDICATO, *op. cit.*, 83 ff.; RAMELLO, *Diritto d'autore, duplicazione d'informazioni e analisi economica: il caso delle biblioteche universitarie*, in *Bollettino AIB* 2001, 4 ff.

⁹⁹ In this regard see also COMBA and TURCHI (fn 1) (“(...) there is uncertainty about whether the transferring of rights to the financing or employing institution occurs automatically and comprehensively, or, rather, the scope of such automatic assignment is limited to the purpose pursued by the employer, as construed from the contract, if present?”) (translation by the authors).

¹⁰⁰ Suggestions that are not always binding upon educators. See e.g., UNIVERSITY OF ROMA LA SAPIENZA, “Tecnologie di facile utilizzo a supporto della didattica a distanza”, <https://www.uniroma1.it/it/pagina/tecnologie-di-facile-utilizzo-supporto-della-didattica-distanza> (21/4/2021) (“The activation of remote teaching and the choice of the platform will be met by each teacher in full autonomy. Solutions other than the ones suggested by the university will be allowed as long as compliant with the minimal measures of IT security required by La Sapienza”) (translation by the authors).

¹⁰¹ E.g., UNIVERSITY OF ROMA LA SAPIENZA, “Buone Pratiche per proteggere i tuoi meeting con Zoom”; UNIVERSITY OF MILANO LA STATALE, “Ariel e servizi didattici online”, <https://www.unimi.it/it/studiare/servizi-gli-studenti/servizi-tecnologici-e-online/ariel-e-servizi-didattici-online> (21/4/2021); interview with Vice-Rector for Didactics Office of the University of Torino, 4 March 2021 (on file with the authors).

¹⁰² UNIVERSITY OF NAPOLI FEDERICO II, “Federica WebLearning Termini e Condizioni”, <https://www.federica.eu/termini-e-condizioni/> (21/4/2021); the repository of the University of Bologna is currently inactive, see interview with Library Services Office of the University of Bologna, 17 March 2021 (on file with the authors).

¹⁰³ UNIVERSITY OF ROMA LA SAPIENZA, “Regolamento della piattaforma Moodle dell'Università degli Studi di Roma La Sapienza”, Decree n.1537/2018, prot. n.49868 of 12/6/2018, art.2.

¹⁰⁴ UNIVERSITY OF TORINO, “Legal Notice Version n. 2 of 20/9/2012”, <https://www.unito.it/note-legali> (21/4/2021) (“The portal (...) respects third parties' intellectual property rights. To this end, reasonable measures have been undertaken to ensure that the reproduction of any contents (...) is processed with the consent of the respective right holders.”).

¹⁰⁵ UNIVERSITY OF NAPOLI FEDERICO II (fn 11).

the university's centralised guidance. Teachers can decide whether to record their lectures and make them available online and, if so, for how long and under which conditions the files will be accessible to students.¹⁰⁶ Leaving such decisions in the hand of each single educator, the universities of Torino, Napoli, and Milano La Statale recently added a disclaimer on their e-learning websites warning against improper uses of uploaded materials and lecture capture.¹⁰⁷ On the contrary, at the University of Roma La Sapienza, it is up to educators themselves to formulate and publish an informative message about how to use the uploaded materials.¹⁰⁸

Despite the resulting fragmentation of established practices and norms regarding lecture capture, a push towards new ad-hoc rules, at both university and national level, is emerging. The transition towards distance education accelerated by the pandemic has prompted the need for a coordinated approach to fill the gaps and overcome divergent responses to the needs of educators and students across the country. The National University Rectors' Conference has recently emphasised the need to facilitate access to electronic resources,¹⁰⁹ yet without providing specific guidance on the role and management of copyrights in the digital classroom. First indications are coming from the Italian Ministry of Education and the Italian Data Protection Authority, who recently recommended schools and universities to prohibit the recording of synchronous lectures and to effectively instruct educators as well as students on the proper use of educational resources online to contrast violations of rights, among which copyrights.¹¹⁰

5. France

The issue of French universities' lecture capture policies needs to be framed within the wider context of the general attitude of universities and lecturers towards copyright law in France. If we put aside copyright implications for the development and distribution of research outputs, this attitude seems characterised by an overall lack of awareness of the requirements of copyright law.¹¹¹ Before the French legislator carved out from the author's exclusive rights an exception for illustration in the context of teaching and scientific research,¹¹² this disregard was particularly manifest as to the use of third-parties copyright-protected materials by lecturers in the course of their teaching. Teachers seldom sought the authorisation of the rightsholders whose works they used.¹¹³ Indeed, teachers have tended to perceive copyright law as an 'obstacle' to the free exercise of their socially beneficial

¹⁰⁶ Interview with the Data Protection Officer Office of the University of Torino, 13 March 2021 (on file with the authors).

¹⁰⁷ UNIVERSITY OF MILANO LA STATALE, "E-learning Portal Ariel - Copyright", <https://elearning.unimi.it/authentication/skin/learn/login.aspx?c=true&url=https://learn.ctu.unimi.it/login/index.php> (21/4/2021); University of Napoli Federico II (fn 11); interview with Vice-Rector for Didactics Office of the UNIVERSITY OF TORINO (fn 10).

¹⁰⁸ UNIVERSITY OF ROMA LA SAPIENZA, "Tecnologie di facile utilizzo a supporto della didattica a distanza" (fn 9) ("The teacher who chooses to use remote education services shall publish a message including the operative instructions on the notice board attached to his/her profile page in the Catalogue of course programs.") (translation by the authors).

¹⁰⁹ See NATIONAL UNIVERSITY RECTORS' CONFERENCE (CRUI), "Minutes 24 September 2020", <https://www.crui.it/resoconto-del-24-settembre-2020.html> (21/4/2021).

¹¹⁰ ITALIAN DATA PROTECTION AUTHORITY, FAQ "Scuola e privacy", www.gpdp.it (21/4/2021); MIUR, "Domande e risposte", <https://www.istruzione.it/rientriamoascuola/domandeerisposte.html> (21/4/2021).

¹¹¹ GRANCHET, "Enseignement et droit d'auteur", in *Communication Commerce électronique*, issue no. 12, December 2005, study no. 42, p. 21 et seq.

¹¹² Art. L. 122-5 3° e), Code de la propriété intellectuelle (CPI); the exception was introduced in 2006 and later amended in 2013 to include the reproduction and representation of copyright-protected works made through a virtual learning environment.

¹¹³ ALLEAUME, "Les exceptions en faveur de l'enseignement et de la recherche scientifique", in *Communication Commerce électronique*, issue no. 10, October 2019, pp. 9 et seq.

activity.¹¹⁴ In many ways, this inclination has outlived the introduction of a teaching exception.¹¹⁵ In turn, this lack of awareness of, and interest for, copyright implications for teaching has affected the overall approach of universities and lecturers to lecture recording.

We surveyed the lecture capture policies of the five largest French universities in terms of student enrollment, namely Université de Lille (ULille), Aix-Marseille Université (AMU), Université de Lorraine (UL), Université de Paris,¹¹⁶ and Université de Strasbourg (Unistra). Overall, we have been struck by the lack of consolidated, university-wide, and publicly accessible policies that would have set forth binding provisions regulating how the copyrights in lecture recordings were to be handled. If such written policies exist, they are often not easily accessible, incomplete, and opaque. This should alert us to a consequential blind spot in French universities' management of the copyrights in pedagogical resources, including lecture recordings, created by higher-education personnel.¹¹⁷

A fuller understanding of this state of affairs necessitates to put those universities' lecture capture policies in the context of the COVID-19 pandemic and the transition to distance education it has induced. All five universities had offered a mix of tools, platforms, and services tailored for online education before the pandemic first broke out in the early months of 2020.¹¹⁸ With the closure of physical spaces of teaching from the 12th of March 2020, and the lasting shift to hybrid education¹¹⁹ later on, these resources have become vital for universities' strategies to ensure a "pedagogical continuity". Virtually all universities have assisted, albeit to varying degrees, their personnel and students in transitioning to distance learning. They have circulated guides to the different tools and services available to lecturers and students, set up training workshops, grouped up all relevant resources onto a single webpage for clarity, etc. However, there are not a lot of references to the management of copyright interests in lecture recordings in that abundance of information.

Looking at French universities in general, it is important to mention that their responses to the challenges posed by the COVID-19 pandemic, including the shift to distance education, have been rather scattered. Not all of them have opted for making recordings of pedagogical activities available online for students to access asynchronously. In addition, those already diverging approaches to pedagogical continuity have kept evolving since the pandemic first broke-out.¹²⁰ This makes it harder

¹¹⁴ GRANCHET, *opt. cit.*

¹¹⁵ An illustration of this inclination lies in the difficulties met by universities and the *Centre français d'exploitation du droit de copie* (CFC) in the implementation of the mechanism for the remuneration of rightholders for the reprography of their works under art. L. 122-10 CPI. When setting the amount of this remuneration, universities usually rely on their lecturers to report how many pages of which copyright-protected works they have photocopied in the course of their teaching. Lecturers have proved to be particularly uncooperative in that regard. In the same vein, some of the requirements of art. L. 122-5 3° e), like the obligation to use only "excerpts" of protected works, are not always observed by lecturers.

¹¹⁶ The Université de Paris was established in 2019 when the Université René Descartes (Paris 5) and the Université Paris Diderot (Paris 7) formally merged. Because the functional merger of the two institutions is an ongoing process, we will survey the policies of both Paris 5 and Paris 7, along with the ones of the Université de Paris proper.

¹¹⁷ The scope of our research does not encompass potential provisions in employment contracts between said personnel and universities that might address this issue.

¹¹⁸ Most of those based on the open-source learning management system Moodle (see e.g. AMU's "AMeTICE"), but not exclusively (see e.g. Université de Lille's "Lille Pod"). Interests in remote teaching has been primarily tied to the rapid growth of the global offer for massive open online courses, or MOOCS, and the development of degrees taught entirely online. Some universities have even been thinking of monetizing recordings of those courses delivered by some of their most prestigious teachers.

¹¹⁹ By "hybrid education" we mean limited in-person teaching, with classroom capacity usually capped at 50%, supplemented by online teaching (e.g. the sharing of the recorded lecture with, or the synchronous streaming of the lecture to, distant students).

¹²⁰ Pedagogical continuity strategies have sometimes diverged among different departments or *facultés* within universities.

for us to track French universities' approaches to remote teaching, and lecture capture in particular. It seems that when universities first closed down on March 12th 2020, teachers retained a substantial degree of discretion in the way they chose to ensure they could still teach their students stranded at home.¹²¹ Even as the second (and hopefully last) COVID-19-impacted academic year nears its end, not all universities have adopted the making available of recorded pedagogical activities as a model of distance teaching.¹²² Among the universities which decided on making lecture recordings available to students, there have been substantial differences as to how long they were to remain online.¹²³ As universities scrambled to transition to distance education, issues related to copyright law initially received relatively less attention compared to far more pressing concerns (e.g. how to ensure that all students have access to a working computer in a country marked by a deep digital divide?).¹²⁴ When it came to the recording of educational activities, concerns related to privacy took precedence over those tied to copyright law.¹²⁵ When copyright was mentioned in written policies, it was mostly in relation to the use of third-parties' materials by lecturers.¹²⁶

Focusing on the five universities we surveyed, and in light of the limited publicly available policies we found, it seems that the default rule is that lecturers retain copyright ownership over the materials they create and share with their students via learning platforms, including lecture recordings.¹²⁷ The terms of use for UL's learning platform ARCHE, which is based on Moodle, provide that "the distribution of a course via the platform ARCHE is authorised by its author. In accordance with relevant statutory laws, it is forbidden to copy – except for private use–, distribute or pass on its content, in whole or in part, unless authorised by the lecturer author and in accordance with their right of paternity."¹²⁸ In addition, UL's IT Policy sets forth that users of the university's IT system agree «not to reproduce, copy, distribute, modify, or otherwise use software programs, databases, webpages, texts, images,

¹²¹ Some teachers, especially those least accustomed to the kind of technologies and services that would have assisted them in teaching their class remotely, chose to send their students written pedagogical materials, while some others opted for a synchronous streaming of their lecture or seminar. Finally, some teachers did almost seamlessly transition to lecture recording, especially those from universities able to either provide them with in-house solutions or licenses to online services relevant to that end.

¹²² The Université de Lille, for instance, does not recommend to its lecturers to record their virtual classes via BigBlueButton, the software it uses for that end, so as to maintain the performance of its network (see <https://infotuto.univ-lille.fr/fileadmin/user_upload/infotuto/pdf-docs/Moodle_Classe-virtuelle_2020.pdf>, last accessed on May 6th, 2020, in French)

¹²³ Some universities opted for deleting all recordings at the end of each semester, others one week after they were uploaded. Decisions seem to have been driven by concerns over the cost of keeping all recordings available online.

¹²⁴ CALAFAT, "Fiction de la 'continuité pédagogique'", in *Par ici la sortie!*, issue no. 1, June 2020, pp. 44 et seq.

¹²⁵ A key authority in the field is *Antovic and Mirkovic v Montenegro* [2017] ECHR 365, where the European Court of Human Rights found that the installation of cameras in lecture halls, without the teachers having control over how the information was collected, was in breach of the right to privacy (ECHR, art 8), as the domestic courts had never even considered any legal justification for the surveillance. For a comment on its application in the context of lecture capture and employee surveillance see EDWARDS, MARTIN, and HENDERSON, *Employee surveillance: the road to surveillance is paved with good intentions*, in *Amsterdam Privacy Conference*, 5 October 2018, available at <https://ssrn.com/abstract=3234382>.

¹²⁶ See e.g. this Sciences Po information sheet for lecturers titled "Respecting copyright" <[https://docs.google.com/document/d/1xNEZzM1m8fyL2ArVZf6Nk\]_6vOeSAkZOWso4-uYFnd8/edit](https://docs.google.com/document/d/1xNEZzM1m8fyL2ArVZf6Nk]_6vOeSAkZOWso4-uYFnd8/edit)> [last accessed on May 5th, 2021]

¹²⁷ Lectures would typically record their lecture or seminar using a software suited for that end (e.g. Zoom, BigBlueButton, OBS Studio, Adobe Connect, Panopto, etc.) before uploading the recording on an online learning platform for their students to access.

¹²⁸ ARCHE Université de Lorraine, Mentions légales, paragraph "Responsabilité de l'utilisateur auteur" <<https://arche.univ-lorraine.fr/mod/page/view.php?id=122405&lang=en>> [last accessed on May 5th, 2021; in French, translation by the authors]

photographs, videos or other copyright-protected works [...], without the prior express authorization from the rightsholders».¹²⁹ It is worth mentioning, however, that UL is not a “user” as per its IT Policy.

In the same vein, the terms of use for AMU’s AMeTICE, another learning platforms based on Moodle, set forth that “contents created by the user remain their property. In that respect, the upload, publication, making available or distribution of the contents does not assign the exclusive rights in them to AMU, other users or any third-party”.¹³⁰ That being said, AMU encourages, without constraining, AMeTICE’s users to license the materials they upload on the platform under Creative Commons licensing schemes.¹³¹ While subscribing to the principle that lecturers retain copyright ownership in the teaching materials they share via AMeTICE, AMU ensures that students can still access those resources in ways most beneficial to their learning experience. Thus, “contents made available, published, or distributed (downloaded, streamed, etc.) on the platform can only be used by those users who did not author them for pedagogical and personal purposes, and in accordance with intellectual property rights, including authors’ moral right. In that respect, users commit themselves not to distribute the contents outside of the circle of dissemination set by the user who made them available, and «not to infringe on the user’s right of paternity and right of integrity».¹³² Similarly, the terms of use for AMUpod, a hosting and streaming platform for audiovisual creations, state that «podcasts available on AMUpod are the exclusive property of their author. Unless otherwise specified, and subject to the statutory exceptions for analysis and short quotation under article L. 122-5 CPI, the representation or reproduction, either in whole or in part, of a podcast without the prior written authorisation of its author is an infringement of their IP rights». ¹³³ Terms of use for ULille’s Lille.Pod, a platform similar to AMUpod, also unequivocally provide that the copyright in the materials uploaded on the platform remain vested in their author.¹³⁴

One last aspect of the issue that needs clarification concerns lecture recordings made by higher-education teaching personnel who qualify as public servants.¹³⁵ Under art. L. 131-3-1, paragraph 1 CPI, “to the extent strictly necessary for the accomplishment of a public service task, the right to use a work created by a public servant in the exercise of their functions or according to instructions they received is, upon creation, automatically assigned to the State”.¹³⁶ In addition, art. L. 121-7-1 CPI also strips public servants of the exercise of part of their moral right in their works.¹³⁷ Those provisions

¹²⁹ Charte régissant l’usage des technologies de l’information et de la communication au sein de l’Université de Lorraine (7 May 2019), art. 3 <https://ent.univ-lorraine.fr/Charte_informatique_UL.pdf> [last accessed on May 5th, 2021; in French, translation by the authors]

¹³⁰ Conditions Générales d’Utilisation de la plate-forme pédagogique AMeTICE, art. 8.1 <https://www.univ-amu.fr/system/files/2020-09/CGU%20Ametice_version_21_juillet_validé%20CA.pdf> [last accessed on May 5th, 2021; in French, translation by the authors].

¹³¹ *Idem*, art. 9.

¹³² *Idem*, art. 4,

¹³³ AMUpod, Mentions légales, paragraph. 4 “Droit d’auteur et respect de la propriété intellectuelle” <<https://amupod.univ-amu.fr/mentions-legales///>> [last accessed on May 5th, 2021; in French, translation by the authors].

¹³⁴ Lille.Pod, Mentions légales, paragraph “Droit d’auteur et propriété intellectuelle” <https://pod.univ-lille.fr/mentions_legales/> [last accessed on May 6th, 2021; in French].

¹³⁵ In brief, those include professors, lecturers, contractual PhD candidates, etc. working at public universities. Temporary lecturers, *enseignants vacataires* in French, are not public servants.

¹³⁶ Art. L. 131-3-1, paragraph 1 CPI; we are not considering here the hypothesis of a commercial use of a protected work created by a public servant.

¹³⁷ Art. L. 121-7-1 CPI.

have been introduced in French copyright law in 2006¹³⁸ and are subject to art. L. 111-1, paragraph 4 CPI, according to which they “do not apply to public servants whose works’ disclosure is not subject, in accordance with their status or the rules governing their functions, to the prior control of their hierarchical authority”.¹³⁹ This crucial qualification was added after professors and lecturers working at public universities vigorously protested against what they perceived as an intolerable encroachment upon their academic freedom.¹⁴⁰ Interestingly, their struggle echoed the one of their peers who, in 1720 and 1721, fought against an exclusive privilege granted by the Crown to the University of Paris to print all books it would deem necessary for the exercise of its mission.¹⁴¹ Thus, university professors and lecturers retain copyright ownership in works they create as part, or even independently of, the courses they teach¹⁴². These provisions apply indiscriminately to the courses themselves, the pedagogical materials created by teachers, and the recordings of lectures or seminars.¹⁴³ Exclusive rights in those protected creations can of course be licensed or assigned by their creators to universities via contractual agreements.¹⁴⁴ Whether university professors and lecturers are willing to part with their rights in their protected creations remains an open question to be researched. Along with an obvious issue of financial compensation, professors, and instructors seem rather uncomfortable with the idea of their lecturing being exposed to their hierarchy and colleagues’ scrutiny.

6. Conclusions. Platformisation and digital dispossession in contemporary education

Despite the different national approaches that this study showed, it seems clear that the pandemic produced a shift in value, or at least in the perception of value of teaching-related copyright, including lecture recordings. The sudden move online – which is ushering in an era of long-term blended and hybrid learning provision – is making universities more aware of the importance of effectively managing teaching materials through policies and contracts that build on – but go beyond – statutory copyright regimes.

In this sense, the focus on the lecture capture policies has provided useful insight into this shift. Through this lens, it is possible to reflect on both the underlying exacerbated power imbalance

¹³⁸ Loi n° 2006-961 du 1 août 2006 relative au droit d’auteur et aux droits voisins dans la société de l’information (loi DADVSI).

¹³⁹ Art. L. 111-1, paragraph 4 CPI.

¹⁴⁰ See e.g. Christophe CARON, “Menaces sur le droit d’auteur des universitaires”, in *Communication Commerce électronique*, issue no. 9, September 2005, study no. 28; Maïté GUILLEMAIN, Audrey LALLEMENT, “La réforme du droit d’auteur des agents publics: difficultés d’applications aux enseignants-chercheurs”, in *Recueil Dalloz*, 2005, pp. 1418 et seq. ; The principle of academic freedom, or academic independence of higher-education teaching personnel was first set out in a 1984 decision of the Conseil constitutionnel (January 20th, 1984, ruling no. 83-165, “*Libertés universitaires*”), before being formally codified in 2000 (art. L. 952-2 Code de l’éducation).

¹⁴¹ Laurent Pfister, “Quand l’État renonça à attribuer à l’Université des droits sur les productions de ses enseignants (1721) : une leçon pour le présent”, in *Communication Commerces électronique*, issue no. 12, December 2005, study no. 39

¹⁴² André LUCAS, Emilie BOUCHET-LE MAPPIAN, Sylvain CHATRY, Stephanie LE CAM (ed.), “Guide du droit d’auteur”, 4th edition, 2018, pp. 63 et seq.

<http://media.sup-numerique.gouv.fr/file/Licences_et_droit_d_auteur/03/0/Guide_du_droit_d_auteur_4e_ed_2018_1006030.pdf> [last accessed on May 6th, 2021, in French]

¹⁴³ Under art. L.215-1 CPI, a lecture recording would qualify as a videogram, defined as the fixation of a set of images, with or without sound. It might be worth mentioning that, under art. L. 215-1, paragraph 3 CPI, the neighboring rights vested in the videogram producer cannot be assigned or licensed separately from the author’s right and the performer’s right in the work that is fixed.

¹⁴⁴ André LUCAS, Emilie BOUCHET-LE MAPPIAN, Sylvain CHATRY, Stephanie LE CAM (ed.), *opt. cit.*, p. 59

between universities and teachers, and the diverging approach towards copyright law across the European higher education landscape. Among the most glaring differences that emerge from our analysis is the tendency towards a broad discretion left to teachers in Italian and French universities, and a more centralised governance and accurate policy-making in the UK and Ireland.

The main concerns arise from the emerging trends towards obliging teachers to record their lectures (from ‘pure opt-in’ to ‘nominal opt-out’). The analysed circumstances suggest that national copyright laws and universities’ internal regulations hardly offer effective ways to oppose the process of ‘dispossession’ of lecture materials and recordings, leaving scant possibilities of recourse to teachers wanting to retain or regain control over the products of their work, and perhaps even attempt to object to the recording imperative.

On a final note, the role played by the rights in performances may turn to be a fruitful starting point to move forward in the modernisation of distance education and recalibration of the relationship between universities and teachers. While the imperatives of digital accessibility should not be discounted, the rights in performances could be at the centre of a conversation aimed at striking a fairer balance between copyright, academic freedom, right to privacy, and freedom of expression, to the ultimate benefit of teachers, students, and the university community as a whole.