

MEMORANDUM

TO: Janna Arney, Ph.D., Deputy President and *Interim* Provost

FROM: Karen E. Adams, J.D., Chief Legal Officer *KEA*

DATE: August 19, 2020

SUBJECT: *Recording of Classes – Considerations and Guidance*

Current return-to-campus guidelines issued by The University of Texas Rio Grande Valley for lecture courses and sections states the following, “Any synchronous class interactions with students, be they face-to-face or remote, *shall be recorded* and made available to them via blackboard.” See <https://www.utrgv.edu/coronavirus/return-to-campus/university-guidelines/lecture-courses-and-sections/index.htm>, last visited July 13, 2020. You have asked what legal issues deans, department chairs, and faculty members must consider in recording individuals class sessions, should recording occur.

The short answer is that there are student-privacy considerations, intellectual-property considerations, and records-retention considerations that both the institution and individual faculty members must account for in recording synchronous class interactions. Each of these considerations will be discussed below, and guidance related to these considerations provided. Also, direction to resources will be provided concerning possible accessibility questions with respect to recordings.

This memorandum and its guidance may be shared with deans, department chairs, faculty, and staff for educational and compliance purposes.

A. Student-Privacy Considerations

Depending on how created or edited, a recording (whether audio or audiovisual) of a class (or portions of the recording) may constitute an educational record of a student protected under the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. §1232g; 34 CFR Part 99).

- If the class recording only includes the instructor (and materials presented by the instructor) without recording or showing any student(s), the recording will not be considered an educational record of any student(s), and FERPA will not limit the recording’s use. (Intellectual-property considerations may place some limitations on use, as discussed in Section B below.)
- If a recording includes student(s) asking questions, engaging in discussion, making presentations, or leading a class (other than teaching assistants), and it is possible to identify the student(s), then the segments of the recording capturing the student(s) may be considered

educational records protected under FERPA. Educational records can be used only as permitted by FERPA, or in a manner allowed by written consent from the student(s) recorded.

This latter situation may concern faculty members since students can learn from the questions (or answers) of other students. So, does FERPA prevent an instructor from sharing/posting an audio/audiovisual recording to other students in the same individual class section? Fortunately, FERPA does not limit or prevent the sharing of a recording, so long as access to the recording is limited to only the other students in that individual class section. Further, such a limited use does not require obtaining a written consent from each student in the class section. This means that an instructor can create access for students in that individual class section to watch (or re-watch) past class sessions, without need to obtain written consents from each student in the individual class section.

Sharing or posting of the recorded class session(s) should be done through a platform (e.g., Blackboard or other approved UTRGV platform) that is accessible only to those class members, and the recording should not be made publicly accessible. In addition, it is recommended that a syllabus statement be added to the class syllabus, to give students notice that class sessions may be recorded and that neither the instructor nor the student may share the recordings, such as:

*We will use technology for virtual meetings and recordings in this course. Our use of such technology is governed by the Federal Educational Rights and Privacy Act (FERPA), UTRGV's acceptable-use policy, and UTRGV HOP Policy STU 02-100 Student Conduct and Discipline. A recording of class sessions will be kept and stored by UTRGV, in accordance with FERPA and UTRGV policies. Your instructor will not share the recordings of your class activities outside of course participants, which include your fellow students, teaching assistants, or graduate assistants, and any guest faculty or community-based learning partners with whom we may engage during a class session. **You may not share recordings outside of this course.** Doing so may result in disciplinary action under UTRGV HOP Policy STU 02-100 Student Conduct and Discipline.*

What if a faculty member or a department wants to allow individuals outside of an individual class section – with other sections of the course, or in a different semester – to access an audio/audiovisual recording of class session(s), which include student participation? Any posting/sharing of these recordings must comply with FERPA, either through obtaining written consents from students or de-identification of the student(s) depicted in the recording(s).

One method of FERPA compliance is for the faculty member to obtain written consent of each student in the class section at the beginning of the semester, or individually from students on a case-by-case basis during the semester. Please note, however, that a student cannot be compelled or required to give FERPA consent to sharing a recording outside of the class section. If a student declines to provide consent, then the faculty member must either de-identify the non-consenting student(s) from the recording, or the recording may not be shared/posted outside of the individual class section.

De-identification of individual student(s) in a recording involves editing to avoid or remove any mention of the student's name, blurring the student's image, altering the voice recording, or editing out a particular student interaction, among other means. De-identification can be made easier by planning recordings so that students (such as those asking questions or making comments) are not shown on video or referred to by name (or repeating the student's name if used by someone else).

Student presentations that are part of a class will be difficult to de-identify. If a faculty member wants to allow individuals outside of a class to access the recording of the class and if student presentations or video projects are part of the class, the faculty member should go ahead and obtain a written FERPA consent from the student making the presentation.

B. Intellectual Property Considerations

The primary question faculty members may have with respect to recording class sessions is, “who owns the recording”? The answer lies in understanding the distinct copyrights that exist in one recorded lecture, the contractual arrangement(s) of UTRGV with vendors such as Zoom or Panapto, and Rule 90101 of the *Rules and Regulations* of the Board of Regents of The University of Texas System (*Regents’ Rules*).

As background, remember that copyright is a form of intellectual-property protection provided by federal law to authors of original works, which possess at least some minimal degree of creativity and which are fixed in a tangible form of expression. Copyright provides the owner with the exclusive right to (i) reproduce the work; (ii) prepare derivative works based upon the work; (iii) distribute copies of the work to the public by means of sale or transfer of ownership; (iv) perform the work publicly; and (v) display the work. Copyright also provides the owner with the right to authorize others to exercise these exclusive rights, subject to certain statutory limitations.

With this understanding in mind, one can see how a recording of a single lecture using software licensed by UTRGV (e.g., Zoom, Panapto, etc.) might involve three distinct copyrights: (i) the copyright in the recording itself; (ii) copyright in the underlying lecture; and (iii) copyright in the third-party material used in the lecture. The first two copyrights – in the recording itself and in the underlying lecture – are most important to and are the focus of this discussion.

Who owns the copyright in the underlying lecture being recorded? According to Rule 90101.7 of the *Regents’ Rules* and federal copyright law, the faculty member will own the copyright in the underlying lecture (work) they create because the lecture is an academic or scholarly work flowing from the faculty member’s appointment, just like the creation of a syllabus, course materials, exams, journal articles, and other similar works.

Who would own the actual recording of the lecture? If UTRGV’s licensed software (e.g., Zoom, Panapto, etc.) is used to record a class session, then UTRGV owns the rights to the recording itself, as it is the licensee of the software and source of the tool being used by the faculty member sending/transmitting the content being recorded. Using UTRGV’s licensed software to record a class session will not itself give UTRGV any rights to the underlying lecture being recorded – those remain with the faculty member.

As a practical matter, what does this mean for faculty members and UTRGV?

- The faculty member can use the recorded class session in the course and scope of their appointment at UTRGV. This means, for example, that the faculty member could retain and review the lecture for purposes related to their job. Or, subject to FERPA (discussed above), the faculty member could re-use the lecture for future classes, provided that no student images, voices, or other identifying characteristics, including comments are on the recording).

- The faculty member, however, would not be able to take the recorded class session and license the session to a third party without UTRGV's permission. For example, if a faculty member teaches a summer course at a local junior college, the faculty member may not take the recorded class session and use it in that summer course, without UTRGV's permission. Because the faculty member does not own copyright in the recording, they could not give those rights to the local junior college.
- Under the *Regents' Rules*, UTRGV could use the recording to present the material, but only in a limited circumstance. Rule 90101.7 of the *Regents' Rules* permits faculty to keep ownership of their scholarly works, but it also grants to UTRGV a limited license to use their works for one year after they leave service:

As the Board of Regents has done historically, as reasonably required for the limited purpose of continuing an institution's scheduled course offerings, the Board of Regents retains for one year following the loss of a course instructor's services a fully paid-up, royalty-free, nonexclusive worldwide license to use, copy, distribute, display, perform, and create derivative works of materials prepared by the instructor (including lectures, lecture notes, syllabi, study guides, bibliographies, visual aids, images, diagrams, multimedia presentations, examinations, web-ready content, and educational software) for use in teaching a course.

So if the faculty member were to leave next fall, and UTRGV had their course recordings, conceivably UTRGV could use those recordings for a year after the faculty member leaves, to offer continuity to the department. This is not a frequent occurrence, though, as the intent of the provision is to offer continuity in the event a faculty member is suddenly unavailable.

A faculty member, wanting to prevent UTRGV from owning copyright in the recording of a class session, may choose to make their own recording of class session(s) – using their own video camera, phone, or presentation software (not licensed or provided by UTRGV). In this way, the faculty member would own both the copyright in the lectures and the recordings.

A faculty member taking this path, however, must exercise extreme caution to ensure no students or their images, voices, questions, or contributions are included in any recording, distribution, or use of any lecture, in order to avoid FERPA or other privacy-law violations.

C. Records-Retention Considerations

The key question for records-retention purposes is the period of time for which recordings must be maintained by UTRGV under state records-retention law. The currently approved Records Retention Schedule does not specifically include a records series addressing audio/audiovisual recordings of this nature. This means that UTRGV would require permission from the Texas State Library and Archives Commission (TSLAC) to destroy the recordings.

To address this concern, UTRGV's Records Management Officer will request approval from TSLAC for the addition of a new records series to UTRGV's Records Retention Schedule for "photographs, audiovisual recordings, and other non-textual media." This records series, found on the Texas State

University Records Retention Schedule, provides for a retention period of “as long as administratively valuable” for such photographs, recordings, and non-textual media. Such a retention period will permit UTRGV to delete recordings in a timely manner to address storage issues, since “as long as administratively valuable” means “the immediate purpose for which the record was created has been fulfilled and any subsequent need for the record to conduct the operations of the agency, if any, has been satisfied.”

UTRGV anticipates that individual class-session recordings would be “administratively valuable” and maintained only for the semester in which the recording is made. If a faculty member chooses to retain a personal (convenience) copy, that copy could be maintained by the faculty member for a longer period; however, it would be subject to the other student-privacy and IP considerations discussed above.

D. Accessibility Questions

If there are specific questions related to accessibility issues for recordings – such as questions related to generating closed captions or other accommodations – faculty members should contact the Center for Online Learning and Teaching Technology (COLTT), available at <https://www.utrgv.edu/online/index.htm>. Access to additional institutional accessibility services is available at <https://www.utrgv.edu/hr/policy/accessibility/index.htm>.