

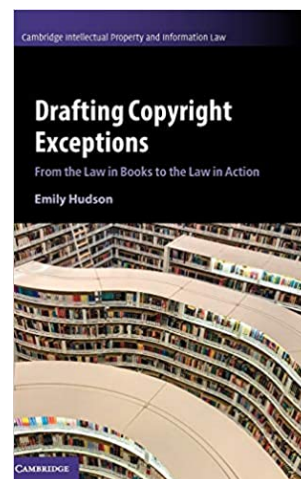
COVID-19: IP Law, Policy & Practice Copyright

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4 June 2020

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References

- Emily Hudson & Paul Wragg, 'Proposals for Copyright Law and Education During the COVID-19 Pandemic' (3 June 2020), available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3617720.
- Emily Hudson, *Drafting Copyright Exceptions* (CUP, 2020) (right).




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What are the issues for higher education?

- ❑ Two important changes:
 - ❑ Closure of libraries.
 - ❑ Movement of assessment and teaching online.
- ❑ The pandemic has exacerbated existing issues:
 - ❑ Asymmetry in physical and virtual holdings.
 - ❑ E-books & other digital content/products (*Paul*)
 - ❑ The copyright implications of using third party works in teaching and research.
 - ❑ Esp. audiovisual works




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Case study: UCL & e-textbooks

- ❑ In paper world, UCL passes 20,000 books to catalogue each year
- ❑ Using UCL's books budget, the costs of commercial e-textbooks is so great that less than 100 e-books could be procured
- ❑ With wildly different licence agreements



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The prevailing copyright environment

- Licensing:
 - Blanket licences for educational copying offered by collectives such as CLA and ERA.
 - Note extension of CLA licence (*to 30 June 2020*).
 - Agreements with producers of subscription databases and other digital products.
 - Creative Commons.
- Exceptions (e.g., fair dealing, ss. 32-36A):
 - Hudson & Wragg, p. 5: sector should not concede too much regarding exceptions.

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Fair dealing: section 32(1)

- Fair dealing with a work for the sole purpose of illustration for instruction does not infringe copyright in the work provided that the dealing is—
 - (a) for a non-commercial purpose,
 - (b) by a person giving or receiving instruction (or preparing for giving or receiving instruction), and
 - (c) accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).

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Controlled digital lending (CDL)

- Could fair use arguments in relation to CDL inform decision-making in the UK under section 32?
 - What are the key tenets of CDL?
 - Warning: CDL is controversial in the US, albeit that some practices seem to have been tolerated.
 - Complaint filed against the Internet Archive on 2nd June.
- In the UK, could CDPA s. 36A (*lending by educational establishments*) help support the rollout of CDL?
 - Applies to digital copies: *Vereniging Openbare Bibliotheken v Stichting Leenrecht* (C-174/15).
- Logistical issues as much an impediment as legal ones.

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Public interest

- The existence of a public interest defence to copyright infringement was accepted in *Ashdown v Telegraph Group Ltd* (CA); and note CDPA s. 171(3).
- This defence is unlikely to have survived *Spiegel Online* (C-516/17) and *Funke Medien v Germany* (C-469/17).
- Even if the defence exists, applying it to the pandemic would require a radical reconceptualisation of its function.
- But public interest arguments may be relevant to remedies:
 - Injunction: *Coventry v Lawrence* (UKSC), *Evalve Inc v Edwards Lifesciences Ltd* (Birss J).
 - Damages: a possible relevant consideration, drawing from *General Tire v Firestone* (UKHL).

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Compulsory licensing

- Rejected by the UK government on the basis that it would 'remove exclusive rights from right holders' and would likely be contrary to international copyright law.
- Legal analysis can be disputed, e.g., by reference to Berne Art. 9(2), state practice in relation to compulsory licensing and the acceptance of remunerated exceptions under the ISD.
- But there are philosophical and practical issues with compulsory licensing.

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Another option: extend s. 36

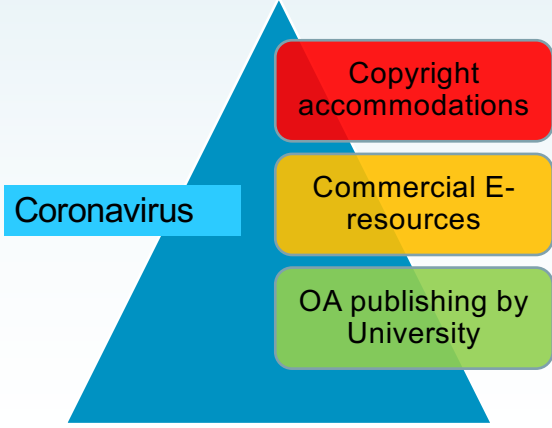
- CDPA s. 36 allows educational institutions to copy and communicate not more than 5% of a work for the purposes of instruction, but not where licences are available.
- General idea: incentivisation of licensing.
 - Similar: 'free-for-all' exception proposed by the Whitford Committee.
- Could s. 36 be extended (perhaps temporarily), for instance to allow copying of longer extracts, or even entire works on CDL terms?

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3 possible ways forward




Copyright accommodations

Commercial E-resources

OA publishing by University

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UCL LIBRARY SERVICES 

Digital Access at a time of crisis

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3 possible ways forward

Coronavirus

- Copyright accommodations
- Commercial E-resources
- OA publishing by University


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Open Access – the institution as publisher

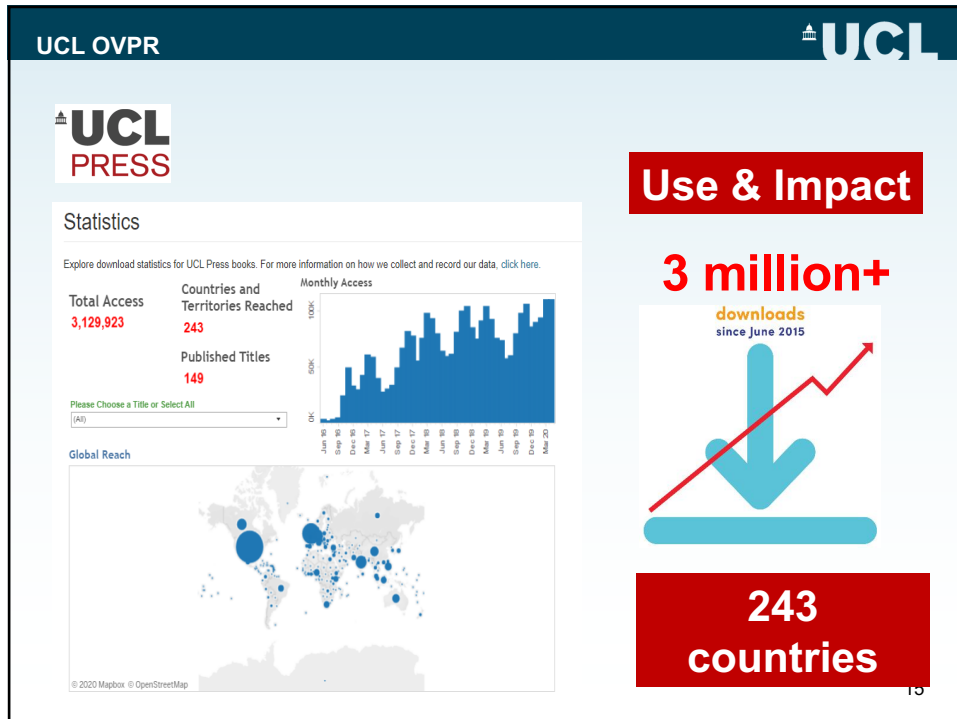
- Textbook of Plastic & Reconstructive Surgery*
- Edited by Deepak Kalaskar et al.
- UCL Press, August 2016
- Available as an OA textbook
- 83,759 downloads
- In 192 countries & territories
- 269 sales of paper copy



<https://www.uclpress.co.uk/collections/open-access/products/83153>

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Country	Downloads
USA	789,062
UK	322,805
India	125,606
Canada	99,238
Germany	80,262
China	74,057
Australia	59,671
Philippines	49,659
Netherlands	42,146
Holy See (Vatican City)	16
Western Sahara	1
Falkland Islands	1
Antarctica	1

Downloads by country (April 2020)

243 countries and territories


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Culture change required

- Textbooks do not count for the REF
- I am paid royalties for textbooks, OA publishing does not pay royalties
- I will harm my career if I spend time producing textbooks rather than research outputs
- I won't be promoted for writing textbooks
- University policies don't recognize education on a par with research




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So...

- University students left between a rock and a hard place
- Copyright restrictions **are** a barrier
- Commercial e-textbooks are too expensive
- Institutional publishing of OA materials a possible way forward



UCL Student Centre, opened 18/2/19

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Let discussion begin...



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