ILLUSTRATION FOR INSTRUCTION AND THE UK HIGHER EDUCATION SECTOR

Perceptions of risk and sources of authority

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Abstract

This dissertation reports on an empirical study into the interpretation of illustration for instruction (section 32 of the Copyright, Designs and Patents Act 1988) in UK universities since its amendment in 2014. This amendment sought to stimulate economic growth by providing teachers and educational establishments with greater flexibility when using copyright material, following the Hargreaves Review of Intellectual Property in 2011. An analysis of the legislative intention of the provision and its potential scope were completed. This was followed by interviews with ten copyright specialists employed in university libraries to explore how the legal provisions had been interpreted and employed. The interview data was analysed using the grounded theory method and a coding frame was produced. Findings were grouped into three themes: 'interpretation' which considered how the legislation had been interpreted; 'practice' which considered the activities taking place within institutions against the backdrop of the organisational structure and culture; and 'responsibility' which considered risk, liability and decision making. The study concludes that despite a strong community approach to addressing copyright issues, interpretation of section 32 is not consistent across the sector, limiting the potential benefits identified by the UK Government. It recommends that further work is carried out within the higher education community to create codes of fair practice which could realise latent flexibility within the law.

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1. Chapter I – Introduction

1.1. Background

Section 32 of the Copyright, Designs and Patents Act 1988 ('CDPA') was amended in March 2014 to allow fair dealing of copyright works "for the sole purpose of illustration for instruction". Prior to this, section 32 only permitted 'chalk and talk' non-reprographic copying and the Government identified a need to provide teachers with greater flexibility when using copyright works, particularly given digital technology.

This dissertation seeks to understand the scope of the exception, as per the legislative intention behind its introduction, and, more significantly, the ways that UK higher education (HE) institutions have subsequently interpreted fair dealing for the purpose of illustration for instruction.

The research question that is investigated is:

> **How have UK universities interpreted section 32 of the CDPA and does this align with the scope of the exception?**

This involves consideration of sources of legal authority, formal institutional policy documentation and informal knowledge sharing that have influenced decision making within the UK HE sector.

1.2. Literature review

A literature review was undertaken to determine existing research into this area, primarily looking at peer reviewed scholarly literature. Whilst no direct investigation into interpretations of educational exceptions in UK law had been undertaken since 2014 there were a number of related studies.

Much of the literature relating to educational exceptions focuses on the balance between private and public interests. However, the discourse of rules versus standards is also relevant.[1] Until 2014 the UK's educational exceptions were narrowly drawn, but the introduction of fair dealing into section 32 introduced a 'standards-like' provision within a previously rules-based regime.

There were some studies focussing specifically on the educational provisions in UK copyright law, and the implications for institutions and the teachers and students within them. However, all of these were completed prior to 2011. Burrell & Coleman undertook an extensive analysis of the educational exceptions in 2005,[2] which found the provisions to be lacking in flexibility. Both Piciotto[3] and Suthersanen[4] considered UK educational licensing arrangements with reference to the limited application of fair dealing defences prior to the legal reform.

Much of the material used in teaching is written by academics themselves and this is considered by Rahmatian[5] and Monnoti & Ricketson[6] in studies of university intellectual property policies. That academics are both producers and consumers of educational materials is described as a source of confusion and tension which is relevant to the movement towards open access publishing models and academic concerns over 'managerialist' approaches to copyright related policies. This tension is also related to the 'special' status of universities as

[1] Louis Kaplow, 'Rules vs Standards: An Economic Analysis', 42 Duke LJ 557 1992-1993
[2] Robert Burrell R and Alison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press 2005)
[3] Sol Picciotto, 'Copyright Licensing: The Case of Higher Education Photocopying In The United Kingdom.' (2002) EIPR 24 (9) 438
[4] Uma Suthersanen, 'Copyright and Educational Policies: A Stakeholder Analysis' (2003) 23 (4) OJLS 585
[5] Andreas Rahmatian, 'Make the butterflies fly in formation? Management of copyright created by academics in UK universities' (2014) 34 (4) Legal Studies, 709735.
[6] Ann Monotti and Sam Ricketson, *Universities and Intellectual Property: Ownership and Exploitation* (Oxford University Press 2003)

institutions serving the public good and upholding academic freedom whilst also interfacing with the wider world of commerce.[7]

Beyond the UK there have been a number of studies on the impact of copyright law and policies within universities. Although a comparison with other jurisdictions is outside the scope of this study, consideration of the theoretical approaches and research problems identified elsewhere is useful. Di Valentino[8] considered the way copyright is perceived and managed within Canadian universities, concluding that universities had not taken full advantage of the flexibility provided by recent Canadian law reforms. Rather they were basing their approach on avoiding liability rather than promoting "users' rights as research and pedagogical necessities".[9] The Canadian analysis drew on Crews' discussion of arbitrary guidelines created in the US following the codification of fair use in the 1976 Copyright Act.[10] This restrictive reading of copyright law led to the creation of community-based codes of best practice by Aufderheide and Jaszi which have had a significant impact on interpretations of fair use in the US.[11]

Perceptions of copyright within educational institutions have also featured as part of research supporting advocacy campaigns for broad educational exceptions[12] in support of open educational practices.[13] However, much of the literature relating to open practice within

[7] ibid, 42-49.
[8] Lisa Di Valentino, 'Laying the Foundation for Copyright Policy and Practice in Canadian Universities' (PhD thesis, University of Western Ontario 2016)
[9] ibid, 7.
[10] Kenneth D. Crews, 'The Law of Fair Use and the Illusion of Fair-Use Guidelines' (2001) 62 Ohio St. L.J. 599
[11] Patricia Aufderheide and Peter Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright*, (University of Chicago Press 2011)
[12] Tomasz Kasprzak, Olga Jurkowska and Alek Tarkowski, 'Creator, rebel, guardian, unsuspecting user: Teachers and modern educational practices' (2017 Communia)
[13] see Jeffrey Pomerantz and Robin Peek, 'Fifty shades of open', (2016) First Monday 21 (5) <https://firstmonday.org/article/view/6360/5460> accessed 2 November 2018

universities makes reference to copyright law as a background factor, rather than considering the specific legal provisions that might support use of third-party content.[14]

The final area for consideration is the emerging field of copyright literacy research, which seeks to identify the most effective educational interventions to support full use of available legal provisions.[15]

This study contributes to the literature by providing empirical evidence on the impact of recent changes to UK law on educational practice.

1.3. Methodology

Although the methodology chosen contains elements of doctrinal research, it is primarily socio-legal in nature. It involved analysis of black-letter sources of law, followed by a comparison with perceptions from those managing copyright issues within UK universities.

The first stage of the project involved analysis of the relevant textual sources of authority, including legislation, associated *travaux préparatoires*, case law, public policy documents, guidance on interpretation of the law and university policies. This provided an opportunity to consider the justifications for the 2014 reforms, stakeholder positions and the existing information landscape in which UK universities have been operating since then. It also allowed for consideration of the historical context and informed the interview sample.

A legal analysis of the potential scope of section 32 was completed, highlighting a number of potential issues with interpretation and application that would be returned to once empirical interview data had been analysed.

[14] Catherine Cronin, 'Openness and Praxis: Exploring the Use of Open Educational Practices in Higher Education' (2017) International Review of Research in Open and Distributed Learning 18 (5)
[15] Chris Morrison and Jane Secker, 'Understanding librarians' experiences of copyright: Findings from a phenomenographic study of UK information professionals' [2017] Library Management 354

A purposeful sample of universities was then created by identifying institutions falling into six broad categories (see Appendix A). This sample was intended to provide a mix of research-led and teaching-led institutions, as well as specialist music and art institutions. It was also based on the analysis of institutional policies and guidance and therefore included a mixture of those with differing levels of formal copyright-related documentation. The analysis of institutional policies also informed creation of a set of semi-structured interview questions.

Following ethical clearance from King's College London, two specialists from each of the six categories of institution were contacted and invited to interview. Participants were provided with an information sheet and consent form and were assured of anonymity.

In total, ten out of the twelve individuals contacted agreed to take part. Attempts to arrange interviews with representatives from independent institutions were unsuccessful, so the sample was comprised entirely of representatives from publicly-funded institutions.

Semi-structured interviews took place between April and May 2018 with some conducted face-to-face and others using Skype. All interviews were audio recorded, transcribed and loaded into the Nvivo software for coding.

The qualitative analysis employed grounded theory[16] to build a model of the ways in which section 32 was interpreted. This involved a number of stages.

Following multiple readings of the interview transcriptions, a first stage of 'open coding' took place. This involved creating a rough set of codes representing the emerging, recurrent themes in the data. These codes were then reviewed during a second stage of 'axial coding' in which further relationships between the codes were identified and arranged into a more

[16] Juliet Corbin and Anselm Strauss, *Basics of Qualitative Research: grounded theory procedures and techniques* (Sage Publications, 1990)

coherent analytical structure. Finally, a stage of 'selective' coding was undertaken during which the existing codes were aligned with a set of three overarching themes: Interpretation, Practice and Responsibility. This led to creation of a finalised 'coding frame' (see Appendix B) which was then set up in Nvivo, allowing for each of the interviews to be coded on a line by line basis.

Once the interviews were coded, a comparison between the experiences of the interviewees and the researcher's legal analysis was completed, allowing for inferences and conclusions to be drawn.

The ethics application referred to the researcher's role as a copyright specialist at a UK university and therefore a member of the community that was the subject of the research. This had implications for potential bias, and so the researcher was careful to avoid leading interviewees by asking only neutral, open questions about their experiences.

It is necessary, however, to recognise that the researcher comes to the research with a specific normative position regarding use of copyright exceptions in education. In order to address this potential research limitation, the researcher employed both 'reflective open-mindedness' and 'reflective equilibrium' in order to acknowledge this normative position whilst attempting to describe the phenomena experienced with as much scholarly rigour as possible.[17]

The use of grounded theory allowed development of a model reflecting the experiences of the community interviewed. However, as only ten institutions were represented there is likely to be a limit to the extent which the model can be generalised. The lack of contribution from any

[17] David Feldman, 'The Nature of Legal Scholarship' (1989) 52(4) Modern Law Review 498, 502-03

independent or distance learning specialist institutions is also a limitation of the research. Both of these limitations could be addressed with further research.

2. Chapter II – Section 32: History, Implementation and Potential Scope

2.1 The History of Section 32

Illustration for Instruction can be traced back to the 1911 Act which included a specific provision allowing for the "inclusion of short passages in educational compilations".[18] These provisions were primarily aimed at educational publishers rather than educational establishments because 'reprographic' technology was not widely available. The 1956 Act introduced a number of updated educational exceptions, including section 41(1) which allowed reproduction of copyright works "in the course of instruction" as well as if used as part of an examination.[19] However, copying was not allowed if it was "by the use of a duplicating process" in order to restrict production of multiple copies.

By the 1970s photocopying was common practice in libraries[20] and recording of audio and film were increasingly affordable. The Whitford Committee, which had been convened to review copyright law in light of technological developments, recognised that unauthorised reproduction of educational materials had become widespread.[21] The Committee's solution was to promote licensing of educational copying rather than seeking to prohibit it.

The 1988 Copyright, Design and Patents Act therefore introduced two new provisions that allowed educational establishments to make recordings of free-to-air broadcasts (section 35) and limited reproductions of published editions (section 36). These exceptions stipulated that

[18] See Copyright Act 1911, s. 2(1)(iv)
[19] ibid, Section 41(3)-(5)
[20] Ronald E. Barker, 'Photocopying Practices in the United Kingdom' (1970, Faber and Faber)
[21] Department of Trade, 'Copyright and Designs Law - Report of the Committee to Consider the Law on Copyright and Design' (Cmnd 6732, 1977)

where a licensing scheme was in place, educational institutions were not entitled to rely on the exception.

Although the principle of exception-backed blanket licensing had now been incorporated in copyright law, other educational exceptions were retained. Section 41(1) of the 1956 Act was updated to become section 32 of the 1988 Act, entitled 'Things done for purposes of instruction or examination'. Despite the appearance of flexibility[22] the teaching provisions of section 32 provided very little freedom and were hedged by so many qualifications and exemptions as to make them virtually unworkable. For example, section 32(1) allowed reproduction only of literary, dramatic, musical and artistic works, whereas section 32(2) stipulated that films and sound recordings could be copied, but only by those teaching the "making [of] films or soundtracks". This meant that it was not possible to copy audiovisual content except in very specific contexts.[23]

But the most limiting aspect of the educational exceptions was the prohibition of reprographic copying under section 32(1)(b) which even prohibited reproduction of a literary, dramatic, musical or artist work on acetate in order to display on an overhead projector.[24] This effectively allowed only traditional 'chalk and talk' teaching unless licences were obtained from rightsholders.

Article 5(3) of the Information Society Directive[25] led to further restrictions when implemented into UK law in 2003.[26] The amended CDPA drew a distinction between

[22] Its use was not limited to those in educational establishments, it covered acts undertaken by anyone 'giving or receiving instruction' and it had broad examination provisions.
[23] Although the Educational Recording Agency (ERA) was set up to provide licences to make recordings of free-to-air broadcasts, there was still much audiovisual content not covered by exception or licence.
[24] Burrell and Coleman (n 2) 122
[25] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc).
[26] Copyright and Related Rights Regulations 2003

commercial and non-commercial instruction[27] and required that any use of works (commercial or non-commercial) had to be accompanied by a sufficient acknowledgement of the copyright holder except "where this would be impossible for reasons of practicality or otherwise".[28]

In 2006 the Gowers Review of copyright reported that educational exceptions were no longer fit for purpose and required reform. However, none of Gowers' education-related recommendations were acted on.

2.2 The Introduction of Illustration for Instruction

The Hargreaves Review of Intellectual Property was launched in 2010 to investigate the legal reform required to support the UK's digital economy. Although educational exceptions did not feature in Hargreaves' ten recommendations[29] the Government included them in the scope of their proposed policy reform.[30] The justification for this was to extend exceptions in line with InfoSoc "to the maximum degree that is possible without undermining incentives to creators".[31] They highlighted the problem with section 32 in that it allowed only 'chalk and talk' teaching, as well as citing the location-based restrictions in sections 35 and 36.

The Government asked for evidence on the case for restricting or removing the ability for rightsholders to license copyright works in education, suggesting that it could "deliver significant financial benefits to educational establishments and free up their use of copyright works".[32] However, they were also aware that doing so could "undermine the financial

[27] Section 32(2A) as amended in 2003 stated that 'fair dealing' use could be made of works for commercial purposes as long as they had already been made available to the public.
[28] CDPA as amended and revised in 2003, section 32(3A)
[29] Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (2011)
[30] Intellectual Property Office, 'Consultation on Copyright' (2011)
[31] ibid 59
[32] ibid 91

incentives that encourage the creation of new educational work"[33] and therefore sought further evidence on the impact of educational licensing schemes.

The consultation responses from interested parties were largely predictable.[34] Educational institutions advocated for expanded exceptions that would allow them greater freedom. Rightsholder organisations favoured maintenance of the status quo, concerned that any expansion of exceptions would undermine the balance struck by introduction of blanket licensing solutions in the CDPA.

The final policy proposals were published by the Government in December 2012[35] along with a series of finalised impact assessments. The impact assessments were an attempt to avoid the "lobbynomics"[36] which Hargreaves had identified as undermining previous reviews of copyright, by creating independent economic analyses of the proposed changes to copyright law.

The policy position the Government reached was a compromise between providing flexibility for teachers and educational establishments, and maintaining the integrity of licensing solutions for reprographic copying and recording of broadcasts. Sections 35 and 36 were to be widened to cover communication of copyright material to authorised users not on the premises of an educational establishment and section 36 was to be expanded so it would encompass a wider range of copyright works. However, they both retained the provision that if collective licences were available to cover the works then educational institutions would not be able to rely on the exceptions.

[33] ibid
[34] Intellectual Property Office, 'Consultation on Copyright: Summary of Responses' (2012)
[35] Intellectual Property Office, 'Modernising Copyright: A modern, robust and flexible framework' (2012)
[36] i.e. partisan, industry-funded economic analyses

The Government recognised that changes to these exceptions alone would not satisfy the need to use copyright works in all potential educational contexts, so sought to expand the scope of section 32. Their solution was to extend it to cover all types of copyright work as well as removing the prohibition on 'reprographic' copying and replacing it with a fair dealing test.[37] The Government was confident that the application of fair dealing as a mechanism allowing "minor acts of copying"[38] would enable the use of educational technologies such as interactive whiteboards, whilst protecting the integrity of educational licences.[39]

The proposed name for the new provision was 'Fair dealing for the purpose of instruction'. However, it was eventually entitled 'Illustration for Instruction' in order to combine the term 'illustration for teaching' from Article 5 of InfoSoc, with the existing CDPA wording relating to 'instruction'.[40] The Government also incorporated a 'contract override' provision to prevent restrictive licence terms from undermining teachers' ability to take advantage of the new exception.

These changes to educational exceptions were incorporated in a Statutory Instrument which received Royal assent in June 2014.[41]

2.3 Potential scope of Section 32

In order to understand the potential scope of illustration for instruction it is important to consider the nature of teaching in UK universities.

[37] As previously mentioned fair dealing had up to this point only been applicable to commercial, non-reprographic copying of published works under the exception.
[38] Intellectual Property Office (n 35) 4
[39] ibid 41
[40] Intellectual Property Office, 'Technical review of draft legislation on copyright exceptions, Amendments to Exceptions for Education' (2013)
[41] The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014

Despite major technological innovations in education, many teachers in HE still deliver lessons in traditional lecture, seminar or classroom environments.[42] At the other end of the scale from this lies dedicated online distance learning, where teachers and students may never meet face to face. Lessons may take place synchronously online through streamed lectures or webinars, and/or asynchronously so that students are able to access learning materials and teaching events at a time convenient to them. There are many models and platforms available to support this, including Massive Open Online Courses (MOOCs) designed to widen access to HE.

In between these is the practice of 'blended learning', where face-to-face teaching is enhanced by making course content available on virtual learning environments (VLEs). Many universities also encourage or require their teaching staff to record lectures and make the recordings available to students via the VLE.[43]

By introducing illustration for instruction, the Government's intention was to remove the barriers preventing teachers and lecturers from using digital technology, whilst not disrupting the regime of exception-backed collective licensing.

[42] Richard Walker, Martin Jenkins and Julie Voce 'The rhetoric and reality of technology-enhanced learning developments in UK higher education: reflections on recent UCISA research findings (2012–2016)' (2018) 26(7) Interactive Learning Environments 858

[43] see Jane Secker with Chris Morrison, 'Copyright and E-learning: A guide for practitioners' (Facet, 2016)

The updated wording of section 32 is as follows:

> **Section 32 Illustration for instruction**
>
> (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).
>
> (2) For the purposes of subsection (1), "giving or receiving instruction" includes setting examination questions, communicating the questions to pupils and answering the questions.
>
> (3) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.

It is clear from the removal of the restriction of reprographic copying that teachers may now use digital technology to copy and communicate copyright works in some contexts. The provisions also extend to student activity and all types of copyright work are now in scope. However, beyond this there are many aspects of section 32 which are less clear.

Illustration for Instruction

Firstly, the terms 'illustration' and 'instruction' have both been described as "awkward",[44] with 'instruction' suggesting an outdated, rote-learning paradigm. Similarly, the term 'illustration' supports a view of students as passive recipients of teaching as well as suggesting a greater emphasis on pictorial works. It is therefore not clear whether 'illustration for instruction' should simply be seen as synonymous with any teaching or learning activity, or whether the language used in the legislation might narrow this to uses most closely resembling traditional classroom teaching.

Sole Purpose

The requirement that illustration for instruction be the 'sole' purpose allowable under the fair dealing defence is also open to interpretation and raises two questions. Firstly, how does one draw the line between a use which is instructional but also has some other function such as providing light relief (e.g. the use of a humorous cartoon)? Secondly, does the term 'sole purpose' prevent section 32 from being used in conjunction with other exceptions such as quotation or parody? This would appear to contravene the principle behind section 28(4) CDPA which states that "the provisions of this Chapter are to be construed independently of each other, so that the fact that an act does not fall within one provision does not mean that it is not covered by another provision".

Fair Dealing

Fair dealing is a concept in UK law that is incorporated in certain copyright exceptions. It provides a defence against claims of infringement where a party has acted in a way that a 'fair-minded and honest person' would regard as being 'fair'. There is no statutory definition

[44] Lionel Bently and Brad Sherman, *Intellectual Property Law*, (4th Edn, Oxford University Press 2014) 253

of fair dealing, and in fact it has been described as impossible to define,[45] although there is jurisprudence guiding its interpretation.

Prior to the Hargreaves review fair dealing only related to three defences:

- Research and private study,[46]
- Criticism and review,[47]
- Reporting of current events.[48]

Although this list has now been expanded to include illustration for instruction as well as quotation[49] and parody[50] defences, the vast majority of UK case law relates to the three established fair dealing purposes above. Despite the different purposes to which fair dealing might apply, it has been clarified that the same test of fairness would need to be applied even when new purposes were being considered.[51] This section therefore considers relevant cases and attempts to apply them to illustration for instruction by way of analogy.

Bently & Sherman define seven factors to consider when determining whether a dealing qualifies as fair:[52]

i. The amount taken,
ii. the use made of the work,
iii. the consequences of the dealing,
iv. whether the work is unpublished,

[45] *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 CA 1027
[46] CDPA 1988 s 29(1) and (1C)
[47] ibid s 30(1)
[48] ibid s 30(2)
[49] CDPA s 30 (1ZA)
[50] CDPA s 30A
[51] *British Broadcasting Corporation v. British Satellite Broadcasting* [1992] Ch 145
[52] Bently and Sherman (n 44)

v. how the work was obtained,

vi. motives for the dealing, and

vii. whether the purpose could have been achieved by different means.

Consideration of 'the amount taken' has been an important element of quotation related cases and a key component of Lord Denning's test in *Hubbard v. Vosper*.[53] This related to the "number and extent of the quotations and extracts" as well as the proportions (the ratio between extracts and commentary). The more that is taken and the greater proportion this makes of the new work, the less likely the dealing is to be fair. However, materials created by teachers are not necessarily directly analogous to published books where the finished article stands alone rather than as an aid to a broader teaching programme. It is likely to be challenging to apply a test associated with published books and newspapers to in-house teaching materials where the amount that might be considered fair could vary significantly depending on the context. For example, in disciplines such as art history where extensive use is made of images. It is also worth noting Lord Megaw's concurring judgement in *Hubbard v Vosper* that despite fair dealing's association with limited use of extracts, it could still be fair dealing to reproduce the entirety of a copyright work in certain cases.[54]

Consideration of 'the use made of the work' relates to whether it is sufficiently transformative. It has been determined that simply making copyright works available without adding additional commentary weighs against a finding of fairness when considering reporting of current events.[55] Although addition of information and commentary is a fundamental aspect of teaching, the extent to which copyright works would be re-

[53] *Hubbard v. Vosper* (n 45)
[54] ibid 1031
[55] *Newspaper Licensing Agency v. Marks & Spencer plc* [1999] EMLR 369, 380 per Lightman J.

contextualised will depend on the conventions of specific disciplines. There may be situations where pedagogic requirements lean towards verbatim reproduction of copyright works without commentary. For example, asking a seminar group to discuss the cultural significance of a photograph without providing any prior analysis. In such cases judicial attention is likely to turn towards the impact the dealing has on the market for the original work.

The 'consequences of the dealing' primarily relate to these market considerations, and it has been determined that where parties are in direct competition it will not be fair dealing to take copyright material.[56] However, consideration of this factor within an HE environment would not just relate to a university acting as a rival trading party.[57] It would also involve whether the dealing might harm the copyright holder if the educational availability acted as a substitute for sales to students. This is a particularly challenging undertaking given the complexity of markets in educational materials.[58]

The consideration of 'whether the work is unpublished' is of primary relevance to cases where it is subsequently made available to the public. Reliance on fair dealing for quotation of unpublished works in books and newspapers is strongest when there is a public interest in revealing the information.[59] An analogy may be drawn between this and the purpose of education as a public good, making it less problematic to include unpublished material in teaching where it is central to the pedagogic intent (e.g. private correspondence in a university library special collection). It may also be less problematic where access to the material is restricted to a limited group of students.

[56] *Hubbard v. Vosper* (n 45)
[57] *University of London Press Ltd. v. University Tutorial Press* [1916] 2 Ch 601
[58] Bently and Sherman (n 44) 252
[59] *Ashdown v. Telegraph Group Ltd* [2002] Ch 149, 173

The question of 'how the work was obtained' considers whether this was done through illegitimate means, such as being leaked[60], copied without permission[61] or acquired through unauthorised access to a database[62]. If the work is obtained illegitimately or the motives of the person doing the dealing are questionable[63] it is less likely that the dealing will be fair. These factors have primarily been considered in relation to press publishing cases and one may draw a distinction between journalism and the majority of day-to-day teaching activity. Most university lecturers are not trying to publish 'exclusive' stories in order to drive newspaper sales or subscriptions. The biggest consideration here is likely to be whether the material they use to illustrate their teaching is taken from a legitimate source and the role the institution plays in providing access or sign-posting to licensed resources.

The last of Bently and Sherman's seven factors is 'whether the purpose could have been achieved by any other means'. This factor attempts to balance the interests of the rightsholder and the user by asking whether the dealing could have been less intrusive on the copyright holder's rights.[64] Newspaper publication of images have been found not to be fair when all that was required was basic information as to whether public figures were at a location at a particular time.[65] This is important in an educational context where 'showing' students is often more effective than simply 'telling' them facts. It seems likely that a broader view of acceptable means might be employed in these circumstances.

Also relevant to this factor is the principle established in criticism and review cases that the copyright work being reproduced need not be the focus of the criticism itself.[66] Although

[60] *Beloff v. Pressdram* [1973] 1 All ER 241
[61] *Hyde Park Residence v. Yelland* [2000] EMLR 363 CA
[62] *HM Stationery Office v. Green Amps Ltd* [2007] EWHC 2755 Ch
[63] e.g. if they act dishonestly or are driven by the desire to benefit financially.
[64] *Newspaper Licensing Agency v. Marks & Spencer plc* (n 55), 382-3 per Lightman J
[65] *Hyde Park Residence v. Yelland* (n 61) 379
[66] *Time Warner v. Channel 4* [1994] EMLR 1, 15; *Pro Sieben Media AG v. Carlton UK Television Ltd.,* [1999] FSR 610 CA

there is no need to directly criticise the work itself, there must be a plausible link between the work or performance and the subject of the criticism.[67] This may weigh against a finding of fairness where copyright material is being used to spark broader discussion of certain phenomena in a teaching context.

In addition to the seven factors above, Lord Denning also commented in *Hubbard v. Vosper* that "after all is said and done, [fair dealing] must be a matter of impression".[68] One might argue that the inclusion of third party content in teaching materials could by its very definition create a different impression than any of the fair dealing examples so far considered by the courts. This could therefore lead to a broader application of fair dealing in the context of illustration for instruction than has been the case with jurisprudence to date.

However, Arnold J casts doubt on this in *Forensic Telecommunications v. West Yorkshire Police*[69] by suggesting that the courts might need to directly apply the "three step test" in Article 5(5) InfoSoc when considering fair dealing for the purposes of non-commercial research. The requirement that fair dealing for the purposes of illustration for instruction might apply only in "certain special cases" suggests it may not be possible to apply a broad interpretation of fair dealing across all educational uses, or even those in certain disciplines that might make extensive use of third-party content.

Non-commercial Purpose

The requirement that the dealing be non-commercial raises questions as to whether recent changes to HE funding mean some activities could be regarded as commercial. In particular the move towards online delivery with commercial partners (e.g. MOOC platforms) and the rise of 'executive education' courses.

[67] *Ashdown v. Telegraph Group Ltd* (n 59)
[68] *Hubbard v. Vosper* (n 45)
[69] [2011] EWHC 2892 Ch

Examination use

The narrowing of the examination provisions following the introduction of fair dealing has also increased uncertainty. Should institutions have changed their approach to submission of coursework now that the law no longer permits "anything" done by students answering examination questions? Does this require changes to the way institutions communicate examination materials to candidates?

Student Work

The inclusion of students as beneficiaries of the exception creates uncertainty over the extent to which they are permitted to use online tools to support their own learning. Recent EU case law clarifies that using third party copyright material in online coursework is a communication to the public, but has not been determinative on whether exceptions for teaching would apply in such instances.[70]

Acknowledgement

Although the requirement for acknowledgement has been part of section 32 since 2003, the exception was rarely used prior to 2014 due to the restriction on reprographic copying. It is therefore unclear which attribution conventions would be acceptable now that reprographic copying is allowed[71] or how to interpret the phrase "for reasons of practicability or otherwise". The assertion that adding attribution might spoil the aesthetic of the teaching materials is unlikely to be a convincing reason. However, searching for rightsholder information is likely to be challenging for teachers who have existing collections of unattributed resources such as images.

[70] *Land Nordrhein Westfalen v. Dirk Renckhoff v*, C-161/17
[71] see *Pro Sieben Media AG v. Carlton UK Television Ltd.* (n 66), and *NLA v Marks and Spencer* (n 64).

Contractual override

The law now specifically provides that where contracts purport to restrict fair dealing for the purposes of illustration for instruction, the relevant clauses can be ignored. However, this is complicated by the continued existence of sections 35 and 36 and the associated collective licensing schemes. The licensing of educational materials is complex[72] and determining which contractual provisions may be ignored and on what basis is likely to present a significant challenge to teachers and those who support them.

Summary

The updated provisions within section 32 include very little which is clear beyond the extension that it covers all types of copyright work and allows the use of reprographic technology such as an interactive whiteboard. Much of its scope remains arguable, particularly given the introduction of fair dealing and the lack of directly applicable case law.

The following chapter explores findings from the ten interviews with copyright specialists to understand how their interpretations align with each of these areas of scope, and the organisational and cultural factors which influence these interpretations.

[72] Educational content may be procured under collective licences, consortium arrangements (e.g. those negotiated by Jisc Collections) and permissions negotiated directly with rights holders and content aggregators.

3. Chapter III – Findings

This chapter presents the findings from the interviews according to three broad themes that arose from the qualitative analysis of the data:

- 'Interpretation' - how interviewees interpret the legislation;
- 'Practice' - the activities, organisational structure and culture of the institutions;
- 'Responsibility' - risk, liability and decision making.

3.1 Interpretation

The findings under the interpretation theme are grouped according to factors associated specifically with illustration for instruction, those relating to fair dealing and other factors not directly related to either.

3.1.1 Illustration for Instruction factors

Spirit and Scope

Although not a specific provision within section 32, a number of interviewees made reference to the 'spirit' and 'scope' of the exception. Their understanding was that it had been updated to allow flexibility in teaching, and several believed their own interpretation was accordingly 'broad'. However, perceptions of the 'spirit and scope' led to consideration of factors not specifically stated in the legislation that nevertheless limited its application.

Firstly, there were differences of opinion as to whether the 'spirit' of the exception limited its application to specific physical locations. Most interviewees reported feeling more comfortable that the defence would apply to activities taking place on campus. Where copyright material was being presented in other locations such as local cinemas or conference venues interviewees were less sure that it would apply.

Secondly, interviewees considered the extent to which teaching activity involved formal assessment of registered students compared to 'outreach' or 'engagement' activity. Again, interviewees felt more comfortable applying the exception to more formal teaching arrangements. Consideration of off-campus and outreach activity also raised questions regarding funding and the potential commercial nature of the activity (see p.28).

Thirdly, two interviewees specifically mentioned that section 32 wouldn't apply to the provision of self-directed reading. Their logic was that section 36 and the Copyright Licensing Agency (CLA) licence had long established a separate regime for that material.

Finally, some interviewees reported that their sense of the 'spirit' of the exception influenced interpretation where the law was perceived to be in tension with the latest technological developments.

Sole purpose

The restriction that dealing be 'for the *sole purpose* of illustration for instruction' was largely interpreted as it needing to be related to "a clear, genuine pedagogic point" rather than merely "decorative" use (I4). Examples such as use of cartoons or images relating to popular culture were described as grey areas. In one case the interviewee drew attention to the importance placed on serious academic instruction at their institution summarising that use of a "fun image just because" would not be acceptable (I1).

Another interviewee described a discussion with an academic colleague over their use of an image from a Hollywood film, the title of which had a tangential reference to a mathematical concept. Although the interviewee initially disagreed with the academic's argument that section 32 could cover use of the image as a means of engagement, they eventually agreed that it was a parodic educational use. This has relevance to whether 'sole purpose' precludes

consideration of other exceptions such as parody, caricature or pastiche (see p.34). However, none of the interviewees mentioned this potentially limiting aspect of the provision.

Non-commercial Purpose

Whether any given use of copyright material might be considered commercial was an ongoing source of uncertainty and concern. One interviewee took what they described as a "risk-averse" approach, defining commercial as "[b]asically, is someone paying for it?" (I9).

Many interviewees stated that delivering a standard accredited course at a publicly-funded university would not constitute commercial activity, but that activities outside this could be commercial. For example, some described delivering MOOCs as commercial activity, and the non-commercial status of executive and continuing professional development courses as questionable. However, discussion of the funding for these types of courses led many interviewees to reflect that all courses now incurred tuition fees which students had to pay, creating doubt as to whether any university teaching activity would be regarded as non-commercial.

More than one interviewee mentioned that the potentially commercial nature of conferences and external events might undermine reliance on section 32, with one interviewee restating their "risk-averse" approach by focussing on whether there was a fee to attend the event (I9). Others discussed commercial publications arising from conferences as well as issues associated with in-house training events and use of freelance training consultants.

The question of commercial use also arose in relation to student-created work (see p.29).

Examination use

A number of interviewees noted that the examination provisions had been limited by the introduction of the fair dealing test in 2014. However, one interviewee believed that in

practice the same activities that were previously permitted would by default be regarded as 'fair'.

There were two key areas in which the examination provisions were applied. Firstly, copyright in the students' assessed work (e.g. repositories of past papers for use by future students), and secondly copyright material used in framing exam questions.

Interviewees noted that where attribution of copyright material undermined the exam question (e.g. revealing the title of an image where the question was "what is this?"), no acknowledgement would be required.

Other interviewees mentioned issues associated with copying musical scores for performance examination purposes. This had been explicitly prohibited within the law prior to 2014,[73] but following the reform it was implicitly prohibited through fair dealing. Interviewees believed that fair dealing would not apply to such copying.

Another interviewee mentioned that the inclusion of the examination provision made section 32 less clear-cut when considering general teaching use.

Student work

A number of interviewees noted that section 32 related to student activity as well as that of university staff.

Two interviewees mentioned student performances and there was some confusion between the provisions of sections 32 and 34. However, they agreed that recording performances and making the recordings available would involve consideration of section 32. One interviewee described their approach to this as involving "risk-based decision[s]" rather than being "strictly about interpretation of the law". (I2)

[73] CDPA 1988 as originally enacted s 32(4)

Interviewees also mentioned student portfolios, particularly those in the creative arts, who were using third party copyright in artistic appropriation and remix contexts. This was challenging because although section 32 might cover their activity as part of assessment, where the use became commercial (e.g. selling artworks) the exception would no longer apply.

Type of work used

Interviewees mentioned approaches and case studies covering many different types of copyright work. These had different issues associated with them

Traditional text-based material was mentioned often. However, the existence of the CLA licence meant that many felt their role was primarily licence compliance rather than determining whether section 32 might apply. One interviewee mentioned the inherent complication of working with high value subscription resources such as the Harvard Business Review. Newspapers were also mentioned as a problem area where it was unclear if reproducing single articles would be regarded as fair.

Images were one of the most often mentioned types of work where “the use of license versus legislation was always a bit muddied” (I8). This was largely because in most cases the entire image would need to be reproduced in order for it to have any instructional value. Images mentioned ranged from photographs and diagrams in textbooks to illustrations, maps, advertisements and company logos. A number of interviewees thought whole images could be used under section 32, although some felt that use of lower resolution images was more likely to be fair.

The use of musical scores for examination purposes is discussed on page 29, but interviewees also commented on the ‘hard line’ taken by music publishers over general educational use.

Musical sound recordings presented a challenge when it came to determining the quantity that might be regarded as fair. Would a long-playing album be regarded as the entire work, or would a single track (i.e. a song or a movement) be the work? Music was also mentioned in the context of playing it for the purposes of setting a mood in class and one interviewee believed this fell foul of the sole purpose provision in section 32.

A number of people mentioned film in the context of section 32. However, this was complicated by the fact that section 34 allowed playing of films and section 36 allowed making excerpts available in an educational context. Some noted that lecture recording technology made it possible to capture an entire film and that this could be a problem. Others discussed the practice of making of clips from commercial DVDs, and concerns over whether exceptions would apply. Defining the line between instructional and recreational showing of films (e.g. film clubs) was challenging but felt to be necessary on the basis that the latter would not be illustration for instruction.

Some mentioned the recorded demonstration of websites and the need to ensure that the recording didn't feature too much of the content on them.

However, despite the different considerations associated with each type of work, one interviewee pointed out that the exception was "more contingent on the nature of the act than the material being used." (I6)

Acknowledgement

Many interviewees mentioned the requirement for correct attribution and the challenges in getting staff to do this, particularly when creating PowerPoint slides. There was also no clear consensus as to what the 'reasons of practicability' which made attribution impossible might be. However, many interviewees described attribution as being a key area of focus for both compliance and support activities since the reform of section 32.

3.1.2 Fair Dealing Factors

Interviewees also discussed their approach to determining fair dealing with many describing it as challenging, using words such as "murky" and "nebulous" (I6). Although no interviewees made reference to all seven of Bently and Sherman's fair dealing factors, one interviewee provided the following summary of what they felt was fair in the context of illustration for instruction:

> "…it's making the point that if you're using it for a genuine pedagogic purpose within a teaching setting, then don't use too much, make sure it's genuine, make sure it's cited…Make sure you're not…preventing a sale." (I4)

However, there were two factors that featured most in the interviews: quantity used and substitution of sales.

Quantity used

When considering whether certain uses might be fair, many interviewees discussed the quantity of the work used as the primary consideration. The majority view was that fair dealing uses would generally cover only limited extracts of works. However, the question of whether images could be used presented a considerable challenge which required consideration on a case by case basis according to the type of material and the nature of the teaching.

One interviewee referenced the inconsistencies in the Government's guidance over use of images in teaching, which suggested it could be fair to use entire images whilst also stating the opposite. For some, the fact that an entire work was being used did not necessarily rule out the possibility that fair dealing might apply, but caution was required.

Substitution of sales

Despite the relevance of substitution of sales to fair dealing, few interviewees mentioned this factor in detail. It was largely discussed in relation to musical scores and image gallery licensing, although a number of interviewees made reference to the importance of "not undermining somebody's business model". (I3)

A related factor was the existence of available licences which made some interviewees cautious about applying fair dealing, despite the contract override provisions. For one interviewee the existence of an available contract acted as a "warning sign" (I9) to think more about fairness.

3.1.3 Other factors

A number of other factors arose which impacted on interviewees' interpretation of whether any given use would be allowed under section 32.

Making available at a time/place of the student's choosing,

Whether content could be made available to students 'on demand' was a key consideration. The most relevant example of this was making slides or recordings of lectures available through the VLE, either before or after a lesson.

This issue was described by one interviewee as "the big one that we still haven't ironed out" (I1), and another interviewee believed that making images available on the VLE on an ongoing basis would not be acceptable, quoting advice received from the CLA.

However, most interviewees thought it was acceptable to make content available within a password-protected environment. For some this interpretation also extended to recording of lectures, not just PowerPoint slides because it was "still pursuing the same educational function." (I6)

Some interviewees believed section 32 could apply to ‘pure’ distance learning provision where the material would only be made available online.

However, despite this general consensus that making material available at students’ convenience could be covered by section 32, few had a clear written policy on it.

Online communication to the public,

There was general concern about making content available on the open web under section 32. This was mostly related to the possibility that people beyond the student cohort might get access to the content.

Many interviewees felt that making digital material available must be done within a password-protected environment for it to be fair under section 32. However, one interviewee pointed out that the law didn’t actually prohibit making material available on the open web. This interviewee believed that although use of section 32 needn’t be limited to closed networks only, making digital material available more widely would increase the risk of legal action.

Interviewees also mentioned the use of open access repositories where students might submit coursework and assessed research outputs such as theses containing third party copyright. Most interviewees felt that section 32 would not apply to such uses, with the provisions of section 30 being more appropriate.

Relationship with other exceptions,

The relationship between section 32 and other exceptions was a common theme within the interviews.

Some interviewees were confused by the provisions of section 34 and the distinction and overlaps with those of section 32.

The existence of sections 35 and 36, along with the associated collective licences, also caused confusion as to whether more than one provision might apply to any given educational activity. Some interviewees questioned whether the percentage copying limits of section 36 might influence fair dealing limits under section 32. One interviewee believed that 5% became a *de facto* ceiling limit over which copying of published works would automatically become unfair.

Many interviewees mentioned section 30 as an important provision when the limits of relying on section 32 had been reached, particularly in relation to material made available online. However, one interviewee felt that the term "quotation" limited its application to literary works in a way that section 32 did not.

One interviewee mentioned discussing use of an image in a humorous teaching context, agreeing it could be seen as a hybrid type of parodic educational use (see p.27) although stopped short of saying that section 30A would apply. The same interviewee also provided summary of their approach to considering multiple exceptions:

> "I see the exceptions as kind of a layering approach. So, yes we're covered by [section 32] for our teaching activity but that teaching activity is invariably criticism and review so we'd be covered by that exception as well. We'd be covered by the quotation exception too potentially. So we'd have three defences, arguably." (I4)

But this view was counterbalanced by a concern from one interviewee who was unsure whether it was possible to rely on more than one exception at the same time, asking "does one exception trump another one?" (I6)

Interpretation as a feeling

Some interviewees described using instinct based on experience when offering advice, with one saying:

> "copyright is a feeling…I don't have a set of criteria in my own head where I go 'ok this meets five conditions that's fine. This one only meets four so I'm going to say no'." (I2)

There was however a relationship between the instinctual assessment of a copyright question and a more formal deliberation where some interviewees described escalating issues to a solicitor if necessary.

One interviewee described the 'instinctual' approach as helpful when assessing use of new technologies. Another felt non-specialists were also able to rely on it.

Interpretation as a negotiation

Another dimension of the application of section 32 was the resolution of differences of opinion with colleagues over interpretation. In this situation interviewees described being asked to take a more permissive approach, and in some cases endorse a particular course of action.

Confidence in interpretation

Many interviewees were not confident that their analysis of what section 32 might cover was correct. Some felt that they are being too "strict", but this was impacted by the perception of their own status and autonomy within their organisation. Some felt they wanted more guidance, either externally provided or through an institutional policy that had been endorsed by senior managers. One even went as far as to say they were "struggling" with some aspects of understanding their role as it related to interpretation. Others felt a personal responsibility to determine this.

See pages 38-40 for issues associated with copyright specialists, their self-perception and status within the institution.

Rules versus standards.

Interviewees did not directly reference the concept of rules versus standards, but they did mention the difference between the clarity of some educational licences and exceptions, and the flexibility within section 32 which made interpretation harder.

A number of interviewees who didn't have an institutional copyright policy felt that interpretation would be easier if they did have one. One interviewee who favoured introduction and use of a policy described a distinction between "people making their own decision" and "following a policy" (I1).

One interviewee mentioned the tendency for rightsholder groups to apply rules rather than standards in codes of fair practice, but pointed out that those in educational institutions would not necessarily be bound by arbitrary limits not set out in law. Another interviewee reflected on the benefits and drawbacks of rules-based guidance, stating that having "definite limits and uses" provided by the Government might be useful, but could be a "double-edged sword" (I3). The concern expressed was that legitimate uses might be considered unfair according to "clear-cut guidelines".

Most interviewees who mentioned this aspect of interpretation described section 32 in terms that suggested they believed it to be a standard rather than a rule. However, many felt somewhat ambivalent about whether this situation was helpful or could be improved by either institutional policy or changes to the legislation.

3.2 Practice

This theme describes the activities, policies, processes and cultures that influence and impact on the way section 32 is used in UK universities.

Organisation structure and copyright responsibility

All the interviewees were employed within the institution's library. The position of the library within the institutions' organisational structure varied, with some standing alone, some converged with IT services and others being part of a network of different libraries within the institution.

The library's responsibility for copyright issues was described by more than one interviewee as something they had taken on by default, often linked to their responsibility for managing the obligations of the CLA licence on behalf of the institution. This was contrasted the lack of responsibility for, or influence over content and guidance on the VLE.

Exploitation of intellectual property created by academics is an area typically associated with the research activities of an institution. Responsibility for this was held by innovation and/or enterprise teams who were separate from the library.

Other teams that had overlapping or related responsibilities included in-house legal counsel and governance teams, although these teams rarely dealt with the detail of copyright issues.

Despite the fact that responsibility for different aspects of copyright was dispersed throughout the institution, the interviewees generally acted as 'connectors' who would help route questions and provide context to support decision making.

Within the sample, professional services departments took the lead on managing copyright issues rather than academic schools.

Professional identity of specialist

In discussing the way that that institutions managed copyright, many interviewees reflected on their own professional identities and the way these had developed over time.

Some interviewees reported having copyright as a clearly defined aspect of their role, whereas others described it as an ‘add-on’, or even something entirely missing from their job description. This had an impact on the level of support they could provide.

A number of interviewees described the steep learning curve they had encountered when taking on responsibility for copyright, with one describing it as “frustrating” and difficult to determine what was and wasn’t permissible (I5).

Most of the interviewees were qualified librarians, although some had legal qualifications or a grounding in other fields such as finance. The interviewees reported a range of levels of expertise, from those who had held a copyright-related role for many years to those who had taken it on more recently. Some of those with library qualifications did not believe copyright law had been sufficiently addressed in their studies.

Interviewees reflected on the difference between their qualifications and being a qualified lawyer, with one describing their level of knowledge as “Mickey Mouse” when compared to in-house legal counsel (I4).

An important aspect of the specialist’s identity was the level of seniority they held within the institution, which varied amongst the interview sample. Those in more senior positions felt more confident in setting institutional positions and taking risks, whereas those in more junior positions felt they took a more cautious approach. In some institutions the specialists had taken on the role of convening or chairing cross-institutional groups that would consider copyright issues. Although they were in the minority, these interviewees were positive about the group’s ability to develop positions and influence behaviour.

More than one interviewee reflected on the philosophy of the role and the need to create an approach which fused librarianship with aspects of legal and regulatory compliance more commonly associated with legal and information governance teams. This didn’t involve

providing formal, legal advice but couched guidance provided in terms which avoided either endorsement or censuring of behaviour.

One interviewee associated the challenges of providing information and advice on copyright with a wider perception of library services being vital yet largely underfunded. However, another interviewee whose background was not in librarianship suggested that many librarians had a "risk averse" mind-set which limited their "innate [ability to] debate things" and "weigh up risks" compared to those with a legal background (I3).

Institutional culture

Interviewees also discussed aspects of the institutional culture as relevant to the way that section 32 was perceived and acted upon.

One interviewee described their institution's approach as being very traditional in outlook, which they believed to be somewhat at odds with practice. Although their institution had recently released a strategy to embrace educational technology, the lack of formal engagement had prevented them from considering copyright issues with non-print media. Interviewees from arts-based institutions also reported not having fully embraced educational technology.

The academic community were described by most interviewees as being generally unaware of copyright issues, and not motivated to think about then in any depth. As a result, there was a sense that many academics thought they could do anything they wanted for teaching purposes under copyright law.

Interviewees thought this increased the likelihood of copyright infringement which was compounded when academics uploaded material directly to the VLE themselves. Interviewees also reported that many established academics were not prepared to change their behaviour.

However, a subset of the academic community who had engaged with specialists were described as at first being cautious, but then more confident in using the provisions within the law once they had become more familiar with them.

The different organisational units with an interest in copyright were reported as having different perspectives and priorities which influenced their approach. Some leadership teams within institutions were described as not taking copyright seriously, even after having been audited. Legal teams were in some cases described as risk-averse, and one interviewee mentioned the role university lawyers play in decision making and the tensions this could cause with academic freedom. Marketing teams were described as being unaware that using other people's copyright work could be an infringement. Some interviewees mentioned tensions within the library over copyright-related decision making and organisational reporting lines.

Despite these tensions interviewees provided examples of constructive relationships between communities. For example, legal and central governance teams were able to liaise and collaborate with copyright specialists on policy and responses to specific enquiries. This was easier in institutions where cross-institutional copyright groups had been established. Similarly, interviewees reported constructive collaboration with e-learning teams who had responsibility for the VLE, and innovation/enterprise teams with responsibility for exploitation of intellectual property.

Interactions between the interviewees and rightsholders over the application of illustration for instruction were discussed largely as hypothetical disputes. The absence of case law or similar legal action meant specialists had to imagine potential conflict when discussing risk with colleagues in the rest of the institution.

Developing positions

Interviewees were asked whether they had formal policies covering use of third-party copyright and interpretation of section 32. Most institutions did not have a formal copyright policy, although all had an intellectual property policy which clarified ownership and exploitation of copyright works. The institutions that had developed a copyright policy did so by creating a cross-institutional group to clarify and rationalise high level positions and inform associated guidance.

Where there was no formal policy, interviewees were unclear as to what their institution's position was on certain issues. They also worried whether the guidance they provided was appropriate given that there was no group formally considering it. The lack of documentation on formal positions also led to disparate and potentially conflicting information about copyright being made available on different institutional platforms.

Even though few institutions had copyright policies, the importance of copyright had in some cases led to spontaneous, grass-roots development of positions without formal support. This involved localised, rather than official, interpretations of illustration for instruction which were regarded as 'guidance' rather than 'policy'.

However, even in cases where guidance was agreed through a more formal sign-off process, responsibility for updating them would often fall back to the specialist with no expectation that ratification from another decision-making body was possible or necessary. This was often because other colleagues lacked the relevant expertise. Specialists therefore found it extremely valuable to liaise with peers in other institutions to ensure their interpretation was in line with sector-wide consensus.

More than one interviewee drew attention to the perceived gap between policy and practice, with many referencing low academic awareness of copyright or possible deliberate

avoidance. One interviewee had addressed this by involving academics in the process of forming positions so they could "take control of their own compliance" (I8).

Use of external sources of authority

Interviewees described using a range of sources of authority to inform the guidance they provided on copyright, including books, websites, legislation, case law and email discussion lists.

Although some interviewees did refer to books and journals, most did not do so regularly. The most commonly accessed information was the legislation itself, Government guidance, information from Jisc Legal (now archived), the copyrightuser.org website and the closed JiscMail discussion list LIS-Copyseek.[74] LIS-Copyseek was described unanimously as an essential resource that allowed creation of 'common-sense' views and acted as a 'temperature gauge' given the uncertainties involved in assessing the use of educational exceptions.

Community discussion was particularly important given that existing case law was not determinative on how to interpret illustration for instruction. More than one interviewee felt that community-created case studies or documentation demonstrating the "epitome of good practice" (I2) would help further. However, one interviewee doubted whether such an undertaking was necessary or feasible given the amount of available information and the need for institutional autonomy.

Communication, visibility and compliance

There was considerable discussion of the difficulty in communicating messages about copyright. Copyright was described as being inherently complex, with issues such as whether any given use was commercial making engagement with academic staff difficult. As previously discussed, perceptions of academic awareness of copyright were low and it was

[74] <https://www.jiscmail.ac.uk/lists/LIS-COPYSEEK.html> accessed 20 December 2018

difficult to get staff and students to attend training courses. Although there was a great deal of written copyright guidance, usually created by the copyright specialist, many felt these were rarely consulted. Some had therefore created videos or interactive e-learning modules in order to make them more engaging.

Many described the process of responding to copyright enquiries and the balance required between endorsing or censuring activity. Dialogue with individuals gave interviewees the opportunity to provide more nuanced contextual information about how to approach copyright-related risk. At times it also involved investigating suspected infringement and discussing potential consequences with colleagues. However, most admitted that the number of colleagues with whom they engaged constituted a small proportion of the entire academic community. Interviewees therefore had a limited understanding of the practices actually taking place within the institution.

Ensuring institutional compliance with copyright law was a component of many of the interviewees' job descriptions. Some felt that the education and advice they provided on illustration for instruction had little impact on those actually teaching. However the interviewee who had taken a proactive approach of visiting academic schools had experienced positive changes.

In many cases institutions had adopted 'compliance practices' which teaching staff were expected to follow. Examples included pausing lecture recordings when copyright protected films were being shown, or using only public domain or Creative Commons licensed material. The alternative approach to this was to embed 'compliance services' such as reading list systems with links to licensed content as well as digitisation and direct permissions services. The balance between the use of compliance practices and services was impacted by available resource and the consideration of institutional risk and academic autonomy. The

lack of appropriate compliance services such as fully functional VLEs made it more likely that academics would use third-party online platforms where the risk of infringement was higher.

Change in behaviour since Hargreaves

The consensus was that whilst the introduction of illustration for instruction was a positive development, this was largely because it legitimised existing behaviour. In some cases, it allowed academic staff to take a less cautious approach and it had also enabled specialists to deliver a more positive and empowering message about copyright to all staff and students. In the words of one interviewee copyright had become "less of a bogeyman" (I8).

Emerging practices

Interviewees also mentioned a range of emerging practices which section 32 might relate to. These included introduction of new VLEs and reading list systems. Some described lecture recording as being "business as usual", although some smaller institutions still hadn't implemented it. Other institutions discussed the expansion into blended and distance learning as well as increased community outreach and engagement. The development of overseas campuses was also a potential issue.

Finally, some described the latest digital accessibility technologies which enabled content to be manipulated according to individual student needs, stating that these would require a fresh consideration of the scope of section 32.

3.3 Responsibility

Interviewees discussed the implications of interpretation and practice in relation to decision making and the perception of risk and responsibility within the institution.

Risk: assessment and appetite

A number of interviewees described risk as a fundamental component of making decisions relating to illustration for instruction, with one saying "there is no right or wrong answer when it comes to copyright, most of it is about risk" (I6). Risk assessment took two main forms:

Firstly, it related to development of overarching policies and procedures which was challenging when specialists were not supported by policies or decision-making bodies (see p.42).

The second type of risk assessment involved case-by-case analyses of situations where policies and procedures had to be interpreted or, in the absence of these formal documents, assessments made based on the specialist's experience. Again the level of support for this varied. One interviewee described the need for pragmatic interpretations rather than those "strictly about interpretation of the law" (I2). These assessments would involve consideration of the most litigious types of rightsholder, reputational implications and the existence of available licences. One interviewee pointed out that such assessments would always be subjective.

Interviewees were clear that their analysis of risk was not formal legal advice and should not be seen as such. Nor was the guidance they provided framed as a 'copyright risk assessment service'. Many interviewees described the importance of dialogue and negotiation with academics over the correct interpretation and assessment of risk (see p.36). There was no set formula for determining risk, rather this was largely an instinctual response based on experience.

Interviewees also mentioned the overall institutional appetite for risk which was perceived as differing between institutions. This ranged from those who felt their institution was overly

cautious to those who had worked on moving to a more ‘relaxed’ yet assertive position. In some cases, interviewees reported that rather than taking a conscious decision around copyright risk, their institutions’ management simply didn’t care.

Even the interviewees who felt they had moved to a more assertive position still felt their institution was conservative compared to other organisations, with one drawing a comparison between a university and a commercial broadcaster.

Some considered the extent to which the institution’s appetite for risk was a reflection of the copyright specialist’s views and the level to which they were supported by the institution.

Decision making

Interviewees had limited oversight of all the activities taking place within the institution in which section 32 might play a part (see p.44). They were therefore not involved with the majority of decisions that staff and students would make.

Where decisions were made relating to policies and procedures the specialists were more likely to be involved, although the organisational structure and complexity of the institution made it hard to keep track of everything that was decided and ensure a consistent approach. As previously discussed, legal and governance teams might get involved in making these decisions, although this was only when a particularly sensitive issue had arisen.

When it came to the volume of day-to-day decisions about whether teachers could rely on section 32 there was considerable uncertainty over who was responsible. Specialists felt that they had been given responsibility for interpreting copyright law, but also felt that individuals undertaking the acts in question had to take some responsibility as well. They also referenced that ultimately the governance team, senior management team or Vice Chancellor was responsible for the way section 32 was being used. This highlighted a potential confusion within the organisation between the concepts of accountability and responsibility.

The expectation that academic staff should be responsible for their own decisions led interviewees to consider whether academics had sufficient understanding of the law. The approach taken by most interviewees was to provide just enough guidance to allow colleagues to take their own decisions, without endorsing any particular course of action. They often used the concept of risk assessment when doing this. However, some still perceived their role as an enforcement one, which included checking VLEs for copyright infringement and contacting module convenors to address issues.

At the heart of the decision making theme was the level of individual versus collective responsibility for making decisions. Specialists felt that the existence of formal institutional policies did, or would, help drive decision making by allowing application of consistent principles. The issue as described by many interviewees was that because interpretation of copyright law was no single person's job, there was a high likelihood of inconsistent decision making. At a sector-wide level the existence of communities of practice and in particular the LIS-Copyseek community provided 'safety in numbers' which helped guide those with responsibility for copyright within institutions. However, as one interviewee pointed out institutions tend not to share details of legal action against them for reputational, commercial and legal reasons. This leads to a lack of evidence regarding the implications of decisions made.

Consequences and liability

The consequences of infringement in the context of teaching use were not widely discussed by the interviewees. Those who did discuss it felt that the consequences of copyright infringement were seen by management teams as a lower priority than other legal issues.

Institutions that made reference to the penalties for infringement, including internal disciplinary proceedings, tended to provide deliberately vague information. Some

interviewees expressed frustration that there appeared to be few consequences associated with infringing copyright when creating teaching materials. The most commonly encountered copyright infringement issue was when photographs had been used on the institutional website and the photographer had discovered them using a reverse-image search.

Interviewees also reported that liability for infringement was not clearly expressed within their institutions and it remained another of the "grey areas" associated with copyright. Most felt that liability for copyright should sit with the person who was doing the copying, and described "situat[ing] the liability" (I2) when providing advice. One interviewee worried about whether they themselves could be liable if they gave incorrect advice, which led them to be more cautious.

Some worried about whether the institution or the individual might be liable for downstream infringement by another party if they made material available in digital form. However, one interviewee was clear that university staff would not be liable in this case.

Another interviewee admitted that despite the wording of their copyright policy and advice, in most cases the responsibility for responding to legal action would sit at the university level rather than involving action against an individual.

3.4 Summary

The interview findings indicate a number of areas, centred on the themes of 'interpretation', 'practice' and 'responsibility', where institutions are facing common challenges and have to a certain extent found consensus positions. However, they also highlight a number of currently unanswered questions, the implications of which are considered in Chapter IV.

4. Chapter IV - Discussion

The research question identified at the outset of the study was:

> **"How have UK universities interpreted section 32 of the CDPA and how does this align with the scope of the exception?"**

The findings from this study suggest that interpretation is not consistently aligned across the sector. This chapter discusses the reasons why this is the case, what the implications are and what might be done to remedy this situation.

4.1 Issues with the legislative drafting

Arguably, one of the reasons that UK universities haven't consistently aligned their interpretation of section 32 stems from the legislative wording of the provision and whether it achieved the Government's policy aims. The term 'illustration for instruction' suggests an old-fashioned style of teaching, and interviewees reported uncertainty when applying it to more innovative, technology-driven teaching practices. They were to a certain extent influenced by the 'spirit' of the law, and the archaic nature of the title of the exception appears to have influenced their interpretation.

The inclusion of the 'sole purpose' restriction has also been interpreted by institutional copyright specialists to mean that 'fun' or 'humorous' uses of copyright material are not permitted. This suggests a limitation in the use of copyright material to situations where students are neither amused nor entertained by the learning experience. In addition, the 'sole purpose' wording has created confusion because of the existence of other exceptions that might apply to educational uses, making it harder to be sure when section 32 might apply.

The removal of provisions for commercial teaching was seen as necessary in order to remove the reprographic copying restriction and comply with InfoSoc (see p.12). However,

interviewees reported difficulty in determining the difference between commercial and non-commercial practices and often took a cautious approach. The existence of the fair dealing test was arguably sufficient to guard against unfair commercial uses without adding the additional interpretive complexity of the non-commercial restriction. This is particularly important given the changes to funding mechanisms within UK higher education.

But perhaps most challenging is the introduction of fair dealing in section 32 within the broader exception-backed UK educational licensing regime. In order to discuss the implications of this it is necessary to look beyond the drafting of section 32 itself to other sources of legal authority. It is also relevant to consider this in the context of the rules versus standards literature.

4.2 Sources of authority: rules versus standards

Rules versus standards considers the optimal specificity of law making. A rule-based law will more precisely determine whether an activity is lawful or not, whereas a standards-based law will be more flexible and open to interpretation. Kaplow identified that rules require greater investment in law making prior to promulgation of the law (*ex ante*), whereas standards incur greater costs afterwards (*ex post*).[75] If the law is likely to be applied frequently and the activities are homogenous then it is more appropriate to have a rule. Where an action is likely to arise rarely, or where activities are heterogeneous in nature it makes more sense to apply a standard. However, rules and standards are not in themselves mutually exclusive. Problems with over-inclusion (too many activities being prohibited by the law) and under-inclusion (too few) can be mitigated by coupling and balancing rules and standards during the law making process, according to the needs of any given domain of activity.

[75] Kaplow (n 1)

Fair dealing is by its very nature a standard rather than a rule. It allows judicial discretion according to the facts of the case, set against criteria determined from previous cases. However, UK educational exceptions prior to the introduction of illustration for instruction were almost entirely rules-based. The Government's challenge was therefore to provide greater flexibility for educators without undermining the existing rules-based regime.

Despite the Government's claim to have found a solution, the interview findings demonstrate that copyright law as it relates to educational activity is now highly complex and the *ex ante* interpretation required is costly. The Government's two key illustrative examples repeated frequently throughout the consultation process were use of limited extracts on an interactive whiteboard (permitted) and multiple reprographic use (not permitted). However, these examples omit consideration of the most fundamental aspect of contemporary teaching: the wide scale use of VLEs and other online platforms to deliver educational materials at a time and place of the students' choosing. Such uses involve making multiple copies of copyright material available to students, so a strict reading of the scope of section 32 based on the Government's example would prohibit use of the exception to defend use of content on a VLE. The consensus amongst interviewees was that this was reasonable and fair, at least in a practical if not strictly legal sense.

The discrepancy between a strict reading of the Government's intentions and the wider interpretation by some university copyright specialists leads to consideration of fair dealing as defined by case law. Because there are no judgements considering illustration for instruction directly, it is necessary to consider fair dealing as it relates to other purposes and consider how it might apply to education. It is clear from the interview data that consideration of whether any given dealing is fair requires a more detailed analysis than the *travaux* or Government guidance provides for. This can be seen by looking at just two of the fair dealing factors discussed by the specialists interviewed: quantity and substitution of sales.

Determining a reasonable quantity that may be copied requires consideration of a number of conflicting comparators and proxies. The rules-based provision in section 36 places an annual 5% limit on the proportion of a work that may be copied. This has clearly influenced both specialists' and the Government's interpretation of what might be fair under section 32. However, interviewees also gave examples, most notably use of images, where use of an entire copyright could be regarded as fair. The case law bears this analysis out, and even the Government makes reference to this when saying that showing a Picasso painting to class of students would be regarded as fair.[76]

The amount of a work that might be copied therefore ranges from around 5% to 100%, and the interviews suggest that such tests are not applied consistently across the sector.

The question of whether any given use was unfair on the basis that it would substitute for sales is similarly complicated by the complexity of the markets for educational goods. The Government was confident that introduction of illustration for instruction would have no impact on blanket reprographic copying licences. In its Impact Assessment on Extending Copyright Exceptions for Educational Use[77] it stated that "a fair dealing exception will be much narrower than the Section 36 reprographic copying exception."[78]

However, this statement may be challenged. Why should a fair dealing exception for teaching always be narrower than the provisions of section 36 and in what way? As previously discussed with regard to quantity, section 32 has been interpreted as allowing more than 5% per year, per work. Making assertions about the relationship between the two exceptions and the functioning of educational markets is complicated by the multiplicity of different

[76] Intellectual Property Office (n 35) 40
[77] (FINAL), IA No: BIS0312 (2012)
[78] ibid 11

licensing and business models in UK universities. The Impact Assessment identified some likely activities that would fall under fair dealing:

> "Uses which might be considered to fall within the exception could include one-off and ephemeral uses, such as the use of an extract in a presentation, as they have a low risk of substituting for sales of works. But mass photocopying of textbooks, for example, is unlikely to fall under the exception as this could substitute for sales of those books."[79]

The reason the Government focused on examples such as textbooks would appear to be the result of the available evidence at the time of the review. The modelling of economic benefits to the education sector and potential harm to rightsholders was based primarily on information gathered relating to clearance of extracts from published literary works. The lack of evidence relating to licensing of non-literary works such as musical and artistic works, as well as sound recordings and film, meant the Government had to make broad assumptions to assess the impact on those markets.[80] The lack of evidence provided suggests that use of copyright material in educational institutions outside of the main collective licensing arrangements is poorly understood.

It could be argued that the Government introduced a standard (fair dealing) into the suite of predominantly rules-based educational exceptions, whilst assuring stakeholders that it would operate like a rule. This can be seen in their assertion that illustration for instruction could not involve making material available to the general public.[81] However, as discussed in this study, whether something is made available to the public is not one of the fair dealing factors considered by the courts. In fact, most fair dealing cases arise as a direct consequence of

[79] ibid
[80] ibid 12
[81] ibid 11

copyright works being made publicly available. Specialists interviewed felt that making material available on the open web was less likely to be fair, although there was no consensus that it definitely couldn't be. Ultimately, only the courts could decide this, but in the absence of case law confusion remains.

Another consideration when it comes to sources of legal authority is that illustration for instruction is just one of a range of fair dealing purposes which could be applied to teaching activities. The most notable of these are the quotation provisions of section 30 which were interpreted by many of the interviewees as covering teaching.[82] Arguably all uses of copyright works for the purpose of 'illustration for instruction' involve quotation, so could be covered by section 30 (including commercial uses). The only limitation on using section 30, as compared with section 32 is that no use can be made of a work that has not yet been made available to the public.

The research indicates that the introduction of illustration for instruction to the CDPA in 2014 has not provided optimal specificity of the law when viewed alongside other provisions. Arguably this stems from the manner in which the Hargreaves review was conducted and implemented, through secondary rather than primary legislation and according to an ambitious time frame.[83] For those in education, it has led to a confusing thicket of related provisions which require in depth and costly *ex post* analysis.

One final aspect of the rules versus standards literature are the information costs associated with promulgating a new law. The Government's economic analysis assumed there would be no costs to institutions in taking advantage of new laws, merely reduced costs in having to

[82] This was despite potential issues surrounding the 'sole purpose' wording in section 32 limiting such interpretations.
[83] Richard Arnold, *The need for a new Copyright Act: a case study in law reform* (2014) 5(2) QMJIP 110

clear copyright in works. However, the findings of this study suggest that tensions within the academic community and the inherent difficulty in communicating copyright lead to significant costs.

4.3 Tensions within academia

The findings from the interviews reveal a set of tensions regarding interpretation and application of copyright law within HE. Policy positions are rarely developed with input from a wide range of stakeholders, and it usually falls to relatively junior employees who struggle to get copyright added to the institutional agenda. As a result it is often unclear to university employees who is responsible or accountable for copyright decisions, or whether the staff or the institution would be liable for any copyright infringement.

Students find it difficult to navigate whether their use of copyright material for teaching purposes is infringing, if indeed they are aware of copyright concerns at all.

Academic awareness of copyright is low and there are many other issues competing for lecturers' time and attention. These are often associated with a culture of assessment and measurement of academic activity. Compliance with copyright law is rarely viewed as important when compared with other aspects of university life which lead to improved research or teaching excellence awards. In addition to this, universities are significant creators of valuable intellectual property as the result of research activity. The agendas of open practice, which promotes open sharing of academic outputs, and exploitation of university-created intellectual property are also to a certain extent in tension. The debate over who owns what and what they should be allowed or obligated to do with it continues to rage, which makes copyright a difficult topic to broach.

In summary, universities are complex organisations where tacit, cultural rules are at least as influential as formal strategies, policies and procedures which reflect the wider regulatory

framework. When it comes to the use of copyright works in teaching, some disciplines may be more affected by copyright issues than others due to the types of work used and the subject-specific traditions of teaching.

4.4 Communicating copyright messages and the role of the specialist

This study highlights that universities have employed copyright specialists who are responsible (if not accountable) for interpreting illustration for instruction, in addition to other aspects of copyright law. In some cases, the specialist has been able to successfully transition the institution from a position of restrictive and cautious guidance, to one that makes greater use of the provisions within the law. However, copyright specialists in many institutions – typically smaller institutions or those with less funding – have neither the seniority, nor the available time to influence the institution's position. These employees tend to focus on the 'compliance' aspect of their brief which is rarely welcomed by academic colleagues.

Copyright is difficult to communicate within an institutional environment. It is a technical field of law that has uncertainty and "greyness" at its heart. Given the demands on academics' and students' time and energy, there is an understandable desire for the message to be reduced down to a simple set of rules which helps them avoid copyright infringement. The danger of following such an approach to its logical conclusion is that it will result in taking arbitrary positions over what activity is lawful, usually in a way that restricts the social benefit provided by educational exceptions.[84]

However, the copyright specialists in UK universities are part of a supportive community who have been able to work together, particularly through the discussion list LIS-Copyseek, to challenge this approach. As a result, the community has been able to raise questions in a

[84] Di Valentino (n 8); Crews (n 10)

safe space which has allowed for a ‘safety in numbers’ approach. These collaborative efforts have allowed some institutions to take greater advantage of section 32 than they would have without such dialogue.

4.5 Locating latent flexibility within the law

Even though the collaborative approach to date has supported institutions’ interpretation of illustration for instruction, this study suggests more could be done within the HE community.

Despite facing the same challenges, it would appear that only some institutions have been able to successfully locate and take advantage of the latent flexibility within the law as it stands. These institutions have been able to work collaboratively across communities both inside and outside the organisation. Other institutions find themselves struggling to find time to develop similar positions, or even get it considered a priority by management teams. But even those who have reported success believe there is more that could be done to guide decision making.

Most interviewees believed that further legislative changes were unlikely, and that requesting Government advice on interpretation of the law as it stands would be problematic. The analysis of existing Government guidance suggests that further guidance may not reflect the reality of teaching, or could run counter to existing interpretations within the sector. It is also important to clarify that such guidance may be norm-setting, but would not be legally binding.

Perhaps a more fruitful avenue of investigation for the UK HE sector would be to follow the example of the codes of fair practice developed in the United States.[85] This involves the creation of community consensus through successive rounds of discussion and deliberation

[85] Aufderheide and Jaszi (n 11)

with input from lawyers and practitioners in specific fields. Although these codes considered fair use, which is a ‘pure’ standards-based regime, this study suggests there is sufficient flexibility within existing fair dealing provisions to allow for the success of an equivalent undertaking.

5. Chapter V – Conclusion

This study has considered the history and policy considerations behind the introduction of illustration for instruction to section 32 of the CDPA in 2014. It has determined the potential scope of the exception, identifying the aspects which are clear and those which are arguable. It has then compared the potential scope of the exception against the experiences of a purposeful sample of copyright specialists in UK universities and considered the extent to which their interpretations align with the law.

Although interviewees regard the introduction of illustration for instruction as a positive development, there are significant challenges arising from the way it was formulated and promulgated, leading to logical inconsistencies. This is exacerbated by the tensions inherent within HE institutions with regard to funding, organisational hierarchies, measurement of success and academic freedom. Only those universities with experienced staff or the available resource to pool collective expertise are confident in their ability to make best use of section 32.

Government guidance on interpretation of section 32 is sometimes vague and inconsistent, and specialists in HE make extensive use of community support to reach consensus positions. Although UK universities are autonomous organisations with responsibility for their own decision-making, the sector largely faces the same challenges in determining what is ‘fair’ or ‘reasonable’ when using third party copyright in teaching. Experience from the US suggests that the UK HE sector could create ‘codes of fair practice’ that would help codify norms for copying in an educational context. These would support interpretation of fair dealing as a standard, rather than an arbitrary rule, and would support the Government’s intention of providing UK educators with greater flexibility to teach using digital technology.

It is recommended that further work is done to assess the feasibility of such an undertaking.

Appendix A – Interview Sample

Six categories of institution for the interview sample were derived from information on Wikipedia.[86] Copyright specialists from two institutions in each category were approached (12 in total). All agreed to take part, apart from those at the independent institutions. All ten interviews were conducted on an anonymous basis, and the following table shows the codes used to differentiate quotations in the dissertation:

Category of Institution	**Interviewee codes**	
Ancient	I1	I8
Civic (or red brick)	I4	I5
Plate glass (institutions created in the 1960s)	I2	I9
Post-1992 (former polytechnics)	I3	I6
Arts-based	I7	I10
Independent (private)	Not represented	Not represented

[86] 'Universities in the United Kingdom' <https://en.wikipedia.org/wiki/Universities_in_the_United_Kingdom> accessed 10 November

Appendix B – Coding Frame

Interpretation – how interviewees interpret the provisions of the legislation.	**Practice** – the activities, organisational structure and culture of the institutions.	**Responsibility** – risk, liability and decision making.

• Spirit and scope
  ○ Location of activities
  ○ Registration/assessment vs outreach
  ○ Teaching vs background reading
  ○ The law's accommodation of technology
• Sole purpose
• Non-commercial purpose
• Examination use
• Student work
  ○ Performances
  ○ Portfolios
  ○ Dissertations & coursework
• Type of work used
• Acknowledgement
• Fair dealing factors
  ○ Quantity
  ○ Substitution of sales
  ○ Contractual provisions
  ○ Other factors
• Making available at a time and place chosen by the student
• Online communication to the public
• Relationship with other exceptions
• Relationship with international / foreign copyright laws
• Interpretation as a 'feeling'
• Interpretation as a 'negotiation'
• Confidence
• Rules versus standards
	• Organisational structure / location of expertise.
	• Professional identity of the copyright specialist
	• Institution's approach to pedagogy and technology
	• Communities with different views:
	  ○ Academics
	  ○ Copyright specialists
	  ○ Library staff
	  ○ Learning technologists
	  ○ Enterprise, Innovation and Commercialisation of IP units
	  ○ Leadership teams
	  ○ Lawyers and corporate governance
	  ○ Rights holders
	• Relationships between and within communities
	• Developing positions on managing copyright
	  ○ Formal/Informal
	  ○ Institution/sector wide
	• Use of external sources of authority
	• Communication of copyright advice
	• Visibility of permitted/restricted acts
	• Compliance services
	• Compliance practices
	• Change in behaviour since Hargreaves.
	• Emerging practices
		• Assessment of risk
		• Appetite for risk
		• Guidance vs enforcement
		• Decision-making
		• Individual versus collective
		• Consequences
		• Liability

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