

## **CLA Submission on the Review of Copyright Tribunal**

### **1. Introduction**

- 1.1 CLA welcomes the opportunity to comment on the workings of the Copyright Tribunal and to comment on what measures might be taken to improve it. At the time of the Leggatt Review of Tribunals, CLA was engaged in its first Copyright Tribunal Claim and thus had no prior experience on which to draw and so did not participate in that review.
- 1.2 The Copyright Tribunal is intended to provide a speedy and inexpensive resolution to disputes, but CLA did not find either to be the case. As a result of its experience of the Copyright Tribunal, and irrespective of the merits of any scheme promulgated by CLA, CLA would have to consider seriously in another Claim whether the costs involved were justified and in its members' best interests.
- 1.3 Historically the Tribunal is believed to have been more sympathetic to users than to copyright owners. The concerns of Collecting Societies have been well documented in the past and many of them were raised in the CLA response to the Gowers Review of Intellectual Property (a copy of which is attached for convenience as Appendix 2).
- 1.4 The aim of any review of the Tribunal must be to produce a simple, low cost and swift process that is fair; fair not only to users, but fair to copyright owners who are entitled both morally and legally to fair remuneration for the use of the products of their creative efforts.

### **2. Purpose of the Tribunal**

- 2.1 The Copyright Tribunal is charged with the task of setting terms of licensing schemes, or of licences provided by licensing bodies which are reasonable in the circumstances. What is "reasonable" should be seen from a perspective of both user and rightsholder and in particular

should have regard to the right of the copyright owner to receive fair remuneration for the use of their works and that any exceptions should be strictly limited by application of the Berne Convention 3 step test.

- 2.2 The origins of the Copyright Tribunal were rooted in the view of the UK government that some counter-balance to the perceived monopolistic power of Collecting Societies was required. The Performing Rights Tribunal was created in 1956 following the Government's declaration when the Berne Convention was revised by the Brussels Act in 1951. This declaration was that it remained "free to promulgate any legislation... necessary in the public interest to prevent or remedy any abuse of the exclusive rights belonging to a copyright owner". The PRT was renamed the Copyright Tribunal and given a wider jurisdiction under the CDPA 1988. Thus the legislative framework under which the Copyright Tribunal operates embeds the notion that it is there to defend users against powerful and monopolistic Collecting Societies.
- 2.3 An inherent feature of collecting societies is that they possess a degree of market power in that they may offer the only feasible route for a user to obtain a collective licence. Yet without them rightsholders would be unable to authorise or to license every use of their works and to enforce their rights as enshrined in the Berne Convention. This benefits not merely rightsholders but also users who are able to obtain licences from a single body thereby saving themselves considerable time and administrative expense.
- 2.4 The perception that collecting societies are more powerful than their users is also in many cases misplaced. It should be noted that the resources available to CLA, both in terms of manpower and money, are considerably more limited than those available to many of its licensees.
- 2.5 The rationale for the ability of users to refer a licensing scheme or a licence issued by a licensing body to a Tribunal (and note there is no comparable right for the collecting society) is based on the assumption that that is their only alternative as they are unable to influence the terms of the licence or licensing scheme or unable to negotiate terms on a fair basis. This is simply untrue in many cases. Large and well funded licensees are quite capable of negotiating on an equal basis – indeed in many cases it is the licensee who holds the greater degree of negotiating power given the difficulties that rightsholders have to prove cases of copyright infringement and to obtain appropriate payment through licence fees.

2.6 Furthermore, it should be noted that collecting societies face a “double jeopardy” risk due to the concurrent jurisdiction of the Copyright Tribunal – currently seen as extension of the government’s historic monopoly concerns about collecting societies – and competition law itself. One should be exclusive of the other.

### **3. Composition of the Panel**

3.1 Copyright Tribunal cases are generally lengthy and complex involving a mix of extensive detail and potentially complicated questions of law. The Copyright Tribunal panel needs to reflect this in terms of its composition.

3.2 The call for the Chairman of the Copyright Tribunal to be a judicial appointment is long documented. CLA welcomes the appointment of Judge Michael Fysh, QC but feels that it should be a requirement that the Chairman or Deputy Chairman hold judicial office.

3.3 The Monopolies and Mergers Commission in its inquiry on collective licensing recommended that the Chairman be either a retired High Court judge or other person of similar standing with experience in the law of intellectual property and available to serve at short notice. Practising barristers or solicitors may well be perceived to have a conflict of interest, as well as finding it difficult to schedule the necessary time to hold the hearing as speedily as possible, and at a time that is convenient to the parties.

3.4 The perception of unfairness would be further reduced if the membership of the panel dealing with a particular reference reflected the interests both of users and of licensors, and had some relevant experience and/or expertise in the matter at issue. A balance between conflicting interests in each side is achieved in the Employment Tribunal where the panel consists of an employer representative and an employee representative in addition to the lawyer chairman. This is also often the case in relation to arbitration panels.

3.5 The criteria for selection of lay members are not disclosed and greater transparency in the selection criteria and procedure would help address some of the concerns of collecting societies. The lay members need to have, and be seen to have, the appropriate experience to deal with complicated cases where much information needs to be absorbed before the issues can be addressed. This is particularly important given the way that the evidence is presented to the Tribunal. It is presented in writing in the first instance and not subject to examination in chief; only those witnesses that the other party wishes to cross examine actually appear before

the Tribunal. It is assumed that the panel members have already mastered the detail and can therefore follow the arguments being advanced to them.

#### **4. Pleadings**

4.1 Copyright Tribunal proceedings have all the trappings of judicial proceedings, but without some of their rigour. The collecting societies in particular are often presented with the worst of both worlds in that they are forced to the trouble and expense of dealing with potentially wide ranging pleadings, but without the certainty that these will define completely the cause of action. Broadly constructed pleadings may disguise what is in fact the main complaint.

4.2 CLA believes that there is an important case for mediation (see paragraph 6 below), but this should generally be at a stage prior to any Copyright Tribunal proceedings. However, as the Copyright Tribunal has the power to issue binding decisions on matters on fact and law (and which cannot be appealed on matters of fact) it is important that the proceedings should be subject to the normal rules of evidence. CLA therefore believes that pleadings are essential, as is the current requirement for each side to formulate the terms of a licensing scheme or licence which it believes would be reasonable in all the circumstances.

4.3 Although pleadings involve considerable expense, they are helpful in defining the ambit of the dispute between parties. In CLA's Copyright Tribunal case, the first round evidence from the Claimant went well beyond the issues identified in the pleadings and CLA could not afford to take the risk of simply ignoring this material and not commenting on it in its second round evidence. This added very considerably to CLA's costs and was commented upon unfavourably in the decision of the Copyright Tribunal in that reference. CLA believes that a much more robust approach ought to be taken by the Chairman of the Tribunal in striking out evidence on matters not put in issue through pleadings.

4.4 In addition, CLA proposes that the standard directions are amended to provide that the Statement of Case of all parties may not be amended without the permission of the Copyright Tribunal so that provision can be made as to the costs incurred as a result of such amendments.

## **5. Disclosure**

5.1 In CLA's Copyright Tribunal case, it was at a considerable disadvantage because of the absence of any obligation on the Claimant to disclose material in advance of exchange of first round evidence. Most Copyright Tribunal references turn on the use by, and value to, the user of the relevant copyright material. That data inevitably is in the hands of licensees. CLA believes that time and money would be saved were the licensee required to provide standard disclosure in accordance with the Civil Procedure Rules, at least in relation to these elements, prior to exchange of first round evidence. CLA believes this could lead to major savings and cost for both sides.

## **6. Mediation**

6.1 As mentioned in its submission to the Gowers Review, CLA believes that parties wishing to launch a reference to the Tribunal should first seek to resolve the dispute through mediation.

6.2 The Patent Office has established its mediation service. Although this seems to have had mainly patent and trademark disputes in mind, there is no reason why it could not be extended to cover copyright disputes.

6.3 Consideration of mediation prior to launching a reference should become obligatory. At present the standard practice directions for the Copyright Tribunal make no provision in relation to mediation; this is out of step with the requirements of the CPR. This would prevent parties being ambushed by Claimants who can launch a reference – without any prior notice to the Respondent – as a negotiating ploy to apply pressure and to improve their bargaining position. Indeed this is specifically recognised in the Copyright Tribunal Notice (25th May 1996) where it states that it is aware that references are sometimes begun by parties simply to preserve their negotiating position. Given that only the users can launch a reference, this is not only deeply unfair, but of course is not in keeping with the spirit of the Woolf reforms. It leads unnecessarily to the commencement of full scale litigation proceedings which, once started, can be more difficult to stop.

6.4 CLA proposes that the regime applying in the Commercial Court should be adopted by the Copyright Tribunal so that as a result the parties would be obliged to consider resolving their dispute through mediation in the hope that this would be successful saving substantial time and

money for all concerned. Parties who did not observe this requirement would need to explain their refusal to mediate and would risk an adverse costs award.

- 6.5 Added to CLA's proposals for earlier disclosure, this should enable disputes to be addressed openly and fairly at an early stage and could reduce the number of references. This would be of benefit to users as well, as it would offer them another alternative to launching a full scale reference.

## **7. Rights of Licensing Bodies**

- 7.1 As noted above, licensing bodies have no right to launch a reference (other than where a Licence or Licensing Scheme has already been the subject of a reference). This always places them unfairly in the position of "defendant".

- 7.2 CLA, as with all other licensing bodies, acts on behalf of its copyright owners. This sometimes leads to a perception that it is the licensing body against whom the user is litigating rather than against the rightsholders it represents. This may falsely reinforce the notion of the "weak" user needing protection against the "strong" licensing body. CLA is a non profit making organisation whose revenues (after deduction of running expenses) are passed on to its rightsholders: the authors, artists and other visual creators and publishers whose efforts contribute so significantly both to the economic and cultural well being of the UK. It is they who are most affected by the decisions handed down by the Tribunal. As stated above, they often are unable to enforce their rights individually for reasons of practicality or cost. In reviewing the Copyright Tribunal, it needs to be born in mind that they too have, or should have, rights.

- 7.3 These should include, as mentioned above, the right for their collecting societies to launch a reference in appropriate circumstances, or to require users to consider mediation before proceedings are commenced. A Copyright Tribunal should also have power to grant orders against users, e.g. disclosure of copying practices and volumes and/or to order a "no copying" declaration where the user insists that copying is not undertaken. Such declaration should be subject to the Statutory Declarations Act 1835 with the appropriate penalties for a false declaration. We appreciate that this would require an extension to the jurisdiction of the Tribunal.

## **8. Factors to be Considered in a Reference**

- 8.1 The Tribunal ought to have a greater regard to existing agreements where freely and fairly entered into by the parties. Once the parties have reached an agreement, the Tribunal should be wary of imposing its own judgement on what it considers is reasonable in all the circumstances where it differs from the position of the parties mutually agreed after negotiation. This is particularly so given that only the user can refer the contract to the Tribunal. In effect, it can “tear up” the contract whereas the licensing body is obliged to continue to honour it.
- 8.2 The Tribunal ought not to exercise its jurisdiction to review what was a binding contract. To do so diminishes the incentive for the licensing body to enter into such negotiations and to try to reach a mutually acceptable agreement in the first place. A licensing body ought not to be discouraged from granting concessions in an attempt to reach a settlement if it fears that this is but one step in a process which can be litigated before the Tribunal and lead to yet further claims for reduction.
- 8.3 If the Tribunal is to retain a jurisdiction in these circumstances, it should perhaps be required to have regard to guidelines similar to those set out in Schedule 2 of the Unfair Contract Terms Act 1977 (indications of the reasonableness of an exemption clause). This includes the relative bargaining strength of the parties and any inducements offered to accept the contract. The Tribunal should not intervene in the absence of strong evidence of a significant change in circumstances, and as indicated above this ought to apply on a reciprocal basis to allow the licensing body also to launch a reference.
- 8.4 When the Copyright Tribunal’s jurisdiction comes into play, there should be no presumption that a licensing scheme or a licence granted by a licensing body is unreasonable unless the collecting society proves to the contrary – it is certainly the perception of CLA that this is the case in practice. Rather, where a licensing scheme or licence has been agreed following detailed negotiations, the presumption should be the opposite; it should be for the complainant user to show that what they had agreed to was unfair.

## **9. Hearing Room**

- 9.1 On a practical note, the accommodation for the Copyright Tribunal hearings is unsatisfactory. There is insufficient space if members of the public and parties attend in numbers. Further, some of these attending have a view of the panel or witness which is obscured by columns. CLA proposes that suitable alternative accommodation be found for the hearings.

## **10. Summary of Recommendations**

- 10.1 A summary of the recommendations proposed in this submission are contained in Appendix 1.

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10th July 2006

## APPENDIX 1

### Summary of Recommendations

- Overlapping jurisdiction of Copyright Tribunal and competition law to be resolved.
- Chairman and Deputy Chairman of the Tribunal to be a judicial appointment.
- Lay members of Panel to have appropriate experience and expertise – selection criteria to be disclosed and appointment process to be more transparent.
- Lay members to represent a balance between users and licensing bodies.
- Pleadings to be retained but rules of evidence enforced more rigorously.
- Requirement for parties to a dispute to formulate proposed terms of licensing scheme to be retained.
- Statement of Case not to be amended without permission.
- Standard disclosure of evidence after Statement of Claim in accordance with CPR.
- Mediation – consideration of it to be compulsory as in Commercial Court with requirements to explain refusal and risk of adverse cost orders.
- Licensing bodies to have rights to launch reference in appropriate circumstances.
- Copyright Tribunal to have power to issue orders to users (e.g. disclosure of copying habits and no copying declarations).
- Copyright Tribunal to have regard to guidelines on when it is appropriate to review a binding contract.
- The onus should be on the Claimant to show that a licence/licence scheme that has been agreed between the parties is unfair.
- Improved accommodation for the Hearings should be found.

## APPENDIX 2

### CLA's Submission to the Gowers Review (minus appendices)

## Introduction

This submission provides firstly some background on The Copyright Licensing Agency Ltd ("CLA"), its operations and licence sectors and then follows the Gowers Review call for evidence in addressing general questions and specific issues. It highlights items listed in the call for evidence that are not addressed. It does not highlight any other issues. CLA is happy for this submission to be made available to the public.

## 1 Background

CLA is the UK's Reproduction Rights Organisation ("RRO"). It represents the interests of the authors, artists and publishers of books, journals and periodicals in connection with reprography including certain forms of digital reproduction.

### 1.1 Economic importance

Creativity is an important driver of economic growth.

The book, journal and periodical publishing industry is of significant importance to the UK's economy. A report to the European Commission in October 2003 (but based on data for the year 2000) measured the contribution of Copyright and Related Rights to the European Economy. This report is attached as supporting evidence. It estimated that copyright industries as a whole represent 7.1% of GDP in the UK. It suggests that print media accounts for 1.79% of GDP. Figures from the ONS and the Publishers Association show that book publishing alone, which generates about £5bn per annum, represents 0.5% of GDP at factor cost. A further £1bn could be added for journals.

Figures alone, however, do not tell the whole story and may underestimate the contribution of the publishing industry. The information produced by the publishing industry is a vital input to many other key sectors of the economy, particularly the high-value added parts of the "Knowledge Economy". Arguably, the publishing industry's £5bn is the keystone on which the whole Knowledge Economy depends.

Copyright is essential to the publishing industry, which depends on it to realise the full value of the creative input of the UK's authors and artists and to support its contribution throughout the economy. Without copyright – and copyright protection – there could not be a viable publishing industry in the UK.

#### 1.1.1 Education and training

Information provision is arguably the most important component of Education. Education, at all levels, is dependent on books and journals; a healthy publishing industry provides up-to-date books and journals (in both print and digital form) to the education sectors from primary schools to universities. Training and life long learning are equally dependent on it.

### **1.1.2 Research and Development**

Scientific, technical and medical publishing supports R&D activities both in industry and in academia in the provision of information and, through the peer-review process, in benchmarking and assessing value.

### **1.1.3 Healthcare**

Publishing supports healthcare through information management, education and training, and research and development.

### **1.1.4 Professional services**

The professional services sector, including financial services and the legal profession, is also heavily dependent on information including published information.

### **1.1.5 Export**

The UK is a significant net exporter of published content, building on the international strengths of the English language. The Publishers Association estimates the value of book exports alone as being £1.3bn.

### **1.1.6 Environmental considerations**

The growth generated through creativity requires no direct energy inputs or other physical resources; arguably, creativity is the only indefinitely sustainable source of economic growth. A creative economy built around the media industries of which book and journal publishing is a part is a fundamentally low-carbon economy.

## **1.2 CLA status and ownership**

### **1.2.1 Ownership**

CLA is a not-for-profit company limited by guarantee. Its owners are the Authors' Licensing and Collecting Society (ALCS) and the Publishers Licensing Society (PLS), through whom it deals with authors and publishers respectively. It represents the interests of visual artists through an association agreement with the Design and Artists' Copyright Society (DACS).

CLA is a member of the Alliance Against IP Theft (the "Alliance") and has had the benefit of reading their submission to which it has also contributed.

### **1.2.2 Business**

CLA earns its income through collective licensing. CLA issues licences authorising a limited amount of copying, beyond the limited copying permitted by law, in consideration of licence fees. These fees are distributed (after deduction of CLA's operating subvention) to the authors, artists and publishers whose works are copied.

In the financial year ended 31<sup>st</sup> March 2005, CLA collected £42m on behalf of its member organisations. The cumulative figure for the 5 years to 31<sup>st</sup> March 2005 was £178m of which £24m was from overseas.

This represented net export earnings of £7.9m over the same period.

CLA's latest published Annual Review (including extracts from its latest Report and Accounts) is attached as supporting evidence.

### **1.2.3 Authority**

CLA's authority to license copying derives from its agreements with its member societies, DACS and RROs. The ALCS and DACS membership agreements and the mandates (non-exclusive licences) granted to PLS by publishers provide the chain of authority for the domestic repertoire. This covers the large majority of copying provided for by the licence. In order to provide licensees with as fully a comprehensive a repertoire of works as practical, CLA operates indemnity-backed collective licences. This means that its licensees, with relatively few exceptions, are able to copy beyond CLA's strict authority to do so. Licensees are indemnified by CLA against any legal action arising from such copying and CLA itself assumes the associated risk.

CLA has reciprocal agreements with counterpart organisations (RROs) in other countries, which enable it to authorise the copying of non-UK works to enlarge the repertoire.

However derived, CLA's authority is in all cases non-exclusive; the copyright owner retains the right to license directly, or to grant other parties the non-exclusive rights to license. CLA is "licensing body" as defined in Chapter VII of the Copyright, Design and Patents Act 1988 (the "CDPA").

### **1.2.4 Sectors served**

CLA issues licences to organisations in all sectors of the economy. Virtually all the UK's schools, colleges and universities are licensed by CLA to enable them to copy extracts from books, journals and periodicals. Similarly a large number of commercial organisations are licensed as are most government departments, the NHS and the British Library. CLA also issues licences to Press Cuttings Agencies and other information providers enabling them to keep their clients up-to-date on important news and development relevant to their businesses.

A selection of Press Releases issued in the last few years, either by CLA or jointly with user representative bodies, highlighting the benefit of the various CLA licensing schemes is attached as supporting evidence.

## 2 General Questions

### 2.1 How IP is awarded

Copyright, being an unregistered right, is not awarded, it arises. Treaty obligations, specifically the Berne Convention (“Berne”), mean that there is no scope to make copyright subject to formalities such as registration.

The lack of registration formality is consistent with Berne, and provides an easy and flexible regime for the creation of copyright. This barrier-free system should be retained.

The UK does have a fixation requirement – that is a work must be manifested in some form – which is optional under Berne. A number of European countries do not have a fixation requirement (thus, copyright may subsist in works in a purely oral tradition). However, the fixation requirement provides evidential clarity and should also be retained.

### 2.2 How IP is used

Copyright provides a foundation for all contracts in the content industries; in the absence of copyright, the contractual regulation of the business would be all but impossible.

### 2.3 How IP is licensed and exchanged

The economic value of a work protected by copyright is only fully realised through publication and/or making available to the public. This is an act requiring the consent (i.e licence) of the copyright holder. A work that remains unread makes no immediate contribution to the economy (although it may eventually add to the cultural archive of the nation); by licensing its publication, the author ensures that its value can be realised.

Broadly speaking, therefore, the copyright regime should encourage licensing and ensure that writing, visual creation and publication earn a fair reward.

#### 2.3.1 A universal defence

Exceptions to copyright are jurisdiction-specific; the licence of the copyright holder is, by definition, a universal defence to an action for copyright infringement. Licensing works across borders; exceptions (in general) do not.

#### 2.3.2 Primary Sales Licences

Works published in digital form require a copyright licence in order that they may be read. Thus, in the digital world, the primary sales contract for content must be a copyright licence (by contrast with the print world, where it is a contract for the sale of goods).

#### 2.3.3 Indemnity-backed licences

Copyright is a strict liability right (i.e. knowledge that an act is infringing is irrelevant as far as the law is concerned) and therefore, in order not to infringe, those who would copy lawfully should be satisfied as to the strict chain of title from author to ultimate licensee. This is clearly impractical and it is usual to rely on permission from a publisher, thereby tacitly assuming that the publisher has appropriate authority from the copyright owner to grant such permissions.

It is standard practice for all formal licences of copyright, at any stage in the chain, to incorporate warranties and/or indemnities, which insulate those further down the chain from upstream faults in the title.

#### **2.3.4 Indemnity-backed collective licensing**

Indemnity-backed collective licensing formalises this approach and permits the associated risk to be pooled. CLA maintains that indemnity-backed collective licensing is a simple, flexible way of licensing any commercially valuable acts of copying. This is so regardless of faults or errors in the upstream chain of title and operates even when the copying is on a very small scale. This system operates without many of the costs associated with maintaining such an upstream chain.

Further, indemnity-backing ensures that licensees can rely on a comprehensive, and broadly-defined repertoire, which significantly reduces the licence compliance costs for licensees.

However, in purporting to license copying in respect of which it may not enjoy strict authorisation, a collective licensing body such as CLA is itself technically infringing copyright. It therefore exposes itself to a risk of costly litigation.

CLA maintains a List of Excluded Works to ensure that that rightsholders who do not wish their works to be covered by a collective licence can opt-out. This is now to be internet-based and changes can take rapid effect, which further protects rightsholders' interests.

#### **2.3.5 Statutory support**

s.136 of the Copyright, Designs and Patents Act 1988 provides limited support to the principle of indemnity-backed collective licensing.

CLA would welcome further statutory support, in particular through a limited immunity to litigation for copyright infringement, subject to immediate rightsholder exclusion on notice. This is equivalent to the "take-down-on-notice" provisions which apply to Internet service providers.

#### **2.3.6 Ease of negotiating licences; barriers to licensing**

Collective licensing provides a solution to the difficulties which might otherwise be encountered by individual users wishing to obtain permission to copy from copyright works. It would clearly be a time consuming and expensive burden to track down the copyright owner of a given work prior to copying on each occasion – if indeed it were possible at all. The system would be equally inefficient from the copyright owner's perspective in having to deal with such multiple requests and handling the micro payments involved.

CLA's licences are easy to obtain and simple to administer. Most are "blanket" licences allowing the user to make a one off payment to cover its copying requirements for the licence period (generally a year) with little formality. Some licensees will be asked periodically to participate in a minimum impact audit or survey of what they have copied over a sample period of a few weeks.

The licences are easy to administer and relatively inexpensive, with the Copyright Tribunal providing a statutory backdrop to ensure that the licence fees demanded are reasonable.

In short, CLA believes that users do not face any real barrier or difficulties in obtaining licences in respect of its current mandate.

## 2.4 How IP is challenged and enforced

### 2.4.1 Specific Problems in Enforcement

There are several difficulties which a collective licensing body faces when trying to enforce copyright:

#### a) Rights to take legal action

Under UK law, an infringement of copyright is actionable only by the copyright owner, exclusive licensee or, in some limited circumstances, a non-exclusive licensee.

A collective licensing body such as CLA operating under a non-exclusive mandate does not therefore have an automatic right to sue. CLA has to obtain specific authority from the copyright owner or owners for each proposed action. This is time consuming and costly, often prohibitively so. The difficulties where multiple rightsholders have been affected by infringing acts are commensurately greater. Where immediate injunctive relief is sought, CLA's lack of locus standi renders the possibility of prompt and effective action almost impossible.

The EU Directive on the Enforcement of Intellectual Property Rights (the "Enforcement Directive") required member states to ensure that "intellectual property collective rights management" bodies were entitled to apply for the application of measures, procedures and remedies necessary for the enforcement of intellectual property rights.

CLA (and many other interested parties) submitted that a change to UK law was required to comply with this and it seemed that the government was in agreement and included relevant provisions in draft regulations. Regrettably it now appears to have changed its mind; if so, we believe that UK law will be deficient in not providing a clear statutory right for representative bodies to take action and that this will be damaging to the enforcement of intellectual property rights and, by extension, to those industries within the UK that rely on IP. CLA's submission to the consultation on the UK implementation of the Enforcement Directive sets out the arguments more fully and is attached as supporting evidence.

#### b) Obtaining evidence of infringement of Intellectual Property in the workplace

CLA also faces difficulties in obtaining the necessary evidence of copying to launch an action. Copying and/or scanning and e-mail distribution of copyright works is widespread in the office environment, yet there is little awareness of the need for a copyright permission. Sometimes the requirement is blatantly ignored.

Evidence of unlawful copying in a private workplace is notoriously hard to obtain – it is almost invisible – and it is too easy for companies to deny that it is occurring or to argue falsely that one or other of the various statutory exceptions apply (see section 3 Specific Issues below).

There is a low perception of risk and the weak nature of the sanctions that might be applied to the infringer do not act as a sufficient deterrent to those organisations who need, but do not take, a licence.

Personal liability for directors is limited to their actual knowledge. This allows directors to avoid any possibility of personal liability by issuing, but not enforcing, ‘no copying’ policies and denying knowledge. This provides little incentive for them to ensure their company does not infringe copyright and unreasonably throws the burden of compliance back onto their employees. They are supposed to judge if there is a relevant statutory exception covering the entirety of their copying and the use to which it is put (unlikely) or be able to seek an individual permission (impractical) or to cease copying (equally unlikely).

CLA concurs with the submission of the Alliance on this important matter, including the submission that the various copyright presumptions afforded by the law should not to be specifically disapplied in the case of criminal remedies under s.107 as is currently the case. UK law should provide a general presumption of subsistence of copyright and a presumption of a lack of permission or licence for the defendant to copy or otherwise exploit a copyright work.

c) Damages

UK law approaches the issue of damages on a compensatory basis. Individual acts of copyright infringement may sometimes only be measured in pence, although the harm to the publishing industry, and the costs of enforcement, may be much greater. UK law does provide that ‘additional damages’ as the justice of the case may require may be imposed having regard (inter alia) to the flagrancy of the infringement (s.97 CDPA). But this is still viewed as being part of a compensatory, not penal, regime, and is rarely applied. It does not amount to the “effective, proportionate and dissuasive” civil remedies that the EU Directive on Enforcement requires.

UK law should embrace more wholeheartedly that notion of penal damages to act as a genuine deterrent to copyright infringement. This might be done by establishing statutory damages; examples from other countries are given in the Alliance submission.

d) Anonymous Evidence

The difficulty of obtaining the necessary evidence has already been referred to. Where interim remedies are sought (such as a Search and Seizure order) the current bar on the use of anonymous evidence presents a further difficulty. Realistically such evidence is only likely to come from employees of an infringing company who are for obvious reasons likely to be reluctant to provide such evidence against their employer. This is the case despite the provisions of the Public Interest (Disclosure) Act 1998 (“PIDA”) which has not proved in practice to be a sufficient comfort to employees intending to disclose facts about their employer. The relative stringency of the requirements that have to be met before a disclosure becomes “protected” and the uncertainty of PIDA’s application make it unlikely that an average employee would risk their livelihood by giving open evidence about copying activities against their employer.

## **2.4.2 Cost barriers to enforcing copyright**

Many of the problems of obtaining evidence also lead to an increase in direct and indirect costs. The costly nature of the Copyright Tribunal – as a form of ADR – is dealt with below. It is worth mentioning two further problems:

a) The requirements for a supervising solicitor in search and seizure

### orders

The requirement that a claimant must instruct, and pay, for an independent solicitor to be present during the execution of a search order adds significantly to the costs burden of obtaining evidence. It acts as a significant deterrent to a claimant considering whether to apply for such relief. It is inconsistent with the approach of the Woolf reforms to civil litigation and, given the general duty of a solicitor to the court in executing orders and the wide case management powers of the court, probably unnecessary.

### b) Trading Standards

s.107 (A) CDPA provided that it is the duty of every local weights and measures authority to enforce the provisions of s.107 CDPA establishing the criminal liability of a person making or dealing with infringing articles. It gave such authorities the power to make test purchases, to enter premises and to seize goods and documents. Unfortunately this provision has yet to come into force due, we understand, to a lack of funding. Such provisions, if enacted, would provide a valuable tool for those seeking to enforce copyright and other IP, as well as emphasising the government's commitment to the enforcement of copyright to help sustain a viable publishing industry as well as all those other industries dependent ultimately on the existence of copyright. It would also assist in tackling the burgeoning amount of criminal activity that this lack of official enforcement helps to spawn.

## **2.4.3 Use of ADR and the Copyright Tribunal**

The Copyright Tribunal, first established as the Performing Rights Tribunal by the Copyright Act 1956, operates under the framework contained in the CDPA. It has jurisdiction over licences and licensing schemes operated by licensing bodies and so is not, strictly speaking, a form of alternative dispute resolution. It is a quasi-judicial court of first instance and is not therefore a mediation process. Users may refer licences, or licensing schemes, to the Tribunal so, once referred, its use is not optional for collecting societies. However collecting societies do not themselves have the right to initiate a reference to the Tribunal.

Copyright Tribunal proceedings are adversarial in process, requiring the full panoply of pleadings, detailed procedural rules and rules of evidence. They are thus costly and time consuming; they have not proved in practice to provide a simple, low cost and flexible way of settling disputes. Conceived originally as a counter balance to the perceived potential for collecting societies to abuse their near monopoly power, the Copyright Tribunal is generally believed by individual authors and publishers affected by its decisions to be pro-user; a view enhanced by the inability of copyright owners to launch a reference themselves and by the cost awards that have been made over the years by the Tribunal.

The use of, indeed a requirement for, mediation would be welcome. It is surprising that the Woolf reforms to the civil procedure system do not apply to Copyright Tribunal proceedings. There is no requirement for a user to attempt to settle a dispute or to seek mediation before launching a reference to the Tribunal. Indeed often proceedings are launched by users as a negotiating tactic to apply pressure to the collective societies. There is no scope for the defendant to request a stay of proceedings to allow for ADR in an attempt to settle the proceedings or indeed for the Tribunal to impose such a stay, or to include the refusal to engage in ADR as a consideration in its cost awards.

The Patent Office has recently launched a mediation service; it is too soon to comment on how effective this will prove to be in addressing some of the concerns that have been expressed by copyright owners about the Copyright Tribunal.

In addition to mediation, CLA believes that copyright owners would be encouraged to believe that balance between the interest of users and copyright owners was achieved if the jurisdiction of the Tribunal were extended over users in certain respects and to allow copyright owners to initiate a reference. This could include refusals to take a licence; alternatively an order to make a 'no copying' declaration subject to the Statutory Declarations Act 1835 so that there would be sanctions for a false declaration. It could, in appropriate cases, include orders for disclosure (including orders to third parties for disclosure) relating to copying volumes and habits, use of copying and/or value of copies made. This would help to counterbalance the difficulties faced by copyright owners in obtaining evidence of infringement referred to above.

There are significant costs involved in preparing the defence to what are often wide-ranging pleadings without any real sense of what may prove to be the main complaint. The combined effect of the adversarial nature of Copyright Tribunal pleadings, the lack of an overriding objective encouraging the parties to use ADR to settle without engaging in proceedings, and a lack of active case management to narrow the case to issues in dispute necessarily increases the length of the proceedings and the hearings, as well as the costs incurred – and generally born disproportionately by the defendant collecting society. Very often issues initially cited by users in Tribunal cases prove not to be the main issue on which the case ultimately turns, which is the complete opposite of what the Woolf reforms were attempting to achieve.

There are many other issues to do with procedure and process of the Tribunal that require consideration, which are to be addressed as part of the separately announced Patent Office review of the way in which the Copyright Tribunal works to which CLA will be separately submitting.

#### **2.4.4 Barriers to efficient enforcement internationally**

Although not the primary focus of this response to the Call for Evidence it is worth noting that the patchwork of different regimes and exceptions permitted by the EU Directive on Copyright and Related Rights in the Information Society (the "Copyright Directive") means that the EU is very far from having a harmonised copyright law. Collecting societies in member states operate under very different systems. The different exceptions allowed, along with the various models of statutory licence and levy schemes, render community wide licensing almost impossible and prevents the creation of genuine and fair competition between collective management organisations throughout Europe.

### **3 Specific Issues**

*Specific issues not addressed in this submission:*

- Current term of protection for sound recordings and performers' rights;
- Copyright – licensing of public performances
- Copyright – designated archive status
- Patents – utility patents
- Pharmaceutical Supplementary Protection Certificates
- Trade Marks – international issues
- Designs – registered designs and unregistered design rights

### **3.1 Copyright Exceptions: fair use and fair dealing**

The scope for copyright exceptions is limited by the Copyright Directive, which sets out an exhaustive list of permitted acts. Member States of the EU may not enact permitted acts beyond those set out in the Copyright Directive.

It is worth reiterating the point made in 2.3.1 above, that a licence is a universal defence and applies in all jurisdictions, whereas exceptions to copyright are jurisdiction-specific, even within the EU and despite the best efforts of the Commission to harmonise exceptions in the Copyright Directive.

The Berne “three step test” was incorporated into the Copyright Directive. The three step test requires that exceptions to the exclusive right of the copyright owner to authorise reproductions:-

- shall be permitted only in certain special cases;
- provided that reproduction does not conflict with a normal exploitation of the work;
- and provided that such reproduction does not unreasonably prejudice the legitimate interest of the author.

The Copyright Directive required that the permitted exceptions and limitations should, in all cases, be subject to the above tests. The UK government declined to incorporate these principles specifically into UK law. It refused to introduce the test as such into UK law as a general constraint on exceptions, but preferred to continue with its existing practice of using the test as a standard in framing exceptions to copyright. The government’s views was that the various exceptions to copyright contained in the CDPA (as amended following the UK implementation of the Copyright Directive) were considered to comply with the three step test.

CLA and many other rightsowners and representative bodies disagreed with this view and feel that the UK government has failed to implement the Copyright Directive correctly and that many of the exceptions do not comply with the three step test where they may result in detriment to the legitimate interest of the rightsholder or conflict with the normal exploitation of the work. It should now be considered that licensing a copyright work through a collective licensing scheme such as CLA is a normal exploitation of the work and a legitimate interest of a rightsholder. To the extent that copying is permitted by law without compliance with the 3 step test, it follows that it must be contrary to the Copyright Directive. What it said below about specific exceptions, and indeed all other exceptions within the CDPA, must be read subject to this overriding concern.

#### **3.1.1 “Fair use”**

Fair use is a defence to a claim of copyright infringement in the USA. In the UK, it was part of the common law until the Copyright Act of 1911, which replaced it with the statutory defence of fair dealing. In the United States, “fair use” was codified into the statutes in 1976.

#### **3.1.2 “Fair Dealing”**

Fair dealing (which should not be confused with the US concept of “fair use”) was introduced in the Copyright Act of 1911 (which brought UK law into line with the Berne Convention), to replace the then common-law defence of fair use.

The UK’s statutory fair dealing defences were changed in 2003 with the

implementation of the Copyright Directive. Specifically, it was established that copying for the purposes of commercial research was not fair dealing, which removed an ambiguity that had been in place since at least 1956.

The availability of simple copying licences from CLA and (in the case of works published in digital form, direct from publishers as part of the primary licence) means that commercial research of UK organisations is not significantly hindered by the new tighter definition.

### **3.1.3 The Library Privileges**

The library privileges contained in ss.38-39 of the Copyright, Designs and Patents Act 1988 are analogous to the s.29 exception for fair dealing for the purposes of research or private study, and have similarly been limited by the implementation of the Copyright Directive.

#### a) Licensed Alternatives

The removal of the library privileges exception from copying for the purposes of commercial research in 2003 meant that it was possible that some libraries might have had to refuse to make copies in some cases which previously have made under the library privilege. In response to this, and to ensure that no library would have to refuse a legitimate request from a commercial researcher for a copy, CLA introduced two simple licensing schemes, a “Low-volume Document Delivery Licence” for organisations (such as the libraries of learned societies) which mainly supplied copies remotely, and a Sticker Scheme for walk-in researchers in public libraries.

#### b) Extra-territorial application

UK libraries use the UK exceptions to make copies which are delivered overseas (“document delivery”), into jurisdictions where the UK legislation does not apply. This can undermine attempts by local copyright owners to protect copyright, and undermines the right of those other jurisdictions to determine their own copyright laws in line with the treaties.

There is a substantial international trade in licensed document delivery which is undermined by this use for export purposes of an exception which was enacted with the requirements of the UK’s researchers and students.

### **3.1.4 Further exceptions**

Statutory reform is a blunt and expensive instrument to permit copying in certain special cases, requiring Parliamentary time as well as substantial departmental resources.

Appropriate voluntary licensing is a better solution where rightsholders are willing to grant such rights and the thrust of the Copyright Directive is to encourage licensing wherever possible.

CLA is equipped to administer indemnity-backed collective licences, provided the majority of rightsholders are willing, for most circumstances involving books, journals or periodicals. Where a case can be made for such uses, rightsholders should be encouraged to implement collective licensing before the parliamentary and departmental resources are committed to statutory reform, and activist pressure groups calling for such changes should be encouraged to open discussion first with rightsholders and their representatives, and only when all such discussion fails to take the matter up with Parliament.

#### a) Copying for readers with a visual impairment

The Copyright (Visually Impaired Persons) Act 2003 introduced a new exception to copyright, in response to a long period of lobbying by visually-impaired people (VIPs) and their representatives.

Rightsholders had already introduced a set of Joint Industry Guidelines serving the same purpose as the first part of that Act, following lengthy consultation with visually-impaired people, and CLA now operates a licensing scheme giving free permission to organisations producing accessible editions of published works.

These schemes (which the Act supports, but which do not require its existence) have substantially removed the copyright impediments to the production of accessible versions of works; there remain technical and economic impediments which joint consultation between rightsholders, VIPs and their representatives are addressing.

### **3.2 Copyright – digital rights management**

CLA has long had an interest in digital rights management, which has the potential to complement collective licensing in the administration of copyright.

CLA does, however, have certain reservations about current digital rights management technologies:

- the lack of interoperability between different DRM systems threatens to unbalance the market and place too much power in the hands of service providers to the detriment of authors, publishers and their readers.
- Inappropriate use of DRM technology can reduce accessibility to those with a visual impairment or other disability. CLA and rightsholders are committed to making works accessible on equivalent commercial terms to everyone regardless of ability;
- most seriously of all, DRM is predicated on a relationship of distrust between rightsholders and their customers, the paying and reading public. This distrust is, in the long term, deeply harmful to the industry. In the book and journal publishing sector, some publishers are now pursuing a policy of trust, rather than DRM, particularly with institutional customers who operate strong internal copyright compliance policies.

#### **3.2.1 DRM and Collective Licensing**

DRM is sometimes positioned as an alternative to collective licensing, particularly in European countries where collective licensing is on a statutory basis remunerated through levy systems.

Voluntary collective licensing, as practised in the UK, is however complemented by appropriate DRM solutions, and appropriately managed, DRM and collective licensing together can rebuild the relationship of trust between copyright holder and reader.

### **3.3 Copyright – orphan works**

Orphan works – where the copyright owner cannot be traced – present a significant

clearance problem for many users of copyright material, particularly in libraries and archives.

Indemnity-backed collective licensing, however, *already* provides a simple solution.

Where orphan works are published books, journals or periodicals, they are already covered by CLA licences for the copying of extracts. CLA and its member organisations ALCS, PLS and DACS themselves already face the problem of tracing the copyright owner and remitting any licence fees collected to them.

For copying orphan works to an extent, or in a manner, beyond what is permitted by a CLA licence (for example the digitisation of works of historical interest or the copying of unpublished works) CLA would strongly advocate much further exploration of the possibility of a broader indemnity-backed collective licensing solution for orphan works, rather than immediate implementation of a statutory exception.

### **3.4 Legal Sanctions on IP infringement**

Voluntary collective licensing, as practised in the UK, always allows rightsholders to opt-out of any scheme. This is important to preserve rightsholders' interests.

Collective licensing enables wider use to be made of content, without undermining rightsholders' economic interests, and it is CLA's contention that the statutory regime should encourage (but not mandate) collective licensing.

#### **3.4.1 Calculating the quantum of damages**

If a collective scheme exists, covering a particular type of work and a particular use of that work, its existence is relevant to the calculation of the quantum of damages applicable in any infringement action, whether or not the work in question is included in the scheme. The level of licensing fees a rightsholder would have earned had the infringing act been licensed through a collective scheme is a useful yardstick for assessing damages.

### **3.5 Parallel imports and international exhaustion**

CLA is concerned by the unequal operation of exceptions to copyright in the European Union, specifically in the field of document delivery.

CLA accepts the principle of community exhaustion where the rightsholder's consent has been granted, but – in accordance with community law – this cannot apply to copies which are put into circulation as a result of a statutory exception and thus without the consent of the rightsholder.

A number of libraries in the European Union are, however, circulating copies made under their national exceptions.

### **3.6 Coherence between Competition Policy and IP policy**

Intellectual property rights, including copyright, confer limited monopoly rights and therefore have implications for competition.

#### **3.6.1 Exclusive copyright licences**

Exclusive licences, such as the licence granted by an author to a publisher, are essential to the healthy functioning of the industry in order to justify the substantial investment made by the publisher in the author's work. The

publisher acquires a monopoly in the work licensed and is thus able to commit resources to its development.

### **3.6.2 Non-exclusive licences**

Most retail licences, including the primary sales licences referred to above, are non-exclusive. Non-exclusive licences raise far fewer competition concerns.

All CLA licences are non-exclusive, as are the mandates given by publishers to PLS and by authors, through the membership agreement, to ALCS. This means that they are always free to license the same copying directly with the user concerned; this provides CLA with an incentive to keep its licences efficient.

## 4 Conclusion

The key recommendations in this submission are:

- The “fixation” requirement under Berne be retained, but no registration formality to be introduced into UK law.
- Voluntary licensing should be encouraged and the need for further exceptions, or a widening of existing exceptions, avoided. No private copying exception is required.
- The Berne 3 step test should be specifically incorporated into UK law.
- Company Directors liability for copyright infringement to be established.
- Article 4 of the Enforcement Directive to be implemented into UK law to give intellectual property collective rights management bodies the legal standing to sue.
- Trading Standards provisions of the CDPA to be brought into force.
- Damages regime to include possibility of penal damages as a deterrent.
- Limited immunity to claims for copyright infringement for collecting societies provided they are subject to a notice and take down procedure.
- Presumptions of copyright ownership to apply in criminal matters.
- Requirement for supervising solicitors in search and seizure orders to be abolished.
- Copyright Tribunal to be reformed to allow copyright owners to have recourse to it and to build in a requirement for mediation prior to launching a Tribunal claim.

The Copyright Licensing Agency Ltd – 19th April 2006

Supporting Evidence Attachments:

1. EU report on Contribution of Copyright and Related Rights to European Economy
2. CLA’s Review 2005 (including Report and Accounts)
3. Press Releases.
4. CLA’s submission on UK implementation of Enforcement Directive.