

**Copyright in The Knowledge Economy – EU Commission  
Green Paper and Call for Comments**

**Response by The Copyright Licensing Agency Limited (“CLA”)**

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## **1. Introduction: Copyright in the UK Knowledge Economy**

- 1.1 CLA is a not for profit company, limited by guarantee. It was founded in 1983 by the Authors' Licensing Collecting Society Limited and the Publishers Licensing Society Limited who themselves represent, directly or indirectly, authors and publishers of most of the books, journals, magazines and other periodicals published in the UK. Artistic works such as photographs, illustrations, etc. appearing within those works are covered by virtue of an agency agreement between CLA and the Design & Artists Copyright Society Ltd; a network of repertoire exchange agreements with similar organisations throughout the world means that CLA's collective licences cover the overwhelming majority of UK publications as well as a large number of titles from overseas.
- 1.2 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 such as law firms, pharmaceutical companies and many other businesses 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 developments relevant to their businesses.
- 1.3 We have attached as Appendices CLA's submission to the Gowers Review of Copyright in the UK and to the follow-up consultation of the UK Intellectual Property Office.
- 1.4 CLA confirms that this submission may be published by the Commission.

## **2. Executive Summary**

- 2.1 CLA believes that the call for a widening of exceptions from copyright as listed in the EU Copyright Directive 2001 (the "Copyright Directive") is misplaced. No hard evidence has been presented demonstrating a need for any widening of these exceptions. Increasing exceptions leads to an increased risk of abuse by entities that should not benefit from them whilst jeopardising the creative industries and the knowledge economy without delivering any proportionate benefit to those persons and classes at whom the exception is targeted.
- 2.2 In particular, CLA believes there is no need for any of the menu of exceptions available to Member States under the Copyright Directive to be rendered mandatory. CLA believes it is for each Member State to implement the exceptions as appropriate according to local circumstances and needs.
- 2.3 In the UK, there is no evidence that the current law is preventing access to information to those with a visual impairment or any other disability or impeding teaching and research in the UK. There is also no evidence that existing copyright laws are hindering creativity in terms of user generated content.
- 2.4 Freely negotiated licensing solutions – either negotiated on an individual basis with the rightsholder or on a collective basis with a collective management body – provide a better solution to users' needs than legislative exceptions whilst ensuring a fair return to creators and producers. This also complies with the Berne 3 step test which should remain as the benchmark by which exceptions are measured.

## **3. General Issues (Questions 1 to 5)**

- 3.1 There are two themes to this. Firstly the Green Paper asks whether the introduction of exclusive rights has translated into a fair share of income for all the categories of

rightsholders. But this seems to step outside of the purpose of the Green Paper (“to foster a debate on how knowledge of research, science and education can best be disseminated in the online environment”). Exceptions generally result in a reduction or elimination of remuneration to copyright owners, regardless of their category of interest.

- 3.2 The second theme is the degree to which the Copyright Directive has achieved harmonisation through the creation of an exhaustive list of exceptions. It notes that some degree of harmonisation has been achieved whilst leaving Member States flexibility to implement the exceptions.
- 3.3 CLA agrees with this view, but notes that widening the list of exceptions, or making some of them mandatory, will not of itself result in a better dissemination of knowledge for research, science and education in the online environment. The key is the reference to the inclusion in the Directive of the 3 step test, which the Green Paper rightly notes is not simply to ensure compliance with international treaty obligations, but is in fact a benchmark for all copyright legislation. The fundamental truth is that knowledge and information can be best developed and disseminated in an environment which protects and rewards creativity. The copyright industries have often observed that users falsely characterise them as wishing to “lock up” content or prevent access; but this of course is patently untrue, as all authors, artists and other creators, as well as publishers and other producers, wish to ensure as wide a circulation of their products as possible. But, like all other producers of goods and services, they wish to be paid a fair price for their efforts. In looking at dissemination of knowledge in an online environment, the debate should be less about the need for more exceptions and more about how the copyright industries can be assisted to develop content and bring it to market.

**Q1 Should there be encouragement or guidelines for contractual arrangements between rightsholders and users for the implementation of copyright exceptions?**

In most cases, to the extent that there is a copyright exception, there is little scope or need for contractual arrangements regarding the implementation of the exception, as the exception in favour of the user displaces the copyright owner’s rights and hence the need for any contractual arrangements. But as stated above, copyright exceptions do not generally achieve the objective of a better dissemination of knowledge as they confuse access to a work (i.e. the availability of the product for sale in the market) with access for free (i.e. the right to take and use content produced by others without payment). CLA thinks a better model to achieve the desired aim is to provide for a “safety net” of exceptions that apply in certain defined and justified cases, but only where an appropriate licence is not available.

There are two good examples of this in the UK:-

- i) Visually Impaired Persons: The UK legislation that provides a right for a person suffering from a visual impairment to make, or have made, an accessible copy is displaced by a licensing scheme. CLA, on behalf of its rightsholders, has launched such a scheme allowing organisations (such as the Royal National Institute of Blind People) to make accessible copies for others where no commercially available edition exists and also for organisations that hold a CLA licence to make accessible copies for their students or employees.
- ii) Educational Exceptions: Educational establishments are allowed to copy a small amount of a literary work in the absence of any licensing scheme. A CLA licence exists and therefore, at least for those works covered by the CLA licence, the exception is disapplied.

The above model achieves the required aim of ensuring that in appropriate cases users can have access to literary works if no appropriate licence exists, yet allows rightsholders to design, in conjunction with users, a licence that is more flexible and tailored to their needs whilst ensuring a just return to the copyright industry that has made the work available in the first place.

It should be noted, however, that the issues are slightly different in the online environment to those existing in the analogue world. Generally speaking a digital product is delivered with a licence prescribing the extent of permitted use. If a user organisation requires a wider or different use, that is a matter of agreement between them and the copyright owner; it would be inappropriate for the law to prescribe a right to a use above and beyond that for which they have freely bargained.

**Q2. Should there be encouragement, guidelines or model licences for contractual arrangements between rightsholders and users on other aspects not covered by copyright exceptions?**

CLA believes that “aspects not covered by copyright exceptions” are those areas where copyright, like other intellectual property rights should be a matter of private contractual arrangement, subject only, where appropriate, to legislation in the areas of competition law and consumer protection. Apart from the practical aspects of trying to promote a finite set of guidelines and agreements for an infinite variety of circumstances, there seems to be little need for guidelines on contractual arrangements in order to enable the dissemination of knowledge. No evidence has been adduced to suggest that the creative industries themselves are somehow failing to make their products available (indeed, as noted above, this is precisely what they are striving to do).

Encouragement should therefore be directed to supporting the creative industries in protecting, and therefore enabling them to market, their copyright content thus providing the necessary stimulus for the creative and financial investment required to produce and make available the works in the first place. The real risk in the online environment is not the inability of users to access content (leading to a spurious argument that further exceptions are required), but that works can be too easily copied or pirated because of the opportunities afforded by the Internet, where the technology enabling illicit copying and proliferation of illegal copies has outstripped the ability of copyright owners to enforce their rights.

Initiatives such as the Automated Content Access Protocol (ACAP) and the efforts to produce a voluntary code of conduct for Internet service providers shows that rightsholders are prepared and able to offer and participate in constructive solutions to such problems as illegal file sharing. But this requires the commitment of ISPs and search engines to accept the existence and scale of the problem in the first place and to embrace the solutions provided. It is in this area that the EU should be providing encouragement.

**Q3. Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?**

It is not clear from the question what alternative is or would be proposed to an approach based on a list of non-mandatory exceptions, other than to suggest that some or all of the exceptions should become mandatory (see Q4 below). Any list-based approach inevitably suffers the problem that the list is seen as “best practice” and therefore encourages Member States to incorporate such exceptions into their national law where they do not already exist. The list therefore risks setting a minimum standard of exceptions rather than providing a limiting perimeter as it was intended to do.

**Q4. Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?**

It will be apparent CLA does not believe that any of the exceptions should be made mandatory. “Ensuring more legal certainty” should not be achieved at the expense of rightsholders with the concomitant risk to the creative industries that are such a vital part of the knowledge economy in the EU; one might as well equally argue that legal certainty could be achieved simply by eliminating all exceptions. Nor it is right that the “better protection of beneficiaries of exceptions” should be seen as the main aim of copyright legislation.

The legislative regime should instead be ensuring a robust and sustainable creative industry within the EU thus enabling all users to enjoy the benefit of a vibrant and productive creative sector.

It is also something of a misnomer to bracket together as an homogenous group “beneficiaries” which actually comprises various different classes with different needs. It confuses those who might need access to a copyright work which could otherwise not be available (for instance, those suffering from a visual impairment or other disability) and those such as educational establishments or libraries who do not have a problem obtaining copyright works and where the debate is more an economic one to whether they should be obliged to pay for products they consume.

It should be noted that, in any event, digital products are more adaptable to producing content in formats accessible to those suffering from a disability than analogue products, whilst also improving ease of access to works for all other users. The better dissemination of knowledge for research, science and education in the online environment that the Green Paper seeks is therefore more likely to be achieved by supporting and encouraging copyright owners to make their works available online (through the creation of a robust, efficient and inexpensive system of enforcement) than through the creation of mandatory exceptions which could only serve to stifle innovation and investment.

**Q5. If so, which ones?**

Not applicable.

## **Exceptions – Specific Issues**

### **4. Exception for the Benefit of Libraries and Archives (Questions 6 to 12)**

- 4.1 In CLA’s submission on the Gowers Review on Intellectual Property in the UK we recognised that there might be a case for allowing the digitisation of works by libraries for archival purposes, but that this must be distinguished from mass digitisation of entire collections which inevitably gives rise to the issue of allowing access to such collections at some later point. Mass digitisation, whether or not for commercial purposes, ought always to be the subject of rightsholder consent given the risks inherent in creating digital products where one unauthorised use can quickly lead to a proliferation of illegal digital copies that cannot easily be prevented and where the perpetrator cannot easily be traced.
- 4.2 The Green Paper mentions the Google Book Search project launched with the aim of making the content of books searchable on the Internet. It should be noted that this is done with rightsholders’ consent who have given permission for the digitisation of parts of their collections under appropriate terms and this should be distinguished from the Google library project. The Green Paper states that “Google concludes agreements with European libraries which cover digitisation of public domain works”, but it must be recognised that this is only being done for out of copyright works, presumably because it has been recognised that attempts to digitise in-copyright works would certainly amount to copyright infringement in the EU. Indeed it is noteworthy that the litigation on the Google library programme in the United States has resulted in a draft settlement in which Google has agreed to pay \$45m to those copyright owners whose works have already been digitised and who agree to participate in the settlement.
- 4.3 It is clear that the appropriate way forward for digitisation projects such as these involves a voluntary commercial agreement; copyright exceptions should not be widened so as to distort the bargaining powers of the parties to any such commercial agreements. The Green Paper argues (on page 9) that the making available exception contained in Article 5.3(n) of the Directive would “arguably” not cover the electronic delivery of documents to end users at a

distance; but, in fact, it seems clear that there is no doubt about this as the exception is most definitely not capable of being viewed as permitting off-site delivery and no clarification is required. Indeed the Green Paper quotes Recital 40 of the Directive which states that exceptions for libraries and archives should not cover “uses made in the context of online delivery”. Copyright content on websites is vulnerable to infringement, especially by search engines; the need here is to support copyright, not to make further exceptions to it.

- 4.4 This exception, and the other exception quoted for the reproduction right for specific acts of reproduction for non commercial purposes (Article 5.2(c), are of course also subject to the 3 step test as provided for in Article 5.5 which recognises therefore that the provision of either physical or online access, even for non-commercial purposes, could conflict with the normal exploitation of the work and/or otherwise unreasonably prejudice the legitimate interest of the rightsholder. It is vitally important for the knowledge economy that these exceptions are not in some way widened and thereby inhibit the creation and publication of the protected content on which it depends.

**Q6 Should the exception for libraries and archives remain unchanged because publishers themselves will develop online access to their catalogues?**

There is no need to widen the current menu of exceptions. A legislative remedy to a strictly limited problem is likely to create a far wider problem with a disincentivisation of creators and producers (at best) and (at worst) a risk of wholesale abuse. The parties best placed to determine how and when and under what conditions online access to their work should be made available are the copyright owners themselves.

**Q7. In order to increase access to works, should publicly accessible libraries, educational establishments, museums and archives enter into licensing schemes with the publishers? Are there examples of successful licensing schemes for online access to library collections?**

The institutions listed should certainly be encouraged to enter into licensing schemes and some already do. Some libraries operate a document supply service, either under terms of direct agreements with the rightsholder or through the collective document supply licence operated by CLA, so it does not appear there is a gap in the UK which needs to be filled, but CLA remains willing to develop voluntary licensing solutions to any reasonable requirements which may develop in the future.

**Q8. Should the scope of the exception for publicly accessible libraries, educational establishments, museums and archives be clarified with respect to:**

**(a) Format shifting;**

In CLA’s submission to the UK Gowers report, we highlighted the difference between “format shifting”, which means shifting content from one digital carrier to another but in the same medium and “media shifting” which involves re-presenting content in a different medium. Digitisation involves upgrading from paper to digital – a different medium with vastly greater utility and potential for copies to proliferate without recompense for rightsholders. It doesn’t just produce another copy; it results in a completely different product and should be regarded as media shifting.

Article 5.2(c) already permits Member States to provide for an exception to the reproduction right for specific acts of reproduction which are not for economic or commercial advantage and which does not contravene the 3 step test. This is sufficient to allow Member States to permit digitisation for archival/preservation purposes only so no change or clarification is required. It would be wrong in principle for Article 5.3(n) (which provides for exceptions to the communication right) to be extended to allow for off-site access to digitised works.

**(b) The number of copies that can be made under the exception;**

Article 5.2(c) is limited to acts which are not for direct or indirect economic or commercial advantage and is further limited by Article 5.5 to those acts which do not conflict with the normal exploitation of the work or otherwise unreasonably prejudice the legitimate interest of the rightsholders. Consequently it is clear that this exception can only apply to preservation and archival copies where required and there is no particular need to clarify the number of copies required to achieve this; typically one copy with a further back up copy ought to suffice.

**(c) The scanning of entire collections held by libraries**

It seems abundantly clear that scanning entire collections would amount to copyright infringement on a massive scale and there is no need therefore for clarification.

We assume that the inclusion of the reference to “educational establishments” is merely because that is how the exception is worded in the Directive and not because there is a suggestion that there should be a generalised “format shifting” exception for educational establishments.

**Q9 Should the law be clarified with respect to whether the scanning of works held in libraries for the purpose of making their content searchable on the Internet goes beyond the scope of current exceptions to copyright?**

As noted above, it seems clear that the Copyright Directive does not permit libraries to scan their contents and make the resulting digital copies available and searchable on the Internet and the law should remain as it is. Any extension to the exceptions to allow a library to scan their collections and make them searchable on the Internet would jeopardise the fundamental intellectual property rights of the copyright owner and thereby risk damaging the knowledge economy.

**Q10. Is a further Community Statutory Instrument required to deal with the problem of orphan works, which goes beyond the Commission Recommendation 2006/585/EC of August 2006?**

CLA agrees with the Green Paper that the “extent to which orphan works actually impede uses of works is not clear”. Given “the scarcity of necessary economic data to allow the problem to be quantified” it seems wrong to produce premature exceptions to a problem the size of which is unknown. The High Level Expert Group (“HLEG”) of 2008 recommended a system of self regulation utilising sector-specific codes and, crucially, the need for criteria on what constitutes a “due diligence” search. The risk of any orphan works exception would be that it unjustly robs the re-emerging author or other copyright owner of the orphan work of a claim for an appropriate payment for the use of their work.

The interests of commercial expediency of those users wishing to utilise orphan works should not be put above the principle of copyright where satisfactory alternative solutions can and are being developed. In addition to the HLEG recommendations, CLA has proposed an indemnity-backed collective licensing system which would allow users to use the work under cover of an indemnity from CLA providing them with the commercial comfort they need whilst not robbing the copyright owner of their intellectual property rights and therefore their right to claim for compensation for the past use of the supposedly orphan work.

**Q11. If so, should this be done by amending the 2001 Directive on Copyright in the Information Society or through a stand-alone instrument?**

Not applicable.

**Q12. How should the cross-border aspects of the orphan works issue be tackled to ensure EU-wide recognition of the solutions adopted in different Member States?**

The work of the HLEG on the development of the ARROW project is intended to provide a solution to this involving an EU-wide database on permissions and rights data and a mutual recognition by Member States of each others sector-specific codes.

## 5. The Exception for the Benefit of People with a Disability (Questions 13 to 18)

- 5.1 We have already outlined the position in the UK as regards visually impaired persons. CLA offers two kinds of permissions: one to organisations who wish to make accessible copies which may be distributed to other organisations or users suffering from a visual or other impairment which impedes their access to a work; secondly CLA's standard licences to organisations such as educational institutions, government departments and businesses include the right to make, or have made, accessible copies for their pupils, students or staff. Details can be found at: [http://www.cla.co.uk/vip\\_licence.php](http://www.cla.co.uk/vip_licence.php)
- 5.2 The Green Paper mentions the legislative background to this in the UK and states that the exception in the UK only applies to visually impaired persons (page 13), but in fact the relevant UK legislation defines a "visually impaired person" as including someone "who is unable through physical disability to hold or manipulate a book or to focus or move his eyes to the extent that would normally be acceptable for reading". It is also worth noting that both of the CLA permissions described above have now been extended to include not just those persons who are unable to read a book because of a visual impairment, but also any others suffering from a disability (as defined in UK's Disability Discrimination legislation) where that disability is connected to that person's inability to read or access the work in question, thus including dyslexia to the extent that it impedes or hinders reading or access. This follows the intention of Article 5.3(b) of the Directive providing for a permitted exception for the benefit of people with a disability "which are directly related to the disability" and "to the extent required by the specific disability".
- 5.3 The CLA licence is subject to important safeguards about there not being a commercially available edition in a format which overcomes the particular disability in question, and the need to respect authors' moral rights. The CLA permissions also extend to include databases which, as mentioned in the Green Paper, are not specifically provided for in the Database Directive (Directive 96/9/EC).

**Q13. Should people with a disability enter into licensing schemes with the publishers in order to increase their access to works? If so, what types of licensing would be most suitable? Are there already licensing schemes in place to increase access to works for the disabled people?**

Apart from the CLA licences described above, there are many initiatives being discussed between various rightsowner representative bodies and organisations representing those with visual and other disabilities in which the UK Government has participated and which it is hoped will produce access schemes.

**Q14. Should there be mandatory provisions that works are made available to people with a disability in a particular format?**

The licensing scheme approach should be encouraged as providing the most flexible response to developing needs which can more easily and more quickly cater for problems than the rigid straight jacket that could be imposed by an exception.

**Q15. Should there be a clarification that the current exception benefiting people with a disability applies to disabilities other than visual and hearing disabilities?**

We do not believe that there is any need for clarification as Article 5.3(b) is not limited by reference to the disability being of a particular type or category of disability. The key is that the disability is the cause of the difficulty being encountered in accessing or reading the protected material.

**Q16. If so, which other disabilities should be included as relevant for online dissemination of knowledge?**

Not applicable.

**Q17. Should national laws clarify that beneficiaries of the exception for people with a disability should not be required to pay remuneration for using a work in order to convert it into an accessible format?**

No, since the cost involved in converting the work into an accessible format cannot be quantified on a general basis and might turn out to be substantial. This might also distort the market in that those producers of commercially available accessible formats (which are often run on a not-for-profit basis or at least operate on narrow margins) might find they could not continue with their activity thus robbing the beneficiaries of the exception of the opportunity to purchase what might have been a more convenient or satisfactory product.

**Q18. Should Directive 96/9/EC on the legal protection of databases have a specific exception in favour of people with a disability that would apply to both original and sui generis databases?**

It would be logical for the Database Directive to have an exception similar to that contained in Article 5.3(b) of a Copyright Directive provided it was subject to the other conditions contained in the Copyright Directive on the Berne 3 step test and reasonable provision for remuneration where appropriate. It is arguable that Article 6.2(d) of the Database Directive already permits this if Member States have traditionally had exceptions in this area.

## **6. The Exception for Dissemination of Works for Teaching and Research Purposes (Questions 19 to 23)**

- 6.1 The Green Paper recognises the importance of striking a balance between the needs of the educational sector and the needs of authors and other creators and publishers of copyright works. Authors and publishers recognise the need for teachers to have access to their materials; that is why they write and publish the educational texts in the first place. But the activity of producing high quality educational materials would be undermined if there were a general exception to copyright for the purposes of teaching. That is why in the UK the Copyright, Designs and Patent Act 1988 followed the Whitford Committee recommendations in declining to provide a generalised education exception. There is simply no good reason why the educational sector should not be prepared to pay a fair price for access to copyright materials as it does for the other products and services that it consumes; the same is true for research where the researcher would generally expect to pay for materials consumed in the course of research and where copyright content should be no different. This is why it is entirely appropriate that the Copyright Directive subjected all exceptions to the 3 step test to ensure that exceptions could not conflict with the normal exploitation by the copyright owner of their works or unreasonably prejudice their legitimate interests.
- 6.2 The Gowers Review in the UK also recognised this principle and proposed, following submissions from CLA and others, that any extension of the educational exceptions to the online world (focusing in particular on distance learning students and the use of virtual learning environments) should be on the basis that any exception be limited in its application to small extracts and that it should be subject to there not being an appropriate licensing scheme permitting access – the “safety net” approach. CLA believes that any consideration of the extension of the permitted list of copyright exceptions in the Copyright Directive should be on the same basis, namely that it is subject to the 3 step test, and to displacement by a licensing scheme.
- 6.3 It is also worth repeating the fundamental difference between the sale of a physical hard copy product and a digital product. A hard copy product does not require a separate licence to be granted at the time of sale to allow or delineate the use to which the purchaser may put the hard copy product; whereas the sale of a digital product can only be handled by means of a licence. Therefore all digital products, whether sold online or offline, come with licence terms specifying the classes of persons who may access the product and the uses to which they

may be put. There will be different pricing models dependent upon the size and width of that class. Any extension of the educational exceptions in the Copyright Directive must recognise that the exceptions can be displaced by the licence terms and conditions applying on the sale of an online product. It would be totally wrong for an educational institution to bargain for a limited range of use or class size at a certain price and then to rely on a statutory exception to extend that use or class further; such matters should be left to be dealt with as a matter of private contract.

- 6.4 The Green Paper mentions that UK law does not define “educational establishments”, but in fact s. 174 of the Copyright, Designs and Patents Act 1988 (“CDPA”) defines it as meaning any “schools” within the meaning of the Education Acts and universities, colleges and other educational establishments described in such Acts.

**Q19. Should the scientific and research community enter into licensing schemes with publishers in order to increase access to works for teaching or research purposes? Are there examples of successful licensing schemes enabling online use of works for teaching or research purposes?**

Almost invariably all online products are available on commercial terms which include the necessary licences to permit the institutions to use the digital material.

CLA has already launched licences to the three major elements of the educational sector in the UK (universities, colleges of further education and schools) which allows digital copies (within licence limits) to be made and delivered via a secure password protected Intranet to their students. This covers the making of digital copies from print editions by digitisation and the universities’ licence also includes an element of works created in digital form.

**Q20. Should the teaching and research exception be clarified so as to accommodate modern forms of distance learning?**

The Gowers Review considered the problem of distance learning students and the delivery of teaching materials through virtual learning environments by educational establishments. It proposed that existing statutory exceptions should be extended to include these on the “safety net” principle already described, namely that they would apply only if, and to the extent that, a licensing scheme was not available. Any extension to the list of permitted exceptions should be on a similar basis to allow rightsholders the opportunity to develop appropriate licensing solutions to ensure a just return and that any risk to primary sales of educational texts is minimised.

**Q21. Should there be a clarification that the teaching and research exception covers not only material used in classrooms or educational facilities, but also use of works at home for study?**

See above.

**Q22. Should there be mandatory minimum rules as to the length of the excerpts from works which can be reproduced or made available for teaching and research purposes?**

It is inappropriate to attempt to set mandatory minima to apply across the EU with the very different systems of copyright management that exist.

**Q23. Should there be a mandatory minimum requirement that the exception covers both teaching and research?**

The term “research” has occasioned much dispute as to its meaning and in UK law had to be narrowed to exclude “commercial research” on the UK implementation of the Copyright Directive in 2003. “Research” is such a loose term that an argument can be made that it covers almost any information-gathering exercise; this would then cover almost every conceivable occasion on which a copy was to be made. The exception to the right would then be so wide as to render the right itself meaningless.

The current suite of exceptions – reproductions by an actual person for private and non-commercial use (Article 5.2(b)) illustrating for teaching and scientific research (Article 5.3(a)) and communications for the purposes of research or private study to individual members of the public at dedicated terminals at library and educational premises (Article 5.3(n)) already provide a sufficient number of permitted exceptions and it should be left to Member States to determine which of these to apply. Any requirements beyond that can and should be satisfied by direct contract or licence by the rightsowners or through a collective licensing solution such as that offered by CLA.

## **7. User Created Content (Questions 24 to 25)**

7.1 CLA does not believe that any need for change to copyright law to cover user-generated content has been demonstrated. Any attempt to identify user-created content, meaning content originated by 'end users', as a distinct category of work separate from copyright generated by other individuals and organisations, and any attempt to provide precise rules as to what could be done with existing copyright content by such users, would be almost impossible to draft in any meaningful way and would be likely to result in either great uncertainty or unfairness or both. The existing rules should apply to copyright works regardless of who creates them.

**Q24 Should there be more precise rules regarding what acts end users can or cannot do when making use of materials protected by copyright?**

No; see above.

**Q25 Should an exception for user-created content be introduced into the Directive?**

No; see above.

M T Delaney  
25th November 2008

## Appendix 1 – CLA Submission to the Gowers Review

# THE GOWERS REVIEW

*Submission by The Copyright Licensing Agency Ltd*

## 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

## **Appendix 2 – CLA Submission to the IPO Consultation on Proposed Changes to Copyright Exceptions**

### **1. Introduction**

- 1.1 The Copyright Licensing Agency Ltd (“CLA”) welcomes the IPO consultation on taking forward the Gowers Review on Intellectual Property, and acknowledges the thoughtful and detailed work that has gone into identifying the issues in the Consultation Document.
- 1.2 CLA is a member of the British Copyright Council (“BCC”) and of the Alliance Against IP Theft (“AAIP”) and has the benefit of having read and contributed to their submissions. This submission focuses on those matters that bear most directly upon CLA’s activities in providing collective licensing solutions in the world of hard copy and digital publishing of books, journals, magazines and other periodicals. Although we make some comments on the broader implications to copyright on some of the recommendations, these are dealt with more fully in the BCC and AAIP submissions with which CLA is happy to associate itself.
- 1.3 CLA was founded in 1983 by the Authors Licensing Collecting Society Limited and the Publishers Licensing Society Limited who themselves represent, directly or indirectly, authors and publishers of most of the books, journals, magazines and other periodicals published in the UK. Artistic works such as photographs, illustrations, etc. appearing within those works are covered by virtue of an agency agreement between CLA and the Design & Artists Copyright Society Ltd; a network of repertoire exchange agreements with similar organisations throughout the world means that CLA’s collective licences cover the overwhelming majority of UK publications as well as a huge number of titles from overseas. Further details of CLA’s collective licensing activities and the benefits it brings to users and to copyright owners and creators are contained in CLA’s original submission on Gowers at [http://www.cla.co.uk/assets/139/gowers\\_review2.pdf](http://www.cla.co.uk/assets/139/gowers_review2.pdf).
- 1.4 The cultural value of the copyright industries to the UK needs to be fully appreciated. The UK’s rich history of creating and producing literary and dramatic works is unparalleled anywhere else in the world, and of course the English language is the predominant international language for business, education and entertainment. The economic and financial importance of the copyright “industries” is also highly significant; this includes both the core copyright industries of publishing, involving the creation, distribution and sale of copyright products and services, and copyright-dependent industries whose existence depends upon the core copyright industries (for example manufacturers of hardware on which copyright content is made available, transmitted and consumed).

### **2. General**

#### **2.1 Exceptions and the 3 Step Test**

The first point to make is that all copyright exceptions should be subject to, and comply with, the Berne 3 step test. The Government’s general view is that the way any exceptions are framed means that the conditions of the 3 step test are necessarily complied with and that therefore there is no need to state specifically that exceptions are subject to the Berne 3 step test. This can only be so if the exceptions are interpreted in practice, and in any judicial decision, so as to accord with the Berne 3 step test. This produces an unnecessary area of doubt allowing the possibility of dispute that would be removed were all exceptions to be stated categorically to be subject to this test. In the case of *Fraser Woodward Ltd vs BBC* [2005] EWHC 472(Ch) the judgement included compliance with the Berne 3 step test as being one of the factors relevant to the understanding of what constitutes “fair dealing”. CLA

does not think that such an important matter should be left open as a matter of judicial interpretation to resolve a dispute between parties, but should be stated clearly in the legislation that gives rise to the exceptions in the first place.

2.2 The application of the 3 step test to the particular recommendations is covered below, but it is worth commenting in general terms on the description and analysis of the 3 step test contained in page 14 in the section on the extension to Educational Exceptions (Recommendation 2) of the Consultation Document. Whilst this does seem to support rightsholders view that the test should be interpreted so as not to damage rightsholders economic as well as rightsholders other interests, CLA would note:-

- i) “certain special cases”: this seems to be equated with the exception only applying in “clearly defined cases” as opposed to the more normal understanding of the word special, i.e. “peculiar” or “restricted”. Whilst it is true by definition that an exception for education can only apply to a limited number of beneficiaries and activities (i.e. pupils or students in education), it is hard to see the many millions of students and pupils as constituting a “special” class as envisaged by the Berne Convention.
- ii) “no conflict with normal exploitation of the work” and “does not unreasonably prejudice the legitimate interest of the rightsholder”: CLA welcomes the Government’s view in recognising that collective licensing, and indeed other forms of secondary licensing, are part of the rightsholder’s normal exploitation of the work and one of the author’s legitimate rights that could be unreasonably prejudiced by an exception which obviated the need for a licence. However, it is important also to bear in mind the possible impact on primary sales of wider exceptions. It is almost impossible to prove a direct nexus between a lost sale of a book or a journal and the application of a liberal interpretation of a statutory exception, but it must be true at a general level that this can be the case. The committees in existence prior to the 1988 Act which led to the formation of CLA (e.g. De Freitas Committee, the Wolfenden Committee) all recognised the potential impact of photocopiers on sales of educational texts. The same is true, or possibly even more so, in the digital age.

### 2.3 **Technological Protection Measures (“TPMs”)**

The Consultation Document asks some general questions as to whether the beneficiaries of exceptions should be able to make use of the remedy in the Copyright, Designs and Patent Act 1988 (“CDPA”) where TPMs prevent the exercise of permitted acts. There is an argument that section 296ZE of the CDPA, which was introduced by secondary legislation (the Copyright and Related Rights Regulations 2003) incorrectly effected a fundamental change in copyright law which went beyond the scope of implementing the Copyright Directive, by introducing new rights. The fair dealing and other exceptions had traditionally only provided a defence against an action for copyright infringement without necessarily confirming them as a right. The distinction between the two may not have mattered hugely in practice in the analogue era when the subject of a sale was a physical product such as a book which by definition could only be physically possessed at any one time by only one person. But when the subject matter of the sale is a digital product, such as a literary work sold on a CD-Rom or available online via subscription or a music CD, the possibilities for this to be shared unlawfully, e.g. by file sharing amongst peer groups, increase dramatically. Casting the exceptions as a “right” that then have to be allowed or enabled by the rightsholders causes significant problems in practice – with, it is suggested, little commensurate benefit to users.

2.4 It is only right and appropriate that TPMs should be allowed to enable rightsholders to protect their legitimate interests. The authors’ exclusive right of authorising reproduction of these works under Article 9 of Berne must be prejudiced if such TPMs have to be disabled to allow the exercise of a so-called right. Even if it is accepted that the exceptions to copyright do more than provide a defence against an action for infringement and should be regarded as a right, the lack of legal certainty as to the extent and practical application of these provisions make it hard to see how this could operate smoothly. How can a rightsholder provide for a limited disabling of TPMs to accommodate an exception of an unknown extent, whilst preventing unlawful use? The potential for vast abuse (whether through organised piracy or

by a multitude of individual acts of file sharing) surely outweighs any perceived benefit to users whose legitimate interest in obtaining access to the information or work in question can, and indeed are, met either through the ability to purchase the product or service directly or through collective licensing schemes.

2.5 It follows that CLA believes that any expansion of copyright exceptions as proposed in the Consultation Document should not be accompanied by an extension of s. 296ZE CDPA which appears not to have worked or have been needed at a practical level, and serves only to introduce confusion.

2.6 **Performers Rights**

2.6.1 The Consultation Document asks whether – in terms of exceptions – the corresponding provisions of the CDPA relating to Performers Rights should be amended. This, of course, could only relate to some of the recommendations (e.g. it is hard to see how performers rights could be affected by an amendment to s. 36 which deals specifically with reprography) and this does not directly affect CLA. We think the key to this is in the correct framing of exceptions with, in the field of artistic and literary works, a clear application of the Berne 3 step test.

2.6.2 Article 15 of the Rome Convention dealing with Performers Rights allows Contracting States to provide for exceptions for private use, short excerpts in connection with the reporting of current events and used solely for the purpose of teaching or scientific research. It provides also that Contracting States may provide for the same kinds of limitations to the protection of performers, producers of phonograms and broadcasting organisations in domestic laws as it provides in connection with the protection of copyright in literary and artistic works. This would also therefore suggest the application of the principles of the Berne 3 step test to any such limitations. Any extension of the exceptions to Performers Rights, as with the proposed exceptions affecting literary and artistic works, must be confined so as not to endanger primary sales or prevent the collection of a reasonable remuneration via collective licensing for secondary uses.

**3. Recommendation 2 – Extension to Educational Exceptions to Include Distance Learning**

3.1 Clearly it is the proposed extension to s. 36 that is most relevant to CLA, although it is conceivable that any extension to s. 35 to include on-demand communications within its ambit might affect some activities of CLA's rightsholders. Conventional hard-copy publishing, involving the production and sale of a physical copy of a work, is now complemented to a great extent by electronic products available on CD, as is preferred by schools, or online either as an outright purchase on a subscription or pay per view basis.

3.2 **Extension of s. 35 to include on-demand services in broadcast exception**

3.2.1 It is our view that in general the broadcasting exceptions should not be amended so as to include on-demand services within it. The rationale for the current exception is not that it is thought important that educational establishments should be able to obtain access to broadcasts for free, but rather that they should be able to obtain access at all. The communication/making available of a broadcast cannot be grounded in a typical contract for the sale and purchase of a physical product, but must be dealt with by way of a licence. It would therefore be difficult or impossible for educational establishments to access broadcasts lawfully under, e.g. the standard TV licence unless a separate licensing scheme was established.

3.2.1 The legislature recognised that such access should not be free by allowing for the displacement of the exceptions by certified licensing schemes which can charge an appropriate fee. But the problem of access to on-demand services does not arise at

all since they are, by definition, available “on demand”. There would only be a case of statutory intervention if the market failed to provide licensing models that allowed multiple receipts/viewing of a single broadcast and there is no evidence that this is the case. Extending s. 35 could risk jeopardising the continuance of such services or the launch of new ones.

- 3.2.3 CLA disagrees, therefore, that s. 35 should not be defined “by media” but rather by intent, category of views and activity as specified in paragraph 46 of the Consultation Document. On the contrary CLA think s. 35 should continue to be defined by “media” and focus on “broadcasts” as it currently does, albeit possibly amended to incorporate broadcasts that may be accessed by a viewer at a time of their own choosing where this facility is made available. This is essentially similar to the “time-shifting” provisions in intent.
- 3.2.4 The other issues surrounding s. 35 mentioned in the Consultation Document are repeated in considering the proposed extension to s. 36 and are dealt with in our submission on that below.

#### **4. Section 36 – Extension to include Virtual Learning Environments (“VLEs”) and Distance Learners**

- 4.1 CLA, in conjunction with representative bodies within the various educational sectors, has worked to develop licensing solutions allowing educational establishments to scan hard copy material and to disseminate the digital copy thus created to their students or pupils for educational purposes. It should be noted at the outset that this is slightly wider than the problem that Gowers focussed on in terms of distance learners and VLEs in that before these or other transmission methods can be employed, the original digital copy needs to be created in the first place. This, of course, requires the copyright owner’s permission since it involves copying and indeed transferring a hard copy into a digital product. This digital product has a greater value to the user, but equally presents a greater threat to rightsholders if not done with consent or properly licensed (our comments on the proposed format shifting section below at paragraph 5 are relevant here).
- 4.2 CLA launched a basic scanning licence to the Further Education sector in 2003 and a licence for Universities and other Higher Education Institutions (“HEIs”) was negotiated with UUK/GuildHE in 2006 to allow extracts to be scanned to produce digital copies to be used in courses of study. Finally, CLA has launched (with effect from 1st April 2008) a schools scanning licence which will also allow digital copies to be created by schools and transmitted electronically to their pupils. All of these licences address the issue of delivery to distance learners and are drafted so as to be “technology neutral” therefore allowing presentation through VLEs, PowerPoints, etc. A copy of each of these three core licences is attached. It might be thought therefore that expanding s. 36 is providing a solution to a problem that for the most part does not exist.
- 4.3 CLA is in the process of broadening its repertoire so it is likely that in the near future only those copyright owners (whether UK or overseas) who have specifically excluded their works would not be encompassed by a CLA licence covering scanning and electronic transmission.
- 4.4 **Consultation Document Questions**

##### **Q1: What impact would the expansion of the educational exceptions have? What cost or benefits would accrue to rightsholders and users of copyright works?**

**CLA answer:** The expansion would certainly clarify the rights of users as regards any repertoire not covered by CLA or other licensing schemes. This would clearly be a benefit to users, but it should be recognised that their legitimate needs are being met through voluntary licensing solutions. The additional cost to users of the scanning/digitisation rights is generally quite modest given the greater utility that is offered. The trial scanning licence for HEIs placed a figure of 50p on the scanning right, albeit this was negotiated in the absence of any

hard data as to the use and value of scanning by HEIs and this rate is currently part of the renegotiation for the renewal of the licence which expires in August 2008. The increase proposed, for this year, for schools with the addition of scanning rights is 5% plus RPI. As was the case with the HE licence, this is being offered obviously in advance of any data as to the volume or value of scanning to schools and the rate may have to be reviewed in the future.

For CLA's rightsholders, assuming of course that, as envisaged by the Consultation Document, any expansion of the exception would be subject to a licensing scheme, the benefit would depend upon the rate that can be charged for the additional use of copyright works, which is ultimately subject to the control of the Copyright Tribunal. Although not the subject of this Consultation, it should be noted that the recent reports on the Copyright Tribunal from the IPO and the DIUS Select Committee found that there is a need for reform to restore faith in it on the part of rightsholders. It must be remembered that any analysis of the risks and benefits to rightsholders of an extension to copyright exceptions is crucially dependent on the fairness and operation of the Copyright Tribunal to which collecting societies and their rightsholders are subject.

The risk to those copyright owners not represented by CLA or other licensing schemes is in the lack of remuneration for the use of their work under the exception and the risk to primary sales. A risk that applies to all rightsholders is abuse of the section in that whatever limits are imposed, it can be difficult to monitor or enforce in practice and can lead to instances of excess copying which may significantly increase the threat to primary sales.

**Q8: Should limits be placed on the form of communication used by educational establishments to communicate extracts to distance learners?**

**CLA Answer:** There should certainly be geographical limits to any proposed expansion of this exception. The exception should make it clear that it would only apply to communication to members of the educational establishment within the UK and that sharing between institutions is not permitted. It should be clear that distance learners based overseas should not be covered by this exception which should be aimed at ensuring that UK students and pupils are able to access learning materials provided by their educational institution. This may include genuine distance learning students (probably in the tertiary education sector, but might include those living in remote locations) or those with a learning disability. Overseas distance learning students are generally taking a commercially operated course – but whether or not the course is operated on a commercial basis, it should not benefit from a UK exception. It should also be the case that the exception, as now and in addition to being limited to applying to “educational establishments” for “the purposes of instruction” again should not apply to those operating on a commercial, for profit basis wherever they are based.

Generally technical limits on the communication would appear to be ineffective and probably unnecessary (see below).

**Q9 & 10. Should the expanded exception be limited to communication inside a VLE? Should communication by e-mail outside a VLE be permitted?**

**CLA Answer:** Any attempt to limit communication to a VLE may quickly become outdated as technology and the services and products available change. Indeed it would be hard to settle on a clear definition of a Virtual Learning Environment that met all current needs let alone unanticipated future needs. CLA believe that any such exception should be technology neutral as is the case with the current suite of CLA licences so that, for instance, communication by e-mail might be permitted. The key here is the security of the transmission, as to which see below.

**Q11. Do you agree that access should be subject to security measures, such as a requirement to enter a secure password in order to access the recording? What other security measure might be appropriate?**

**CLA Answer:** Yes; we would refer to the definition of “Secure Network” in CLA licences which has been built upon similar definitions agreed in standard licences in both the educational and corporate sectors. The key elements of this are that:-

- i) there is a network, which may be a standalone network or a virtual network within the Internet. Generally e-mail traffic on, e.g. personal e-mail accounts, should not be permitted;
- ii) the network is only accessible to individuals who are approved by the licensee for access;
- iii) such individuals must authenticate their identity at the time of log-in and periodically thereafter generally by the use of passwords;
- iv) such log-in and authentication to be in accordance with current best practice (thereby ‘future-proofing’ to some extent);
- v) and whose conduct is subject to regulation by the educational institution.

The latter point is particularly important. It is vital that the educational institutions seeking to benefit from an exception should accept the responsibility of alerting their students to the existence of copyright. They must endeavour to control conduct so that it complies with the limits of any statutory exception just as under any licence they are required to endeavour to ensure compliance with licensing terms. This could include the use of appropriate student disciplinary measures for breach of those conditions; for instance password sharing or “trafficking” can easily break security and lead to widespread infringement. CLA would expect institutions benefiting from such an exception to withdraw access immediately and consider other disciplinary measures available to them.

**Q12 & 13. Who should be able to access extracts made available by an educational establishment in a VLE? Is the reference to “teachers and pupils at an educational establishment and other persons directly connected with the activities of the establishment” in section 34 sufficient or too widely cast? What level of responsibility should an educational establishment have for maintaining the security of a password-protected VLE?**

**CLA Answer:** CLA believe that the exception should be limited to staff, students and pupils. The phrase “other persons directly connected with the activities of the establishment” in s. 34 is there for a different purpose and would lead to uncertainty as to who was covered and for what purpose. You will note that CLA licences may extend the category of persons to whom copies can be made, and currently there is a wider category of persons for paper copies than for digital copies, again depending on access to a “Secure Network”. But an extension of the exception beyond those directly involved in the giving and receiving of instruction would be unwarranted and should be left as a matter for licensing as appropriate and by agreement between the rightsholders and their agents, the collecting societies, and the various user groups.

**Q14. How should onward communication beyond a secure environment be prevented?**

**CLA Answer:** It is very difficult to see how such communication can actually be prevented – as opposed to being prohibited. Inevitably there will be those who seek to abuse exceptions and/or licensed permissions, but any attempt at a technical solution, e.g. by trying to limit it by something called a VLE, is likely to fail while possibly causing greater disruption to the law abiding majority. CLA think the best approach is to ensure that educational establishments accept the burden of raising copyright awareness amongst their staff and students and to be vigorous in monitoring usage of the learning materials and applying, where appropriate, disciplinary measures. Another part of the answer to this, again not the subject of this Consultation, is to ensure the correct legislative regime for enforcement of copyright by providing effective, dissuasive and proportionate remedies as envisaged by the Copyright and Enforcement Directives, including a right for collecting societies and other intellectual property

right management bodies to have a right of action (a Representative Action) in accordance with the Enforcement Directive.

**Q15. Should Section 36 be expanded to included classes of work other than short extracts from published literary, dramatic and musical works? If so, what classes of work should be included?**

**CLA Answer:** CLA think the answer to this lies again in understanding the need to ensure that educational institutions can have access to learning materials rather than they should have access at no cost. The current s. 36 exception for reprographic copies limited to 1% of a work per quarter should be seen less as a “right” for schools, colleges and universities, but more as a statutory safety net to ensure some access is possible should rightsholders not deliver licensing solutions. CLA are not convinced that there is any particular need for the exception to be extended in the way described because of a lack of potential access. CLA would point out that CLA licences do include artistic works so far as they occur within a book, journal, magazine or other periodical. CLA would be willing to work with other collecting societies towards delivering a solution to any genuine requirement for licensing of multimedia works.

**Q16. What consequences would such an amendment have on rightsholders?**

**CLA Answer:** As stated above, CLA are not convinced of the need for this expansion and would be concerned that it could have adverse effects on the development and launch of products designed to meet any such need as arises. Any limits that could be set (see below) would necessarily be open to abuse, thus exacerbating the problem. It must be remembered that it is in the interest of authors, visual creators and publishers to produce works relevant to the needs and demands of schools, colleges and universities at a fair price. Generally once the demand is established, the market will ensure there is a supply to match it.

**Q18. If the exception is expanded to other works, what limits should be placed on the size of extracts? Would the application of existing limits to other works be desirable or practical?**

**CLA Answer:** Numerical limits in the current s. 36 applying to reprographic works are generally well understood and capable of some form of measurements, although even this can be problematic. It is hard to see how such numerical limits could be imposed on other classes of work (how do you measure 1% of a painting?) which might suggest a solution of a generalised description such as “small portion” or “insubstantial”. But apart from the uncertainty that this would undoubtedly generate, it would increase the possibilities of abuse. At best, teachers and others trying to comply with the law would struggle to understand what it meant and when they were operating within appropriate limits, and at worst it could allow the use/abuse of extracts of such a size as to damage primary sales.

#### 4.5 **Other Issues**

##### 4.5.1 “Dealt with”:

this definition is less problematic for s. 36 than for s.35 which currently specifically prohibits communication from within the premises of educational establishment to any person situated outside those premises. For s. 35 any inclusion of distance learners within the exception necessarily requires that to be revised. The current definition in s. 36 however contains no such restriction and is, for most purposes, serviceable in that it prohibits any sale or letting for hire. The final limb of the definition in s. 36 (Communication to the public) does require some revision, but this could be addressed by a cross reference to those who are able to access extracts (teachers, students and pupils as above) and confirmation that communication to them by the educational institution for educational purposes and as part of their educational studies does not equal “communication to the public”. If the mechanism of a “Secure Network” is used as described above, then some of the problems envisaged in paragraph 72 (page 13) of the Consultation Document would simply not arise. The

simple answer to the question of whether transmission to an incorrect e-mail address would produce an infringing copy is that technically it would. It is of course entirely unlikely that a single instance of transmission to an incorrect e-mail address would be likely to result in any action or liability.

#### 4.5.2 European Law and 3 step test:

this is covered in the introduction to this submission.

#### 4.5.3 Digital Rights Management (“DRM”):

s. 296ZE would, without more, apply by default to any extension to copyright exceptions, including the education specific exceptions of s. 35 and s. 36. Our views on the legal basis and practical effect of this section were covered in the Introduction. In addition, s. 296ZE is dealing with the application of effective technological measures to a copyright work and is therefore necessarily dealing only with electronic products, whereas the problem identified by the Gowers Review relates primarily to hard copy works that could be photocopied and distributed by hand to a class – see for instance paragraph 5 (page 2) of the Consultation Document referring to the purpose of s. 36 to allow “educational establishments to copy (usually by photocopier)” and also to paragraph 60 (page 12) of the Consultation Document stating the current exception is “aimed at permitting teachers to prepare ad hoc hard copy “handouts” for their pupils”.

It is true that the definition “reprographic process” in s. 178 of the CDPA includes reference to works “held in electronic form” and therefore “any copying by electronic means”. But this again touches on the fundamental difference between a sale of a physical hard copy product (which does not require a separate licence to be granted to allow use of the original acquired) and the sale of an electronic product which can only be handled by means of a licence. Electronic products, whether sold online or offline, will come with licence terms specifying, amongst other things, the classes of person who may access the product and where different pricing models will depend on the size and width of that class. Should any educational establishment wish to acquire a licence permitting use of interactive whiteboards to enhance the classroom learning experience or to allow extracts to be sent to distance learning students by electronic means, they can achieve this through a licence from the supplier of electronic product (and which, in accordance with s. 36 (3) would displace the statutory exception).

CLA would suggest that it would needlessly complicate a relatively straightforward expansion of the exception to include consideration of the possible application of TPMs preventing the exercise of “permitted acts” (with an underlying and contested notion that they are “rights”) and which can only apply to products sold originally in electronic form which do not present the problem which Gowers is seeking to address. It follows, therefore, that CLA believes that s. 296ZE would have to be amended to as not to apply to these exceptions.

## 5. Format Shifting

- 5.1 It is worth making a point of principle that we have made previously in our communications with the IPO to do with an issue of terminology. The proposed new exception relates to “format shifting” and we are most anxious to distinguish this from what we would term as “media shifting” (converting a paper copy to a digital one) and which we do not think should be the subject of an exception at all.

To quote from our letter of 28th February 2007:-

“**Format shifting**, we think, should mean shifting the same content – and in the same media – from one digital carrier to another. Digitisation however involves upgrading from paper to

digital – a different medium with vastly greater utility and potential for copies to proliferate without any recompense for rightsholders. It isn't just a copy; it is a different product. We would regard this as **media shifting**.

Documents which have been “media shifted” using such ubiquitous technology as digital cameras and scanners can even now be converted using run-of-the-mill OCR software into digital files which can be manipulated, stored as part of a database, and searched using keywords. The process is already relatively quick using readily available consumer products, the technical efficiency and speed of which can only increase. The utility of the end product is of a different order entirely from that offered by the paper version. Whilst media shifting might be permitted as an exception only for archival purposes in accordance with the Gowers recommendations, media shifting for other uses should only be permissible under licence. It should not form part of a statutory exception.”

- 5.2 The Consultation Document is clear that in this phase of implementation of the Gowers Review this exception is being discussed specifically to deal with the perceived problems with recorded music, and possibly also of films. But in both the main commentary and in the Impact Analysis for the format shifting recommendation, it is seeking evidence on a possible extension of this proposed exception to cover all classes of work (“option 2”). We are concerned at the examples given on page 17 envisaging the possible scanning of artistic works and literary works which we think are unnecessary and highly dangerous. In short, CLA would ask that any proposed format shifting exception (if required at all) should be strictly limited to music and possibly films where the problem first arose, and that this should not provide an opportunity for some lateral thinking as to which other areas such an exception might conceivably apply.

None of this should be taken as meaning that CLA agrees that a format shifting exception is necessary at all – CLA is happy to associate itself with the submission of AAIP – but simply that there is definitely no case for it to apply at some point to hard copy printed publications of literary works, including artistic works. We therefore address Questions 19 – 29 on the basis that it were being proposed that a format shifting exception should apply to all classes of work.

**Q19. What impact would the introduction of a format shifting exception have? What costs or benefits would accrue to rightsholders and users of copyright?**

**CLA Answer:** Were a format shifting exception to be so drafted as to be capable of applying to printed literary works, CLA thinks that the impact is likely to be adverse and potentially highly significant, with little legitimate benefit to users of copyright. The example given at page 17 of the Consultation Document suggests it may be desirable to allow users to scan a literary work into a portable electronic reading device to read while travelling. We disagree. It would be highly undesirable to allow such activity which, contrary to the last sentence, we do not consider would be legitimate and might impinge on the potential for, or viability of, the publication and sale of an electronic product in the first place. It is hard to believe that legitimate users would actually find the process of scanning a book of hundreds, perhaps thousands, of pages on to a portable electronic reading device to be a worthwhile, cost effective or useful activity and that little extra is gained in the way of convenience in terms of carrying a portable electronic reading device (such as a laptop) instead of a relatively small and lightweight book or journal. Clearly this should be left to the market to provide devices to allow reading with a market in the sale of literary content rather than it becoming a subject of statutory exception which could render stillborn the infant e-book/reader market.

**Q20. Do you agree with the conditions proposed above?**

**CLA Answer:** In any format shifting exception, CLA would certainly agree with the conditions proposed, but would want it to be clear that it did not apply in the first place to printed literary works and that, whatever the category of work in question, it should never apply to a copy generated from the use of an exception (e.g. fair dealing) as opposed to a paid-for acquisition.

**Q21-23:** Are covered by what is said above.

**Q24. Should the proposed format shifting exception be limited to recorded music and film or should it also apply to other works? If so, which ones?**

**CLA Answer:** CLA believes that any format shifting exceptions, as stated above, should definitely not apply to any categories of work (other than recorded music and film if indeed even this is necessary or appropriate).

**Q25. What impact would the introduction of a format shifting exception have on particular sectors of the creative industries?**

**CLA Answer:** The impact could be potentially damaging to the existing hard copy world of publishing in that it could potentially lead to a peer file-sharing culture that could devastate original sales of literary work similar to the music industry and could prevent the launch at all of successful e-book reader products.

**Q26-28. How many format shifts would be allowed? Should the exception allow additional format shifts to take account of changing technology? Should more than one copy be allowed to address the technological process of transferring content?**

**CLA Answer:** The key to all these is in correctly defining what is a format shift as opposed to media shift, in other words allowing, for private use only, an individual to play or display on any number of digital media or carriers they own, content they have themselves purchased – and for private use only. Technology may develop different digital carriers, but the fundamental difference between an analogue (hard copy) product and digital product must be recognised by any exception.

**Q29. Should the exception apply to what works and from what date should the exception apply?**

**CLA Answer:** The difficulty of answering this question sensibly demonstrates the problem with the proposal that there should be an exception at all. If copyright law is not to be changed retrospectively, an exception could only apply to new works published after the date of any implementation of a new exception. This would necessarily imply that the work has also to be purchased after the date of the law changes, but since the change has been proposed in response to a current problem reflecting current and historic consumer behaviour, it is unlikely that consumers and users pay any attention to such distinctions. This rather suggests that the better solution would be a voluntary licensing one rather than a statutory exception. Alternatively, any format shifting exception (narrow and concise in its application as described above) could only apply to the extent that there was no licensing scheme available. In this case, it might be appropriate for the exception to apply to copies made after the date the law changes.

**6. Recommendation 9 extending the exception for copying for research and private study**

- 6.1 The proposed extension of this exception does not affect CLA's core activities and so we do not address specifically questions 30 to 49 of the Consultation Document. CLA would only note that any proposed expansion of copyright exceptions always needs to be measured carefully against the scale of the genuine need versus the possible risk to rightsholders. Exceptions need to be narrowly drafted clearly targeting their intended beneficiaries, as all too often they are capable of having a wider and unintended application. As noted in the introduction, all copyright exceptions should be made specifically subject to the Berne 3 step test and to the various requirements in the Copyright Directive for fair compensation.
- 6.2 The Consultation Document rightly notes the risk of blurring the distinction between the general "fair dealing" exceptions contained in s. 29 and s. 30 with the education-specific exceptions contained in s. 32, et seq. Since the main problem that this proposed exception is

intended to address lies in the educational sphere, it might be appropriate to consider an approach similar to s. 35 and s. 36 in that the needs of educational institutions could be met by a statutory safety net which applied in the absence of any voluntary licensing scheme. In this way the key purpose of access, as opposed to free access, would be met.

- 6.3 The Consultation Document also notes (paragraph 164, page 26) that the issue of DRM is a significant one for rightsholders in this area, and notes in paragraph 165 that the UK is obliged by EC law “to provide a DRM work around arrangement for copies required for the purposes of scientific research”. But this is only required where the member state has chosen to allow such an exception in the first place and where, in accordance with the Copyright Directive, that exception complies with the Berne 3 step test and provides fair compensation. Again a licensing solution that allows rightsholders to be compensated meets the requirements of the 3 step test enshrined in the Copyright Directive whilst the licence itself allows access, obviating the need for any statutory exception and the disapplication of DRM to allow that exception to be utilised.

## **7. Recommendations 10a and 10b – Amendment of Library Privilege Exceptions to Extend Permitted Acts for the Purposes of Preservation**

- 7.1 Many of the issues raised here (3 step test, DRM and disapplication of TPMs) are covered elsewhere in this submission. Recommendation 10a, extending the scope of the current library privilege exceptions to include all classes of copyright work, does not affect CLA beyond the general principles relating to exceptions already discussed.

### **7.2 Recommendation 10b**

“Prescribed libraries to be able to format shift works held on unstable media to preserve permanent collections in an accessible format and that museums and galleries should be added to the prescribed libraries exception”.

As recognised by the Consultation Document, it is important that this exception is limited to archiving and does not permit any subsequent dealing or exploitation. It must certainly not allow remote access, and even on-site access to archived copies must be subject to a condition that it does not substitute for primary sales. After all, archiving a paper copy in an electronic form then allows multiple simultaneous viewing that could otherwise only have been achieved through the multiple purchase of the work. Also, archive copies must be taken from legitimately purchased copies and not from legal deposit copies.

### **Q50. What impact would the expansion of the exception for libraries and archives have? What costs or benefits would accrue to rightsholders and users of copyright?**

**CLA Answer:** The Consultation Document notes in paragraph 173 (page 28) that the current exception provides for prescribed conditions with which a prescribed library or archivist has to comply in order to use the exception. S. 42 (2) CDPA specifies that those conditions should include “provision for restricting the making of copies to cases where it is not reasonably practicable to purchase a copy of the item in question to fulfil that purpose”. CLA agrees that any expanded exception must also be subject to this condition. The prescribed conditions are set out in the Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989 SI No. 1212 (the “Regulations”). However, no library outside the UK should be a library prescribed for the purposes of receiving a format shifted (i.e. an electronic) copy pursuant to the provisions of the Regulations and to this extent Part B of Schedule 1 of the Regulations would need to be amended or disappplied. The “prescribed conditions” should include a requirement for the library to keep records of the occasions on which it uses the benefit of this exception with an indication of the steps taken to identify whether it was reasonably practicable or not to purchase another copy of the item in question.

Further, as noted above, the ability to reproduce a paper copy of a literary work into a digital copy to which there can be multiple and simultaneous access could substitute for the

purchase by a library of more than one copy and so the prescribed conditions ought not to be limited just to “reasonably practicable” efforts to acquire another copy, but to acquire as many copies as might be required for the likely demand for access to the work in a permanent collection.

**Q51. What are the consequences, for rightsholders and beneficiaries, of extending section 42 to cover all classes of works?**

**CLA Answer:** The current exception is limited to “literary, dramatic or musical” works and the Consultation Document proposes to extend it to all classes of work “including sound recordings, films or broadcast”. It does not specify “artistic” works, which are therefore proposed to be included almost by default. This falls outside of CLA’s remit (except to the extent that the artistic work may occur within the pages of a book, magazine or journal), but we note that format shifting original paintings, photographs and illustrations raises certain practical difficulties and issues of principle that require consideration.

**Q52 & Q53. Is it necessary to restrict the number of copies made for preservation purposes? If so, why, and how many copies should be permitted?**

**CLA Answer:** It would be difficult to agree on a numerical limit, so the restriction should be, as noted in the Consultation Document, to as many copies as are required for the purposes of preservation.

**Q54 & Q55. What would be the impact on rightsholders if section 42 was extended to cover museums and galleries? What types of museums and galleries should be included? What criteria should they meet to qualify?**

**CLA Answer:** In terms of literary works, there seems no obvious reason why museums and galleries should not be added to the class of institutions capable of benefiting from this exception provided they are subject to similar or analogous conditions as are laid down for prescribed libraries.

## **8. Recommendation 12 – Caricature, Parody or Pastiche Exception**

- 8.1 In common with many other commentators, it appears to us that there is no proven need for an exception, the extent and application of which would be clouded in uncertainty and would probably cause more problems than it could hope to solve. There seems no real evidence that the current regime acts as a disincentive to the creation of new works that might supposedly be encouraged by the introduction of such an exemption which CLA firmly opposes. Accordingly we do not answer specifically questions 56 to 60.

## Appendix 1 – Impact Analysis and Call for Evidence (Recommendation 2)

Most of the points and issues covered in the partial impact assessment have been commented on in the main submission.

### 1. **Rightsowners represented by CLA**

We have commented above on the relatively modest fee increases charged or proposed to be charged by CLA to extend its licences to cover the scanning and making of digital copies and then their use in the provision of education. It is worth noting that these licences are in a trial phase and that the fees and the grant of rights may need to be revised in the light of further experience as to this use and value to the user and to the potential impact on these primary sales. It is a core value of CLA licences that they must not substitute for the original purchase of the product and that CLA licences must complement, and not compete with, the primary sales activities of their rightsholders.

It is also worth noting that the partial impact assessment is wrong in stating that rightsholders would be benefit from increased revenues as a result of any expansion of the statutory exception afforded by s. 36. S. 36 itself will not provide any revenue for rightsholders; that will come only from the issue of a licence scheme on behalf of rightsholders which, as current CLA licences show, do not depend on there being a pre-existing exception curtailed only to the extent that a licensing scheme exists. Rather one starts at the opposite end of the spectrum in that the exclusive rights of reproduction and communication afforded to the copyright owner require a user to obtain the copyright holder's licence to undertake these acts in the first place.

### 2. **Rightsholders not represented by CLA**

It follows that such rightsholders will be prejudiced by any proposed exception as their rights will be constrained by the exception and they will not automatically receive any compensation or remuneration for this use. If they wish to receive remuneration, they will be forced to contemplate joining a collective licensing scheme such as that operated by CLA or launching their own.

### 3. **Educational establishments/education authorities**

For students and teachers, the benefits listed here will, of course, only apply to those works where the rightsholders are not currently represented by CLA as the CLA licence already grants these rights for the vast number of rightsholders that it represents.

### 4. **Call for evidence**

**“The percentage of extracts of published works currently used by educational establishments that are covered by licensing schemes”.**

It is hard to put a percentage on this; the vast majority of the UK repertoire is covered by the CLA scheme, but there is less extensive coverage of overseas works.

**“The demand for communicating extracts of published works digitally to distance learners, and for displaying such extracts on interactive whiteboards”.**

According to CLA's most recent state schools sector research (QI Statistics “Schools Scanning Research Spring 2008”), the following was reported:

- 84.2% of primary schools and 75% of secondary schools replied that they used digitised copies with digital whiteboard/presentation software;
- 30.8% of primary schools and 45% of secondary schools replied that they used digitised copies with a VLE;

- 10% of primary schools and 50% of secondary schools replied that they e-mailed digitised copies to pupils.

CLA found similar findings from its November 2006 “Digital use of published material” survey of Scottish Schools (run in partnership with Learning and Teaching Scotland via the LTS website).

According to CLA’s most recent FE sector research (QI Statistics “FE Scanning Questionnaire Autumn 2007”):

- 40% of respondents reported they e-mailed copies to students, and;
- 60% of respondents reported they used digitized copies within a VLE/Intranet.

For Higher Education, the predominant trend is generally towards more E Learning rather than Distance Learning per se, i.e. regardless of whether a student is studying by means of regular classroom based tuition or studying at a Distance. There is a growing demand for teaching/learning resources (whether scanned from printed books, journals and magazines or derived from e books or e journals) to be available electronically.

While there is heavy use of Virtual Learning Environments and projected display of PowerPoint presentations on screen, CLA is unaware of demand for interactive whiteboard technology in HEIs.

**“The demand for distance learning generally and whether it is growing”.**

All the indications are that this is growing most rapidly in the FE sector, with HE and schools following on thereafter. This is due, no doubt, in large part to the long-standing role of FE colleges in distance learning provision based originally upon the principle of community outreach, which over time, has extended more significantly to overseas-based learners. The majority of distance learning in the UK post-compulsory education sectors is delivered through the FE sector.

The expanding work of the regional National Education Network members (including the LTS Glow platform, the various Regional Broadband Consortia and C2KNI) indicates demand is increasing.

According to a recent OECD/PISA report:

- UK schools have the most computers per pupil in the world (based upon a study of 57 countries);
- more than £3 billion has been spent on computer equipment in UK state schools in the past 8 years.

As noted above, HEIs seem to attach greater strategic importance to the expansion of ‘E Learning’ and ‘Blended Learning’ than to Distance Learning. Some Learning Technologists assert that “all HE students are now, to a greater or lesser extent, Distance Learners”; reflecting this point, there is no longer a consensus within the Higher Education community about how to define “Distance Learning” as a mode of study. This makes it problematical to point to definitive trends – though it is probably accurate to say that there is an upward trend in: (a) the number of students based overseas enrolled on courses/programmes at UK HEIs; (b) the number of students studying on a part time basis.

**“Which social groups make the most use of distance learning? Are certain vulnerable groups disproportionately represented?”**

There is little information on this, but it is not always vulnerable groups who benefit from distance learning. For example, the DLC pilot licence in Yorkshire was developed specifically to enable delivery of distance learning to gifted learning pupils - rather than the opposite. The CLA/LTS “Digital use of published material” survey of Scottish Schools examined the pedagogical importance and benefits of the new learning technologies in some detail. It identified that the use of ICT enables “equal access for print-disabled pupils: those who cannot see the text (visually impaired), who cannot read the text (dyslexic), who cannot handle the books (physically impaired), who cannot understand the text (learning impaired).”

**“What licensing schemes will be introduced as a direct result of expanding the exception, and the estimated administrative costs for those operating the licence schemes?”**

CLA has already launched its scanning licence for schools.

**“The impact on education outcomes”.**

The government drive for personalised learning is making teachers tailor learning resources to individual pupils more than before. Schools need licences that enable them to do this using techniques such as digital ‘cut and paste’ and to make full use of the features of new technologies like digital whiteboards. CLA’s enhanced licences enable teachers to do the everyday things they need to do in order to provide the best learning experience for individual pupils, but doing so within a blanket licence framework.

The CLA/LTS survey findings included:

- Individualised programmes of study were possible, giving rapid feedback to learners;
- Interactive learning, e.g. using whiteboards, involves children fully in the teaching/learning process;
- Opportunity for very young children to access resources in a safe environment.

**“The price sensitivity of smaller educational establishments to prices of licence schemes”.**

All of CLA’s education licences are based upon the size of the student/pupil population of the licensee. In this respect, all such licences issued by CLA are proportional to the size (and therefore the price sensitivity) of the licensee.

In the HE and FE sectors CLA negotiates licence fees with representative bodies of the sectors (e.g. UUK and AoC). These negotiations are on the understanding that almost by definition, blanket licensing schemes are aimed at providing a simple, cost-effective solution to rights clearance for licensees and can only be offered on a cost-effective basis by CLA when there is no tailoring of the licence terms to individual needs. There is less variation in size of institution in HE than there is in FE (partly because the FE sector is approx 2.5 times the size of the HE sector in institution number terms).

There is more significant variation in size of institution within the state schools sector, but again, all Local Authority maintained schools continue to be licensed with CLA.