

## CLA Response to HMG's Consultation on Copyright

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## **PART 1: KEY THEMES, INTRODUCTION, SUMMARIES, LEGAL AND ECONOMIC BACKGROUNDS**

### **1. KEY THEMES OF THIS SUBMISSION**

- The basic premise of the Consultation Document following the Hargreaves Review that the proposed changes would lead to economic growth is flawed; instead the reverse is more likely to happen.
- The evidence base in the Consultation Document is inadequate and does not support the case for the changes advocated.
- Many of the proposals are potentially illegal under EU and international law. The lack of any mechanism to enable “fair compensation” to be paid makes it difficult for the UK to apply many of the exceptions allowed by the EU Copyright Directive.
- The approach of providing exceptions only as a ‘safety net’ where no licensing scheme exists should be supported and extended.
- Voluntary licensing, including in particular collective licensing, represents the best solution, both from an economic and legal perspective. In this Submission CLA supports constructive proposals or suggests practical alternatives to deal with problems wherever possible.

### **2. INTRODUCTION**

- 2.1 CLA is a Collective Management Organisation (a “CMO”). Details of CLA are contained in Appendix 1.
- 2.2 CLA does not accept the basic premise of the Hargreaves Review that “the UK Intellectual Property framework, especially with regard to copyright, is falling behind what is needed”, claiming that the “potential benefits from making the changes suggested would add between 0.3% and 0.6% of the size of the UK economy by 2020 and cutting dead weight costs by over £750m”. However CLA recognises that there are certain areas in which improvements can be made and that there are a range of measures, both legislative and non-legislative, to support licensing solutions at both an individual and a collective level to answer some current needs and to provide a sound platform to take the UK economy forward.

- 2.3 In many cases, CLA believes that insufficient evidence has been presented to support the case for change; hence it is thus premature to seek changes to the law, in particular to expand copyright exceptions. A hallmark of the civilised society is its respect for property rights and the focus in the Consultation Document on the incentive effect of copyright as the sole justification for copyright overlooks this important principle. It proposes a significant reduction in the rights of copyright owners in return for an illusory prospect of economic growth.
- 2.4 The original Hargreaves Review noted the paucity of economic evidence underpinning discussions regarding copyright often leading to a polarisation of views between user groups and copyright owners (although it should be noted that all copyright owners are also themselves in one form or another copyright users and that many copyright users are indeed also copyright owners). As a result, CLA, along with ALCS, PLS and DACS, commissioned PriceWaterhouseCoopers (“PwC”) to provide an economic analysis of the Impacts of Copyright, Secondary Copyright and Collective Licensing in the UK as part of its Submission to the Hargreaves Call for Evidence. This is available at: [http://www.cla.co.uk/data/corporate\\_material/submissions/2011\\_pwc\\_final\\_report.pdf](http://www.cla.co.uk/data/corporate_material/submissions/2011_pwc_final_report.pdf).
- 2.5 CLA has also now commissioned a further report from PwC which is an economic analysis of education exceptions in copyright (the “PwC Supplementary Report”). This report focuses on the proposals for changes to the copyright framework regarding the Use of Works for Education and is available on CLA’s website at: [http://www.cla.co.uk/about/publications\\_and\\_submissions/](http://www.cla.co.uk/about/publications_and_submissions/). The key findings of the PwC Supplementary Report are noted in Section 4 below.
- 2.6 CLA is also a member of the Alliance Against IP Theft (the “Alliance”) which has commissioned a report from Oxford Economics to provide a critical analysis of the work undertaken by the Government in launching this Consultation. This examines the economic framework underlying the Impact Assessments and comments on specific exceptions and is presented as part of the submission by the Alliance to the Consultation.
- 2.7 It is disappointing that there has been little in the way of similar economic analysis to support the proposals contained in the Consultation Document and CLA notes that the IPO is only now conducting some independent analysis on 4 areas (Private Copying, Codes of Conduct, Orphan Works and Parody) affecting the proposals contained in the Consultation Document. It seems premature therefore to be seeking a response on many of these issues until this work is completed.

- 2.8 More generally, it is unreasonable to expect, as the Consultation Document often does, copyright owners to provide evidence to demonstrate that a problem does not exist when no evidence has been presented, or has yet to be presented, to demonstrate the nature and scale of that problem.
- 2.9 Furthermore, it seems many of the problems might be addressed through a version of the Digital Copyright Exchange, which itself was subject to another review (the Hooper Call for Evidence) launched after the announcement of the Hargreaves Review and to which many copyright owners and their representative bodies have made submissions; CLA's submission to this is available at:  
[http://www.cla.co.uk/data/corporate\\_material/submissions/2012\\_cla\\_submission\\_on\\_dce\\_feasibility\\_study\\_feb2012.pdf](http://www.cla.co.uk/data/corporate_material/submissions/2012_cla_submission_on_dce_feasibility_study_feb2012.pdf).
- 2.10 Again it seems premature to consider implementation of far reaching changes to UK law before the results of the Hooper Report are known. As noted in the CLA submission to the Hooper Call for Evidence, CLA is considering significant investment in developing an online transactional clearance system filling many of the functions of the Digital Copyright Portal as envisaged in that Call for Evidence. Many other rightsholder bodies are working on or delivering similar initiatives in their respective areas, and these should be given an opportunity to provide user solutions that may not be developed if the rights given to copyright owners are significantly reduced and their CMOs weakened as a result.
- 2.11 Licensing is a more flexible (and generally quicker) way of answering user needs than legislation. CLA licences have consistently delivered solutions to user needs, as demonstrated by the timeline contained in the PwC Supplementary Report (a copy of this timeline is also attached as Appendix 2 for ease of reference). A description of the areas where CLA has delivered a solution to users problems was also contained at paragraph 6 in the CLA submission to the original Hargreaves Review.
- 2.12 Furthermore, as noted in that Submission, CLA has launched an initiative to provide a set of easily recognisable industry standard icons for use on websites to identify what permissions they attach to a particular digital product. This tells users at a glance what they can do with that product and/or whether they would need a further licence and/or a CLA licence for a particular usage (see Appendix 1 to the CLA DCE Submission). That Submission also noted the collaborative licensing pilot initiative agreed between CLA and the Newspaper Licensing Agency Ltd and, since that Submission, CLA has entered formal discussions with the Music Publishers Association with a view to providing blanket licensing permissions for the copying of sheet music in schools.

2.13. CLA agrees that this Submission, together with its Appendices, may be made public.

### **3. EXECUTIVE SUMMARY of CLA's RESPONSE TO THE PROPOSALS IN THE CONSULTATION DOCUMENT**

3.1 There is an alarming lack of evidence to support the case for change. New exceptions often have unintended adverse consequences disproportionate to the scale of the problem being addressed. In many places there appears to have been insufficient attempts by user groups to engage in a constructive dialogue with copyright owners before reaching for the nuclear option of seeking further exceptions to copyright.

3.2 The Oxford Economics study argues that the Consultation Impact Assessments often fail to quantify a net cost or benefit and that "in spite of this lack of a quantitative basis, the proposed initiatives are often preferred to the existing status quo. In short, change is suggested even though there is no costing to support it."

3.3 There is no support in the Consultation Document for the assertion that changes to copyright would contribute to the growth agenda on the scale claimed. There is by contrast a clear danger that significant damage could be done to the creative industries in the UK – see Section 4 (Economic Background) and, in particular, the PwC Supplementary Report. The Oxford Economics study concludes that there is little empirical evidence to support the view that the preservation of copyright is economically inefficient; it questions the assumption that there will be large scale benefits to business from the proposed measures, arguing that instead much of the benefit may accrue to recreational consumer surplus.

3.4 Voluntary licensing, particularly collective licensing, has provided solutions to user needs and is more flexible and quicker than legislative change. Since it is undertaken by, and with the support of, copyright owners, it sidesteps the difficulties of analysing whether a particular change to the law complies with EU and International Treaty obligations. By definition, licensing undertaken by or on behalf of the rightsholders becomes part of their normal exploitation and is therefore consistent with those obligations.

3.5 Many of the proposals, either stated as a preferred option in the Impact Assessments or floated as a possibility for consideration in the Consultation Document, are of questionable legality in terms of the UK International Treaty obligations and the EU Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (the "Copyright Directive") – see section 5 (Legal Background to Copyright Exceptions for Education) below.

- 3.6 A lack of an over-arching mechanism in the UK to provide fair compensation and to comply with the Berne 3 Step Test (in particular to ensure that exceptions do not conflict with a normal exploitation of a work and do not unreasonably prejudice the legitimate interests of the rightsholder) means that exceptions in UK law must necessarily apply only when either no harm (or only minimal harm) is caused to the copyright owner. Where individual licensing is impracticable or impossible, voluntary collective licensing is the only way that the UK can comply with the Copyright Directive and the Berne 3 Step Test; therefore proposals to limit the application of licensing schemes, or to abolish them completely, would, in CLA's view, be illegal under EU law, as well as damaging to the UK economy.
- 3.7 This suggests also that many of the arguments seeking a change in copyright law as part of the stated aim of supporting the agenda for growth are based on a flawed logic: if they can only apply in situations where they cause minimal harm to rightsholders, it is hard to see then how they could possibly add £2bn to UK GDP. The notion that such a massive increase in GDP could be achieved by sweeping away existing restrictions, which, as the argument must run, serve no current purpose and do not protect or support any current economic activity, seems fanciful.
- 3.8 A summary of CLA's responses to the specific proposals is contained in Section 6 and the detailed answers to the Consultation Questions are in Part 2 of this Submission.

#### **4. ECONOMIC BACKGROUND TO COPYRIGHT AND COLLECTIVE LICENSING**

- 4.1 The PwC Supplementary Report (together with the original PwC Report) provide a comprehensive examination overview of the key economic issues relevant to the education exceptions in current legislation and the proposed changes. It considers the impact on innovation and economic growth and how the proposed changes would affect the economic value generated through the production of creative content. It shows that the educational publishing sector is worth £1.2bn and employs 22,000 people. It measures the contribution of the educational publishing sector to the economy in terms of its Gross Value Added, its fiscal contribution to the Exchequer and its contribution to exports – export book sales alone are worth £203m per annum.
- 4.2 It reveals that CLA income equals on average 12% of Earnings before Interest, Tax, Depreciation and Amortisation of publishers; this amount is equal to 19% of their investment in new works. A loss of, or reduction in, the CLA income stream to publishers would prompt a range of responses, including cutting jobs, reducing investment in new works and a reduction in innovation. Over 43,000 authors receive secondary licensing income from CLA and CLA revenues constitute 18% of income earned from writing by educational authors.

4.3 Some of the key findings of the Report on potential costs and benefits of the proposed changes in terms of potential benefits include:

- the extent of 'free use' of unlicensed works under the s.36 exception is in fact insignificant;
- CLA licence fees represent only a tiny fraction of the total expenditure of educational establishments;
- the potential cost savings to educational establishments of the proposals are minimal.

4.4 Whereas the potential costs (adverse effects) include:

- a direct loss of secondary licensing revenues of £6.6m (if the 'licence override' is removed from the current 1% exception in s. 36) and ignoring any dynamic effects of a decline in the number and quality of works;
- a direct loss of £33.3m (if the 'licence override' is removed and the current 1% exception in s. 36 is increased to 5% or instead made subject to a non-numerical 'fair dealing' test) again ignoring any dynamic effects;
- this would have an 'important disincentive effect' with 'risks that publishers will stop developing products for the national market';
- which would particularly endanger the quality of educational outcomes and have wider costs for the rest of the UK economy;
- the resulting loss of the monitoring and enforcement aspects of CLA's activities would threaten the orderly market, reducing demand for textbooks and threatening the viability of text books sales in the UK;
- 40% of authors would reduce both their output and time spent on educational writing if they lost 20% of their CLA income. PwC estimate this would result in a 29% decline in output;
- further long-term costs would include a potential decline in quality and quantity of educational texts which could adversely impact on employment and exports.

## **5. LEGAL BACKGROUND TO COPYRIGHT EXCEPTIONS FOR EDUCATION**

5.1 The scheme of the 1988 Act was to provide education-specific exceptions that would apply in the absence of any appropriate licensing scheme. This broadly implemented the recommendations of the Whitford Committee Report (Cmnd 6732, March 1977) which recognised that whilst provision had to be made for educational establishments to be able to make copies without seeking advance clearance in each case, this should not be at the expense of the copyright owners and that some form of blanket licensing scheme would be required.

5.2 Various 'safety nets' were to be provided should licensing schemes not be developed to provide a solution and the s. 36 exception under consideration in the Consultation Document was one of those (there are others as noted in Section 15 below). But UK law of course also has to be interpreted in the context of EU law and its International Treaty obligations.

5.3 The United Kingdom is a party to the Berne Convention and accordingly is obliged as a matter of international law to comply with its terms. Article 9(1) provides that authors of literary and artistic works protected by the Convention shall have the sole right of authorising the reproduction of these works, "in any manner or form", together with Article 9(2) which provides for permissible exceptions under the so-called "three-step test", namely that any exceptions and limitations shall:-

- i) only apply to certain special cases;
- ii) which do not conflict with the normal exploitation of the work; and
- iii) do not unreasonably prejudice the legitimate interest of the rightsholder.

It is axiomatic that any exception which adversely impacts on the sale of the original product infringes the 3 step test as it must conflict with a normal exploitation of the work.

5.4 CLA has long argued that its licensing activities constitute one of the main ways in which rightsholders exploit their works. Collective blanket licences of the sort offered by CLA are a benefit to rightsholders (as well as to users), as rightsholders would otherwise have to engage in time-consuming and administratively costly individual permissions for vast numbers of requests per year. By pooling their repertoire in a licensing scheme such as CLA's, they can avoid the expense (and sometimes the impossibility) of providing permissions on the basis that the activity is more efficiently handled by a collective operation.

5.5 With the increasing prevalence of works published and/or sold in electronic form where, by necessity, the transaction consists of the grant of a licence as opposed to a sale of a physical product, licensing has become more and more a part of the business model of copyright owners. The licence granted may be individual (direct by the copyright owner to the purchaser/user) or collectively through a licence issued by a CMO. It is clear therefore that collective licensing is now a 'normal exploitation' of works by copyright owners and any exceptions in UK law cannot be interpreted so as to prevent this form of normal exploitation by the copyright owner in contravention of EU and International law.

5.6 This was recognised by the previous Government as expressed in the Gowers Second Stage Consultation (at paragraph 129) where it noted that the proposals at the time to amend copyright exceptions would only apply where no licensing scheme existed thus, it was said, operating in a way that did not prevent a 'normal exploitation of the work'.

- 5.7 The Consultation Document does not really focus on the 3<sup>rd</sup> limb of the test (unreasonable prejudice to legitimate interest), although the Gowers Second Stage Consultation described it as the ‘focal point’ of the whole test (paragraph 48). But a useful analysis of the background to this limb of the test is contained in paragraph 220 of the Whitford Committee Report. The explanation given is that where a reproduction does not conflict with a normal exploitation (i.e. limb 2 of the test is passed), limb 3 is there to ensure that national laws only permit copying on any scale without permission if authors are reasonably remunerated (and see also paragraph 60 of the Whitford Committee Report). Other EU member states achieve this through levy and other mechanisms to ensure reasonable remuneration is payable to authors to comply with this limb of the test; in the UK, it is only the licences offered by CMOs that enable UK law to comply.
- 5.8 Furthermore, it is questionable whether exceptions afforded to such a wide class of individuals (either “all students in the country” or indeed “all individuals under the private copying exception”) can pass the first limb of the Berne 3 Step Test, that they apply only in “certain, special cases”. The use of the word “special”, in addition to “certain” implies that it must apply only to some subset of a general class of the population as a whole. In the Gowers Second Stage Consultation, the previous administration covered this matter by interpreting the first limb of the 3 Step Test as meaning only that the class of persons to whom the exception applied was identifiable and thus “certain” (paragraph 47). It seemed to ignore completely the additional requirement that the case to which the exception to be applied should be “special”.
- 5.9 The requirements of the Berne Convention itself are reinforced by the Agreement on the Trade Related Aspects of Intellectual Property (the so-called TRIPs Agreement), which forms part of the WTO Agreements concluded at the end of the Uruguay Round. Article 9 of TRIPs requires its members to comply with Articles 1-21 of the Berne Convention (excluding Article 6*bis* on moral rights).
- 5.10 The Berne 3 Step Test has also of course been incorporated into EU and UK law by means of Article 5.5 of the Copyright Directive. Article 5.2 and 5.3 of the Directive set out a list of permissible exceptions and limitations from the reproduction right of Article 2 which Member States are permitted to provide under national law. Article 5.5 provides that these exceptions and limitations “shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightsholder.”
- 5.11 Additionally the menu of exceptions, which Member States are permitted to allow, contain within them further restrictions and/or limitations on the extent of those exceptions (e.g. the requirement for “fair compensation”). It has never been entirely clear how the exceptions contained in the Copyright Directive map on to the exceptions contained in the 1988 Act and it

is therefore also unclear at times as to which particular exception the Government may be relying in respect of any particular proposal in the Consultation Document. Indeed one of the points made in the Consultation Document is that this parallel approach may lead to confusion and that it might be better simply to incorporate verbatim the wording of the Copyright Directive into UK law.

5.12 A close analysis of the various permitted exceptions shows there is little scope to extend copyright exceptions without either any mechanism for fair compensation being provided or provision for copyright owners to exploit their works through individual or collective licensing. CLA has taken advice from leading Counsel on the extent to which some of the proposals in the Consultation Document affecting the education sector would comply with the UK's EU and International Treaty obligations. Relevant extracts from that Opinion are quoted below.

5.13 The Opinion first analyses the relevant provisions of the Copyright Directive:

“Recital (14) of the Copyright Directive states that:

“(14) This Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.”

Article 5.2(c) permits exceptions or limitations to the reproduction right:

“(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;”

Article 5.3(a) provides a further relevant permissible exception (also permissible in relation to the rights in Article 3 of the Directive):

“(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;”

Recital (42) casts further light on what can be treated as non-commercial: (42) When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.”

“It seems to follow from that recital that one must concentrate on the nature of the act of reproduction itself rather than the nature of the institution within which it occurs. For example, the same act of reproduction should be treated as permissible or not permissible on the same test whether it is carried out within a publicly or charitably funded fee-free school or within a fee paying school whose overall activities are conducted for profit. Presumably, it is sufficient if the teaching and learning are as such directed to non-commercial purposes even if conducted in a fee paying institution.”

The Opinion then considers the proposals in the Consultation Document affecting Education:

*Permitted extent of copying by educational institutions:* At present, section 36 of the 1988 Act permits educational institutions to copy up to 1% of a particular work, so long as no relevant licensing scheme is in operation. Unlike section 29(1C) which permits “fair dealing” for the purposes of private study, section 36 contains no requirement that the copying be “fair”. The Consultation Document contemplates, first, increasing the permissible limit from 1% to a higher level (paragraph 7.141). What limit is contemplated is not stated, but CLA understands that a 5% level is possibly in contemplation. Secondly it contemplates making the exception in section 36 into a “fair dealing” exception and (so it is said) aligning with the proportion of a work that individual students are already permitted to copy under section 29 (7.142).

There is a fundamental flaw in this analysis. Section 36 permits mass copying for a whole class of students. Thus, x% of a work photocopied y times for a class of y students cannot be equated in its impact on the copyright owner with the impact of some individual members of the class choosing to make copies of parts of works which may or may not coincide with each other, even if some may copy up to x% of that particular work. The distinction between individual copying and copying for multiple individuals is reflected in section 29(3)(b) which effectively prohibits individual students from delegating their copying activities for private study.

In my view therefore the Courts, if asked to apply a “fair dealing” test to the quantum of permissible copying under section 36, would not set the permissible level at that same amount as might be permissible to an individual student under section 29. Nor would the answer be the same in respect of different sizes or categories of works. For example, 5% of a lengthy educational textbook might result in the extraction of whole chapters and their distribution to whole classes of students could easily substitute for sales of the work. If such activity were repeated across the institutions which teach the particular subject to which the work relates, it could have a very severe effect on the market for specialist educational works.

I note that the Gowers Second Stage Consultation (at paragraph 102) cautioned that a 5% exception “may fail the three-step test”. It may be more accurate to say that there will almost certainly be sizes and categories of works in respect of which a blanket 5% limit would fail the

three-step test. The Consultation Document may be hoping to side-step this problem by introducing a fair dealing limitation into section 36, which would effectively lead to the courts having to apply the three-step test on a case-by-case basis. This would give rise to significant uncertainty for both rights owners and users, and [might result] in a series of test infringement cases before the courts to clarify the application of the law to different sets of circumstances.

Nor is it clear that amending the law in this way would be compliant with the Copyright Directive. At a superficial level the UK government would be able to say that a “fair dealing” restriction would mean that the application of the exemption in any individual case must comply with Article 5.5. However, that ignores the obligation of Member States to provide effective remedies for the protection of rights which EU law requires them to protect. Imposing a requirement on rights owners to establish on a case by case basis the necessarily vague requirements of the three step test is to deny them effective remedies for the enforcement of their rights. The use of the concept of “fair dealing” in sections 29 and 30 may be inherently necessary but it does not follow that it is necessary to extend these concepts into the new area of copying by educational establishments.”

The Opinion continues:

*Exception to apply regardless of licensing schemes:* The further proposal being contemplated is possibly to apply the section 36 exception regardless of the existence of a licence scheme (paragraphs 7.149-51). This issue is linked to the question of whether enhanced permitted copying levels would fail the three-step test since the impact of permitted copying on the legitimate interests of the rightsholder will be enhanced if the rightsholder is not able to recoup revenue through a collective licensing scheme.

Paragraph 7.149 refers to reducing the “fees and bureaucracy associated with licensing”: deciding on a case-by-case basis whether or not any particular act of copying is permissible as “fair dealing” appears particularly difficult so the risk is that the bureaucracy will increase rather than reduce. It seems unlikely that educational institutions would completely escape the need to copy beyond the maximum limits imposed by fair dealing and the increased bureaucracy in identifying specifically those acts which exceed the threshold and require to be licensed could be considerable

*Electronic distribution of works within educational institutions ....*the Consultation Document appears to contemplate a uniform approach to fair dealing both in respect of e.g. traditional copying from paper book to photocopied page, and for e.g. electronic copying, such as providing access to a digitally document held centrally in a university library system.

Whilst it can be argued that there are broad analogies when it comes to the application of the three-step test, in my view there are clear differences which necessarily apply because of the

structure of the permitted exceptions within the Directive. I have quoted above the broader exception in Article 5.2(c) in respect of educational establishments applies only to the reproduction right and only the “illustration for teaching” exception in Article 5.3(a) applies also to the communication to the public and “making available” rights in Article 3. It follows that Member States are not entitled to create broad exceptions for educational institutions to make works available electronically, but are restricted to doing so for the purpose of “illustration for teaching”. (In the French text, this phrase is: “d’illustration dans le cadre de l’enseignement”).

This is clearly narrower than just “use for teaching”. It suggests the use of a work or other subject matter to illustrate a point which is made by the teacher or in teaching materials which have been created independently. In my view a broad exception for educational establishments from the “making available” and “communication to the public” rights set out in Article 3 of the Directive would contravene the UK’s EU obligations if it were not in terms limited to illustration for teaching. Clearly, a similar point can be made about fair dealing for the purposes of scientific research; and note that non-scientific research is not covered at all by Art 5.3(a).2

Dealing with Fair Dealing for Research and Private Study, and Private Copying, the Opinion states:

Article 5.2(b) of the Directive permits “reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightsholders receive fair compensation”. It is within this broad permissible exception that, presumably, section 29 must now lie. Indeed, section 29 was restricted to research for a non-commercial purpose by the 2003 Regulations which transposed the Directive into UK law. Accordingly it is a requirement of EU law that the rightsholders must receive “fair compensation” if the UK is to take advantage of this permissible exception.

It is arguable that no compensation is required if a private individual merely converts a work which he or she owns and has paid for into a different medium for personal convenience (e.g. the owner of an audio CD who copies a track into an iPod or similar device in order to listen to it more conveniently). But it is clearly more difficult to justify the failure to provide “fair” (or indeed any) compensation in a case where an individual acquires a copy of a work or part of a work without payment”.

Dealing with the issue of protecting copyright exceptions from override by contract the Opinion states:

“this chapter of the Consultation Document on this subject does not distinguish between contracts which over-ride exceptions (e.g. a contract that would prevent someone from using

a work for the purpose of reporting news or current events in circumstances where they would have the right to do so under copyright law) and contracts which permit, but may impose charges on, acts which would be permissible under general law. I consider the latter case raises different issues.

For example, as an alternative to selling individual paper copies of a book for use by students and teachers, an educational publisher might provide a single digital copy under licence terms based on electronic access to the work by students and teachers. If it were possible to characterise many such acts as individually fair dealing for private study then if the provision contemplated by the government were simplistically applied it could lead to many acts of access being left out of account for royalty purposes. This would be a serious disincentive to publishers to permit such licensing, and could lead to severe administrative difficulties in working out what acts do and do not amount to “fair dealing”.

I think an analogy drawn from EU competition law is helpful. Whilst it is in general problematical for a rights owner to seek to impose royalty obligations on licensees for acts which clearly fall outside the scope of the rights which are being licensed, it is generally permissible for parties to agree reasonable rates of royalty which extend across a broad class of acts where it is difficult or impractical to separate out which acts do and which do not require a licence.”

- 5.14 In summary, it is CLA’s view, supported by an Opinion from leading Counsel, that many of the Proposals affecting the various exceptions that are or may be applicable to educational establishments **would be of doubtful validity in terms of the UK’s obligations under EU law and International Treaties and open to challenge on that basis.**

## **6. SPECIFIC PROPOSALS – SUMMARY OF CLA RESPONSES**

**Orphan Works:** CLA has long supported the need for a solution to the Orphan Works issue and welcomes proposals for enabling legislation. But permissions to use Orphan Works, after diligent search, should be granted in the first instance by rightsholder-controlled bodies.

**Extended Collective Licensing:** CLA welcomes proposals to provide statutory support for ECL schemes of the sort it already operates, but believe ECL scheme operators must adhere to a set of principles (see paragraph 8.6 below) and should also be subject to a Code of Conduct.

**Codes of Conduct:** CLA supports the proposals for Codes of Conduct despite some concerns regarding the evidence base used to support the Case for Change. It should however be a requirement for organisations granting Orphan Works permissions and

operating ECL schemes to observe a Code. But CMOs should be given greater support to ensure better user behaviour.

**Private Copying:** the theoretical problem (of individuals reusing digital products they have acquired) that the Proposals seek to solve is of diminishing significance, has caused no real problems in practice and is more safely addressed through licensing than potentially dangerous and illegal exceptions.

**Preservation by Libraries and Archives:** museums and galleries could be added (if precisely defined) and multiple copies for preservation purposes should be allowed, but any further use (such as electronic display or communication) should be subject to licence. CLA agrees that exceptions should be extended to include other copyright works and that museums and galleries should be added to the list of bodies entitled to the benefit of the exception – but for preservation purposes only.

**Research and Private Study:** the exception should not be extended to cover institutions. It is difficult to see how sound recordings, films and broadcasts can be included within the scope of this exception in compliance with the Copyright Directive; an appropriate amendment to ss. 35 and 36 would be better.

**Text and Data Mining:** no compelling evidence has been adduced to support this Proposal which is premature when the user problems are only just being articulated and already licensing solutions are being developed.

**Parody, caricature and pastiche:** The Consultation Document discloses no evidence of a genuine problem in need of a solution. While there may be a grey area at times between something which is a parody and something which is a copy, it has caused little problem in practice.

**Use of works in Education:** much of what is contained in these Proposals is unnecessary, dangerous, likely to prove counter-productive and potentially illegal, whilst delivering, at best, marginal cost savings to educational establishments. Better solutions can be found in ECL and existing legislative provisions which have yet to be used – see paragraphs. 15.7 to 15.10.

**Exceptions for people with disabilities:** making the current exception absolute would result in the loss of the benefits which licensing can deliver in a way UK legislation cannot (e.g. a universal defence to copyright infringement claims and the possibility of reciprocal Accessible Copies from overseas).

**Quotation and reporting current events:** there seems to be no evidence base to suggest that this is a problem currently and the proposed exception could introduce uncertainty and would be open to abuse.

**Public administration and reporting:** what might be a minor convenience for public bodies could cause damage to the publishing industry; works which are available elsewhere should be excluded from any widening of the exception to allow on-line communication of copyright works to the public.

**Other exceptions allowed by the Directive:** any such exceptions should only apply to the extent that is no relevant licence or licensing scheme available.

**Exceptions and contract override:** there is no reasonable case for copyright law to render null and void contractual terms which have been freely entered into. Such a provision would introduce uncertainty and would be of doubtful effect internationally and possibly in breach of the Copyright Directive. CLA licences already present a partial solution which users should utilise more fully.

**Copyright Notices:** there is little scope for IPO officials to provide guidance on copyright which does not trespass on areas which are the province of the Courts and there are significant conflict of interest issues. An ADR service is a better alternative.

## PART 2 – DETAILED ANSWERS TO THE QUESTIONS IN THE CONSULTATION DOCUMENT

### 7. ORPHAN WORKS

- 7.1 Although CLA believes (contrary to the Consultation Document) that the problems in existing legislation preventing implementation of Orphan Works authorisation/licences could have been fixed by a more limited change, but broadly welcomes the proposals for an overall solution.
- 7.2 A mismatch still seems to exist between the views of user groups and rightsholder bodies on the scale of the problem. The Consultation Document notes that the British Library consider 31% of its books are orphan and the JISC strategic content alliance report “In from the Cold” suggested the scale of the problem was in the region of 5%-10% covering all types of copyright works. But the ALCS research in relation to the Google book settlement on the share of books that could be classified as orphan (based on the number of out of print works for which ALCS collected secondary licensing fees) showed that only between 1.6% and 4.7% of books were orphan (see page 56 of the original PwC report at Appendix B).
- 7.3 Claims regarding the percentage of works considered orphan by large institutions ought to be peer reviewed in line with the best practice guide for submissions of evidence proposed by the Consultation Document. For instance the accuracy of the figure of 31% for Orphan Works quoted by the British Library above is questioned by ALCS in their submission.
- 7.4 CLA had proposed an Orphan Works licence solution several years ago and this work was taken up by the British Copyright Council which presented proposals on behalf of all of its members to the IPO. CLA still supports this approach which has many similarities to the Government proposals, but with some critical differences:-
- “Authorising Bodies” for the purposes of granting permissions to use Orphan Works should always, in the first instance, be rightsholder-controlled bodies and not a statutory body (and certainly not a user organisation holding a collection and seeking to self-certify/self-license);
  - there should be payment, that payment should be upfront and payment should belong to and distributed by bodies who are genuinely representative of the copyright owners of the class of works in question (and not be payable to the Government as “bona vacantia”);
- 7.5 Rightsholder-controlled bodies should be the initial authorising body because they are best placed to:-

- assess the appropriate market rate so that the use of an Orphan Works does not undercut the use of a commercial unavailable work and/or substitute for the commissioning of a new work;
- assess the appropriate restrictions on the usage of the Orphan Work and the other terms and conditions;
- monitor compliance with the terms of the permission granted;
- continue to search for the copyright owner of the Orphan Work in question;
- ensure a fair distribution where such copyright owners cannot be found

7.6 Rightsholder-controlled bodies are also more likely to have the trust of the copyright owners whose works are being used, necessarily, without their permission and to ensure that the system is not abused.

7.7 The rates and other terms and conditions applicable to an Orphan Works permission granted by an Authorising Body should be subject to the jurisdiction of the Copyright Tribunal in the usual way.

7.8 But a body like the Copyright Tribunal should not be a first port for an Orphan Works permission; they should only have a reserve power where no rightsholder-representative body exists to grant, or is prepared to grant, Orphan Works permissions for particular categories of works.

7.9 CLA accepts that any Authorising Body should be subject to a Code of Conduct as envisaged in the Consultation Document and that this should be a condition of receiving authorisation in the first place.

7.10 CLA believes that the proposals contained in the EU draft Directive on Orphan Works contain a problematic split between use for commercial and non-commercial use and do not address the problem in the round. CLA urges the Government to bring pressure to bear on the Commission to adopt an overall solution of the sort proposed by the BCC.

### **Consultation Questions**

**Q. 1 Does the initial impact assessment capture the costs and benefits of creating a system enabling the use of individual orphan works alone, as distinct from the costs and benefits of introducing extended collective licensing? Please provide reasons and evidence about any under or over-estimates or any missing costs and benefits**

It is difficult to estimate costs accurately before users have provided details on true scale of problem and uses to which the copies intended to be put (as set out in the following

questions) but the costs for the ARROW Project (Accessible Registries of Rights Information and Orphan Works) project to date are believed to be c. €5 million.

**The Government is particularly interested in the scale of holdings you suspect to be orphaned in any collections for which you are responsible. Would you expect your organisation to make use of this proposed system for the use of individual orphan works? How much of the archive is your organisation likely to undertake diligent searches for under this proposed system?**

N/A.

**What would you like to do with orphan works under a scheme to authorise use of individual orphan works?**

N/A.

**Q. 2 Please provide any estimates for the cost of storing and preserving works that you may not be able to use because they are/could be orphan works. Please explain how you arrived at these estimates.**

N/A.

**Q. 3 Please describe any experiences you have of using orphan works (perhaps abroad). What worked well and what could be improved? What was the end result? What lessons are there for the UK?**

N/A.

**Q. 4 What do you consider are the constraints on the UK authorising the use of UK orphan works outside the UK? How advantageous would it be for the UK to authorise the use of such works outside the UK?**

Any stand alone solution to the Orphan Works issue in the UK cannot provide cover for the use of works abroad. Even for UK works territorial rights may have been granted exposing a user to the risk of a claim for infringement to which a UK "permission" would provide no defence. An authorising body could consider giving an indemnity as part of the permission but the types of 'orphan' works and proposed uses of those works are too uncertain at this stage for any useful costing exercise to be carried out. A common system of Orphan Works treatment throughout EU may provide a partial answer (it is vital that the UK Government works with the EU to ensure any EU-wide solution properly protects UK rightsholder interests). Any global answer is most likely to be delivered through a network of voluntary

agreements between authorised licensing bodies representing the rightsholders in each country.

**Q. 5 What do you consider are the constraints on the UK authorising the use of orphan works in the possession of an organisation / individual in the UK but appearing to originate from outside the UK:**

**For use in the UK only**

**For use outside the UK**

**How advantageous would it be for the UK to authorise the use of such works in the UK and elsewhere?**

See above.

**Q. 6 If the UK scheme to authorise the use of orphan works does not include provision for circumstances when copyright is unclear, what proportion of works in your sector (please specify) do you estimate would remain unusable? Would you prefer the UK scheme to cover these works? Please give reasons for your answer.**

N/A.

**Q. 7 If the UK's orphan works' scheme only included published/broadcast work what proportion of orphan works do you estimate would remain unusable? If the scheme was limited to published/broadcast works how would you define these terms?**

N/A.

**Q. 8 What would be the pros and cons of limiting the term of copyright in unpublished and in anonymous and in pseudonymous literary, dramatic and musical works to the life of the author plus 70 years or to 70 years from the date of creation, rather than 2039 at the earliest?**

There seems no pressing need to alter the regime the 1988 Act created to deal with unpublished works. No detailed evidence is given as to the scale of this issue, why it would reduce significantly the orphan works problem and how it would contribute to increasing the UK's GDP. An individual Orphan Works licence must be a better solution than an exception that would capture much more recent works than the sole example in given in the Consultation Document.

**Q. 9 In your view, what would be the effects of limiting an orphan works' provision to non-commercial uses? How would this affect the Government's agenda for economic growth?**

This approach might follow the limited solution proposed in the current EU draft Directive, but does not answer the problem where many potential users and uses of Orphan Works are commercial. As the Consultation Document acknowledges, there is also a difficulty in determining the line between "commercial" and "non-commercial" which isn't as simple as "for profit" or "not for profit" (a nationalised utility might not operate for profit, but is providing the same function as a private sector operator would). But any contribution to the agenda for economic growth almost by definition has to come from commercial use.

**Q. 10 Please provide any evidence you have about the potential effects of introducing an orphan works provision on competition in particular markets. Which works are substitutable and which are not (depending on circumstances of use)?**

It is impossible to provide hard evidence of the results of a course of action which has not yet been embarked upon. But, as the Consultation Document acknowledges, it is vital that a solution does not cause market distortion by allowing free (or cheaper) "orphan works" to undercut the market for new works and new commissions which could otherwise have contributed to economic growth.

**Q. 11 Who should authorise use of orphan works and why? What costs would be involved and how should they be funded?**

The authority to grant permission to use Orphan Works should always in the first instance be restricted to bodies genuinely representative of, and controlled by, the rights owners. They are best placed to assess the relevant terms and conditions attaching to the use of the Orphan Works, as well as best placed to continue attempts to trace the Orphan Works owner and to ensure a fair and appropriate distribution system where this cannot be done.

CMOs already have large databases and search and distribution systems; they would be one of the main sources in any "due diligent" search and it is therefore logical that they also handle the permissions and fee handling. The use of a rightsholder-controlled body would provide greater comfort to copyright owners that the system is not being abused and avoids the almost intractable conflict of interest issues that would arise were self-licensing by large institutions holding significant archives to be approved.

**Q. 12 In your view what should constitute a diligent search? Should there be mandatory elements, and if so what and why?**

There is broad agreement on what these requirements should be, starting from the EU i2010 Library Initiative High Level Expert Group guidance to the draft proposals contained in the Digital Economy Bill and in the draft EU Directive. These requirements would include:

Legal deposit records;  
records of publishers` and authors` associations;  
databases of CMOs;  
other existing databases and registries such as ARROW and WATCH (Writers, Artists and their Copyright Holders);  
ISBN and ISSN searches.

**Q. 13 Do you see merit in the authorising body offering a service to conduct diligent searches? Why/why not?**

CLA proposes to continue (along with ALCS and PLS) participating in the ARROW project as it moves into Phase 2; whether there would be a further need beyond that which could be filled cost-effectively depends on the outcome of the ARROW project (as well as the nature and scale of the requirements for diligent searches).

**Q. 14 Are there circumstances in which you think that a diligent search could be dispensed with for the licensing of individual orphan works, such as by publishing an awaiting claim list on a central, public database?**

This would be contrary to the fundamental principles of copyright. Users wishing to copy or use a work without tracing the copyright owner should at least be expected to make the effort of engaging in a diligent search rather than simply listing a proposal to use, requiring copyright owners to monitor constantly a list of such proposals. Apart from being wrong in principle, such a proposal would be open to abuse with large organisations issuing massive lists of works proposed to be used making it extremely difficult and expensive for individual copyright owners to check, possibly generating significant amounts of litigation. It is noteworthy that the approach adopted by Google (copy and offer opt outs afterwards) has resulted in lengthy and expensive litigation in the US.

**Q. 15 Once a work is on an orphan works registry, following a diligent search, to what extent can that search be relied upon for further uses? Would this vary according to the types of work, the type of use etc? If so, why?**

It would seem logical that a work designated as orphan following a diligent search should be orphan for all reasons; the variability lies more in the nature of the permission, the fee and other terms and conditions that might be applied.

**Q. 16 Are there circumstances in which market rate remuneration would not be appropriate? If so, why?**

Rightsholders would expect that market rate remuneration always to be applicable. No coherent argument as to where this should not be the case has so far been presented.

**Q. 17 How should the authorising body determine what a market rate is for any particular work and use (if an upfront payment system were to be introduced)?**

This can only be achieved through an analysis of the “going rate” for a particular use or particular type of work - which rightsholders are best placed to deliver.

**Q. 18 Do you favour an upfront payment system with an escrow account or a delayed payment system if and when a reventant copyright holder appears and why?**

Payment should up front. Any delayed payment system (with a potential for a fee never to be paid) must necessarily favour the use of an Orphan Work, as opposed to a commercially available work. As the Consultation Document notes, there would always be a risk that the user body could later be hard to trace or could have ceased to exist or become bankrupt thus preventing payment. An “Orphan” Work does not mean there is no copyright owner, merely that the owner cannot at that time be traced and the users’ interest ought to end with obtaining a permission/indemnity to use in payment of a fee rather than attempting a “free ride” in the hope that the owner can never be traced.

**Q. 19 What are your views about attribution in relation to use of orphan works?**

Any Orphan Works permission should not interfere with the moral rights of the author.

**Q. 20 What are your views about protecting the owners of moral rights in orphan works from derogatory treatment?**

There should be no change to the right to object to derogatory treatment of a copyright work.

**Q. 21 What are your views about what a user of orphan works can do with that work in terms of duration of the authorisation?**

This question cannot be sensibly answered until users have articulated the case for the interested uses (and which works) more clearly.

**Impact Assessment**

CLA would favour Option 1, but implemented in line with above comments.

## 8. EXTENDED COLLECTIVE LICENSING

- 8.1 As will be apparent from the description of CLA's operations contained in the CLA submission to the original Call for Evidence for the Hargreaves Review (see paragraph 3 of that Submission), CLA already operates a non-statutory Extended Collective Licensing scheme. While CLA believes the size of the problem (for blanket licensing) that ECL might address is relatively small (see the answers to Q. 26 below), it broadly welcomes the Government's proposals to formalise this in UK law. But whether it is appropriate to introduce ECL schemes in other areas will differ according by sector.
- 8.2 CLA does not believe that ECL represents an answer to the Orphan Works problem, although its current blanket collective licensing inevitably does overcome the Orphan Works issue for users insofar as it relates to copying of extracts from works within CLA licence limits.
- 8.3 Nor is ECL necessarily a panacea to the issue of "mass digitisation". The need to digitise existing collections to ensure their preservation should be dealt with under the exceptions for libraries and archives (see section 11 below). However, as CLA has pointed out in earlier submissions, mass digitisation for the purpose of preservation on its own is ultimately a rather pointless exercise unless the works thus digitised and preserved can be made available in some way and used in the future. But this is definitely the province of licensing as it clearly impacts on the rights of copyright owners and potentially on the wellbeing of the creative industries generally.
- 8.4 The lengthy and costly litigation surrounding the Google book settlement demonstrates the need for large scale usage of digitised collections to be done with the full support of the copyright owners whose works are included. The use of ECL for mass clearance of such uses is more problematic than using it to legitimise current licensing schemes. The uses to which such digitised collections could be put, the fees to be payable for such usage, and the restrictions imposed to prevent any undermining of the creative industries are matters requiring a fuller discussion and an greater understanding of user needs and intentions.
- 8.5 CLA would only seek authorisation for an ECL scheme to cover mass digitisation/mass clearance if it was convinced that appropriate safeguards to protect the publishing industry existed and were practicable to enforce and assuming, of course, that it obtained the consent of the greater part of its members and the copyright owners whose works might be affected – however that is ultimately defined.
- 8.6 Any ECL scheme operator should comply with the principles developed by CLA, ALCS and the Publishers Association. These are that any organisation offering an ECL scheme in the UK should:-

1. be a rightsholder owned or controlled body;
2. be acting genuinely in the interest of rightsholders and not for its own commercial purposes;
3. represent a significant number of rightsholders.....
4. ....of all categories of rightsholders in the works covered by the scheme;
5. respect opt-outs (and publish this right broadly);
6. seek to locate and pay correct rightsholder for copying under the scheme;
7. have fair distribution policies agreed by, or on behalf of, all categories of rightsholders;
8. implement national treatment for overseas rightsholders.

8.7 It is equally important that, as with Orphan Works, any ECL scheme operator should also be subject to a Code of Conduct along the lines envisaged in the Consultation Document and this should be a condition attaching to any grant of authorisation to operate an ECL scheme.

8.8 Contrary to the view expressed in the Consultation Document, CLA does not believe that in fact there will be significant cost savings, as it already operates this system. It is unlikely therefore that its running costs would be reduced simply because there was now a statutory backdrop to its current operations. ECL schemes which operate abroad tend to do so in a climate of greater compliance and so costs of licensing and enforcement may be reduced. The greater efficiency to be achieved is that of access to a more complete repertoire.

### **Consultation Questions**

**Q. 22 What aspects of the current collective licensing system work well for users and rights holders and what are the areas for improvement? Please give reasons for your answers.**

We think that the current collecting licensing system has worked extremely well covering the majority of reasonable user needs (see CLA's past submissions, e.g. original Hargreaves Report to the Gowers Report and to the various Consultation documents subsequent to that). Blanket licensing, in the field of literary works as operated by the CLA, has in effect been a non-statutory extended collective licensing scheme with UK rightsholders (represented ultimately by CLA) bearing the indemnity risk. There are gaps regarding works specifically opted-out (which would remain under Government proposals for ECL) and regarding some overseas repertoire where CLA has been unable to conclude an appropriate repertoire exchange agreement with a body representing rightsholders in a particular country. But CLA figures reveal the overall problem to be a relatively small:

- i) of all titles copied, as shown by CLA surveys, only 0.2% are not covered by the CLA licence;

- ii) UK titles specifically excluded from CLA licences amount to only 0.0007% of repertoire offered (the current percentage coverage by CLA Licences of overseas repertoire is difficult to establish).

ECL would potentially provide an answer to this residual problem, although it is recognised that use of excluded works could increase when licensees were properly authorised to use them.

Blanket licensing, of course, does not deal with specific one-off needs beyond licence terms. But it should be remembered that CLA had pioneered a transactional clearance system (called the CLA Rapid Clearance System – CLARCS) which had to be disbanded following the complaint made by UK universities to the Copyright Tribunal. Some of these additional needs may be met in future through the creation of a Digital Copyright Exchange which CLA is considering.

**Q. 23 In the Impact Assessment which accompanies this consultation, it has been estimated that the efficiencies generated by ECL could reduce administrative costs within collecting societies by 2-5%. What level of cost savings do you think might be generated by the efficiency gains from ECL? What do you think the cost savings might be for businesses seeking to negotiate licences for content in comparison to the current system?**

We believe the figures quoted in the Impact Assessment to be wrong, at least as far as CLA is concerned and in the field of literary works. CLA already operates this type of system and it is not likely that the cost base will alter that much. CLA, through its two members ALCS and PLS, and through its agency agreements with DACS and CMO abroad, engages in a continuing campaign to heighten awareness of collective licensing amongst rightsholders and alerting them to the potential to opt-out of the scheme. It might be thought that such efforts would be even more important under an ECL scheme and it would be important for CLA to demonstrate to rightsholders its commitment to seeking mandates wherever possible and therefore no cost saving is anticipated.

**Q. 24 Should the savings be applied elsewhere e.g. to reduce the cost of a licence? Please provide reasons and evidence for your answers.**

It is not anticipated that there will be any cost savings.

**Q. 25 The Government assumes in the Impact Assessment for these proposals that the cost of a licence will remain the same if a collecting society operates in extended mode. Do you think that increased repertoire could or should lead to an increase in the price of the licence? Please provide reasons for your answers.**

Given the Government's assumption in the Impact Assessment that "cost savings" could be offset against increased licence fees rather suggests that the Government recognises that an increased repertoire should be worth more. It would clearly be inequitable if existing repertoire providers were to suffer a reduction in their distributions (without there being a commensurate reduction in the copying and use of their works) simply because additional works were made available for copying and were copied. Distribution systems, based on copying data provided by licensees, would have to ensure fair treatment for all rightsholders (whether based in the UK or overseas) in accordance with the principles for national treatment and therefore a modest uplift in fee to reflect the increased repertoire might be required.

**Q. 26 If you are a collecting society, can you say what proportion of rights holders you currently represent in your sector?**

As per answer to Q22:

- i) of all titles copied as shown by CLA surveys, only 0.2% are not covered by CLA licence;
- ii) UK titles specifically excluded from CLA licences amount to only 0.0007% of repertoire offered;
- iii) It is difficult to establish similar percentages figures for overseas works.

**Q. 27 Would your collecting society consider operating in extended collective licensing mode, and in which circumstances? If it is something you'd consider, what benefits do you think it would offer to your members and to your licensees?**

As CLA schemes already operate, in practice, on a non-statutory extended collective licence basis, CLA would be most interested in pursuing an ECL authorisation for its core blanket licences. The benefits to licensees would be an enlarged repertoire either increasing the information they can easily access and/or decreasing the administrative time and cost in seeking specific permissions for works outside of a CLA licence. The benefit to CLA and its members would be the provision of a statutory basis for its operations providing a shield against civil and potential criminal liability for copyright infringement in providing a service of the sort requested by users.

**Q. 28 If you do not intend to operate in extended collective licensing mode, can you say why?**

N/A.

**Q. 29 Who else do you think might be affected by the introduction of extended collective licensing? What would the impact be on those parties? Please provide reasons and evidence to support your arguments.**

In terms of ECL schemes offered by existing CMOs genuinely representing their rightsholders, impact would be minimal on rightsholders. Non-mandating members could still opt-out and, as described in answer to Q.22, stringent efforts would continue to locate rights owners around the world and to draw their attention to the existence of the scheme and ability to opt-out.

**Q. 30 What criteria do you think should be used to demonstrate that a collecting society is “representative”? Please provide reasons for your answer.**

It would be difficult to reduce this to a percentage number. Given that the total population of rights owners is unknown, it would be almost impossible to determine whether a given percentage had consented. It therefore would have to be a matter of judgement by discussion and agreement between the bodies seeking authorisation from the Secretary of State with sufficient protection to ensure an open process in which all interested bodies could participate and, as appropriate, challenge along the lines envisaged in the failed provisions of the Digital Economy Bill. The Government will be aware of the way this operates in Scandinavia where generally the criteria are as described above rather than a fixed percentage limit.

The factors to be taken into account in determining representativeness could include:-

- governance structure demonstrating rightsholder control;
- actual numbers of specific mandates;
- actual number of works represented;
- history and length of experience in providing rightsholder services;
- fair and accurate cost-effective distribution systems;
- cost-effective administration charges;
- absence of complaints from rightsholders;
- evidence of positive support from other bodies generally recognised to represent specific groups of relevant rightsholders.

**Q. 31 Do you think that it is necessary for a collecting society to obtain the consent of its members to apply for ECL authorisation? What should qualify as consent – for example, would the collecting society need to show that a simple majority of its members have agreed to the application being made?**

It is clearly right that a CMO should obtain the broad consent of its members, or, as appropriate, of the members of the class or works to be covered by the scheme. If the population of members was a known number against which a percentage could be applied, then it is suggested that at least 75% should consent, equivalent to the requirement for special resolutions under Companies Act legislation for resolutions of particular importance. Clearly the copyright owners most affected by an ECL scheme are not the members (who already participate), but non-members who have not opted-out and may simply be unaware of the scheme. Given that these “non-members” by definition may not be known to the CMO, obtaining their consent may be impossible or, at least, prohibitively expensive. Applying a given percentage of consent for members as a criterion for operating an ECL scheme is somewhat irrelevant in these circumstances. However it seems likely that members of the same class of rightsholder are likely to be best placed to look after the needs of non-members.

**Q. 32 Apart from securing the consent of its members and showing that it is representative, are there other criteria that you think a collecting society should meet before it can approach the government for an ECL authorisation? Please give reasons for your answer.**

See above.

**Q. 33 When, if ever, would a collecting society have reasonable grounds to treat members and non-member rights holders differently? Please give reasons and provide evidence to support your response.**

CLA cannot envisage a situation in which members and non-members will be treated differently. It adheres to the principle of national treatment, holding and distributing licence fees to mandating and non-mandating members and to UK and overseas rightsholders alike.

**Q. 34 Do you have any specific concerns about any additional powers that could accrue to a collecting society under an ECL scheme? If so, please say what these are and what checks and balances you think are necessary to counter them. Please also give reasons and evidence for your concerns.**

No – provided the criteria regarding the ability of an organisation to obtain authorisation as a genuinely rightsholder-representative body are met and assuming appropriate Codes of Conduct applied to bodies when operating ECL schemes (especially if used for Orphan Works).

**Q. 35 Are there any other conditions you think a collecting society should commit to adhering to or other factors which the Government should be required to consider, before an ECL authorisation could be granted? Please say what these additional conditions would help achieve.**

Much of this is covered above; the key principles for the operation of an ECL scheme in the UK are set out in paragraph 8.6 above.

**Q. 36 What are the best ways of ensuring that non-member rightsholders are made aware of the introduction of an ECL scheme and that as many as possible have the opportunity to opt out, should they wish to?**

ECL scheme operators should be obliged to conduct a thorough programme and awareness-raising campaign to ensure rightsholders are informed (see principles listed in response to Q. 35).

**Q. 37 What type of collecting society should be required to advertise in national media? For example, should it need to be a certain size, have a certain number of members, or collect a certain amount of money?**

The size of the collecting society is less relevant here than the number and value of the works for which they are seeking an ECL authorisation. The advertisement should be appropriate and proportionate to the permissions sought and it may be more important for the advertising to be conducted in specific trade press or journals – and on appropriate Internet sites – than in national media.

**Q. 38 What would you suggest are the least onerous ways for a rights holder to opt out of a proposed extended licensing scheme?**

So far, opting out – as practised in the CLA scheme – has been conducted with the minimum formality with any form of written or electronic communication sufficing. ECL scheme operators should include a specific opt-out form on their websites making it easy for users to opt-out, but it should not be mandatory to use these. The key is that the opt-out is activated by someone with authority to commit within the organisation to opt-out (given that the result could be to reduce revenue payable to that opted-out rightsholder).

**Q. 39 Should a collecting society be required to show that it has taken account of all opt out notifications? If so, how should it do so? Please provide reasons for your answers.**

There seems little need to add to bureaucracy and cost by requiring a CMO to demonstrate it has respected opt-outs. Clearly CMOs must communicate to their licensees – typically on a website these days – what is included and what is not included (and note the effect of s. 136 of the 1988 Act that will deem works to be included if this is in any way unclear). Any aggrieved rightsholder who feels that their opt-out has not been implemented within a due period (periods will vary, but could typically be on a quarterly basis) would obviously have a legal right for infringement/authorising infringement against the CMO who would have no protection under the ECL provisions of the law.

**Q. 40 Are there any groups of rights-holders who are at a higher risk of not receiving information about the introduction of an ECL scheme, or for whom the opt-out process may be more difficult? What steps could be taken to alleviate these risks?**

Owners who cannot be identified or traced (and who would therefore be better dealt with under the Orphan Works provisions) and overseas rightsholders. Orphan Works licences have to be subject to a high standard of controls as described in Section 7 and national treatment for overseas rightsholders, as described in the principles for ECL schemes (see paragraph 8.6), should be required.

**Q. 41 What measures should a collecting society take to find a non-member or missing rights owner after the distribution notice fails to bring them forward?**

CMOs should be obliged to retain monies due to a given rightsholder under an ECL scheme for a minimum period (in CLA's case this would be a 6 year period under statutory limitations) and to refresh the distribution notice periodically.

**Q. 42 How long should a collecting society allow for a non-member rights holder to come forward?**

As described in the response to Q. 41, CLA believes a 6 year period for its activities would be appropriate, although ex-gratia payments might be made even beyond that period.

**Q. 43** Aside from retention by the collecting society or redistribution to other rights holders in the sector, in what other ways might unclaimed funds be used? Please state why you think so.

Unclaimed funds should be disbursed in accordance with a distribution scheme approved by rightsholders. The purposes for which such distributions might be made could include a contribution to the overheads of running such schemes, further distributions generally to rightsholders of the same class, or payments for charitable or other public purposes linked to the sector in question.

### **Impact Assessment**

CLA would prefer Option 2 subject to the comments and restrictions outlined above.

## 9. CODES OF CONDUCT

- 9.1 CLA chaired the British Copyright Council Working Group which has over the last year has developed a set of principles of good practice for CMOs. The BCC principles largely coincide with the proposals contained in the Consultation Document.
- 9.2 While CLA is unconvinced that the number of genuine complaints justifies legislative remedy (see paragraph 9.4 below) it generally supports the introduction of Codes of Conduct. CLA will be developing its own Code of Conduct in accordance with the BCC principles including the appointment of an Ombudsmen and a separate, independent, code reviewer.
- 9.3 CLA does not accept that CMOs are “unregulated” as asserted in the Consultation Document. CLA, like most CMOs, is subject to Companies Act legislation and also to competition law and its bodies, the Office of Fair Trading and the Competition Commission. Furthermore, its licences are subject to the jurisdiction of the Copyright Tribunal. Indeed in many other submissions CLA, with other CMOs, have argued that the Copyright Tribunal, which is meant to achieve a fair and reasonable balance between copyright owners and users, is in fact in many respects unbalanced (for instance, only the users can apply to the Tribunal and indeed the origins of the Tribunal were rooted in the view of the UK Government that some counterbalance to the perceived monopolistic power of collecting societies was required).
- 9.4 CLA also does not accept that there is actually a significant problem that needs to be addressed. The Consultation Document itself contains little empirical evidence of the existence and size of the problem and the database of complaints received by the Minister recently published by the IPO rather supports the view that the problem is relatively small (see response to Q. 46 below).
- 9.5 But this is not to suggest that CMOs should not adopt Codes of Conduct, but rather that any proposals to introduce a statutory Code of Conduct, should be treated with caution and as a last resort. As noted in the answer to Q. 65 below, it seems inappropriate to consider statutory Codes of Conduct until a more statistically sound database of complaints is available following the implementation and operation of voluntary Codes of Conduct after a 3 year period.
- 9.6 But in return for this extra regulatory burden (seeking to address a problem of doubtful scale), it should be recognised that users also need to adhere to some best practice principles as the Consultation Document notes. The behaviour of some users represents a much greater mischief: CLA is engaged in expensive high profile disputes with large public sector bodies who appear not to share the Government’s aim (as stated in this Consultation) to support and encourage creativity and the growth that intellectual property can bring.

The Government should also lend more concrete support to CMOs by taking the opportunity presented by a reform of copyright law to introduce a right of action for CMOs in accordance with Article 4 of the EU Enforcement Directive, also as set out in answer to Q. 45 below.

- 9.7 CLA, in common with other UK CMOs, believes the greatest problem lies not in the operation and conduct of CMOs based in the UK, but in that of those based in Europe where, perversely, and as the Consultation Document notes, they are subject to greater regulation currently. There are significant doubts that UK rightsholders (both corporations and individuals) are in practice receiving fair treatment. The Impact Assessment on a Copyright Exception for Private Copying (at p.13) notes the disproportionately high costs of administration of GEMA (the German music collecting society) and which it attributes to the use of a levy scheme. In fact levy schemes ought to be cheaper to run (given that the CMO incurs no cost of licensing the sales and simply collects money to which it is statutorily entitled) and the Government should be considering other reasons as to why these costs are so high.

### **Consultation Questions**

- Q. 44 What do collecting societies do well under the current system? Who benefits from the way they operate? Please explain your response and provide evidence for it.**

CLA believes that its licences have been proved to provide a satisfactory solution to the problem posed by photocopying, both from the perspective of users and copyright owners. The success has been translated into the digital world over the last decade with the inclusion firstly of scanning permissions within the licence and then digital material and, more recently, website material. The continuing evolution of CLA licences to meet reasonable user needs is demonstrated, for the education sector, by the timeline indicating the history of developments and the signing of Repertoire Exchange Agreements with RROs abroad, as shown in Appendix 2.

The broad repertoire offered by CLA on an indemnity-backed basis (see response to Q. 22) demonstrates the breadth of the solution and the relative lack of user complaints bear testimony to this (CLA has only once been referred to the Copyright Tribunal in its history). CLA administrative fees at 11% are low by any standards.

- Q. 45 What are the areas for improvement in the way that collecting societies operate at present? Who would benefit from these improvements, and what current costs (if any) could be avoided? Please give reasons and provide evidence for your response.**

The greatest difficulty CLA faces is enforcement. Users are loath to volunteer to take a licence and to disclose voluntarily usage and copying levels of copyright works. CLA therefore incurs costs in pursuing unlicensed organisations to the detriment of their members and of course to those organisations who have taken a CLA licence. Recent Compliance activity against infringers found to have been copying illegally without a licence (including some in the public sector) has so far cost CLA six figure sums; details can be disclosed to the IPO on a confidential basis if requested.

Further costs could be saved if CMOS were given their own right to sue in accordance with Article 4 of the EU Enforcement Directive. This requires Member States to include intellectual property collective rights management bodies among the persons entitled to the benefit of the measures, procedures and remedies necessary for the enforcement of intellectual property. This, combined with the possible ADR service mentioned under the Copyright Notice proposals (alongside the recent introduction of a small claims track to the Patent County Court) would further simplify and reduce the costs of ensuring that the law is complied with.

**Q. 46 Do you agree with the analysis contained in the impact assessment of the costs and benefits for collecting societies and their users? Are there additional costs and benefits which have not been included, or which you are able to quantify? Please provide reasons and evidence for your response.**

The need for further Regulation and a statutory Code of Conduct has not been made in the Consultation Document. The IPO has now published its “database” of complaints received by the Minister via MPs. It analyses 103 complaints over a 15 month period (at a little over 6 a month itself hardly demonstrative of a significant problem). Of these:

- 27% related to Licensing Requirements (in effect a complaint that Copyright law exists);
- 30% related to 2 separate single issues but appear to relate to pricing and proposed pricing (a matter for the Copyright Tribunal and not within the remit of a Code of Conduct);
- a further 7% directly related to rates (also therefore a matter for the Copyright Tribunal);
- 17% to issues for small and micro businesses where again the complaint appears to relate to the need for a copyright licence.

Only 3% were about members rights and about 19% to complaints about licensing tactics, both of which might fall within the purview of a Code of Conduct suggesting less than 20 relevant complaints to the Minister on an annual basis. By contrast the Telecommunications Industry Ombudsman website shows nearly 200,000 complaints in 2011.

These figures from the IPO demonstrate what CMOs have often claimed namely that the volume of true complaints (as opposed to complaints about having to comply with copyright

law and to pay for the copyright consumed) is in fact extremely low. CLA itself has about 10 'formal' complaints per annum, generally again relating to the state of the law rather than CLA's conduct or operations.

The table on page 5, in particular the cost-income ratio, is over simplistic as some of the costs attributed to CMOs will be incurred in providing services and functions other than copyright licensing and/or not directly attributable to the costs of collective copyright licensing. The comparative with Charity Facts indicating that charities typically spend 5% to 13% of the income on administrative costs may be misleading, as the charity cost figures may well exclude the cost of the funds they raise, which are simply deducted from funds raised which then appear as a net figure. CLA has been unable to check this as the URL in the Impact Assessment quoted appears to be permanently unavailable.

**Q. 47 Who else do you think would be affected by a requirement for collecting societies to adhere to codes of conduct? What would the impact be on them? Please provide reasons and evidence for your response.**

As stated in the response to Q. 45, we think it is appropriate that there should be some obligation on users to deal fairly and honestly with collecting societies, but we repeat that we think the size of the problem to be addressed by the introduction of the Codes of Conduct is relatively small – and far less in other sectors such as telecommunications and other utilities. This is in fact demonstrated by the IPOs own database mentioned in response to Q. 46.

**Q. 48 Is one year sufficient period of time for collecting societies to put in place a code of conduct? Please provide reasons for why you agree or disagree. Please also provide evidence to show what a workable timeline would be.**

CLA believes the one year period is feasible. Having initiated the BCC Working Group and participated in the development of the BCC Principles of Good Practice for CMOs, CLA now aims to produce its own Code by November 2012.

**Q. 49 What other benefits or rewards could accrue to a collecting society for putting in place a voluntary code? Please provide evidence for your answer.**

CLA believes that benefits both for users and members are marginal.

**Q. 50 In your view, does it make a difference whether there is a single code, one joint code or several joint codes? Please give reasons for your answer.**

The BCC have produced a set of Principles of Good Practice for CMOs – a template of the sort of things that CMOs might like to consider including in their own Codes. CLA believes

sector-specific single Codes incorporating these Principles as appropriate is the best approach.

- Q. 51 Are there any other areas that you think should be covered in the minimum standards, or areas which you think should be excluded? Please give reasons for your response, including evidence of alternative means of securing protection in relation to any areas you propose should be excluded from the minimum standard.**

The areas listed in the Consultation Document cover the core minimum standards – they more or less map onto the BCC proposals.

- Q. 52 Are there any additional undertakings that a collecting society should give with regard to its members and the manner in which it represents them? Should any of the proposed minimum standards about members be excluded? Please provide reasons and evidence to support your response.**

CLA supports the level of obligations to rightsholders set out in the Consultation Document (it reflects its current practice).

- Q. 53 Are there any additional undertakings that a collecting society should give with regard to its licensees, or any of the proposed minimum standards be excluded? Please give reasons and evidence for your response, included why you consider any standards which you propose should be excluded to be unnecessary.**

The requirement to draft in ‘Plain English’ is easier said than done. Licences are legal instruments which may have to be construed in a Court of law by reference to complex legislation using many defined terms. Whilst Licences should also be as clear as possible, it is more important that accompanying support literature for users explaining what they may or may not do under the licence is more appropriate for a Plain English approach.

- Q. 54 Are there any additional expectations for licensees that should be set out by a collecting society in its code, or should any of those listed be excluded? Please give reasons why.**

CLA welcomes this government recognition that users also have obligations. An additional obligation that users should be open about their usage and copying levels of copyright material. Many companies and public departments still refuse to take a copyright licence unless and until they are caught and presented with evidence of illegal copying (in one case twice). We mentioned in paragraph 9.6 above the disputes CLA currently has with large public sector bodies and in response to Q. 45 the costs of compliance activity against unlicensed organisations.

**Q. 55 Are there any additional measures that a collecting society should put in place to ensure proper control of the conduct of its employees, agents, and representatives? Should any of the proposed standards be excluded? Please say what these are any provide evidence to support your response.**

CLA supports the measures listed dealing with the conduct of employees, agents and representatives.

**Q. 56 Are there any additional provisions that you believe would enhance the transparency of collecting societies? Should any of the proposed provisions be excluded? Please give reasons and evidence to support your response.**

It is not clear what is understood by a 'uniform format' in including tariff details on websites. The nature of licensing operations varies significantly between CMOs and it is unlikely that a uniform format would be either feasible or helpful.

**Q. 57 Are there any other criteria that a collecting society should report against? Should any of the proposed criteria be excluded? Please give full reasons and evidence for your answer, describing what impact it would have and on whom.**

Much of the suggested reporting requirements are already covered by Company Law and accounting requirements: CMOs should not be obliged to go further than other organisations in any particular respect on a matter already covered by the law. There are Data Protection and privacy issues around some items (e.g. distribution) but otherwise the requirements seem broadly acceptable.

**Q. 58 Are these criteria sufficient for the creation of a complaints procedure that is regarded as fair and reasonable by the members and users of collecting societies? Should any proposed criteria be excluded? Please provide reasons and evidence for your response.**

The criteria appear more than adequate (considering the low level of complaints).

**Q. 59 Please indicate whether you think a joint ombudsman or individual ombudsman would work better. Please say why you would prefer one over the other.**

There should be no compulsion either way. CLA is considering with other CMOs the possible appointment of a joint Ombudsman.

**Q. 60 Is the Ombudsman the right person to review the codes of conduct? Please give reasons for your answer, and propose alternatives if you think the ombudsman is not best placed to be the code reviewer.**

Any Code Reviewer should be independent of the Ombudsman. The Code Reviewer should have an appropriate background in, or experience of, copyright and able to assess fairly the fitness for purpose of any Code and as well as compliance with the Code. CLA suggest that a retired judge or other legally qualified person with relevant experience would be best placed to fill the role.

**Q. 61 What do you think about the intervals for review? Are they too frequent or too far apart? Please provide reasons for your answers.**

CLA believes the initial review period should be 1 year and supports the subsequent review period as being 3 years.

**Q. 62 What initiatives should the Government bring forward to provide recognition of high performance against voluntary codes of conduct? Please give reasons and evidence for your response.**

CLA is interested in exploring with the IPO the kite-marking approach.

**Q. 63 What do you consider to the process and threshold for non-compliance should be? For example, should Government test compliance on a regular basis (say by following Ombudsman's reports) or on an ad-hoc basis? What evidence would be appropriate to demonstrate non-compliance? Please give reasons for your answer.**

The trigger for the Secretary of State to impose a statutory back drop power should be where the independent Code Reviewer has received a significant number of complaints that a CMO has failed to comply with, or failed to introduce, a suitable Code.

**Q. 64 What, in your view, are suitable penalties for non-compliance with a statutory code of practice? For example, are financial penalties appropriate, and, if so, what order of magnitude would be suitable? Please give reasons and provide evidence for your answer.**

Possible removal of any kite marking accreditation and, for operators of Orphan Works or ECL schemes, removal of their authorisation to offer such licences/permissions. Financial penalties are inappropriate and unhelpful as it ultimately harms both the members (individual authors, artists and publishers) and the users between whom the costs of licensing inevitably have to be borne.

**Q. 65 Do you agree that the imposition of a statutory code should be subject to review? How long should such a code be in place before it is reviewed? Please give reasons for your answer.**

CLA believes a statutory code should only be imposed (as a backdrop power) where it has been clearly demonstrated that voluntary Codes have failed in a particular respect or sector and that there is a significant problem requiring remedy; this requires a more statistically sound database of complaints to be available following the implementation and operation of voluntary Codes for a suitable period. However the review period for any statutory code that is imposed should be the same as for the voluntary codes (see answer to Q. 61).

**Q. 66 If you are a collecting society which may qualify as a micro-business, would you be likely to introduce a voluntary code? If you are a user of collecting societies, what do you believe the Government should do to encourage good practice in any collecting societies which are exempt from the power to introduce a statutory code? Please give reasons for your answer.**

N/A.

### **Impact Assessment**

CLA would propose that Option 1 (self regulation) should be adopted and that Option 2 (statutory backdrop powers) should be reserved for operators of ECL schemes and Orphan Works permissions.

## 10. PRIVATE COPYING

- 10.1 This has long been a thorny problem, but with the passage of time licensing solutions have developed allowing what most people would regard as reasonable use. Music files can now under most licensing/purchase models be played on a number of different devices or platforms. Competition between providers has been encouraged as they seek to differentiate themselves with different packages which they feel will appeal more to consumers. CLA is also unaware of any individuals who have been sued for copyright infringement as a result of playing music they've acquired on different devices for their own use (as opposed to peer-to-peer file sharing & piracy). In any event it is hard to see how an exception intended to deal with a diminishing problem could contribute to economic growth; the risk of course is that a badly drafted exception could have the reverse effect by damaging existing and future business models.
- 10.2 The proposals seem to cover what CLA has termed "media shifting" in previous submissions, as opposed to just "format shifting" and/or "platform sharing". "Format shifting" or "platform sharing" mean shifting content from one digital carrier to another but in the same medium, whereas "media shifting" involves recreating content purchased in one medium into a different medium, e.g. digitising a work which exists in paper or analogue form into digital form. Digital form is a different medium with a greater utility and potential for copies to proliferate without recompense to rightsholders. It doesn't just produce another copy, it produces a completely different and new product; any exception that permits this must infringe the rightsholders exclusive rights of reproduction and communication as set out in the Copyright Directive without there being any concomitant mechanism to provide for fair compensation as required by the Copyright Directive.
- 10.3 Such a wide exception to allow "media shifting" is also unlikely to contribute to economic growth, but rather to stifle it – the example of the digital publishing industry was contained in the original PwC Report. Digital editions of works previously published in paper form represent a market opportunity requiring significant upfront investment which would be jeopardised through the uncertainty caused by a widely drawn exception that was open to differing interpretations on this issue. Apart from the potential harm to the publishing industry, users stand to suffer through the lack of professional production of high quality digital products.
- 10.4 Any exception that is introduced should be narrowly drawn to apply only to personal use (and not family use, which is definitely something which should be left to licensing terms) and should apply only to works that are owned by the individual in question and which have not been borrowed or acquired somehow in some other way under one of the exceptions to copyright (whether fair dealing, library privileges, etc.).

- 10.5 The requirement to provide “fair compensation” for any private copy exception cannot be met through an approach of building it into the original sale price; any statutory exception should be subject to displacement by the existence of an individual or collective licence.

### **Consultation Questions**

- Q. 67 Do you agree that a private copying exception should not permit copying of content that the copier does not own?**

Yes; also an exception should not extend to copies acquired under various exceptions to copyright, but should be limited to documents or electronic files purchased by the user.

- Q. 68 Should the private copying exception allow copying of legally-owned content for use within a domestic circle, such as family or household? What would be the costs and benefits of such an exception?**

No, this should be the subject of licensing arrangements of the sort currently offered by the music industry.

- Q. 69 Should a private copying exception be limited so that it only allows copying of legally-owned content for personal use? Would an exception limited in this way cause minimal harm to copyright owners, or would further restrictions be required? What would be the costs and benefits of such an exception?**

As with the answer to Q. 67, a private copy exception should be limited to apply only to legally owned (indeed acquired) content for the use of the purchaser.

- Q. 70 Should a private copying exception be explicitly limited so that it only applies when harm caused by copying is minimal? Is this sufficient limitation by itself, or should it be applied in combination with other measures? What are the costs and benefits of this option?**

A narrower exception in which the limits are explicit would be preferable to avoid the uncertainty and potential litigation surrounding a wider exception subject to a “harm to rightsholders” test.

**Q. 71 Should the current mechanism allowing beneficiaries of exceptions to access works protected by technological measure be extended to cover a private copying exception? What would be the costs and benefits of doing this?**

The current regime regarding TPMs, an exception should apply to any new exception.

### **Impact Assessment**

CLA would prefer Option 0.

## **11. PRESERVATION BY LIBRARIES AND ARCHIVES**

- 11.1 CLA agrees that the current exception should be extended to cover sound recordings, films and broadcast and audio visual works.
- 11.2 CLA also agrees that these exceptions should be extended to include museums and galleries, but these should be clearly defined in the way that libraries are currently defined for the purposes of the library exceptions to provide rightsholders with similar comfort levels about bodies entitled to the benefit of the exception: all such institutions should at least be not for profit organisations.
- 11.3 The requirement in current legislation applying to the library exceptions that the preservation exception applies only where a purchase is impracticable should be preserved and applied to any extension along the lines envisaged by the Consultation Document.
- 11.4 The purpose of these changes, as recognised in the Consultation Document, is to ensure that UK's cultural heritage is preserved and therefore these exceptions should apply only to preservation purposes. Any further use of collections thus preserved through making available communications to the public should fall outside such an exception requiring a licence from the copyright owner or a CMO acting on its behalf.

### **Consultation Questions**

#### **Q. 72 Should the preservation exception be extended:**

- **to include more types of work**
- **to allow multiple copies to be made**
- **to apply to more types of cultural organisations, such as museums**

#### **How might this be done, and what would be the costs and benefits of doing it?**

CLA agrees that the exceptions should be extended to include audio visual works and sound recordings, as well as literary to musical works, and that multiple copies made as part of a digitisation process should be allowed, provided the exception is still subject to the requirement set out in s. 42 that it applies only to where it is not reasonably practicable to purchase a copy (in other words a digital edition) of the item in question.

CLA also agrees the exception could be extended to other defined types of cultural organisations such as museums and galleries provided they can be defined in a clear and

precise way in the way libraries are in pursuant to the library copy exceptions (The Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989).

The key of course is that no use beyond preservation should be allowed without the copyright owner's consent (which could be an individual or collective permission).

**Q. 73 Is there a case for simplifying the designation process which is part of Section 75? How might this be done and what would be the costs and benefits of doing it?**

N/A.

**Q. 74 Should any other changes be made to the current exceptions relating to libraries and archives, and what would be their costs and benefits?**

No other changes have been proposed.

**Impact Assessment:**

CLA would prefer Option 2.

## 12 RESEARCH and PRIVATE STUDY

- 12.1 Although the proposal to extend the copyright exception for non-commercial research and private study to include sound recordings, films and broadcasts appears uncontentious, the difficulty lies in applying the “fair dealing” element of the Test. As stated elsewhere, this Test must now incorporate, in addition to other factors set out in UK case law, compliance with the Berne 3 Step Test and Article 5.5 of the Copyright Directive. The UK has no generalised mechanism for ensuring payment of fair compensation (and/or, as appropriate, ensuring it does not conflict with the normal exploitation or prejudice the legitimate interest of rightsholders) in the way most EU Member States do with levy systems or through statutory licensing/compulsory collective management systems. It is hard to “research” or “study” a film or a sound recording without consuming the entire product and thereby potentially resulting in a lost sale.
- 12.2 It would be better therefore to provide that any extension should be subject to there not being a relevant licensing scheme in existence and to ensure that where it is feasible to license this sort of use, rightsholders can exploit their rights and thereby derive some revenue to comply with the fair compensation requirement.
- 12.3 s. 36 could also be amended to confirm that the exception applies also to Acts which otherwise would breach the Communication Right of s. 20 of the 1988 Act provided the licence override remained and the extension did not cover original digital publications, the use of which should always be determined solely by the terms and conditions of the original purchase and licence (in accordance with Article 5.3(n) of the Copyright Directive) See also the answer to Q. 76 and, more generally, Section 20 below.
- 12.4 But the proposal to extend this fair dealing exception to cover institutions is misconceived. CLA licences already cover this activity (all CLA licences in the education sector now include scanning as a core permission in the licence and in most cases the use and re-use of digital products as an option) and the proposals would undermine the need for the CLA licence which we believe would not be permissible under EU law. “Fair dealing” has always been seen as an exception which is applicable only to single copies and not the making by institutions of multiple copies.
- 12.5 It is worth returning here to the provisions of the Copyright Directive. This permits an exception to the reproduction right for “specific acts of reproduction made by ...educational establishments....” but this does not apply to electronic distribution of works. Article 5.3(a) provides a further exception which covers also the communication right (in addition to the reproduction right) for “the sole purpose of illustration for teaching or scientific research”. CLA’s legal advice is that “this is a relatively narrow permitted exemption that is clearly narrower than just “use for teaching” suggesting use of a work or other subject matter to

*illustrate* a point being made by the teacher or in teaching materials which have been independently created and that “a broad exception for educational establishments from the making available and communication to the public rights set out in Article 3 of the Copyright Directive would contravene the UK’s EU obligations, if not in terms that were limited to illustration for teaching”. In other words this permitted exception is similar to the “chalk and talk” exception contained in s. 32 of the 1988 Act.

### **Consultation Questions**

**Q. 75 Would extending the copyright exception for research and private study to include sound recordings, film and broadcasts achieve the aims described above? Can you provide evidence of its costs and benefits?**

The problem with extending the research and private study exception to include sound recordings, film and broadcasts is to ensure that the exception complies with the Copyright Directive and the Berne 3 Step Test (normal exploitation/prejudice of legitimate). It is also important to ensure that it does not displace the need for licensing schemes where these exist or can be launched. It is difficult to see the research and private study exception being used in practice for anything other than whole works thereby immediately bringing it into conflict with the normal exploitation provisions of the Copyright Directive and the Berne Convention. It would however perhaps be better to amend ss. 35 and 36 as appropriate.

**Q. 76 Should the copyright exception for research and private study permit educational establishments, libraries, archives or museums to make works available for research or private study on their premises by electronic means? What would be the costs and benefits of doing this?**

No: it is completely contrary to the purpose and history of the fair dealing exceptions to allow institutions to use and make multiple copies in lieu of purchasing original editions and/or paying for an appropriate copyright licence. Such an unjustified extension would be contrary to the Berne 3 Step Test and, CLA believes, beyond the power of the UK Government under the EU Copyright Directive.

A better alternative would be to amend s. 36 to confirm that the current “1%” exception can apply also to electronic communications provided the current regime that the exception does not apply to extent that a licensing schemes exists is maintained and that the terms of primary licences for the use of digital publications should always determine the permitted usage.

## Impact Assessment

Option 1 (extend “fair dealing” to included sound recordings, films and broadcasts provided exception does not displace need for licensing schemes. s.36 of the 1988 Act could be amended to confirm the 1% exception applies also to e-communications.

### **13. TEXT AND DATA MINING**

- 13.1 The problem outlined in the Consultation Document is of comparatively recent origin. The concept of text and data is of relatively recent origin; whilst researchers and academics may have been aware of this and concerned at the implications, the history of dialogue with rightsholders seeking a solution is much shorter. Indeed it is only in the last few months that CLA has been invited to participate in meetings to discuss the issue.
- 13.2 There is little evidence to support the case for change disclosed in the Consultation Document. Other submissions have pointed to the only detailed study into the issue commissioned by the Publishing Research Consortium entitled “Journal Article Mining”. This showed that over 90% of requests for permission to data mine were being granted. Furthermore draft model licences for publishers to use (similar to the STM/PDR model licences), are being developed.
- 13.3 It seems clearly premature, therefore, to contemplate an exception with uncertain implications before it can be shown whether or not a genuine problem exists which cannot be solved through licensing by rightsholders. CLA has had the benefit of reading the submission from the Publishers Association on this issue and agrees with it; the costs of introducing an exception are various and outweigh any perceived benefits (which are, in any event, so far unsubstantiated).
- 13.4 CLA remains ready to assist if it becomes apparent that there is a need for a collective licence as part of the solution to the issue.

#### **Consultation Questions**

- Q. 77 Would an exception for text and data mining that is limited to non-commercial research be capable of delivering the intended benefits? Can you provide evidence of the costs and benefits of this measure? Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?**

The Consultation Document discloses little hard evidence of a need for any exception that is not currently being met by voluntary licensing. Most publishers are granting individual permissions on a routine basis and draft standard licences are being prepared by industry bodies; see the Text and Data Mining Sample Licence prepared by the International Association of Scientific, Technical & Medical Publishers which is available at <http://www.stm-assoc.org/>. CLA would be prepared to consider developing a collective licence should there be a need.

## **Impact Assessment**

CLA prefers Option 0 (do nothing).

## **14. PARODY, CARICATURE AND PASTICHE**

- 14.1 Again, there is no evidence base disclosed in the Consultation Document to support the case for change (it cites only one example). The final conclusion of the Gowers Review and the Government Consultation on Implementation of its recommendations was that there was no serious problem here that needed to be addressed and that works of parody, caricature or pastiche were not being prevented from creation because of the lack of an exception.

### **Consultation Questions**

- Q. 78 Do you agree that a parody exception could create new opportunities for economic growth?**

Again there is little evidence of the opportunities that would be created by an exception or which are currently being missed because of the lack of one. Previous reviews concluded that there was no need to change the law in this area and no fresh evidence has been presented to justify a change of policy.

- Q. 79 What is the value of the market for parody works in the UK and globally?**

As above, this has not been demonstrated.

- Q. 80 How might a parody exception impact on creators of original works and creators of parodies? What would be the costs and benefits of such an exception?**

Given that there appears to be no current problem, any exception can only have adverse and probably unintended consequences creating costs through litigation whilst not delivering commensurate benefits.

- Q. 81 When introducing an exception for parody, caricature and pastiche, will it be necessary to define these terms? If so, how should this be done?**

The difficulty of defining these terms, other than using a dictionary definition, demonstrates why this is not a problem that needs to be solved. One example on YouTube hardly justifies the introduction of a major new exception.

- Q. 82 How should an exception for parody, caricature and pastiche be framed in order to mitigate some of the potential costs described above?**

N/A.

**Q. 83 Would making this a “fair dealing” exception sufficiently minimise negative impacts to copyright owners, or would ore specific measures need to be taken?**

All exceptions should be fair dealing subject to the Berne 3 Step Test as replicated in the EU Copyright Directive and the “fair dealing” criterion must be construed in that way, but it would be better not to have the exception in the first place.

**Q. 84 Are you able to provide evidence of the costs and benefits of such an exception?**

No.

### **Impact Assessment**

CLA prefers Option 0 (do nothing).

## 15. USE FOR WORKS IN EDUCATION

- 15.1 The potential for significant harm to be caused to the publishing industry in the UK were these proposals to be fully implemented are discussed in the PwC Supplementary Report. A thriving industry in which the UK is a world leader could be placed at risk through the thoughtless introduction of absolute exceptions for education. These risks would apparently be taken in order to achieve only minimal savings by educational establishments: PwC estimate in their Supplementary Report that expenditure by educational institutions on CLA licences comprises **less than 0.1%** of their total expenditure.
- 15.2 CLA has grave concerns about the proposals suggesting in places the abolition of the concept which underpins the educational exceptions that they should apply only as a safety net where no licensing scheme exists. This approach was adopted following the recommendations of the Whitford Committee which recognised the public benefit of education but concluded that: “the fact that ‘education’ is a good cause is not in itself a reason to deprive copyright owners of an entitlement to remuneration” and that “if copyright materials are used in education the copyright owner is entitled to payment. They [*i.e. the copyright owners*] should not, as a class, be expected to make some exceptional contribution in this field.”
- 15.3 Furthermore, exports might also be put at risk. The UK is often seen as having a “gold standard” of copyright laws, which encourage other countries, particularly developing countries when forming their own copyright law, to adopt a similar approach. This helps create and protect markets into which UK publications can be exported. The PwC Supplementary Report discusses the importance of export revenue in Section 2. The CLA timeline of licence development (see Appendix 2) lists the Repertoire Exchange Agreements that CLA has concluded. These include very recently, an agreement with the relevant CMO in India with a medium to long term potential for significant revenues to flow back to the UK.
- 15.4 The legal background to copyright, educational exceptions and collective licensing is discussed at some length in Section 5. From the legal advice that CLA has received, it is apparent that any attempt to remove the “licence override” from s. 36 would be likely to put the UK in breach of its EU obligations in the absence of any alternative system to ensure that copyright owners receive fair compensation for use of their works. The likely outcome would be significant litigation with students, educational institutions, copyright owners and the Courts wrestling with difficult judgements as to whether individual acts of copying by, or on behalf of, students amounted to an infringement or fell within one of the exceptions permitted by the Copyright Directive.
- 15.5 The proposal to increase the 1% limit in the s. 36 exception, alternatively to render it subject to a “fair dealing” test rather than a numerical limit, is also discussed in the PwC Supplementary Report and in Section 5 (the Legal Background). No data is disclosed in the

Consultation Document to underpin the relevant size of the amount not covered by CLA licences and therefore relevant to the s. 36 exception (see figures 1 to 3 of the relevant Impact Assessment). CLA's own figures suggest that the size of the white box is in fact tiny (only 0.2% of titles copied (as shown by CLA surveys) are not covered by the CLA licence and the UK titles specifically excluded from CLA licences amount to only 0.0007% of the repertoire that is included). The PwC Supplementary Report analyses the true size of the "white box" in the diagrams in the Consultation Document calculating the amount of copying within the exception and finds it to be a tiny proportion of the licensed copying.

- 15.6 It is also noteworthy that the conclusion reached by the Government at the end of the Consultation Document stemming from the Gowers Review had been that the 1% limits were clear and appropriate and that there was no real reason to change them. Indeed the previous administration appeared to accept the argument that the 1% limit in the exception was the appropriate level and that an increase to 5% must fail the 3 Step Test (paragraph 102 of the Gower Second Stage Consultation).
- 15.7 The 1988 Act already contains provisions containing further "safety nets" for educational establishments in addition to the s. 36 exception. Sections 137 to 141 give powers to the Secretary of State to extend coverage of existing schemes where required and also power for the Secretary of State to launch an enquiry as to whether a new provision is required to cover copying by educational institutions. If there is a positive recommendation for a new licence, then rightsholders have a year in which to launch such a licence (and this licence would then be certified under s. 143 of the 1988 Act). If however no such licence is launched, then the Secretary of State can order that the making of copies within the terms of the recommendation should be treated as having been licensed by the copyright owners.
- 15.8 The existing law therefore already allows educational institutions to make a case that there is a gap in the provision of licences (either by the extension of existing schemes or a creation of wholly new ones) with adequate mechanisms to ensure that if accepted by the Secretary of State (and subject to the appeal to the Copyright Tribunal) that one way or another a licence scheme or general permission would be promulgated.
- 15.9 It seems therefore that if the problems faced by educational establishments are so large as to justify consideration of such a major change in existing law, then perhaps it would be better to consider first whether the existing provisions might be utilised to deal with the problems.
- 15.10 It also should of course be remembered that Extended Collective Licensing of the sort envisaged in the Consultation Document would also provide a better solution to the problem and one that would be compatible with EU law.

## Consultation Questions

**Q. 85 How should the Government extend the education exceptions to cover more types of work? Can you provide evidence of the costs and benefits of doing this?**

CLA licences already cover the use of modern presentation technology such as interactive whiteboards (colloquially known as “Smartboards”) and CLA agrees that the s. 36 exception could be extended in a similar fashion (provided subject to a licence override). Artistic works, *where embedded* in literary works (books, journals, magazines and other periodicals) should also be covered by the 1% exception, but self-standing artistic works – a photograph, painting, illustration, etc. are not appropriate for this treatment given the impossibility of defining a meaningful limit on the amount that can be copied (whether 1% or more) and the danger it would represent to primary sales and the commissioning of new artistic works.

**Q. 86 Would provision of “fair dealing” exceptions for reprographic copying by educational establishments provide the greater flexibility that is intended? Can you provide evidence of the costs and benefits of such an exception?**

CLA believes that any removal of the numerical limit in favour of a generalised “fair dealing” test is unnecessary, dangerous and illegal. As the final Consultation Document from the previous Government on the Second Stage Consultation on the implementation of Gowers noted, the 1% test is understood and that any increase is likely to result in harm to rightsholders. To the extent that a problem exists (this has not been properly articulated by users), it would be better solved through the existing legislative provisions contained in ss. 137-143 of the Act which have not yet been activated – see main commentary.

**Q. 87 What is the best way to allow the transmission of copyright works used in teaching to distance learners? What types of works should be covered under such an exception? Should on-demand as well as traditional broadcasts be covered? What would be the costs and benefits of such an exception?**

In terms of the repertoire and actions covered by a CLA licence, distance learning (to the extent not already covered by the law) should be enabled subject to the other conditions including the licence override. But the purchase/licence terms of the acquisition of the original digital publication/subscription should always apply to determine the extent of permitted usage. Any attempt to provide for a copyright exception to override such terms would be contrary to Article 5.3(n) of the Copyright Directive (see Section 20 below).

**Q. 88 Should these exceptions be amended so that more types of educational body can benefit from them? How should an “educational establishment” be defined? Can you provide evidence of the costs and benefits of doing this?**

There is no issue in principle with extending these provisions to apply to public museums and galleries (provided they can be sufficiently identified) and provided also it is limited to the provision of educational instruction (rather than merely making available to the public) and, of course, subject to there not being a licensing scheme in existence.

**Q. 89 Is there a case for removing or restricting the licensing schemes that currently apply to the education exceptions for recording broadcasts and reprographic copying? Can you provide evidence of the costs and benefits of doing this, in particular financial implications and impacts on educational provision and incentives to creators?**

As above, CLA believes this proposal to be unnecessary, dangerous and illegal – see Section 5 and the PwC’s Supplementary Report. To set against this, there are only minimal savings that could be achieved in the short run; expenditure by educational institutions on CLA licences comprises less than 0.1% of their total expenditure (PwC Supplementary Report).

#### **Impact Assessment**

CLA prefers Option 1 (extend type of work and allow interactive displays), Option 3 (enabling distance learning) Option 4 (widening definition of educational establishment) if, in each case, it is subject to retention of the licence override provision.

## **16. EXCEPTION FOR PEOPLE WITH DISABILITIES**

16.1 For several years the CLA Print Disabled Licence, licensing institutions to make Accessible Copies for those suffering from some form of impairment, has covered these additional conditions mentioned in the proposals. Equally all CLA blanket licences to organisations for their internal copying include the extended range of conditions in the permission to make Accessible Copies for their staff, students or employees. CLA however supports the proposal to change s. 31 of the 1988 Act to include these additional conditions in the copyright exception.

16.2 But CLA believes that this copyright exception should remain subject to a licence override to preserve the additional benefits that only voluntary licensing can bring.

16.3 These benefits include:-

- the ability to circulate Accessible Copies made under licence outside of the UK. Voluntary licensing, when coupled with an indemnity, provides a universal defence against claims against copyright infringement, whereas clearly UK law will be of no assistance for any claim made outside the UK;
- preserving the licence override will facilitate the exchange of Repertoire Exchange Agreements by CLA with its counterparts overseas thus potentially allowing Accessible Copies made under licence or permissions abroad to be imported in to the UK;
- a voluntary licensing scheme contains the potential for there to be a central repository of Accessible Copies, or an index of the same, allowing institutions to avoid the duplication of creating new Accessible Copies where one already exists and which also allows the niche publishers of commercial editions of Accessible Copies to target their efforts where such commercial editions are most needed;
- publishers are voluntarily allowing institutions wishing to make Accessible Copies access to pre-production digital files which makes the process of creating an Accessible Copy easier and cheaper. It is doubtful if they would be prepared to do this in the face of an absolute statutory exception. CLA has had the benefit of reading the PA submission on this point and agrees with their comments.

### **Consultation Questions**

**Q. 90 How should the current disability exceptions be amended so that more people are able to benefit from them? Can you provide evidence of the costs and benefits of doing this?**

CLA licences have for some years included other conditions (such as dyslexia) which impair the ability of a person in reading or accessing a work and has no objection to a similar extension to s. 31 of the 1988 Act.

**Q. 91 How should the disability exceptions be expanded so that they apply to more types of work? Is there a case for treating certain works differently to others? What would be the costs and benefits of amending the exceptions in this way?**

N/A.

**Q. 92 What are the costs and benefits of the current licensing arrangements for the disability exceptions, and is there a case for amending or removing them?**

As per paragraph 16.3, the current licensing arrangement delivers benefits that an absolute exception cannot in terms of:

- overseas circulation of Accessible Copies made in the UK;
- the possibility of reciprocation for Accessible Copies made overseas;
- the provision of information enabling publishers to target editions where a commercial Accessible Copy should be produced,
- the incentive to continue working with bodies representing print-disabled persons to allow access to digital pre-production copies enabling efficient and cheap production of Accessible Copies.

**Q. 93 How should this exception be modified in order to simplify its operation?**

N/A.

### **Impact Assessment**

CLA prefers Options 1 and 2 (broadening scope to include all types of disability and all types of copyright work) but subject to licensing schemes.

## **17. USE OF WORKS FOR QUOTATION AND REPORTING CURRENT EVENTS**

- 17.1 There appears to be little evidence disclosed in the Consultation Document demonstrating the need for such a change and where the exception would be open to abuse.
- 17.2 CLA licence covers many instances of the use of quotation and it doesn't seem to be a problem in practice.
- 17.3 The CLA licence for press cuttings and media monitoring organisations, along with the NLA licence to such organisations for newspapers, provides cover for uses for reporting current events. If an expanded exception were used as a reason not to take these licences, it would conflict with the rightsholders right to a normal exploitation of their works contrary to the Copyright Directive and the Berne Convention (see Section 5 above); if the exception can only apply in minor cases that cause no harm outside of these licences, it is hard to see how it can contribute to the growth agenda.

### **Consultation Questions**

- Q. 94 Should the current exception for criticism and review be amended so that it covers more uses of quotations? If so, should it be extended to cover any quotation, or only cover specific categories of use? Can you provide evidence of the costs or benefits of amending this exception?**

There is no real evidence of the need for "other uses" of quotations (the Impact Assessment merely notes that some other common uses "may" need clearance). The risk of course is in attempting to address a minimal, or perhaps even non-existent problem, greater uncertainty and disproportionate damage is done to the publishing industry.

- Q. 95 Is there a need to amend or clarify the exception for reporting current events? Could this be done as part of a quotation exception, or would a separate measure be needed? What would be the costs and benefits of doing this?**

Again, there seems no clear need to amend or clarify this exception which has worked well in practice.

- Q. 96 Is there a need to amend the existing provisions relating to speeches and lectures, and what would be the costs and benefits of doing so? Should these provisions be combined with a quotations exception?**

N/A.

**Q. 97 Would there be additional benefits if all three types of exception examined by this section were combined?**

N/A.

### **Impact Assessment**

CLA prefers Option 0 (do nothing); if Option 1 (fair dealing exception for all uses of extracts and quotations) is chosen it should be subject to a licence override and needs an acceptable definition of “extracts” and “quotes”.

## **18. USE OF WORKS FOR PUBLIC ADMINISTRATION AND REPORTING**

- 18.1 The only justification for this change appears to be a desire to “max up” exceptions in the UK law to the levels permitted in the EU in the hope that this will somehow thereby increase UK GDP. But the Consultation Document is looking only at one side of the coin – the menu of exceptions allowed by Member States by the Copyright Directive without recognising also that these are often attached to specific requirements that fair compensation should be payable and are always attached to a requirement for compliance with the 3 Step Test and the right to a normal exploitation of the work.
- 18.2 Placing copyright works for public bodies as part of various regulatory procedures exposes those documents to widespread copying and use potentially damaging original sales of those products. Therefore any right to post online copies of documents supplied for regulatory purposes should exclude literature (such as journals, books or articles) available elsewhere in accordance with the approach adopted when the Patent Rules were amended.

### **Consultation Questions**

- Q. 98 How should the current exceptions for use by public bodies be amended to support greater transparency? How could such exceptions be limited to ensure that incentives to copyright owners are not undermined? Can you provide evidence of costs or benefits of doing this?**

Any exception should follow the approach adopted in the amendment to the Patent Rules cited in the Consultation Document that only making available online by a Government body pursuant to its statutory function should exclude “non-patent literature such as journals, books or articles (available elsewhere)”.

### **Impact Assessment**

CLA prefers Option 1 (amend existing legislation to allow online delivery) but only if books, journals, or articles which are available elsewhere are excluded.

## **19. OTHER EXCEPTIONS ALLOWED BY COPYRIGHT DIRECTIVE**

- 19.1 In many of these examples, the problems caused by the lack of a general mechanism to ensure fair compensation is payable. Given the refusal of successive Governments to contemplate any form of levy system or similar, it has to recognise that voluntary licensing schemes are the only way to allow it to deal with this requirement in the Copyright Directive.
- 19.2 Therefore any attempt to introduce absolute exceptions must run the risk of falling foul of the limitations imposed by the Copyright Directive and the Berne Convention. Any new exceptions therefore should be subject to a licence override.
- 19.3 The fact that there are examples of where organisations have chosen not to license a particular activity or chosen to license it for free does not automatically mean that there is minimal harm. Circumstances may change and licensing, even with no licence fee, allows some control over use and monitoring of the position and this should be allowed to continue.

### **Consultation Questions**

**Q. 99 Should a new exception for time-shifting of broadcasts by social institutions be introduced? What would be the costs and benefits of doing this?**

As with any proposed new exception, it should be subject to a licence override and therefore should only apply to the extent that no licensing scheme exists to legitimise the use.

**Q. 100 Should a new exception for use during religious celebrations or official celebrations organised by public authorities be introduced? What would be the costs and benefits of doing this?**

See answer to Q. 99.

**Q. 101 Should our current exceptions be expanded to cover use for public exhibition or sale of artistic works on the internet? What would be the costs and benefits of doing this?**

N/A.

**Q. 102 Should our current exceptions for the demonstration and repair of equipment be expanded? What would be the costs and benefits of doing this?**

N/A.

## **Impact Assessment**

CLA prefers Option 0 (do nothing).

## **20. PROTECTING COPYRIGHT EXCEPTIONS FROM OVERRIDE BY CONTRACT**

- 20.1 The Consultation Document refers to “various existing provisions” as examples of this approach and also refers to the position in Ireland. But all of these examples state that “for the purposes of the exception”, it is irrelevant whether or not there is a contractual term to the contrary or words to that effect. Thus the exception and statutory defence afforded by the exception remains whether or not there is a contrary provision in a contract. But this would be the case anyway, as it is simply not possible for an individual to “contract out” of statutory defences which would always remain available whether or not such wording existed in the statute.
- 20.2 This is quite a different thing from saying that particular conditions in a contract should be rendered “null and void” thereby introducing a major change into the principles of contract law in the UK. The matter would be better left to contract law to determine whether or not the contracts were enforceable on the basis of validity of consideration offered. Typically users enter into contracts to obtain a range of benefits amongst which is the increased certainty as to what they may do.
- 20.3 The proposal suggests there is a benefit to be derived from a clear exception overcoming the supposed lack of certainty as to whether such terms are enforceable under current contract law, but it is in fact likely to lead to the reverse and have unintended consequences. Suppliers may simply refuse to enter into contracts with institutions entitled to benefit from exceptions that might allow them more use of the work purchased than they have paid for. Difficulties under private international law could arise where an overseas supplier sued for breach of contract under the law of their country and/or sued in their own jurisdiction.
- 20.4 The Opinion obtained by CLA (see Section 5) notes the failure of the Consultation Document to distinguish between contracts which override (or purport to override) exceptions and those which permit, but may impose charges on, acts which would be permissible under general law.
- 20.5 It cites the example of the potential supply of a single digital copy to an educational institution under licence terms based on electronic access to the work by students and teachers so that the amount to be paid by that institution would depend on usage measured through an individual act of access. It would be perverse if many of those acts were then claimed to be covered by the fair dealing exception and that the contract terms covering payment for that use were unenforceable. This would be deeply unfair, counterproductive (it would be a severe disincentive for publishers to engage in such licensing in the first place so depriving institutions of any access) and, in CLA’s view, illegal under EU law.

- 20.5 One of the policy objectives stated in the Impact Assessment is to allow users to do “limited, reasonable, things for the copyright works, that do not undercut the way copyright offers incentives to creators”, but this seems to be a circular argument. If rightsholders believe it is in their commercial interest to include a clause in their contract restricting their uses, or the amount of use, to which a work may be put under the contract (on the terms and at the price agreed with a user institution) by definition allowing that institution simply to tear up that part of the contract must cause harm and disincentivise creativity. Such a change must therefore conflict with a normal exploitation and/or prejudice the legitimate interests of copyright owners contrary to the Copyright Directive and the Berne Convention.
- 20.6 Furthermore the only relevant exception in the Copyright Directive to the Communication right (Article 5.3(n) allows “communication or making available, for the purpose of research or private study, to individual members of the public... of works... not subject to purchase or licensing terms.”. The underlined wording is presumably there for precisely this reason: to avoid the absurd result of an institution agreeing to pay a certain price for an agreed amount of use and then using the law to claim a greater usage free of charge. A change that had the effect of rendering null and void contractual terms in digital supply licences would fall outside the permitted exception and so be illegal.
- 20.7 CLA licences are sometimes quoted as being without prejudice to statutory rights, but in terms of the permissions afforded by the licences to copy, they do not distinguish as such between those copies which it may have been possible to make them under one of the exceptions to copyright and those which would always have been beyond any such exception. The point is the licensee obtains the benefit and certainty that, provided the licence terms are complied with, the copy is lawful.
- 20.8 CLA licences provide an answer to the difficulty of complying with differing contractual terms for electronic subscriptions (for those publishers opted-in to the CLA scheme) and yet only 22% of universities in the state sector have seen fit to take out this element of the licence to deal with this supposedly major problem and the sector has consistently argued that this element is of little value in terms of the CLA licence fee.
- 20.9 In collective licensing terms, this proposal would introduce further elements of doubt and potential costs and uncertainty. The Copyright Tribunal has jurisdiction to determine whether or not a fee charged by a CMO is reasonable; users and their representative bodies can agree a licence fee with a CMO – but then still go to the Copyright Tribunal at a later stage – to seek a reduction. There is no necessity for yet a third stage by allowing, in addition, a right to appeal to the Court to claim that a licence is preventing use of a statutory exception and/or to disregard a licence term or simply claiming the exception to justify its breach of contract and putting the CMO to the test of proving in the contrary in Court.

- 20.10 One of the benefits of collective licensing for users is that it introduces certainty allowing them to copy without needing to determine in each case the limits of any copyright exception and this practical solution should not be disturbed.

### **Consultation Questions**

**Q. 103 What are the advantages and disadvantages of allowing copyright exceptions to be overridden by contracts? Can you provide evidence of the costs or benefits of introducing a contract-override clause of the type described above?**

The disadvantage of this proposal is that it would introduce a wholly unjustified interference with private contract law. CLA believes that the statutory defences to a claim for copyright infringement simply cannot be waived by contract (and therefore remain available as a defence to a claim whatever is said in the supply contract). But whether or not the supplier still has remedies under the contract for breach of contract should remain to be tested under standard English contract law principles.

The reason most often cited for seeking this change is the administrative difficulty and cost of complying with a myriad of different licence terms. It seems perverse that a change in law should be sought to assist one particular sector of the economy in minimising its costs (caused by a voluntary choice to enter into so many contracts) at the expense of another sector of the economy (particularly one that contributes such a high share of UK GDP) instead of resourcing themselves properly and/or adapting their business models.

Clearly educational and other institutions should, like everybody else, pay for what they use and not seek to use copyright exceptions to obtain a free ride at the expense of creators and publishers.

### **Impact Assessment**

CLA prefers Option 0 (do nothing).

## 21. COPYRIGHT NOTICES

- 21.1 The proposals risk blurring the distinction between the judiciary and the legislature with the Government potentially both writing and passing the law and then interpreting and applying it as well. There is also a specific conflict of interest issue in that Government bodies, as major users of copyright works (indeed some of them are currently in dispute as to the need for and value of a copyright licence), cannot be seen as impartial when issuing guidance on the possible application and extent of copyright exceptions.
- 21.2 It would be most inappropriate for there to be a legal obligation of the Courts to have regard to Notices issued by Government officials. Any dispute before a Court turns on an interpretation of facts (which must be a matter for the judge or jury) and/or an analysis of the interpretation and application of the law itself (which is also a matter for the judge); in neither case is it appropriate for a Government official to have a quasi-judicial role in issuing guidance.
- 21.3 Most complaints generally turn on a misunderstanding or ignorance of the law of copyright and/or the application of the law to a particular factual circumstance and/or the rate for a copyright licence – all of these are matters for the Courts of the Copyright Tribunal.
- 21.4 But CLA agrees there may be a benefit in launching an ADR service as envisaged in the Consultation Document.

### Consultation Questions

**Q. 104 Are there specific and or general areas of practical uncertainty in relation to copyright which you think would benefit from clarification from the IPO? What has been the consequence to you or your organisation of this lack of clarity?**

The biggest area of doubt and debate lies in the scope of the various copyright exceptions, notably the fair dealing exceptions. Successive Governments have refused to countenance an explicit reference to the 3 Step Test (as articulated in the Copyright Directive), but it seems pretty well established now through case law and indeed Government's own Consultation Document and previous Consultation Documents that the fair dealing and indeed other exceptions always have to be construed by reference to that test.

Nonetheless this is not immediately apparent to copyright users when reading the 1988 Act and when engaging with CLA and other CMOs regarding their need for a licence. Were all exceptions to be explicitly subject to the test or, better still, stated to apply only where no licensing scheme exists (in accordance with the recommendations of the Whitford Committee) this area of uncertainty would be removed and UK law would then become more compliant with European law and international treaty obligations.

**Q. 105 Who do you think would benefit from this sort of clarification? Should it be reserved for SMEs as the group likely to produce the greatest benefit in economic growth terms?**

See above.

**Q. 106 Have you experienced a copyright dispute over the last 5 years? If so, did you consult lawyers and how much did this cost?**

CLA most often faces copyright disputes in terms of enforcement of the need for licences. We gave examples in our response to Q. 45 of the recent compliance activity costing six figure sums where CLA had uncovered evidence of copyright infringement not authorised by a direct permission or CLA licence.

**Q. 107 Do you think that it would be helpful for the IPO to publish its own interpretation of problem areas which may have general interest and relevance? What sources should it rely on in doing so?**

CLA believes that the IPO should certainly not publish interpretation on specific issues. It is hard to form a view regarding some "general guidance" without specific examples, the risk being that general guidance can easily slip into covering specific issue or being applied to specific issues. As can be seen from CLA's answer to Q. 46, the IPO's own database of complaints to the Minister shows that the overwhelming majority of issues that users complain about is to do with the need for them to take a licence under copyright law and/or the rates payable, both of which are matters that should be outside the scope of any advice or guidance given by a civil servant as they fall within the remit of the Courts and/or the Copyright Tribunal.

**Q. 108 Do you agree that it would be helpful to formalise the arrangements for these Notices through legislation? Please explain your answers.**

CLA is doubtful that these Notices would be of any benefit to users or rightsholders and certainly does not believe they should be formalised as part of the legislation. The analogy with the Patent Notices is inappropriate.

**Q. 109 How do you think that the IPO should prioritise which areas to cover in these Notices?**

See Q. 108.

**Q. 110 Does there need to be a legal obligation on the Courts to have regard to these Notices? Please explain your answer.**

No – see above.

**Q. 111 Are there other ways in which you think that the IPO can help clarify areas where the law is misunderstood? How would these work?**

The clear need is for the IPO to provide awareness of copyright and to promote a positive view of its benefits and its importance to the UK economy. CLA, in common with other CMOs, engages in several education and awareness campaigns, but is inevitably hampered by resources; this is a role that a Government department is ideally placed to fulfil.

**Q. 112 Do you think it would be helpful for the IPO to provide (for a fee) a non-binding dispute resolution service for specific disputes relating to copyright? Who would benefit and how? Are there any disadvantages of IPO operating such a service?**

CLA would welcome the creation of such a service. CLA has often proposed mediation to resolve problems with users as a preliminary step before legal or Tribunal proceedings. But the difficulty is that users are often reluctant to engage in mediation; indeed in a current dispute some Government departments contesting the need for and value of a CLA licence specifically refused mediation! An ADR service sponsored by the IPO might appear more attractive to users.

**Q. 113 What would you be prepared to pay for a dispute resolution service provided by the IPO? Please explain your answer, for example by comparison with the time and financial cost of other means of redress.**

It is not possible to quantify an amount in advance of knowing the details of any dispute but CLA would be prepared to pay an appropriate share of any such mediation/ADR process assuming of course the user in question was prepared to pay its share.

**Q. 114 Which would you find more useful: general Notices on the interpretation of the law (free) or advice on your specific dispute (for which there would be a charge)? Please explain your answer.**

Covered above; CLA believes that the IPO should definitely not provide advice on specific disputes (whether or not for a fee), as that is a matter of legal advice and/or legal judgement and is doubtful that general Notices have a role to play.

## Impact Assessment

CLA prefers Option 0 (do nothing).

## Appendix 1 – Details about CLA

- 1 CLA is a not for profit company, limited by guarantee. It was founded in 1983 by the Authors' Licensing Collecting Society Ltd ("ALCS") and the Publishers Licensing Society Ltd ("PLS") 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 and drawings appearing within those works are covered by virtue of an agency agreement between CLA and the Design & Artists Copyright Society Ltd ("DACS"). CLA is a Collective Management Organisation (a "CMO"). A network of repertoire exchange agreements with similar CMOs throughout the world means that CLA's collective licences also cover a large number of overseas publications.
- 2 CLA plays an important role in the publishing industry acting on behalf of authors, artists and publishers in licensing the copying of extracts from publications by photocopying and other reprographic means, by scanning and, increasingly, by licensing the use and re-use of electronic publications. CLA's licences provide an effective solution for users who need to obtain lawful access to content at a reasonable price whilst ensuring a fair return to the creators and producers of that content. CLA has distributed over £600m to its copyright owners since it commenced operations.
- 3 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, and similarly a large number of organisations in both the public and private sector are licensed. CLA licences allow press cuttings agencies and other information providers (such as the British Library) to keep their clients up-to-date on important news and developments relevant to their businesses. Licences tailored to the needs of businesses that depend heavily on information and research such as law firms and pharmaceutical companies have been developed in consultation with those sectors.

## Appendix 2 – Timeline of CLA Licence Innovations 2000-2012

