



Australian Law Reform Commission – Copyright and the Digital Economy Discussion Paper CLA Submission

1. The Copyright Licensing Agency Ltd (“CLA”)

CLA is a Collective Management Organisation (a “CMO”). It is a not for profit company incorporated in the UK, limited by guarantee. It was founded in 1983 by the Authors’ Licensing Collecting Society Ltd and the Publishers Licensing Society Ltd 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. A network of repertoire exchange agreements with similar CMOs throughout the world (including the Copyright Agency of Australia with whom CLA has had a long relationship) means that CLA’s collective licences also cover a large number of overseas publications.

CLA issues licences to organisations in all sectors of the UK economy. Virtually all the UK’s schools, colleges and universities are licensed by CLA to enable them to copy extracts from books, journals, magazines and other periodicals; 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.

CLA is a member of the International Federation of Reproduction Rights Organisations (IFRRO) and of the British Copyright Council (BCC) both of whom have entered submissions to the ALRC Discussion paper.

2. ALRC Discussion Paper

The ALRC Discussion Paper touches briefly on the issues of voluntary licensing as opposed to statutory licensing stating that “few stakeholders have argued for the benefits of statutory licensing over voluntary licensing” but that “ALRC is interested in further comments on this matter” (para 6.3.5).

The UK operates a voluntary licensing system, albeit with a statutory backdrop (as outlined in **3.** below). The voluntary licensing system works well in the UK with a degree of flexibility to enable it to react to changes. But it grew out of the particular circumstances in Britain and has been a feature of the UK legislative landscape for over a quarter of a century. The Australian statutory licensing system has also worked extremely well, both for users and rightsholders, over a similar period of time and it is not the intention of this submission to argue that one approach is preferable to the other, but to provide an overview of the UK system from a perspective of a collective rights management body and to draw attention to some of the issues and problems. But it might prove more difficult than expected to transpose a system that has grown out of one culture and legislative regime to another, even if it is similar.

The wider issues raised in the ALRC Discussion paper regarding copyright exceptions including, in particular, a potential “fair use” exception, have of course been subject of the Hargreaves Consultation in the UK and the Modernising Copyright programme of the UK Government which CLA has entered a submission (attached).

These issues are not further addressed here as the IFRRO and BCC submissions deal with these aspects from a rightsholder perspective. But CLA would draw attention to the 2 reports it commissioned from PwC: “An economic analysis of copyright, secondary copyright and collective licensing” and the supplementary report “An economic analysis of education exceptions in copyright” (both of which are attached) which demonstrated the close link between a robust copyright regime with tightly defined exceptions and a healthy publishing industry.

Much of the concern expressed by users in the Discussion Paper (particular academic institutions who originally wanted the statutory licensing system) relates to the relevance of statutory licences in a digital age with an increasing use by those institutions of digital subscriptions. This seems to be, in reality, a disguised argument about the value that should be attached to a statutory licence rather than the need for one. The UK experience is that whilst there has undeniably been an increased use of digital resources, it has not been in substitution for photocopying and scanning where copy volumes, particularly for scanning, remain high. There remains a significant dependence on these copyright uses which are best served by a collective blanket licence which, from the user perspective, needs to have as broad a reach as possible in terms of repertoire coverage.

The way in which CLA licences cover electronic publications is dealt with below in **4.**

3. The UK System

UK law, like the Australian system, grants to the copyright owner exclusive rights to do or undertake the doing of certain acts (the “Restricted Acts”) principally, following the scheme of the European

Copyright Directive, what are known as the Reproduction and Communication Rights. However, certain “Permitted Acts” are reserved to users through a series of general exceptions, notably fair dealing for the purposes of non-commercial research and private study.

There are also certain education-specific exceptions:

i) Non-reprographic copying (s. 32 of the Copyright, Designs and Patents Act 1988):

Known colloquially as the “chalk and talk” exception, this provides that copies may be made in the course of instruction or preparation for instruction provided the copying is not done by means of a reprographic process (that is a process either for making identical/facsimile copies or one involving the use of an appliance for making multiple copies including copying by electronic means). This exception also provides that copyright is not infringed by anything done by way of setting questions or answering questions in an exam.

The UK Government has proposed replacing this exception with a more general exception for the purposes of instruction subject to the “fair dealing” test. The new exception aims to upgrade the exception to reflect the digital age and modern teaching techniques to allow the use of whiteboards and PowerPoint presentations as a modern equivalent of writing on a blackboard. The UK Government has stated that this is intended to permit routine minor classroom uses that are not harmful to rightsholders’ interests and that it will not replace the need for blanket licences for schools, colleges and universities.

When implemented, the exception will need to comply with the European Copyright Directive which, apart from requiring that all exceptions apply with the Berne 3 Step Test (and thus do not unreasonably prejudice the legitimate interests of the author or conflict with the normal exploitation of the work) but must also be for the “sole purpose of illustration”, as this would now also be an exception to the Communication Right as well as the Reproduction Right.

ii) Reprographic copying by educational establishments (s. 36):

This allows reprographic copies of passages from literary works to be made within strict limits. These are, currently, 1% of the work per quarter, but are proposed by the UK Government to be increased to 5% per annum. Crucially this exception does not apply if, or to the extent that, licences are available authorising the copying in question. The UK Government has stated that its policy is to retain this “licence override” as indeed reflected in the draft legislation which has now been published.

The revised exception, apart from the increase in extent limits, will clarify that copies made under the exception may also be provided to distance learners.

The scheme of UK legislation therefore is to ensure that the exceptions enable educational institutions to make copies for which they do not need to obtain a direct permission at the point of copying, but in ways that do not damage rightsholders interests. Educational establishments can either copy under a direct licence or a collective blanket licence or under the “safety net” of the s. 36 exception if no licence scheme is in existence to cover the particular use in question.

But the law goes further and also provides a power for the Government to extend the coverage of an existing licensing scheme for reprographic copying by educational establishment if works of a description similar to those covered by the scheme are unreasonably excluded from it (provided their inclusion would not conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the copyright owner).

There is a further power for the Government to hold an enquiry as to whether a new licensing scheme is required to authorise the making of copies by educational establishments where existing licensing schemes do not provide coverage. If that enquiry recommends that a new scheme is required and no licensing scheme has been established within a year, there is provision for a statutory licence to be implemented.

These provisions (to extend coverage of an existing scheme or to recommend and/or provide for a new scheme or statutory licence) have not been utilised and the Government is now, in parallel with its reform of copyright law, proposing to introduce an extended collective licence along the lines of the Nordic model. Under this a scheme operator, acting on behalf of the majority of the members of a certain class of copyright work, can extend the repertoire coverage provided by the licence to include all other works (albeit subject to the right of copyright owners to opt-out of that extended collective licence scheme). ECL schemes under these provisions would not be limited to educational uses, but of course would be of particular interest to the educational sector, although they would not replace the scheme of education-specific exceptions subject to a licence override in UK law.

In summary, UK law thus provides:

- exclusive rights to the copyright owner;
- subject to general & education-specific exceptions;
- which exceptions may be displaced in certain cases by the existence of a licence scheme (including potentially ECL schemes); and
- where those licence schemes could be extended by the Government or a new scheme launched to provide a statutory licence if necessary.

This is, in all but name, a statutory licence system.

It is clear that in both jurisdictions some “safety net” for educational establishments to enable them to copy reasonable amounts simply and easily, on payment of fair compensation to rightsholders, is required. Both the UK and Australian systems currently seem to deliver that but it may be thought the Australian system is somewhat more straightforward in providing statutory licences at the outset.

4. CLA Licences for the Education Sector

CLA has historically offered 3 distinct licences to the various educational sub-sectors: schools, colleges and universities. Originally covering photocopying only, first scanning rights and then re-use of participating digital publications to which licensees subscribed were added over time. CLA educational licences now also include opted-in websites in the Digital Material component of the Licence.

CLA education licences typically operate on an inclusive basis providing blanket coverage for all books, journals and magazines published in the UK (or published in countries with whom CLA has managed to sign a Repertoire Exchange Agreement, such as Australia) subject to the right of copyright owners to opt-out of a CLA licence scheme. However, the digital repertoire available is constructed slightly differently, as it depends on the publisher opting in some or all of their digital products, - although 40 of the top 50 publishers have now opted-in their digital products.

The permissions for Digital Material that are included in the CLA Licence provide licensees with certainty as to what they can do with their digital resources. The rights granted by the CLA Licence to use Digital Material are additional to the rights granted in the primary (or subscription) licences under which a University has access to and/or permission to make further use of a digital item. Where the terms of a primary licence do not grant the necessary permissions (for example, to download an item of Digital Material covered by the Licence to a VLE), the CLA Licence can be invoked to authorise this activity. Conversely, where the primary licence agreement is invoked to authorise copying, the terms and conditions of the CLA Licence do not apply. The primary and secondary permissions co-exist providing the user with a uniformity of basic coverage for digital uses whilst respecting the rights of the copyright owners.

Hitherto the digital component has been an optional extra that universities could take on top of the core photocopying and scanning licence. However, the university sector has now agreed that the digital component should be included so that, as for schools, CLA will now

only be offering one licence covering photocopying, scanning and the use of opted-in digital publications for one composite fee.

5. Issues and Problems of a Voluntary System in the UK

These fall into 3 main areas:-

i) need for a licence:

There is scope for some institutions to argue they don't need a copyright licence. The reasons vary, but generally resolve to an argument that increased availability of "freely" available Internet resources and use of electronic subscriptions to access paid-for digital resources has obviated the need for a collective licence or reduced its value. But as noted above, it is CLA's experience that reliance on Internet and digital resources has been in addition to, not substitutional for, reliance on more traditional formats whether through photocopying or scanning of extracts from an existing hard copy collection.

But as the vast majority of primary, secondary and tertiary educational institutions in the UK have eventually taken or kept a CLA licence, the main effect of such debates has been to create conflict and increase cost when resources might more profitably be devoted to improving licences rather than arguing over the need for one at all.

ii) operation of the licence:

The ability to undertake surveys and other data collection exercises is dependent on the willingness of users firstly to enter into those licences and secondly to permit entry to undertake such exercises. These data collection exercises have traditionally played a part in assessing the total volumes copied and thus assist in valuing the licence, but are also of course extremely important to enable a CMO to distribute the licence fees received fairly to the authors, artists and publishers whose works have been used. Clearly once a licence is signed there is a contractual right to conduct surveys, but to be successful (as well as cost efficient), these depend on the co-operation of the licensed institution. As it is undertaken without the backdrop of statutory authority, these have historically proved difficult to undertake, building cost into the system.

Whilst the vast majority of CLA's licensees do co-operate, there are many instances of outright refusals to co-operate which might take the form of refusing to engage by phone or email with setting up a survey and arguments as to whether CLA has the right to carry out such a survey. Occasionally planned surveys have had to be called off, but more commonly the problem manifests itself in a lack of co-operation where, perhaps through a lack of

awareness, staff may refuse to engage fully, resulting in reduced or uneven pools of data. This may impact on the fairness of the distribution whilst adding to the costs.

Whilst CLA generally enjoys good relations with its educational licensees, the ease with which data collection exercises could be undertaken would surely be improved if they were implemented in accordance with some statutory authority.

iii) mandate acquisition

Users need their licence to cover as broad a range of published materials as possible, hence CLA's licences cover all books, journals magazines and other periodicals published in the UK. Without statutory authority to do this and in advance of any ECL authorisation, CLA and its member organisations ALCS and PLS, have to engage in an expensive and burdensome process of acquiring authority from individual rightsholders, as well as concluding Repertoire Exchange Agreements with CMOs abroad.

Whilst specific opt-outs from individual rightsholders are respected (and implemented in licences) such mandates do not (and cannot) provide comprehensive coverage (and particularly international coverage) as not all rightsholders can be identified or traced to provide a mandate or confirm an opt-out. CLA therefore has to operate a non-statutory, indemnity-backed collective licensing scheme so that where it lacks actual authority it provides instead an indemnity to the user against any claims for copyright infringement. This exposes CLA unnecessarily to legal risk that is absent in the Australian system.