

## **COPYRIGHT LICENSING: THE CASE OF HIGHER EDUCATION PHOTOCOPYING IN THE UK**

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The decision of the UK Copyright Tribunal in a reference made on behalf of UK Universities<sup>1</sup> was a decisive moment in a long saga, and may have wider and perhaps unpredictable repercussions. At the moment when electronic distribution is likely to stimulate radical changes to the world of scholarly publication, the decision resolves some of the points of conflict created by the earlier technology of reprography which has posed its own challenges to copyright. The Tribunal resolved three main issues between the parties: (i) the pricing of the blanket licence for reprographic copying in universities; (ii) the ending of a separate transactional procedure involving additional payments for copying of 'course packs'; and (iii) the inclusion in the licence of artistic works forming part of a published edition. Underlying these issues were some more general questions regarding the nature of copyright and the legitimate forms of its exploitation and remuneration, which will be discussed in the last part of this article.

### The Statutory Framework

The bases of the statutory framework for the licensing of reprographic copying and its supervision by the Copyright Tribunal, enacted in the 1988 Copyright Designs and Patents Act (CDPA), were laid in the Whitford Committee Report of 1977.<sup>2</sup> The development of photocopying during the 1970s brought into sharp focus the problem of the limits of legitimate copying for educational purposes. The statutory exception for 'fair dealing for the

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Professor of Law at Lancaster University Law School, UK. I was a member of the UUK negotiating team from January 2000, and am grateful to colleagues both on the team and in the wider academic community, as well as to our able legal advisers, for helpful discussions of many of the issues, but stress that the analysis and opinions expressed here are solely my responsibility.

<sup>1</sup> *Universities UK (formerly Committee of Vice-Chancellors and Principals of the Universities of the United Kingdom) v. Copyright Licensing Agency Limited, and Design and Artists Copyright Society Limited*, Copyright Tribunal Case Nos. CT 71/00, 72/00, 73/00, 74/00, 75/01, available from <http://www.patent.gov.uk/copy/tribunal/triabissued.htm>, accessed 9<sup>th</sup> April 2002. Although formally several references were made under different statutory provisions for procedural reasons, they were all part of the same proceeding so I will refer to 'the reference'. In line with the terminology adopted in the reference, I will refer to the parties as 'UUK', 'CLA', and 'DACs', and to the higher education institutions represented by UUK as HEIs, or universities.

<sup>2</sup> *Copyright and Designs Law*, Report to the Secretary of State for Trade, March 1977, Cmnd 6732.

purposes of research or private study<sup>3</sup> left considerable scope for interpretation, in particular in relation to its application to the growing practice of teachers making copies of relevant material for their students. Educationalists considered that this was a problem for publishing only to the extent that it might damage print sales. Photocopying provided a means of easy access to the material purchased by libraries for the rapidly increasing numbers of students and researchers. Since these readers would be very unlikely to purchase individual copies of the bulk of rapidly growing periodical and monograph literature, photocopying could only be said to harm sales in limited circumstances. Thus, the Council for Educational Technology suggested to the Whitford Committee (para. 256) 'a dual approach for education - extended fair dealing provisions and a blanket licensing system'.

Whitford strongly endorsed the concept of 'blanket licensing', having considered the various schemes already operating in other countries, as well as the existing UK scheme for public music performances. It envisaged that these should emerge through negotiations between licensing bodies and organisations representing users, but to 'encourage' the process it proposed that (i) reprographic reproduction should not be an infringement until such schemes were in place, and (ii) once schemes were available, the fair dealing exception should no longer apply to reprographic (facsimile) copying, even of single copies. Furthermore, Whitford proposed that, 'in the not unlikely event of disagreement', a copyright tribunal should have the power to decide 'not only on rates of payment, but also on terms and conditions, having regard to what is reasonable in all the circumstances' (para.287).

After due consideration, a government Green Paper in July 1981<sup>4</sup> endorsed this approach, but with a significant modification. It took the view that the narrowing of the 'fair dealing' exception would be impractical and unreasonable in the era of the self-service photocopier, which is 'after all nothing more than a tool of modern technology' (p.10). However, abuse should be prevented by an amendment making it clear that the exception did not extend to 'systematic copying of the same material'.<sup>5</sup> This was endorsed in the White Paper issued in 1986,<sup>6</sup> which also proposed a corresponding attenuation of the liberty to copy in the absence of a licence, to 1% of any work per quarter.

Following a period of furious lobbying from all sides, the proposals in the White Paper were in the main enacted in the 1988 Act. The exception for 'fair dealing ... for the purposes of research or private study' was re-enacted in s.29, but with explicit exclusions (a) to prevent

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<sup>3</sup> Copyright Act 1956 s.6. Section 7 of the Act also allowed non-profit libraries subject to certain conditions to supply to readers single copies of an article from a periodical or reasonable extracts from a book.

<sup>4</sup> Reform of the Law Relating to Copyright, Designs and Performers' Protection (Cmnd 830) July 1981.

<sup>5</sup> Para. 8.8, p.47. This was also to apply to the 'library' exceptions, to make it clear that libraries could only supply single copies to users. However, the fair dealing exception would be explicitly extended to the separate 25-year copyright in published editions, introduced in 1956 'to prevent pirate publishers from reproducing the typography of complete editions photographically' para. 8.11.

<sup>6</sup> Intellectual Property and Innovation, Cmnd 9712.

libraries from supplying multiple copies, and (b) where 'in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose' (CDPA 29(3)). Educational establishments were given the freedom to copy up to 1% per quarter from published works, but only if and to the extent that no licence was available (CDPA 36).

This was part of a more general international trend of extending to the print world the system of collective licensing which had originated with music performance licensing. Such schemes in effect entail compulsory licensing.<sup>7</sup> However, this was veiled in the UK legislation, which emphasised the voluntary negotiation of terms between groups in some way representing different interests, but with the possibility if they failed to agree of recourse to a tribunal having the power to decide what is 'reasonable'. It also made these negotiations unnecessarily difficult by failing to clarify what the parties are supposed to be negotiating about. Licensing was obviously intended to cover copying beyond the limits of fair dealing, but since those limits were left indeterminate, the parties were obliged to negotiate privately an issue which is surely one of public policy.<sup>8</sup>

### **Negotiations and Licences**

As Whitford had suspected, agreement was elusive, since the parties began from radically different perspectives. Educationalists argued that payments should essentially recoup the possible economic losses to publishers from print sales. Any substantial charges or elaborate permission procedures for making photocopies would deny users the benefits of the new technology of reprography. Publishers, on the other hand, considered that payments should reflect the benefit to users of obtaining convenient access to the work, albeit by a means under the control of users and owing nothing to the print publishers. This disagreement raises some fundamental questions about the concept of copyright, arising from the extension of its application to cover 'secondary' rights resulting from new communications technologies.

Attempts to negotiate educational licences date back at least to the 1970s (see Whitford Report para. 261), but had proved fruitless in the absence of a clear legislative framework or policy. Negotiators continually found it impossible to agree either on (i) what requires to be licensed, or (ii) the rates and bases for payments. The Whitford report envisaged blanket licensing for all photocopying, which in effect meant a tax on photocopying; but it left the

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<sup>7</sup> Unhelpfully described by Herman Cohen Jehoram as 'voluntary compulsory licences' : (2001) 23 EIPR 134, at 135.

<sup>8</sup> In contrast, the Australian legislation (Copyright Act 1968, as amended) provides a more precise definition of fair dealing and a right to a statutory licence; initially this was based on record-keeping, but this was found administratively cumbersome, and amendments in 1989 introduced the alternative of sampling: see Application of Copyright Agency Ltd under s.153C of the Copyright Act 1968; University of Adelaide & Ors [1997] ACopyT 3 (11 July 1997); and Australian Copyright Tribunal Ltd. v. University of Adelaide et al [1999] ACopyT 1, CT 4 of 1997 (2 February 1999). Despite the clearer legislative framework there has been disagreement and litigation over the scope of permitted copying, especially of course packs: see Copyright Licensing Agency Ltd et al. v. Victoria University of Technology et al. 53 FCR 56 (1994).

details to negotiation, with a cursory few lines suggesting that charges 'on a capitation basis' might be possible, and urging that administration costs be kept low (para. 281).

Following the formation of the Copyright Licensing Agency (CLA) in 1982-3,<sup>9</sup> it made determined efforts to negotiate educational licences, but with limited success. In May 1984 the CLA promulgated a Licensing Scheme for Photocopying of Copyright Books, Periodicals and Journals, broadly aimed at all users, from schools and colleges to hospitals, commercial organisations, copy shops and private individuals. The 'simple conditions' it proposed entailed a fee of £10 per photocopier, a limit on the proportion of works which might be copied, a requirement to make and return records for all copies made, and payment of a fee per copy 'based on the average cost of buying pages of different types of work'. In fact, this scheme was substantially based on proposals developed earlier by publishers' representatives, which had found little favour amongst users. In June 1982 universities had rejected a draft licence proposed in autumn 1981 by the Committee of the United Kingdom Copyright Owners (chaired by Lord Wolfenden); yet a 'final draft licence' had been put forward by the Publishers Association in virtually identical terms in December 1982, followed by further versions in March and August 1983, culminating in the CLA's scheme of 1984.

The universities' main objection to these proposals was that they covered not only multiple copying but also the making of single copies in libraries, which they regarded as within the scope of the fair dealing and libraries' exceptions. Despite the rejection in the 1981 Green Paper of Whitford's recommendation to curtail fair dealing once licensing schemes were on offer, the CLA proposals still envisaged that licensees would pay for all copies. To ease acceptance, the CLA suggested trial schemes which entailed monitoring of copying at sample institutions, but universities feared that this was merely intended to prepare the ground for generalised restrictions on and charges for all copying. The CLA did succeed in reaching agreement with local education authorities on behalf of schools, initially for a trial scheme from November 1984, and then a 3-year licence from April 1986. This was no doubt easier to achieve because the vast bulk of copying in schools is multiple copies for classroom use, rather than single copies made by or for an individual pupil.<sup>10</sup>

Thus, the disagreement between universities and publishers centred on the extent of the exception for 'fair dealing for the purposes of research or private study' as applied to photocopying. Publishers could argue that fairness depended on the proportion of the work that is copied, so that it would not be fair dealing to make even a single copy of a substantial proportion, for example the whole of a periodical article; and that copying for the purposes of instruction in an institution was not for the purposes of private study.<sup>11</sup> Universities might

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<sup>9</sup> It was established in April 1982 and incorporated by guarantee in January 1983. For an account from the CLA's perspective see Charles Clark and Colin Hadley, Collective Administration of Reprographic Reproduction Rights, (London: The Copyright Licensing Agency Ltd., 1993).

<sup>10</sup> Schools also had a strong incentive following successful infringement actions brought by the Music Publishers' Association in 1981, and the Publishers' Association in 1984: see Clark & Hadley, ibid., p.18.

<sup>11</sup> Lawyers took the much stronger point on behalf of publishers that the fair dealing exception in the 1956 Copyright Act applied to literary copyright and not to the publisher's

counter that the exceptions must necessarily apply even if there has been copying of a 'substantial part' of the work, since otherwise there would be no infringement; and argued for an economic test: dealing should be regarded as fair if there is no commercial motive or profit and it was within bounds ensuring that the publisher would not lose sales of print copies. Even if copies were made by teachers for students, they might still be for the purposes of 'private study' in their rooms, the aim being to avoid the problem of many students attempting to read the same item in the library. In view of the ubiquity of the self-service photocopier, the 1981 Green Paper had rejected restrictions on the making of single copies, but it suggested a clarification of the exceptions 'to make it quite clear that they excluded the related production of multiple copies of the same material' (p.10). Beyond this, however, the government was reluctant to offer any more precise definition of fair dealing.

In support of their position, universities put forward codes of practice to define the legitimate limits of educational copying, and proposing simple procedures for payments for copying beyond those limits.<sup>12</sup> In the meantime, some developed procedures for requesting permissions from publishers for copying which they considered outside the fair dealing limits (essentially, multiple copying). This was initially quite successful, and some publishers were willing to permit copying without any payment from items which students could not be expected to buy.<sup>13</sup> However, they were instructed to end such practices by the Publishers' Association, which viewed them as undermining its case for a CLA Licence. The Publishers' Association went further, and resorted to threats of legal action, and lawyers' letters were sent to the University of Kent in 1983, and the University of Warwick in 1985, both in respect of copies made for law students. These were fairly easily resisted, since the Association could not show that it had any mandate to act on behalf of the rights-owners of the material involved, much of which in any case was effectively in the public domain.<sup>14</sup> The universities undertook to remind their staff of the importance of adherence to copyright law, and affix notices to this effect next to every photocopier.

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separate 25-year copyright in the typographical layout, but this point was not pressed in the general debate about the legitimacy of photocopying. The 1986 White Paper recommended removal of this anomaly, which was accomplished in the CDPA 1988.

<sup>12</sup> See Aslib (The Association for Information Management), "Photocopying and Copyright. Supporting document to a draft Owners and Users Joint Code of Photocopying Practice for materials other than music", March 1984.

<sup>13</sup> Law schools took the lead, for understandable reasons, and at first met with a positive response from law publishers: see the article by Hugh Jones (Director of Sweet & Maxwell), "Permission to Make Multiple Photocopies. Or how to photocopy copyright material for class use with full permission of publishers and authors", The Law Librarian, September 1984, p.20.

<sup>14</sup> Thus, government documents were subject to an open licence stated by Treasury Circular (9 January 1958, replaced by General Circular 75/76); the Incorporated Council for Law Reporting, which publishes the main series of Law Reports, accepted that they could be copied for educational purposes; most international organisations printed a permission on their publications for non-commercial reproduction with due acknowledgement; many journal publishers (especially learned societies) also granted permission freely.

The enactment of the CDPA broke this deadlock. In 1987, as the legislation passed through parliament, agreement was reached for a one-year trial scheme in 1988 for universities. This aimed 'to establish the extent of Multiple and Systematic Single Copying', to assess the burden of recording it, and to consider the feasibility of a collective licence. In participating institutions such copies were to be recorded and paid for at the rate of 2.5p per page copy (the publishers' initial bid was 12p). Some eighteen months later, with the CDPA about to enter into force, agreement was reached on a 3-year licence from 1 January 1990. This covered the right to make 'multiple copies ... for any occasion or purpose', as well as the right to make copies 'when, for the purpose of a lecture ... or other formal class, groups of students are required by a member of staff to obtain copies of copyright material for such purpose'. This wording was clearly aimed to cover the type of copying explicitly excluded from fair dealing by the new s.29(3) of the CDPA. As Whitford had hoped, the payment was a capitation fee, set at £1.475 per full-time-equivalent students (FTES), and there was no mention of a rate per page. Copying should not exceed 5% or one complete chapter of a book, one article from an issue of a journal, or one poem or short story not exceeding 10 pages. There was no requirement to request permission in advance, nor even to keep records of items copied, except for those universities selected to participate in a sampling scheme, the stated aim of which was to monitor the operation of the licence and facilitate distribution of the income by CLA to rights-holders. The universities had effectively achieved their aim of a blanket scheme covering multiple copying and with minimal administrative burdens.

This was largely reversed by modifications pressed by the CLA and introduced as amendments to the licence, to come into force from 1 May 1993. These excluded from the blanket licence 'the creation and copying of study packs ... defined as collections which consist in whole or in part of Copyright Material assembled in advance by or on behalf of academic staff for teaching purposes and made available to students ... to the extent that [sic] four or more extracts of copyright material in sets of five or more, during any one course of study'. For these, the CLA established a 'transactional' system it named CLARCS, through which permissions could be obtained on payment of a fee per page-copy, on condition that such study packs were supplied to students only at cost. The capitation fee for the blanket licence was set at £2.25 per FTES, with annual increases to reflect inflation. In the negotiations for the fee, the CLA had suggested that it should be based on an estimate of 30 pages x 10p per page, less a discount of 25%, but the universities disliked the concept and especially the price of 10p per page, and the formula was not mentioned in the amended licence.

Repeated attempts by universities since 1995 to reverse the exclusion of study packs from the blanket licence were met by the CLA's firm reply that it had 'no mandate' to do so. The amended Licence of 1993 was renewed for successive short periods to March 1998, when a new Licence was agreed, after some ten months of negotiations. When its terms became known there was widespread dissatisfaction in universities, since not only was the study packs exclusion maintained, but it was defined more widely. In their defence, the negotiators could say that the capitation fee had been held at £3.09, rising to £3.25 in the 3<sup>rd</sup> and final year, compared to the CLA's first negotiating offer of £4.20 (which it regarded as a 'discount' on the 'objectively' justifiable fee of £6.72) and the universities' proposal of £2.62. However, at the CLA's insistence, the Licence stated that the fee had been calculated by reference to a 'formula' of 65 pages multiplied by 5 pence, and that this formula should be used as the basis for future Licence fees.

These terms reopened the old wounds, since such a formula required agreement on which copies should be paid for, and assumed that this was a factual matter. Since the 1988 trial scheme, the CLA had used surveys to try to estimate the total volume of photocopying in universities which, as an average per FTES, would be put forward as a basis for negotiation of the fee. However, the surveys covered all copying, including single copies made on self-service copiers in libraries - indeed, this was the main focus of the surveys. To take account of 'fair dealing' the CLA would simply offer a 'discount': thus, the 1993 Licence was notionally based on a formula of 30 pages x 10p per page, with a discount of 25%; the opening offer in 1997 was based on surveys which produced an estimate of 80 pages per FTES, which the CLA again proposed to discount by 25%. Following the 1998 Licence, the CLA developed a new survey methodology, the basic details of which were accepted by universities. However, when the question of how to determine the 'fair dealing' discount was broached, discussions broke down in acrimony. The CLA continued to insist that a substantial proportion of single copies should be paid for under the licence, even though the Licence itself only covered 'multiple Copies for the same occasion or purpose'.<sup>15</sup>

A further dispute arose in 1999, when the CLA moved to exclude artistic works from the Licence, and make them the subject of a separate Protocol. This resulted from the conclusion by the CLA of an Agency agreement with DACS (the Design and Artists' Copyright Society). The CLA had rejected approaches from DACS since 1986, and had simply excluded from its licences the copying of 'separate illustrations', but an agency agreement was finally reached in later 1998. As a result, the CLA proposed to exclude all illustrations from the Licence, and to offer a Protocol covering them. Failing to reach agreement with the UUK negotiators, it wrote directly to its university licensees, announcing a variation of the Exclusions in the 1998 Licence to remove all illustrations, and offering a Protocol for all artistic works. The fee per FTES for this was initially set at £3.17p, but this was apparently intended only for departments which were high users of artistic works, and after reconsideration it was offered on an institution-wide basis at 65p, which was accepted by some 30 institutions (mainly those with fine arts or medical schools). The position of the remainder in relation to illustrations remained unclear until July 2000, when the CLA, fearful that this issue would overshadow the negotiations for extension of the main Licence (due to expire from 1 February 2001), unilaterally extended the artistic works indemnity, although this was said to be subject to satisfactory progress in those negotiations.

By this stage, however, the universities' representatives had obtained legal advice that was unequivocal: the only means of obtaining a Licence which might meet their needs was a reference<sup>16</sup> to the Copyright Tribunal, which was duly commenced in July 2000.

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<sup>15</sup> This seems to have been a clumsy rewording of the terms of the 1990 licence cited above. Strangely, however, the negotiators seem to have disregarded the fact that the Licence only covered multiple copying, perhaps because of the difficulty of identifying single copies made 'for the same occasion or purpose'.

<sup>16</sup> For procedural reasons four references were made under CDPA 118 and 119 of the existing licence and the variation proposed in respect of artistic works, and on behalf of those who had accepted the artistic works protocol as well as those who had not. During the proceedings two further references were made to deal with the CLA's argument that CLARCS was not a scheme: see Interim Decision paras. 27-30. The DACS became a party to the references as an Intervenor.

## The Tribunal's Decision

In its decision of 13 December 2001,<sup>17</sup> the Tribunal aimed 'to achieve a simple, economic, universal system promoting good education for the benefit of staff and students, whilst at the same time achieving fair and reasonable remuneration for the owners of rights' (para.177). To this end, its Order provided for a 5-year Licence from 1 August 2001, with no restriction on Course Pack copying, and without the exclusion of separate illustrations, for a fee per FTES of £4.00, increasing in line with inflation but 'not based on any notional number of pages or price per page' (para.178).

The legal basis for ending the course packs restriction seems straightforward, since the Tribunal is empowered under CDPA 118 and 119 to settle the reasonable terms for a licensing scheme. In deciding the restriction was unreasonable, the Tribunal was influenced not only by the universities' evidence of the administrative inconvenience and the harm to education of requiring prior clearance, but also the CLA's own evidence that the administrative costs of CLARCS clearances absorbed over one-third of the revenue derived from it (paras.67-9).<sup>18</sup> However, legal complications were raised by the CLA's view, consistently maintained in negotiations since 1992, that it had no mandate from rights-owners to permit course pack copying. To support this, CLA's counsel argued that the Tribunal's jurisdiction extends only to the rights actually conferred by owners on licensing bodies, and that to decide otherwise would entail compulsory licensing. The Tribunal took essentially the common-sense view that the scheme covered copying of licensed material, and the restrictions regarding course packs related to the terms on which this could be done. Its jurisdiction to decide the reasonableness of such terms inevitably entails a degree of compulsion:

'As this Tribunal pointed out in *British Sky Broadcasting v PRS* [1998] EMLR 193 at 210-211, most of the Tribunal's work consists of imposing terms on parties who have been unable to agree. Where the Tribunal awards more favourable terms to the licensee than were on offer, those terms are imposed. But that does not mean that the Tribunal is creating a compulsory licensing scheme: the rightsholder is always free to withdraw from the scheme.' (para. 65)

This issue was raised in another form in the final Hearing in March 2002 to settle the terms of the new Licence. UUK contended that since the Tribunal had determined a fair rate and terms for the existing repertoire, it would be inappropriate to continue to limit the indemnity in the Licence so as to allow the CLA to vary the Excluded Works and Categories of Excluded Work from 'time to time'. While the Tribunal accepted (as conceded by counsel for the CLA) that the right to add to Excluded Categories should go, it was unwilling to end the right to extend the list of excluded works, or to allow the indemnity to continue regardless of any

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<sup>17</sup> This and the Final Order are available at <http://www.patent.gov.uk/copy/tribunal/tribnews4.htm>.

<sup>18</sup> Collecting societies are conscious of the criticism that they 'spend pounds to distribute pennies': see Clark & Hadley, *ibid.*, note 9 above, p.18, who report that as early as 1982 the CLA's Board decided that its costs should never exceed 20% of its operating income, and that at the time they wrote the CLA was deducting only 12.5% overall from fee income.



such exclusions. In the event of withdrawal of a significant number of works, it said, UUK could return to the Tribunal for reconsideration of the Licence terms.<sup>19</sup>

No clear reason was given for this decision, which probably reflected the Tribunal's reluctance to impose a 'compulsory' licence. However, the proposal on behalf of UUK could be said to follow logically from the Tribunal's adjudication of the reasonable terms for the Licence. The CLA's fees income, since it has been determined on the basis of the Tribunal's view of a reasonable licence fee, should be sufficient to compensate all rights-owners for copying within the limits in the Licence, regardless of whether such rights-owner has formally mandated the CLA to act on its behalf or not; hence, the CLA should always be in a position to cover any claims for which it might be liable under the indemnity.<sup>20</sup> For the CLA it was argued that as an 'agent' it could act on behalf only of those who give it a mandate; however, in practice it does not and cannot have mandates from every rights-owner, and should be seen not as a purely private body acting on behalf of rights-owners, but a quasi-public one, administering schemes within the statutory framework.

The Tribunal had less difficulty in deciding to include all illustrations in the Licence, since this was desired by all the parties. However, it largely accepted the universities' position in taking the view that the exclusion of 'separate illustrations' in the Licence should be construed to refer only to artistic works 'which are both (a) on a separate page and (b) not necessary for the understanding of the text' (para.104). Thus, it allowed only 5p per FTES (or about 1.5% of the royalty) within the new blanket licence for the right to copy full-page artistic works (para.171).

The fee of £4.00 per FTES was arrived at by taking a 'starting figure' for the Current Licence of £2.75, and adding an 'uplift' of £1.20 for inclusion of Course Packs, and only £0.5p for artistic works (reflecting its narrow view of what had previously been excluded as 'separate illustrations': paras.175-6). The uplift for Course packs reflected the current income through CLARCS for these of nearly £1m, which divided by 1.4m FTESs implied a fee of 70p. The Tribunal allowed for both an increase in the volume of such copying and the savings on CLA's administrative costs in setting an uplift of £1.20p for Course Packs (para.170).

The Tribunal gave two reasons for its 'starting point' of £2.75 for the Current Licence. One was that the increase in 1993 (from £1.475 to £2.25) had been somewhat high especially in view of the reduction in scope of the licence introduced then. The other was that 'it is at the upper end of what can be justified as reasonable having regard to what is paid by schools' (para.175). The case for the universities had relied heavily on the licences agreed by the CLA

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<sup>19</sup> UUK could also rely on the provisions of CDPA 137-138, which empower the Secretary of State to order that a licensing scheme for educational establishments be extended to works of a similar description which are 'unreasonably excluded', if to do so 'would not conflict with the normal exploitation of the works or unreasonably prejudice the legitimate interests of the copyright owners' (s.137.2.b), subject to appeal to the Copyright Tribunal. Section 137.2.b reflects the terms of article 9(2) of the Berne Convention and article 13 of the Agreement on Trade Related Property Rights (TRIPS) of the World Trade Organisation (WTO), discussed below.

<sup>20</sup> In case of difficulty, the CLA itself could initiate a request to the Secretary of State to use the s.137 powers.

for schools, since CDPA 129 requires the Tribunal to have regard to the availability of licences to other persons in similar circumstances. The most recent schools licence (in force from 1<sup>st</sup> April 2000 to 31<sup>st</sup> March 2001) charged 53p and 91p per pupil for primary and secondary schools respectively. This was stated to be based on surveys showing copying averaging 53 pages and 119 pages per pupil respectively, and a page value of 5p per page; but these figures were said to have been reduced 'as a concession' to 17 and 29 pages, and subject to a further discount of 37.5% since schools acquired their licences through an agent (the Local Education Authorities). The universities' claim had therefore proposed a fee of 60p per FTES, since the CLA's surveys had shown total copies (including all single copies) averaging 106 per FTES, and universities could expect 'discounts' at least as great as those given to schools. However, the Tribunal resisted the sharp cut in the fee which would follow from the comparison, by accepting arguments made by the CLA for distinguishing schools and universities.

The Tribunal was offered extensive evidence by the parties as to both the volume of copying and the appropriate price per page, but found none of it of much assistance. For the universities, an analysis of the volume data from the CLA surveys showed that less than 25% (some 27 pages per FTES) constituted multiple copying, and even when the CLA's expert statistician added an estimate for other non-fair-dealing copies, it came to below one-third. To counter this, the CLA had introduced evidence attempting to show substantial under-reporting in the surveys, based on monitoring of the most recent surveys by Price Waterhouse Coopers. The Tribunal concluded (para.146) that none of the surveys were reliable, and there was probably some under-reporting, though far less than the factor of three suggested by the CLA.

It also found it hard to decide what allowance should be made for fair dealing, although stating that it should 'probably' be more than the 22% suggested by the CLA (para. 146). It dealt briefly with the various contentions of the CLA as to the circumstances in which a single copy might not be fair dealing: copying by a student 'for the purposes of his course of a relevant article, or a relevant short passage from a book' would usually be fair dealing, although copying the whole of a textbook would not; an instruction by a lecturer that every member of a class should make copies of the same material would not be fair, but the mere distribution of a reading list is not an infringement at all (paras. 34-35).

It had equal difficulty with the other factor in the 'formula', the price per page. Here there were issues of principle which were perhaps inadequately explored in evidence (despite the voluminous documentation submitted). For the CLA it was argued that the price per page should reflect the value to the user, based on the cost per page of printed works (in the case of academic books, around 16p per page), which had long been put forward by publishers as the appropriate basis for pricing. The effect of this would be to increase four- or five-fold the cost of a photocopy. Universities in contrast suggested that exploitation of secondary rights should produce a similar income for the owner as that of the primary copyright itself: thus, an author's royalty of 10% of the retail price of a book produces somewhat less than 1p per page-copy; and it was suggested that in the case of permissions (e.g. for commercially-sold collections of selected reprints), if a charge is made at all, the rate might be between £8.00 and £12.00 per thousand words for a print-run of 500, or 1p per page-copy. This would add 20-35% to the cost of a photocopy, and thus not act as a significant restriction. Perhaps because it had inclined towards UUK on the volume factor, the Tribunal tended to prefer the CLA's view of these indicators of value, but in any case firmly rejected the 'formula' approach.

In view of the significant uncertainties surrounding the volume of copying as well as the difficulty of estimating the proportion that might be fair dealing, the Tribunal's rejection of a 'mathematical' approach (para.177) is understandable. There was also the advantage that if it performed its duty of deciding what was 'reasonable' in an impressionistic way, rather than taking a view on the issues of principle on which the parties were so divided, it might spare itself the embarrassment and the parties the expense of an appeal on points of law.<sup>21</sup> In essence, it seems to have set the fee by reference to the level which the parties had agreed in their previous dealings. Although it rejected submissions for the CLA that the existing Licence negotiated in 1998 should be regarded as the fairest comparator (it could hardly be a 'comparator', since it was the very scheme which had been referred), the Tribunal reached back to the 1993 revision of the original 1990 licence for its 'starting point'.

Certainly, the outcome could be regarded as giving something to both sides, and hence a common-sense solution to an intractable problem. Universities obtained the comprehensive and simple blanket licence they had always sought, and briefly achieved in 1990-3. Taking account of its administrative cost savings on CLARCS (and allowing for an increase in course pack copying), the CLA would maintain its income at approximately the same level. Those who no doubt remained apprehensive were those publishers who were fearful that opening the floodgates to course packs would damage their sales of academic books to students.

However, the Tribunal's testy criticism of the 'scale and consequent cost of the proceedings' (para. 13) perhaps points to more fundamental problems in the statutory scheme, which largely relies on private negotiations within a framework which fails clearly to identify the public policy principles on which they should rest. Despite the voluminous evidence adduced, resulting from 15 months of pre-trial proceedings and requiring a hearing extending over some eight days, it cannot be said that the Tribunal had an adequate basis for a thorough evaluation of these issues, especially their economic aspects, in more than an impressionistic manner.

### **Determining Normal Exploitation and Legitimate Interests**

Although heavily disguised as a 'voluntary' arrangement, this type of licensing scheme is in effect one required by statute. It attempts to deal with some important issues of public policy by 'private' negotiations establishing a system of management of property rights. However, the ambiguities of the UK statutory framework reflect a larger dilemma about the concept of property underlying copyright. That is, whether it is an inherent and essentially private right, or one defined by public policy to help manage the commercial diffusion of creative works. Licensing was the response to the challenge posed for copyright by the new technology of reprography. What was left unclear, however, was whether it was intended simply to enable owners to exercise their legitimate private rights, or rather as a means of adapting the existing form of those rights to technological and hence socio-economic change.

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<sup>21</sup> Provided the Tribunal has regard to all relevant factors, its wide discretion to decide what is reasonable is not subject to appeal; nevertheless, a court has recently overruled one of its decisions on the basis for setting a royalty rate, in Phonographic Performance Ltd v. Virgin Retail Ltd [2001] E.M.L.R. 139, although it has been suggested that this should be regarded as an exceptional case: see E. Bragieli, "Is the Copyright Tribunal Showing Irrational Tendencies?" (2001) 23 European Intellectual Property Review 371-374.

From the perspective of copyright as private property, licensing schemes merely offer a solution to the transaction-costs problems for individual owners to control the use made of their property. The elements of compulsion are therefore considered undesirable, since they mean that 'the exclusive right to authorise has been degraded to a mere right to remuneration'.<sup>22</sup> To combat this, private property idealists see digital networking as providing a means of jettisoning the historical legacy of collectivist collecting societies, and transforming them into 'clearing houses, huge rights and contents databases and automatic licensing engines'.<sup>23</sup> Yet, perhaps paradoxically, such a transformation is acknowledged to require a political impetus, since neither the societies themselves nor their users seem inclined to bring it about. Users are certainly repelled by the idea that they should be compelled to request prior permission and arrange a payment before making use of a photocopy machine. The societies themselves are at best ambivalent regarding the complex arrangements necessary to provide individual permissions on a transactional basis, which are inevitably costly (as revealed by the evidence regarding CLARCS which was decisive in the UK Tribunal's decision to end the transactional requirement for course packs). The main example of a transactional system is that operated by the Copyright Clearance Center in the USA. However, that operates in the context of a broad statutory exemption for 'fair use' which extends to multiple copying for classroom use; so it is only copying beyond the limits of quasi-statutory Guidelines that must be cleared and paid for. Furthermore, the arrangement is the target of much dissatisfaction and criticism, and the Guidelines honoured as much in the breach as the observance.<sup>24</sup>

An alternative perspective sees the regime of collective administration as powerful, and yet increasingly fragile, precisely due to the vain attempts to force it into an individual property rights paradigm.<sup>25</sup> From this viewpoint, Kretschmer suggests two directions for reform: (i) the separation of the reward for creativity and support for culture from the publisher-dominated system of rights management, which would require the drastic shortening of the period of exclusive protection to one adapted to the product cycle of the cultural industries, which he suggests is 5-20 year; however, he concedes that this alternative is now ruled out by the entrenchment at international level in the TRIPS and Berne agreements of the traditional author-based period of protection; or, (ii) the transformation of collection into a regulatory instrument, a form of taxation on cultural consumption (as with systems such as the blank tape levy), ensuring that an adequate share of revenues flows back into creative production.

Indeed, economic analysis of copyright suggests that its justification lies not in transaction costs alone, but in the characteristics of informational and cultural products as public (or

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<sup>22</sup> Herman Cohen Jehoram, (2001) 23 EIPR, at 136.

<sup>23</sup> Ibid., also citing Daniel Gervais, Paper for the Advisory Committee on Management of Copyright and Related Rights in Global Information Networks, Geneva 14 and 15 December 1998, WIPO APMC/1/1.

<sup>24</sup> See Ann Bartow, "Educational Fair Use in Copyright: Reclaiming The Right To Photocopy Freely." (1998) 60 University of Pittsburgh Law Review 149.

<sup>25</sup> Martin Kretschmer, "The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments." (2002) 24 European Intellectual Property Review 126-137.

joint-impact) goods. This requires a balance to be struck in the definition of the rights attaching to copyright, between providing a reward-incentive for producers by granting them the right to exclude, and the need to ensure adequate access by consumers and secondary users. From this it follows that the elements of compulsion in licensing also cannot adequately be justified in terms of resolving collective action and transaction costs problems, since compulsion necessarily interferes with the incentives/access balance. Rather, licensing should be seen as a means of recalibrating that balance, especially in the context of the extension of copyright into new fields resulting from technological change.<sup>26</sup> This analysis certainly seems to provide a better explanation for the case of higher education reprographic licensing.

The justification for licensing photocopying cannot merely lie in the transaction-costs problems for individual authors in negotiating a 'market' rate for authorising a photocopy. The prior issue is whether and to what extent the exclusive right should extend to restricting photocopying. This can be seen both logically and historically, certainly from the details of the UK case recounted above. It was the legislative impulse to establish a licensing system for reprographic rights that justified remuneration to print publishers from photocopying, rather than the converse. Certainly, the elastic concept of copyright, if viewed in the classical liberal terms of a private property right, could be extended to allow print publishers to control the use of and demand a rent from the new technology of photocopying. Whether and to what extent they should do so, however, is a question that should be addressed not in terms of private rights, but of public policy.

To make a copy for sale in competition with the original is clearly an infringement of the primary copyright; to make a copy which might substitute for a potential purchase of the original may well be; but for producers of printed works to demand payment for copying in other circumstances assumes that they have the right to capture the added value generated by the availability of reprography. The automatic extension of copyright protection to include exploitation through new or 'secondary' markets created by new communication systems could clearly restrict the benefits from technological change. Thus, when Whitford addressed the issue, it was in terms of protecting print publishing, not of ensuring adequate remuneration to authors from secondary rights. The Committee's proposal to end the fair dealing exception once licensing was in place was based on its alarmist view that 'unless something is done there is a serious danger that, in some fields at least, publication will cease' (para. 271). By 1981, the Green Paper conceded that this was exaggerated and stressed the educational benefits of photocopying, while accepting that print publishers should be remunerated for multiple copying by excluding it from fair dealing. But, by refusing to define the legitimate limits of fair dealing as regards single copies, it failed to provide a sufficiently clear definition of the extent of the property rights which should be the subject of private negotiation for remuneration.

The alternative to legislative action might have been to ask the courts to resolve these questions by private litigation, a course which as we have seen was not pursued beyond initial threats by UK publishers. The remedies for infringement are in principle the same as for any property right (CDPA 96), and aim mainly at compensation for economic loss. This would

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<sup>26</sup> T. Gallagher, 'Copyright Compulsory Licensing and Incentives.' Oxford Intellectual Property Research Centre Working Paper Series No. 2. (2001).

face the courts with the same issue of defining the nature and limits of the property right, initially by considering the scope of fair dealing.

For copying which exceeded the court's view of fair dealing the issue would present itself in terms of the appropriate remedy. Would a court be willing to grant a permanent injunction to restrain non-commercial photocopying for educational purposes of a reasonable proportion of printed works? The only justification for doing so would be to preserve the owner's right to negotiate reasonable remuneration, and this would necessarily be influenced by the availability of licensing.<sup>27</sup> What would be the measure of damages if an infringement were found? Since intellectual property rights are inexhaustible assets, economic loss may be quite low, especially in the case of non-commercial unauthorised use. In relation to their primary rights, publishers might indeed find it hard to show substantial direct sales losses from photocopying in higher education, much of which is from journals and monographs which the user would not otherwise buy, so that a photocopy rarely substitutes for a purchase of that same item. It would be difficult for a court to take account also of indirect losses resulting from the general diversion of purchasing power into copying instead of buying new books, since that is not a loss that can be shown to affect the copyright owner of the work that is actually being copied.<sup>28</sup> The publishers' true case rests on the loss of their 'secondary' rights, i.e. the loss of the rights to license photocopying. But the existence and extent of these rights depends on how far the elastic concept of copyright is allowed to stretch.

Admittedly, courts have generally been very willing to extend the concept of copyright. However, this also reflects the power of owners to select examples of egregious violation as cases to be pursued. Thus, it is significant that in the UK, although threats were made against universities, legal action was commenced only against schools, in respect of copies for classroom use and from high-value works such as music.<sup>29</sup> The US case most heavily relied upon by publishers is that involving a commercial copy-shop, Kinko's, producing bound course-books.<sup>30</sup> Having said this, the propensity of the courts to favour a private rights view of property does not negate the point that in defining its extent public policy issues are at stake.

This point is of much more than merely sectoral and parochial significance, since the extent of copyright is now a matter of global import, and defined by international treaty. As is well-

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<sup>27</sup> Phonographic Performance Ltd v. Maitra [1998] 1 W.L.R. 870; see also Gwilym Harbottle, "Permanent Injunctions in Copyright Cases: When Will They Be Refused." (2001) 23 European Intellectual Property Review 154-157; and most recently, Ludlow Music v. Robbie Williams, Chancery Division, 14 February 2002.

<sup>28</sup> The provision for 'additional damages' in CDPA s. 97(2) does offer a basis for an award related to the 'benefit accruing to the defendant from the infringement', but this is in the context of 'flagrant' behaviour: for a recent example see Nottinghamshire Healthcare NHS Trust v. News Group Ltd (Chancery Division) 12 March 2002.

<sup>29</sup> Clark and Hadley, *ibid.* above note 9, p.18 .

<sup>30</sup> Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1537 (S.D.N.Y. 1991), enforced, No. 89 Civ. 2807 (CBM), 1991 WL 311892 (S.D.N.Y. Oct. 16, 1991). See Ann Bartow, *ibid.* note 23 above.

known, the basic provisions of the Berne Convention (to which the US finally acceded in 1989) have now been greatly amplified by the TRIPS agreement, which may be enforced through the WTO's Dispute-Settlement system. The 1967 Stockholm revision of Berne extended copyright protection to include a general right to control reproduction, but subject to the possibility of exceptions:

Article 9: (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The language of Article 9(2) has also been transposed into TRIPS Article 13 with some changes. Most significantly the final phrase refers not to 'the author' but to the 'right holder', a further abandonment of the claim that copyright aims to stimulate creativity. TRIPS article 13 therefore separately establishes a general standard against which all limitations and exceptions to copyright will now be judged, ultimately through the WTO's powerful Dispute Settlement system.

These provisions have in fact already been the subject of an important adjudication through the WTO, resulting from a complaint by the EC against exceptions in the US Copyright Act allowing radio broadcasting without payment in business premises below a specified size (the 'business' exception), and of any broadcast performance by means of a 'homestyle' receiver (the 'homestyle' exception). The WTO Panel applied the three criteria which it considered are embodied in this standard: (a) exceptions must be limited to 'special cases'; (b) they must not conflict with a 'normal exploitation'; and (c) must not 'prejudice the legitimate interests of the right holder'. By finding that the 'business' exception was too broad to qualify as a special case, but the 'homestyle' exception could do so, the Panel struck a certain balance. Of greater interest and direct relevance here were its views on the second two criteria. The Panel first rejected the argument made for the EC that without any provision for remuneration there is ipso facto a conflict with normal exploitation and prejudice to legitimate interests. It then stated:

6. 183. We believe that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work (i.e., the copyright or rather the whole bundle of exclusive rights conferred by the ownership of the copyright), if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains.

However, it also stressed that 'normal exploitation' should be viewed dynamically in relation to the potential markets, and not merely the existing situation. Thus, the central consideration

in deciding 'normal exploitation' was whether licensing could reasonably be organised and become accepted.<sup>31</sup>

As regards the 'legitimate interests' requirement, the Panel's view was that the test should be whether the exception 'causes or has the potential to cause an unreasonable loss of income to the copyright owner'.<sup>32</sup> This essentially meant whether a licensing scheme would produce reasonable levels of income. This again depends on the willingness of users to pay rates acceptable to owners. However, as we have seen from the example of higher education reprographic licensing, there can be a big gap between the expectations of owners and the willingness to pay of users. The price will determine the allocation of the benefits resulting from new communications technology, and may significantly affect its impact: if owners demand a high fee for reproduction rights the use of new communications technology would be significantly inhibited.

An important feature of new communications technologies is that they greatly reduce the marginal cost of access to intellectual products. At the same time, they both shift and blur the line between production and consumption. Access via photocopying is a type of delivery on demand, which can greatly reduce both distribution costs, and in effect those of production (since the user produces for herself).<sup>33</sup> Equally, however, it raises difficult questions about charging for the initial costs of production, which are mainly fixed rather than variable costs. The division in the academic publications market between individual and library sales enables a higher price to be charged to libraries, which can be said to cover multiple-user access, and therefore to justify the right to make copies from an item purchased by the institution, under the fair dealing exception. In respect of multiple copies, it is perhaps not unreasonable to provide for a supplementary payment to print publishers (towards their production costs), based on the rough-and-ready data produced by a sampling system in a licensing scheme such as the CLA's.

This is clearly a long way from providing remuneration in respect of access to specific works, which would require a transactional system with detailed record-keeping of each item. However, any justification for differentiating payments according to the frequency of copying of particular items lies not in the economics of publishing but in providing a reward-incentive for authors. In practice, however, the vast bulk of academic authors are employed by the very institutions which buy and use the works, and there is no widespread or indeed easily justified demand for them to be rewarded in this way. Although the Authors' Lending and Copyright Society (ALCS) is one of the founders of the CLA, it has relatively few academic authors among its members. Distributions from the CLA via the ALCS to academic authors have been only in relation to copying from books; for journal articles (for which academic authors generally receive no payment in the first place), the CLA income has gone entirely to the

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<sup>31</sup> United States – Section 110(5) of the US Copyright Act. Report of the Panel, WTO WT/DS/160/R, 15 June 2000. It found that licensing could reasonably be provided for many of those covered by the 'business' exception (Paras 6.210-11), but not for the 'homestyle' cases (Paras. 6.218-9).

<sup>32</sup> Ibid. para. 6.229.

<sup>33</sup> Electronic publishing of course takes this much further, since the publisher need only make a single copy, which can be made available to unlimited potential users via the internet.



publishers.<sup>34</sup> These issues are raised even more acutely by the new forms of electronic dissemination, which may radically transform the role of publishers as intermediaries, through the development of 'open archiving'.<sup>35</sup>

Thus, both 'normal exploitation' and 'legitimate interests' entail normative considerations with important public policy implications regarding communications systems and their cultural and educational impacts. Can they adequately be evaluated by reference only to the rights of individuals or groups and decided primarily by private negotiations? It is at the very least important to avoid an essentialist view of copyright as a private property right, by recognising that the rights of the owner need to be balanced against the rights of users. These may be expressed in terms of human rights: for example the rights to dissemination of information and to freedom of expression,<sup>36</sup> and even the right to education.<sup>37</sup> However, the right to property is also a human right, so it is a matter of balancing different rights. The Court of Appeal in the UK recently held that the balance between the exclusive rights of owners and the interests of users and the public in dissemination is already taken into account in the statutory definitions of copyright and its exceptions (including fair dealing). Since copyright protects only the form of expression and not information itself, it is only in comparatively rare circumstances that human rights in respect of dissemination of knowledge or information would trump copyright.<sup>38</sup> This clearly makes it all the more important that the scope of copyright and its limits should be interpreted so as to safeguard the interests of users and the public generally.

## Conclusions

The difficulties experienced in the UK with reprographic copyright licensing for higher education are by no means unique. Although licensing schemes for photocopying are widespread, at least in developed countries, their terms vary widely, depending mainly on the

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<sup>34</sup> See Alan Story, 'What Happens to the HECA Revenues?', July 2000, available from <http://www.ukcle.ac.uk/copyright/revenues.html>, accessed on 9<sup>th</sup> April 2002.

<sup>35</sup> See the Open Archives Initiative <http://www.openarchives.org/>, and the Budapest Open Access Initiative <http://www.soros.org/openaccess/help.shtml>.

<sup>36</sup> Article 10(1) of the European Convention on Human Rights, and article 19 of the Universal Declaration of Human Rights.

<sup>37</sup> Article 26 of the Universal Declaration of Human Rights, spelled out in more detail in article 13 of the International Covenant on Economic, Social and Cultural Rights of 1976.

<sup>38</sup> *Ashdown v. Telegraph Group Ltd* [2001] EMLR 44. Referring to the jurisprudence of the European Court of Human Rights at Strasbourg, especially *Fresoz and Roire v. France* (1999) 5 B.H.R.C. 654, Lord Phillips M.R. accepted that 'There will be occasions when it is in the public interest not merely that information should be published, but that the public should be told the very words used by a person, notwithstanding that the author enjoys copyright in them', but stressed that these are likely to be rare; however, the right to freedom of expression might more often lead to restricting the owner to a remedy in damages rather than an injunction: *ibid.* pp. 9-10.

statutory framework within which they are established.<sup>39</sup> Their operation in relation to higher education has been and remains particularly controversial not only in the UK, as evidenced by litigation on similar issues for example in Australia, New Zealand and the USA. This is perhaps because the potential conflicts between commercial exploitation of reproduction rights and the interests of users and the public generally in the widest dissemination of knowledge and information are especially acute in relation to educational publishing.

The UK case points to the importance of ensuring that copyright legislation provides an adequate framework for licensing. At the very least this requires a clear definition of the extent and limits of owners' rights, in particular of the scope of fair dealing. However, it should also be recognised that this type of licensing is not a purely private matter of rights management. Copyright entails state-backed monopoly control over the dissemination of knowledge, information and culture. While the remuneration incentive is important, it is also crucial to ensure that charges for access are not disproportionate, and that the distribution of revenues fairly reflects the objectives of the monopoly grant. It is perhaps time to reconsider whether the system of adjudication of disputes in the event of a failure to negotiate reasonable terms should be replaced by a more comprehensive scheme for the supervision of collective rights administration.<sup>40</sup> Indeed, in view of the potential of digital rights management to upset the delicate balance of private rights and public interest inherent in copyright,<sup>41</sup> stronger public regulation of licensing in general may be desirable.<sup>42</sup>

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<sup>39</sup> For an account from the viewpoint of the organisations themselves, see details provided by the International Federation of Reproductive Rights Organisations <http://www.ifrro.org>.

<sup>40</sup> Clark & Hadley stress the importance of legal accountability of collecting societies: they quote from the WIPO report "Collective Administration of Copyright and Neighbouring Rights" of 1989 which suggests that societies should be subject to some form of supervision of 'certain key elements of the collective administration systems, such as whether the actual activities correspond to the approved articles of association; whether the costs of administration are reasonable; and whether the distribution and transfer of fees actually takes place as prescribed' (ibid. note 9 above, p.9). This regulatory role goes well beyond that laid down for the UK's Copyright Tribunal.

<sup>41</sup> Thus, it has been suggested that the outlawing of anti-circumvention technology enacted in the US in the Digital Millennium Copyright Act (intended to implement article 11 of the WIPO Copyright Treaty) is equivalent to the granting of the printing monopoly to the Stationer's Society, and entails a move back from modern copyright to guild monopoly: G. S. Lunney Jr., "The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act." *Virginia Law Review* (2001) 87: 813. See also Julie E. Cohen, "WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?" [1999] *EIPR* 236; and Therien, J. R. (2001). "Exorcising the Specter of a "Pay-Per-Use" Society: Toward Preserving Fair Use and the Public Domain in the Digital Age." (2001) 16 *Berkeley Technology Law Journal* 979.

<sup>42</sup> Dan L. Burk and Julie E. Cohen, "Fair Use Infrastructure for Rights Management Systems." (2001) 15 *Harvard Journal of Law and Technology* 41.