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'Show me the money'! An insight into the Copyright Licensing Agency (CLA) and its interaction with Higher Education Institutions

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Abstract

The aim of this paper will be to provide a case study of the Copyright Licensing Agency (CLA) and its inter-action with Higher Education Institutions (HEIs). The paper will begin by introducing and expanding on the concept of higher education institutions and how they have had to adapt to copyright reproduction, especially from the mid twentieth century, with the advent of the photocopy machine. The paper will touch upon the copyright laws that have attempted to regulate copying within HEIs in the UK and consider whether it has been a success or not. The paper will then carry out a study in to CLA and will aim to raise and answer the following question: what really happens to the money that is collected from HEIs by the CLA and distributed through the Authors Licensing and Collecting Society (ALCS) and Publishers Licensing Society (PLS)? Is the license fee collected from HEIs fairly distributed amongst the right holders? Having looked at both HEIs and collecting societies (CLA specifically), the paper will consider whether collecting societies are the best practical solution we have or whether we are putting up with a system that we have come to know? The UUK v CLA case revealed the dangerous side of collecting societies, especially that of CLA and questioned its motives and aims. In offering a solution, the system in USA will be considered where the US law allows for two or more competing collecting societies in one area. Does competition combat an abuse of a dominant position, which is what we have in the UK and is this the way forward for the UK? Or does competition curtail creativity? Whilst some of these questions have been answered by the author, others have been left open for consideration.

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1. Introduction

Regulatory bodies, organisations, companies which have a monopoly in the market-place come under scrutiny at some point. In the same manner, it came as no surprise when the Copyright Licensing Agency (CLA), a collecting society, and as such a natural monopoly[1], was taken before the Copyright Tribunal in 2001 – by Universities UK (UUK). UUK claimed that CLA was abusing their monopolistic position by requesting high license fees from universities and not being clear in the distribution of license fees to the right holders.

This paper will commence by looking at the role and function of Higher Education Institutions (hereinafter HEIs) before moving on to look at the technological inventions which challenged copyright laws within HEIs and pushed them to adapt and cope accordingly. This part of the paper will also look at the rules and regulations (copyright laws) which assisted HEIs to cope with the copying.

Following the brief introduction to HEIs, the paper will turn to look at Copyright Collecting Societies (CCS). What is a collecting society, why was there a need to develop such societies and how have they been developed throughout the years are three questions which will be addressed in the introduction to CCS.

Thereafter, the focus will be on Copyright Licensing Agency (CLA). Carrying out the discussion in the form of a case-study, first, the interaction between HEIs and CLA will be considered from the vantage point of the Higher Education Copying Accord (HECA) and the survey system adopted by CLA. The study will then turn to specific grey areas within CLA, such as, what happens to the money channelled from HEIs to CLA? The system in place establishes that the money received by CLA is distributed to authors, publishers and artists through the Authors Licensing and Copyright Society (ALCS), Publishers Licensing Society (PLS) and Design and Artists Copyright Society (DACS) respectively. Is this a myth or does it work in practice? If it does exist in practice, how much of an income does the ALCS receive from CLA annually for purposes of distribution of remuneration to authors? Does this figure reflect the number of licenses, which have been granted by CLA to various licensees? What is the percentage of the income generated by CLA which represents licenses granted to HEIs? Does this figure reflect the income received by ALCS for distribution, especially to academic authors? These are some of the questions which the writer will attempt to answer in the following pages.

The paper establishes that the concept of collecting societies is a positive thing and without this system, right holders will be faced with an insurmountable task of attempting to collect royalties. Furthermore, it cannot be ignored that one of the main attractions of collecting societies are its ability to reduce transaction costs. As such, the concept remains solid and valid – the question is: how can the existing system be made better? Is there a solution?

In looking towards solutions, attention is drawn to a solution across the Atlantic: USA. However, with solutions, there are evident benefits, but, also drawbacks which have been highlighted and discussed.

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[1] As to what is meant by natural monopoly, *see infra* p. 6 under the heading '3.1 What is a CCS?'

Ultimately, in looking to the future, the hope is that a fair system will prevail which will allow right holders to create for the benefit of society whilst at the same time ensure that they are being remunerated fairly for their efforts.

2. An introduction to Higher Education Institutions

> *Every civilized society tends to develop institutions which will enable it to acquire, digest, and advance knowledge relevant to the tasks which, it is thought will confront it in the future. Of these institutions the university is the most important.*
>
> *- Sir Eric Ashby -*

The roots of tertiary education have an 'ancient and noble ancestry'. The earliest institutions of this kind included the Academy of Socrates and the Library of Alexandria. However as German philosopher Karl Jasper so accurately describes it, it is the desire for knowledge and determination to acquire it that takes us to the third level of education. A university is seen as the perfect medium for acquiring knowledge and creating channels to disseminate and pass such knowledge on to society. The *transmission of knowledge* through teaching is seen as one of the oldest and most lasting of all the purposes[2] *(emphasis added)*. As J. Embling says, "the transmission of knowledge, the teaching function, was still important but it was the extension and refining of the heritage which was the basis of success and prestige"[3].

At a recent conference at the University of Edinburgh[4], this point was further re-iterated when it was agreed that the purpose of HEIs 'was to produce top quality research and well educated graduates through a developed system that supported the teaching and learning process'[5].

Today, teaching and research go hand in hand – in fact it is correct to state that ever since the internet became commonplace within HEIs in UK, during the mid-1990's there has been a healthier balance between teaching and research[6]. The reason for this being that in the past research was emphasised over teaching as the findings could be widely read in the outside world, hence bringing fame and rewards not always available to the successful teacher. The internet has changed all this by expanding the university's audience through methods such as e-learning. For example, recently the AHRC Research Centre for Studies in Intellectual Property and Technology Law at

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[2] Embling J., *A fresh Look at Higher Education: European Implications of the Carnegie Commission Reports* (Amsterdam, London: Elsevier Scientific Publishing Company; 1974) at p. 17.

[3] *Ibid.*

[4] IP Free World in Higher Education Institutions, Playfair Library Hall, University of Edinburgh, 16-17 September 2004.

[5] *See,* edited minutes of the above conference at http://www.law.ed.ac.uk/ahrb/publications/online/ipfreeworld.pdf p. 3 of 12.

[6] *See, also* Bok Derek, *Universities in the Marketplace: the Commercialization of Higher Education* (New Jersey: Princeton University Press; 2003), chapter 6.

the University of Edinburgh[7] developed and introduced a LL.M. programme via a Virtual Learning Environment (VLE) accessed via the Internet. With the advantages of it being flexible, cost-effective and easily accessible, a student in Nottingham, UK or Beijing, China can enrol for the degree of LL.M. in Innovation Technology and Law and will enjoy the full status as a student at the University of Edinburgh. Advanced technological inventions such as the internet have made the *transmission of information* easier, quicker and cheaper. At the same time, reproduction of creative works has become 'instantaneous' with the 'aid' of the internet.

From the beginning of the twentieth century, copyright laws in UK have always made special provisions for reproducing for educational purposes and private study under the fair dealing' provision. The advent of the photocopying machine, first, and then the computer along with the internet, has seen to pose a significant threat to copyright laws.

In considering the inventions which posed a threat to copyright laws, the paper will briefly touch upon the reasons which contributed towards HEIs having to adapt to these inventions or methods before looking at the laws which assisted these institutions to do so.

2.1 Coping with copying: the inventions

Adapting to various methods of distance learning or copying is not a new concept to HEIs. As far back as 1892, William Rainey Harper, President of the University of Chicago created a correspondence school for individuals who could not afford to leave their homes and jobs to learn on campus. President Harper's concept of the distance learning course which was carried out through the medium of 'snail-mail' has now been replaced by electronic mail or electronic teaching, with HEIs having to adapt accordingly.

As far as reproduction is concerned, the ancient universities of Oxford (1249), Cambridge (1284), St. Andrews (1411), Glasgow (1451), Aberdeen (1494) and Edinburgh (1583) would have had to adapt to the invention of the printing press by Johannes Gutenberg in 1436. In the 20th century, the invention of xerography in 1938[8] (later came to be known as photocopying) by Chester F. Carlson posed an equally significant threat to copyright laws within HEIs.

Moreover, since one obligation of university reform is to provide greater breadth of study for more students, enrolments increased notably during the twentieth century. A greater number of students within HEIs during the twentieth century pushed for an increase in the use of resources within these institutions. An example relevant to this paper can be drawn from the increased use of photocopy machines within HEIs which has had adverse effects on copyright laws, with Edinburgh University alone housing approximately 480 photocopiers.

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[7] http://www.law.ed.ac.uk/ahrb/

[8] Battelle Memorial Institute signed a deal giving Carlson 40% of the proceeds and in 1947 signed a deal with Haloid and the first photocopiers known as the Xerox Model was introduced in to the market in 1949. Not long afterwards Bush Vannevar (1945) created a device known as Memex, the idea behind the internet, and upon which it was ultimately built, *see*, http://public.web.cern.ch/Public/ACHIEVEMENTS/WEB/successstory.html

One of the consequences of increased enrolment and resources to match the increasing number of students was commercialisation of universities. As Thorstein Veblen states –

> *It is one of the unwritten and commonly unspoken commonplaces lying at the root of modern academic policy that the various universities are competitors for the traffic of merchantable instruction in much the same fashion as rival establishments in the retail trade compete for custom.*

Two words stand out in the above quote – competitors and merchantable. Whilst adapting to advanced technological inventions throughout the years and having to cope with copying as a result, HEIs had fallen in step with commercialisation and competition within the market place like all other institutions. Copying, transmission and dissemination of knowledge had taken on an entirely new meaning with these modern inventions. As much as information needed to be shared for the benefit of society, through teaching and research, the creators needed to be protected too; in other words an effective balance of rights was needed. A tightening of copyright laws was seen as essential – and this came about with the introduction of three main pieces of law during the 20th century and the more recent *Copyright and Related Rights Regulations 2002.*

2.2 Coping with copying: the rules and regulations

The need to create boundaries around the permissible limits of educational copying came about at the beginning of the 20th century. UK copyright law introduced the 'fair dealing' proviso in *section 2* of the *Copyright Act 1911.* This section struck the all-important balance between the creator and user and recognised that copying should be made available for 'fair' purposes, which would ultimately assist society as a whole. Further, this Act created the base upon which the 1956 and 1988 Copyright Acts were finally built.

The *Copyright Act 1956* provided for the defence of 'fair dealing' for three purposes: research or private study; criticism or review; and reporting current events[9]; it set out special exceptions in respect of libraries and archives[10]; records of musical works[11]; protection of artistic works[12]; in respect of industrial designs[13] and for use of copyright material for education[14].

However, the real breakthrough came about with the *Copyright Designs and Patents Act 1988* (hereinafter 1988 Act). Apart from consolidating the copyright law and attempting to strike a satisfactory balance between the creators and users, the Report of the Committee to consider the law on copyright and designs (hereinafter Whitford

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[9] Section 6.

[10] Section 7.

[11] Section 8.

[12] Section 9.

[13] Section 10.

[14] Section 41.

Committee) dealt with general copyright revision in March 1977[15], and was committed to providing copyright laws, which were in the public interest. The Whitford Committee was also instrumental in introducing the system of 'all-or-nothing' blanket license, as discussed in the following pages.

The 1988 Act is extremely comprehensive in providing exceptions; and in accordance with the recommendations made by the Whitford Committee, the Act boasts of 56 copyright exceptions in total. However, it must be noted that some of these exceptions have been added on during the past years, in complying with EU Directives.

3. Copyright Collecting Societies (CCS) – what, why and how?

3.1 What is a CCS?

The European Union described a collecting society as 'any organization which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes'. As such, a collecting society is also known as a 'collective licensing body' as one of the main purposes of such a body is to license the works of its members, (i.e. copyright holders), to users and collect royalties[16] for the privilege.

In UK, CDPA 1988, section 116(2) describes a collecting society as –

> *A society or other organization which has as its main object, or one of its main objects, the negotiation or granting, either as owner or prospective owner of copyright or as agent for him, of copyright licenses, and whose objects include the granting of licenses covering works of more than one author.*

A collecting society provides a simple method of gaining authorisation to copy *removing the need to seek permission from a right holder on an individual basis each time (emphasis added).* It does what an individual creator cannot do for himself. As such one of the underlying concepts of copyright collecting societies (CCS) is to save on *transaction costs* of copyright administration *(emphasis added).* Transaction costs has been considered, reviewed and analysed in a number of ways by Ronald H. Coase who established through his *Coase theorem* also known as the *legal entitlement theory* that the importance in transactions lies in the efficiency over and above cause and fairness[17]. Reviewing Coase's theorem, Robert Merges went on to say that even

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[15] A special committee on general copyright revision reported its findings and recommendations in a publication entitled *Copyright and Designs Law: Report of the Committee to Consider the Law on Copyright and Designs*, commonly referred to as the Whitford Committee Report after its chairman, Justice Whitford.

[16] Royalty is a fixed sum. It can be paid in a lump sum or over a period of time in accordance with an agreed-on payment schedule. Once agreed upon, the sum is independent of the future success of the licensee. So even though, sales may drop or rise, the royalty remains fixed at the agreed sum. This does not mean that the royalty is not affected at all by future sales; it is the contrary. One of the main tasks of the licensor and licensee is trying to anticipate future sales before the licence is made. This leads to the conclusion that paid-up licences are best suited to those situations where future sales are relatively predictable.

[17] Merges Robert P., Symposium: Towards a Third Intellectual Property Paradigm: Comments: Of Property Rules, Coase and Intellectual Property (1994) *Columbia Law Review* 2655- ; Merges Robert

though transaction costs can be reduced by compulsory licensing, CCS provides for more efficient reduction in transaction costs as there can be 'expert tailoring' rather than the one-size-fits-all as in compulsory licensing.

From the time collecting societies were created, they were seen as a 'natural monopoly'. A natural monopoly industry represents the least expensive manner in which a particular aggregate production can be made available to society if only one producer exists. There are of course social costs involved when a natural monopoly is run by one producer/firm – the reason why natural monopolies are subject to heavy regulation, particularly in their pricing strategies, in exchange for an absence of competition. The natural monopoly aspect of copyright administration has to do with the transaction costs of actively trading copyrights. For example, the copyright to publicly perform a particular musical composition may be passed on to radio stations and discotheques. In the same manner, the copyright to photocopy creative works can be passed on to schools and universities. If copyright holders join together in a collective society, then with only one visit to each client they can together negotiate all the copyright at once, thereby saving on the costs of visits to individual clients. Also the costs of monitoring the uses that are made of the copyrights are also proportionately reduced when many copyright holders act together. Therefore, the formation of collective societies to administer copyrights is an efficient means by which the transaction costs can be greatly reduced, since most of the creations in each collective have the same set of users. Hence, *even if it is not profitable for individual copyright holders (who are quite successful) to negotiate their intellectual property right with the user set, doing so collectively with each member of the collective bearing only a fraction of the cost can make transactions feasible and worthwhile (emphasis added).*

3.2 Why did CCS come about?

During the fifteenth and sixteenth centuries music flourished and in England Henry Purcell,[18] Handel captured London with opera. During these times, it was interesting to note that the composer as well as writing his own composition performed them himself or with an orchestra, advertised the concerts and even collected the subscriptions from the public[19]. The public flocked to enjoy music being played and sung.

One of the characteristics when looking at the history of the progression of music from the fifteenth and sixteenth centuries to the modern age is the medium through which it was disseminated – from the confines of the church, castle and chamber to the more open market place, stage, large public gardens such as Vauxhall in London and Crystal Palace in Sydenham and finally the concert hall. The progression reflects the process and attempts of reaching out to the public. This process was completed in stages during the 19th and 20th centuries with the aid of technological inventions such

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P., Contracting in to Liability rules: Intellectual Property Rights and Collective Rights Organisations (1996) 84 *California Law Review*, pp. 1293-1386. Cooter Robert & Ulen Thomas, *Law & Economics* 3rd ed., (Reading Massachusetts, Harlow England, Sydney, Madrid, Amsterdam: Addison-Wesley Longman, Inc.; 2000), p. 85;

[18] 1659-1695.

[19] MacQueen Hector & Peacock Alan, Implementing Performers Rights (1995) 19(2) *Journal of Cultural Economics*, pp. 157-175.

as the microphone[20], telegraph,[21] gramophone,[22] radio[23], television[24] and finally the internet. The public was reached in millions, if not billions, and the 'use-for-all' had turned in to a nightmare situation of 'protection-from-all'.

The situation of attempting to protect these creative works was firmly established when in 1847, a French composer, Ernest Bourget brought a case before the Tribunal de Commerce de la Seine which upheld a revolutionary law of 1793, recognizing a right to public performance for the first time[25]. Bourget realised that unlike Mozart and other composers of the 16th and 17th centuries that collected subscriptions outside concert halls or public gardens for the enjoyment of their music, this individualistic approach had become impossible with both musical and technological advancements. In other words, music was being played everywhere and composers had no control over it. The solution was some kind of an intermediary, an agency, which could regulate licenses to public performances on behalf of the creators – and so the collecting society was born.

3.3 How did it develop?

Ernest Bourget's win over his case before the Tribunal de Commerce de la Seine in 1847 was therefore instrumental in the setting up of the French *Agence Centrale pour la Perception Droits Auteurs et Compositeurs de Musique*. Assisted by his colleagues Victor Parizot, Paul Henrion and also publisher Jules Colombier, *Agence Centrale* which was created for the joint administration of performing rights in musical works laid the foundations to the very first modern collecting society in 1851 – *Société des Auteurs et Compositeurs et Editeurs de Musique* (hereinafter SACEM) which became the European model for collecting administration in the years to come. *SACEM* replaced *Société des gens de lettres* (Society of French Writers), founded by Honore de Balzac and Victor Hugo.

In UK, the *Copyright Act 1911*[26], was instrumental in the creation of the *Mechanical Copyright Licences Company Limited* (MECOLICO). MECOLICO was established in 1911 to collect and distribute royalties from producers of sound recordings for recording rights in music and lyrics – a task that could not have been carried out by individual right holders. Today, MECOLICO is no more – but in its place are the *Mechanical Copyright Protection Society* (MCPS) and the *Performing Rights Society* (PRS), both of which were created in 1914. PRS was created to administer public performance rights of authors, composers and music publishers in musical works.

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[20] Sir Charles Wheatstone, 1827.

[21] Samual Morse, 1837.

[22] Emile Berliner, 1887.

[23] Marconi, 1895.

[24] John Logie Baird, 1926.

[25] Kretschmer Martin, Copyright societies do not administer individual property rights: the incoherence of institutional traditions in Germany and UK in Towse Ruth, *Copyright in the Cultural Industries* (Cheltenham UK, Massachusetts USA; Edward Elgar Publishing: 2002) pp. 140-164.

[26] For a discussion on the Copyright Act 1911, *see* Mendis Dinusha, 'Historical Development of Exceptions to Copyright and Its Application to Copyright Law in the 21st Century' at http://www.ejcl.org vol. 7.5 (December 2003) pp. 17-18.

However, mechanical reproduction of copyright works was still not recognised. Further, section 19 of the *Copyright Act 1911* required right holders, if they had granted a licence to record a work, to grant a licence to any other person to record the same work upon payment of a statutory royalty. In other words, once a right holder licensed his works, it was available for all for the payment of a royalty. In 1914, the level of the statutory royalty was set at a mere 5% of the ordinary retail price of the record.

It was after 14 years, in 1928, that the statutory royalty was raised to 6¼ %. The *Mechanical Copyright Protection Society Ltd* (MCPS), a publishers' agency administered mechanical licences from 1924. No fixed formula was set for the distribution of royalties at that time. The system has developed vastly since then and today a 60:40 split of mechanical royalties in favour of the composer is seen as standard.

The next major development came about in 1934 with Phonographic Performance Limited (PPL)[27] being created. PPL is the UK collecting society for record companies and performers. PPL licenses radio stations, TV stations and other broadcasters who use sound recordings (records, tapes, CDs etc) in their transmissions. PPL also licenses clubs, shops, pubs, restaurants and thousands of other music users who play sound recordings in public. The license fees that PPL collects are then distributed to the rightful owner of the sound recording copyright – usually the record company responsible for creating the track and also the performers who played on the track.

Disputes between the collecting societies and users were inevitable and hence, under the *Copyright Act 1956,* the Performing Rights Tribunal was set up to settle disputes between PRS and its major users. Its function was to resolve disputes when no agreement could be reached between the contracting parties.

At present there are more than a dozen collecting societies in the UK[28] and more recent legislation such as the *Copyright, Designs and Patents Act 1988* has regulated collecting societies with the introduction of a Copyright Tribunal which represented an extended jurisdiction reflecting the growth of the collective copyright administration int o fields other than performing rights. Of these dozen or more collecting societies, the focus of this paper will be on the Copyright Licensing Agency.

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[27] See http://www.ppluk.com

[28] These include, Authors' Licensing and Collecting Society Limited (ALCS) which administers "secondary" rights in literary, dramatic, musical and artistic works; British Equity Collecting Society Limited (BECS) which administers performers' remuneration; Compact Collections Limited (CCL) which collects royalties for film and television producers; Design and Artists Copyright Society Limited (DACS) which administers rights in artistic works; Directors and Producers Rights Society Limited (DPRS) which administers certain rights on behalf of films and television directors and producers; the Performing Artists Media Rights Association Limited (PAMRA) which collects recorded performance remuneration on behalf of performers; the Video Performance Limited (VPL) which administers the rights of producers of music videos; Music Publishers Association (MPA); British Phonographic Industry (BPI) and the International Federation of the Phonographic Industry (IFPI). For an account on these societies, see *Copinger & Skone James on Copyright* (London: Sweet & Maxwell; 1998), 28-10. *Monopolies and Mergers Commission, Collective Licensing* – A report on certain practices in the Collective Licensing of Public Performance and Broadcasting Rights in Sound Recordings CM 530 (London: Her Majesty's Stationery Office; 1988).

4. A Case-study: Copyright Licensing Agency[29]

The Copyright Licensing Agency (CLA) is a non-profit making agency that licences organisations for photocopying and scanning. The society was set up in 1982 and since its inception it has been acting on behalf of authors, artists and publishers of books, journals, magazines, law reports and periodicals by issuing licences and ensuring copyright compliance.

The society strikes the balance between creativity and incentive as it allows organisations and institutions to fulfil their information requirements whilst at the same time protecting copyright and hence encouraging creativity.

Its members, i.e. the authors, publishers and artists that it represents, own the agency[30]. The money that is collected from organisations such as HEIs are then distributed to the right holders of copyright works through the Authors' Licensing and Copyright Society (ALCS) and the Publishers' Licensing Society (PLS) which together set up CLA in 1982.

The main question, however, is whether the right holders, especially authors', *actually receive 'appropriate' royalties* through the ALCS which distributes the income received by CLA *(emphasis added)* to the authors. This raises a number of questions immediately, as set out in the introduction. First, how much of an income does the ALCS receive from CLA annually for purposes of distribution? Does this figure reflect the number of licenses, which have been granted by the CLA to various licensees? In the present context, what is the percentage of the income generated by CLA, which represents licenses granted to Higher Education Institutions (HEIs)? Does this figure reflect the income received by ALCS for distribution, especially to academic authors? What is the method that is used by ALCS to distribute the income to authors? As such, how is this income distributed?

These questions, amongst others have been considered below. Answers to these questions can be drawn from the context of surveys; the income and distribution methods of CLA through ALCS/PLS/DACS; and license system between CLA and HEIs which arises from the *Higher Education Copyright Accord license (HECA)*[31]. Set out below is a brief look at HECA and some of the methods employed under it.

4.1 The interaction between CLA and HEIs

4.1.1 The Higher Education Copying Accord (HECA) – An Agreement for License to Photocopy

In April 1998, CLA and Committee of Vice Chancellors and Principals (CVCP), (now Universities UK, *UUK*), signed a licensing agreement covering the photocopy of copyright materials within British HEIs. This was known as the Higher Education Copying Accord (HECA)[32]. Fort use and access to the materials under the 1998

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[29] For more information on Copyright Licensing Agency Limited, see, http://www.cla.co.uk

[30] These include ALCS; PLS and CLA also has an agency agreement with the Design and Artists Copyright Society (DACS) – see also, *ibid.*

[31] *See infra*, pp. 12-14.

[32] However, the interaction between HEIs and CLA dates back to the mid 1980's. The first licensing agreement between HEIs and CLA was concluded in the latter part of 1980's, June 1989.

HECA, all universities had to pay the CLA a flat charge (blanket license fee) of £3.25 per full-time equivalent student (FTES). This license was due to expire in 2001 and after negotiations between CLA and UUK failed, UUK took CLA before the Copyright Tribunal[33]. The main argument forwarded by CLA was that HEIs should make a separate payment for Course Packs through the *Copyright Licensing Agency Rapid Clearance Service* (CLARCS) over and above the blanket license fee of £3.25 per FTES. CLA's justification for maintaining the CLARCS two-tier system for Course Packs was that (a) Course Packs are a substitute for textbooks and so need special control and fees. UUK complained that the new license fee proposed by CLA, £10.25 was too high and that course-pack material should not have to be cleared separately.

The Copyright Tribunal decided in favour of UUK, and set the blanket license fee at £4 per FTES (£2.75 basic fee – [reduced from £3.25] + £1.20 fee for course-pack copying + 0.05p for separate artistic works)[34]. The decision made on the new blanket license fee in August 2001 will run for five years – until August 2006. In exchange the CLA, on behalf of its members, grants an indemnity from some forms of legal liability for breach of copyright, provided the terms of the agreement are respected. The HECA also gives the CLA various powers of enforcement, such as obligation on universities to allow it to inspect and audit their copying.

Keeping in line with the requirements of HECA license, the University of Edinburgh entered in to an agreement with the CLA for license to photocopy in 1999, which was renewed in 2001. Below are a couple of extracts from the license of 2001 which highlights the agreed method of payment and survey.

Clause 5 – Payments

> *(a) In consideration of the grant of the Licence by CLA to the HEI upon the terms and conditions hereof the HEI shall pay to CLA fees per annum per FTES of £4.00, such fee to be increased in line with the increase in the Retail Price Index on an annual basis on 1 August each year, the first such increase to take effect on 1 August 2002;*
>
> *(b) The most up to date totals for HEIs FTES shall be used for every invoice. The first invoice under this Agreement shall be issued for the period 1st August 2001 to 31st January 2002 . . . all invoices are payable within thirty days of their presentation;*
>
> *(c) All invoices raised by CLA shall be subject to Value Added Tax calculated at the rate for the time being in force.*

Clause 7 – Surveys

> *The purpose of a survey is to establish what is being copied.*

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[33] Case of *UUK v CLA* [2001] CT, Case nos:. CT 71/00, 72/00, 73/00, 74/00, 75/01 available from http://www.patent.gov.uk/copy/tribunal/trisbissued.htm

[34] See also, new specimen license on CLA website at

http://www.cla.co.uk/have_license/support/he-support-license.html

> *(a) If selected for the purpose of carrying out a survey . . . the HEI shall during the period of the survey ensure that it and all Authorised Persons co-operate fully with the requirements of CLA relating to the survey;*
>
> *(b) CLA shall on giving reasonable notice have the right of access throughout the Licensed Property at any reasonable time or times in order to organise and carry out a survey.*

The agreement is very clear about the payment of the blanket license fee, but unfortunately not about the distribution. For example, HEIs would like to know that the money that is being paid by them is being appropriately distributed to authors, which is not made clear in the present agreement. The issue of distribution is discussed and analysed in the following pages. As regards surveys, between the periods of spring 1999- autumn 2004, whilst certain HEIs have been surveyed twice or more, University of Edinburgh has been the subject of none.

More recently the University of Edinburgh has entered in to another agreement with CLA to ensure copyright compliance known as *The CLA Higher Education Digitisation*, the most recent being the license of 2003-2004. Under this license, the payment clause reads as follows –

Clause 13

> *13.1 The CLA will invoice the Licensee for License Fees relating to any CLARCS Licenses granted to the Licensee in accordance with Schedules 1, 2 and 3, and Licensee will pay such invoices in full within 30 days of invoice.*
>
> *13.2 If any invoice remains unpaid after payment is due (but without prejudice to the provisions pf Clause):*
>
> *13.2.1 The CLA shall send a reminder by recorded delivery mail and if the invoice is still unpaid ten working days from the date of the reminder then any CLARCS Licenses to which the invoice relates will be suspended.*
>
> *13.2.1 Interest shall run on such unpaid amounts calculated from the date of the invoice at a rate of 3% above the base rate from time to time of Lloyds-TSB Bank PLC (compounded monthly).*

It is interesting to note that the *Digitisation License* does not have a clause on surveys, which brings us to the obvious yet important question – how does CLA know which articles have been downloaded from which journals? With a very scanty 'survey methodology' and scanty distribution system, there are a number of questions that the CLA needs to answer more accurately. With due respect to the surveys carried out by CLA, one wonders how accurate these surveys are?

4.2 Survey methodology of CLA

The survey methodology within CLA is divided in to four main sections and include[35] –

(1) Record keeping survey;

(2) Questionnaire survey;

(3) Information audits; and

(4) Scanning digitisation.

The *record keeping survey* comprises an analysis of copyright photocopying carried out at pre-selected photocopiers. Before this survey is carried out, CLA would agree in advance with the licensee, over a period of weeks. Basically, during the time of the survey, the employees/licensees will be asked to make an extra copy of one page identifying what it is that they are copying. They then record the number of pages copied (and the number of copies made) on a label supplied by CLA which they then stick to the page of the extra copy made and place in boxes placed at the photocopiers. CLA field officers collect these at regular intervals. At the same time, meter readings of the pre-selected photocopiers are recorded. Data analysis by CLA of this information assists CLA to distribute license fee revenue to the appropriate authors, artists and publishers.

A *questionnaire survey* consists of a series of short, informal face-to-face interviews about photocopying practices based on a diary of copyright photocopying conducted over a short period, and involves only an agreed sample of employees.

Information audits use the licensee's holdings and subscriptions including departmental subscriptions of books, journals and magazines. In conjunctions with questionnaire surveys, this data enables CLA to calculate fair distributions to rights holders. Once complete, licensees will only be asked to update their catalogue of holdings and subscriptions to CLA every three years.

Where *scanning/digitisation* of copyright material additionally are permitted under the Licence, licensees may be required to record bibliographic details and levels of use. Collection of this information may form part of the data collection exercise undertaken for photocopied copyright material. It may not necessarily be carried out during the same period.

There are a few points that can be raised on the survey process set out above especially in relation to the record keeping survey. According to this method, CLA field officers monitor pre-selected photocopiers at selected universities over a period of six weeks. However, is there a system whereby CLA officers decide with University officers, the best time to monitor? According to the methodology used by CLA, the surveys are carried out in the spring and autumn seasons of a calendar year. If each survey is carried out 'over a period of six weeks' how many universities can really be surveyed in one year? For the year 1999, it was recorded that CLA surveyed photocopiers at six UK HEIs during spring and a further ten HEIs during autumn. The target for CLA appears to be around 15-20 HEIs per calendar year.[36] However, if

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[35] Information provided by the Manager of Survey Operations of CLA (London).

[36] Information provided by CLA, as at October 2004.

each HEI is surveyed for six weeks, then the target of 10-15 HEIs per calendar year does not add up correctly.

Secondly, as noted above, employees are asked to make an extra copy of a work identifying what they are photocopying. The question that comes to mind at this point is how many officers monitor one university at one given point? We already know that they monitor photocopying at pre-selected photocopiers. We already know that a university such as University of Edinburgh, houses approximately 480 photocopiers[37] within the university. For example, when CLA officers, come to the University of Edinburgh to monitor the photocopying, how many of these 480 copiers do they monitor? Is it the machines located within the eight main libraries[38] of the University of Edinburgh? What about all the photocopying that goes on at research centres by research students who may not necessarily use the library photocopiers but use the photocopiers within research centres in a department? Are these monitored too? When Edinburgh University was surveyed, in the early 1990's, it is reported that almost all the photocopiers at its main library were monitored. Some 'other departments' were also monitored, however, at the time of writing this paper it has not been possible to identify what these 'other departments' were.

CLA confirms that the essence of their surveys is the collection of physical evidence of copying of individual titles, supervised by field officers at copying machines within organisations selected in a sampling of their sector. The survey data thus collected and analysed forms the basis for the distribution of fees paid by organisations for the copying of copyright works under CLA licenses. In 2002-03 over 150,000 survey returns were processed and a further 350,000 returns were processed for CLA's transactional licenses such as document delivery and higher education digitisation.

Finally, in relation to the actual surveys, the information sent by CLA itself illustrates the surveys which have been carried out in various universities throughout UK (in total 73 universities: 61 in England; 2 in Northern Ireland; 5 in Scotland and 5 in Wales). Further enquiry in to CLA returned the information that of all the universities within UK 73 universities have been surveyed at least once since 1999. It was also revealed that the CLA carries out surveys on a three-year cycle. By this, it means that a university that is surveyed, for example, in 1999 is under no obligation to be surveyed again until at least until the year 2002. In this manner, CLA can ensure that many universities as possible can be surveyed.

However, it is curious to note that within this list some universities have been surveyed twice or more: for example Universities of Kent at Canterbury; University of Strathclyde Glasgow; Leeds Metropolitan; and Falmouth College of Arts whilst in the last five years (from 1999-2004) some of the larger institutions such as Aberdeen, Glasgow, Edinburgh, London School of Economics and Cambridge have not been

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[37] Information provided by Allan White, Officer in charge of Departmental Copiers, University of Edinburgh.

[38] These include Main Library George Square; Law & Europa Library; Darwin Library; Moray House Library, New College Library; Robertson Engineering and Science Library; James Clark Maxwell Library; and Veterinary Library (Summerhall, Easter Bush Veterinary Library and Centre for Tropical Veterinary Medicine). Note that Erskine Medical Library has now moved in to the Main Library at George Square (providing services to Psychiatry, Royal Infirmary and Western General Hospital) as of 25 June 2004.

surveyed even once even though they have been licensed with CLA since 1999, through the HECA license.

Reflecting on the survey methodology of CLA, both plus and minus can be seen. On the one hand, credit must be given where it is due: may be the survey system employed by CLA is not the most accurate supervision or monitoring system that has been implemented by a collecting society, but it does have a regulated structure. Moreover, as a result of being party to the blanket license (HECA), the responsibility to monitor does not lie with the University alone; the license ensures that monitoring will be carried out by the collecting society. Although, at first blush this may not seem vital, it does have significant consequences in the absence of a blanket license or a collecting society, as was seen in an Australian case thirty years ago[39]. However, at the same time, it cannot be ignored that the present survey methodology does have gaps and drawbacks which needs to be addressed, as pointed out above.

4.3 An insight in to the distribution of remuneration within the CLA

In May 2000, *The Times Higher Education Supplement* published an article which stated that academic authors are losing hundreds of thousands of pound in revenues from the use of their work for teaching and research because the CLA cannot manage the complex system of reimbursement[40].

The findings set out in this Article revealed that in 1999 the HEIs channelled £5 million in to CLA of which the CLA would then periodically inform ALCS how much was available for distribution. However, in December 1999, the ALCS received only £180,000 by the CLA for distribution, which highlights a major discrepancy in the distribution of remuneration[41].

Apart from that 1999 was a significant year for HEIs as it was the first full year which saw the new blanket license fee in operation through the HECA license. With this new development in place, the 1999 Annual Report of CLA stated that the –

> *CLA is in a unique position. In 1999 we have used that position to establish a copyright working group with representatives of the HE sector and to bring pressure to bear on the high-street copy shops for the part they play in the evasion of the fees rightfully due to right- owners' (emphasis added)*[42].

Given this information, it is interesting to note from the Annual Review 1999 that CLA broke the £29 million per year barrier for the first time by generating a fee income of £22.7 million (£19.08m from UK, £3.6m from overseas) – 18% higher than the previous year[43].

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[39] *University of New South Wales v Frank Moorhouse* (1975) 133 CLR 1.

[40] Patel Kam, Authors Missing Out on Copyright Fortune, (19 May 2000) *The Times Higher Education Supplement* at http://www.thes.co.uk

[41] *Also see*, CLA Annual Review 1999 which can be accessed at

http://www.cla.co.uk/media/review-99.pdf

[42] *Ibid.,* at p. 4.

[43] *Ibid.*

On the one hand, these facts are reflective of stricter copyright compliance within organisations, which is undoubtedly a positive thing. On the flip side, it raises the kind of concerns that were highlighted in the article published in *The Times Higher Education Supplement* and also raises concern about an abuse of a monopoly position. At least one of these concerns was voiced by CLA when it admitted that in respect of the distributions, CLA fell significantly short of its target by £14.9m in 1999. After playing catch-up a further £19.2m was admittedly distributed[44]. However, the situation remains unclear as the Annual Report then goes on to say that the balance of undistributed fees carried forward was £16.0m. The reason given for this is that in any given year the fees received by the Agency cannot be distributed to members and other RROs until the work of analysing the copying which takes place over the period has been completed. CLA therefore has the right to hold substantial sums, which are in the process of being allocated to its members and foreign RROs. A further insight in to the CLA Annual Review of 1999 may shed some light on its distribution system.

4.4 An insight in to CLA's Annual Reviews of 1999 and 2003

4.4.1 Annual Review 1999

CLA claimed that the £180,000 received by ALCS related only to journal articles[45]. However, nowhere in the annual review does it state that the £180,000 distributed by ALCS related only to journal articles copied. A closer look at the annual review 1999 shows that whereas every other item of the accounts is broken down in to sub-headings, the distribution fee is not. The only fact that is made known to us is that after the gross fee is collected, a certain amount is deducted for 'subvention' – and that's about it! The table below should make this point clear.

Table 1: Fee Revenues and Distributions – year ended 31 March 1999[46]

	1999 £	**1998** £
Gross fee collections	22,681,605	19,141,132
Less: subvention	(1,796,944)	(1,732,372)
Adjustment for accrued subvention	250,000	
	21,134,661	17,408,760
Undistributed fees brought forward	9,830,330	8,597,632
Fees available for distribution	30,964,991*	26,006,392

[44] *Ibid.* The reason for the delay CLA explained was due to finalising details of the Tripartite Agreement.

[45] CLA Press release, "Authors not missing out on copyright fortune" (01 June 2000) at http://www.cla.co.uk/media/press_releases/press46.html

[46] CLA, Annual Review 1999 at http://www.cla.co.uk/media/annual_review.html p. 19.

Distributions	(14,901,726)*	(16,176,062)
Undistributed fees carried forward	16,063,265	9,830,0330

This raises the following question – how does one know what has happened in the distribution of the license fees? Especially in the columns which have been highlighted with an asterix (*) – may be it would be helpful for the reader/layman to know up-front to whom the CLA license fee is being distributed.

Furthermore, the annual review 1999, offers a diagram which represents the 'Gross Fee Collections' and 'Distribution of Copying Fees to Members and Foreign RROs' from during the 1990's. An insight in to the graphs shows that there is a massive difference between the fees that is collected and that which is distributed. Even if operating costs and general expenditure, total to a substantial amount within CLA, question marks hang over to the difference in millions between the income and distribution. The following diagram should make the following point more clear –

Figure 1: Gross Fee Collections – All sources (£ millions)[47]

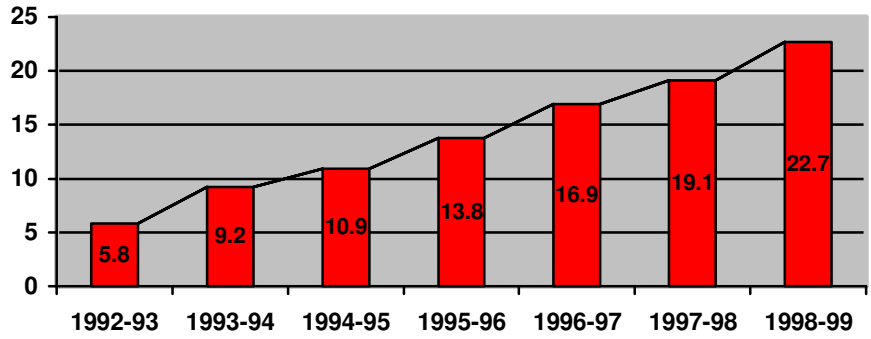
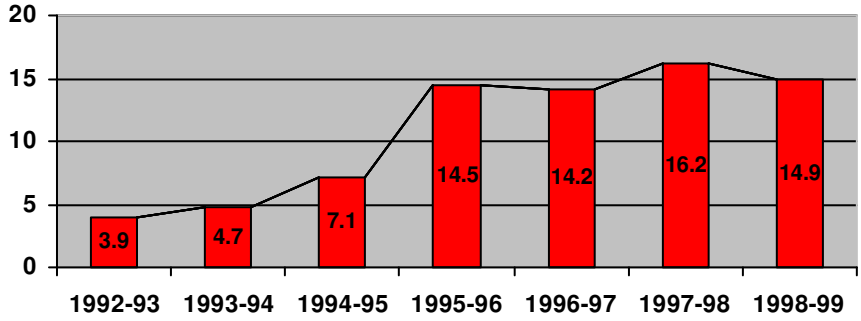


Figure 2: Distribution of Copying Fees to Members & Foreign RROs (£ millions)[48]



The most important point that can be drawn out from the above two graphs is that the distribution graph varies significantly from the income graph, with the sole exception of 1996-97. The costs to CLA amongst others include operating costs including staff

[47] CLA, Annual Review 1999 at http://www.cla.co.uk/media/annual_review.html at p. 14.

[48] *Ibid.,* at p. 15.

costs, wages/salaries, pension costs, directors' fees, auditors' remuneration, depreciation, exchange differences, hire purchase and cost of tangible assets including land and buildings, furniture and equipment and IT systems. Even if these costs are deducted from the income which is received by the CLA, it is surprising to note that from an income of £9.2 million in the year 1993-94, only £4.7 million was distributed to members. Likewise, in the year 1998-99 (the first full year that the blanket license between CLA and HEIs was in operation) the distribution fee stood at £14.9 million, against an income of £22.7 million.

It is even more fascinating to note that the interest received from undistributed fees goes towards reducing CLA's operating deficit[49]. Shouldn't this interest be kept aside to be distributed to authors at the time of distribution? Furthermore, in the annual review, under the heading 'operating costs' it goes on to say –

> *Administration costs were £2.6 million in 1998-99 and as such were within the figure budgeted for the year*[50].

The operating costs breakdown for 1998-99 in the 1999 annual review, add up to £1,184,936 million – certainly not to £2.6 million, nearly a difference of a million pounds. Ultimately, the one question all this boils down to is – what happens to the money received by CLA and how accurate is CLA's dealings with the income received and fees distributed?

The reason that was offered for the year 1999 was that at the time of publishing the annual review for 1999, and due to a tri-partite agreement of 1999, there was undistributed fee of £ 19.2m.

> *The distributions programme for the year had been held back due to the delay in finalising the new tripartite details*[51].

Taking an objective stance, it can be argued that 1999 proved to be a difficult year for CLA; given that it was the first time that surveys were being conducted and payments collected from HEIs through the HECA license system, may be things didn't work out as anticipated. Would the beginning of the 21st century tell us a different story? However, 2002 proved to be one of the toughest years faced by CLA, yet, as they awaited the decision of the *UUK v CLA* case which was ultimately decided in favour of UUK. Would it be possible that this was the much needed a wake-up call for CLA? However, a look at the annual review of 2003 unravelled a similar story to 1999.

4.4.2 Annual review 2003

In the same year that CLA celebrated its 20th anniversary and the case of *UUK v CLA* was settled, in favour of *UUK,* CLA also recorded cumulative distributions to right holders, exceeding £188 million. It was the first time in the history of the CLA that distribution has been at such a high with a distribution total of £38.7 million being distributed in the twelve-month period. One of the reasons given for the unexpected change was based on the fact that revenue from licenses available for distribution

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[49] *Ibid.,* at p. 20

[50] *Ibid.,* at p. 23.

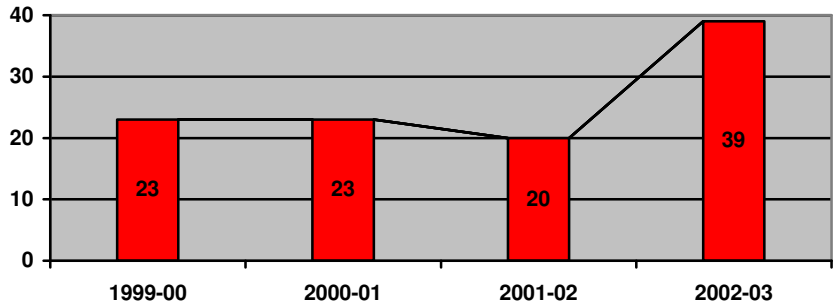
[51] *Ibid.,* at p. 10.

were being held back pending the result of the Copyright Tribunal action involving the case of *UUK v CLA*[52].

Before that, the flow of distribution in the late 1990's was at an average of £15 million. The figure rose considerably following the completion of the HECA Agreement in 1999 and in the years 2000-02 were at an average of £22 million. However, it was not until 2002 that CLA recorded the highest ever distribution of license revenue. One may wonder whether the CLA, being a natural monopoly in the copyright collective licensing market had become complacent until the landmark agreement and case were brought to the forefront.

The graph below shows the scale of distribution in the years 1999/2000 – 2002/2003.

Figure 3: Fee Distributions 1999-2003 (£ millions)



Furthermore, in the Annual Review 2003, under a heading titled, '*Where the distribution money goes'* an explanation is offered – also a first – which goes on to say –

> *CLA distribute the fee revenue for UK right holders to ALCS, PLS and DACS, split in proportions agreed between the societies, and for foreign right holders to their national RRO. Each society in the UK completes the distribution to right holders according to its own procedures determined in consultation with its members. CLA provides a bureau service to PLS for completing the publisher distributions.*

Unfortunately, this is information that is already known and does not shed new light on what really happens to the collected revenue. The accounts section at the back of the Annual Review of 2003 provides a more detailed account of the distributed income, although it does not specifically state how much was distributed to ALCS, PLS and DACS; the accounts simply state that the distributions amounted to £38,704,380 out of £54,711,984 which was available for distribution and that the undistributed license fee stands at £17,459,753.

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[52] *See,* CLA Annual Review 2003 at http://www.cla.co.uk/about/review-03.pdf at p. 18.

Hence, there are once again grey areas. 'Subvention income'[53] which represents revenue retained by the company has been accounted at £4,368,040. However, at no point in the balance sheet is this figure accounted for in the form of a breakdown as to why and for what it has been retained. (For example, the accounts reveal that the operating costs of 2003 amounted to £4,479,270 and at page 27 of the Annual Review a breakdown of this figure is set out). However, as far as the subvention income is concerned, it's lacking in transparency and even if there are good reasons for retaining this sum of money the lay person will not know why the company retained this amount over and above the money that is retained for fixed current assets.

Before moving on to set out CLA's side of the story, it must be pointed out that the most recent *Annual Review of 2004*, sets out the first-ever Distribution Aims adopted by CLA[54]. As a result of the discrepancies relating to distribution of remuneration owed to right holders and the lack of transparency in this respect, CLA has come under much criticism in the recent past. Therefore it is encouraging to note that the Annual Review of 2004 has provided for some significant revisions to the issue of transparency and as such distribution of remuneration. Furthermore, the issue of transparency has for the first time been addressed in the present Annual Review. The Chief Executive of CLA, Peter Shepherd states in his Executive Report of 2004 that –

> *Transparency in distribution methodology is now a primary aim of CLA . . . The first step taken to meet this goal was to develop a set of distribution aims . . . As a result, individual rights holders will be able to understand how the distributions of fees are calculated in each of CLA's revenue sectors*[55].

However, apart from this major revision to the code of practice of CLA, the financial matters remain similar to the previous years with the Balance Sheet once again providing a broad picture without providing the all-important breakdown of the specific distributions: for example how much was transferred to ALCS, PLS and DACS for distribution to authors, publishers and artists respectively? In fact, whilst the Report on the one hand provides for aims to improve the issue of transparency and distribution, on the other hand, the accounts of 2004 makes a statement in relation to the "Accounting policies" which in the present opinion makes matters even less transparent than before. The Accounting Policies states that –

> *The following principal accounting policies have been applied consistently with the exception of the treatment of interest receivable . . . Interest receivable is included as part of the subvention income and is not, therefore, shown separately in the income and expenditure account. In prior years interest was shown separately.*

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[53] Subvention income collected in the year is calculated at an agreed rate of gross license income invoiced in the year. The difference between subvention income collected and that required to cover the company's operating overheads is included in the balance sheet. In the first period of a new contact, subvention income is only recognised when expenditure directly attributable to the distribution of income to the owners of rights has been incurred.

[54] *See,* CLA Annual review 2004 at http://www.cla.co.uk/about/review-04.pdf at p. 7.

[55] *Ibid.,* at pp. 2-3.

This, it is believed, adds to the lack of transparency, because rather than clearly indicate the amount of interest received, yet another item is now 'bundled' under the heading of subvention income.

4.5 CLA's response to the allegations against it

CLA stands firm in their claim that revenue is distributed fairly. In reply to the article published in *The Times Higher Education Supplement* CLA hit back with a press article titled "*Authors not missing out on copyright fortune"*[56] claiming that the findings in the article were "inaccurate and misleading". CLA then went on to explain the financial statistics which made it clear that the findings in the previous article were inaccurate. Interestingly, though, the figures that CLA quote in the press article are a far cry from the statistics published in the Annual Review 1999.

In the press article, the following statement is made –

> *In the financial year just ended, CLA collected a total £24m in copyright fees and distributed a total of £23m (unaudited figure). Of the £20m distributed inside the UK, £7.5m went to authors and £12.5 to publishers. Of the £4.9m in fees collected in HE, 1.1m was paid to overseas right holders, £2.4m to UK publishers and £1.4m to UK authors. The HE figures relate to fees collected in UK HE which is not the same as fees due to UK academic authors. A significant proportion of the material copied in HE is by authors who are not academics or British . . . the figure of £180,000 comes from ALCS and relates to the fees due to UK authors of journal articles only.*

In a further press article, which appeared in *The Times Higher Education Supplement*[57], CLA went on to insist that –

> *As part of the blanket license in higher education, surveys are conducted according to a methodology agreed with the Committee of Vice-chancellors and Principals. These enable fees to be fairly apportioned to individual authors. The license exists because authors and publishers in the UK trust the higher education sector to give a full and fair account of it's copying. Anything less undermines an arrangement that makes it easy to copy widely legally and at reasonable cost. The license balances the interests of copyright-holders . . . and those of higher education users.*

These statements cannot be disputed. The existing system and the blanket license system is the most convenient to right holders, as members of CLA, and to users such as HEIs. The surveys assist CLA to distribute the license fees appropriately. None of this is disputed. However, the issue is that of the lack of transparency, which raises a number of questions, and has left them unanswered.

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[56] CLA Press Release, "Authors not missing out on copyright fortune" (01 June 2000) at http://www.cla.co.uk/media/press_releases/press46.html

[57] Peter Shepherd, "License to fulfil" (09 June 2000) at http://www.thes.co.uk

In responding to the issue of transparency, CLA states that in relation to the HECA license of 1999 CLA is confident that 'its license terms are reasonable and that its case will stand up to scrutiny since it has always been entirely transparent in its dealings with the Higher Education sector'[58]. Furthermore CLA claims that it 'remains committed to constructive negotiations on the terms of the new license and sees no reason why it should not be possible to reach an amicable solution that reflects and rights and needs of both users and copyright owners'[59].

In support of these claims, an academic author, Gerald Cole[60], a former lecturer and researcher in Higher Education has endorsed CLA's views and in CLA's newsletter of winter 2000, claimed –

> *Collective licensing provides a framework within which copying can be controlled and paid for. Users do not have to seek clearances from individual publishers or authors but can channel their requests through a collecting society, which will also handle the financial transactions on their behalf. Authors and publishers can be assured of receiving fees from the collecting body . . .The community as a whole must face up to its responsibilities to those who contribute to the nation's intellectual capital.*

Ultimately, whatever criticisms we make or how much greener the grass may seem on the other side, it cannot be ignored that CCS and in the present context, CLA is doing a sterling job. If collecting societies or CLA did not exist, one cannot begin to imagine the consequences authors and performers in particular would have to face in today's technologically advanced world. How can authors, artists and publishers keep track of their works, which can now be copied in UK, USA, China and New Zealand at the same time with modern technology such as the internet? How would they deal with the high transaction costs of copyright administration? As such their importance must be re-iterated. Yet, their tendency to abuse their monopoly position as was seen in *UUK v CLA* cannot be ignored. The problem stems from the fact that one of the characteristics of collecting societies and for example, CLA, is that it is a natural monopoly and does not face any competition, thus leading to the abuse of their monopoly position. If there were to be competing collectives the situation may be different. As such, the question is how can the existing system be made better? Is there a solution?

5. Solutions

5.1 From across the Atlantic (USA) – Competition amongst collectives

One of the features that has been absent from collecting societies within UK and other European countries is competition amongst collectives. The situation is different in USA where competition is strongly encouraged. There appears to be three reasons for the lack of competition in UK and a number of other European countries –

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[58] CLArion, *Newsletter of the Copyright Licensing Agency,* Winter 2000, p.2.

[59] *Ibid.*

[60] Gerald Cole is also an author-director of CLA.

(1) Government regulation authorises only a single collective to administer a particular right, for example in countries like Austria, Germany and Switzerland where collectives must be licensed by the government;

(2) Government policies that mandate open entry and equal treatment of members may lead to a single collective; and

(3) Efficient negotiation between the monopoly collective and user groups may eliminate any incentive for competitive entry.

Besen, Kirby and Salop[61], three American economists carried out some research in to competing collectives in the 1990's. They looked at a monopoly collective and established that if a second 'closed' collective[62] enters to compete with the monopoly 'closed' collective, then each collective takes the membership of the other as given and makes its best response and their equilibrium behaviour would be simple to determine. They also went on to assume that a monopoly closed collective has a 'surplus' (difference between license fee and cost of creating a work and administration) that is distributed equally among the collectives 'founding' members. Additional members who enter the collective will be paid the cost of creation of their work, but not a share of the surplus.

A further feature of this competitive system, the maximum all-or-none license fee that each collective can demand will *equal the additional or incremental value of its members' works to the licensee (emphasis added)*. In other words there will be competition between the collectives to attract more successful members, but not necessarily the up-and-coming author. Each collective will attempt to maximize its surplus per member to attract members, assuming that it can charge a license fee equal to the incremental value of its repertory, reflecting the incremental value of its members. Equilibrium will arise when neither collective wishes to increase or decrease its own membership. This equilibrium has three main characteristics –

(1) Each collective will receive a smaller license fee than if it had the same membership but there were no competing collective. This is because each collective obtains only the incremental value of its repertory. As such, even if both collectives offer blanket licenses, the licensee will obtain a portion of the surplus.

(2) Entry of a second collective will increase the combined membership of both collectives. The aggregate membership of both collectives would be larger than what a single closed collective would choose.

(3)The combined membership of the two collectives will not exceed the optimal number of creative works.

Additional collectives will thereafter enter only if the administrative costs are small. If the administration costs are small, competition among collectives may result. One of the methods to address this issue is to require single collectives to compete in issuing licenses but permitting them to combine for purposes of administration – a solution that has the additional benefit of eliminating duplication of administrative

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[61] Besen Stanley M., Kirby Sheila N., & Salop Steven C., An Economic Analysis of Copyright Collectives (1992) 78 *Virginia Law Review*, pp. 383-415.

[62] A closed collective essentially means where the collective limits its membership. By its nature, this kind of collectives reflects discrimination amongst members.

costs. But, if the collectives remain small in equilibrium, providing for joint administration may not bring about the efficient result. Or it may be that the equilibrium is so small that the collectives can tacitly collude in setting license fees.

Important factor should be that there should be no barriers to entry. Without barriers competition among collectives should drive license fees to a level reflecting the costs of composing songs plus the costs of administration. Competition will lead to production of efficient number of works. Based on this theory it is argued by the three American economists that the presence of competing collectives as in the case of the competing performing rights societies in USA, i.e. ASCAP and BMI[63] makes government regulation unnecessary. Yet, government regulation may still be needed as barriers to free entry may exist in the form of higher costs for later entrants; entry by new collectives may take time; and there may be long-term contracts between songwriters and collectives or between collectives and users.

Whilst the benefits of competing collectives are clear from the above facts, the drawbacks seem almost non-existent. Set out below are some of the possible drawbacks or risks that may arise as a result of competing collectives.

5.2 Drawbacks of competition amongst collectives

The point in looking towards competition as a solution is to break the monopoly power. However, in the effort to create competition, the writer wonders whether it is possible that the competitive system may backfire leading to an even bigger empire of collectives and a threat of an even bigger monopoly.

Such risks can exist in the form of mergers or concerted practices. Mergers happen because companies want to expand whilst saving on money (by integrating their operations). As such, a merger or a 'business marriage' occurs when two or more parties combine to pool their activities in a particular field, often creating a new, jointly owned operative vehicle for this purpose, with its own management and access to sufficient resources.

Up until 01 May 2004, mergers were regulated by Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings[64] and by the Monopolies and Mergers Commission in UK. The Application of Council Regulation (EEC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings[65] (*the EC Merger Regulations*) came in to force on 1 May 2004 following the Enterprise Act of 2003 in UK. Broadly speaking mergers involving enterprises with an aggregate world-wide turnover of more than Euro 5bn (around £3.5bn) and where the aggregate Community-wide turnover of each of at least two of the enterprises concerned is more than Euro 250m (around £200m) will be investigated by the European Commission taking into account the views of Member States. UK's Office of Fair Trading (OFT) and Competition Commission will regulate mergers, which do not come within this ambit. Generally, the UK competition authorities can only consider mergers if the turnover in the UK of the enterprise being taken over exceeds £70m, or the merger creates or increases a

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[63] American Society of Composers, Authors and Publishers (ASCAP) established in 1914 and Broadcast Music Inc (BMI) established in 1939.

[64] OJ L 395 , 30/12/1989.

[65] OJ L 24/1 29/01/2004.

25% share in a market for goods or services in the UK or a substantial part of it. There is no general requirement to notify mergers to the UK competition authorities.

There are also other rules which regulate whether a merger will get the go-ahead green light, of which one of the new provisions under the EC merger regulations is the substantive test which sets out that mergers which would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market. Given the figures set out above and the new substantive test that has come in to play under the EC merger regulations, alongside the identical market they operate in, it is unlikely that competing collectives will merge and as such this risk can be ruled out.

As far as concerted practices are concerned, Article 81(1) of the EC Treaty[66] states that –

> *The following shall be prohibited as incompatible with the common market: . . . concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:*
>
> *(a) Directly or indirectly fix purchase or selling prices or any other trading conditions;*
>
> *(b) Limit or control production, markets, technical development, or investment;*
>
> *(c) Share markets or sources of supply;*
>
> *(d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage* . . .

A concerted practice is 'a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. . .'.[67]

The object of the EC Treaty in creating the concept of concerted practice 'was to forestall the possibility of undertakings evading the application of competition rules by *colluding in an anti-competitive manner* falling short of a definite agreement' *(emphasis added)*.[68] It is intended to catch collusive conduct between or amongst undertakings, which is a product not of an agreement, but rather that of a nod and wink!

Because of its nature the question that is most frequently raised is how can concerted practices be proved especially when they go to great lengths to cover their tracks?

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[66] Before the Amsterdam Treaty came in to force in 1999, Article 81 was previously Article 85.

[67] Case 48/69 *ICI v Commission* (Dyestuffs) [1972] ECR 619 at 655 as referred to in Lane Robert, *EC Competition Law* (England: Pearson Education Limited; 2000), p. 53.

[68] *Ibid.,* at p. 54.

Generally, parallel conduct, which is suspiciously uniform, shows signs of concerted practices. Yet again what about intelligent adaptation to market conditions and innocent parallel behaviour? There appears to be a fine line in oligopolistic markets in which the normal conditions of the market are marketed by parallelism. As such and on the facts set out above, a more realistic drawback of competing collectives could be the risk of concerted practices.

6. Conclusion

Reflecting on the arguments set out above, three broad conclusions can be established. The first conclusion, drawn from the first ten pages of the paper illustrates the historical reasons for having set up collecting societies and the important functions that they have performed throughout the years. As already pointed out in the preceding pages, it must once again be emphasised that –

> *The formation of collective societies to administer copyrights is an efficient means by which the transaction costs can be greatly reduced, since most of the creations in each collective have the same set of users. Hence, even if it is not profitable for individual copyright holders (who are quite successful) to negotiate their intellectual property right with the user set, doing so collectively with each member of the collective bearing only a fraction of the cost can make transactions feasible and worthwhile*[69].

The paper then went on to reveal the negative side to collecting societies, from the point of view of CLA, which was taken before the Copyright Tribunal by UUK in 2001. The focus of the discussion was hence on CLA – to illustrate and establish the second conclusion that copyright collecting societies such as CLA in its interaction with HEIs has exposed some grey areas whilst at the same time shown that they have the tendency to abuse their monopoly position, being a natural monopoly. In the introduction to this paper a number of questions that were seen to make up these grey areas within CLA were raised. The middle section of the present paper attempted to answer these questions by demonstrating that the money, which comes in to CLA from HEIs, is not always accurately distributed to the rightful copyright owners. CLA employs a survey system so that through the survey data that is collected and analysed it is possible to form the basis for the distribution of license fees. However, whilst the paper highlighted the benefits of having such a regulated survey system in place, the flaws of the survey system were also raised and discussed. An insight in to the CLA Annual Reviews of 1999 and 2003 drew further attention to the main question: is the license fees channelled by HEIs in to CLA distributed fairly to authors, publishers and artists?

The third and final conclusion, which can be drawn from the paper, is that the concept of collecting societies is good, but the system and the manner in which it is run can certainly be made better. A solution in the form of competing collectives as seen in USA confirms that that could be the answer in tackling with the problem of abuse of monopoly position. However, it is possible that solutions can throw up further problems, as was pointed out – in the form of mergers and concerted practices. These, the writer hastens to add, are more of a 'possible risk' than actual prevalent

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[69] *Supra* pp. 10-11.

problems within the competing collective system. Furthermore as already argued, the 'risk' of a merger can be written off.

Ultimately, all the above arguments can be summarised in to a single phrase: 'old wine in new bottles': the concept of collecting societies is good, but the system can be made better as the present system gives rise to grey areas and drawbacks generally, as was illustrated in the foregoing pages. As such the competing collective system as seen in USA may be the way forward, but, until it is tried and tested in UK, a concrete solution remains unclear.