

CASE NOS: CT 71/00, 72/00, 73/00, 74/00, 75/01
IN THE COPYRIGHT TRIBUNAL
REFERENCES UNDER SECTION 118, 119 and 121
OF THE COPYRIGHT, DESIGNS AND PATENTS ACT 1988

B E T W E E N:

**UNIVERSITIES UK (FORMERLY
COMMITTEE OF VICE-CHANCELLORS AND PRINCIPALS OF
THE UNIVERSITIES OF THE UNITED KINGDOM)**
Applicant

- and -

COPYRIGHT LICENSING AGENCY LIMITED
Respondent

- and -

DESIGN AND ARTISTS COPYRIGHT SOCIETY LIMITED
Intervenor

INTERIM DECISION

Before Mr Christopher Floyd QC, Chairman: Mr Evelyn Cribb, Mrs Angela Howorth

Mr Henry Carr QC and Dr Heather Lawrence instructed by Baker & McKenzie for the Applicant

Mr Robert Englehart QC and Mr Robert Howe instructed by Denton Wilde Sapte for the Respondent

Mr Pushpinder Saini instructed by Denton Wilde Sapte for the Intervenor.

Hearing dates 10th, 11th, 12th, 13th, 14th, 17th, 18th and 20th September 2001.

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Introduction and parties

1. How much money should Universities be required to pay under a Licensing Scheme for the photocopying by their staff and students of the literary and artistic copyright material contained in books and journals? Should there be a unitary licensing system, or a two-tier one in which an additional fee and advance clearance is required for Course Packs? What is meant by the exclusion from the current Licensing Scheme of “separate illustrations, diagrams and photographs”? These are the three principal questions which the Tribunal has to decide in these References. For those interested only in the answers to the questions, there is an overall summary at the end of this long Decision.
2. The Applicant is Universities UK Limited (“UUK”). The Applicant was formerly the Committee of Vice Chancellors and Principals of the United Kingdom, known as CVCP. The Applicant represents the interests of Higher Education Institutions (“HEIs”) in the United Kingdom. In the rest of this decision we will not distinguish between CVCP and UUK, as there is no need to do so.
3. The Respondent is the Copyright Licensing Agency (“CLA”). The members of the CLA are the Authors Licensing and Collecting Society (“ALCS”) and the Publishers’ Licensing Society (“PLS”). The CLA acts as an agent for its members under specific mandates for the purpose of licensing copyrights owned or controlled by its members. There is no dispute that the CLA is a “licensing body” within the meaning of Section 116(2) of the Copyright Designs and Patents Act 1988¹. However it differs from some other licensing bodies (such as the Performing Right Society) in the fact that it is

¹ “In this chapter a ‘licensing body’ means a society or other organisation which has as its main object, or one of its main objects, the negotiating or granting either as owner or prospective owner of copyright *or as agent for him*, of copyright licences, and whose objects include the granting of licences covering works of more than one author” emphasis supplied

not an assignee of the works that it is authorised to license. The CLA was incorporated in 1983.

4. The Intervenor is the Design and Artists Copyright Society Limited (“DACs”). It was also incorporated in 1983. The objects of DACs include the promotion of the copyright interests of visual artists. It is also a licensing body within section 116(2) of the Act, enjoying the benefit of mandates from its members to act as their agents in relation to licensing of their rights. Since July 1998 DACs has, in turn, appointed the CLA as its agent for the purpose of granting the right to HEIs to make photocopies of its members’ artistic works.
5. The present series of references was commenced during the currency of a licence dated March 1998 between the CLA and the HEIs. That licence was expressed to run for three years. It expired on 31st January of this year, before the hearing. We refer to it nevertheless (as it was referred to throughout the proceedings) as “the Current Licence”. The Current Licence is in fact the successor of two previous licence agreements entered into between the CLA and UUK: the first in 1989 and the second in 1993.
6. The Current Licence is referred to as a “blanket” licence. It is so called because, subject to “Course Packs” (which we deal with in the next paragraph) the licence fee is calculated on the basis of a flat rate per “full time educational student” or “FTES” at the institution in question and because, again subject to general restrictions in the terms of the Licence, there is no upper limit on the number of photocopies which may be made nor any restriction on what may be photocopied. To calculate the amount of royalty it has to pay in a year, the institution multiplies the number of students by the flat rate. The amount of royalty per FTES was fixed by the Current Licence at £3.09 for 1998/9, £3.17 for 1999/2000 and £3.25 for 2000/01. We will have to return in somewhat more detail to the terms of the Current Licence later in this decision.

7. The licence fee payable under the Current Licence does not cover the production of Course Packs, which are defined compilations of photocopied material provided to support a course of study. We will need to return to the somewhat troublesome definition of “Course Packs” in due course. The Licence requires that Course Packs are the subject of separate payment and individual clearance through the Copyright Licensing Agency Rapid Clearance Service (“CLARCS”). Although the rights holder may authorise the CLA to grant consents for Course Packs at a “default rate” of 5p per page, or any other rate which it chooses to impose for Course Packs, not all publishers have chosen to do so. This gives rise to a challenge to the Tribunal’s jurisdiction over CLARCS: it is said that CLARCS is not a “licensing scheme” within the meaning of the Act.
8. UUK contend that the two-tier licensing system created by CLARCS is uncertain, restrictive and cumbersome. They contend that the Tribunal does have jurisdiction over CLARCS, or at least sufficient jurisdiction to dispense with it, and that we should make an order which removes the two-tier structure which CLARCS creates.
9. Until some time at the beginning of 1999 the licence granted by the CLA excluded from its scope certain separate artistic works. There is a dispute about the effect of this provision, but it appears that the Universities had assumed that the exclusion did not prevent the copying of works which appeared within the text itself. Indeed, it is common ground that a licence which prevented, for example, the copying of charts or diagrams forming part of a scientific article would be of little or no value, as such diagrams often interact with the text in such a way that neither is comprehensible without the other. The same may not be true of an incidental photograph not specifically related to any passage in the text: but a case-by-case analysis of this kind is obviously impractical and was never embarked on.
10. In May 1999, following their appointment the previous year as agents for DACS, the CLA wrote directly to the Vice Chancellors of the Universities to inform them that, with effect from August 2000, artistic works which were

not separate from the text would also be excluded from the licence. The offer was accompanied by a Protocol, the so-called Artistic Works Protocol, which granted a further licence for all artistic works found in the Licensed Material subject to payment of a further fee of £3.17 per FTES for certain students or departments. If all the HEIs had accepted the Artistic Works Protocol, the income which CLA received from the Current Licence would have increased greatly. Moreover it is difficult to see how any HEI could have continued to allow photocopying if it had not signed up to the Protocol. A “text only” licence would not meet the copying needs of an HEI.

11. Although some of the HEIs signed up to this Protocol at a very much reduced rate of 65p for *every* FTES, it is true to say that the HEIs as a whole regarded the proposal with very great concern. We have no doubt that the proposal was the major factor in persuading UUK to commence the present references. At some point the CLA must have appreciated that their proposal would not stand up well to the scrutiny of this Tribunal, because they withdrew it very shortly prior to the commencement of these references in July 2000.
12. The parties are now all agreed that the licence should cover all artistic works included in published editions whether they are full page works or embedded in the text. The question of whether there should be any and if so how much of an uplift on the royalty rate as a result of the inclusion into the licence of separate artistic works is a matter which we have to decide.

The conduct of the References

13. One feature of these References which has concerned all three members of this Tribunal is the scale and consequent cost of the proceedings before us. We were provided with 24 lever-arch files of materials to read in advance of the hearing. The written evidence is extensive, and extremely detailed. No point, however irrelevant, is allowed to go unanswered, with the result that the second round witness statements turned out in some cases to be longer than the original ones. We think that the Tribunal should consider in future

at the Directions hearing whether unrestricted second round evidence of this kind should be permitted. It was certainly not helpful in the present case.

14. It should further be borne in mind that the issues in references to the Copyright Tribunal are those defined by the pleadings. There is no point in going to the trouble and expense of having pleadings if the evidence is then allowed to touch on every aspect of the licensing scheme which is the subject of approval or dissatisfaction by the party concerned and whether or not relevant to any pleaded issue. We feel that this basic principle was not fully complied with in this case.
15. No doubt as a result of the volume of material thus created, it was originally suggested that 15 hearing days would be necessary to dispose of the case. We set it down for 10 days. In the result only 8 sitting days were necessary. Proceedings of the magnitude which the parties or their advisors contemplated in this case are not necessary to resolve the issues which arise for decision.
16. To do its job effectively the Copyright Tribunal must be accessible at reasonable cost. It exists at least in part to prevent unreasonable terms being imposed on licensees who have little choice but to take a licence. Yet in the present case we heard evidence from both sides that a reference to the Copyright Tribunal was regarded as a last resort: a failure of a most serious kind. The reason for this view is the perception that the proceedings are necessarily extremely costly, intolerably lengthy and highly complex. The danger that lurks in such a state of affairs is that the cost of a reference to the Tribunal could be seen as an incentive to the acceptance of unreasonable terms, in conflict with the above objective.
17. Aspects of Copyright Tribunal proceedings (for example its special rules about cross examination) are deliberately designed to save time and cost. The same philosophy should be applied to the written stages.

The parties' positions

18. The positions of the parties in relation to the issues in the References are as follows.
19. UUK contend that the rate should be 60 pence per FTES, with no exclusion of Course Packs². They do so on the basis of a comparison with licences granted by the CLA to schools and because, they say, much of what is covered by the licence comes within the statutory defence of “fair dealing”. This would represent a significant reduction on the royalty under the Current Licence, coupled with a significant expansion in the scope of permitted activities under it.
20. The CLA wish the current arrangements for Course Packs to remain the same. As to the royalty, they contend that the Tribunal should not interfere with the royalties payable under the Current Licence for the period it was in force. For the period after the term of the Current Licence (i.e. from 1st February, 2001), they contend that the rate should be no lower than £3.34, i.e. £3.25 (the royalty for the last year of the Current Licence) plus RPI adjustment. They go further and suggest that there should be a substantial increase from the current level of fees. They say that a “fair rate” would be in the region of £13.09 per FTES less such discount as the Tribunal thinks to be appropriate to allow for fair dealing copies. On this basis, they say that a fair fee would be in the order of £10.25 per FTES. To this should be added whatever uplift may be appropriate if separate artistic works are to be brought within the scope of the Licence. At the lowest, the minimum figure should be £4.44 plus any addition for separate artistic works. This uses the 5p per page figure (inflation adjusted) and current survey data for the number of copies.
21. It can be seen that, not surprisingly, the main parties' positions straddle the royalty agreed for the purposes of the Current Licence. UUK submit that

² see UUK's Opening Skeleton §119

they should pay less than a fifth of what they have been paying under the Current Licence and receive considerably more extensive rights. On the other hand, although the CLA avoid putting a top figure on the rate, their figure of £10.25 excluding separate artistic works is already more than three times what is being paid under the Current Licence.

22. DACS's intervention was directed to ensuring that the interests of artistic copyright owners were properly represented. They played a relatively minor role in the proceedings as a whole and called only one witness. Their contention was that an uplift in the region of 20% would be appropriate for an all-inclusive licence for artistic works³.

The Statutory Framework for these references to the Copyright Tribunal

23. Under Sections 118 and 119 of the Act a proposed or current licensing scheme can be referred to the Tribunal. After hearing the case the Tribunal is empowered to make such order either confirming or varying the scheme or proposed scheme so far as it relates to cases of the description to which the reference relates as it may determine to be reasonable in the circumstances.
24. The approach which it is appropriate for the Copyright Tribunal to take in a case such as the present was not seriously in dispute. In determining what is reasonable, we are required by section 129 to have regard to the availability of other schemes to other persons in similar circumstances and the terms of those schemes and exercise our powers so that there is no unreasonable discrimination between licensees under the scheme and licensees under other schemes operated by the same person. In other words we must look at comparables. We will endeavour to apply this approach.
25. Section 130 provides further statutory guidance where the licence, as here, relates to the reprographic copying of published literary, dramatic, musical or artistic works. In such circumstances we are required to have regard to

³ DACS opening skeleton §21

- (a) the extent to which published editions of the works in question are otherwise available,
- (b) the proportion of the work to be copied,
- (c) the nature of the use to which the copies are likely to be put.

These are all factors which we consider in the course of this decision.

26. Section 135 makes clear that the mention of the specific matters referred to above does not affect our duty to have regard to all relevant considerations.

27. The four main references which are before us are as follows:

(1) Reference 71/00 was brought under Section 119 of the Act by UUK in respect of the Current Licence and the variations sought to be invoked in respect of artistic works.

(2) Reference 72/00 was brought under Section 118 of the Act by UUK in respect of the artistic works variation alone on the basis that it was a proposed licensing scheme.

(3) Reference 73/00 was brought under Section 118 of the Act by UUK on behalf of specific HEIs who had signed the Artistic Works Protocol (“the Protocol HEIs”) on the basis that it was a proposed licensing scheme.

(4) Reference 74/00 was brought under Section 119 of the Act by UUK on behalf of the Protocol HEIs to address the possibility that the Protocol HEIs were not part of the main licensing scheme.

28. Somewhat late in the day UUK started a fifth reference. This was to deal with the argument referred to above that CLARCS was not a licensing scheme and that accordingly the Tribunal had no jurisdiction to make orders in respect of it. The reference is brought under Section 121(2) of the Act which provides as follows:

“A person who claims, in a case excluded from a licensing scheme, that the operator of the scheme either: -

- (a) has refused to grant him a licence or procure the grant to him of a licence or has failed to do so within a reasonable

time of being asked, and that in the circumstances it is unreasonable that a licence should not be granted, or

- (b) proposes terms for a licence which are unreasonable
may apply to the Copyright Tribunal”

Subsection (4) provides that if the Tribunal is satisfied that the claim is well-founded, it shall make an order declaring that, in respect of the matters set out in the order, the applicant is entitled to a licence on such terms as it may determine to be applicable in accordance with the scheme, or as the case may be, to be reasonable in the circumstances.

29. Unlike Sections 118, 119 and 120, Section 121(2) does not expressly permit applications to be made by organisations claiming to be representative of persons requiring a licence: on its face it is only available to the actual person who makes the claim identified in the subsection. UUK is not a person who can claim to have been refused a licence by the CLA: only an individual HEI could do that.
30. We agree with the CLA that Section 121 cannot be used in the way that UUK seek to use it. Anticipating this further difficulty, Mr Carr QC, who appeared for the UUK in the first five references, obtained instructions during the hearing to present a yet further reference on behalf of one of the HEIs. However, for reasons which will appear, we have come to the view that we have jurisdiction to deal with CLARCS in the main references. It is not necessary for us to look further into either the fifth or sixth references.

Statutory Provisions relating to copying in educational institutions

31. Before embarking on the exercise of determining what it is reasonable to pay for a reprographic copying licence, the Tribunal must have in mind a correct view of what copying activities of staff and students at an HEI are likely to be an infringement of copyright in law.
32. The most important provision for present purposes is Section 29. That section provides that:

“Fair dealing with a literary work, other than a database, or a dramatic musical or artistic work for the purposes of research or private study does not infringe any copyright in the work.”

Subsection (3) provides that certain things done *other than by the researcher or student himself* are not fair dealing if

“(a) in the case of a librarian, or a person acting on behalf of a librarian, he does anything which regulations under section 40 would not permit to be done under section 38 or 39 (articles or parts of published works: restriction on multiple copies of same material), or

(b) 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.”

33. The cross-referred sections 38 to 40 are sections which take out of the scope of infringement copying by librarians of an article, or a reasonable proportion of a book if the librarian is satisfied that the person requiring the copies requires them for the purposes of his research or private study, provided that not more than one copy is required or more than one article from the same journal.
34. Clearly, a student who takes a photocopy for the purposes of his course of a relevant article, or a relevant short passage from a book is likely to do so in circumstances which amount to fair dealing. At the other extreme, if he were to take a photocopy of a whole textbook, we think that his dealing would not be fair, even if done for the purposes of private study.
35. Materials provided by the staff for distribution to a number of students at more or less the same time would not in general amount to fair dealing because of the exception in section 29(3)(b). If a lecturer were to instruct every member of his class to make copies of the same material, we consider that this too would not be fair dealing. But the mere distribution of a reading list, without any instructions to copy, is not in our view an infringement of copyright at all.

36. Section 32 contains a defence of very limited application. It permits *non-reprographic* copying for the purposes of instruction or of preparation for instruction.
37. Section 36 allows reprographic copying of passages from published literary, dramatic or musical works by or on behalf of an educational establishment for the purposes of instruction provided that not more than one per cent of any work is copied in any quarter, and provided that a licence is not available.
38. Sections 137-140 contain express powers relating to reprographic copying by educational establishments. Section 137 allows the Secretary of State to make an order extending a licensing scheme for reprographic copying by educational establishments to *works* which are excluded unreasonably from the scope of the scheme. Before he can do so it must appear to him that making the works subject to the scheme would not conflict with the normal exploitation of the works or unreasonably prejudice the legitimate interests of the copyright owners.
39. The above provisions make it clear that the legislature has recognised that:
- (a) dealing which is both fair and for the purposes of research and private study should not be an infringement of copyright;
 - (b) the fair dealing defence of research and private study is a personal one, and will not normally extend to the making of multiple copies for others;
 - (c) there is no general defence of reprographic copying for the purposes of instruction or tuition;
 - (d) even in the case of the copying of very small percentage amounts of any work, the legislature has decided against a defence for educational establishments if a licensing scheme is available.

In declining to create a wide generalised defence for educational establishments the legislature has struck a balance between the interests of copyright owners on the one hand, and the interests of education and

scholarship on the other. A healthy publishing industry is important in general, but of particular importance to those in education. Wholesale exemption from the copyright laws for educational establishments would be damaging to the publishing industry, and in consequence damaging to education. On the other hand the publishing industry depends on academic authors for much of its raw material. If education is burdened too heavily with copyright restrictions, teaching is inhibited and scholarship is discouraged, to the disadvantage of the public interest in general, and the publishing industry in particular. It is a good example of a symbiotic relationship. Indeed that is what Dr George Richardson a former chief executive of Oxford University Press as well as Reader in economics at the University of Oxford called it.⁴

40. The arguments leading to this balancing of interests can be seen laid out in the Report of the Committee to consider the law on Copyright and Designs under the chairmanship of the late Mr Justice Whitford (“the Whitford Report”) presented to Parliament in March 1977. At paragraph 268, under the heading “Education” the Committee say:

"In view of the growth of reprography as a problem in the educational field since the time of the Gregory Committee, we have considered first the question whether there should be any express exceptions in favour of educational establishments at all. We feel that the fact that 'education' is a good cause is not in itself a reason for depriving copyright owners of remuneration. Nobody suggests that the makers of notebooks, compasses and rulers should supply these products to educational establishments free of charge. Although the types of material used in such places today are very different from the text books of the past and indeed are much more diverse, education is still in a large measure dependent upon the work of authors, artists and composers. Education is equally dependent upon the work of the publishers who first produced the material which the authorities want to copy for educational purposes. The majority of educational submissions were in fact of the view that, although they should be completely free to copy, it is right that they should pay copyright owners a reasonable fee in respect of the reproduction of copyright material."

We find those observations to be true in the light of the evidence we have heard some 24 years later.

⁴ First Expert Report §29

The Current Licence

41. The Current Licence grants to each HEI

“the non-exclusive right for the Authorised Persons on the Licensed Property upon and subject to the terms and conditions herein provided:

- (a) to make or receive (or permit the making or receiving of) multiple Copies for the same occasion or purpose. Such Licence shall not include the right to copy from Copies save for the purpose of producing the whole or any part of a Course Pack or to make copies from copies held in Short Loan Collections on the Licensed Property in both cases subject to Clauses 3(h) and (j)
- (b) subject to applying for and receiving clearance through a CLARCS Copying Agreement to make and distribute Course Packs and to make and distribute Copies of Distance Learning Education Material;
- (c) to copy Licensed Material in accordance with Clause 8.

42. “Copies” are defined as “reprographic or duplicated reproductions on to paper of Licensed Material”. Licensed Material is:

“original published editions of books, looseleaf works, law reports, periodicals and journals published in the Mandating Territories or by publishers included in the List of Participating US Publishers in which copyright subsists but excluding Excluded Works and Categories of Excluded Materials as published by the CLA from time to time. For the avoidance of doubt unpublished material, including theses, are not the subject of this Licence.”

43. Schedule 1 to the Licence includes a list of the Excluded Categories. At the date of the Current Licence the Excluded Categories included such things as printed music, maps, charts or books of tables, bibles, liturgical works and newspapers. Of particular relevance is paragraph 9 of the Schedule, the exclusion of “separate illustrations, diagrams and photographs”.

44. “Course Packs are defined as

“a compilation (whether bound or looseleaf) of four or more photocopied extracts of Licensed Material from one or more sources which compilation:

- (a) exceeds twenty five pages of such Licensed Material, and
- (b) is intended to provide the students registered on a Course of Study with a compilation of materials designed to support the teaching of that Course of Study; and
- (c) is prepared and distributed in advance of and/or during a Course of Study and either piecemeal or in one batch.”

45. Clause 3 sub-clauses (a) to (k) contain numerous restrictions on the copying permitted under the Licence. Clause 3(e) is concerned with restricting the amount of copying in relation to the whole of any work:

“(e) the HEI shall ensure that the Copies which are distributeddo not during any one Course of Study exceed either singly or in aggregate the greater of five per cent of any published edition, or:

- (i) in the case of a book one complete chapter;
- (ii) in the case of an article in an issue of a serial publication or in a set of conference proceedings, one whole article;
- (iii) in the case of an anthology of short stories or poems one short story or poem not exceeding ten Pages in length;
- (iv) in the case of a published report of judicial proceedings, the entire report of a single case;”

46. Sub-clause (h) provides what is to happen about Course Packs:

“(h) if the amount of copying falls within the definition of a Course Pack then permission for those Copies must be sought pursuant to a CLARCS Copying Agreement PROVIDED THAT:

- (i) the creation and copying of Course Packs (whether in bound or looseleaf form) may only take place once an Authorised Person has obtained permission through a CLARCS Copying Agreement; and
- (ii) no Course Pack is licensed for sale by the Licensee but Course Packs may be supplied to Authorised Persons and registered distance learning students of the HEI at a price set to recoup only the cost of production (including the CLARCS fee) and not for profit; and

- (iii) every copy shall bear a prominent notice on its cover and on the first page of the text stating the academic year of its creation and that the material is not licensed for resale or for further copying.”

47. A “CLARCS Copying Agreement” is defined by the Licence as “the agreement as defined in the Fourth Schedule and as amended from time to time by the CLA”. The reference to the Fourth Schedule is presumably a mistaken reference to the Third Schedule. That schedule, after defining a number of terms, states that a CLARCS Copying Agreement “comprises the written components set out in this Schedule and also in the CLARCS User Handbook together with the following components (which are particular to each CLARCS Copying Agreement):

- (a) the Call Details
- (b) the Details
- (c) the Special Conditions, if any
- (d) the Permission Reference Number.

The CLARCS system

48. It is necessary to explain in some detail the working of the CLARCS system. The following summary of the ways of obtaining CLARCS clearance is taken from the evidence of Mr Peter Shepherd, the Chief Executive and Company Secretary of the CLA.
49. CLARCS is administered by a specialised team within the CLA of three permanent and four temporary staff. The temporary staff are employed for the peak period of August to February. The process is set out in the CLARCS User Handbook. Requests for clearance are usually received from the library staff or a dedicated copyright officer at the HEIs although in a minority of cases, requests are received direct from the academic department within the HEI requiring the Course Pack.

50. Clearance can be obtained in a number of ways. First, the HEI can contact the CLA by telephone, fax or e-mail either to seek clearance or obtain a quote. In order to do this the HEIs have to provide:-
- the account number;
 - their code;
 - their address;
 - their password;
 - a chosen reference;
 - the ISBN or ISSN of the publication to be copied;
 - the title of the publication to be copied;
 - for journals and periodicals, the issue and volume number or dates of issue. If the journal uses article identifiers these can be provided instead;
 - the use to which the copies will be put. This could be for Course Packs or for distribution as part of distance learning;
 - the length of the extract to be copied;
 - the number of copies to be made.
51. On the basis of this information the CLA can advise whether it is mandated to grant permission for the copying to be made and the total cost. Where no mandate exists or the request exceeds the ambit of the mandate, the CLA, with the HEI's consent, will refer the request to the rightsholder. The rightsholder will then contact the HEI directly as to whether permission is granted or not. In rare instances the CLA will refuse permission, for example when the HEI is in arrears to the CLA.
52. A second approach to seeking clearance is for the HEI to use the CLA database to check whether the CLA is mandated in respect of particular titles. This involves accessing the CLA Website and then by using a series of simple screens, entering the ISBN or ISSN number, the purpose of the copying (e.g. for Course Packs), the length of the extract and the number of copies. If the CLA has a mandate for that publication a screen will appear confirming this and cost the request.

53. The rates charged for CLARCS clearance have varied over the years. Under the 1993 agreement it was typically 6 pence, 9 pence or 13 pence per page. Under the 1998 agreement there was a default rate of 5 pence per page but publishers were still free to set their own rates.

Jurisdiction over CLARCS

54. The requirement that Course Packs be separately cleared through the CLARCS system can be seen as having two component parts. The first part is a restriction on the general, so-called “blanket” part of the Licence forbidding copying if the nature of the copying is such as to fall within the Course Pack definition. This is what Clause 3(h)(i) provides. The second part is an agreement on the part of the HEI, where there is an intention to create a Course Pack, to seek permission through CLARCS. This may or may not be obtained depending on whether the rights owner has given the CLA a mandate for CLARCS.
55. Mr Englehart QC, who appeared for the CLA, summarised the jurisdiction point in this way in his opening skeleton:

“It is the CLA’s primary case that, in the circumstances, the Tribunal has no jurisdiction to “include” copying for course packs into the licence, as is suggested by UUK. Chapter VII of the Act does not create a compulsory licensing system. The Tribunal’s jurisdiction extends (in this area) to controlling the exercise by licensing bodies of rights which have been conferred on licensing bodies by the rights owners. The Act does not envisage that the Tribunal should compel rights owners to confer rights on the licensing body. The CLA has not been mandated to give a blanket licence for copying for course packs but only to act as a vehicle for the grant of clearance, where the rights owner is willing, on individual transactions. In short, CLARCS is not a “licensing scheme” within s. 116(1). The grant of a blanket licence for the creation of course packs is not something which the CLA has the right to grant. It is not within the CLA’s repertoire of rights. CLARCS is in truth merely an optional service intended to simplify administration for prospective licence applicants on a transactional basis. There is nothing mandatory about CLARCS and nothing to prevent those who desire to copy for the purpose of course pack creation from seeking a licence direct from the copyright owner.”

56. This argument can be broken down into a number of components:

- (a) is CLARCS, viewed on its own, a licensing scheme?
- (b) if CLARCS is not a licensing scheme, are we deprived of jurisdiction if the blanket licence is a licensing scheme?
- (c) does the absence of mandates for blanket licensing of Course Packs matter?
- (d) if we take steps to bring Course Packs within the blanket licence, are we guilty of compulsory licensing?

57. In summary, we think Mr Englehart is right that CLARCS, on its own, is not a “licensing scheme” within section 116(1) of the Act. However, we do not think that this fact deprives us of jurisdiction over the Course Packs. We do not think that the absence of mandates is relevant. We do not think that bringing Course Packs within CLARCS means that we are engaging in compulsory licensing. It follows that we think that we have jurisdiction to remove the requirement for separate clearance of Course Packs from the Current Licence.

58. Firstly, is CLARCS a licensing scheme when viewed in isolation? A licensing scheme is defined in Section 116(1) as:

“a scheme setting out:

- (a) the classes of case in which the operator of the scheme, or the person on whose behalf he acts, is willing to grant licences, and
- (b) the terms on which licences would be granted in those classes of case.”

CLARCS is really the converse of this. It is a part of the arrangement operated by the CLA where the “operator” is indicating that it may not be willing to grant licences, or at least may not be willing to grant licences without a further opportunity to consent. Furthermore the terms on which it

will grant those licences are not in any real sense “set out”, as they will vary depending on the transaction.

59. It seems to us, however, that to ask whether CLARCS is a licensing scheme, and to decide the question of jurisdiction depending on whether the answer to that question is “yes” or “no” is an incorrect approach. It is common ground that the Current Licence is a licensing scheme. One of the terms of the Current Licence is a restriction on copying to the extent that the copying falls within the definition of a Course Pack. The Current Licence having been properly referred to the Tribunal, we have jurisdiction to consider whether that restriction is reasonable in the circumstances. If we come to the conclusion that it would be reasonable in the circumstances to vary the scheme by removing the restriction, then it would be within our power to do so.
60. In those circumstances does it matter that the CLA have not been mandated by their members to grant blanket licences for Course Packs? It seems to us that this fact cannot deprive us of jurisdiction. Suppose that the CLA’s mandates contained a term that the CLA had no authority to license the works in question at less than £3 per FTES per year. That could not conceivably prevent the Tribunal from ordering a reduction in royalty rate below that figure.
61. A similar argument could have been, but was not, based on the provisions of the Act. It would run like this:
 - a. Section 116 says that a licensing scheme is a scheme which sets out those cases in which “the operator of the scheme... is willing to grant licences”;
 - b. Section 119(1) allows a reference on behalf of a person who claims he requires a licence in a case of “a description to which the scheme applies”;
 - c. Section 119(3) allows the Tribunal to vary the scheme but only so far as it relates to cases of the description to which the reference relates.

The scheme only relates to non-Course Pack copying. Hence, it could be argued, the Tribunal has no jurisdiction to make any order in relation to anything else.

62. We think that this approach takes too narrow a view of “a case of a description to which the Scheme applies”. The language is different from and in our view deliberately wider than Section 116 (“classes of case in which the operator of the scheme ... is willing to grant copyright licences”). Moreover this construction would mean that there could be no widening of a scheme in any respect under Section 119 beyond those classes of case covered by an existing scheme.
63. It is true that Sections 121(1) and (2), in contrast with sections 118 and 119, deal separately with cases which are “covered by a licensing scheme” and cases which are “excluded from a licensing scheme”. No doubt this was necessary in order to provide different criteria for the application in the two types of case. Nevertheless it is to be noted that the requirement in the case of Section 121(1) is that the case be “covered by the scheme”, rather than “of a description to which the scheme relates”. We take the view that the cases to which the scheme relates are those involving copying by HEIs of Licensed Material. The copying involved in the creation of Course Packs involves copying of the same material, by the same people as are involved when copying takes place under the blanket licence.
64. Mr Englehart reminded us that the Act contains specific provision in Sections 137-141 for compulsory inclusion into a licensing scheme of matters excluded therefrom. This was an important basis for his submission that Course Packs could not be included in the scheme compulsorily by exercise of the Tribunal’s jurisdiction under Sections 118 or 119. However we think Mr Carr is right that Sections 137-141 are concerned with the inclusion of categories of *work* excluded from licensing schemes. The Course Pack exclusion does not exclude works from a licensing scheme: it excludes a type of copying of works which are *included* in a scheme.

64. Moreover the submission is based on the suggestion that the existence of the powers for the Secretary of State to take action under sections 137-141 is an indication that there is no concurrent jurisdiction in the Tribunal on a reference under Section 118 or 119. We do not believe that is necessarily right: however it is not necessary for us to decide the point, as the jurisdiction we are being asked to exercise does not overlap with the jurisdiction under the later sections.
65. Almost any exercise by the Tribunal of its jurisdiction to control licensing bodies and licensing schemes can be characterised as “compulsory licensing”. But the exercise by the Tribunal of its jurisdiction cannot occur before the owner of the rights has voluntarily decided to participate in a licensing scheme. As this Tribunal pointed out in *British Sky Broadcasting v PRS* [1998] EMLR 193 at 210 to 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.
66. There is undoubtedly some evidence that publishers are concerned to prevent unrestricted creation of Course Packs, and that it is this concern which gave rise to the restrictions in the Licence, the setting up of the CLARCS system and the withholding by some publishers of a mandate for CLARCS. This evidence, however, falls to be considered when we come to our decision about what is reasonable in the circumstances. The absence of mandates does not trump the Tribunal’s jurisdiction.

Problems with CLARCS

Cost

67. CLARCS is very expensive to administer. CLA revenue figures for the HE sector (which includes a minimal number of non-HEIs) through CLARCS since 1997 has been:-

1997/98 £301,000

1998/99 £519,000

1999/00 £843,000

2000/01 £971,000

68. CLA's total CLARCS costs for 2000-01 were in the region of £550,000. If costs are split in proportion to revenue, a figure of £355,000 is arrived at for the cost of administering CLARCS clearance for the HEIs. This is approximately £189,000 for direct costs and approximately £166,000 for indirect costs re-allocated from other departments.
69. The CLA's costs are not the only costs involved in the administration of CLARCS. Although we do not have figures, it seems to us from the evidence which we have heard that the CLARCS system involves a great deal of administration on the HEIs' side. There can be no possible doubt that the CLARCS system is very much more expensive than the blanket licence to administer. Indeed Mr Shepherd accepted as much in cross examination.

Administrative problems

70. We have referred above to the troublesome definition of Course Packs. Where a lecturer assembles all his material in advance, there is no problem. The material can be looked at and assessed against the definition. But what happens where the same material is distributed but in instalments throughout the course of study, rather than all in one go? Sub-paragraph (c) of the definition includes such material "distributed in advance of and/or during a Course of Study and either piecemeal or in one batch". What of the lecturer who intentionally distributes only three extracts amounting to 25 pages on the first day of his course, so as to avoid the need for clearance? He then distributes a fourth extract: so he goes over the limit into Course Pack copying. Does he now need clearance for all the material? It is said to depend on the lecturer's intention. We can understand why the draughtsman was not content to limit himself to material provided in advance: the restriction could be too easily avoided. But by extending the definition to

piecemeal material he has introduced genuine uncertainty, and created retrospective licensing of what initially did not have to be licensed.

71. UUK called a substantial body of evidence in connection with the practical problems which clearance of Course Packs gives rise to. Not all of the witnesses were required to attend for cross-examination. They did not have to be: the Tribunal's rules permit evidence to be commented on even if not subjected to cross-examination. We also bear in mind the fact that complaints about the operation of a system like CLARCS are more likely to come to light than statements of satisfaction.
72. Course Packs were a significant topic in the negotiations which led to the Current Licence. Although separate treatment and payment for Course Packs was ultimately agreed, it was very clear from the negotiations that the HEIs would have liked to have them removed if the CLA had been prepared to agree.
73. UUK called Elizabeth Gadd, an Academic Librarian at Loughborough University with a professional and research interest in copyright. Prior to her present job she had worked for two years as a Copyright Officer and then Project Manager on Project Acorn, an electronic library project funded by the Joint Information Systems Committee (JISC). She had also worked at University College London seeking copyright permission through CLARCS and directly with publishers to create Course Packs for use by students. In 1997 she co-founded and now co-owns and manages an email discussion list, "Lis-Copyseek", a discussion forum for librarians and copyright permission seekers.
74. In 2000, Miss Gadd was awarded the Elsevier/LIRG Research Award to investigate the copyright clearance activities in UK Libraries through a project entitled "Clearing the Way". As part of this research project she performed an analysis of the year 2000 Lis-Copyseek Archives.

75. Miss Gadd's view was that the Current Licence was unnecessarily complex, necessitating a great volume of additional burdensome copyright clearance both through CLARCS and direct to publishers. Her analysis of the Lis-Copyseek archives revealed that the second largest group of messages (40) related to the Course Pack guidelines supplied by the CLA, and clearance procedures through CLARCS. A recurring theme was where the boundary line lay between "ad hoc" or "fair dealing" copying and Course Pack copying.
76. In the Clearing the Way project Miss Gadd carried out a questionnaire survey and five case study interviews of HEIs. She said that whilst there were some positive comments from HEIs who felt that CLARCS was coping as best as it could or getting better, there were many mixed reports indicating a very variable service, the negative comments making the strongest impression on her. These were strongly worded using verbs such as "appalling", "dreadful" and "terrible". Many complained about "a very poor level of customer service". One person described it as "bureaucratic, old fashioned, not designed with users' needs in mind [and] wasteful of resources", another as "very slow and cumbersome". One respondent found the CLA a prohibitive intermediary between library and publisher, stating that "[CLARCS is] inadequate for my needs, quite often the CLA is unable to clear the quantity I require or clear for electronic use. So time is often wasted going between the CLA and the publisher. The publisher doesn't want to know and the CLA can not move without the publisher amending their original contract!"
77. Miss Gadd also found comments from respondents on the length of time taken for clearance. These included comments such as "slow to respond to emails", "poor response time – takes several days", and "takes weeks in busy periods". One respondent pinpointed specific delay problems with the introduction of new licence clauses - "CLARCS printed material service was appalling just after the 1998 re-negotiated licence came into force. CLARCS printed material service evidently could not cope with the volume of requests from all HEI institutions at the start of the current academic year,

in October 1999. My institution signed up to the CLA Artistic Works (photocopying) protocol last year - CLARCS procedures for clearing artistic works in course packs were initially dreadful, with delays of several months.”

78. The CLA sought to undermine Miss Gadd’s evidence on the ground that it did not fairly represent either her Report or the underlying responses. For example, the view she had taken in the Report was that “opinion is clearly split” about CLARCS. There were both positive and negative responses. This is hardly surprising: it is to be expected that it will work well for some people some of the time. What is of concern, however, is how often it works badly. The CLA suggest that where there have been complaints, these have in some instances been due to the failure by the HEI to supply all the necessary details. This may be so, but seems to us to miss the point. We are not concerned to attribute fault for the shortcomings of the system but to discover to what extent it works well. It is not a recommendation of the system to find that the HEIs are having problems with supplying the information necessary to obtain clearances. The complexities of the system which we have summarised above clearly, in our view, contribute to the difficulties experienced by users.
79. A further UUK witness who was not cross-examined was Jonathan Burch, Copyright Officer at Leicester University. He gave highly specific examples of problems he had encountered with CLARCS. He said that it had proved to be an inflexible, partial service, offering at times very poor levels of customer satisfaction which had failed to live up to its name.
80. We were also concerned about the necessary involvement of academics in the clearance process. For example Professor Picciotto gave evidence that he and his colleagues avoided the preparation of Course Packs partly due to the administrative inconvenience in obtaining clearance. The Stoll and Bide report, published in June 1996, did confirm and explain the growth of photocopied handouts. However, it also mentioned that “academics seem to exclude or restrict the use of third-party-copyright material in course packs”,

after referring to the costs in time and money involved. It is undesirable that academics should be involved in more bureaucracy than is absolutely essential, and equally undesirable that they should be hampered in the way they teach by administrative hurdles.

81. We have come to the very firm view that the administrative arrangements under which Course Packs are dealt with outside the blanket licence are complex, costly to administer, inefficient and burdensome.

Justifications for CLARCS

82. The CLA contends that there are good reasons for maintaining the CLARCS two-tier system for Course Packs. The principal ones are (a) that Course Packs are a substitute for textbooks and so need special controls and fees, and (b) that valuable distribution and market research information is gathered by CLARCS.

Prevention of textbook substitution

83. Whilst publishers and authors are understandably delighted to license the photocopying of their works in return for proper remuneration, they are equally understandably disinclined to encourage copying which would cannibalise sales of the published editions from which the copies are taken.
84. We recognise and respect this concern of the publishers. Nothing in UUK's submissions suggests that we should not do so. However we were wholly unpersuaded by the evidence that Course Packs are in fact, in the main, a substitute for textbooks. Normally a lecturer will put together his Course Pack from a variety of different sources. Each will be a short extract which could be copied under the blanket licence. If one extract is a portion of a particular textbook, its inclusion as a part of a Course Pack is no more likely to take away sales of that textbook than if it had been copied under the blanket licence.

85. Course Packs are still subject to those restrictions in the Licence which are concerned with the amount of a work that can be photocopied: for example no more than a single chapter of a book. We are not persuaded that in the absence of such extracts the student would wish, or be able to, buy the entire textbook. Moreover much of what is contained in Course Packs comes from journals which students themselves are unlikely to purchase, and cannot substitute for textbooks.
86. As Dr Richardson pointed out, the only type of book for which a Course Pack might be competition is a published compilation of “readings” from different sources. Even then, the substitution theory depends on the existence of an appropriate set of readings for the course in question.
87. Given the choice between maintaining the CLARCS system in the hope of protecting sales of a limited class of publications, and including Course Packs within the blanket licence with an appropriate adjustment of the royalty, we would, in the light of the evidence, favour the latter course without hesitation.

Distribution advantages

88. It is suggested that by maintaining the CLARCS system, the CLA obtain valuable information which they can use for distribution of the income and for market research.
89. The information as to the distribution of income is said to be useful in the following way. Because Course Packs have to be cleared on a “work by work” basis, the CLA will know the exact identity of the publisher or author who is entitled to the money. Whilst it may be an advantage, no such information is available for the blanket licence. A common feature of licensing schemes is that they operate without detailed information as to the works being used. Moreover, when the cost of CLARCS is taken into account, we are by no means convinced that the more precise approach to distribution is value for money or a good justification for retention of the system.

90. As to market research, it is suggested that detailed information about Course Packs would enable the publishers to identify gaps in the market. Apart from reinforcing the point that Course Packs are not substitutes for text books, we were not persuaded by the evidence that this was a real concern of publishers, or the real motive behind the retention of the two-tier system.

Other considerations on CLARCS

91. The separate treatment of Course Packs was an innovation in the 1993 version of the licence negotiated between UUK and the CLA. No such two-tier arrangement existed in either the Trial Scheme introduced in 1987 or the 1989 agreement. This is perhaps not surprising in view of the findings of the Whitford Committee. At paragraph 268 of their report, they said:

“Copyright owners, with some exceptions, appeared to be prepared to accept the need for freedom of action in educational establishments, and to abandon any claims to a need for copyright clearance in advance, provided they are paid a fair sum for the use of their work. They were perhaps forced into this position because of the sheer impossibility of policing infringements and the probability that the detection of any individual instance of infringement and the institution of proceedings for such infringement would cost far more than any sum which might be recouped by way of damages.”

Later, at paragraph 272, they said:

"We believe that most people requiring photocopies have no real wish to harm the interests of authors and publishers and would much prefer to be honest citizens. What they will not do is accept the trouble and delay involved in seeking permission for each copy. But they would welcome a system which, for a modest sum and with no great formality, would enable them, within the law, to meet their need for copies.”

92. The Tribunal has encountered schemes involving a need for clearance in advance of use before. In *The British Phonographic Industry v Mechanical Copyright Protection Society (No 2)* [1993] EMLR 86 a Tribunal chaired by Mr Robin Jacob QC (as he was) had to deal with an aspect of a scheme under which a record company wishing to make a new record had first to

apply to the MCPS for a “clearance”. Until the clearance was given there was no licence. The Tribunal said at page 100

“We have no doubt that in the normal case the licensing body should grant a blanket licence for all material within, or which in future comes within, its repertoire - - in short there should be a blanket licence for records for retail sale.”

This was subject to a special case, the first recording licence, where the MCPS said that it could not grant permission until its member had notified his willingness to have his work recorded. It was common ground in that case that the wishes of the member should be respected: so a system was devised which allowed for prior consent in those cases. We are satisfied that the present dispute is analogous to the “normal case” in *BPI v MCPS* and is wholly different from the issue of first recording licences.

93. It seems to us to be correct, almost from first principles, that if matters can be arranged so as to dispense with the two-tier treatment of Course Packs then it would be highly desirable to do so.
94. We have of course to bear in mind the potential effect on the amount of copying of removing Course Packs from CLARCS and placing them within the blanket licence. Indeed one of the justifications urged upon us by UUK for the inclusion of Course Packs within the blanket licence is that the current bureaucratic arrangements are a disincentive to the creation of Course Packs and accordingly an inhibition on teaching methods. The corollary is that if one removes the bureaucracy more copying will result, and a higher rate per FTES would be appropriate.
95. We had our attention drawn to a decision of the Copyright Tribunal of Australia in *Copyright Agency Ltd v University of Adelaide* [1999] ACopyT 1 in which that Tribunal acceded to a request to set a separate rate for Course Packs. The Australian Tribunal was faced with a claim that “anthologies or compilations of licensed copies bound so as to resemble books and known as “coursepacks” which are commonly sold to students in university bookshops

at their approximate cost” should be subjected to a different and higher rate per page. This definition is of course much tighter than that which applies to the Current Licence. Moreover it does not appear to have been suggested that any advance clearance system analogous to CLARCS should be implemented. Nevertheless, the recognition by the Tribunal that Course Packs are entitled to a higher rate of royalty than other forms of copying is one which accords with our own impressions from the evidence in the present case.

Conclusion on CLARCS

96. We do not think that the separate treatment of Course Packs is reasonable. On the evidence we consider that it would be reasonable to allow Course Pack copying within the blanket licence provisions, subject of course to the existing quantitative limitations on copying in Clause 3 of the Current Licence.
97. We propose to make an Order that the Scheme be varied to remove the restraint on Course Pack copying within the blanket part of the Licence. This will entail some detailed revision of the Licence. For example CLARCS copies are an exception to the restriction that HEIs must not sell copies: they are permitted to recoup their costs but no more. We have not heard argument on this point, but given the terminological difficulties with the definition of Course Packs, we would be loath to see its retention in this context. We would also express the preliminary view that there would be no vice in the HEIs being permitted to recoup their costs generally. Indeed it is a nice question whether they do not do so already when they charge students for the use of a photocopier.

Artistic works

98. We have set out above the principal provisions of the Current Licence. It is a licence to copy any copyright material in published editions of books and periodicals. The licensed copyright is not restricted to literary works, as it might have been. It is certainly not “a text-only” licence, as CLA have

asserted in the past. In this context, what is meant by the exclusion of “separate illustrations, diagrams and photographs”?

99. DACS and CLA contend that the line is to be drawn between works which are embedded in text, and works which appear on a separate page without any accompanying text.
100. UUK say that the Licence is simply making clear that it does not extend to works outside published editions, for example prints.
101. We confess that we do not find this issue of construction particularly easy to resolve. It is easier to start with what it is that the exclusion does not mean:
 - (i) Firstly it cannot mean all “illustrations, diagrams and photographs”. The language is seeking to exclude a particular sub-set of artistic works included within the published edition. If it were not so the word “separate” would have no meaning. So it does exclude something: the question is, what?
 - (ii) Secondly, we think it most unlikely that the parties intended to exclude artistic works which were necessary to an understanding of the work as a whole. As we have already said, a licence to copy a scientific paper which does not include the right to copy diagrams which are discussed within it is virtually worthless. This must be so whether the diagram occupies a part of the page with other text, or has a page of its own. Certainly everyone appears to have worked on the basis that masking of diagrams in these circumstances was not something which the Licence required.
 - (iii) Thirdly, we think it most unlikely that the parties intended to exclude artistic works embedded in a page of text, even if they are wholly unnecessary to an understanding of the text. Masking of parts of pages, simply to avoid copying an incidental illustration is absurd.

- (iv) Fourthly we do not think that “separate” artistic works are, as UUK suggest, only those which are outside the published edition altogether, so that the exclusion merely explains that the Licence does not extend beyond published editions of books and periodicals. We believe that the exclusions are there to cut out material from the scope of the licence which is granted, not to explain that the Licence does not extend beyond its stated scope.
102. It follows that the only class of work which it can sensibly be suggested that the parties intended to exclude were those which are both on a separate page and unnecessary for an understanding of the text.
103. We reject the construction advanced by DACS and supported by CLA, namely that it means all works which have their own page, as opposed to being surrounded by or embedded in text. Mr Saini, who appeared for DACS very frankly conceded this construction meant that whether a work was licensed or not could depend on purely typographical considerations. He did not commend it to us on the grounds of practicality or common sense: merely on the basis that it was the only realistic meaning that could be given to the words. He did support it, however, by reference to evidence that in the art and publishing world a distinction is made in royalty terms between full page and part page prints. Furthermore it is conceivable that such a demarcation might have been motivated by the fact that it would not be necessary to photocopy full page works in order to capture the text.
104. Accordingly we proceed on the basis that the correct construction of the agreement is that separate artistic works are those which are both (a) on a separate page and (b) not necessary for the understanding of the text. Copying of works which were not separate in that double sense was already permitted under the Licence.
105. So much for the construction of the agreement. But in practice the exclusion of separate works of this nature does not seem to have been the subject of discussion between CLA and UUK at any time during the negotiations for

any of the HEI licences. Moreover there was no evidence that HEIs fully understood that this restriction on their right to copy existed. Mr Shepherd of the CLA gave evidence as follows:

Q. A licence which only allowed the lecturer to copy the text but not the graphs and diagrams would be pretty worthless, would it not? A. I think so, yes.

Q. Irrespective of whether a particular graph happens to be on the same page as the text or typeset on a separate page? A. I think it is very desirable they should copy everything in the article.

Q. Let us take a case where you have a graph on a separate page?
A. Yes.

Q. If you are trying to use material to teach and you cannot copy it because it happens to be on a separate page what are you going to do?
A. It is a real nuisance, I can see that.

Q. If a blanket licence was granted which excluded that right it really would not be worth very much, would it? A. I would not go that far. I can see that it would be a real pain not to have the right to copy that particular page with the illustration on it.

Q. This problem is whether it is half text or full page. We heard from Mr Anderson-Evans it was never discussed at all by you during the negotiations? A. No, that is correct, it was not.

Q. You did not say, look, sign up for a blanket licence, do you remember, because you are not going to have a right to copy certain artistic works in articles? A. No, it was not touched on at all.

Q. Right. Have you ever been under the impression that academics out there, to take my example of a scientific article, if they want to copy them under the blanket licence, are you under the impression they were covering up graphs on a page? A. The thought never occurred to me.

106. Technically, in the light of our finding about construction, HEIs could have been sued for copying separate artistic works. Copying was obviously taking place. But the exclusion has always been there and they have never been sued.

107. All parties now agree that the exclusion should go, and we propose to make that order. In view of the evidence, separate artistic works should come within the blanket licence. We shall have to consider whether any uplift of

the royalty should follow that decision. We will have to bear in mind that what is *added* is in the nature of a luxury: the added scope of the licence does not include artistic works necessary for the understanding of the text.

Royalty Rate

108. The first two references were commenced on 31st July 2000, some six months before the expiry of the Current Licence. Under the powers we have under section 123(3) we could direct that a change of royalty take effect from the date of the Reference. In any event we have to fix the royalty for going forward from the expiry of the Current Licence. That new royalty should take account of the fact that we propose to vary the Scheme by bringing Course Packs within the blanket licence, and by removing the restriction on copying separate illustrations, diagrams and photographs.

The relevance of the Current Licence

109. The negotiations for the Current Licence were the subject of much evidence. The CLA argue that we should place great weight in relation to royalty on the fact that, in their words, the Licence represented a genuine consensus between two representative bodies represented by professional and distinguished negotiating teams. This was not the case of a monopolistic licensing body imposing “take it or leave it” terms on individual users of copyright.
110. There is much force in this argument. The Tribunal has certainly paid close attention to evidence of previous agreements between the same parties before. The Current Licence is good evidence of what the parties themselves regarded as reasonable, or perhaps we should say, what the parties themselves regarded as *insufficiently unreasonable* to refer to the Copyright Tribunal. But its relevance to the proceedings is no more than that. It is certainly not conclusive of what is reasonable. If it were it would be difficult to see how, immediately upon its expiry, the CLA can plead for an increase in the royalty rate by a factor of three or four. At times we felt the argument being advanced was based more on the suggestion that we should not interfere because of principles of contract law: it was undesirable

that a party could seek a variation on terms that he had freely negotiated. However our ability to vary a licensing scheme is circumscribed only by what is reasonable. The parties may have overlooked factors which we regard as relevant. If so it is our duty to take them into account and, to the extent that it may be reasonable to do so, vary the scheme accordingly.

The negotiations for the Current Licence

111. The Current Licence (agreed in 1998) was preceded by two earlier agreements: an initial licence of 1988 and a supplemental agreement of 1993. The main issues in the negotiations were the fee for the blanket licence; what the blanket licence included and excluded; transactional licences, principally for Course Packs (sometimes called Study Packs) and the definition of Course Packs. It was common ground throughout that the blanket licence permitted photocopying of copyright material in books, periodicals and journals, up to certain limits, by students and staff, on payment of a fee per FTES. It was also agreed that all photocopying by research postgraduates, who are supervised but not taught, comes within the fair dealing provisions of the Act and that they are therefore excluded from the number of FTES.
112. It appears that concerns about unauthorised photocopying at universities surfaced in the mid-1980's, specifically when an out of court settlement occurred between the Publishers Association and Warwick University. In June 1986 negotiations opened between the CLA and UUK to establish an experimental licensing scheme. The outcome was a trial by 22 HEIs for one year commencing on 1 January 1988.
113. During the trial, records were kept of every page of copyright material copied "to assist in establishing the basis on which fees might be chargeable under any formal longer-term agreement" and a fee of 2.5 pence per copy page was paid.

114. Subsequent negotiations led to an agreement between the two sides by June 1989. On 4 July 1989 the UUK wrote to all its members sending them a specimen of the Collective Licensing Agreement which had been agreed, accompanied by an explanatory Note. The plan was that each HEI would then deal direct with the CLA, signing their Agreement (not individually negotiable) and making the appropriate payments.
115. The Agreement was to come into operation from 1 January 1990 for an initial period of three years, after which its terms were to be reviewed. The fee was set at £1.475 per FTES, to be increased in the second and third years by inflation. As a result, the fee went up to £1.62 and then to £1.68.
116. The Agreement permitted photocopying of copyright material by, or for, all students on a course, including photocopying of multiple copies of the same material. The First Schedule listed Excepted Works, among which were "separate illustrations and/or photographs" as in the trial scheme previously. Copyright material was defined to include books, periodicals and journals published in the United Kingdom in which copyright subsists and the CLA granted an indemnity in respect of any claims for any alleged infringement of such copyright. The extent of photocopying was limited to 5 per cent of the total length of the copyright material or one complete chapter of a book or one complete article of a periodical or journal. Any photocopying beyond those limits was a matter of individual negotiation at an additional fee between the HEI and publisher concerned.
117. A sampling system was instituted under which four universities would be selected in each year to maintain records of photocopying for prescribed periods. This was intended to monitor the operation of the licence and to make calculations as to what fees should be paid by CLA to which copyright owners.

118. The evidence of this Agreement was documentary and largely uncontested, as none of the participants in the negotiations was any longer available.
119. At the time of the 1989 agreement, the polytechnics were separate from the universities. A then representative of the polytechnics did give evidence to the Tribunal and stated that the agreement accepted by the polytechnic sector "simply mirrored the agreement already reached by UUK".
120. The initial Licence was extended unchanged for 4 months, subject to an RPI uplift. The Supplemental Agreement was set out as an amendment to the Initial Licence and came into operation on 1 May 1993 for a period of 2 years and 3 months. Although described and drafted in that way, a fundamental change was introduced: special provisions and fees for Course Packs.
121. The evidence of the negotiations for the 1993 Agreement is scant. It appears they took place over a large part of 1992 and early 1993. On the CLA side, the main evidence was an undated (probably late 1992), unsigned internal Aide-memoire which set out their negotiating position. This stated, inter alia, that from the rightsholders' standpoint the 1990 licence had been intended to cover only "occasional multiple and supplementary photocopying" and not "multiple photocopying of course support material ... intended for use as components of course readers (i.e. substitute text books), study packs or distance learning packs". The latter should be excluded from what was called the blanket licence and should be the subject of separate licences negotiated individually through CLARCS. As to the fee for the blanket licence, the Aide-memoire stated that it would reflect usage by students multiplied by an average page price for books.
122. The UUK evidence was that their negotiators were confronted with indications of large scale usage and shown lots of Course Packs, without any means of challenging what was alleged. The suggestion was that teaching

methods were changing to make more use of photocopying, particularly at some universities and for some kinds of course.

123. The result was both an acceptance of the two tier principle and also an increased fee for the blanket licence which was to give reduced rights. The blanket licence fee went up to £2.25 per FTES for the period up to 31 July 1994, which represented a 33.9% increase, with an RPI increase for the following academic year.
124. The figure of £2.25 was based, in CLA's view, on each FTES photocopying on average 30 pages per year and a royalty page rate of 10p, which was then discounted by 25%. The Aide- memoire had stated that a discount, of an unspecified amount, would be given for central negotiation. The figures were confirmed by UUK, but they regarded them as "entirely arbitrary" and in reality only agreed "the resultant amount per student".
125. Study packs were defined in the Supplemental Agreement as "collections which consist wholly or partly of Copyright Material assembled in advance by or on behalf of academic staff for teaching purposes and made available for students". Where such study packs included "four or more extracts of copyright material in sets of five or more, during any one course of study", they fell outside the blanket licence and had to be licensed under the CLARCS system.
126. Finally, the sampling system already established in the Initial Licence was to be extended and referred to a joint working party for further study.
127. Although the licence as varied by the Supplemental Agreement expired on 31 July 1995, it was renewed by successive extensions to 31 March 1998. The terms remained unchanged, except that RPI increases were added to the fee. Thus the £2.30 fee for 1994/95 went up to £2.38 for 1995/96, then £2.45 for 1996/97 and £2.52 for 1997/98.

128. Discussions and correspondence about the next licence agreement took place in 1994 and 1995. After a hiatus, serious negotiations began in May 1997 when working groups were appointed by both sides and went on until March 1998.
129. The CLA's opening position was that they believed the survey results showed the proper fee to be £6.72. Acknowledging that it would be unrealistic to seek such a fee, CLA applied a discount of 37.5% and proposed a fee of £4.20. That discount was said to include 11.6% for fair dealing permitted by the Act and therefore outside the licence. The surveys had not attempted to differentiate between photocopying inside and outside the fair dealing provisions and the survey totals included both. That explains why there was an allowance or deduction for fair dealing; but the figure of 11.6% was simply an estimate. The balance of the 37.5% discount was not explained, but may relate to the 25% discount granted for the Initial Licence. However, the reasons for, or the validity of, those percentage discounts is of no concern since the negotiations progressed solely on the net figure. The £4.20 figure per FTES was then justified as a multiplication of 70 pages per student x 6p per page photocopied.
130. That figure was put forward at a negotiating meeting on 17 June 1997, at which UUK offered initially £2.62 per FTES and apparently unofficially, after a break, £3.08 per FTES, calculated at 80 pages x 3.85p per page. However, a UUK letter of 10 September 1997 suggested £2.80 per FTES, calculated at 70 pages x 4p per page.
131. The number of pages was derived from the surveys, which at best were indicative of the average number of pages being photocopied by each student and at worst were meaningless. The licence fee per page was derived from the average retail price of academic books. It is not necessary to record

the arguments as to what the figures should be, because the negotiation always centred on the resultant fee per FTES.

132. On 17 December 1997 CLA proposed a compromise of £3.73 per FTES, which they expressed as 65 pages x 5.75p per page. This was marginally reduced in a final offer on 22 January 1998 to £3.67 per FTES, by reducing the fee per page to 5.65p. Acceptance of this offer was proposed at a meeting of the UUK copyright group on 4 February 1998, but it was rejected as it would have meant an increase of 46% which was unacceptable to university management. UUK's response was to offer £3.09, which meant an increase of 19%, expressed as 65 pages x 4.75p per page. The main committee of UUK on 13 February 1998 endorsed the offer of £3.09 as the maximum to be paid and failing acceptance, threatened to refer the issue to the Copyright Tribunal.
133. Negotiations for the 1998 Agreement had been detailed, protracted and perhaps somewhat acrimonious. They were saved from final deadlock by a private discussion between the chairmen of the two sides. To avoid a reference to the Tribunal if possible, Professor Zellick on behalf of UUK and Ms Duffy on behalf of CLA had a private meeting on 2 March 1998. Agreement was reached for a fee of £3.09 in the first year, £3.17 in the second year and £3.25 in the third year. CLA expressed this as a fee of £3.25, being 65 pages x 5p, discounted for the first two years. Despite all the doubts about the validity of the formula, at the last moment it was conceded by UUK that the formula as stated was needed to provide a basis or benchmark for future negotiations. The formula itself had not been contentious; the problem had all along been the numbers to be applied to the two factors.
134. After the meeting on 2 March 1998, progress was rapid. The new Licence came into effect from 1 April 1998 and incorporated into it as a Schedule was the Accord. The Accord was written as an explanation for users in HEIs of the terms of the Licence and what they could do and how. CLA provided

UUK with the first draft of the Accord in December 1997, but it never became a jointly approved document. The Licence itself was the subject of conflicting evidence as to whether it was shown to UUK before being issued to the HEIs. We do not consider it necessary to resolve the dispute, as the terms appear to have reflected the main points of the agreement which had been reached.

135. The single most important impression which we gained from the negotiations is that the increase agreed in 1993 against the background of the introduction of the separate treatment of Course Packs was too great. This is therefore a factor which we propose to take into account in assessing the final royalty.

The Formula

136. Clause 5(d) of the Current Licence provides that the fee per FTES has been calculated on the basis set out in the Fourth Schedule, which says

“The fee per FTES referred to in Clause 5(a) has been calculated on the basis of 65 pages of Copying per FTES per year at a cost per Page of 5 pence

i.e. $65 \times 5 = \text{£}3.25$ per annum”

Clause 5(e) provides that

“the formula of number of pages multiplied by the pence per page (also known as the cost per page) shall be used as a means of determining future Licence fees”

This is what has been referred to as the Formula.

137. There is much to be said, in theoretical terms, for the Formula as a means of determining a royalty. Spelling it out:

- (a) the fact that it is based on the number of FTESs means that the size of each HEI is taken into account;

- (b) the use of a number of pages should be an indication of the average amount of copying per student per year of Licensed Material for which a copyright licence is required;
- (c) the price per page is an attempt to get at a reasonable price to be paid for a page of photocopying.

Nobody has any problem with the formula as such. It provides a rational way of arriving at a royalty. The dispute is over whether it is possible to arrive at sensible numbers, in particular the number of pages and the cost per page to plug into it.

- 138. There was no dispute about the number of FTESs. We were given a total figure of 1.4 million FTESs. This means that the blanket licence produced in its last year 1.4 million x £3.25 i.e. £4.55 million.
- 139. A major dispute surrounds the number of pages to be used in the formula. It involves a number of questions. Firstly, how many pages are copied by or for the average student per year? Secondly, how much of that copying is covered by a fair dealing defence?
- 140. A major dispute also surrounds the price per page: in particular should the price per page be what has been called the “true economic cost per page”?
- 141. As the Tribunal has noted in the past⁵ it is not really the basis of calculation which is the real issue: it is the result of the calculation. If the Formula produces a final number which we regard as excessive or inadequate, then we are free to vary it to a figure which is reasonable. This approach was certainly recognised by the parties. Although they negotiated over numbers of pages and price per page, what they had their eye on in the end was the

⁵ See e.g. *British Airways plc v The Performing Right Society Limited* [1998] EMLR 556 at 563

total sums they would pay and receive. For example the CLA wrote in their own Board minutes in November 1997:

“it was agreed that there was no underlying principle as to page rate and that the aim was to achieve the maximum possible income”⁶

There is nothing wrong with this: it is commercial common sense. If you get the right figure in the end, you can suggest a number of pages and a page rate which, when multiplied together, result in that figure. This seems to have been the approach which both parties have adopted in negotiations.

Number of pages/underreporting/fair dealing

142. The number of copies used in the Schedule to the Current Licence is 65. Mr Shepherd’s evidence in his witness statement was that this figure was arrived at from surveys of copying which showed an average figure of 83 pages, but was then discounted by 22%. Further surveys conducted subsequently showed larger figures: 110 for Autumn 1999 and 102 for Spring 2000.
143. UUK’s case in opening was that the results of CLA’s surveys represented at best an upper limit prior to any consideration of whether a licence was needed for the copying at all. They say that CLA’s surveys based on both the old methodology (used until May 1999) and the new methodology (used thereafter) are flawed and that there is no objective justification for the 22% discount. Their own analysis of four sets of survey results from Autumn 1999 to Spring 2001 shows that only roughly 27 copies are multiple copies.
144. The CLA’s case in opening was that the latest surveys showed copying had risen to a level of 106 pages per student. They also said that the evidence of their accountant, Mr Samuel, showed that there had been significant under-reporting during surveys.
145. The 22% figure used to reduce 83.5 pages to the 65 pages used in the Licence was explained by Mr Shepherd to have been arrived at only in

⁶ E1/file1/tab 51 page 117

CLA's internal thinking. He could not recall that it had ever been articulated to the CLA as a discount due to fair dealing. In fact, even in CLA's internal documentation at least part of the reduction from 83.5 pages was described as being due to transfer of revenue to CLARCS. Accordingly it would be wrong to view the 22% discount as an attempt to quantify an appropriate discount for fair dealing.

146. Although we listened with great care to all the evidence on this topic we find it impossible to base any quantitative conclusions on it. The conclusions we feel able to draw are:

- (a) none of the survey evidence can be described as reliable;
- (b) there is probably a degree of under-reporting, although nothing like the amount (a factor of more than three) found by Mr Samuel;
- (c) probably more than 22% of the copying recorded is fair dealing;
- (d) the overall amount of photocopying in HEIs is steadily increasing.

147. To make a finding on the basis of these conflicting considerations that the royalty in the Current Licence is too high or too low would not be justified.

True economic cost per page

148. How does one arrive at the right price to charge for each page? If an extract of say 20 pages from a 200 page book is copied and distributed to students, should the HEI pay a royalty of 10% of the retail price of the book? Should we adopt this so-called true economic price per page?

149. While the concept may have some use, as we will explain, we do not think that the "true economic price per page" is a direct route to the assessment of a royalty. It could only be so if it were the case that photocopies were a substitute for the purchase of textbooks. We have already explained, in connection with CLARCS, why we do not think that this is the case. In the

absence of a licence to photocopy, lecturers would not be able to hand out extracts from books and journals. There would be a variety of consequences. The lecturer might change the content of his lecture so as not to rely on the handout of extracts. The students might be encouraged to read the extracts in the library. We think the least likely result is that the student would go and buy an entire textbook in order to have access to the extract which is relevant to his course.

150. To reject the economic cost per page as a direct route to the royalty rate is not to say that the concept is of no relevance at all. Undoubtedly the price of the published edition should have an influence on the royalty. The rate charged for copying academic texts and journals may well be higher than that charged for copying from other publications where the price per page of the published edition may be lower.
151. Moreover it is relevant that the ability to photocopy means that the parts of value *to the student* can be obtained without the need to purchase the rest. If publishers sold their textbooks by the chapter rather than as a whole, one could imagine they could charge more than proportionately for the relevant chapter required by the student: he would rather pay £10 for the one chapter which mattered than pay £50 for nine more chapters which had nothing to do with his course. This is a matter which we bear in mind as well.
152. CLA's evidence on this topic was to calculate a price per page based on the average retail price of academic books and journals less the cost of making the photocopy. This produced a figure of around 13p per page after the deduction of about 3p for the cost of photocopying.
153. We think that there is value in the cost per page figure as a comparator with other licences. It is an indication of the relative value of the material to which the licence relates. But we cannot use it in combination with the already uncertain number of pages to arrive at a figure for a royalty.

The Schools Comparable

154. The CLA Formula was used in the negotiations with schools. The licence fees were purported to be based upon 53 pages per pupil in primary schools and 119 pages per pupil in secondary schools (being the results of schools surveys), and a page rate of 5p per page. This should have produced a rate of £2.65 for primary school pupils and £5.95 for secondary school pupils. In fact, the number of pages per pupil was then heavily “discounted” in order to arrive at 17 and 29 pages, and then a further “discount” was applied to produce end fees of 53p and 91p per pupil.

155. Not surprisingly, the schools’ licences are relied on by UUK as comparables pursuant to Section 129 of the Act. The schools appear to be getting more for less money: there is no CLARCS restriction for example. Further, the licences are certainly granted in similar circumstances, being for educational purposes, and containing many of the terms which are included in the HEI licences.

156. The Schools’ licence says that:

“The surveys show an average of 53 pages and 119 pages per annum for primary and secondary schools respectively, which have been reduced as a concession to 17 and 29 pages in each case for the purpose of this licence. The figure thus produced has been further discounted by 37.5% for those schools acquiring their licence through an agent.”

UUK say they have not been afforded similar discounts and such discrimination is not reasonable. They do not however go as far as to say that the Schools’ licences are identical, so that no difference is justifiable. The exercise is therefore one of examining the extent to which discrimination can be justified.

157. The first point we would note is that the material which is likely to be copied under the Schools’ licences on the one hand and the Current Licence on the other is likely to be different. The economics of schools publishing and

publishing for HEIs is not the same. Schools publishing is aimed at a much larger market. School books are much cheaper on average than academic books. There is little schools copying from journals. It is here that the “cost per page” principle comes in, and justifies to a large extent the difference between schools and academic licence fees.

158. Secondly there is a recognition in the Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts and Cable Programmes) (Educational Recording Agency Limited) (Amendment) Order 1998 S.I. No. 203 that different rates may be charged for the use of material for HEIs on the one hand and primary and secondary schools on the other.
159. Thirdly there are some 30,000 individual schools. When the CLA negotiated with a single LGA they afforded them a discount of some 42.5%. This was reduced to 37.5% when instead of the LGA the CLA had to deal with some individual LEAs. Mr Shepherd’s explanation for this discount in his witness statement was that “The CLA agreed to grant the schools sector a further 37.5% discount on the 85 pence and £1.45 to reflect a series of factors such as volume concession, administration support, survey costs and fair dealing.” In his oral evidence he explained that the CLA had calculated that they were saving some half to three-quarters of a million pounds by dealing only with LEAs rather than individual schools. It seems therefore that both the LGA and the LEAs shouldered a significant proportion of the administrative burden of administering the licences. By contrast, UUK acts only as a central negotiator.
160. We consider that the differences between the rates charged to primary and secondary schools on the one hand and those charged to HEIs on the other are within the band of what can be described as reasonable, although clearly at the higher end of that band. We regard the schools comparison exercise as one which should exert a downward pressure on future royalties.

Other comparators

161. Apart from the Current Licence and schools some other comparators were mentioned.
162. The first suggested comparator was Further Education. The Further Education institutions merely adopted what the HEIs had done. This lends some further support to the reasonableness of the Current Licence.
163. A second suggested comparator was attempted by UUK's witness Professor Picciotto. He asserted that the average royalty for academic book authors is 10%. He then used a figure which he had found for the average price of an academic book, namely £16.77. So, he said, the average receipt per book was £1.67. Assuming an average book length of 250 pages, this yielded a figure of 0.7 pence a page. This calculation ignores the position of publishers. Moreover it ignores the journals. The document relied upon by Professor Picciotto (The Library and Information Statistics Unit Annual Library Statistics for 2000) gives a figure of £105.56 for serials. And the average book price relied on varies significantly depending on whether you take books sold or books copied. In the end this calculation was not pressed very hard by Mr Carr for UUK.
164. Professor Picciotto also referred to what he called the average rate charged between publishers for reprint rights of 1.2 pence a page. This was founded on a single anecdotal discussion with one publisher. Moreover such inter-publisher rates for a specific publication cannot be equated with blanket licensing.
165. Professor Macrae put forward a further comparator: the DACS rates for full page artistic works. We are not sure why he did so as he is a statistician with no relevant experience. We do not consider the particular DACS tariff selected by him to be a relevant comparable.

Ability to pay

166. The ability of the licensee to afford the licence fee may in some circumstances be a factor in determining what is reasonable. We do not find it of much assistance here. Professor Tarrant, who gave evidence for UUK, made it clear in the course of his evidence that he was not relying on the HEIs' ability to pay in order to reduce the fee. A similar statement was made by Professor Zellick in 1995 in the course of the negotiations. Nevertheless the evidence showed that the pressures on university funding were a factor in resisting increases in the fees in the course of the negotiations.
167. Ability to pay may be a further factor in explaining the difference between the schools and HEIs fees. Schools are subject to tight budgetary constraints in relation to how much they can spend on licensing. However, we do not rely on this factor because we do not have evidence of the extent to which it was actually a factor in negotiating the Schools' licence.

Other factors on royalty

168. Two other factors seem to us to be relevant. At one stage shortly before the conclusion of the Current Licence it appears that UUK were prepared, if the formula was removed, to offer £3.67 (which is some 13% more than the figure of £3.25 that was ultimately agreed). Professor Zellick apparently rebuked Mr Anderson Evans for disclosing this readiness to the CLA. Nevertheless, this is a good indication of the reasonableness to UUK of the figure that was agreed.
169. The second is that a UUK position paper of October 1995 had floated the idea of an enhanced blanket licence, which would give HEIs the option of a single licence to include the production of course packs at a higher fee, suggesting £5 per FTES as a reasonable sum. It was mentioned at a joint meeting in June 1997 and circulated to the CLA Education Board Committee in July 1997. This is the only indication we have of the value attributed by UUK to the removal of CLARCS. The figure would be about £5.70 in today's money.

Uplift for CLARCS

170. There can be no doubt that the variation which we have decided to make to the scheme so as to permit Course Pack copying justifies a substantial uplift on whatever fee would be appropriate for an unmodified scheme. CLARCS was responsible for an income of nearly one million pounds in 2000-2001. Given that there are about 1.4 million FTESs, CLARCS copying at the present rate would, if included within the blanket licence, require an uplift of 70p on the standard fee simply to maintain the same level of income for CLA. But if CLARCS is included in the blanket licence we believe that the result will be a much greater volume of copying. The CLA will also benefit in a saving of administrative costs. The uplift should reflect all this. We think that a reasonable figure for this uplift is £1.20.

Uplift for Separate Artistic works

171. Compared to the removal of the Course Pack restriction, the advantage gained by the ability to copy full page artistic works is more theoretical than real. We mark the removal of the uncertainty surrounding separate artistic works with an uplift of 5p, which is about 1.5% of the current royalty.

What to do with the Formula?

172. It is obviously right to express the royalty in terms of a sum per FTES. But we do not think it right to state in the scheme that this is based on a number of pages and a price per page. The royalty we are setting is a royalty for the amount of photocopying which we consider that the HEIs are likely to do under the amended blanket licence. It allows for CLARCS copying to increase by a substantial factor. If in future negotiations the parties wish to contend that copying has increased or decreased in a way which is different from that which we have allowed for, they are of course free to do so. The effectiveness of such an argument in negotiations will depend on the quality and the comparability of the data relied on.

RPI

173. The Royalty we set should be increased in accordance with the increase in RPI on an annual basis, as in the current scheme.

Term

174. We did not hear argument on the question of term. Nevertheless previous licences have lasted from 3 to 5 years. We propose to order that the new scheme shall be in force for 5 years. We consider that the increase should take effect at the beginning of the academic year, which is when much Course Pack preparation will take place. For this reason we are backdating our award to 1st August 2001, and making some transitional provision for the period from 1st February 2001 to 1st August 2001.

Conclusion on royalty rate

175. We think that the figure of £3.25 for the Current Licence as it stands is too high for the two reasons which we have already given. Firstly we think that it is at the upper end of what can be justified as reasonable having regard to what is paid by Schools. Secondly we think that the 1993 increase, which increased the fee whilst decreasing the scope of the Licence, was somewhat high. On those grounds we take as our starting figure the sum of £2.75. In setting this starting figure we have worked on the basis that the figure for the Current Licence includes copying of all non-separate artistic works. We have also taken account of the movement in RPI.
176. Starting from the lower figure of £2.75 for the Current Licence, we will increase it by £1.20 for CLARCS and by 5 pence for separate artistic works, giving a final figure of £4.00 per FTES.
177. One can also become too involved in mathematics. At the end of the day we are involved in the process of what the Australian Copyright Tribunal called “judicial estimation”. Is £4.00 per FTES a year a reasonable fee for the blanket right to copy in accordance with the Licence, including the right to prepare Course Packs? Having read the evidence in this case, and listened

attentively to those witnesses who were required to attend, we have come to the conclusion that it is. Overall we have been seeking 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. Our order will abolish a most unpopular and inconvenient two-tier system yet secure for CLA and therefore its members an increased revenue with certainty of income and a saving of administrative costs.

Overall summary

178. We propose to order

- (a) that the restriction on Course Pack copying and the requirement for CLARCS clearance be removed from the Current Licence with effect from 1 August 2001;
- (b) that the exclusion of separate artistic works be deleted from the Current Licence with effect from 1 August 2001;
- (c) that the royalty shall be expressed as a sum per FTES per year, but not be based on any notional number of pages or price per page;
- (d) that with effect from 1 August 2001 the royalty shall be increased to £4.00 per FTES per academic year increasing in line with the increase in the RPI on an annual basis on 1st August each year;
- (e) that the new scheme shall run for 5 years from 1 August 2001.

179. We are anxious not to make administrative difficulties by re-writing the past to any greater extent than necessary. Thus for the period between the expiry of the Current Licence and 1 August 2001 it seems reasonable to order the continuation of the Licence subject only to the RPI increase. This would appear to be a fee of 50% of £3.34. We leave untouched CLARCS

payments for that transitional period. We make no variation to the Current Licence for the period it was in force.

180. Clearly all or most HEIs will have paid an instalment of their licence fee which was due to be invoiced on 1st August 2001. In addition some will have paid separate fees for CLARCS usage on or after that date. Such payments as have been made must be offset against payments due under the new regime, and an appropriate balancing payment made.

Further procedure

181. We direct the CLA to produce an amended version of the draft Licence to give effect to our Order and serve it on the Secretary and the other parties by Jan 15 2002. UUK and DACS should respond with such amendments to that draft as they contend are necessary to give effect to our Order and serve the same on the Secretary and the other parties by Jan 30 2002. Thereafter we will if necessary fix a further hearing to make a final order (which will annexe the amended licence) and deal with any applications for costs.

CHRISTOPHER FLOYD QC
Chairman, on behalf of the Tribunal

13 December 2001