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## **Articles, the academy and authorising reproductions [1]**

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### **1. An apocryphal tale of teaching and copyright**

There exists an apocryphal tale of that academic ingénue, the newly appointed law lecturer. In devising a course that he has been asked to teach, he writes his lectures, plans his tutorials and compiles a reading list for the students. As to the latter, due to the weight of numbers taking the course, he asks the library to make photocopies of some relevant academic articles, so that they can be made available, on a short-term loan basis, to the students. The message comes back that some of the articles on the list can be photocopied but some cannot. The reason? “Because”, he is informed, “two of the articles on the list are from the same journal and, under the terms of the current CLA licence, we are only allowed to copy ‘5% or one whole article (whichever is the greater) from a single issue of a journal’”. “But”, he protests, “I *wrote* one of those articles in that journal ... surely I can give you permission to reproduce that one”. The librarian holds him in his steely glaze: “I think you’ll find, that *you* have nothing to do with the matter”. Our young lecturer has unwittingly been drawn into the mysterious world of copyright, of licensing agreements and the Copyright Licensing Agency (CLA).

### **2. The role and mandate of the CLA**

The CLA was established in 1982 as a non-profit making company by its two constituent members (and owners): the Authors’ Licensing and Collecting Society (ALCS) and the Publishers’ Licensing Society (PLS).[2] Its mandate to negotiate a licence with the UUK/SCOP as to the reprographic reproduction of academic material flows from these two founding organisations. The current licence that the CLA has negotiated with the UUK/SCOP is designed “to enable students and members of staff to copy extracts, within clearly defined limits from books, journals and periodicals published in the UK, Australia, Canada (including Quebec), Denmark, Finland, France, Germany, Greece, Iceland, The Netherlands, New Zealand, Norway, Republic of Ireland, South Africa, Spain, Sweden, Switzerland and by some publishers in the United State of America”. [3] This licence (effective from 1 August 2001 until 31 July 2006) permits the copying of extracts “from *paper* on to *paper*” “from most books, journals and periodicals published in the UK [and so on] with the specific exception of those belonging to one of the [following categories: printed music, maps, charts, or books of tables, public examination papers, workbooks, work cards and assignments, private documents, works published by non participating US publishers, bibles, liturgical works, orders of service, newspapers, industrial house journals, ‘copying not allowed under the CLA licence’ titles, works included on the Excluded Works list, [4] works published outside the Mandating territories]”.

### **3. The young lecturer and the CLA**

Consider then: if, when our idealistic young lecturer contends that he is able to proffer permission to the librarian to make his work (let us call it Article A) freely available to the students on his course and the librarian answers that it is nothing to do with the lecturer, then either he or the librarian must be holding an untrue position (albeit mistakenly). If the librarian is correct in his assertion, this must depend upon whether or not the CLA have the authority to negotiate a licence pertaining to the reproduction of the lecturer's work. There are essentially two ways in which this state of affairs may have come about: either, the academic publisher of the journal holds the relevant copyright in the material in question and is being lawfully represented by the PLS, or the young lecturer is being lawfully represented by the ALCS.

#### **4. The young lecturer, the publisher and the PLS**

The Publishers' Licensing Society was established in 1981 and, together with the ALCS, owns the CLA. Publishers (academic and non-academic) authorise the PLS to administer collective licences, with a variety of bodies, pertaining to the reproduction of the publisher's copyright works.[5] When considering what rights subsist in a journal article (and indeed who owns those rights) there are of course two sets of rights to bear in mind: the copyright in the typographical arrangement of the published work [6] and the copyright in the text of the article itself.[7] In relation to the first, the publisher will generally always be responsible for, and so hold the copyright in, the typographical arrangement of the published work. In this regard the librarian is correct – the lecturer has no authority to grant any permission concerning the typography of the published article – and so, the library must rely upon the CLA licence at least to this extent. In relation to the second copyright, it will either be the case that the publisher has required the young lecturer to assign his rights in the text to them or, alternatively, to licence the use of the work, as a precondition to publication. On this point, different journals adopt different approaches and, while there are almost as many contractual variations in this area as there are academic publishers, the following two examples represent two ends of the relevant spectrum.

##### **Example 1: Trust Law International (TLI)**

The journal states in its *Guidelines for Contributors* that “[c]opyright of the material published in the journal rests with the publishers, Reed Elsevier (UK) Ltd. Contributors to the journal will be asked to sign an assignment of copyright or a publishing licence by the publisher. Following publication, permission will usually be given (free of charge) to authors to publish their articles elsewhere, if they so request”.

##### **Example 2: European Intellectual Property Review (EIPR)**

The journal states that the “European Intellectual Property Review is © Sweet & Maxwell Ltd [and contributors]”

Should our lecturer's Article A have been published in TLI then it would appear that the librarian is also correct in his assertion as to the copyright in the text of the work – the lecturer's permission is entirely irrelevant. However, should his article have appeared in the EIPR then the position is not so straightforward. Where the lecturer has not assigned any copyright in his article to the publisher, then the legal relationship existing between the two will more than likely involve no more than the granting of a licence as to the first publication of that work in that journal. That is, the lecturer will have granted Sweet & Maxwell, as the publishers of the EIPR, a licence to reproduce for the first time his copyright text in print. Do the terms of the licence extend any further than that? Will the licence function in a manner that allows the publisher to authorise a third party, such as the PLS (and so the CLA), to negotiate terms and conditions as to the subsequent reproduction of the lecturer's copyright work? In general, when no explicit terms and conditions have been set out between the two relevant parties, as is often the case, then the nature of those terms will extend no further than is

necessary to give business efficacy to the arrangement at hand. It seems unlikely, under such circumstances, that any authority to licence the subsequent reproduction of the text of Article A can lie with the PLS.[8]

## 5. The young lecturer and the ALCS

Set up in 1977 the ALCS is “the UK rights management society for all writers”, and, together with the PLS, owns the CLA. The ALCS’s introductory pamphlet sets out that “[m]embers grant to the Society the right to administer on their behalf those rights that they cannot exercise as an individual, or that are best handled on a collective basis”. That is, these authors mandate the ALCS to collect in and redistribute copyright fees on their behalf.[9] At present, the money collected by the CLA for the photocopying of books on behalf of the PLS and the ALCS is split equally between those two organisations. However, in relation to journals and periodicals a different arrangement exists. Since 1997, unless the relevant publisher can establish that they hold more than 90% of the rights in a particular periodical or journal (as would be the case in relation to TLI but not for the EIPR), then it has been agreed that 25% of the collected fees would be passed to the ALCS for re-distribution.[10]

Consider again our young lecturer and his Article A which has appeared in the EIPR: the librarian believes that, if he has already copied one article from that particular issue of the journal, then he cannot also photocopy Article A as to do so would involve a breach of the terms and conditions of the CLA licence. If the authority lying behind that licence, in relation to the text of Article A,[11] does not flow from the PLS, then it must depend upon the mandate that the CLA have received from the ALCS, and that in turn depends upon a mandate having been granted by the young lecturer to the ALCS. If the lecturer has granted the ALCS such a mandate, then, once again, the librarian is correct and so remains bound by the terms of the CLA licence. However, if the lecturer is not a member of the ALCS and has not granted them any authority to collect reproduction fees in relation to his Article A or indeed any of his academic writing, then, should the library wish to reproduce the text of the article, they need to seek permission, not from the ALCS (via the CLA), but from the author of that work himself, that is, our young lecturer. It is at this point that the librarian’s assertion that the young lecturer’s permission has “nothing to do with the matter” breaks down. True, the library may not be able to reproduce a facsimile version of the journal article given that the publisher will have a copyright in its typographical arrangement of the published work, but, as to the copyright in the lecturer’s text itself, there would appear to be nothing operating to prevent the library making copies of that text available to the student body, or anyone else, by print or electronic means, so long as they do so with the consent of the lecturer.

## 6. A brief summary

Consider again the opening gambit – who has the authority to grant the library permission to reproduce the text of Article A? The nature and terms of the current CLA licence with the UUK/SCOP as to the reprographic reproduction from journals and periodicals appears to suggest that, other than those materials specifically excepted, all other published materials fall within its remit. And yet, depending upon the nature of the relationship that our young lecturer has with his academic publisher as well as with the ALCS, this may not actually be the case. Where he is not a member of the ALCS and has granted his publisher no more than a licence to first publish his article in print, then it is the lecturer, and not the CLA, from whom the librarian should be seeking permission. In short, what we often *perceive* the licence to cover, and what the licence *actually* covers, are arguably two discrete phenomena. There is perhaps, on the part of the university librarian, an understandable unwillingness to test these actual limits of the current licence. It is, after all, an imprecise beast, and, given that the CLA makes it clear that it will indemnify the librarian against any actions pertaining to reproduction that appears to fall within the remit of the licence,[12] then the temptation to step beyond the apparent boundaries of that licence (with its attendant fear of litigation and institutional (and often personal) liability) is, perhaps understandably, rarely if ever acted upon. As has been suggested however, depending upon the circumstances, the copyright in any

text of a published article may not in fact be subject to the terms of the current CLA licence.[13] So far, so good. However, is there a way in which this first level enquiry might be developed into a useful strategy by which academic publications might be removed from the remit of the CLA licence *in toto*?

## 7. The existing free zone

This brief article has suggested that there already exists an arguably substantial body of academic work, which does not fall within the remit of the CLA licence, but which libraries could, under the right conditions, freely disseminate, whether on paper or by electronic means. The library's ability to do so will depend of course upon its ability to secure the permission of the academic in question to reproduce the text of his article. Obviously, clearing rights on an individual basis takes time, effort and expense. One of the fundamental attractions in relying upon copyright clearing centres such as the CLA is that they remove the necessary expense of institutions having to clear such rights on an individual and ad hoc basis. However, suppose that, upon academic publication, every author of every article, who retained the copyright in their article, made it clear that they were content for the text of their work to be freely reproduced within the educational sector for educational purposes. One standard footnote appended to the start of every academic publication within any given discipline would be sufficient to address the issue of individual rights clearance. This would not be an abandonment of the individual's rights to his work, but simply the granting of an *a priori non-exclusive licence* to those bodies within the educational sector to reproduce the work free of charge. [14] Take the process one step further: first, compile a register of legal academic publishers who do not claim any rights in their contributors' texts; next, marry this with a register of academics who are happy for their journal publications to be freely disseminated; third, make the information available to law libraries operating within the University sector. The result is perhaps the beginnings of an alternative, but crucially *free*, licensing scheme, concerning the arena of the academic article, that would begin to operate as a rival to the current and costly CLA licence.[15]

## 8. Expanding this free zone

It is one thing to recognise and perhaps capitalise upon the opportunities for disseminating work that already subsists within this academic free zone. There are, however, a number of additional strategies that could be employed in the drive to democratise access to journal publications and push back the boundaries of that space even further still. These involve reassessing our relationship with the ALCS (should we have one) as well as our relationship with the academic publishing community.

Consider first the situation wherein the ALCS is lawfully representing the author in question. The mandate given to them by the author extends to the reproduction of all of his or her academic (or other) output, be it a journal article, a student core text, or a monograph. We can of course recognise the valuable contribution that the ALCS have to play in relation to our monographs or student textbooks, but do we want them to exercise that same control in relation to our other (financially inconsequential) academic output? It is, at this point, worth reflecting upon why it is we write for academic journals in the first place. The motivation is not generally (or indeed ever) one of direct financial gain. Indeed, there are arguably other factors and attendant benefits, ignoring those of direct financial gain, that prove more significant in influencing our drive to publish. In the first place, there are clear secondary (indirect) financial gains to be made in terms of how our overall research portfolio affects matters of promotion, and so on, within our individual departments (the promotion factor). The place of the RAE exercise looms large in our own personal development as well as the development of the institutions to which we are attached. It becomes increasingly important to develop national and international profile, and in this regard, improving the extent to which our own written material circulates within the academic community can only operate to build and improve upon the development of such profile. Related to this are, of course, motivations of intellectual frisson and vanity (the kudos factor); in many respects, there is something fundamentally attractive

about the notion that others are reading and responding to (whether critically or not) the research that we produce. Ignoring these aspects of career development and peer respect, there also remains the basic impulse to contribute to the academic debate, to circulate opinions to which we are intellectually and emotionally committed, and to try and influence contemporary thought and development within our national (regional and international) legal jurisdiction (factors of altruism and real (or imagined) social and legal influence).[16] There are no doubt other reasons for publication that could be explored, but the point should hopefully have been made that by comparison with what might otherwise be gained financially, the reasons for seeking the free circulation of our own work (and that of others) appear to be otherwise compelling. In that light, why not simply revoke that part of the ALCS mandate that extends to the reproduction of an academic article for the purposes of education and research? The commercial consequences for the author are, arguably, practically non-existent; by contrast, the consequences for the educational sector as a whole are potentially significant.

Clearly the situation is different when the academic publisher claims the copyright in the article as published. The need and desire to publish (especially for younger members of academic staff) will often result in the author simply acceding to the requirements of the publisher. One such example, as detailed above, is that of Trust Law International; contributors must assign their rights in their work to the publisher prior to publication. There are two obvious things to be done here. First, it is interesting to note that the publishers of TLI do state that “[f]ollowing publication, permission will usually be given (free of charge) to authors to publish their articles elsewhere, if they so request”. Perhaps, as authors, we should make it standard practice, prior to publication to simply ask for such permissions. Were it an ordinary condition of the assignment to the publisher that the author be able to authorise making the material available for educational use, on a non-commercial basis, this would of course release a substantial body of additional academic material from the economic confines of the current CLA licence. Moreover, as is the case above, one strategically drafted footnote would be sufficient to alert the educational establishment that an appropriate licence has been granted by the publisher to the author to this effect. The alternative strategy, of course, is to refuse to assign the rights in the work to the publisher in the first place. Whether or not the lecturer is in any position either to negotiate such permissions, or simply refuse to assign the copyright in his work to the publisher, may inevitably be compromised by the lack of parity in bargaining strengths between the two relevant parties. Faced with the choice between publication or no publication, one might well excuse the (young) academic for signing away his current rights in return for an established and growing research publication portfolio. When negotiating with the publisher on an individual basis, the bargaining position of the academic is, naturally, much reduced. That could of course be altered were the academy, as an institution, prepared to refuse to sign over certain of their rights to the publishing community writ large. In this regard, of course, much would stand or fall upon our willingness as a community to act in unison.

## 9. Developing a unified and collective strategy

Perhaps however this author is mistaken; perhaps the sufficient goodwill does not exist amongst academics, legal or otherwise, to engage in such a concerted exercise. After all, a recent *Guide to Managing Intellectual Property: Strategic Decision-Making in Universities* has pointed out that: “[A]n effective IP strategy and policy may also help universities to recruit and retain high quality staff. Opportunities to supplement university salaries, through commercialisation, are an increasingly important consideration for many academics. In addition, many will wish to see their research outputs commercialised, and therefore used, because *they consider this to be an integral part of their academic responsibilities*”.[17] In preparing this short comment, a very brief questionnaire was circulated around the staff of two university law departments within the UK.[18] Two questions in particular are of direct relevance to the current discussion. The first was as follows: “Do you think university libraries should have to pay fees to photocopy and disseminate your journal articles?” To this question, 32 out of 34 answered: “No”. The remaining two responses indicated: “Don’t know”. As to the second question: “Would you be willing to let all higher educational establishments within the UK disseminate your published journal articles for non-commercial purposes free of charge?” To

this, 33 from 34 answered: “Yes”. The remaining response indicated that s/he would not be happy for such dissemination to take place if it was “in bulk”; that is, a qualified “No”. Albeit anecdotal, the evidence provided by these responses is of considerable interest. Although only a small sample group, the almost unanimous support for allowing higher educational establishments to freely reproduce academic articles for non-commercial but educational purposes nevertheless belies a divergence in attitude to reproduction fees between academia and those licensing organisations that claim to represent the interests of individuals within the academic community. There would also appear to be something of a disjunction between the policy set out in the aforementioned *Guide* and the opinions and views of those who responding to the questionnaire. The explanation for this no doubt lies in the fact that, on the first page of the *Guide*, the Executive Summary states with great clarity that: “*This Guide is targeted at vice-chancellors and senior managers in universities*”.[19]

As indicated, however, such evidence is sketchy at best. Similar surveys could or perhaps should be distributed to all other law departments within the country (perhaps via the Society for Legal Scholars network) in order to gain a quick but accurate national snapshot as to whether the views expressed above are shared by colleagues at other institutions. Should that be the case, then what is it that lies in the way of engaging in some form of coherent, consensual and unified action, on the part of the academy, in renegotiating their interests viz a viz the ALCS, the PLS and the academic publishers with whom they deal, in order to release the educational sector from the burden of paying photocopying fees to reproduce the text of every single academic article hereafter published within the UK.[20] Further, imagine an online database designed to compile, classify and archive the texts of all academic articles; anyone would be entitled to access, search, retrieve and download such material, provided they are doing so for the purpose of their own research or study.[21] Examples of such endeavours already exist, both as commercial and non-commercial projects.

## 10. The HERON project

One such example is the HERON project (Higher Education Resources On Demand). It was established to offer a national service to the UK academic community for copyright clearance, digitisation and delivery of book extracts and journal articles and has established a resource bank (in excess of 2,000,000 extracts) of already digitised materials that are available for rapid re-use (subject to obtaining the relevant copyright permissions).[22] Working with the CLA, the HERON project was designed to facilitate in the development of a copyright clearance service for electronic rights for the Higher Education community. The role of the CLA is to provide authorisations, through its Rapid Clearance Service (CLARCS), relating to the creation, storage and exploitation of digital versions of existing print holdings.[23] HERON originally began as a project jointly funded by the Joint Information Systems Committee (JISC),[24] the University of Stirling, Napier University and South Bank University but was, in March 2002, acquired by Ingenta.[25]

## 11. The way forward? A non-commercial alternative to HERON (?)

Should a viable non-commercial alternative to HERON be developed, the benefits of such a system would, it is suggested, be manifold. On the one hand there are obvious benefits to be gained in terms of developing a system in which academic ideas, argument and debate flow freely around the educational sector (an effective and free marketplace of ideas). As well as the various individual benefits to be realised, outlined above, other than those of direct financial reward, there are gains to be made in terms of being able to design and deliver courses for students freed of the possibility that what the students will read may in reality be defined by considerations relating to the weight that the copyright regime brings to bear on the delivery of educational material and thought. In addition, should an effective and free system of permissions be developed, the benefit for the library sector is likely to be substantial. The first and obvious benefit is a financial one; should we be able to effectively remove academic articles from the remit of the CLA licence, then obvious opportunities arise for renegotiating that licence in a manner that is economically advantageous for the library sector. There are, however, other attendant (non-financial) benefits to be gained. In a recent survey

of the rights clearance process within the library sector, a number of problematic factors were identified on the behalf of library staff that a broadly defined, effective system of a priori academic licensing could also address. The types of problems and concerns identified were as follows: the heavy administrative burden involved in clearing rights; having to trace individual rights holders; the volume of permissions needed; the time delays involved in awaiting responses and the general overall length of the clearance process; internal relationships with academic staff; [26] anticipated problems in future electronic copyright clearance. [27] Clearly, instigating a non-commercial alternative to the HERON project would not operate as the panacea for all of these various ills, but there is no reason why it could not operate to substantially improve upon many of those aspects identified within libraries as contributing to the time, complexity and cost of clearing copyrights, at least as regards academic journal publication.

Thus far, many readers may perceive the commentary and aspirations set out within this article to be overly ambitious, unbearably altruistic, or simply grossly unrealistic. Such objections have not, however, prevented similar initiatives taking root in other jurisdictions. [28] In Australia, for example, a website has been established by legal academics, operated by the Australian Legal Information Institute (AustLII), which provides free access to and comprehensive coverage of a wide range of primary and secondary legal resource materials. [29] Similarly in the US, a website has been created by the Law Library of the U.S. Congress which provides links to almost 40 U.S. law reviews and journals that are prepared to provide online access to the full text of their published articles, rather than simple abstracts. [30] There is no reason to believe that a similar successful program could not be developed within the UK. What is required however is a level of proactive and co-operative behaviour between the academy, the libraries and those who work for the promotion of legal education that previously has been absent. The suggestions for proceeding, that have been outlined above, [31] indicate a way in which we might begin to identify exactly what academic texts can be freely reproduced (with the consent of their authors) as well as ways in which other texts may be drawn into this space. Those suggestions, however, go no further than identifying a system in which copyright permissions can effectively function outside the realm of the current CLA licence. They do not operate to improve upon *access* to the actual texts of the various published articles involved. As indicated earlier, to simply rely upon any library employing in-house reprographic or digitisation techniques to photocopy or scan articles for distribution amongst staff and students is to ignore the fact that they will in any case have to rely upon the CLA licensing facilities in order to clear what rights the academic publishers have in the typographic arrangements of those published works. With this in mind, in order to capitalise fully upon the suggested project, then a more co-ordinated national strategy would need to be embarked upon. For example, a working group might be established with representatives from the academy, the university libraries, and those who work for the promotion of legal education and open and freely accessible research scholarship (UKCLE, SLS, BILETA, JISC, CURL, SPARC, SHERPA, the AUT and so on) to discuss ways in which the various texts of these journal articles can be gathered together and made available, within an online forum or database, in a format that does not impinge upon any typographical copyrights held by the publishers of such articles. [32] One method of proceeding would involve the development of a system of linked individual institutional archives. That is, within each institution work could be carried out to encourage greater levels of understanding and co-ordination between academic staff and library staff in order to make sure that every item of published research be made available to the libraries for cataloguing and digital storage. [33] In an age of relentless e-mails (and e-mails attachments) such exchanges would hardly prove unduly problematic. If this were manageable within every law library throughout the UK, then provision could then be made so that each of these individual archival databases be made available to all other law libraries operating similar systems throughout the UK – that is, these individual institutional archives could be developed in such a manner as to be *interoperable* thus creating the potential for the development of a global virtual research archive. [34]

The proposals set out above, it must be conceded, represent no more than the crude and, probably, ill thought out suggestions of someone who knows a little about copyright, but very little about the potential and problems of harnessing the efforts of committed individuals and information

technology to some better, altruistic end. Nevertheless, if they operate to do no more than generate some awareness of, and stimulate some debate about, what are otherwise significant issues of concern to the academy, then they will have served some basic function. It needs to be remembered that in all of this we are only limited by our own willingness to act, organise, lobby and to freely share the fruits of our own time and intellectual labours. Why should we buy back that which we freely give away?

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[1] As the author of this article, and the owner of the copyright therein, I hereby authorise all and every educational institution and library to reproduce and disseminate the text of this work for the purposes of educational instruction and research, subject to the following conditions: that I be identified, at all times, as the author of the work and that the work not be used for commercial purposes without my prior consent. Material from this article formed the basis of a paper presented at the 2003 annual conference of the British and Irish Law Education and Technology Association (BILETA). I am grateful for the helpful comments made by those members of the subject section present on that occasion.

[2] Its licence now also extends to reproduction of artistic works through its agency agreement with the Design and Artists Copyright Society (DACS).

[3] User Guidelines: Copying from books, journals and periodicals in UUK/SCOP Higher Education institutions.

[4] The list of Excluded Works is available online; the current version is dated April 2001 (although this is in the process of being updated).

[5] For more information see the Publishers Licensing Society's Mandate Handbook. At present over 1600 publishers are registered with, and so represented by, the PLS.

[6] CDPA s.1(1)(c).

[7] CDPA s.1(1)(a).

[8] In any case, even if it did, the lecturer may still be able to authorise the library to reproduce the text of his work, depending upon whether the licence existing between himself and the publisher is of an exclusive or non-exclusive nature. An exclusive licence, of course, must be in writing and signed by or on behalf of the copyright owner; CDPA s.92(1). Should these conditions not be met (and this particular author has yet to sign anything in relation to the publication of any of his work in any academic journal) then the licence that exists between the two remains non-exclusive, to which end, the lecturer remains free to subsequently authorise the librarian to reproduce his text.

[9] *ALCS: protecting and promoting authors' rights*. For further details see Article 7 (c) (d) and (e) of the ALCS's articles of association as well as the Society's website. Currently, all members pay an annual subscription fee of £7.50.

[10] See *ALCS: protecting and promoting authors' rights*, 8.

[11] As has been established above, the copyright in the typographical arrangement of the work lies with the publisher, as represented by the PLS.

[12] Indeed, one might suggest that the rhetoric of CLA materials operates to reinforce the potential consequences of infringing behaviour on the part of the library system. Consider for example the opening paragraph of the CLA's press release concerning the launch of their Digitisation Licensing scheme: "The Copyright Licensing Agency (CLA) today launched its first licensing schemes for the digitisation of printed text. For the first time CLA is in a position to offer a licence which, subject to terms and conditions, will permit the creation, storage and exploitation of digital versions of existing print holdings, *without fear of copyright infringement*" (emphasis added). For more on the CLA's digitisation licensing scheme see the following documents on the CLA website ([www.cla.co.uk](http://www.cla.co.uk)): *Higher Education Digitisation Licensing Scheme: User Guidelines*; *Higher Education Digitisation Licensing Scheme: Digitisation Agreement*; *Higher Education Digitisation Licensing Scheme: White Paper on CLA's proposals for Licensing digitisation in Higher Education*.

[13] *Universities UK v CLA* [2001], a case brought before the Copyright Tribunal, concerned amongst other things the pricing of the blanket licence for reprographic photocopying in universities and the ending of a separate transactional procedure involving additional payments for the copying of “course packs”. Under the existing system, the licence fee that universities paid to the CLA did not cover the production of “course packs”; these were the subject of separate payment and individual clearance through the CLA’s Rapid Clearance System (CLARCS). It is with some irony that, as part of their defence, CLA argued that the CLARCS system did not amount to a licensing scheme within s.116(1) of the CDPA, and so did not fall within the jurisdiction of the Copyright Tribunal. The reason for this was because, in the words of Robert Englehart QC appearing for the respondent, “[t]he 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 ... 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”. *UUK v CLA* [2001], CT Case nos CT 71/00, 72/00, 73/00, 74/00, 75/01, available from <http://www.patent.gov.uk/copy/tribunal/trisbissued.htm>. For more on this case see Sol Picciotto, “Copyright Licensing: the Case of Higher Education Photocopying in the United Kingdom” *EIPR* [2002] 438-47.

[14] Arguably a more effective strategy might be for those academic journals, that are so inclined, to include a standard statement on all work submitted by their contributors to the same effect, rather than rely upon individual authors to make such a declaration.

For examples of different types of licences that academic (and non-academic) authors might employ, see the Licensing Project established by Creative Commons in December 2002 to encourage individuals to more freely disseminate their work (<http://www.creativecommons.org>). Creative Commons present four different types of licence that might usefully be employed: an “Attribution” licence which allows others to copy, distribute, display, and perform your copyrighted work (and derivative works based upon it) but only if they give you credit; a “Non-Commercial” licence which lets others copy, distribute, display, and perform your work (and derivative works based upon it) but for non-commercial purposes only; a “No Derivative Works” licence which let others copy, distribute, display, and perform only verbatim copies of your work, but not derivative works based upon it; and a “Share Alike” licence which allows others to distribute derivative works only under a license identical to the license that governs your work.

In January 2003 Cory Doctorow published his first novel “Down and Out in the Magic Kingdom” under an Attribution/No Derivatives/Non-commercial Licence developed by the Creative Commons project (for more details see <http://creativecommons.org/licenses/by-nd-nc/1.0-legalcode>). Within 24 hours the entire book had been downloaded over 20,000 times; the next day the book was listed amongst Amazon’s top 300 sellers. Those who download and enjoy the book for free are invited, not to send the author any money, but rather to purchase a copy and donate it to a local school or library in their area. For more information see [http://www.craphound.com/down/archives/2003\\_01.php](http://www.craphound.com/down/archives/2003_01.php). Should it be considered necessary, to safeguard the financial interests of the academic publishers, the permission involved might be granted subject to the condition that the library in question subscribe to the journal in the first place. In this way, sales of, and subscriptions to, such journals (within the educational sector) need not necessarily be jeopardised in any way.

[15] The strategy of drawing upon the copyright regime (or indeed a property paradigm at all) in order to ensure greater and freer access to works of scholarly interest, will, of course, strike some as being somewhat paradoxical in nature. For an interesting discussion of the various problems and contradictions that arise in relation to the use of legal discourse and intellectual property law techniques in trying to maintain the highest levels of academic freedom and autonomy, see, in general, Corynne McSherry, *Who Owns Academic Work? Battling for Control of Intellectual Property* (Harvard University Press, 2001). While not denying the inherent paradox of the above situation, McSherry points out, in relation to the US at least, that this phenomenon is not a recent one: “[T]he use of IP rights to defend the autonomy of higher learning ... from the conduct of businessmen (including university administrators) dates at least to the making of the modern university”; at p. 140.

[16] As well as the benefits that accrue to the individual academic, there are clearly institutional advantages to take into account, in terms of the academic department within which we operate, in

that wider and more rapid dissemination of our work operates to raise the profile and prestige of the institution itself.

[17] *A Guide to Managing Intellectual Property* (Auril/UUK/Patent Office, March 2002), 6; emphasis added.

[18] My thanks to those individuals from the University of Durham and Queen's University Belfast who participated.

[19] *Op. cit.*, 3; emphasis added.

[20] In addition to the ALCS the PLS and academic publishers one might usefully add the University as employer.

[21] See n.36 and accompanying text.

[22] Information about HERON can be obtained at <http://www.heron.ac.uk>.

[23] The CLA launched their digitisation licensing scheme in February 1999 to cover the process of scanning extracts from periodicals and journals, converting the scanned file into a suitable form and then making that material available (under certain circumstances) to the staff and students on the University's intranet. More information about CLA Digitisation Licences is available on the CLA website ([www.cla.co.uk](http://www.cla.co.uk)): *Higher Education Digitisation Licensing Scheme: User Guidelines*; *Higher Education Digitisation Licensing Scheme: Digitisation Agreement*; *Higher Education Digitisation Licensing Scheme: White Paper on CLA's proposals for Licensing digitisation in Higher Education*.

[24] For more information see <http://www.jisc.ac.uk>.

[25] Ingenta provides online access to professional and scholarly research. For publishers, Ingenta offers a range of online hosting and distribution solutions, and for librarians, customisable research retrieval and collection management services. Researchers are able to search and access (generally for a fee) a broad range of scholarly and professional research, in electronic, fax or Ariel format. With offices in Cambridge (MA), Providence (RI), Oxford and Bath, it has nearly 14,000,000 articles that are available for downloading. For more information see <http://www.ingenta.com>. For some evidence as to the attitude of the library sector to HERON see Elizabeth Gadd, *Clearing the way: copyright clearance in UK libraries* (LISU Occasional Paper no.31, 2002) pp. 14-15, 48-50.

[26] Gadd recounts various respondent's comments to the effect that "the library is often seen as 'being awkward' by our academic colleagues because we have to implement these [copyright] regulations"; another commented about the "constant battle against the attitude that it is all about interfering with academic freedom"; *op. cit.*, p. 15.

[27] *Ibid.*, pp. 5-30.

[28] For more information in this area in general see the Copyright in Higher Education Workgroup website at <http://www.ukcle.ac.uk/copyright/index.html>.

[29] See: <http://www.austlii.edu.au>.

[30] See: <http://www.loc.gov/law/guide/lawreviews.html>. There are of course many other examples of both established and embryonic research publication archives: the arXiv archive (<http://www.arxiv.org/>) based at Cornell University which contains over 200,000 papers relating to Physics, Mathematics and Computer Science; in South Africa the Information technology Division of Stellenbosch University has launched an Information Infrastructure Initiative to provide web hosting services for scholars, scholarly societies and academic bodies; MIT has announced a global launch of DspaceT which will provide a digital repository system to capture, store, distribute and preserve the publications of MIT's faculty and research staff (<http://dspace.org>). For more information about these initiatives, and others, see the ACOSC *Digest of Scholarly Communication News* (December 2002) as well as the information available at <http://openarchives.org>.

[31] *Supra*, *The existing free zone* and *Expanding this free zone*.

[32] Clearly the work of such an organisation need not be limited to this alone. For example, they might also usefully develop a series of standard licensing agreements acceptable to academics, similar to those developed by organisations such as the Creative Commons, *supra* n.15, that academics could append to the beginning of their journal publications to encourage and inform others about the ways in which their work may be disseminated throughout the educational sector free of charge. In addition, such an organisation could provide a focal point for any concerted action in which the academy might engage, in terms of renegotiating academic relationships with the

publishing community, and so on.

[33] That is, that once anyone working within a law department publishes any given article, a transcript of that article is sent their institution's library for conversion into a pdf file (or some other suitable format) and storage on a local institutional archival database of such material.

[34] In this regard, it is worth noting that free and effective software is already available that allows for metadata from different archives to be harvested and collected together in searchable databases; for more information on this Open Archives Initiative (OAI) see <http://openarchives.org>. In practical terms, as any individual academic moves from institution to institution, his or her body of work could easily be transferred from the one library to the other.