



## **Gowers Review of Intellectual Property: Call for Evidence**

### **ALCS written evidence submission**

ALCS Ltd  
Marlborough Court  
14-18 Holborn, London, EC1N 2LE

## **Introduction**

The Authors' Licensing and Collecting Society Limited ('ALCS') is the UK rights management society for writers of all genres of literary and dramatic copyright works including fiction, journalism, plays, poetry, academic texts, TV and radio scripts and story-lines, dramatisations, translations, abridgements and adaptations.

Established in 1977 and wholly owned by its writer members (of whom there are currently 53,000), ALCS is a not-for-profit, non-union organisation. The Society's governing body, the Board of Directors, is composed of elected Ordinary writer members, and writers nominated by its two Corporate members, the Society of Authors and the Writers' Guild of Great Britain. Since its foundation, ALCS has paid writers over £115 million in fees and today it continues to identify and develop new sources of income for writers. To provide further information about ALCS, we [ refer to ] our Strategic Plan and Annual Report for 2005/06. Additional information is available on our website at [www.alcs.co.uk](http://www.alcs.co.uk).

ALCS is grateful for the opportunity to contribute to this inquiry and would be pleased to provide further oral or written information or assistance to the Review team as required.

We have responded to the general and specific questions that we feel have a direct bearing on the interests of our members, and writers generally.

## **Responses to General Questions**

### **1. How IP is awarded**

#### **(a) Are there barriers to obtaining IP rights due to system complexity? What could be done to improve this situation?**

Under s.78 of the Copyright Designs and Patents Act 1988 (the Act) authors are required to assert their right to be identified as the author of their work, in writing. This so-called 'Paternity Right' is enshrined in Article 6*bis* of the Berne Convention - to which the UK is a signatory - as the 'right to claim authorship'. In a digital-use environment where an individual's work may be readily shared, republished or simply plagiarised, this further level of legal protection for authors is vital. The assertion requirement - involving specific reference in either the document by which the work is assigned, or other legal instrument - adds unnecessary complexity. Removal of this requirement from the Act would not

only bring the UK into closer harmony with the position in the rest of the EC, but also with the provisions of the Berne Convention itself<sup>1</sup>.

**(b) How easy is it to find out about obtaining IP rights? What could be done to improve awareness for businesses and innovators? Is there sufficient awareness of the need to protect IP internationally?**

If IP rights are to deliver their full potential in driving innovation and stimulating creativity, improving rights awareness must be seen as a target for all rights, across all sectors and user groups.

In terms of improving awareness within the business / SME community we support the work being undertaken by the Patent Office - providing workshops at the British Library Business & IP Centre, and advice services to Business Link – with further cross-departmental support being provided, where appropriate.

We also support, within the education sector, the further roll-out of the Patent Office THINK kit and the proposed joint initiative with DfES to adapt the material for use within the primary, FE and HE sectors.

ALCS also supports the on-going work of the Qualifications and Curriculum Authority (QCA), aimed at dealing with plagiarism and associated issues within the education sector, specifically the development of the curriculum on citizenship, and functional and personal development skills to inform and educate on these issues. ALCS also supports programmes for raising the awareness of education providers as well as pupils in this area, and welcomes the publication of *Authenticating Coursework*, the QCA's guide for teachers. Our response to part (f) of the specific question on the application of copyright exceptions in the field of education deals in greater detail with practical measures such as:

- positive recognition of the value and importance of attribution should be encouraged, not just in terms of teacher and student awareness, but possibly also in marking
- guidance on attribution, but also on misrepresentation (i.e. derogatory use)
- student awareness raising to begin as early as possible

Looking more broadly at the need to improve awareness of the rights of creators in their works, we believe that support – both political and financial – is required to sustain initiatives such as the recent Industry Trust for IP Awareness National Consumer Awareness Campaign. The key message – ‘piracy is not a victimless crime’ - must be emphasised. While recent research<sup>2</sup> suggests that consumers

<sup>1</sup> Art 5 (2) states, “The enjoyment and exercise of these rights shall not be subject to any formality...”

<sup>2</sup> *Fake Nation*, Intellectual Property Theft and Organised Crime Project, 2005,

continue to make the connection between piracy and a) local / organised crime and b) loss in revenue such as taxation, there is little evidence to suggest that consequent losses to creators with low economic status or, indeed, loss of future creativity itself, is seen as significant. This is clearly an area requiring further attention at a policy level.

We are encouraged by the 3-step action plan set out in the government response to the Creative Industries IP Forum Education & Communication Working Group report, and wholeheartedly support the inclusion of creators themselves as part of the groups for whom assistance in appreciating the value of IP may be of value. Faced with new models for the distribution of their works on-line - such as the fee-free options offered by the Creative Commons licensing schema - individual creators need to be made aware of the full life-cycle economic value (present and future) of the works they produce.

Users also need to be made aware that, while technology may empower them to interact with IP works, the underlying rights protecting those works should also be respected. It is important to emphasise that these two interests can and should co-exist. Indeed this essential interrelationship between robust IP rules and the creation and use of content, was recently enshrined in points 16 and 17 of the Preamble to the UNESCO Convention on the protection and promotion of the diversity of cultural expressions (2005):

*Emphasizing the vital role of cultural interaction and creativity, which nurture and renew cultural expressions and enhance the role played by those involved in the development of culture for the progress of society at large,*

*Recognizing the importance of intellectual property rights in sustaining those involved in cultural creativity,*

Through its partnerships with publishing bodies and the Copyright Licensing Agency (CLA), ALCS is working on joint initiatives to deliver rights awareness programmes to writers, publishers and end-users.

Content / platform providers also have a role to play in promoting an understanding of IP rights and the balance between creators and users. The BBC Creative Archive (CA) project for example uses strong messages regarding user interaction with works within the archive. On a practical note, the CA user point-of-contact provides an ideal opportunity for the BBC and its partners to ensure that rights awareness messages are communicated. ALCS, through the Creators' Rights Alliance (CRA), has lobbied the Creative Archive Licence Group on this point. Such messages will be vital and when the pilot scheme extends to material not wholly owned by the BBC - to the extent that the CA providers are able to address the possible public misconception that BBC CA content is all 'publicly owned' material.

The Google Book Search Library Project provides a further example of how public messages on the importance and indeed relevance of IP rights, in the context of stimulating further innovation, may be distorted. During 2005 the Project launched with accompanying positive public messages regarding the need to use new technology to provide information /access to content. The internal reality - discord, disarray, lawsuits - clearly demonstrates that 'an act now, ask later' approach is not supportable, and will ultimately damage the public perception of individual and corporate rightsholders and providers. We stress again the value of communication and collaboration and suggest that the DTI, DCMS, and DfES all have a role to play in ensuring that the UK achieves the balances enshrined in EC copyright law,

"The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights..."<sup>3</sup>

## **2. How IP is used**

### **(a) What types of IP does your organisation use and why?**

ALCS is the UK rights management society for writers of all genres of literary and dramatic copyright works including fiction, journalism, plays, poetry, academic texts, TV and radio scripts and story-lines, dramatisations, translations, abridgements and adaptations.

Regarding the actual exploitation of the rights subsisting in these works, the guiding principle for ALCS is to administer writers' rights only in situations where, for legal or practical reasons, collective management is the only or most appropriate option. The ALCS 'Plain English Mandate' (attached as ALCS Doc.1), based on Article 7 of the ALCS' Memorandum and Articles of Association (attached as ALCS Doc.2) explains in more detail the nature and extent of the rights that we currently administer.

ALCS administers the 'secondary rights' in its members' works, securing fees for uses occurring after the initial payments e.g. for publication / broadcast. (The tables attached as ALCS Doc.3 demonstrate the types and level of income secured by ALCS for writers during the past 10 years).

In reviewing the impact of IP on the overall UK economy it is vital to take account of:

- a) the economic significance of the contribution made by creators to UK GVA, and its reliance on a supportive IP regime, and

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<sup>3</sup> Recital 22, Directive 2001/29/EC

- b) the need to reward the initial act of creativity throughout the entire life-cycle of the resulting work.

Enforced buy-outs of the IP of individual rightsholders have become an industry norm in some sectors, making it still more important that the creator's long term investment is both acknowledged and protected.

As digital technologies extend the life-cycle of works so solutions have to be found to provide for appropriate frameworks for rewarding their usage. In our responses to Question 3 and under the specific heading 'Orphan Works', we look in greater detail at various solutions and models for delivering rewards to writers to sustain their innovation and creativity, and legitimate access to users.

#### **(d) How does your company value its IP?**

Although the ALCS repertoire of works is essentially valued on a collective basis, we are acutely aware of the difficulties faced by many writers in gaining recognition for the economic value of their individual works and that their contractual bargaining position is almost always that of the weaker party.

As described above in our response to 2(a), the value of the IP exercised by ALCS on behalf of its members relates to the added value for writers from the exploitation of their work after the initial primary payments. The graph attached as ALCS Doc.4 provides an illustration of the on-going value to writers in respect of a typical work from secondary licensing revenue. In economic terms, the benefits of this system of providing added value are twofold: the writer receives further income on an on-going basis to enable the creation of further works and the end-users are granted the rights to use the raw materials necessary to sustain their own activities – whether copying materials for education or business sectors or re-transmitting works in the broadcasting sector.

#### **(f) How well does the UK IP system promote innovation?**

It is important, in the present review, to clarify and define the idea of 'innovation', and its role in driving economic competitiveness, in its full context. The DCMS figures quoted in the Introduction to this Call for Evidence demonstrate the significant contribution made by the creative industries to the UK economy. It should be noted that without the initial creativity, there are no creative industries.

Broadly speaking the copyright system itself - the balance of rights, exceptions, etc. - provides a solid framework for the protection and promotion of creative innovation, and a balance between creators and users. It is clear however that technological change increasingly places tension on this balance, while the accompanying debate all too often focuses on the needs of consumers and

service providers, with little or no thought to those at the source of the supply chain.

Digital technology offers users far greater choice in terms of the way in which they access and interact with creative content. From a writer's perspective, the same technology provides an incentive to create, by providing the means to entertain, educate and inform new readers and explore new markets – thus generating a potentially larger return on their investment<sup>4</sup>. If current and future advances in new media technology are to deliver both of these objectives - as it should - then a balance must be struck between the provision of access to content and the observance and understanding of the following basic principles:

- i) the recognition of the rights - both economic and moral - in the underlying content, and
- ii) the need for the development of an appropriate and equitable infrastructure to ensure that the on-line use of creative content may be audited and, where the creator so chooses, remunerated.

This delicate balance was neatly summarised in the recent EC staff working paper on the issue of the creation of digital libraries<sup>5</sup>,

“Solutions have to be found that respect the legitimate interest of creators, while enabling full use of the potential of the new technologies.”

These new technologies redefine the traditional access relationships between users and content by allowing individual and collective licensing arrangements to be made directly between creators and users. For example, a digital library of written works made available on-line - for research, private study or simply pleasure – is likely to include a significant number of older / 'out of print' works as part of the 'stock' of the library, where the rights have reverted to the author. As well as providing the initial innovation for new works, creators can also add value to new on-line access models by providing the rights clearance for a huge volume of existing published material.

While our evidence deals with the issues surrounding the present UK moral rights regime elsewhere (Qu. 1a / 'Exceptions'), it is worth noting that the level of financial reward received by writers for the exploitation of their *economic rights*, itself raises issue of sustainability of innovation at this level. In 2001 a survey by the UK Society of Authors<sup>6</sup> of its members writing across all genres found that

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<sup>4</sup> Evidence from our members suggest that, in the last decade, the income for mid-list authors – the backbone of trade book publishing – has declined steadily.

<sup>5</sup> SEC(2005) 1194, *Annex to the Communication to the Commission* "2010: Digital Libraries"

<sup>6</sup> Survey results published in *The Author*, Volume XXI No.2

61% earned less than half the national average wage, and 46% less than a quarter.

An evaluation of the UK copyright regime, and consideration, where appropriate of necessary changes to that regime must seek to achieve the balance quoted above. Such an evaluation should, of necessity, give equal recognition (in terms of legal and social policy) to the 3 key stakeholders groups: i) creators ii) content producers / providers (such as intermediaries and aggregators) and iii) users.

The importance of the role played by the initial creative input in driving subsequent commercial initiatives was clearly identified in the Treasury-commissioned Cox Review of 2005,

“Creativity, properly employed, carefully evaluated, skillfully managed and soundly implemented, is a key to future business success – and to national prosperity.”<sup>7</sup>

**(g) To what extent does your organisation make use of other methods used by Government to encourage innovation, such as public funding?**

ALCS is wholly owned by its members and has never received public funding. We are however looking to work with DTI, DCMS and DfES on projects and further research aimed at encouraging and supporting innovation and creativity within our sector.

**(h) Are data on the use of patents and other forms of IP useful as a means of measuring innovation?**

Throughout this submission we argue for the recognition of the part played by the creator in delivering the significant contribution to UK GVA made by the creative industries. Although the DCMS CIEE figures provide a sectoral analysis of the economic impact of this contribution, they do not separately analyse the value added by (i) creators (such as authors and performers) and (ii) commercial exploiters (such as publishers and producers). If the UK creative Industries are to sustain and expand their contribution to GVA in a digital-use market, this further analysis will be vital to enable creators, exploiters and users of creative products to develop the necessary relationships and models for future growth.

A comprehensive review of this nature is clearly a significant undertaking and we would suggest that the Evidence and Analysis team established under the DCMS Creative Economy Programme may be the most appropriate body to take this

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<sup>7</sup> The Cox Review of Creativity in Business: building on the UK's strengths, September 2005

work forward, with cross-departmental support and guidance provided by the DTI.

**(j) Have you encountered patents or other IP rights being used defensively, i.e. obtained not to develop products, but only to prevent others from doing so? Under what circumstances do you consider this acceptable?**

Through anecdotal evidence of its members, ALCS is aware of situations where writers are coerced into signing contracts with publishers and producers that require the assignment / exclusive licensing of all rights in the work, for global exploitation for the full term of copyright. The full range of rights thus granted are not exploited but have been perceived by publishers, producers and broadcasters to be necessary for the protection of their commercial interests in the print and analogue environment. Regardless of the rights or wrongs of this comprehensive assignment, it is clearly neither appropriate nor acceptable in the digital era, and can only operate to stifle further innovation and creativity in the way that creators produce and market their works.

### **3. How IP is licensed and exchanged**

**(a) How easy is it to negotiate licences to use others' IP for commercial or non-profit purposes?**

*and*

**(g) Does your organisation use methods to facilitate exchange of IP - such as cross-licensing or pooling IP rights with other firms or organisations?**

Various licensing frameworks already exist in the UK to address the needs of individual and corporate rightsholders and users. Current UK schemes based on collective administration models - such as the Public Lending Right, reprography through the Copyright Licensing Agency (CLA), and audio-visual copying under the Educational Recording Agency (ERA) scheme - provide for lending, copying and further use of works, in both analogue and digital form, in a trusted and credible licensed environment, and with the assurance through ALCS and others that creators are remunerated. Such schemes also provide a valuable service to licence users, by providing the assurance of legal compliance for multiple works and rights at a single point of licensing.

This assurance is made possible by collaboration between the various groups of rightsholders. The well-established UK environment for the collective licensing of printed works, under the CLA scheme, ably demonstrates the value of such partnerships. Under the scheme, users are able to copy a vast repertoire of works, based on a single point of contact with a licence provider. A working

relationship between the creators of literary and artistic content (as represented by ALCS and the Design and Artists Copyright Society (DACs) respectively) on the one hand, and the publishers of the works incorporating this content (as represented by the Publishers' Licensing Society) on the other, is essential in providing this facility to users. These relationships - and the formal, legal agreements underpinning them - are the product of many years of working together to understand and appreciate the issues surrounding the rights and rightsholders within each group.

A further example of how the 'pooling' of IP rights can lead to solutions that benefit creators, commercial rightsholders and users, thereby enhancing every part of the value chain, is the scheme operated by the Educational Recording Agency (ERA). The scheme brings together the various and multiple rightsholders of the audio-visual works contained within UK broadcasts, providing educational establishments with a single point of contact for both licensing and discussion on user requirements. The resulting payments are distributed to the various rightsholder groups through the trusted and accountable mechanism of collective administration.

A similar solution to the issue of multiple rights holders in a single 'product' was presented by the EC cable and satellite Directive<sup>8</sup>, allowing groups of rightsholders, represented by individual collective administration organisations, to negotiate usage terms for the rights to retransmit television across borders. On this basis, digital media convergence that produces mixed-media products should not be seen as a barrier to licensing – the collective administration model shows how users and broad-based rightsholder groups can deliver workable solutions.

**(b) What mechanisms do you use for finding potential licensing partners?**

Within our sector umbrella organisations such as the International Federation of Reproduction Rights Organisations (IFRRO), the European Writers Congress (EWC), the International Confederation of Societies of Authors and Composers (CISAC) and the Association Internationale des Auteurs de l'Audiovisuel (AIDAA) provide opportunities for international discussion on the issues concerning rights and rights management, as well as presenting opportunities to connect with new licensing partners. (The map attached as ALCS Doc.5 shows the countries where ALCS currently has reciprocal representation agreements).

**(d) Are there specific barriers to licensing in the main forms of IP currently used: patents, copyright, trade marks, and designs?**

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<sup>8</sup> Article 9, Directive 93/83

Please refer to answer given to (e) and (f) below.

**(e) Are there barriers to licensing IP on grounds of cost? What drives these costs?**

While the lending of books within UK public libraries is subject to separate legislation and regulation<sup>9</sup>, s.66 of the Act separately empowers the Secretary of State to order that a broader range of copyright works may be lent to the public, subject to the payment of a 'reasonable royalty.' The Act also provides that such an order may be overridden or delimited by the terms of a certified licensing scheme. In the absence of such an order, and on the basis that Part II of the Act contains similar provisions in favour of performers, ALCS and the British Equity Collecting Society (BECS) have, since 2000 been in discussion with various representatives of the DTI and DCMS regarding a licensing scheme for the lending of audio-books in public libraries. Although the Chartered Institute of Library and Information Professionals (CILIP) support the proposed scheme and PLR have offered to assist in the data-gathering process, the main barrier to the scheme has been the issue of funding and administering the licence fee in a cost effective manner. The scheme is currently being considered by the Minister for Culture.

Although s.66 was introduced back in 1996, no 'reasonable remuneration' has yet been paid in respect of this exercise of the lending right. With no Order from Secretary of State and no certified or voluntary licensing scheme in place, libraries are effectively infringing this right. The aim of the proposed scheme is to offer compliance to libraries and a fair return to writers and performers for the use of their works.

While we make the arguments for collective management schemes elsewhere in this submission, based on the pragmatic solutions they can deliver in dealing with large volumes of rights and works, it is also worth noting the costs savings that this approach can achieve. For example, for the 2004/05 financial year the administrative cost of the ALCS distribution operation was 16.45% of the total fees collected, but thanks to prudent management of the company assets (interest on undistributed fees and property income), the average commission charged to individual writers was only 12.7%.

**(f) Are there specific barriers to licensing IP in your sector?**

Within the ALCS sector - the collective licensing of the full range of literary and dramatic copyright repertoire - two barriers are noteworthy. The first is primarily

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<sup>9</sup> s.40A, CDPA 1988

related to costs issues (see (e) above). The second relates to a specific right that an author may grant to a collecting society to exercise on his / her behalf.

In looking at the effectiveness of the Rental & Lending Directive, the 2004 EC analysis of the copyright 'Acquis'<sup>10</sup> dealt only with EC activities aimed at enforcing the PLR aspects of the lending right. Although this, in itself, is an important part of the Directive that has, at times, required the intervention of the Commission and ECJ, the paper failed to address the unsatisfactory working of the unwaivable right to equitable remuneration for rental, established under Article 4 of the EC Rental & Lending Directive.

Essentially Article 4 provides authors (and performers) with an unwaivable right to equitable remuneration for rental, in cases where they have transferred their exclusive rental right to a film / sound recording producer. The Recitals to the Directive state that the equitable remuneration, 'must take account of the importance of the contribution of the authors and performers concerned to the phonogram or film.' The architects of the Directive described Article 4 as one of its 'main achievements' explaining that it was designed, "to counterbalance the disadvantages typically encountered by authors and performers in negotiations with producers."<sup>11</sup>

Although the Directive permitted Member States to choose the party against whom the remuneration would be claimed, the draftsman commented that to best fulfil the aim of Article 4, rental outlets would be the most appropriate debtors. Unfortunately, UK implementation chose to make the person to whom the rental right was transferred liable for payment. In the majority of film production cases, through industry practice or statutory presumption (s.93A CDPA), the right will transfer to the film producer.

This approach presents various practical problems:-

(i) Production companies, as legal entities, may only exist for the duration of the project concerned.

(ii) Producers are rarely the party receiving direct (and quantifiable) commercial benefit from the exploitation of the rental right. That is the distribution outlets, benefiting from a rental market reckoned, by the British Video Association figures for 2004, to be worth in excess of £460m<sup>12</sup>. (Recent initiatives by, for example Blockbuster and Amazon, offering 'click and post' services have added a further consumer value to the rental product).

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<sup>10</sup> SEC (2004) 995

<sup>11</sup> *The EC Directive on Rental and Lending Rights and on Piracy*, Reinbothe & von Lewinski, Sweet & Maxwell, 1993.

<sup>12</sup> UK Film Council Statistical Yearbook 2004/05

(iii) To licence the distribution outlets directly, one needs to establish that the rental right itself has been transferred in each case (s.93B (3) CDPA).

(iv) s.93C (4) states that remuneration is not to be considered inequitable, 'merely because it was paid by way of a single payment or at the time of the transfer of the rental right.' It may therefore be argued that, following payment of the original contractual fee, the author /performer has no further claim for the onward value derived from the rental market. This entirely defeats the aim of this provision of the Directive, as described in the quotation above.

Furthermore, while some 10 years after the UK implementation of the Directive no workable collective schemes have been established in the UK, other EC countries collect and pay rental fees to collecting societies for UK authors and performers. In view of the recent EC measures designed to encourage collecting societies to 'compete for rightsholders', this disparity under a supposedly harmonised provision is particularly unsatisfactory.

We would therefore submit that the 2 main barriers to the effective licensing of this right, in this sector in the UK are:

- a) the complexities in identifying the transferee of the rental right
- b) the ability to include equitable remuneration as part of the contract fee without assigning it a specific value.

ALCS is keen to find a practical solution to this problem that rewards the writer, as envisaged by the Directive, from the proceeds of the rental market. As an initial step towards this objective we would support an impact assessment by the Patent Office to determine the affect on the commercial rental industry of introducing, as part of a code of conduct/ best practice requirement for production contracts, a fixed percentage payment made to a collecting society by the film producer from the proceeds of commercial renting.

Alternatively there is the ultimate sanction of a reference to the Tribunal to determine the level of equitable remuneration payments (including back-payments) due to authors and performers.

### **(i) Are there barriers to trade and exchange of IP internationally?**

The exchange of national repertoires between collective rights managers under the provisions of reciprocal representations agreements provides a valuable framework within which users are granted access to international works, and rightsholders are able to receive fees for exploitation overseas<sup>13</sup>. With a view to extending and adapting the current licensing frameworks for a digital-use market,

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<sup>13</sup> ALCS is currently signatory to over 50 international agreements

recent EC regulatory measures for collective rights management bodies<sup>14</sup> have aimed to sharpen their competitive edge - focusing on issues such as equitable distribution / deductions, non-discrimination, accountability and transparency.

A key part of the evolution of this framework is the on-going work aimed at developing internationally recognised, authoritative standards for identifying works - through organisations such as the International Standards Organisation (ISO) - as a vital tool in enabling and encouraging the cross-border licensing of national repertoires.

#### **4. How IP is challenged and enforced**

**(a) Are there specific problems with enforcing the main different forms of IP: patents, copyright, trade marks, and designs?**

**and**

**(f) Are there specific barriers to challenging and enforcement of IP rights for small businesses or individuals?**

Our submission has already emphasised the importance of finding the correct balance between using technology to disseminate works and the protection of rights and creativity. The availability of peer-to-peer (P2P) file-sharing software enables users to access and share copyright works on a grand scale. The well-documented losses suffered by the music industry are replicated in the audio-visual field - the British Video Association noted a three-fold increase in illegal downloads of film / TV works in 2003/04, leading to an overall loss to the DVD sales market of £45m. These losses not only affect the future of creative and economic investment but also the breadth and quality of content that is ultimately offered to consumers, as decisions on which projects are supported are based on commercial rather than cultural imperatives.

Aside from the practical issues relating to costs (referred to in our response to 4b), individual creators (or their representative bodies) face various barriers and challenges in enforcing their rights in the context of P2P file-sharing.

- a) The copyright content flowing through on-line networks clearly adds value to the product offered by Internet Service Providers (ISPs) to users. Although this value is partly supported by the flow of infringing copies of works between users of P2P networks, the law effectively removes ISPs from the frame of liability by virtue of the 'safe harbour' provided by s.28A in respect of temporary copies of works. In view of the losses suffered by

<sup>14</sup> Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC)

authors downstream, in respect of these activities, it is difficult to reconcile the current operation of this exception with the non-prejudice requirements of the Berne Convention 3 Step Test.

- b) The House of Lords decision in the Amstrad case<sup>15</sup> effectively set the UK standard of authorising copyright infringement (under s.16 (2)) at a high level – requiring an intermediary to grant (or purport to grant) to third party users the rights that lead to the infringing activity. If the present review is to achieve the aim of recasting copyright to fit the digital age, then the current UK approach to interpreting ‘authorising copyright infringement’ must be reviewed to reflect the far greater control exercised by commercial intermediaries on the activities of users committing infringements in the on-line environment.

At a more general level, individual writers may face certain barriers in enforcing their rights as against users, due to the activities of the party responsible for the commercial exploitation of their work. For example where publishers operate on-line marketing initiatives in relation to writer’s works - such as making parts of works available digitally - the individual writer may have no control over the extent of the usage of these works, or the compliance terms upon which they are made available.

**(b) Are there barriers to challenging infringement and enforcing your IP rights on grounds of cost? What drives these costs?**

It is increasingly difficult in the digital marketplace for individual writers effectively to monitor and audit the use of their works on-line; the technical and financial resources required will, in many cases, be beyond their reach. In our response to the question on DRM under ‘Specific Issues’ we explain the importance of addressing this issue and examine potential, collective solutions to this issue.

Furthermore even if an individual creator discovers infringing activity in relation to their work, the processes for affecting the removal of that work (whether from an on-line source or physical location), or securing adequate recompense for consequent loss / damage, are likely to be too costly to undertake.

**(c) To what extent does your organisation make use of other methods than litigation to resolve IP infringement cases, for example the Patent Office opinion service, mediation services, Alternative Dispute Resolution, or the Copyright Tribunal?**

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<sup>15</sup> CBS songs Ltd -v- Amstrad Consumer electronics (1988)

As a co-owner of the Copyright Licensing Agency, ALCS has participated in proceedings before the Copyright Tribunal. ALCS looks forward to participating in the Patent Office review of the Copyright Tribunal, and supports the points raised by the CLA submission regarding the current system.

## **Responses to Specific Questions**

### **• Copyright exceptions - fair use / fair dealing**

**Background: There are a number of exceptions to copyright that allow limited use of copyright works without the permission of the copyright holder.**

#### **(a) What are your views on the current exceptions in copyright law?**

As stated above in relation to our comments on the application of s.28A, we feel that the Berne 3 step-test is vital to maintaining the balance between rights and exceptions under the current provisions, most notably the requirement that exceptions should not apply so as to “unreasonably prejudice the legitimate interests of the right holder.” From an individual creator’s perspective it is crucial that the common law and statutory rules permitting the use of works under fair dealing exceptions are applied with this principle in mind - particularly as digital technology makes the use and re-use of works ever easier.

The exceptions applied to moral rights, set out in Chapter iv of the Act, do not strike the same balance. In a digital environment where an individual’s work may be readily shared, manipulated, republished or simply plagiarised, moral rights should provide an important further level of legal protection for an author’s name and reputation. Ironically the same technology presents a counter-argument to the historic reasoning behind many of the statutory limitations on UK moral rights. For example the justification provided for the exceptions in respect of news reporting and publications in newspapers, magazines and ‘similar periodicals’ is based on the notion that the ability of authors to enforce attribution and integrity rights may interfere with the process of preparing and rapidly disseminating news items. If the aim of this review is, in part, to recast copyright to fit the digital age ,we suggest that these limitations are re-examined in the light of the greater flexibilities offered to publishers and editors in the context of digital publishing.

More specifically, it seems inconsistent to require a sufficient acknowledgement of a work (including an identification of the author) under the news reporting fair dealing exception on the one hand<sup>16</sup>, while stating that the author’s attribution

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<sup>16</sup> s.30(2) CDPA

right 'does not apply in relation to any work made for the purpose of reporting current events', on the other.<sup>17</sup>

On a practical level, if current and future initiatives aimed at creating digital libraries are to develop, so as to provide authoritative information to both users and rightsowners, legal protection for attribution rights will play a key role. This point is developed further in our responses to questions 3i, 1b and in our responses on DRM and Orphan Works.

We would also argue that the phrasing of the integrity right requires further review in the context of the uses to which works may be put in a digital environment. In defining the 'derogatory treatment' of a work, the current statutory provisions present a finite set of activities - "any addition to, deletion from or alteration to or adaptation of the work...".<sup>18</sup> This list is too prescribed to provide sufficient protection for authors in situations where, through processes of cutting and pasting, works or parts of works can be readily incorporated into other works / products. If such activity results in prejudice to the reputation of the author, copyright law should offer legal redress. We suggest that the wording of Article 6*bis* of the Berne Convention - "...any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work..." provides the necessary flexibility and protection to suit the digital environment.

A robust moral rights regime not only provides further incentives for innovation and creativity in a general sense - the right to be credited and have your work respected are valuable rewards - but also forms part of the new value models for the use of works. For example, we have identified the importance of attribution rights in the development of digital libraries / archives. This potential 'value impact' of moral rights is rarely recognised. Although not strictly an exception as such, the current statutory provisions allowing for a blanket waiver of moral rights devalues both the rights themselves and their potential to stimulate creativity and innovation - and leads to situations where creators are effectively forced to waive these rights to secure their deal.

### **(b) Could more be done to clarify the various exceptions?**

We have already set out elsewhere in our submission the importance of legal protection for an author's right to receive an attribution for their work. Although the current fair dealing exception allowing non-commercial research requires a 'sufficient acknowledgement' this is not required in cases where it would be 'impossible for reasons of practicality or otherwise', whereas in describing an exception for scientific research<sup>19</sup>, the ISD talks only of cases where acknowledgement is 'impossible'.

<sup>17</sup> s. 79 (5)

<sup>18</sup> s.80(2)(a)

<sup>19</sup> Art. 3a, 2001/29/EC

It is important here to note the distinction between using works for research and private study: the former suggests the *public dissemination* of a work comprising another work used under the exception, the latter does not. It is in the public space that the acknowledgement holds its key value. The current UK exception dealing with the recitation / reading of reasonable extracts from literary and dramatic works *in public*<sup>20</sup> also requires a sufficient acknowledgement, but does not delimit this in any way. We would therefore argue that the words ‘for reasons of practicality or otherwise’ offer potential for confusion as to the scope of the allowance for non-attribution of used works, and that the basic ‘impossibility standard’ referred to in the ISD provides greater clarity for both users and all groups of rightsholders and should apply.

**(d) Are the current exceptions adequate or in need of updating to reflect technological change? For example copyright law in the UK does not currently have a private “fair use” exception. Such an exception might allow individuals to copy music CDs onto their PC and MP3 player for their personal use. Should UK law include a statutory exception for “fair use”?**

The starting point for this discussion must be Recital 31 of the EC Information Society Directive,

“A fair balance of rights and interests between the different categories of rightsholders, as well as between the different categories of rightsholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment.”

Article 5(2)(b) allows Member States to provide for an exception to the copying right, “...in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightsholders receive fair compensation which takes account of the application or non-application of technological measures...”

How do we achieve this fair compensation for private copying in the UK?

1. As private copying by users increases, thanks to digital technology, adding knock-on values in other sectors (P2P software producers / distributors, MP3 player manufactures etc.) how does a UK author secure compensation for private copying of their works in the UK? Our response to question 4 demonstrates the obstacles associated with enforcement, against individual users, and that enforcement should not be the only route to fair compensation.

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<sup>20</sup> s. 59 CDPA

2. Similarly non-fair dealing private copying of text from on-line sources (cut 'n' paste, full print out, etc.) for 'personal use' still involves the use of an author's IP without permission or remuneration. As with the private copying of digital files, these activities are in danger of becoming sufficiently commonplace so as not to carry associations of illegality, or prejudice to unseen third parties.
3. In conclusion it is clear that the situation as it currently stands under the UK legal framework does not provide the fair balance between authors, providers and users envisaged by Recital 31. Our responses to question (e) sets out a range of possible measures to address this imbalance.

**(e) How would you see content owners being compensated for such use?**

The debate in this area clearly demonstrates that there are no perfect solutions that address all of the various interests satisfactorily. We therefore set out three possible options:-

1. The introduction of a fair use exception backed by a statutory scheme to recompense legal private copying. Through its reciprocal representation agreements ALCS has, for many years, received the share due to UK writers in respect of overseas statutory schemes. The graph attached as ALCS Doc.6 compares the overall levels of private copying revenue collected in Germany, France, Spain and the Netherlands (during the period 2004/05) against the levels of fees paid to ALCS in respect of audio-visual and reprographic private copying fees.
2. The introduction of a statutory licence (administered by collective rights managers) to (i) commercial beneficiaries of private copying (i.e. P2P software producers / distributors, MP3 player manufactures etc. - not individual users) and (ii) collective sectoral users – business, education, government etc. The fee scale applied / negotiated should reflect the commercial benefit enjoyed by the licensee.
3. Leave the market to develop solutions to secure fair compensation payments back to creators, supported by government and industry initiatives to educate and inform users of copyright works at the various levels.

Given that non-intervention in the market has so far worked to the considerable disadvantage of writers in the UK, ALCS would be more than willing to discuss the possible implementation of options 1 and 2 in more detail with the Review team if required.

**(f) To what extent has technological change presented difficulties in use of copyrighted material in the field of education?**

While digitisation and the Internet remove practical ‘difficulties’ in accessing works, this inevitably creates a level of misunderstanding, amongst pupils and students, regarding the legality of this use.

The Qualifications and Curriculum Authority (QCA) 2005 Report warned that, “The availability of the internet is a powerful aid to learning but carries a new generation of risks of plagiarism.”<sup>21</sup>

In the Royal Literature Fund research report (2006) Hilary Spurling also pointed out that a significant proportion of undergraduates cannot convey their ideas clearly in writing. This, linked to the acknowledged increase in plagiarism made possible by widespread internet access, gives rise to wider concerns for the sustainability of graduates’ preferred career paths.

Quite apart from the legal and moral implications of plagiarism, it is clearly not in the interests of society at large to produce ‘a cut and paste generation’ that does not understand the difference between the free flow of information and the flow of free information. On that basis the difficulties associated with the use of copyright work in a digital education environment should be addressed on two levels: licensing and user education.

During a recent meeting with ALCS the QCA highlighted the following issues/actions as being part of their forward planning to deal with the culture of plagiarism:

- positive recognition of the value and importance of attributing authors should be encouraged, not just in terms of teacher and student awareness, but possibly also in marking
- guidance on attribution, but also on misrepresentation (i.e. derogatory use)
- awareness to begin as early as possible
- three identifiable levels of concern have been identified, each of which may need a different response:
  - ignorance/inexperience
  - misinterpretation/ error
  - conscious ‘abuse

ALCS fully supports the QCA in these aims and is looking to develop joint initiatives to deliver practical solutions to the current problems.

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<sup>21</sup> A review of GCE and GCSE coursework arrangements, QCA (2005)

We have suggested elsewhere in this submission that proportionate licensing solutions are key to the balance between access and rights, and we wholeheartedly support the views expressed by Lord Sainsbury, speaking at the Creative Economy Conference held in October 2005, as part of the UK EU Presidency.

“Offering consumers compelling new content in innovative ways, simple for the consumer to use and at a fair price must be the way forward for all the creative industries.”

In applying this principle to the UK education sector, it is again important to consider the current structures and how they may be adapted to suit the required uses. As one of its founding members, ALCS supports ERA’s submission to extend its remit, under a revised s.35, to enable greater flexibility for users of audiovisual educational materials within a trusted and well-established licensing environment.

With regard to offering further uses to the education sector in the context of text-based resources ALCS and PLS will be working to build on the success of the CLA trial scanning licences used in the HE and FE sectors, and continuing a dialogue (through CLA) aimed at delivering further licensing solutions to users within this sector.

As ever a key aim of any licensor is to ensure that users know about their service and can access it. On that basis we would envisage the following simple framework for collective licensing in a learning environment where much of the content is delivered direct to the user:

- a) light-touch, single point-of-contact licence access,
- b) the application of rights management information, utilizing standard identifier codes to permit the making of accurate and supported micro-payments,
- c) working with similar organisations within Europe and globally, under the framework of existing and future partnerships, both to deliver the greatest breadth of content and to ensure maximum interoperability of systems which, in turn, avoids fragmentation and duplication of effort, and
- d) collaborating with partners (including government departments) to ensure that education / awareness rights messages are used effectively and appropriately.

This final point is particularly important in the education sector where young people have grown up with the ubiquity of technological access, but may have missed out on the opportunity to appreciate the role played by IP rights in sustaining the individual creator who produces the music, books, films and video games etc. that they enjoy. As Lord Sainsbury observed in his recent speech to the Social Market Foundation,

“It is crucial that we educate young people about IP so they respect the time, energy and resources that have gone into their latest purchase.”<sup>22</sup>

**(g) Are there issues concerning the archiving of material covered by copyright?**

In its recent submission to the DCMS and EC Information Society Department consultation on the creation of digital libraries under the EC i2010 programme, ALCS argued for the need to find solutions to enable copyright protected works to be included, in appropriate circumstances. Writers have traditionally supported ‘public good’ archiving and access solutions, as is evidenced by their support for RNIB initiatives to provide wider access for the partially sighted; but are generally opposed to archiving and access programmes which result in the direct or indirect commercial exploitation of their work under a general ‘public good’ claim, such as the Google digitising project.

A copy of the DCMS/EC submission is included with our evidence.

If copyright works are to be archived on a large scale, and made available to users for access in digital form, the main issues to address involve the legal and operational framework within which these activities are to take place. ALCS would strongly argue that the necessary elements of this framework already exist. In the analogue environment libraries and archives have traditionally selected content for preservation and acted as gatekeeper between the various forms of content and the user. We submit that the same expertise and resources can and should be employed in the context of digital libraries. Similarly new initiatives should recognise the facility offered by collective rights management organisations to a) clear the secondary rights in large repertoires of works, for digitisation and making available, and b) provide trusted and reliable mechanisms for payment of any resulting remuneration fees where appropriate.

**• Copyright – digital rights management**

Background: Increasingly digital media content is distributed with integrated digital rights management (DRM) technologies. While these can, in theory, enable both individual and corporate rights-holders to track usage and prevent

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<sup>22</sup> “Innovating for Success: The Gowers IP Review and Economic Competitiveness”, February 2006

unlicensed copying by technological means, concerns have been raised about interoperability and that such technologies may impair the content consumer's legal rights. For example they may be unable to take into account exceptions to copyright, the ultimate expiry of copyright term, or the future evolution of technology. They may therefore undermine legitimate rights to access digital content, now and in the future. (NB: We are aware of all formal submissions that have been made to the All Party Parliamentary Internet Group on this issue. (A copy of the ALCS submission is included, for ease of reference.)

**(a) Do you have a view on how the use of digital rights management technologies should be regulated?**

A further barrier to the effectiveness of the current DRM infrastructure is the absence of an authoritative UK or international rights ownership database to enhance, for example, the bibliographic data provided by such commercial sources as Nielsen Book Data or by national institutions such as The British Library. There would be considerable economic value for all groups of rightsholders in developing such a database or register but this would need to be set against the operational cost of maintaining its currency on a daily basis.

Before addressing the question of the regulation of DRM technology it is important to be clear about the particular form of DRM that one is referring to and to draw the necessary distinction between the use of technological protection measures on the one hand, and the application of electronic-rights management information - as this latter term is defined in Article 7(2) of the Information Society Directive - on the other.

Regarding the former, it is crucial to the overall balance between the rights of content owners and users that technological protection measures (TPMs) are applied fairly and appropriately. TPMs should not operate so as to restrict legally permitted access to works. If users perceive that TPMs are applied to this effect, the public debate regarding the value of / need for legal protection for rights is likely to be prejudiced, to the ultimate detriment of all groups of rightsholders. This is of particular concern to creators who, in many cases will not be in direct control of the TPMs applied to their works, and yet may be perceived to be part of the 'lock down' process. In terms of regulation therefore, we would argue for the necessary means to be put in place to ensure that TPMs are applied correctly.

Our answer to question 3 above sets out the 'key features' of a digital licensed environment, where rights are dealt with on a collective basis. In this model the other side of the DRM coin, the application of rights management information, plays a vital role. If users are to be offered access to works in a regulated environment the means for auditing, and in appropriate circumstances, remunerating that usage must be available. The key to achieving both aims is the

development of reliable and universally accepted standardised International Identifiers, incorporating the facility to provide rights ownership metadata. For example the ISTC (International Standard Text Code) – currently being developed under the auspices of the International Standards Organisation – aims to provide greater granularity in the identification of textual works, and will be of value to organisations like ALCS in dealing with the flexibility inherent in digital copying and dissemination of works.

The ALCS database already incorporates information on some 250,000 writers and contains archived information relating to over 2.2m works. During the 2005/06 financial year, this resource enabled ALCS to pay £15m to over 41,000 writers. Rather than seek specific regulatory measures regarding the use and development of RMI, ALCS aims to build on existing relationships and foster new ones both nationally and internationally - with e.g. other collective rights managers, libraries, broadcasters etc. - to ensure that it continues to provide an authoritative data resource for writers and their works. Equally from a user / perspective such a resource has the potential to add considerable value as a cost-effective means of accessing / remunerating writers.

#### • Copyright – orphan works

##### **(a) Have you experienced any difficulties in identifying the owners of copyright content when seeking permission to use that content?**

It is a core function of the ALCS Member Services Department to conduct research into the authorship of works, to enable us to make accurate and comprehensive royalty distribution payments. Aside from the addition of new content, the ALCS database is also subject to on-going development processes to ensure further data can be sourced and shared with UK and overseas partners. The graph attached as ALCS Doc.7 demonstrates ALCS's overall success rate in identifying and paying collectively managed licence fees to writers

##### **(b) Do you have any suggestions on how this problem could be overcome?**

The issue of orphan material is already economically important in the analogue world, where both audio-visual and printed media throw up many multiple contributor works, and will become increasingly so as converged digital media produce a high volume of mixed-media products.

In its Report on Orphan Works<sup>23</sup> the United States Copyright Office identified two important aims of a system dealing with this issue:

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<sup>23</sup> A Report of the Register of Copyrights, January 2006

“First, any system to deal with orphan works should seek primarily to make it more likely that a user can find the relevant owner in the first instance, and negotiate a voluntary agreement over permission and payment, if appropriate, for the intended use of the work...Second, where the user cannot identify and locate the copyright owner after a reasonably diligent search, then the system should permit that specific user to make use of the work, subject to provisions that would resolve issues that might arise if the owner surfaces after the use has commenced. These provisions should balance the interests of the right holder with the interest of the user who has undertaken to use a work in reliance on the orphan works designation.”

As to a suitable framework for applying these principles in practice, the Staff Working Document accompanying the 2005 EC Communication i2010:digital libraries identified the extended collective licence model as a possible option that satisfies the technical, legal and organisational challenges raised by the issue of orphan works. This model is based on the premise that users in certain specified non-commercial sectors - such as education, libraries etc - may use works as licensed under the statutory provision, subject to the subsequent payment of remuneration to the author.

The significant caveat that we would add to our support of this model is to emphasize the importance, to the sustainability and credibility of such a collective scheme, of setting the ‘entry point’ correctly. In other words, the collective scheme should only operate in cases where the prospective user of the work has expended reasonable endeavours and resource in locating the rightsholder. Remuneration schemes, by definition, are not designed to replace individual licensing arrangements. Equally the level of remuneration applied by such schemes should be fixed at an appropriate level.

Clearly any effective collective scheme will require a broad-based coalition of partners to ensure that all information sources are effectively managed and resourced. ALCS has already held initial discussions with both the British Library and the NUJ aimed at investigating the feasibility of setting up a single inquiry point. to determine who holds rights in written works. Our earlier comments regarding the value of international partnerships in the context of authoritative and interoperable data exchange apply equally here.

## **Closing Observations**

1. Throughout our submission we have been mindful of the fact that the term ‘rightsholder’ is increasingly used as if it described a homogeneous group with shared interests. As our evidence has shown, this is not always the case. In circumstances where the interests of individual and corporate rightsholders are or may be different we have therefore used the phrase ‘individual and corporate’

(which equates to the 'original and acquiring' terminology which has been used by such bodies as the International Federation of Reprographic Rights Societies (IFRRO) which includes both publishers and creators in its membership.

2. For individual rightsholders (i.e. writers in the case of this submission) we would welcome a step by government beyond recognition in general terms of the value of the creator to the creative economy, to more precise recognition and protection of the writers' very specific investment and legitimate place in the economic value chain, which current business practice has eroded in some sectors.

3. Given the likely significance of DRM in the future management of rights in all digital media, we would emphasize the need for the involvement of writers' organisations in their further development to ensure equitable remuneration for all groups of rightsholders as appropriate.

4. Solid IP protection for all relevant parties – from creator to user – helps to prevent abuse by any dominant 'supplier', and the resultant reduction of creativity and its contribution to cultural and economic life.

## **Attachments**

ALCS Doc.1 The ALCS 'Plain English Mandate'

- ALCS Doc.2 Extract from Article 7 of the ALCS' Memorandum and Articles of Association, included with Membership Application form
- ALCS Doc.3 Ten year analysis of the types and level of secondary rights income secured by ALCS for writers
- ALCS Doc.4 Graph showing the on-going value of a typical work from secondary licensing revenue.
- ALCS Doc.5 Map showing the countries where ALCS currently has reciprocal representation agreements.
- ALCS Doc.6 Graph comparing the overall levels of private copying revenue collected in Germany, France, Spain and the Netherlands (during the period 2004/05) against the levels of fees paid to ALCS in respect of audio-visual and reprographic private copying fees.
- ALCS Doc.7 Graph demonstrating ALCS's overall success rate in identifying and paying collectively managed licence fees to writers

### **Annexed Documents**

ALCS Strategic Plan

ALCS Annual Report (2004/05)

ALCS Submission to the EC/DCMS i2010 Digital Libraries Consultation

ALCS Submission to the APIG DRM Inquiry

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[ALCS Doc.1](#)

[A Plain English Mandate](#)

[All Ordinary Members of ALCS sign the mandate which authorises ALCS to license and collect royalties on their behalf. Below is a 'Plain English' explanation of the rights involved.](#)

Each Member grants ALCS the authority to exercise rights on their behalf as part of schemes for the collective administration of royalties in the UK and overseas. This does not involve a formal transfer of the copyright in the works; the Society is simply appointed to administer the rights in situations where collective administration is the most appropriate option i.e. where the fees cannot practically be obtained through any other means.

This authority entitles ALCS in agreed circumstances to permit or forbid the exercise of the rights, grant licences, collect fees for use and damages for misuse and take action to defend and protect the rights.

#### The Rights

The rights that constitute the current ALCS mandate are set out below. Although the mandate may appear broad it should be noted that, in practice, the rights are only applied in specific circumstances, in many cases under the detailed terms of prescribed licensing schemes.

Within the existing categories of rights, any extension to current licensing schemes or other agreements is subject to extensive consultation and sign-off processes. Depending on the type of rights, writers and usage involved, such consultation may involve, among others, the Society of Authors and Writers' Guild of Great Britain (the ALCS Corporate Members), representatives of authors' agents and the ALCS Ordinary Members. The following list of rights is accompanied, in each case, by an example of how the rights are exercised in practice. The examples are provided for the purposes of illustration, and do not provide an exhaustive description of every practical use scenario.

A list of FAQs providing further details on the practical application of the mandated rights can be found on our website at [www.alcs.co.uk](http://www.alcs.co.uk)

Copying:                      Reproduction of works from paper or electronic sources, through photocopying, scanning or other copying processes; e.g. photocopying extracts from books and serials within schools / universities under the terms of Copyright Licensing Agency (CLA) licences.

<u>Accessible Copying:</u>	<u>conversion of works into accessible formats for visually impaired users e.g. Schools copying books into audio formats under the terms of the fee-free CLA licence scheme</u>
<u>Recording:</u>	<u>TV programmes for use by educational establishments, under the terms of statutory schemes e.g. the video taping within schools of TV programmes, under the terms of the Educational Recording Agency (ERA) scheme.</u>
<u>Lending:</u>	<u>Overseas Public Lending Right (PLR) for books: audio books in UK public libraries e.g. ALCS currently receives fees from the PLR schemes in Germany and the Netherlands, and is continuing to campaign for compensation for writers for the lending of audio books in UK public libraries.</u>
<u>Broadcast Retransmission:</u>	<u>Cable and satellite retransmission of UK TV and radio signals overseas e.g. BBC services simultaneously re-broadcast in Eire, Belgium and the Netherlands, as well as programmes scripted by UK writers that are individually re-broadcast between neighbouring countries within Europe.</u>
<u>Private copying:</u>	<u>Fees from statutory levies imposed on copying equipment e.g. the law in many overseas territories provides for a levy on the import, manufacture, sale and even operation of copying equipment to account for 'home copying' by individuals. The resulting fees are split between rightsholders.</u>
<u>Rental:</u>	<u>Statutory equitable remuneration for film rental e.g. European law provides for an unwaivable right to remuneration for authors of film scripts in cases where their exclusive rental right has been transferred to a film producer. ALCS is continuing to campaign for schemes that formally recognise and account for this remuneration right.</u>
<u>Communication to the Public:</u>	<u>Broadcasting and on-demand delivery e.g. includes 'traditional' broadcasting where services are delivered according to fixed schedules, as well as making works available to users, to be accessed at a time of their choosing.</u>

Performance: Live recitation of works (Limited application). e.g. poetry readings at festivals.

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ALCS Doc.2

## Application for Membership

I HEREBY APPLY TO BECOME AN ORDINARY MEMBER OF THE AUTHORS' LICENSING & COLLECTING SOCIETY LTD

I understand that (i) my Membership shall be subject to the Memorandum & Articles of Association of the Authors' Licensing & Collecting Society ("the Society") and my rights, duties and obligations as an Ordinary Member shall be governed by the Memorandum & Articles, and all rules made thereunder, as in force from time to time, and, in particular, (ii) the rights which the Society shall be entitled to administer on my behalf are as specified in paragraph (c) of Article 7, including such additional rights pursuant to paragraphs (d) and (e) of Article 7.

Article 7 (c), (d) and (e):

7 (c) Subject to the paragraph (e) the categories of rights in each work of a Member to be administered by the Company on behalf of that Member are, in respect of the United Kingdom and the Republic of Ireland, the following categories:-

- (i) the lending right;
- (ii) the reprographic right in each published work;
- (iii) the private recording right;
- (iv) the right to communicate the work to the public by any means of cable diffusion which expression includes diffusion over any path provided by a material substance or by re-transmission or re-broadcasting of the work to the public by the technical means known as MMDS or any similar technical means of omnidirectional microwave or ultra high frequency transmission using terrestrial transmitters or other terrestrial equipment;
- (v) the off-air recording right;
- (vi) the right to perform the work in public by means of apparatus for receiving visual images or sounds conveyed by electronic means;
- (vii) the right to communicate the work to the public by means of the satellite broadcasts of the programme services of the BBC Worldwide and others including the terrestrial retransmission thereof;
- (viii) the right to communicate the work to the public by electronic transmission, capable of or amenable to collective administration;
- (ix) the rental right;
- (x) the performing right;
- (xi) the right for educational establishments to reproduce the work for use in enlarged text format and onto acetate for use with overhead projectors only, in each case solely for the purposes determined by the Secretary of State for Education and

Employment (or otherwise the Minister of the Crown responsible for Education in either Scotland or Wales) in connection with the teaching of the United Kingdom National Curriculum and/or any other national literacy initiatives instituted by such Secretary of State;

- (xii) the right (1) to reproduce the work in text form in the Braille and/or Moon systems, (2) to store such text electronically (including the right to reproduce the same electronically but only for purposes ancillary to the reproduction of text in such systems); and (3) to issue such reproductions exclusively and solely to visually impaired persons for noncommercial purposes ('visually impaired' means a person so blind or having a serious sight problem that cannot be improved by the use of corrective lens);
- (xiii) the right (1) to mechanically reproduce the work (but excluding the right to mechanically reproduce any work which has been sung, spoken or performed with music); and (2) to issue such mechanical reproductions exclusively and solely to visually impaired persons for non-commercial purposes in formats available exclusively for registered blind persons.

7 (d) The categories of rights in each work of a Member to be administered by the Company on behalf of that Member in respect of countries outside the United Kingdom or the Republic of Ireland (hereinafter referred to as 'overseas countries') are the following categories of rights for all such overseas countries, or such part or parts of those countries as the Board may decide in respect of any particular category of rights; namely:-

- (i) The rights which, from time to time, are administered by the Company in respect of the United Kingdom and the Republic of Ireland, including all such rights as subsist under the laws of the overseas countries and which correspond to the rights administered for the United Kingdom and the Republic of Ireland, howsoever such rights may be described in those laws;
- (ii) such other rights as the Board may, from time to time, decide are not capable of being effectively administered otherwise than by collective administration provided that no such decision shall have effect:-
- (a) until notification of the Board's decision has been sent to each Member, nor
- (b) in relation to a particular Member, if, within 30 days from the date of notification to the Member of the Board's decision, the Member serves on the Secretary written notice stating that he/she does not wish the decision to apply to the rights in his/her works.

7 (e) The Corporate Members and the Ordinary Members in General Meeting may by special resolution decide that the Company shall administer other categories of rights in respect of the United Kingdom and the Republic of Ireland in addition to those mentioned in paragraph (c):

provided that, subject to paragraph (f)\*, such a resolution shall not have effect in relation to a person who is a Member when the resolution is passed if, within 30 days from the date of the resolution, the Member serves on the Secretary written notice that he/she does not wish the resolution to apply to the rights in his/her works.

\* Articles of Association of ALCS Ltd.

A copy of the Memorandum & Articles of Association and any rules made thereunder will be sent on request, free of charge.

I undertake to inform the Society in writing from time to time of (i) new and additional titles and (ii) any change in my bank or payment details.

**Please deduct my membership fee from my royalty payments.**

**Yes**

**No**

**If no, please complete a Direct Debit Mandate for payment of your Membership Fee.**

Name (capitals) \_\_\_\_\_

**Signed** \_\_\_\_\_ **Date** \_\_\_\_\_

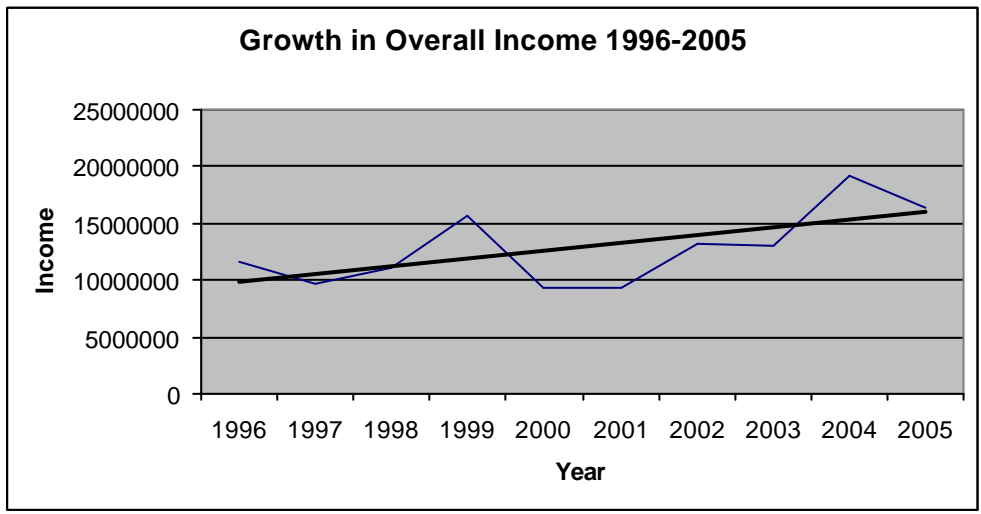
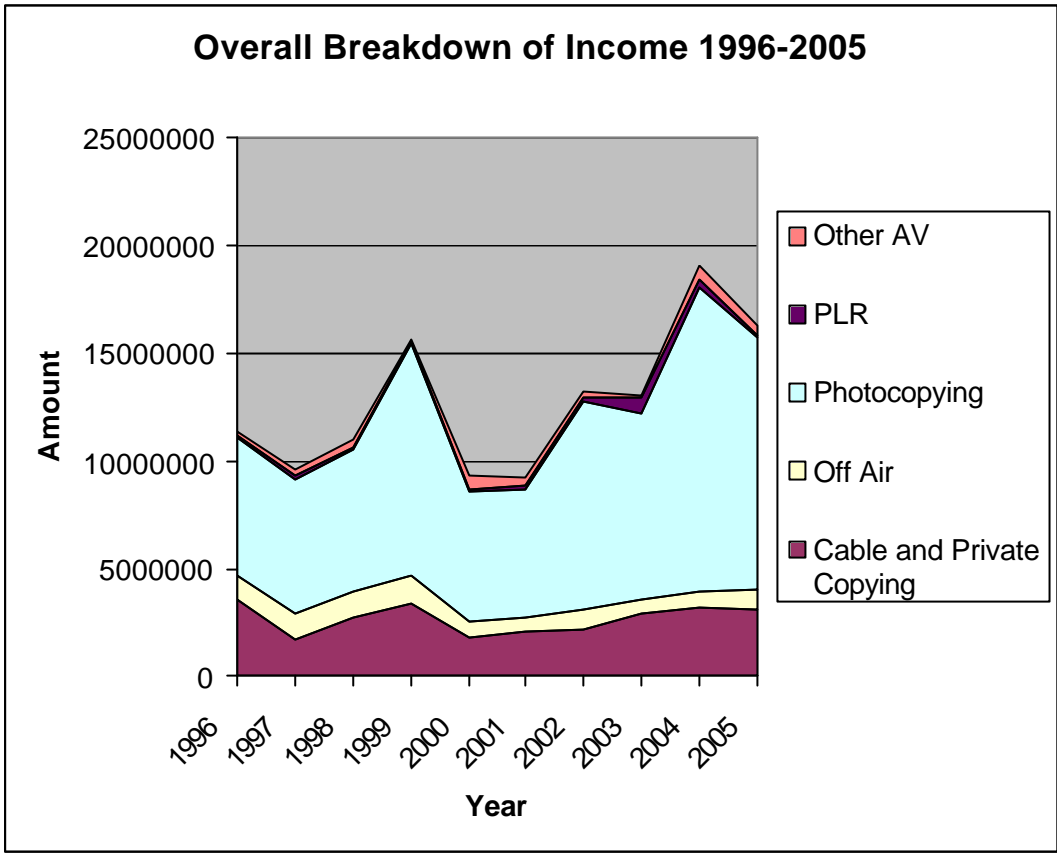
[ALCS Ltd is registered under the Data Protection Act 1998.](#)

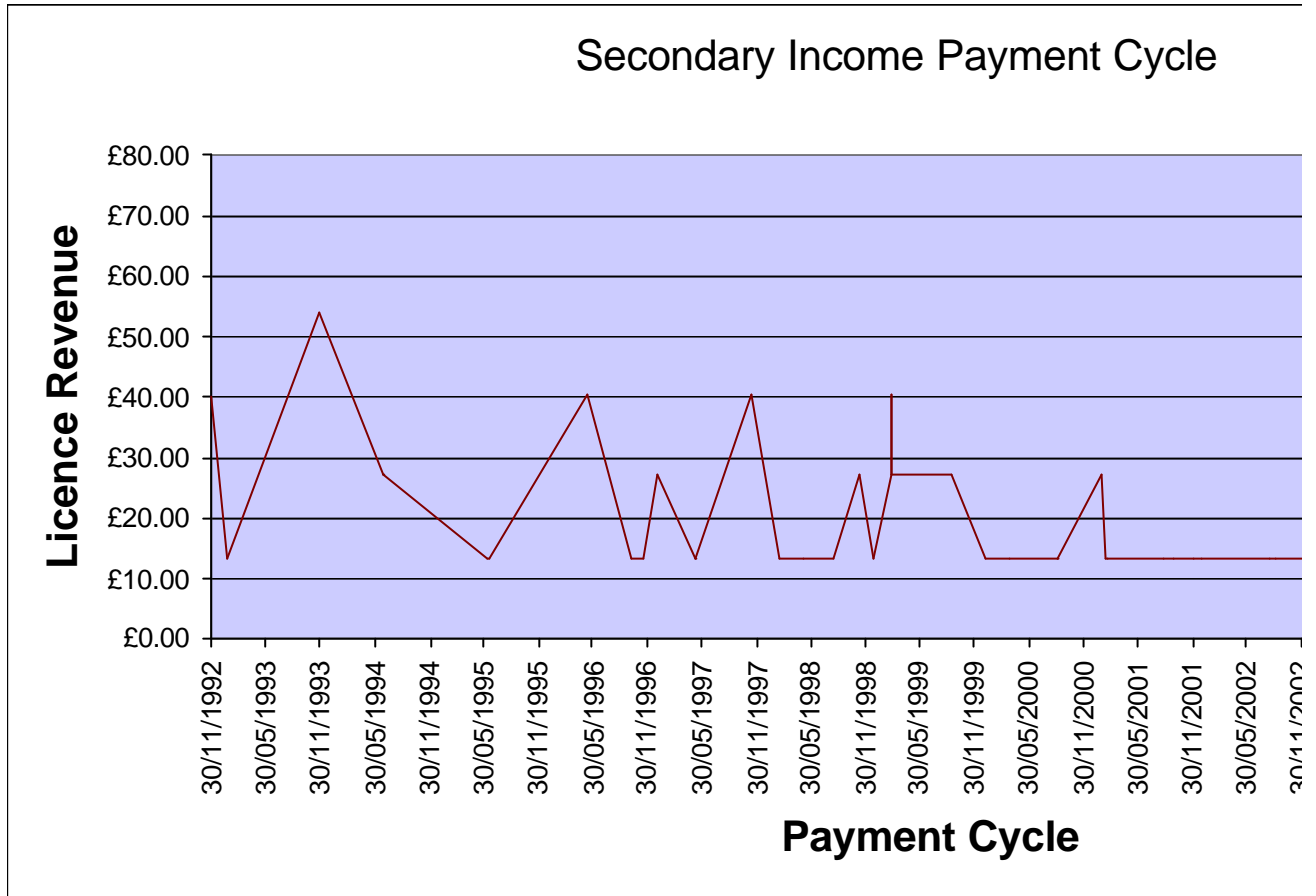
[For the purposes of administration of your rights, names \(including pseudonyms\) and date of birth are registered by ALCS with the Swiss Collecting society SUISA, such registration being made available to every Society member of the International Confederation of Societies of Authors and Composers \(CISAC\).](#)

[ALCS never releases your personal details to any company outside the Society for marketing or promotional purposes.](#)

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[ALCS Doc.3](#)





## ALCS International Agreements

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Australia  
Georgia  
Latvia  
Singapore  
Austria

Germany  
Lithuania  
Slovakia  
Belgium  
Greece

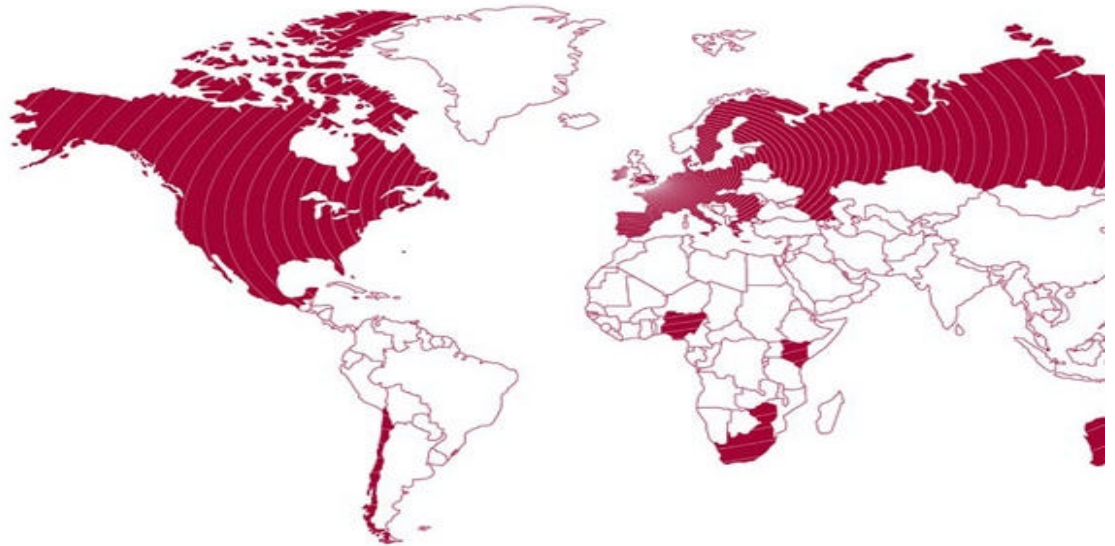
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South Africa  
Bulgaria  
Hong Kong  
Netherlands

Spain  
Canada  
Hungary  
New Zealand  
Sweden

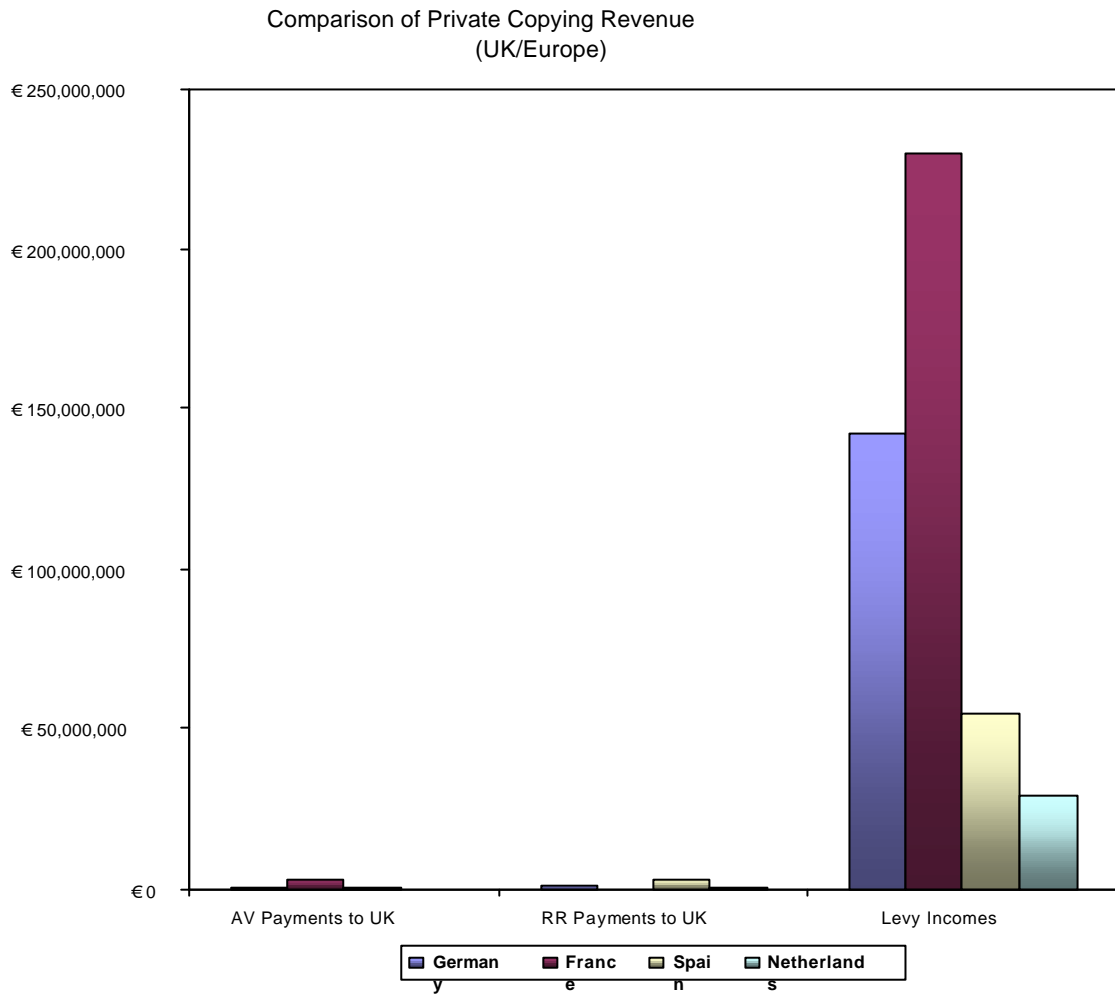
Chile  
Ireland  
Nigeria  
Switzerland  
Czech Republic

Italy  
Poland  
United States  
Denmark  
Jamaica

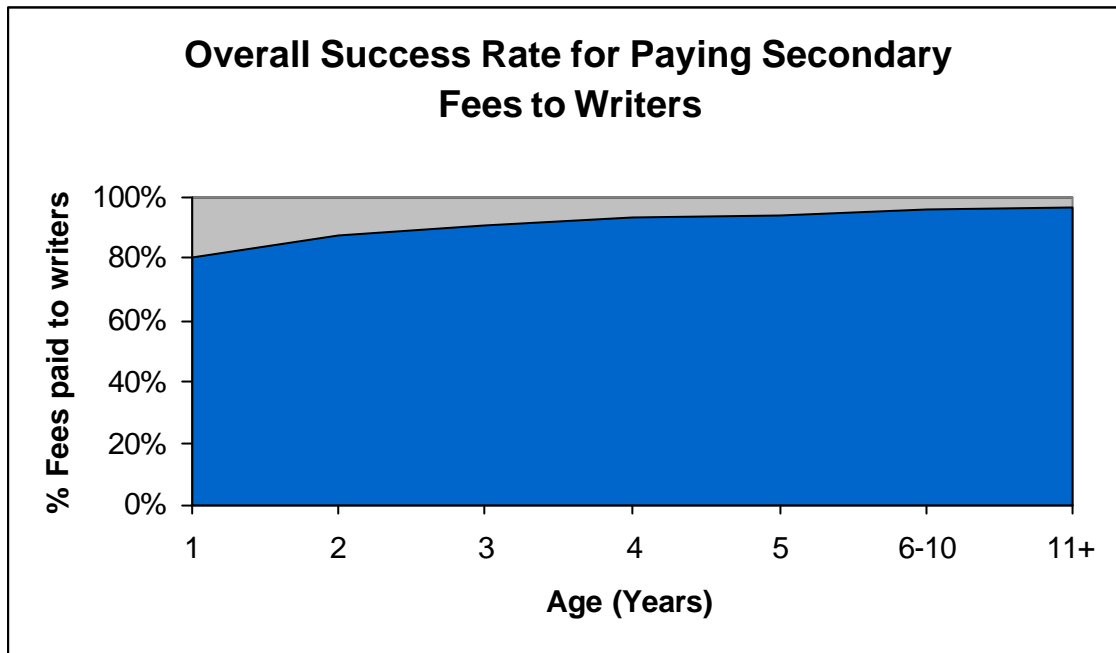
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**ALCS Doc.6**



**ALCS Doc.7**



## Consultation on the European Commission's Communication i2010: Digital Libraries

### ALCS Response to the Communication and Staff Working Paper

#### Introduction

**The Authors' Licensing and Collecting Society Limited ('ALCS') is the UK rights management society for writers of all genres of literary and dramatic copyright works. Established in 1977 and wholly owned by its writer members (of whom there are currently 52,000), ALCS is a not-for-profit, non-union organisation. The Society's governing body, the Board of Directors, is composed of elected Ordinary writer members, and writers nominated by its two Corporate members, the Society of Authors and the Writers' Guild of Great Britain. Since its foundation, ALCS has paid writers over £100 million in fees and today it continues to identify and develop new sources of income for writers. To provide further information about ALCS, we enclose a copy of our Strategic Plan and Annual Report**

**Our response is structured as follows: Opening remarks, Comments on the Communication and Staff Working Paper, Responses to the Questionnaire and finally an Annex setting out some specific comments on the overall approach in both documents.**

**We have responded to the parts of the questionnaire that we feel have a direct bearing on the interests of our members, and writers generally.**

#### Opening Remarks

**? The digital preservation of the UK/EC cultural heritage is an ambitious but hugely valuable operation. We support these co-ordinated initiatives (backed by the provision of EC funding) and welcome the opportunity to contribute to the debate and overall process.**

**? Regarding the terms on which digital libraries are constituted and accessed, we submit that the correct balance is identified on page 9 of the Commission Staff Working Paper to the Communication,**

**“Solutions have to be found that respect the legitimate interest of creators, while enabling full use of the potential of the new technologies.”**

**? The Introduction to the Communication speaks of the challenge of bringing out the full ‘cultural and economic potential’ of the wealth of European cultural heritage. It is vital that any discussion of the exploitation of this cultural asset recognises the fundamental economic and moral rights of the creator and the creator’s place in the value chain.**

**? We support the principle that technology is harnessed to enable the greatest possible access to information, culture, education etc, provided that the same technology also provides the means for protecting the integrity of creative output and, where appropriate, auditing and providing the means to reward its usage.**

**? Clearly an undertaking of this scope requires the co-operation of a large and diverse group of stakeholders. Some recent initiatives in the area of digital library creation, from the commercial sector, have demonstrated the problems that can arise from inadequate communication and consultation processes. We would therefore suggest that a key component in this project is to maintain the balance between the interests of the three key stakeholder groups: rightsholders, providers and users.**

**In addressing the interrelating issues of preservation, digitisation and on-line access, these general comments discuss the challenges identified in the Communication under organisational, legal and technical sub-headings.**

## **Organisational Challenges**

**In identifying the organisational challenges involved in the creation of a European digital library, the Communication refers to both ‘new ways of working’ and ‘organisational changes within the institutions concerned.’ While there is clearly a need to look at adapting the present infrastructure governing library provision to meet the needs of a digital use environment, we must guard against re-inventing the wheel. In the analogue environment libraries and archives have traditionally selected content for preservation and acted as gatekeeper between the various forms of content and the user. We submit that the same expertise and resources can and should be employed in the context of digital libraries.**

**Similarly it appears that the Communication envisages only two options to the solution of clearing rights for digitisation and on-line access to works within digital libraries - legislative change and case-by-case rightsholder clearance - concluding that neither option represents a practical or realistic solution. Again we feel that consideration must be given to the option of developing the existing frameworks which already meet the needs of the current environment. Current UK schemes based on collective administration models - such as PLR, reprography through the Copyright Licensing Agency (CLA), and Audio-visual copying under the Educational Recording Agency (ERA) scheme - provide for lending, copying and further use of works, in both analogue and digital form, in a trusted and credible licensed environment, and with the assurance through ALCS and others that creators are remunerated.**

**This assurance is made possible by collaboration between the various rightsholder groups. The well-established UK environment for the collective licensing of printed works, under the CLA scheme, ably demonstrates the value of such partnerships. Under the scheme, users are able to copy a vast repertoire of works, based on a single point of contact with a licence provider. A working relationship between the creators of literary and artistic content (as represented by ALCS and the Design and Artists Copyright Society respectively) on the one hand, and the publishers of the works incorporating this content (as represented by the Publishers’ Licensing Society) on the other, is essential in providing this facility to users. These relationships - and the formal, legal agreements underpinning**

**them - are the product of many years of working together to understand and appreciate the issues surrounding the rights and rightsholders within each group. We therefore submit that, in the context of the present discussion, serious consideration must be given to the value offered by established rightsholder joint ventures, in identifying solutions to permit legitimate digital copying and delivery of works to users.**

**More specifically, we would identify the following as 'key features' of a licensed environment, enabling the copying of and access to works, based on a collective licensing model:**

- a) light-touch, single point-of-contact licensing solutions,**
- b) the application of rights management information utilizing standard identifier codes to permit the making of accurate and supported micro-payments,**
- c) working with similar organisations within Europe, under the framework of existing partnerships, both to deliver the greatest breadth of content and to ensure maximum interoperability of systems which, in turn, avoids fragmentation and duplication of effort, and**
- d) collaborating with partners (including government departments) to ensure that education / awareness rights messages are used effectively and appropriately.**
- e) In the event that the processes of discussion and negotiation between users and the relevant licensing body break down, the Copyright Tribunal provides the ultimate regulatory sanction.**

**In describing the current system whereby physical items within libraries are lent to the public, point 2.2 of the Staff Working Paper states that, "There is no guarantee that the items will not be copied or further distributed, which might prejudice the interests of the rightsholder." While there may be no guarantees, voluntary and statutory reprography schemes within library (including business libraries) and education sectors already provide for remuneration to account for onward copying. As with the initial access, any onward distribution of digital material requires a trusted and credible framework dealing with issues of security, trust, and usage audit / remuneration.**

**We support the basic principle of ‘digitise once, distribute widely’, set out under the heading Organisational Challenges, subject to the understanding that any discussion on the provision of digital libraries should take account of the existing solutions and mechanisms already developed in terms of models for remuneration and usage audit.**

**Finally, it is vital from the outset of this discussion of organisational challenges to take account of the full range of stakeholders involved. A specific point regarding the various chains of authority involved in a collaborative attempt to create digital libraries, applies to the comment in point 2.1.2 of the Staff Working Paper that, “Publishers could, for example, facilitate the development of digital libraries with copyrighted material”. The supposition that publishers are able to give such an authority fails to take account of the rights, in any given work, that separately vest in the authors of the content. This is particularly important in view of the inclusion of older / ‘out of print works’ - likely to form a significant part of a digital library’s ‘stock’ - the rights to which have reverted to the author.**

## **Legal Challenges**

**We are concerned at some of the language used in the Communication under this heading – for example, IPR rules are ‘problematic’, digital rights management systems are for ‘restricting the access to digital material’ – in terms of how the debate on using content subject to copyright or other IP regulation is being framed.**

**We urge the Commission to note the essential interrelationship between robust IP rules and the creation and use of content, recently enshrined in points 16 and 17 of the Preamble to the UNESCO Convention on the protection and promotion of the diversity of cultural expressions (2005):**

***Emphasizing the vital role of cultural interaction and creativity, which nurture and renew cultural expressions and enhance the role played by those involved in the development of culture for the progress of society at large,***

***Recognizing the importance of intellectual property rights in sustaining those involved in cultural creativity,***

**As technology allows ever greater access to and use of creative content, it is vital that rights such as copyright are recognised as a tool for the development of digital markets and, by extension, economic as well as cultural growth and development.**

**We therefore ask that the Commission ensures that the policy emerging from this debate recognises and adopts the 'fair balance' approach described in Recital 31 of the Information Society Directive and does not seek to extend the current copyright exceptions as a 'quick fix' solution. We further suggest that the 'Berne three-step Test' remains a valuable benchmark for the framing of copyright exceptions – particularly regarding the issue of prejudice to creator rightsholders with lower economic status.**

Looking specifically at the UK position, the Educational Recording Agency (ERA) scheme provides a good example of the interplay between statutory copyright exceptions, collective rights clearance and user interaction. The scheme brings together the various and multiple rightsholders of the audio-visual works contained within UK broadcasts, providing educational establishments with a single point of contact for both licensing and discussion on user requirements. The resulting payments are distributed to the various rightsholder groups through the trusted and accountable mechanism of collective administration.

A similar solution to the issue of multiple rights holders in a single 'product' was presented by Article 9 of Directive 93/83, allowing groups of rightsholders, represented by individual collective administration organisations, to negotiate usage terms for the rights to retransmit television across borders. On this basis, digital media convergence that produces mixed-media products should not be seen as a bar to licensing – the collective administration model shows how users and broad-based rightsholder groups can deliver workable solutions.

Although we deal with the issues of DRMs in more detail under the heading Technological Challenges, we would like to address, in this section, the importance of clarity in defining terms, particularly as this debate enters the public arena. It is vital that the distinction is always drawn between the use of technological protection measures on the one hand and the application of electronic-rights management information - as this latter term is defined in Article 7(2) of the Information Society Directive - on the other.

Although we also deal with the issue in greater detail in the following section, it is appropriate, at this point, to highlight the issue of the moral rights in digitised content as a legal challenge to be addressed.

Within a digital use environment a robust system of legal protection of the creators' right to be identified as the author of their work and to preserve its integrity is more important than ever. The Communication identifies the problem of difference in implementation between Member States in terms of the exceptions applied in respect of the economic rights, but does not address the unharmonised position regarding moral rights within the Community. Put simply, the waiver provisions and copious exceptions that operate to restrict the rights under UK law (especially with regard to journalistic and reference works) mean that users of a digital library in the UK will be operating under a significantly different regime from those in the majority of other countries within Europe.

It is vital, in a digital environment where an individual's work may be readily shared, manipulated, republished or simply plagiarised, that this

**further level of legal protection for an author's name and reputation is maintained and respected.**

## Technical Challenges

The Communication correctly identifies that films / Audio-visual works are particularly susceptible to degeneration. Similarly, while pre-19th Century printed works are likely to be more robust, 'paper works' from the late 19<sup>th</sup> Century onwards are more likely to require preservation. On the basis that a large volume of works requiring preservation are therefore likely to be still within copyright, it is clear that it will not be adequate to focus a European digital library purely on Public Domain works – rather, as the Staff Working Paper suggests, we need to work towards solutions that address the legitimate interest of creators, alongside enabling full use of the potential of new technologies.

In describing the functionality of a digital library the Communication refers to making content 'more interesting to use' and the employment of "appropriate services allowing the user to discover and work with the content'. Again, in the interests of early clarity of definition, references to 'working with' content should identify the different issues that arise for works that are *and are not* in the Public Domain. We would like to see future discussions of user access of digital libraries specifically acknowledge and take account of the issues surrounding the moral rights of the authors of underlying content, in the context of user interactivity.

A separate but equally important issue arises in the context of the digitisation process itself. It is vital that the key issue of accuracy in the process is understood in its full context. From a user point of view a sub-standard digital copy of a work is an irritation, in some cases a waste of money. From a creator's view point their reputation, and by extension livelihood, is at stake. It is no exaggeration to say that a single letter missing from a text may be significant, particularly in the academic /STM publishing sector.

In 2004 ALCS conducted a survey of writers' views on the issue of accuracy in the digital copying process. While some respondents cautiously favoured the use of OCR technology, others had genuine concerns:

**"In essence, the error rate for mathematical expressions is so high as to make OCR impossible."**

**"I'm concerned that my (modern language) teaching material may not scan well – accents ß characters Ü ã Õ, etc., if missing make stuff look inaccurate".**

**“...the level of OCR error is so high that one would not wish to be ‘acknowledged’ as a source.”**

**The Communication suggests that the development of OCR systems to apply to languages other than English should be a priority. We would argue that the aim should be the development of systems that produce high quality, faithful digital copies for *all texts* that are copied.**

The importance of total accuracy in the digitisation process, is ably demonstrated on page 8 of the Staff Working Paper, under the heading Technical Challenges. The third line of the italicised paragraph that sets out the benefits to the Google project of the current OCR correction systems, contains a typographical error. In this case, a missing letter has simply converted one English word into another, a mistake that even a highly developed correction system is likely to miss but one which, in another context, could be detrimental to the credibility of the content and its author's reputation.

In the previous section we referred to the need to be clear in describing the various components of DRM systems. If successful business models are to evolve, the role of DRM systems as enabling technology providing more accurate data as to the actual usage of works – a fundamental criterion for dealing fairly with both rightsholders and users – will be crucial and should be emphasised in the current discussion.

On that basis, in terms of digital library provision, we fully support the priority need to develop:

- a) search capability in authoritative accurate descriptions,
- b) reliable and universally accepted standardised International Identifiers, incorporating the facility to provide rights ownership metadata. For example the ISTC (International Standard Text Code) – currently being developed under the auspices of the International Standards Organisation – aims to provide greater granularity in the identification of textual works, and will be of value to organisations like ALCS in dealing with the flexibility inherent in digital copying and dissemination of works.
- c) cross-border interoperability of systems, and
- d) the facility, where appropriate, to embed education / awareness messages within the search and interaction processes.

There is, within the Communication, a suggestion that DRM technology is primarily a tool for restriction of access. A perception by users and policy-makers of DRM as a tool for commercial protection and the 'lock-down' of content can only harm the long-term aim to achieve a developed, broad-based and sustainable business plan for the delivery of digital library services, and should not be promoted. For example there is, within the specific area of the collective management of rights, clear potential for *creator-focussed* DRM systems to enhance the current methodology and infrastructure (referred to in our comments on 'Organisational Challenges') through the capture and storage of transactional data.

## **Digitisation and online accessibility**

***1) What additional measures could be taken at national and European level to encourage digitisation and online accessibility of material in all European languages?***

**Policy makers at European and UK level need to recognise the potential offered by existing frameworks in terms of the established library infrastructure and the facility offered by collective rights management organisations to a) clear secondary rights for digitisation and making available, and b) provide trusted and reliable mechanisms for payment of any resulting remuneration fees. In this way this project can realise its full potential by offering users access to works that are in the public domain *and* those subject to rights protection.**

**Turning specifically to the UK position, the six aims stated in the DCMS digitisation Action Plan launched in November 2005 must be underpinned by an understanding of the need to consult and communicate as broadly as possible both within government (DTI, DFES) but also with bodies representing both libraries and rightsholders. It is only through such an inclusive approach that the aim of the Action Plan to avoid, ‘fragmentation and duplication of digitisation activities’ will be achieved.**

***2) What measures could be taken to promote private investments and new businesses models such as public-private partnerships for digitising and making historical collections accessible?***

**Our comments above on collaboration and consultation apply equally to this question, particularly in light of the problems arising out of the Google digitisation schemes launched during 2005.**

**In describing the body of European cultural heritage the Communication and Staff Working Paper refer variously to its ‘full cultural and economic potential’, the possibility of its ‘re-use for added-value services and products’ and the ‘considerable spin-off for other industries’. This language clearly recognises the commercial value that may be achieved across various sectors from a concerted digitisation and on-line access programme which, in turn, suggests that value may be gained from partnerships forged within the private, commercial sector. In order to sustain this model the legitimate interests of rightsholders – particularly creative rightsholders who are, of course, the source of the content fuelling**

**the entire initiative – must be respected and acknowledged. In the context of measures to be taken we would urge the Commission in all discussions, whether on business models or legislative reform, to keep this simple fact firmly in mind: if creators have no incentive to create, there is no content to supply to users.**

**3) *What measures of a legislative, technical, organisational or other nature, could facilitate the digitisation and subsequent accessibility of copyrighted material, while respecting the legitimate interests of authors?***

We refer to the specific and detailed comments made earlier in our submission under these three headings.

**4) *Is the issue of orphan material economically important and relevant in practice? If yes, what technical, organisational and legal mechanisms could be used to facilitate wider use of this material?***

Yes, the issue of orphan material is already economically important in the analogue world, where both audio-visual and printed media throw up many multiple contributor works, and will become increasingly so as converged digital media produce a high volume of mixed-media products. We feel that, in identifying the extended collective licence model, the Communication has found an option that satisfies the technical, legal and organisational challenges raised by the issue of orphan works. The significant caveat that we would add to our support of this model is to emphasize the importance, to the sustainability and credibility of such a collective scheme, of setting the 'entry point' correctly. In other words, the collective scheme should only operate in cases where the prospective user of the work has expended reasonable endeavours and resource in locating the rightsholder. Remuneration schemes, by definition, are not designed to replace individual licensing arrangements. Equally the level of remuneration applied by such schemes should be fixed at an appropriate level.

**5) *How could public domain material and other material available for general use (voluntary sharing) be made more transparent and widely known in order to facilitate its online availability for subsequent use?***

The Communication identifies the key challenges to be addressed in the establishment of digital libraries under the headings: legal, technical, organizational and financial. We suggest that a further issue be given equal consideration, that of communication. The overall planning for this project must incorporate a detailed strategy for communicating the answers to the following basic questions: what is it? where is it? what can I do with it? what can I not do with it, *and why?* It is vital that the italicized final question is adequately addressed if the project is to extend to works subject to rights protection, as we believe it should. If technology is to be used to grant access to users, then the same technology must also be

**employed, at the point of contact, to deliver educational and rights awareness material to those users. This is particularly important in the context of young people who have grown up with the ubiquity of technological access, but may have missed out on the opportunity to appreciate the role played by IP rights in sustaining the individual creator who produces the music, books, films and video games etc. that they enjoy.**

**This project presents a unique opportunity at both European and national levels to connect with this generation, and we urge policy makers to grasp it.**

## Preservation of digital content

***6) What priority measures – in particular of an organisational and legal nature— should be taken at national and European level to optimise the preservation of digital content with the limited resources available?***

In terms of prioritising digital preservation activities, it seems logical to focus on those materials that are at greatest risk of degeneration. Our response under the sub-heading 'Technical Challenges' identified audio-visual works and printed media from the late 19<sup>th</sup> Century onwards which are printed on paper already degrading. As the more recent works are likely to have rights issues attached, it is vital that the preservation strategy includes the necessary step of consultations, either on an individual or collective basis, with rightsholders.

***7) Is there a risk that national legal deposit schemes lead to a multiplication of requirements on internationally active companies? Would European legislation help avoiding this?***

We agree with the view stated in the Communication that a patchwork of legal deposit regulatory provisions across Member States may work against the aim to avoid fragmentation and duplication in the overall European digitisation programme. We are not however convinced that harmonising legislation will produce a timely or comprehensive solution. One only has to look at the attempt in Article 5 of the 1992 Rental and Lending Directive to set up a mechanism for the provision of public lending right schemes in Europe, - and the subsequent history of interventions by the Commission and ECJ - to realise the practical problems that can arise when certain harmonising legislative measures are applied at national level.

An alternative option that the Commission may consider in this area is investing in and supporting schemes such as TEL, to encourage the domestic representative bodies of libraries within the Community to work together to ensure that duplication of effort is not required by either the libraries themselves, or users of the system who have already conformed with the legal deposit requirements in their own jurisdiction.

***8) How could research contribute to progress on the preservation front? Which axes of work should be addressed in priority by the forthcoming Specific Research Programmes as part of the 7th Framework Programme?***

**Based on the suggestions in this response we propose that the following areas of research merit careful consideration:**

- a) research into opportunities for and methodology of pilot schemes for the digital preservation of works within a licensed environment. The logical extension of such research would be to analyze the viability of such schemes in the context of the making available of works.**
- b) research into further collaborative activity, including funding packages, regarding the establishment and use of standard International Identifier and data exchange codes.**
- c) research into existing international schemes and strategies that have successfully delivered rights awareness and education programmes, where non-Public Domain digitally preserved works are made available for public access.**
- d) research into the development of creator-focused DRM systems that are focused on capturing granular data regarding the digital preservation and subsequent use of works – with a view to making supportable and credible payments to individual rightsholders in cases where the onward usage is not permitted by legal exceptions.**

Annex

## The Communication

1. **We are concerned at the suggestion on page 5 that the Google Print Library Project is somehow a natural response to the fragmentation of digitisation schemes within Member States. The motivation behind the various Google digital information provision schemes is clearly distinct from that of an individual Member State looking to preserve and enable access to its cultural materials.**
  
2. **At this early stage of the discussion it is important that terms are defined clearly. The exception provided for by the Information Society Directive, cited under the heading Legal Challenges, does not apply to *any* copying; only copying for non-commercial purposes – as stated in the annexed Staff working Paper.**

## The Staff Working Paper

3. **Two points arise regarding the description of the Google Print Library Project set out in part 2.1.1.**
  - b) **While it may have been part of the original planning for Google to ‘work with publishers and authors to determine how much text will be shown’, the experience of rightsholders in the UK and US has been somewhat different, with involvement limited to the offer of an opt-out right offered to publishers.**
  
  - c) **Most global IP systems are designed to allow a rightsholder the first opportunity to authorize others to do certain acts with their works, such as copy them and make them available to**

others. The present difficulties between Google and rightsholder groups are the fairly inevitable result of 'act first, ask later' policy.

4. "Voluntary sharing of content can have an important place in shaping the common information space" (Point 2.2.2). This comment is potentially misleading, without further explanation. While it is clear that a creator (or their transferee) may be at liberty to share content as they choose, the current volume of infringing works shared between individual users on peer-to-peer networks is an entirely different activity and one which, clearly, this Staff Working paper does not seek to condone.
  5. The statement on page 8, "Legal deposit schemes may fall short of their useful purpose if unprotected copies are not made available by those who produce the information" requires further explanation. Otherwise it may seem that the Communication is advocating making legal deposit library collections *of all works* available as digital libraries.
  6. Two points arise regarding the description of Creative Commons and the BBC Creative Archive Project set out in page 13:
    - a) The suggestion that the Creative Commons licensing model gives the, "creators of content the opportunity to protect some of their rights, while giving away others" is not entirely accurate. CC simply provides access to a range of licences – rights protection is left entirely in the hands of the creator. The lack of such an infrastructure – dealing with issues relating to enforcement of economic and moral rights, reversionary provisions etc. - seem to present a major deficiency with this model.
    - b) The comment that the BBC Creative Archive project, "...seems to have been slowed down, amongst others (*sic.*) because of rights clearing issues for the underlying material" is inaccurate and, in the absence of further detail, unlikely to help foster the kind of collaborative approach needed to deliver the overall aims of this project. In reality, the inadequacy of the consultation and communication with rightsholders prior to and during the pilot phase of this project, have been a major factor in hindering an effective collaborative approach, as advocated in this response.
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Submission by the Authors' Licensing & Collecting Society to the All Party Internet Group Inquiry into Digital Rights Management

17<sup>th</sup> January 2006

Introduction

**Writers are particularly concerned about the way in which both the policy debate and media attention around Digital Rights Management systems are focused either on the global media moguls or the rights and expectations of consumers. For this reason, we welcome this initiative by the All Party Internet Group and the opportunity to present a different perspective than that which can be provided by the publishers/ media corporations or by consumer groups; and to propose that further research is needed into business models and protection systems which will ensure that creators are appropriately remunerated and recognised for their work.**

**From the outset we suggest at any discussion of an entity known as “DRM”, acknowledges and applies the internal sub-definitions applied by European / UK legislation to this term. If an informed debate is to take place, it is vital to acknowledge the role of (and separate legal protection for) “rights management information”,<sup>24</sup> alongside the various technical and legal measures that exist to specifically provide protection for works and information. This distinction is of particular importance in terms of the public debate on this issue.**

**Our response to each of the key issues is as follows:**

1. Does DRM distort traditional tradeoffs in copyright law?

**Writers see copyright as protecting their position in a market place in which they will always be the weaker party in any individual negotiation. It provides them with a degree of control over what happens to their creative output, the opportunity for remuneration throughout the life cycle of their work, and thus makes a major contribution to an environment in which they can continue to create. The author can, in theory, although not in practice in some genres (journalism and Science, Technical and Medical publishing for example), choose whether to assign all or part of the rights in a work to a publisher who will then undertake to edit, publish and promote the work while also undertaking to protect the writer's rights.**

**What distorts the relationship between the two is the exercise of compulsion in a contractual relationship in which the individual author will almost always be the weaker party. That compulsion can involve a requirement that ‘all rights in all media in perpetuity’ are assigned to the publisher, sometimes with the implication that a failure to assign may affect publication of future work.**

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<sup>24</sup> As defined by s. 296ZG(7)(b) of the CDPA (1988)

**DRMs will not *per se* affect the imbalance; but the ownership and management of DRMs will. On the negative side, if DRMs are owned and operated by international conglomerates, it is highly likely both that remuneration to the individual writer for their secondary rights will be adversely affected (see Appendix for examples of secondary rights income for writers from ALCS) and that the individual writer's bargaining power will be still further weakened.**

**However, if alternative sources of investment can be found in order that DRMs secure secondary rights income streams to writers by the addition of rights ownership metadata and systems for recording usage and handling micro-payments, then DRMs can become the instruments for potential improvement of the current imbalance.**

**The most difficult of these three elements is the development of an authoritative, current source for rights ownership information. Secure systems for recording usage which do not impinge on personal privacy, and protocols and standards for data exchange, are already available or in development. Collecting societies provide a pre-existing business model for the management of micro-payments where the individual rightsholder is not in a position to licence or collect revenues due. Further investment in the extension of authoritative rights ownership initiatives, possibly on the lines of the Watch database, would be of real value as digital markets develop.**

**On the positive side, DRMS will be one of the tools which will allow considerably more authorised, global re-use of a writer's work provided that the licensing structure is sufficiently flexible, the DRM systems operable on a range of different platforms, and the remuneration system (if required by the creator) fair and equitable.**

2. Do new types of content sharing licences (such as Creative Commons or Copyleft) need legislation changes to be effective?

**There seem to be two assumptions underlying this question. The first being that these types of licence are in some way ineffective, the second being that they are de facto 'a good thing' and should be supported. Neither of these assumptions is proven, and should be before any consideration can be given to legislation.**

**For example, in the case of Creative Commons, there are now reported to be some 50 million Creative Commons licensed works on the internet. There is clearly a widespread perceived need (in the academic community at least) for some form of licensing structure which gives choice to the creator and allows easy access. In theory the Creative Commons model provides a highly effective response to that need. It is worth noting, however, that one of the reasons for the successful take-up of the licence may be the fact that they rely on, and exist in, an already highly developed legislative system – copyright law.**

**The critical unanswered questions are whether the licences are achieving and will achieve what the licensor and the licensee needs. What is crucial to remember (as it is not explicit in the information supporting the CC licensing scheme) is that the licence does not, in itself, provide any rights protection to the creator as it lacks any support infrastructure. Without any means of exercising control the creator is, in effect, giving away all rights (globally and in perpetuity) whether that is the intention or not. Legislation will not change this; consumer and creator education, involvement of existing models for individual and collective rights management, and creator-controlled open DRM systems could potentially be more effective.**

3. How should copyright libraries deal with DRM issues?

**It is for the practitioners to comment here. From the writers' perspective, it is crucial to their ability to continue to create that DRM – both in the context of technological protection and rights management – is used effectively by legal deposit libraries to ensure that access, whether on-site or remote, is granted within the existing framework permitting activities such as non-commercial research and private study. In cases where the proposed use exceeds such legal exceptions, DRM technology presents the opportunity for point-of-contact licensing solutions.).**

4. How should consumers be protected when DRM systems are discontinued?

**We suggest that the question of continuity in the terms of the technology underlying successive generations of DRM should be addressed in the context of its affect on both consumers *and* *rightsholders*.**

5. To what extent should DRM systems be forced to make exceptions for the partially sighted and people with other disabilities

**We suggest that 'forced' is the wrong term, in this context. In accordance with the call for 'voluntary measures' in the EC Copyright Directive<sup>25</sup>, ALCS has always supported improved access for the partially sighted and, most recently, has been a party to detailed discussions, facilitated by the DTI, between rightsholders and representatives of the visually impaired community. The resulting pilot scheme aims to provide access to digital files enabling the creation of accessible materials in a technically secure and trusted environment. Whilst wishing to retain control of their rights, and to secure adequate remuneration in appropriate cases, the majority of our members have consistently supported all measures which would assist access for the partially sighted and those with similar disabilities, a continue to do so in the digital-use environment.**

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<sup>25</sup> Art.6(4), Directive 2001/29

6. What legal protections should DRM systems have from those who wish to circumvent them?

**In an environment where – through the operation of peer-to-peer file sharing technologies – content, once ‘released’ can be readily and rapidly distributed globally, a set of a robust legal rules to protect the legitimate securing of such content is vital. We suggest that the raft of measures introduced into Part VII of the Copyright Designs and Patents Act (1988), on implementation of the EC Copyright Directive provides these rules. The challenge now for policy-makers is to ensure that, particularly in cases of the most serious commercial infringements, the available civil and criminal sanctions are vigorously (and visibly) applied.**

**Alongside the formal legal rules, schemes that harness the potential for DRM to provide rights education and awareness messages should also be promoted across government departments (such as DTI,DCMS,DFES), by informed groups such as All Party Internet Group.**

7. Can DRM systems have unintended consequences on computer functionality

**There will be others more qualified to respond on this technical issue.**

8. The role of the UK Parliament in influencing the global agenda for this type of issue

**The UK Parliament has an important role to play in this global debate. One only has to look at the DCMS figures on the value of exporting the creative industries - £11.4 billion contributed to the balance of trade in 2001, representing a 4.2% share of all goods and services exported – to understand the commercial significance of protecting creativity and the products and industries it drives in the digital-use environment.**

**Digital technology offers users far greater choice in terms of the way in which they access and interact with creative content. From a writer’s perspective, the same technology provides an incentive to create, by providing the means to entertain, educate and inform new readers and explore new markets. If current and future advances in digital technology are to deliver both of these objectives – as it should - then a balance must be struck between the provision of access to content and observance and understanding of the following core, basic principles:**

- (i) the recognition of the need to protect rights - both economic + moral - in the underlying content, and**
- (ii) the need for the development of an appropriate and proportionate infrastructure to ensure that the on-line use of creative content may be audited and, in appropriate circumstances, remunerated.**

This delicate 'balance' was neatly summarised in the recent EC staff working paper on the issue of the creation of digital libraries<sup>26</sup>,

*“Solutions have to be found that respect the legitimate interest of creators, while enabling full use of the potential of the new technologies.”*

The UK Parliament has a clear role to play in leading the DRM debate – by identifying and supporting technology means that a) guard against unlawful use of content and b) provide an environment that serves the needs of both lawful users and those who create the underlying content.

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<sup>26</sup>SEC(2005) 1194, Annex to the Communication to the Commission “i2010: Digital Libraries”

## APPENDIX

### About the Authors Licensing & Collecting Society

**The Authors' Licensing and Collecting Society Limited ('ALCS') is the UK rights management society for writers of all genres of literary and dramatic copyright works. Established in 1977 and wholly owned by its writer members (of whom there are currently 52,000), ALCS is a not-for-profit, non-union organisation. The Society's governing body, the Board of Directors, is composed of elected Ordinary writer members, and writers nominated by its two Corporate members, the Society of Authors and the Writers' Guild of Great Britain.**

**Since its foundation, ALCS has paid writers over £100 million in fees and today it continues to identify and develop new sources of income for writers. It therefore has a proven track record of managing the licensing, collection and distribution of royalties at the micro level to very large numbers of authors for whom this income is essential. To provide further information about ALCS, we enclose a copy of our Strategic Plan and Annual Report.**

#### Secondary rights income for writers

**The following are typical examples of a range of writing incomes from secondary rights secured through ALCS collective licences. They do not constitute full secondary rights income, as Public Lending Right and other fees should also be added.**

**They should be viewed in the context, according to the findings of a Society of Authors survey in 2001<sup>27</sup>, of 61% of their writer members earning less than half of the then national average wage, and 46% less than a quarter.**

**Writer 1: Playwright and TV script writer (for adults)  
Average annual ALCS income 2000-2005: £4,850.00**

**Writer 2: Novelist and writer of general non-fiction  
Average annual ALCS income 2000-2005: £ 1329.00**

**Writer 3: Writer of books, and radio and TV scripts (for children and young adults)  
Average annual ALCS income 2000-2005: £335.00**

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<sup>27</sup> The Author, Volume XX1, No.2