



**Determination of revenue shares from licensing undertaken by CLA  
and NLA**

**Report of Mark Bezant prepared at the request of ACS, ALCS, BAPLA,  
DACS and PLS**

**Volume 1  
Report and appendices**

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## 1. Introduction

### My appointment

- 1.1 Copyright Licensing Agency Limited (“**CLA**”) and NLA Media Access Limited (“**NLA**”) are collective management organisations (“**CMOs**”), appointed on behalf of copyright owners to administer the licensing of rights and collection and distribution of licence fees.<sup>1</sup> In particular, CLA and NLA are reproduction rights organisations (“**RROs**”), who license organisations that wish to copy and re-use published works.
- 1.2 CLA and NLA license rights to copy different bodies of repertoire. The repertoire controlled by CLA relates to books, magazines and journals, while that controlled by NLA relates to magazines and newspapers. Both organisations license copying throughout the United Kingdom (“**UK**”) but have reciprocal licensing arrangements with RROs located overseas by which they license content to users in other countries.
- 1.3 CLA and NLA distribute the licence fees collected (after deducting certain costs) to copyright owners. I have been appointed to determine the basis of distribution of licence fees between three classes of rightsholder, being authors, publishers and visual artists (“**VAs**”).
- 1.4 My instructions are summarised in a brief attached to my letter of engagement and included as an exhibit to this report. I have been instructed to provide my determination by a steering group (the “**Steering Group**”) on which the following organisations (the “**Parties**”) are represented:
- (1) the Authors’ Licensing and Collecting Society Limited (“**ALCS**”);
  - (2) the Publishers Licensing Society Limited (“**PLS**”); and
  - (3) three groups representing VAs: the Artists’ Collecting Society (“**ACS**”), the British Association of Picture Libraries and Agencies (“**BAPLA**”) and the Design and Artists Copyright Society (“**DACS**”).

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<sup>1</sup> I set out a glossary of terms used in this report at Appendix 1.

- 1.5 The briefing note describes the objective of my determination as follows:
- “The objective is to achieve a fair and transparent division of revenues between the different classes of right holder whose rights are used in the course of licensing by CLA and NLA, namely authors, VAs and publishers, in the light of the best available evidence; and to recommend a mechanism by which this division of revenue can be reviewed (and where it proves necessary revised) on a periodic basis by reference to relevant data collected from time to time.”*
- 1.6 Following my appointment, ALCS and PLS agreed to share equally in any licensing revenue due to them in respect of books. It therefore falls to me to consider the allocation of revenue:
- (1) in the case of books, between authors and publishers on the one hand, and VAs on the other; and
  - (2) in the case of each of magazines and journals, between authors, publishers and VAs.
- 1.7 My determination of the distribution of revenues is, in the absence of manifest error, final and binding on the Parties. I have also been asked to recommend a mechanism by which this division of revenue can be reviewed (and where it proves necessary revised) on a periodic basis.
- 1.8 I provide a chronology of the determination process in Appendix 2.

## **Scope of my determination**

### ***CLA income***

- 1.9 My determination will apply to CLA’s income after deducting its commission (so that CLA can cover its costs), with the exception of licence fees:
- (1) distributed to overseas RROs; and
  - (2) relating to printed music and newspapers.

### ***NLA income***

- 1.10 My determination will apply to all NLA income in respect of magazines mandated through PLS, net of NLA’s deductions to cover its costs.

- 1.11 The CLA revenue relevant to my determination currently exceeds by a significant margin the relevant NLA revenue: approximately £60 million of CLA income and £3 million of NLA income each year falls within the scope of this determination. The process has focused on copying under the CLA licence, being the licence under which the majority of relevant revenue is generated.

### Sources of information

- 1.12 I have provided the Steering Group with a full set of exhibits to this report, which I list in Appendix 3.
- 1.13 Each of the five Parties provided me with an initial paper (the “**Initial Papers**”) setting out its views on the issues relevant to my determination. These papers were provided on 2 December 2014 except that of DACS which joined the process after the other Parties and which provided its Initial Paper on 16 March 2015.
- 1.14 Two organisations referred me in their Initial Papers to research they had commissioned previously:
- (1) ALCS referred me to a report by Dr Melanie Ramdarshan Bold of Loughborough University dated March 2014 on the rights positions of non-staff<sup>2</sup> authors contributing to magazines and newspapers (the “**Loughborough Study**”); and
  - (2) PLS referred me to a report by Simon Alterman and Jo McShea of Outsell, Inc. dated December 2012 on the contracting practices of publishers (the “**Outsell Report**”).
- 1.15 I held extensive meetings with the Steering Group to discuss and agree research to be conducted to assist me in my determination, recognising both the cost considerations and practical difficulties in obtaining information. This research consisted of:
- (1) analysis of the rights ownership and the extent of use of visual content within a sample of works copied under various CLA licences (the “**FTI Sample**”);
  - (2) research by Schoolzone, a specialist school market research organisation, consisting of focus groups and online surveys relating to copying under CLA’s education licences; and
  - (3) the collection of data and interviews with CLA and NLA personnel.

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<sup>2</sup> I use the term ‘non-staff’ to refer to contributors to newspapers, magazines or journals (authors or VAs) who are not employed by the newspaper, magazine or journal. The Parties’ submissions sometimes use the terms ‘freelance’ and ‘non-employed’ to refer to such contributors.

- 1.16 Throughout the process I invited the Parties to conduct their own research to the extent that they considered that the research being conducted on behalf of the Steering Group was insufficient or they considered further research would assist the process. The Parties relied upon or commissioned their own further research, principally as follows:
- (1) ALCS conducted a survey of its members relating to the contracting practices of non-staff authors contributing to magazines and journals, the results of which were summarised in its submissions;
  - (2) ALCS appointed Martin Howe QC to provide an opinion on the rights of non-staff authors contributing to magazines and 'other periodical publications' (the "**Howe Opinion**");
  - (3) ALCS refers to a report produced by the International Federation of Reproduction Rights Organisations ("**IFRRO**") in 2011 on revenue distributions between creators and publishers ("**IFRRO Distributions Paper**");
  - (4) PLS commissioned a report by Elisabeth Ribbans, an editorial consultant on rights management, on the importance of images in the media monitoring market (the "**Ribbans Report**");
  - (5) ACS, BAPLA and DACS refer to a report by PwC, commissioned in 2011 by CLA, PLS, ALCS and DACS entitled "An economic analysis of copyright, secondary copyright and collective licensing" (the "**PwC Report**");
  - (6) ACS, BAPLA and DACS refer to a booklet produced by IFRRO in 2006 entitled "The Art of Copying" ("**Art of Copying Report**"); and
  - (7) DACS refers to a survey conducted by the British Photographic Council ("**BPC**") which included questions on the assignment of secondary rights.
- 1.17 The Parties each provided submissions on 9 October 2015 (the "**First Submissions**") and further submissions on 23 October 2015 (the "**Second Submissions**") in which the Parties commented on one another's First Submissions. BAPLA and ACS chose to produce both submissions jointly.
- 1.18 I selected a random sub-sample of responses from the FTI Sample and asked the publishers of the relevant works to provide documents supporting their response to the rights survey. Gwilym Harbottle ("**Mr Harbottle**"), a specialist intellectual property barrister practising at Hogarth Chambers, reviewed this information (the "**Harbottle Review**"). In the interests of timing, the First and Second Submissions were produced before the Harbottle review was complete.

- 1.19 Mr Harbottle's findings were provided to the Steering Group on 9 November 2015. Mr Harbottle subsequently updated his findings on 11 November 2015 and explained aspects of his opinion. The updates and explanations were similarly provided to the Steering Group. I invited the Parties to comment on the implications of the Harbottle Review, which they did on 13 November 2015. Mr Harbottle produced a second report, dated 20 November 2015, in which he considered the comments of the Parties.
- 1.20 On 10 and 16 November 2015, I asked the Parties a series of follow-up questions relating to their First and Second Submissions. I provided the Parties with a draft determination on 24 November 2015, and asked them to comment on the draft by 11 December 2015. I summarise the key points raised by the parties on the draft determination in Appendix 4.
- 1.21 With one principal exception (my research relating to international comparators) I have restricted my determination to the research agreed by the Steering Group and the extensive information provided to me through the Parties' submissions. In some cases I have not taken into account issues raised in the submissions because no evidence has been provided in support of the submission.

### **Supporting team**

- 1.22 I have been appointed in this matter as a sole arbiter, but I have been assisted in my research and analysis by a team of accountants and economists from FTI Consulting LLP ("**FTI**"), of which I am a partner. Neither FTI nor I have conducted an audit of the information provided to me during the determination.
- 1.23 Those assisting me include Andrew Wynn, a managing director at FTI, and Tim Battrick, a director at FTI.

### **Liability to third parties**

- 1.24 My letter of engagement is with ALCS and PLS. FTI and I do not accept any liability arising out of this engagement except to ALCS and PLS.

## 2. Summary of conclusions

### Background

- 2.1 CLA and NLA license organisations to copy certain repertoires, including books, magazines, journals and newspapers. Table 2-1 below summarises that part of CLA's income in the year to 31 March 2015 that is relevant to my determination. I do not provide a similar analysis for NLA's income because the relevant NLA income is much smaller. The relevant NLA income (amounting to about £3 million each year) relates entirely to the copying of magazines.

**Table 2-1: Relevant CLA income in the year to 31 March 2015**

	£m	%
<b>Education</b>		<b>49%</b>
Schools	13.5	23%
Further Education ("FE")	4.8	8%
Higher Education ("HE")	10.2	18%
<b>Business</b>		<b>21%</b>
Pharmaceutical	1.0	2%
Law	1.5	3%
Finance, accountancy, media and retail	3.3	6%
Other	6.5	11%
<b>Public sector</b>		<b>9%</b>
NHS	1.7	3%
Other government and public sector	3.4	6%
<b>Transactional licensing</b>		<b>1%</b>
Document delivery	0.3	1%
MMO	0.2	0%
HE second extract	0.0	0%
<b>Licence fees collected in the UK</b>	<b>46.4</b>	<b>80%</b>
Income from overseas RROs	11.3	20%
<b>Total</b>	<b>57.7</b>	<b>100%</b>

Source: Table 3-1.

Note: 'Licence fees collected in the UK' refers to income collected in the UK in respect of CLA licences that was allocated in the distribution process to UK works.



- 2.2 In Table 2-1 above, transactional licensing includes:
- (1) 'document delivery', mainly being fees paid for copies of items ordered through the British Library;
  - (2) licence fees paid to CLA by media monitoring organisations ("**MMOs**"); and
  - (3) additional payments made by universities under the second extract scheme introduced in 2015/16 to copy a second chapter of a book where not permitted under the HE licence itself.
- 2.3 CLA collects information about the copying activities of its UK licensees which it uses to assess the proportion of copying within each sector relating to each of books, magazines and journals. CLA also identifies a relatively small amount of copying of websites within the scope of the CLA licence. The balance of copying varies by sector. For example, the vast majority of copying under the CLA licence within schools is of hardcopy books, while the majority of copying by businesses is of magazines or journals.
- 2.4 CLA distributes revenues between the relevant groups of rightsholders:
- (1) 8% of all amounts are currently distributed to VAs; and
  - (2) the split of the remaining amounts varies by format, with the overall split achieved being 39:61 in favour of publishers, in line with an agreement between PLS and ALCS.
- 2.5 My brief states that "*ALCS, PLS and the VA representatives believe that these [existing] mechanisms for sharing revenue (that have stood for many years) may no longer be fit for purpose*".
- 2.6 I set out further information about the activities of CLA and NLA in Section 3.

### **My approach**

- 2.7 The Parties do not agree on what issues are relevant to my determination.
- 2.8 The Parties agree that my determination should consider:
- (1) the extent to which the rights to authorise end-users to make reprographic reproductions of text and images within a work remain with the creator of the work or have been obtained by a publisher, for example through an assignment of copyright, a licence granting these rights, or under a contract of employment. I refer to these rights as the "**relevant rights**"; and
  - (2) the relative value of text and images to those making copies under the CLA and NLA licences (as distinct from their values in the primary market).

- 2.9 The Parties disagree as to the analysis appropriate to answer these questions, or the weight to place on the research and analysis available to me.
- 2.10 The Parties disagree as to the relevance of a number of other issues. I set out my views on the relevance of these issues in Section 4 and summarise my conclusions below.

***Fairness***

- 2.11 My brief explains that my objective is to achieve a “*fair and transparent division of revenues*”. It is therefore necessary to consider the meaning of the term ‘fair’ in this context.
- 2.12 I interpret the term ‘fair’ to mean ‘appropriate in the circumstances’; namely by reference to the evidence available to me, the scope of the CLA and NLA licences and revenues actually collected under these licences, and not wider concerns as regards illegal copying or the terms of the licences at issue.

***The Directive***

- 2.13 The Parties all referred to the implications for my determination of Directive 2014/26/EU on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (the “**Directive**”). PLS suggested that I should restrict my analysis to an assessment of rights ownership and usage in light of the Directive. As I explain in Section 4, I do not consider that the Directive restricts me to considering or basing my determination on only rights ownership and usage, and therefore consider the relevance of a range of other factors identified by the Parties.

***Usage vs. availability***

- 2.14 I base my determination on research relating to content actually copied rather than content that is available to be copied. When entering a licence, potential licensees are likely to consider the volume and nature of copying from which they expect to benefit, potentially by reference to past copying behaviour. The licence fee can therefore be attributed to the volume and nature of copying anticipated. This is, in my view, a better approach than attributing the fee to all works available for copying.

***Synergy value***

- 2.15 Licensees are potentially willing to pay more for a licence because they incur lower transaction costs than if they needed to acquire the same rights from a greater number of counterparties. For similar reasons, licensors may be willing to accept lower licence fees due to the cost savings associated with providing these licences jointly with other rightsholders. I refer to the additional income (if any) that licensors earn as a result of licensing through a reduced number of organisations as ‘synergy value’.

- 2.16 In this case, the relevant additional income to licensors is, in my view, the difference in the total licence fees that licensors would receive:
- (1) under the current arrangement where licences can be obtained through CLA and NLA; and
  - (2) under an alternative arrangement where three separate licences need to be obtained in respect of each of the repertoires licensed by CLA and by NLA. One set of licences would relate to rights held by publishers, another to rights held by authors and a third to rights held by VAs.
- 2.17 The counterfactual in (2) is not a situation in which all rightsholders sell licences individually. The PwC Report referred to by the Parties quantified additional costs associated with a scenario in which licences are sold individually by separate rightsholders and so I do not consider that PwC's conclusions are relevant to my determination.
- 2.18 I would not expect licensees to be willing to pay materially more for the ability to license the same content through a single organisation rather than through three. Many licensees already need to obtain rights from both CLA and NLA. Consequently, the synergy value that is relevant to my determination is likely to be small. I therefore do not consider separately synergy value in my determination.

***Insurance value***

- 2.19 Licensees are potentially willing to enter a CLA and NLA licence, even if they do not expect to perform any copying, to protect themselves against liabilities arising from unknown or inadvertent unlawful copying within their organisation. I refer to income from such licensees as 'insurance value'.
- 2.20 I consider that insurance value is likely to be proportionate to usage and the relative value of text and images in that inadvertent or unlawful copying of works would be correlated with the type of works actually copied (by other licensees). Further, I would expect the likely sums at stake in any lawsuits that could follow unlicensed copying to be in proportion to the value derived from the copying of the relevant type of material, be it images or text.
- 2.21 In any case, a distribution of insurance value by reference to all material available for copying under the CLA licence would be difficult to implement. This is due to the very large number of works in copyright. It might be appropriate to weight some of these works more highly than others, say based on their age or assessed "popularity". This would introduce further complexity and potential for disagreement.
- 2.22 Given the above, I consider that insurance value should be distributed based on data relating to relevant rights and usage as opposed, for example, to distributing such value evenly between authors, publishers and VAs.

***Indemnities***

2.23 ALCS refers to indemnity arrangements between CLA and the Parties. It appears to me likely that claims under these indemnities will occur infrequently or be small. I therefore do not consider that these indemnities are significant to my determination.

***Images produced by authors***

2.24 Some images in copied content are created by the individual who authored the work, rather than by a separate VA. It is therefore appropriate for the author to receive compensation for this work in the same way that a third party VA would if he or she had created them.

2.25 In practice, many images are produced in collaboration between authors and VAs. I have not been provided with information about the proportion of images that are entirely produced by authors. In the absence of such information, I assume for the purposes of my determination that the proportion of images that are wholly produced by authors is not significant.

***Copying of entire images***

2.26 BAPLA, ACS and DACS observe that the CLA licence permits in some cases the copying of an entire work produced by a VA (such as an entire picture within a book) but only a portion of the text within a book. This difference is relevant only to the copying of books because the CLA licence permits the copying of an entire article of a magazine or journal.

2.27 It might be appropriate to increase the distribution to VAs if, for example:

- (1) the copying of complete images has a significant negative effect on the sales of the relevant image outside of the CLA licence; but
- (2) there is no such effect on the sales of the book being copied.

2.28 Such cannibalisation resulting from the copying of works would cause VAs to require a greater share of licence fees to incentivise them to permit the copying of their works. However, I have seen no evidence that such a situation arises in practice and so I proceed on the basis that it does not.

***Form of proposed distribution***

2.29 I provide separate distributions in respect of each of:

- (1) books copied in schools;
- (2) books copied in FE;
- (3) books copied in HE;

- (4) books copied in business and public sector organisations;
- (5) magazines; and
- (6) journals.

2.30 This allows for changes over time in the balance of income from different formats or sectors.

2.31 In reaching my conclusion I have sought to achieve a determination that adjusts in line with changes in sources of income and is practical and cost effective.

#### ***International comparators***

2.32 I consider that the way in which overseas RROs determine relative value can inform the distribution of income from UK licensees. However, care needs to be applied in considering such comparators, because legal frameworks and publishing practices may differ between countries. I consider information relating to international comparators that is potentially relevant to my determination in Section 9.

#### ***Income from overseas RROs***

2.33 CLA receives income from overseas RROs. In distributing this income it is necessary to decide whether to apply a distribution based on my decision in respect of the distribution of revenues from UK licensees or whether to have regard to the distribution policies of originating countries.

2.34 I am not aware of any overseas RROs that apply different distributions depending upon the country from which income is received. There are likely to be differences in legal frameworks and publishing practices between countries which mean that overseas distribution policies might not be appropriate in respect of works published in the UK. I therefore distribute overseas income in the same proportions as income from UK licensees, as I explain further below.

#### **Ownership of relevant rights**

2.35 In Section 5 I summarise the information available to me regarding rights ownership. The Parties interpret this information differently. I summarise their views and my findings on rights ownership in Section 6.

#### ***FTI Sample***

2.36 I asked 242 publishers whether they hold the relevant rights to text and images in a sample of 541 copied extracts of books, magazines, and journals, and 102 frequently copied works.

- 2.37 Following discussions with the Steering Group, I subsequently asked publishers to provide information in support of their responses in respect of 59 items.<sup>3</sup> This information was reviewed by Mr Harbottle who disagreed with the publishers' position in some cases. In performing my calculations relying on the FTI Sample, I have adjusted the publishers' responses to take account of Mr Harbottle's views.
- 2.38 Table 2-2 below shows my adjusted estimate, based on the FTI Sample, of the proportion of pages containing copied content (text or images) where the creator retains the relevant rights to that content. I do not consider the relevant rights to text in books in this table because ALCS and PLS have reached agreement in respect of these revenues.
- 2.39 In this table, the line labelled "magazines" is based on my sampling work in the MMO sector and the line labelled "journals" is based on my sampling work in the HE sector (excluding books copied in HE).

**Table 2-2: Proportion of pages including text or images respectively, where the publisher does not have all relevant rights to the text or images**

<b>Items</b>	<b>Text</b>	<b>Images</b>
Books: Schools	N/A	57%
Books: FE	N/A	71%
Books: HE	N/A	69%
Books: Business and public sector	N/A	42%
Magazines	13%	37%
Journals	24%	15%

Sources: Table 6-3; Table 6-4.

#### **ALCS survey**

- 2.40 ALCS conducted a survey of its members regarding the typical commissioning arrangements of non-staff authors contributing to magazines and journals. The survey was conducted online and non-staff authors who had contributed to the magazine and journal titles included in the FTI Sample were invited to respond. 443 of the 733 ALCS members invited to take part completed the survey. Responses were not subject to review.

<sup>3</sup> I originally selected 60 items for this purpose but one was included in error, leaving a sample of 59 items.

- 2.41 Authors were asked how frequently they sign a written contract or commissioning form for their contributions to magazines and journals. 47% of authors responded that they have never signed an agreement with a publisher. The implication would be that such authors may have retained the relevant rights, assuming that no unwritten contract has arisen, for example by oral agreement.
- 2.42 Authors were also asked about the rights that they typically grant to publishers. Of those authors who stated that they always signed an agreement with publishers, 19% stated that in so doing they did not grant relevant rights to the publisher.
- 2.43 The ALCS survey related only to content written by non-staff authors as opposed to employees. ALCS estimated that at least 30% of magazine content is written by non-staff authors, while PLS considered that 30% was itself the best available estimate. Adopting this 30% statistic and assuming (as ALCS does) that all journal articles are written by non-staff authors, I have used the results of the ALCS survey to estimate the proportion of relevant rights in text held by authors, as opposed to publishers. On this basis, I estimate that journal authors retain their relevant rights in 49% of cases and magazine authors in 19% of cases.
- 2.44 However, I consider that my calculation is likely to overstate the relevant rights held by authors:
- (1) the 30% statistic from the Office for National Statistics (“**ONS**”) refers to all employees, full-time and part-time; however, ONS data shows that non-staff authors are more likely to work part-time and hence produce a relatively smaller share of content;
  - (2) although journal contributors tend to be non-staff authors, they may not retain their relevant rights even where there is no signed contract (as I assume in this calculation). PLS refers to the usual licensing practices for academic journals and provides links to a series of standard terms that these publishers provide to authors and which PLS considers show that journal authors do not retain their relevant rights;<sup>4</sup>
  - (3) non-staff authors who contribute regularly to magazines are more likely to have a contract with the publisher and to transfer their relevant rights. Regular contributors are likely to provide a greater share of content than occasional contributors, implying that a greater share of content would be covered by contractual terms than suggested by the survey results, where each author is assumed to deliver the same body of content; and

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<sup>4</sup> PLS Second Submission, Section 5.1.

- (4) authors' beliefs may not reflect the actual rights position; for example, individuals may have failed to review fully all policies and terms that submission and publication entail.

2.45 Given the issues above, I perform my calculations relying on the results of the FTI Sample on rights ownership but I also show in the main body of this determination the effect of adopting the results of the ALCS survey.

***Other sources of rights ownership information***

2.46 I have considered a series of other sources of rights ownership information including:

- (1) the Outsell Report (commissioned by PLS);
- (2) the Loughborough Study (commissioned by ALCS);
- (3) the Howe Opinion (commissioned by ALCS);
- (4) a survey of photographers conducted by the BPC;
- (5) various evidence relating to images provided by picture libraries; and
- (6) information collected for the NLA Special Contributors Scheme.

2.47 I discuss these sources in Section 5.

***My decision***

2.48 Some of the Parties stated in their submissions that the size of the FTI Sample was insufficient to rely solely on its results in my determination. All else equal, I would naturally place greater confidence in a large sample than a small one. Given the cost, timing and logistical constraints under which this research was performed, it would not have been possible to carry out a significantly larger data collection exercise than that performed.

2.49 The FTI Sample is the source of rights ownership information on which I place most weight. It is the only quantitative source of such information where information provided has been subject to independent review, via the Harbottle Review.

2.50 Some of the Parties challenged assumptions made by Mr Harbottle in his review of the responses to the FTI Sample. ALCS, BAPLA, ACS and DACS suggested that these assumptions favoured publishers over creators. The most significant three such issues were as follows:

- (1) **Oral agreements:** Mr Harbottle accepted representations from publishers relating to certain oral agreements with creators;
- (2) **Promotional material:** Mr Harbottle assumed that the relevant rights passed from VAs to publishers in the case of promotional images; and



(3) **Previous editions:** Mr Harbottle assumed that the terms of contracts relating to previous editions of works mirror those of later editions.

2.51 I agree that these three assumptions (the “**Disputed Assumptions**”) are reasonable as a starting point but observe that the first two favour publishers over creators and that the third will also favour publishers if they have adopted more consistent rights acquisition processes over time, as some of the Parties have suggested. I have therefore considered the effect of not applying these assumptions. That is, where a publisher has established that it has relevant rights only as a result of one of these assumptions, I consider the effect of instead assuming that the claim is not supported.

2.52 In addition to the FTI Sample, I have considered the results of the ALCS survey. However, this exercise was not developed via discussion with the Steering Group, has not been subject to independent review, and relates to text only.

### **Relative value of text and images**

2.53 I summarise in Section 7 the information available to me regarding the relative value of text and images. The Parties interpret this information differently. I summarise their views and my decision on relative values in Section 8.

2.54 The information available includes:

- (1) my review of images included in copied extracts reviewed as part of the FTI Sample, which I have used to assess the page coverage of images copied in different sectors;
- (2) surveys conducted by Schoolzone of teaching staff in schools and HE establishments regarding their copying practices;
- (3) information about the way in which press clippings are produced by MMOs and used by their clients; and
- (4) various other research and observations relating to trends in the use and importance of visual content.

2.55 I explain below my approach to assessing the relative value of text and images in different types of copied content. I first summarise research conducted by Schoolzone in respect of the relative value of text and images in schools and FE.

### **Schoolzone research**

- 2.56 The Steering Group asked me to oversee research of copying behaviours in the school and HE sectors, these being sectors accounting for a relatively large amount of income under CLA licences and in which copying practices are likely to be more uniform than in some other sectors. This research was performed by Schoolzone, a specialist school market research organisation. Representatives of PLS, ALCS, BAPLA and a member of my team worked with Schoolzone to review and comment on all materials provided to participants as part of the research and to comment on drafts of Schoolzone’s reports.
- 2.57 For each sector, Schoolzone convened an online focus group, which was followed by online surveys of 88 school teachers and 87 HE staff. In both sectors, a similar proportion of respondents considered the copying of: (1) text; and (2) images to be essential to their teaching, as shown in Table 2-3 below.

**Table 2-3: Proportion of responses describing the copying of text and images as essential to their teaching**

	<b>Text</b>	<b>Images</b>
Schools	59%	60%
HE	47%	53%

Sources: Table 7-2; Table 7-3.

- 2.58 Respondents were asked to identify the most important category of content for their copying from “*Exclusively text*”, “*Annotated images only*”, “*Exclusively images (not annotated)*” and “*Text and images together*”. The responses varied by subject and did not conclusively indicate that one of text or images was more important than the other.
- 2.59 Respondents indicated that they copied approximately equal amounts of text and images. However, this was not consistent with the results of the FTI Sample which indicated that the majority of pages copied in schools did not contain images. Schoolzone found that much copying in schools and HE takes place outside of the scope of the CLA licence (typically from the internet). It may be that this content, which is not included in my determination, is more heavily image-based than the content of hardcopy books that is copied under the CLA licence. Whatever the explanation, as I explain below, I do not rely solely upon the Schoolzone research in assessing the relative value of text and images copied by schools and FE establishments.

### **Copying of books in schools and FE**

- 2.60 The Schoolzone research indicates that the value of text and images is broadly similar, although for the reasons above is likely to overstate the value of images.
- 2.61 However, page coverage may understate the value of images. The average proportion of pages consisting of images in the schools and FE books included in the FTI Sample was 9% and 6% respectively.

2.62 I assume in my calculations that the relative value of text and images in books copied in schools lies between that suggested by the Schoolzone research and page coverage. I assume that **25%** of the value of materials copied in schools relates to images and 75% to text, but consider the effect of adopting alternative assumptions.

2.63 I consider that images are likely to be less valuable in FE than in schools given their more limited usage. In performing my calculations I assume that **20%** of the value of books copied in FE relates to images and 80% to text, but consider the effect of adopting alternative assumptions.

### ***Copying in HE***

2.64 I place more weight on Schoolzone's survey of school teachers than HE staff given that much copying in HE is, I understand, overseen by library and information staff rather than teaching staff. As for the schools analysis, I compared the estimates provided by the Schoolzone research of the proportion of copying that consists of text versus images with data collected in the FTI Sample, which includes only works copied under the CLA licence. I found that respondents again reported a greater amount of copying of images than takes place under the CLA licence.

2.65 The FTI Sample shows that the vast majority of copied pages within HE do not include any pictures and so I do not rely on the Schoolzone research in assessing the relative importance of text and images within HE. However, I consider that it is appropriate to value images copied in HE at a premium to their page coverage:

- (1) images account for 3% of page coverage in HE books and appear on 9% of pages copied. I assume that **5%** of the value of books copied in HE relates to images; and
- (2) images account of 2% of page coverage in journals copied in HE and appear on 8% of pages copied. I assume that **5%** of the value of journals copied in HE relates to images.

### ***Copying of journals outside of HE***

2.66 I assume that the relative value of text and images in journals copied in other sectors (for which I have limited separate information available to me) is the same as in HE.

### ***Copying of books in the business and public sectors***

2.67 CLA does not hold records of specific extracts of books copied by businesses and in the public sector. However, information is available regarding the most frequently copied works in these sectors, albeit not the specific parts of those works copied.

- 2.68 Within my sample of the most frequently copied works in these sectors, 4% of pages contained images. I do not have data on the proportion of page coverage within these works that relates to images, which is likely to be less than 4%. I assume that images provide **2%** of the value of books copied in these sectors relates to images, but my calculations are not sensitive to this assumption.

#### ***Copying of magazines***

- 2.69 PLS and ALCS consider that the relative value of text and images in magazine content is more strongly weighted towards text than page coverage would suggest. This is due to the low click-through rates in respect of MMO content, meaning that few MMO clients access the images contained in the original article.
- 2.70 I observe that MMO content is not the only magazine content copied by businesses. CLA was not able to provide me with information on the relative importance of MMO and other magazine content copied by businesses. However, I understand that all of NLA's magazine revenue is derived from copying MMO-generated magazine clippings.<sup>5</sup>
- 2.71 Of the MMO extracts identified in my sampling exercise, images had page coverage of approximately 33%. To the extent that users do not see these images due to the way the content is accessed, it would be appropriate to ascribe less than 33% of the value of copied magazines to images.
- 2.72 For the purposes of my calculations I assume that **20%** of the value of magazine content relates to images. This is less than the value of images implied by their page coverage.

#### ***Summary***

- 2.73 Table 2-4 below summarises my conclusions in respect of the proportion of the total value of copying related to images. For comparison, I also show the proportion of pages containing images and the overall page coverage of images.

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<sup>5</sup> PLS comments on my draft determination, Appendix 1.

**Table 2-4: Relative value of text and images**

	<b>Image value</b>	<b>% pages with images</b>	<b>% image page coverage</b>
Books: Schools	25%	34%	9%
Books: FE	20%	28%	6%
Books: HE	5%	9%	3%
Books: Business and public sector	2%	4%	Unknown
Magazines	20%	66%	33%
Journals	5%	8%	2%

Source: Table 8-2.

## International comparators

- 2.74 When considering international comparators, I consider that it is helpful to consider separately the implications of international comparators in respect of: (1) rights ownership; and (2) the relative value of text and images. I set out this analysis in Section 9 and summarise it below.

### **Rights ownership**

- 2.75 I have considered the relative allocations made by overseas RROs to publishers and to creators. My research indicates a range of different practices. Given that the rights ownership situation may differ by country as a result of differences in legal framework and publishing practices, I do not base my determination upon this analysis.

### **Relative value of text and images**

- 2.76 I have considered the relative allocations made by overseas RROs to authors and to VAs. Research by IFRRO suggests that the majority of RROs distribute revenues between authors and publishers using a 50:50 split.<sup>6</sup> IFRRO finds that, on average, VAs received 15% of RRO revenues in 2005.<sup>7</sup> However, my research regarding distributions made in five developed economies suggests that publishers in these countries tend to receive a greater share than suggested by the IFRRO reports.

<sup>6</sup> IFRRO Distributions Paper, Section 4.1.1.

<sup>7</sup> Art of Copying Report, page 18.

- 2.77 As some of the Parties have observed, collective licensing and distribution practices differ markedly from country to country. In addition, public information regarding practices rarely indicates what assumptions have been made regarding the ownership of rights or the relative value of text and images in the process of determining distributions. It is sometimes difficult to separate the effects of these two sets of assumptions in interpreting a distribution adopted by an RRO.
- 2.78 I have reflected on international evidence as part of this process but do not base my determination directly on international comparators.

### **My determination in respect of the division of revenues**

- 2.79 My determination below applies to all income within the scope of my determination that is:
- (1) invoiced for by CLA on or after 1 January 2016;
  - (2) collected by CLA from all sources, whether from licensees or under bilateral agreements, on or after 1 January 2016; and
  - (3) invoiced for or collected by NLA on or after 1 January 2016.

- 2.80 In making my determination, I have relied on a mix of information relating to actual usage and guidance as to the way in which licensees copy the materials available to them. This is consistent with CLA's (and other RROs') practices in determining distributions of revenue.

### ***Income from UK licensees***

- 2.81 I summarise my conclusions in respect of UK income relating to magazines and journals in Table 2-5 below. These conclusions are based on my decisions in respect of relative value and rights ownership based on the FTI Sample. I have adjusted the results of the FTI Sample to reflect the Harbottle Review.

- 2.82 Relying on the FTI Sample may be overly generous to publishers if the claims relying on the three Disputed Assumptions are all accepted. I have therefore adopted a determination that is the average of my calculations both assuming that publishers did and did not establish that they have the relevant rights where it was necessary to rely upon one of the Disputed Assumptions. I set out the full details of this calculation in Section 10.

**Table 2-5: My determination in respect of UK revenue relating to magazines and journals**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>
Magazines	72.5%	17.5%	10.0%
Journals	76.0%	23.0%	1.0%

Source: Table 10-9.

- 2.83 I summarise my conclusions in respect of UK income relating to books in Table 2-6 below.

**Table 2-6: My determination in respect of UK revenue relating to books**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>
Schools	42.0%	42.0%	16.0%
FE	42.5%	42.5%	15.0%
HE	48.0%	48.0%	4.0%
Business	49.5%	49.5%	1.0%
Public sector: NHS	49.5%	49.5%	1.0%
Public sector: Central and local govt.	49.5%	49.5%	1.0%
Transactional licensing: Document delivery	49.5%	49.5%	1.0%
Transactional licensing: MMO	N/A	N/A	N/A
Transactional licensing: HE second extract	48.0%	48.0%	4.0%

Source: Table 10-9.

- 2.84 To the extent that CLA assesses that any income relates to websites:
- (1) where these websites are online or digital versions of specific magazine, journal or book titles (such as a 'soft copy' or an 'e-book'), the distribution will follow the allocation for the relevant format;
  - (2) where websites do not relate to specific magazine, journal or book titles, allocation will follow the allocation for books; and
  - (3) in the case of overseas income relating to websites, if these websites correspond to specific magazine, journal or book titles the revenue will be treated as overseas income relating to the relevant format, otherwise as income from the copying of books (see below).

***Income from overseas RROs***

- 2.85 As a first step in distributing overseas income, CLA should use title-specific data provided by overseas RROs to determine, where possible, the amount of the income that relates to each of books, magazines and journals. There will be a residual amount received for which title-specific information is not available and hence where it is not possible to determine the formats of the works copied.
- 2.86 Subject to the paragraph below, I propose that CLA's overseas income for these categories be distributed between publishers, authors and VAs as follows:
- (1) where overseas income is known to relate to books, using the same overall ratio as UK licence income relating to the copying of books in the financial year immediately prior to that in which the overseas income is distributed by CLA to rightsholders;
  - (2) where overseas income is known to relate to magazines, using the same ratio as UK licence income relating to the copying of magazines;
  - (3) where overseas income is known to relate to journals, using the same ratio as UK licence income relating to the copying of journals; and
  - (4) where it is not possible to determine the format of work copied, using the same ratio as UK licence income across all formats in the financial year immediately prior to that in which the overseas income is distributed by CLA to rightsholders.
- 2.87 The exception to this is where income relates to a sub-section, but not all classes of rightsholders. In this case the distribution should be shared only between the parties representing this subsection of rightsholders and in the same proportions.

***Overall distribution***

- 2.88 I compare the overall effect of my determination to the distribution currently in place in respect of CLA income in Table 2-7 below. In this table, I assume that the CLA income within the scope of my determination from each sector remains at the level achieved in the year to 31 March 2015. The percentage splits may vary in future depending upon the amount of CLA income from different sources.



**Table 2-7: Comparison of existing and new distributions of CLA income, using income for the year to 31 March 2015**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>
<b>Current distribution</b>			
Split	54.3%	37.7%	8.0%
Amount (£m)	31.3	21.8	4.6
<b>New distribution</b>			
Split	55.3%	35.9%	8.7%
Amount (£m)	32.0	20.7	5.0

Source: CLA.

### **My determination in respect of future reviews**

2.89 I cannot anticipate developments in the way in which content is licensed via CLA (or NLA, as appropriate) or the applicable regulatory framework. Therefore, I recommend that the relevant issues are considered at regular intervals rather than try to anticipate events or provide a formula to update the distribution. However, I highlight three areas where there is subjectivity in this determination as a result of limited information available to me. A future review could collect further information relating to:

- (1) rights ownership;
- (2) the way in which magazines are copied, including the relative importance of MMO and other content, which affects the relevance of low click-through rates on MMO content; and
- (3) the relative value of text and images copied under the CLA licence.

2.90 I consider that future reviews should not be performed unless there is a realistic prospect that an appropriate distribution may have changed since the date of this determination, either due to changes in activities and practices or because material new information is available. It is not possible to say in advance exactly when this will occur, but if the Parties agree at any time that this has happened, they should be free to review the distribution scheme sooner than I suggest. Equally, if there is consensus that matters have not materially changed over the recommended timescale, the Parties should be free to agree to postpone the review. My recommendations apply where no consensus is reached.

2.91 I recommend the Parties follow a cycle of reviews of journals, magazines and books (in that order) so that part of the determination is reviewed every three years. Each review should include a review of associated online content. The first review will be of journals in 2019.

2.92 I set out the full details of the recommended review cycle in Section 11.

### 3. Background

#### Introduction

- 3.1 In this section I set out background information about CLA, NLA and the Copyright, Designs and Patents Act 1988 (“**CDPA**”). This summary is based primarily on my brief, information provided to me by CLA and NLA, and the Parties’ submissions.

#### The role of CLA

- 3.2 CLA licenses “secondary rights” in published material (comprising text and embedded images). These licences cover photocopying, scanning and equivalent digital uses of extracts from a large repertoire of published books, magazines, journals and (to a lesser extent) websites.
- 3.3 Licensed extracts are limited to 5% of the pages in a work or, if longer, one chapter of a book or one article of a magazine or journal.<sup>8</sup> CLA licences cover both the text and the embedded images, whether photographs, illustrations or other artistic works.
- 3.4 Certain limits apply in respect of systematic or repeated copying of the same licensed material.
- 3.5 CLA derives its authority to license its customers from mandates from rightsholders (in practice via organisations representing rightsholders). CLA relies on mandates from its two shareholder members: ALCS passes on mandates from its author members and PLS passes on mandates from publishers. CLA previously relied on mandates from DACS. Amounts were paid to DACS for onward distribution to VAs. DACS has operated a “payback scheme” whereby VAs could make a claim against DACS for payment on production of evidence that their material had been embedded in works which may have been available to copy.
- 3.6 CLA is in the course of opening its membership to other relevant CMOs. Three organisations representing VAs have indicated an interest in applying for membership, namely ACS, BAPLA and DACS.

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<sup>8</sup> In 2015/16 CLA started to allow HE institutions to copy a second chapter of a book for an additional fee. This copying does not fall within the blanket licence and is transactional income under the category ‘HE second extract’.

3.7 CLA licenses the education, public and commercial sectors through a series of licences as follows:

- (1) **Educational institutions:**
  - (a) schools via a single licence with the Department for Education;
  - (b) FE colleges via individual licences;
  - (c) universities individually on the basis of central negotiations with Universities UK (that is, HE);
- (2) **Businesses**, via individual licences with varying terms depending upon the sub-sector as follows:
  - (a) pharmaceutical;
  - (b) law;
  - (c) finance, accountancy, media and retail;
  - (d) other businesses;
- (3) **The public sector:**
  - (a) the NHS via individual agreements for England, Wales, Northern Ireland and Scotland;
  - (b) central government departments via a single licence with the Cabinet Office;
  - (c) local authorities via individual licences;
  - (d) public bodies such as the BBC and charities via individual licences;
- (4) **Transactional licensing**, which includes 'document delivery', mainly through the British Library, licence fees paid to CLA by MMOs and 'HE second extract' fees from universities that pay a supplement to copy second chapters/extracts of books; and
- (5) **Overseas:** CLA has bilateral agreements with equivalent RROs around the world under which UK publications are licensed in those territories and the monies deemed to have been collected in respect of any copying of those publications are paid to CLA for onward distribution to the appropriate UK rightsholders.

CLA is similarly able to license overseas publications in the UK under such arrangements and the monies collected in respect of the overseas publications are paid to the appropriate RRO of the relevant country for onward distribution.

Overseas income can be either title-specific or non-title specific, with title-specific revenues accounting for approximately two-thirds of the total.

### Amounts distributed by CLA in the year to 31 March 2015

- 3.8 Table 3-1 below summarises CLA's income in the year to 31 March 2015 after deducting CLA's commission to cover its costs and excluding amounts relating to printed music and newspapers (which are outside the scope of my determination). Amounts distributed to overseas RROs are also not included in my determination. The rows of Table 3-1 distinguish between the various licensing sectors.

**Table 3-1: Relevant CLA income in the year to 31 March 2015**

	Total income £m	Distributed to overseas RROs £m	Relevant CLA revenues £m
<b>Education</b>			
Schools	14.0	(0.5)	13.5
Further Education	5.2	(0.3)	4.8
Higher Education	12.4	(2.2)	10.2
<b>Business</b>			
Pharmaceutical	1.1	(0.1)	1.0
Law	1.7	(0.2)	1.5
Finance, accountancy, media and retail	3.7	(0.4)	3.3
Other	7.2	(0.7)	6.5
<b>Public sector</b>			
NHS	2.1	(0.4)	1.7
Other government and public sector	3.5	(0.2)	3.4
<b>Transactional licensing</b>			
Document delivery	0.8	(0.5)	0.3
MMO	0.3	(0.1)	0.2
HE second extract	0.0	0.0	0.0
<b>Licence fees collected in the UK</b>	<b>51.9</b>	<b>(5.5)</b>	<b>46.4</b>
Income from overseas RROs	11.3	(0.0)	11.3
<b>Total</b>	<b>63.2</b>	<b>(5.5)</b>	<b>57.7</b>

Source: CLA.

- 3.9 In Table 3-2 below, I show the percentage of CLA's relevant revenues (in the sense of falling within my determination) earned from each sector.

**Table 3-2: Relevant CLA income in the year to 31 March 2015**

	<b>£m</b>	<b>%</b>
<b>Education</b>		
Schools	13.5	23%
Further Education	4.8	8%
Higher Education	10.2	18%
		<b>49%</b>
<b>Business</b>		
Pharmaceutical	1.0	2%
Law	1.5	3%
Finance, accountancy, media and retail	3.3	6%
Other	6.5	11%
		<b>21%</b>
<b>Public sector</b>		
NHS	1.7	3%
Other government and public sector	3.4	6%
		<b>9%</b>
<b>Transactional licensing</b>		
Document delivery	0.3	1%
MMO	0.2	0%
HE second extract	0.0	0%
		<b>1%</b>
<b>Licence fees collected in the UK</b>	<b>46.4</b>	<b>80%</b>
Income from overseas RROs	11.3	20%
<b>Total</b>	<b>57.7</b>	<b>100%</b>

Source: CLA.

## **The current basis of distribution of CLA licence fees**

- 3.10 CLA currently deducts 11% from the licence fees it collects to cover its administration charges and distributes the remaining licence fees as follows.

### ***Allocation to individual works***

- 3.11 First, CLA allocates the amount to be distributed to individual works. This is done using data relating to: (1) actual copying; (2) the books, journals and magazines held in business libraries; and (3) behavioural questionnaires relating to the types of materials that individuals working in various types of organisation copy. The weight that CLA places on the different sources of data varies by sector.
- 3.12 Table 3-3 below summarises the allocation of UK licence fees from each sector. CLA collects data that is used to inform the profile of copying by format of work which in turn informs the profile of the distribution. In the case of business copying, this analysis considers separately the copying of each of books, magazines and journals. In the case of other sectors, CLA currently distinguishes only between books and 'serials', a category that includes both magazines and journals.
- 3.13 Table 3-3 does not include income from overseas licensing because format information is provided by only some overseas RROs.

**Table 3-3: Approximate distribution of relevant CLA income in the year to 31 March 2015**

	Magazines	Journals	Serials (total)	Books	Websites
<b>Education</b>					
Schools	N/A	N/A	1.0%	98.5%	0.5%
Further Education	N/A	N/A	7.5%	92.5%	
Higher Education	N/A	N/A	14.9%	85.1%	
<b>Business</b>			<b>86.0%</b>	<b>14.0%</b>	
Pharmaceutical	8.0%	87.0%	95.0%	5.0%	
Law	12.0%	56.0%	68.0%	32.0%	
Finance, accountancy, media and retail	65.0%	30.0%	95.0%	5.0%	
Other	52.0%	33.0%	85.0%	15.0%	
<b>Public sector</b>					
NHS	N/A	N/A	70.4%	29.6%	
Other government and public sector	N/A	N/A	69.0%	31.0%	
<b>Transactional licensing</b>					
Document delivery	0.0%	83.0%	83.0%	17.0%	
MMO	100.0%	0.0%	100.0%	0.0%	
HE second extract	0.0%	0.0%	0.0%	100.0%	
<b>UK licence fees</b>			<b>35.0%</b>	<b>64.9%</b>	<b>0.1%</b>

Source: CLA.

- 3.14 CLA identifies only a small proportion of its income as relating to the copying of websites. In the year to 31 March 2015 this was about 0.5% of the distribution in respect of schools and nil in respect of other sectors. This is consistent with surveys that CLA conducts in each sector. Copying of website content is rarely reported to CLA and, where it is reported, is mainly of non-mandating content such as BBC.co.uk or YouTube. It is relatively rare for survey respondents to report copying digital and online versions of published content.



3.15 While much content is copied online, most of this copying falls outside of the scope of the CLA licence. The vast majority of copying under CLA's licence is of printed material as opposed to mandated websites. The exception is the use of content from MMOs, some of which:

- (1) scan printed materials, host this content on their own website and then provide clients with links to access it;
- (2) copy information from external websites to their own website and then provide clients with links to access it; or
- (3) provide direct links to clients to access external websites.

3.16 Rather than seeking to distinguish between these approaches, CLA classifies all business income from such copying as related to magazines, rather than websites. This does not affect my determination because the choice by MMOs from the three approaches above should not, of itself, affect the allocation of licence fees.

3.17 Following the issue of a draft of this determination to the Parties, the Parties discussed how to classify serials between magazines and journals so that CLA can extend its analysis in Table 3-3. That discussion is ongoing but I proceed on the basis that a classification will be agreed.

***Allocation to class of rightsholder***

3.18 Second, CLA allocates revenues net of operating costs to the relevant groups of rightsholders. 8% of all amounts are distributed to VAs. The split of the remaining amounts varies by format. The split between ALCS and PLS is:

- (1) 50:50 in respect of books;
- (2) 15:85 in favour of PLS in respect of magazines and journals; and
- (3) 50:50 where the data available to CLA (commonly from overseas sources) does not identify what type of content has been used.

3.19 In addition to the steps above, in 2005 ALCS and PLS established an agreement (the "**Bipartite Agreement**"), which fixed the overall distribution of CLA income between authors and publishers at 39:61 in favour of publishers in 2004/5, 40:60 in 2005/6, and 41:59 thereafter. The mechanism for maintaining the overall allocation was an annual payment from PLS to ALCS.<sup>9</sup>

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<sup>9</sup> ALCS First Submission, pages 22 to 23.

- 3.20 My brief states that “ALCS, PLS and the VA representatives believe that these [existing] mechanisms for sharing revenue (that have stood for many years) may no longer be fit for purpose”.<sup>10</sup>
- 3.21 ALCS and PLS agree that my determination will supersede the terms of the Bipartite Agreement.<sup>11</sup>

## **NLA**

- 3.22 NLA licenses “secondary rights” in the text and photographs and other embedded images in magazines and newspapers. The licensing of secondary rights relating to newspapers does not form part of my determination. As with CLA, NLA licences cover photocopying, scanning and equivalent digital uses (with some limited republication rights).
- 3.23 NLA started to license magazine repertoire to the business and public sectors on 1 October 2013. Other copying of magazines in these sectors continues to be licensed by CLA. All copying of magazines in education markets and overseas continues to be licensed by CLA.
- 3.24 NLA licenses MMOs and organisations that use the services of MMOs. The majority of copies licensed by the NLA therefore relates to the distribution of press cuttings. NLA does not currently license magazines overseas or into other sectors.
- 3.25 Some magazines, such as The Economist, mandate directly with NLA while others mandate through PLS. Only the latter are within the scope of my determination.
- 3.26 NLA deducts 20% from the licence fees it collects to cover its administration charges and transfers the balance to PLS for onward distribution to publishers. The publishers take responsibility to pay any part of this revenue that may be due to other classes of rightsholders (such as authors and VAs) under their mandate to PLS.

## **The CDPA**

- 3.27 The CDPA provides the statutory basis of copyright law in the UK. For the purposes of this determination, the Steering Group agreed that text and images should be understood to be short forms for literary and artistic works respectively, as defined in the CDPA.<sup>12</sup> I set out these definitions in the glossary at Appendix 1.

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<sup>10</sup> My briefing note, page 5.

<sup>11</sup> ALCS First Submission, page 23; PLS First Submission, paragraph 4.1.

<sup>12</sup> CDPA, Part 1, Chapter 1, Sections 3 and 4.

## 4. My approach

### Introduction

- 4.1 The Parties do not agree on what issues are relevant to my determination.
- 4.2 The Parties agree that my determination should consider:
- (1) the extent to which the rights to authorise end-users to make reprographic reproductions of text and images within a work remain with the creator of the work or have been obtained by a publisher, for example through an assignment of copyright, a licence granting these rights or under a contract of employment. I refer to these rights as the “**relevant rights**”;<sup>13</sup> and
  - (2) the relative value of text and images to those making copies under CLA and NLA licences (as distinct from their values in the primary market).<sup>14</sup>
- 4.3 The Parties disagree as to the analysis appropriate to answer these questions, or the weight to place on the research and analysis available to me.
- 4.4 The Parties disagree as to the relevance of a number of other issues. The Parties raise a significant number of points which I consider can be addressed as follows:
- (1) **Fairness:** What does it mean for the outcome of my determination to be ‘fair’?
  - (2) **The Directive:** To what extent does the Directive require or allow me to base my determination on factors other than rights ownership and usage?
  - (3) **Usage vs. availability:** To what extent should I focus on content that is actually copied as opposed to content that is available to be copied?
  - (4) **Synergy value:** Does a portion of CLA and NLA income relate to an amount that licensees are willing to pay for the convenience of a collective licence rather than incurring the transaction costs of acquiring copying rights from multiple counterparties? If so, how should such income be distributed?

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<sup>13</sup> ALCS First Submission, page 2; BAPLA and ACS First Submission, page 4; DACS First Submission page 13, PLS First Submission page 2.

<sup>14</sup> ALCS First Submission, page 2; BAPLA and ACS First Submission, page 5; DACS First Submission page 5; PLS First Submission page 9.

- (5) **Insurance value:** Does a portion of CLA and NLA income relate to an amount that licensees are willing to pay to protect themselves against liabilities arising from unknown or inadvertent unlawful copying within their organisation? If so, how should such income be distributed?
- (6) **Indemnities:** To what extent are the indemnity arrangements between CMOs, CLA and CLA's licensees relevant to any distribution?
- (7) **Images produced by authors:** How should I take account of the fact that some images in texts are produced by the authors of the text rather than separate artists?
- (8) **Copying of entire images:** Is it relevant that the CLA licence permits in some cases the copying of an entire work produced by a VA (such as an entire picture within a book) but only a portion of the text within a book?
- (9) **Form of proposed distribution:** At what level should I set my determination? That is, to what extent should I establish specific distributions for different components of CLA's income rather than a single distribution applicable to all CLA income?
- (10) **International comparators:** Are the distribution schemes adopted by overseas RROs relevant to the distribution of income from UK licensees?
- (11) **Income from overseas RROs:** How should income from overseas RROs be distributed?

4.5 I summarise in this section the views of the Parties on these issues and describe my approach to each issue. In many cases, one Party has raised an issue in their First Submission and one or more of the other Parties have addressed that issue in their Second Submissions. For this reason, the order in which I present the views of the Parties in respect of each issue varies.

## Fairness

- 4.6 My briefing note explains that my objective is to achieve a “*fair and transparent division of revenues*”.<sup>15</sup> It is therefore necessary to consider the meaning of the term ‘fair’.

### VAs view

- 4.7 BAPLA’s Initial Paper states:<sup>16</sup>

*“Commercial practice has grown up around the current division. Collective licensing funds are a significant source of revenue to a range of businesses, authors and artists. In the case of businesses, they may have based future financial planning around them, for individual creators the funds may be a critical source of income. The current split ensures that a significant percentage of distributed revenue goes to authors and visual artists, thus channelling funds directly from the end user to the creator. In this sense, it may be said that one aspect of fairness in the arbiter’s decision is to ensure that a future division of revenues continues to support the creative process, as the current division has been effective in doing.”* (my emphasis)

*“If the arbiter decides on a significant change in the current value of division, fairness requires appropriate transitional arrangements to ensure a smooth transition. For example, the arbiter may wish to recommend a period over which the change should be made in increments. This will allow those individuals and businesses affected by the change to plan securely, and cushion the effects of change for any group which may see its share fall. We see individual creators, including both authors and visual artists, who do not have the same reserves as corporations, and who will be less flexible in seeking alternate sources of income, as being particularly vulnerable to such change.”* (my emphasis)

- 4.8 BAPLA and ACS state:<sup>17</sup>

*“We believe that it is important for the arbiter to have sight of all the issues relevant to collective licensing of this kind in order to be in a position to ascribe fair weighting to all elements, as a basis for a fair and equitable valuation overall.”* (my emphasis)

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<sup>15</sup> My briefing note, page 12.

<sup>16</sup> BAPLA Initial Paper, pages 1 and 5.

<sup>17</sup> BAPLA and ACS First Submission, page 3.

4.9 DACS states:<sup>18</sup>

*“In the context of the Directive, DACS asserts that the General Assembly, when setting a fair and equitable distribution policy, must arrive at the true economic value of the rights to be remunerated.”* (my emphasis)

**ALCS view**

4.10 ALCS states that the de facto nature of collective licensing requires a different approach to revenue sharing to that applied to commercial transactions, placing a greater emphasis on fair allocation principles.<sup>19</sup>

4.11 ALCS states that the following factors are relevant to an assessment of fairness:<sup>20</sup>

- (1) **Compensatory payments:** collective licensing generally deals with user activity over which rights owners have little or no control and so it is counterintuitive to base the determination on rights ownership information. An even split would be a fairer approach;
- (2) **Reuse as a zero cost model:** the current distribution in respect of serials (magazines and journals) is similar to the sharing of income between publishers and authors in the primary market. Publisher costs in respect of secondary sales are lower than in respect of primary sales and so a more even split of income would be appropriate; and
- (3) **Rewarding the underlying value of licensed content:** the contribution of authors to the value of copied content is greater than the contribution of publishers. Recognising that some authors write as employees, the overall split should be rebalanced to an even sharing.

**My decision**

4.12 I interpret the term ‘fair’ to mean ‘appropriate in the circumstances’; namely by reference to the evidence available to me, the scope of the CLA and NLA licences and revenues actually collected under these licences, and not wider concerns as regards illegal copying or the terms of the licences at issue.

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<sup>18</sup> DACS Second Submission, page 8.

<sup>19</sup> ALCS First Submission, page 11.

<sup>20</sup> ALCS First Submission, pages 21 and 22.

## The Directive

- 4.13 The Directive was adopted by the European Council on 26 February 2014 and is expected to become part of UK law by early 2016.
- 4.14 The Parties disagree as to the extent to which the Directive requires or allows me to base my determination on factors other than rights ownership and usage.

### PLS view

- 4.15 In its First Submission, PLS describes compliance with the Directive as a ‘fundamental principle’ of the determination. PLS states:<sup>21</sup>

*“The Directive is clear that distribution mechanisms need to be linked to both usage and to actual rights ownership; and that every effort should be made to identify and locate the specific rights holders to whom monies are due.”*

- 4.16 In its Second Submission, PLS clarifies its position that rights ownership and usage are the sole basis on which I should make my determination:<sup>22</sup>

*“The valuation process is only about usage and rights; as stated in the original brief to the Arbitrator, it is about the allocation of revenues from CLA and NLA licences on an objective, fair and transparent basis. This is in accordance with the requirements of the CRM Directive and as a principle has been endorsed by the visual artist members of IFRRO.”*

### ALCS view

- 4.17 ALCS agrees that any methodology for revenue allocations should comply with the Directive, but considers that the Directive allows for a broader interpretation of relevant factors than PLS suggests:<sup>23</sup>

*“The definition of ‘rightholder’ in the Directive permits an alternative approach – a rightholder may be someone entitled to a share of revenue under an agreement. In other words, the Directive provides some leeway to develop a hybrid solution for distributing income underpinned by an agreement signed by the parties representing the relevant groups of rightholders – such as the Distribution Agreement [being the revenue sharing arrangements agreed between the CLA members] required by the CLA Membership Agreement [being an agreement between PLS and ALCS dated 2014].”*

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<sup>21</sup> PLS First Submission, paragraph 2.2.

<sup>22</sup> PLS Second Submission, paragraph 2.1.

<sup>23</sup> ALCS First Submission, page 24.

4.18 ALCS also considers that:<sup>24</sup>

*“When CLA exercises its mandates, the publishers, authors and artists on whose collective behalf it grants licences are thus ‘rightholders’ in the sense described above, rather than individuals or entities who definitively own rights in a licensed work. The conflicting evidence on rights ownership produced for this review confirms the necessity of adopting such a pragmatic approach to defining ‘rightholders’ for the purposes of CLA/NLA licensing and revenue allocation. We have said consistently that while evidence of rights ownership is an important component in this review, other relevant factors... must also be taken into account. The Directive is sufficiently flexible to enable FTI to take such an inclusive approach to the determination.”*

#### **VAs view**

4.19 DACS accepts that *“both usage and actual rights ownership fall within the scope of the Directive when considering fair methods for distribution”* but *“categorically rejects the PLS implication that these are the sole measures advocated by the Directive”*.<sup>25</sup>

4.20 DACS refers to the Directive’s requirement that ‘relevant data’ be used to support distributions as well as ‘the economic value of the use of the rights’ and ‘the nature and scope of the use of the work’. DACS states that *“economic value is not proxied by usage data, as PLS asserts”*.<sup>26</sup>

4.21 BAPLA and ACS similarly comment on the PLS references to usage and relevant rights data but consider that *“despite the apparent implication in PLS’s submission to the contrary, the Directive does not require these to the exclusion of all other methods of determining distribution mechanisms”*.<sup>27</sup>

4.22 BAPLA and ACS support the conclusions that ALCS draws from the definition of ‘rightholder’ in the Directive and concludes that *“while the Directive emphasises the central importance of rightholders within collective management systems, it does not oblige or bind rightholders to limit options for distribution allocations solely to usage and rights ownership”*.<sup>28</sup>

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<sup>24</sup> ALCS Second Submission, page 2.

<sup>25</sup> DACS Second Submission, pages 6 and 7.

<sup>26</sup> DACS Second Submission, page 1.

<sup>27</sup> BAPLA and ACS Second Submission, page 1.

<sup>28</sup> BAPLA and ACS Second Submission, page 2.



***My decision***

- 4.23 The Directive has two complementary objectives:<sup>29</sup>
- (1) to increase transparency and efficiency in the functioning of CMOs (including RROs); and
  - (2) to facilitate the granting of cross-border licensing of authors' rights in online music in particular.
- 4.24 On my reading, the Directive states that in arriving at an accurate and equitable distribution, a CMO ought to have regard to its different membership bases, the actual ownership of rights to licensed works, the usage of works, and 'other subject matter'. The distribution should make use of relevant and available data, and CMOs should make distributions in a timely and cost efficient manner. The Directive is not prescriptive, leaving the responsibility for deciding on the distribution policy to the 'general assembly'<sup>30</sup> of the RRO.<sup>31</sup>
- 4.25 It does not appear to me that the Directive restricts me to considering or basing my determination solely on rights ownership and usage. I therefore consider the relevance in this section of other factors that one or more Parties advance in support of their position.

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<sup>29</sup> Council of the European Union, Press Release No 6654/14.

<sup>30</sup> The Directive defines a 'general assembly' as "*the body in the collective management organisation wherein members participate and exercise their voting rights, regardless of the legal form of the organisation*" (Directive 2014/26/EU, Article 3).

<sup>31</sup> Directive 2014/26/EU, Article 8(5)a.

## Usage vs. availability

4.26 The Parties differ as to the information that is relevant to my determination.

### **PLS view**

4.27 PLS considers that “*The valuation process is only about usage and rights*”,<sup>32</sup> and explains that:<sup>33</sup>

*“The licence permits actual copying, and payment should be made for what is actually copied to the extent that this is possible. Proxies for usage simply provide us with another way of understanding what is copied in the absence of reporting or survey data.”*

4.28 PLS identifies what it considers are challenges in attempting to take account of the availability of works:<sup>34</sup>

*“A number of arguments have been made concerning the value of content that may be “available to be copied” rather than content that is actually copied. We remain unconvinced by these arguments for two main reasons. Firstly, this departs from the principle of allocations following actual use. Secondly, it is subject to reductio ad absurdum, in that every book, every journal article and every magazine article ever published in the UK that is still in copyright (and many of those published overseas) is covered by CLA licences; the number of rightholders whom we would collectively be obliged to compensate under the terms of the Directive would be measurable in tens of millions.”*

### **ALCS view**

4.29 ALCS agrees that distributions should be made by reference to usage:

*“Data on usage of licensed works must be the primary guide in setting the allocations for distribution...Where that evidence is incomplete or inconclusive, other factors relevant to collective licensing should be taken into account, such as allocations made under comparable schemes and the application of fair distribution principles.”<sup>35</sup>*

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<sup>32</sup> PLS Second Submission, paragraph 2.1.

<sup>33</sup> PLS Second Submission, paragraph 2.3.

<sup>34</sup> PLS First Submission, paragraph 5.2.

<sup>35</sup> ALCS First Submission, page 1.

*“The guiding principle for this review must be that the greatest weight in terms of allocations should be given to classes of works that are demonstrably subject to the greatest use by licensees. This follows the guidance issued by the International Federation of Reproduction Rights Organisations (IFRRO) that RROs, such as CLA and NLA, should distribute licence revenue, ‘efficiently, diligently and expeditiously, while approximating actual use as far as possible.’”<sup>36</sup>*

- 4.30 However, ALCS also states that “further breadth can be added to this review by considering additional factors that guide a fair allocation of revenue”<sup>37</sup> and explains:<sup>38</sup>

*“As stated at the outset, ALCS believes that the starting point for allocating licence fees should be the data on the usage of works...When assessing this ‘availability value’ for CLA and NLA licences, the volume of rights within the collective mandate provided by ALCS should be reflected in the overall allocation to authors for serials [magazines and journals] within the business sector.”<sup>39</sup>*

- 4.31 This quote refers specifically to the business sector where ALCS considers that “the quality and extent of data regarding usage is far more limited than in the education sector”.<sup>40</sup>

#### **VAs view**

- 4.32 BAPLA and ACS go further in emphasising the importance of the availability of content for copying:

*“We differ from ALCS on the hierarchy or ordering of valuation elements: we do not believe that usage data should take precedence over other considerations (and there is no evidence to suppose that the Directive or prospective UK regulation requires such a restrictive approach); rather, as we stated in our first joint submission, we believe that a fair valuation will take a balanced view of the various factors we consider to be relevant.”<sup>41</sup>*

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<sup>36</sup> ALCS First Submission, page 4.

<sup>37</sup> ALCS First Submission, page 21.

<sup>38</sup> ALCS First Submission, page 24.

<sup>39</sup> I understand that ALCS focuses here on the business sector because more limited usage data is available for this sector compared to some other sectors.

<sup>40</sup> ALCS First Submission, page 24.

<sup>41</sup> BAPLA and ACS Second Submission, page 4.

*“BAPLA and ACS have expressed their shared view that while data on usage has a place in this project, the value of a comprehensive collective licence with a blanket repertoire availability must receive due priority.”<sup>42</sup>*

- 4.33 DACS noted in Steering Group meetings that CLA licences are typically purchased in advance of actual copying taking place. It therefore suggested that this indicates that licensees place value on the availability of content for copying rather than the specific content that they subsequently copy (given that they cannot know precisely what content they will copy in future). DACS subsequently provided extracts from the CLA website and the CLA HE licence that it considers *“clearly demonstrate that the licence is an advance permission providing access to the whole repertoire”*.<sup>43</sup>
- 4.34 DACS goes on to question what would happen if a licensee made no copies and whether CLA would reimburse the licence fee. It also notes that CLA is rigorous in enforcing its notice period for the termination of licences, meaning that licensees sometimes need to pay even when no copying is taking place.<sup>44</sup>

***My decision***

- 4.35 In my view, a potential licensee is likely to consider the volume and nature of copying from which he expects to benefit, potentially by reference to past behaviour. While the potential licensee may not know in advance the exact content to be copied, he will have some expectations as to the format (book, magazine or journal) and its subject matter. Given this, I consider it reasonable to have regard to titles and their content (such as volumes of text and images) actually copied.
- 4.36 As an analogy, if licensees could choose to copy material from two alternative repertoires and expect to copy material from the first but not the second, they would be willing to pay to access the first but not the second. The availability of the second repertoire will have limited, if any, value to them.

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<sup>42</sup> BAPLA and ACS Second Submission, page 7.

<sup>43</sup> DACS responses to my follow-up questions of 10 November 2015, page 4.

<sup>44</sup> DACS responses to my follow-up questions of 10 November 2015, page 5.

4.37 IFRRO summarises the basic principles that member RROs should follow when making distributions as follows:<sup>45</sup>

*“An RRO is accountable to both the authors and publishers it represents and to the users from whom it collects fees. It must maintain the highest standards when dealing with the funds it holds in trust. Users must be confident that the payments they make are related to the material actually copied, and authors and publishers must be confident that the revenue collected is distributed according to the actual use of works.”*

4.38 IFRRO finds that RROs apply distributions based on objective availability when it is impossible to collect data directly from users on actual copying. Distribution based on objective availability is predominantly used for distributing revenues from blanket and repertoire licence schemes and by RROs which administer compulsory licences and levies.<sup>46</sup>

4.39 In any case, it is not clear how an analysis of the ownership of relevant rights and the relative value of text and images would differ were I to base my conclusions on the characteristics of all works available for copying as opposed to those that are actually copied. None of the Parties has presented me with evidence in this regard.

4.40 Related to usage and availability, and also the issues of synergy and insurance value discussed further below, the Steering Group discussed at our meetings whether to obtain the views of CLA’s licensees and the users of CLA licences. It was agreed it would be helpful to obtain views from users of CLA’s educational licences and such research is summarised in Section 7. In addition, a member of my team discussed with various CLA staff their negotiations with licensees and potential licensees. The CLA staff involved in these discussions were CLA’s:

- (1) Chief Financial and Operating Officer;
- (2) Director of Education and Public Sector who leads CLA’s relationship and negotiations with the Department for Education; and
- (3) Head of Sales.

4.41 These discussions covered:

- (1) CLA’s negotiations with the Department for Education in 2012 and 2014 regarding licensing to schools;
- (2) CLA’s negotiations relating to the FE and HE licences;

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<sup>45</sup> IFRRO Distributions Paper, Section 2.3.

<sup>46</sup> IFRRO Distributions Paper, Section 3.3.

- (3) the ways in which CLA identifies new business licensees; and
- (4) examples of organisations within the public sector who sought to terminate their CLA licence either by amassing a library of content licensed directly from publishers or by implementing a 'no copying' policy.

4.42 I provided a summary of these discussions to the Steering Group. Because this document contains commercially sensitive information I do not reproduce its content here but my decision on the issues discussed in this section take account of its content.

4.43 Having reviewed the note, the Steering Group decided not to conduct any further research of licensees or licence users.

## Synergy value

### VAs view

4.44 The VAs consider that a significant component of CLA income comprises 'synergy value'. BAPLA and ACS "*suggest that the contributions of the parties involved in this valuation operate in synergy with each other within the collective licence*".<sup>47</sup>

4.45 DACS attempts to quantify synergy value as follows:<sup>48</sup>

*"When discussing the economic [synergy] benefits of a blanket licence to the higher education (HE) sector, PricewaterhouseCoopers (PwC) concluded that 'the current transaction costs for users and rights owners ... are £6.7m [whereas] with an atomised model... the transaction costs would be between £145m and £720m per year', representing a potential tenfold increase in the costs to the sector ... In the context of the HE licence the synergy value is therefore 90% of the value to the market, with content being 10%."* (my emphasis)

4.46 DACS later explained the 90% statistic was derived by observing that the estimate of transaction costs in the PwC Report amounted to approximately 90% of those that would be incurred in the absence of collective licensing.<sup>49</sup>

4.47 DACS suggests that synergy value should be shared equally between publishers, authors and VAs.

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<sup>47</sup> BAPLA and ACS First Submission, page 7.

<sup>48</sup> DACS First Submission, paragraphs 5.3.3 - 5.3.4. Square brackets and ellipses as in original.

<sup>49</sup> DACS responses to my follow-up questions of 10 November 2015, paragraph 3.1.

**ALCS view**

- 4.48 ALCS agrees that there is some synergy value but considers it to be smaller than DACS suggests.<sup>50</sup>

**PLS view**

- 4.49 PLS also agrees that there is some synergy value and states:<sup>51</sup>

*“We support the ‘synergy’ argument made by DACS and BAPLA & ACS to the extent that CLA and NLA need to include images if they are to license text, and note that the opposite is equally true (and under NLA licences in particular, images may not be copied without text).”*

**My decision: amount of synergy value**

- 4.50 The ability to enter a collective licence and so avoid the search and transaction costs associated with entering a large number of bipartite licensing arrangements has significant value for both licensor and licensee. The research to which DACS refers attempts to quantify some of these benefits.
- 4.51 Synergies benefiting licensees increase the fees that licensees are willing to pay. For similar reasons, licensors may be willing to accept lower licence fees due to the cost savings associated with providing these licences jointly with other rightsholders.
- 4.52 I do not agree with DACS’ assessment that 90% of the licence value is derived from synergies. Rather than indicating that 90% of licensor income is derived because licensors offer their licences on a collective basis, the DACS statistic reflects the fact that transaction costs to individual licensees and rightsholders are reduced by 90% as a result of collective licensing. This is not a practical alternative, as the IFRRO Distributions Paper notes.<sup>52</sup>
- 4.53 When assessing the synergy value due to VAs (or any other rightsholders) as a group, I do not consider that the synergy value should be assessed by comparing a system: (1) where there is a single collecting society; and (2) where only bipartite licensing arrangements exist with entities such as individual authors or specific publishers.

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<sup>50</sup> ALCS Second Submission, page 5.

<sup>51</sup> PLS Second Submission, paragraph 2.5.

<sup>52</sup> IFRRO Distributions Paper, paragraph 2.

- 4.54 Instead, the relevant synergy value is, in my view, the difference in the total fees that licensors:
- (1) received under the current arrangement where licences can be obtained through CLA and NLA; and
  - (2) would receive under an alternative arrangement where three separate licences need to be obtained in respect of each of the repertoires licensed by CLA and by NLA. One set of licences would relate to rights held by publishers, another to rights held by authors and a third to rights held by VAs.
- 4.55 The counterfactual considered in (2) is not a situation in which all rightsholders sell licences individually. The PwC Report relates to this alternative estimate which I do not consider to be relevant to my determination.
- 4.56 I would not expect licensees to be willing to pay materially more for the ability to license the same content through a single organisation rather than through three. Many licensees already need to obtain rights from both CLA and NLA.<sup>53</sup> Consequently, the synergy value that is relevant to my determination is likely to be small. I therefore do not consider separately synergy value in my determination.

***My decision: distribution of synergy value***

- 4.57 I now consider the distribution of additional licence fees resulting from synergies between the Parties (which, as I explain above, I consider to be small). Having established the amount of such revenue available for distribution, the way in which this is shared will depend on the bargaining position of each party.
- 4.58 The bargaining power of each party will depend on how costly it would be to terminate the negotiations over the allocation if an agreement is not reached. In such a case, I assume that the party would withdraw from the existing collective licensing scheme and grant licences outside the existing CLA and NLA framework. To the extent that one party will suffer a less adverse outcome from such a termination than the others, he is likely to hold greater bargaining power and so demand a larger proportion of the synergy income for himself.
- 4.59 The costs that the Parties would bear to operate through alternative collecting societies would be one consideration when identifying their alternatives to a negotiated agreement. Beyond this, I do not consider that the cost savings experienced by rightsholders through operating under the existing framework are relevant to the proportion of the total licence fee that can be ascribed to synergy value.

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<sup>53</sup> A similar position applies in the music industry where many establishments that wish to play recorded music need to make payments to more than one collecting society.



- 4.60 DACS explains that the allocation of synergy value was an important item of discussion during the 1998 negotiations.<sup>54</sup> The fact that synergy value was considered during these negotiations does not change my opinion that the amount of synergy value is not material.

### **Insurance value**

- 4.61 Several of the Parties have submitted that my determination should reflect the allocation of what they term ‘insurance value’. Some Parties use the term ‘indemnity value’ in place of ‘insurance value’. I use the term ‘insurance value’ in this report to distinguish this issue from that of “indemnities” which I discuss further below.
- 4.62 Any insurance value, over and above the value attributable to the availability of works under the CLA licence, arises because the CLA licence protects licensees against liabilities arising from unknown or inadvertent but unlawful copying within their organisation.

### **VAs view**

- 4.63 BAPLA and ACS state:<sup>55</sup>

*“Choice, availability, ease of access, removal of transaction processes and costs, insurance or indemnity aspects all have value to licensees for which they are willing to pay.”*

- 4.64 DACS states:<sup>56</sup>

*“An example of a licence purchased for indemnity [insurance] reasons is the Cabinet Office as discussed in paragraph 5.2. The indemnity value is derived from the Department of State not being sued for copyright infringement. There are typically numerous visual creators contributing to a work, versus one publisher and one author, so it follows that there could be many more cases brought by visual creators. In the context of the indemnity value of a licence, the value attributable to the images would be many times that of the text.”*

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<sup>54</sup> DACS Initial Paper, page 1.

<sup>55</sup> BAPLA and ACS First Submission, page 1.

<sup>56</sup> DACS First Submission, paragraph 10.2.

**ALCS view**

4.65 ALCS explains that “many businesses take out licences as part of their general legal compliance” and provides a quote from a CLA report that “The insurance aspect of the licence is extremely important to licensees”.<sup>57</sup>

4.66 ALCS states:<sup>58</sup>

*“The ability to copy from a broad repertoire is important for MMOs in providing a breadth of curated content to their clients. For individual businesses, a significant part of the value lies in the assurance of legal compliance provided by licences...We submit that the allocation of revenue from licensing in this sector should reflect the contribution – in terms of mandates and indemnities – made by each group of rightholders in enabling CLA and NLA to offer blanket licences.”*

**PLS view**

4.67 PLS states:<sup>59</sup>

*“...whether or not licensees acquire licences as an “insurance policy”, the licence covers actual copying not some sort of “theoretical copying” that does not exist. The motivation of the licensee in acquiring the licence has no impact on allocation.”*

**My decision**

4.68 I consider that insurance value is likely to be proportionate to usage and the relative value of text and images in that inadvertent or unlawful copying of works would be correlated with the type and volume/value of works actually copied (by other licensees).

4.69 Further, I would expect the likely sums at stake in any lawsuits that could follow unlicensed copying to be in proportion to the value derived from the copying of the relevant type of material, be it images or text.

4.70 In any case, a distribution of insurance value by reference to all material available for copying under the CLA licence would be difficult to implement. This is due to the very large number of works in copyright. It might be appropriate to weight some of these works more highly than others, say based on their age or assessed “popularity”. This would introduce further complexity and potential for disagreement.

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<sup>57</sup> ALCS First Submission, page 24.

<sup>58</sup> ALCS First Submission, page 23.

<sup>59</sup> PLS Second Submission, paragraph 2.4.

- 4.71 Another way to examine this is as follows. Imagine a situation in which licensees can purchase insurance against unlawful copying as a separate product without the need to purchase an underlying CLA licence (where the insurance covers unknown or inadvertent but not routine copying). How then should the income from such insurance policies be distributed? To answer this question it is necessary to consider how the licensee values different aspects of the insurance.
- 4.72 Taking this a stage further, one might consider that it is possible not just to purchase a single comprehensive insurance policy but a wide range of alternative policies covering different types of copying. Purchasers might be able to buy one such policy, none or several. As an example, one option might cover copying of trade journals in the pharmaceutical sector only. In the same way as a traveller will only be prepared to pay for travel insurance in respect of countries he plans to visit, given the option, a licensee is unlikely to pay more than a nominal sum for cover relating to types of copying he does not expect to take place.
- 4.73 It would also be difficult and expensive to distribute very small sums in respect of this nominal value to each rightsholder.
- 4.74 I do not consider that it is necessary to consider the relative number of creators involved in works, as suggested by DACS. If there is a greater number of VAs contributing to any given work than publishers or authors this could cause, in principle, a greater number of lawsuits per incidence of inappropriate copying. However, the DACS analysis overlooks that licensees would primarily be concerned with the value of the lawsuits, which would already be captured by taking account of the relative value of text and images.
- 4.75 Given the above, I consider that insurance value should be distributed based on relevant rights and usage.
- 4.76 DACS refers to a licence purchased by the Cabinet Office when considering insurance value.<sup>60</sup> I comment on these particular negotiations in Appendix 5, where I explain that they do not affect my conclusions.

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<sup>60</sup> DACS First Submission, paragraph 10.2.

## Indemnities

4.77 My brief provides the following information about indemnities:<sup>61</sup>

*“The licences offered by CLA have been backed by an indemnity granted to licensees against claims for infringement of copyright or non-payment of licence fees. To the extent that such a liability exceeds £10,000, CLA itself has been indemnified by ALCS, PLS and DACS in the past. This has provided comfort to CLA licensees, who may be copying from a broader range of publications than CLA strictly has mandates for. In the case of PLS the risk resides with PLS which does not take an indemnity from publishers with respect to CLA licences.*

*The indemnity has only once been invoked against CLA and in that case the liability did not exceed the £10,000 cap.”*

### ALCS view

4.78 ALCS was the only party to comment on these indemnities in its submissions:<sup>62</sup>

*“The operation of the CLA indemnities is governed by the CLA Members Agreement. The indemnities cover two types of possible complaints by rightholders:*

- *they did not mandate the relevant CMO to authorise CLA to license their work(s);*
- *late or non-payment of their fees due from CLA licensing.*

*Although the first category appears more serious in terms of the quantum of a possible claim, it is unlikely to apply much in practice...*

*That leaves the indemnity for late or non-payment of rightholders. The wider pool of right-holders formally included within CLA business licences as a result of ECL significantly expands the group covered by this indemnity, particularly in the case of individual contributors. As such, under the ECL regime, the value of the indemnity provided to CLA by bodies representing creators increases significantly. The combined terms of the UK ECL Regulations and EU Collective Rights Management Directive require bodies representing creators to make prompt and efficient payments to this wider ‘ECL population’ of non-mandating rightholders.”*

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<sup>61</sup> My briefing note, page 3.

<sup>62</sup> ALCS First Submission, page 25.

- 4.79 ALCS's references to the "ECL" are to the Extended Collective Licensing scheme, under which CLA will be permitted by law to negotiate licences on behalf of rightsholders whether they are members of CLA or not.

***My decision***

- 4.80 The first indemnity to which ALCS refers contemplates a situation that ALCS does not expect will arise frequently. None of the other Parties raised this issue and so I do not consider it further.
- 4.81 The second indemnity identified by ALCS does not relate to a benefit provided to licensees. Instead, I understand that it refers to indemnities provided by the various groups of rightsholders against a scenario where a rightsholder does not consider that it has been properly compensated. These indemnities represent an internal arrangement of CLA members to take responsibility for liabilities for failures in CLA processes. This might be relevant to my determination if material costs associated with the indemnity were to be borne by a party but which were not in proportion with its share of the distribution. In this case, it would be appropriate for that party to be compensated for these costs.
- 4.82 However, I understand that the indemnities have to date only been invoked against CLA once and the liability did not exceed the £10,000 cap. I do not know whether this instance related to the first or second issue identified by ALCS but the implication is that the indemnities have not to date resulted in any costs being borne by the providers of those indemnities.
- 4.83 I therefore do not consider that these indemnities are material to my determination.

**Images produced by authors**

***ALCS view***

- 4.84 ALCS states:<sup>63</sup>
- "Maintaining the 50/50 split between authors and publishers for books has been agreed and is outside the terms of this review. This agreement, however, deals with payments in respect of literary, not artistic, works. Given that an author's publishing contract will typically not distinguish between different elements of the author's contribution, where a book includes artistic works created by the author, fees due for copying those works should also be split 50/50."*

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<sup>63</sup> ALCS First Submission, page 9.

- 4.85 ALCS conducted a survey of the authors of the 100 most copied books in each of the Schools, FE and HE sectors to identify the proportion of artistic works within the CLA repertoire that are created by authors:<sup>64</sup>

*“We asked members to estimate the proportion of artistic works they had created to accompany the literary works within their books. In all sectors the survey identifies a high proportion of works which included ‘author-created’ artistic works. The survey also highlights a collaborative approach whereby authors often create initial versions of artwork for completion by publishers in the design phase of the publishing process (see select comments below the figures).”*

- 4.86 ALCS invited respondents to identify the proportion of images they created by selecting a range. The options were 0%, 0%-25%, 25%-50%, 50%-75%, 75%-100% and 100%. Assuming that responses are evenly distributed through each range, the results of the survey can be summarised as in Table 4-1 below.

**Table 4-1: Results of the ALCS survey relating to images produced by authors**

	<b>Schools</b>	<b>FE</b>	<b>HE</b>
Authors whose works contain no images	16%	13%	28%
Proportion of images created by authors where the work contains images	35%	46%	53%
Sample size	44	29	48

*Source: ALCS First Submission, page 10 and underlying data provided by ALCS.*

- 4.87 Respondents to the survey were invited to provide further comments if they wished.
- 4.88 Based on the results, ALCS indicates that the production of images tends to be a collaborative process between authors and VAs.

<sup>64</sup> ALCS First Submission, page 10.

**PLS view**

4.89 PLS states:<sup>65</sup>

*“In the Steering Group discussions [which I understand to refer to discussions in which I was not involved], there has been an assumption that with respect to the rights in images in publications, to the extent that these belong to the rightholders in the text (authors and publishers), the revenue should be allocated and distributed through the same route as for the text. We agree that this is the logical approach, which creates some simplification.”*

**VAs view**

4.90 BAPLA and ACS state:<sup>66</sup>

*“We would accept PLS’ pragmatic suggestion which states that to the extent that rights in artistic works are owned by publishers or authors, any remuneration due to them should be dealt with through the overall allocation to each group for text.”*

4.91 DACS appears to suggest that the number of images that are wholly produced by authors is low. It refers to quotes from authors provided by ALCS and states that these show that:<sup>67</sup>

*“...the actual artistic work included in the publication is made by a third party, an independent visual creator, rather than the writer...They are not author created, they are ‘located/suggested’ by authors and ‘carried out’ by visual creators.”*

**My decision**

4.92 I agree with the principle that authors should receive compensation for images that they create, to the extent they retain the relevant rights. It is therefore necessary to identify the proportion of images that are created by authors.

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<sup>65</sup> PLS First Submission, paragraph 4.3.

<sup>66</sup> BAPLA and ACS Second Submission, page 4.

<sup>67</sup> DACS Second Submission, page 25.

4.93 ALCS accepts that the production of images tends to be a collaborative process and the comments received in response to the survey are consistent with authors collaborating with VAs. Some comments also indicate that respondents were not sure how to interpret the term 'create' in the question. One such response reads:

*“Depends what is meant by 'create'. My contribution is usually to give precise instructions and rough sketches, which are then 'created' into a finished image/chart/diagram by the publisher.”*

4.94 The author providing this response indicated that he or she 'creates' between 50% and 75% of images. Such responses were typical. I set out in Appendix 6 a sample of responses to the survey and further comments from authors that are consistent with authors responding that they create images but that there is also a VA involved in the process. (This appendix does not include a complete list of comments provided by respondents and is not intended to be representative of all responses but rather to show the significant number of comments consistent with this statement.) In many cases, the author responds that they create some proportion of images, where that proportion potentially takes account of the relative contributions of the author and VAs.

4.95 There are some examples in Appendix 6 where the response appears to overstate the author's contribution to images:

- (1) one publisher paid an illustrator to create images but the author claims to have created all images (although it is not clear which party has the relevant rights from the information provided);
- (2) one publisher redrew maps supplied by the author who claims to have created all images; and
- (3) one publisher sourced or produced all images in the work but the author claims to have created between 0% and 25% of images rather than selecting the 0% option.

4.96 I agree with ALCS that where an author is solely responsible for artistic works in a publication and retains the relevant rights to these images, he should receive the same income from these images as would a separate VA who had created them. In contrast, where images are produced collaboratively, I assume that the income in respect of these images should be allocated amongst VAs to the extent that they have retained the relevant rights and not to authors.

4.97 In the absence of information about the proportion of images that are entirely produced by authors, I assume for the purposes of my determination that the proportion of images that are wholly produced by authors is not material. This assumption may be revisited in future reviews if additional information becomes available.



## Copying of entire images

### VAs view

4.98 BAPLA and ACS make the following observation:<sup>68</sup>

*“Our final note in respect of the unique value of artistic works relates to the copyable extent of a work. CLA licensing agreements provide for a maximum copyable limit on publications – usually 5% of a publication, or no more than a specified number of articles, within a defined timescale. This is to ensure that copying under a CLA licence does not become a means of substituting for a primary market sale of the publication – a point which is generally reflected contractually.*

*Artistic works on the other hand are generally copied in their entirety, whether copied in the context of a page including text, as a standalone image, or as a disembedded image. Indeed, it could be argued that applying similar limits to an artistic work as apply to text would be less than helpful to licensees: it clearly makes little sense to copy only a portion of an artistic work.*

*Yet this 100% copying of a work has never been addressed in the allocation of value to rightsholders. Here, then, is an opportunity to factor the issue into fresh thinking about how to determine a fair apportionment.”*

4.99 DACS supports this point.<sup>69</sup> However, none of the VA Parties indicate how this factor should be accounted for in any distribution.

### My decision

4.100 In the case of magazines and journals, the CLA licence permits the copying of a complete article or paper and so the text that may be copied forms a cohesive whole. In the case of books, the licence permits the copying of at least an entire chapter of the work which, again, I would expect to provide some level of coherence.

4.101 For this reason, the difference in the nature of the rights offered in respect of text and images may not be as pronounced as the VAs suggest. That said, I agree that there is a question of potential relevance: does the ability of a licensee to copy an extract of a book have a more detrimental effect on primary sales of image content than textual content?

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<sup>68</sup> BAPLA and ACS First Submission, page 15.

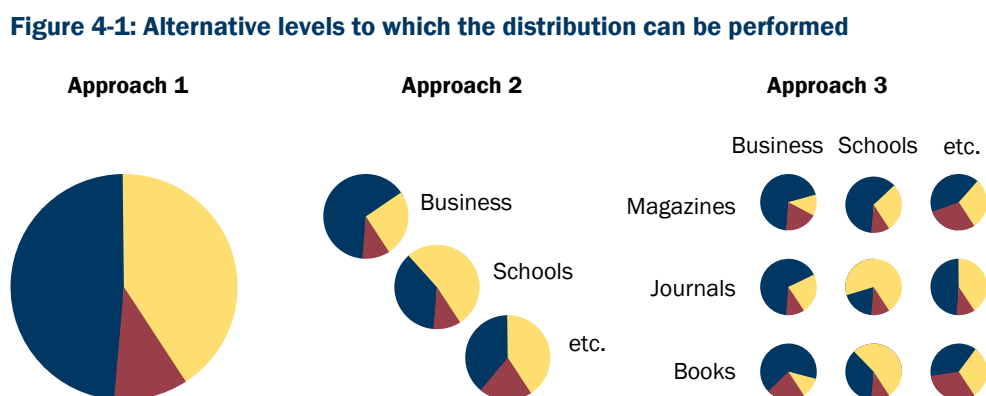
<sup>69</sup> DACS Second Submission, page 20.

- 4.102 The ability to copy extracts of books may affect the sales of the book itself and potentially also sales of images that they contain (which might be acquired independently of the book if no copy were made). This effect may be positive (because users of copies are enticed to buy the whole book or a version of the image) or negative (because the copy provides a substitute for the original work). To the extent that the licence has a more negative or less positive effect on primary sales by VAs than authors, then VAs may require relatively more compensation for their contribution to the licence than authors.
- 4.103 None of the Parties has provided evidence on the effects of copying on primary sales, and in particular no evidence on the relative scale of the effect on different types of contributor. The rights granted by the CLA licence in respect of image copying are likely to differ to those granted in the primary market for images. For example, while picture libraries may grant licences to publish an image in a particular way, I understand that CLA licences instead relate to re-use internally within an organisation, permitting limited (if any) external use. This would tend to reduce the extent to which copying of images under the CLA licence adversely affects primary sales of images.
- 4.104 In the absence of the relevant evidence, I do not take this factor into account in my determination because it is not clear to me that its scale is material to my conclusions. To be material, the effect of copying on primary sales would need to differ significantly between different types of content.

### Form of proposed distribution

- 4.105 A distribution of revenue can be performed at various levels. For example:
- (1) a single distribution to be applied to all licence fees;
  - (2) different allocations to be applied to income from different sectors (such as from businesses and schools); or
  - (3) different allocations to be applied to income from the copying of each format of work (such as books and magazines) within each sector.

4.106 Figure 4-1 below illustrates these different approaches by showing the increased number of proposed distributions required for each subsequent approach. Each pie chart is a separate distribution where the three colours represent the amounts distributed to publishers, authors and VAs. The sizes of the segments are purely illustrative.



4.107 The first approach is the simplest. The second approach is more complex but allows for the allocation to respond to changes in the relative amounts to be distributed from different sectors in future. To the extent that the value contributed by one group (VAs say) is significantly greater in respect of one particular sector (schools licensing say) than other sectors, this approach will automatically vary the allocation should the income earned from schools grow or decline relative to that earned in other sectors.

4.108 The third approach is more complex still, but allows for the allocation to change as one or both of the relative amounts to be distributed from sectors varies in future and the relative frequency of copying of different formats of work changes.

**PLS view**

4.109 PLS suggested in its First Submission that I proposed separate allocations in respect of each of books, magazines and journals. Its rationale for doing so rested on differences in the rights ownerships position for different formats.<sup>70</sup> While these differences can be taken into account using a single allocation, such an approach remains robust should the relative incidence of copying of different formats vary.

4.110 PLS revised its views in its Second Submission:<sup>71</sup>

*“In reading through our colleagues’ and our First Submissions, we have come to the inescapable conclusion that, as DACS pointed out, a single rate of allocation across all types of books for “other image rightholders” does not pass the test of being objective, non-discriminatory and transparent (particularly the second of these tests).*

*Adopting a single ‘book allocation rate’ would also greatly complicate issues when it comes to future revisions – a review of one sector would potentially lead to unpredictable changes in allocations in other disconnected sectors, which would have the potential to discriminate against rightholders in that sector.*

*However, we would be very concerned at any proposal to adopt different rates for different genres of book within a licensing sector; CLA would find it extremely difficult to distinguish, for example, between textbooks and monographs in Higher Education. Our view is that licensing sector provides a reasonable proxy for book type and would provide a practicable solution for CLA.*

*We therefore recommend that the more granular approach for books proposed by DACS to allocating revenues by licence sectors should be adopted.”*

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<sup>70</sup> PLS First Submission, paragraph 4.3.

<sup>71</sup> Second PLS Submission, Section 4.

**ALCS view**

- 4.111 ALCS states that *“The allocation model should differ between the education sector and business/other sectors”*.<sup>72</sup> It also suggests that separate allocations should be made in respect of books and journals.<sup>73</sup> It describes a benefit of such an approach as that it is *“dynamic as it will respond to the data inherent in CLA sales figures and surveys”*.<sup>74</sup>

**VAs view**

- 4.112 DACS states:<sup>75</sup>

*“DACs suggests that granularity should be by sector i.e. Schools, FE, HE and Bus/Gov and might be by class of work i.e. books, magazines and journals. We are aware of consumers/licensees who demand levels of granularity sufficient to transparently understand where their licence fees are delivering benefit in the creative value chain. The concept of fairness is agreed by all parties to this valuation process and granularity by sector and class of work would offer the fairest solution to all classes of rightholders. We are sympathetic to what PLS referred to as ‘rough justice’; such a level of granularity would leave fewer publishers feeling aggrieved which would in turn better future-proof the new distribution shares. Notwithstanding the arguments of fairness, rough justice for publishers and future-proofing, DACS notes that both PLS and ALCS advocate for less granularity, based in part on an economically viable path to delivery, and we are open to that possibility.”*

**My decision**

- 4.113 I provide separate distributions in respect of each of:
- (1) books copied in schools;
  - (2) books copied in FE;
  - (3) books copied in HE;
  - (4) books copied in business and public sector organisations;
  - (5) magazines; and
  - (6) journals.

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<sup>72</sup> ALCS First Submission, page 2.

<sup>73</sup> ALCS First Submission, page 3.

<sup>74</sup> ALCS First Submission, page 26.

<sup>75</sup> DACS Second Submission, pages 12 and 13.

- 4.114 My relatively more granular distribution in respect of books reflects the fact that books are copied in a wide range of sectors and that the Parties agree that the extent and importance of images in books varies by sector.
- 4.115 In reaching my conclusion, I have sought to achieve a balance between a determination that adjusts in line with changes in sources of income and one that is practical and cost effective and consistent with the approach used by overseas RROs.

### **International comparators**

- 4.116 The Parties disagree on the extent to which distribution schemes adopted by overseas RROs are relevant to the distribution of income from UK licensees.

#### **VAs view**

- 4.117 DACS, BAPLA and ACS consider that there is merit in reviewing the distribution methods in other countries.<sup>76</sup> DACS does not consider that differences between countries' legal and copyright frameworks, such as the use of statutory levies instead of collective licensing, or the level of revenues collected, lessens the relevance of international comparators.<sup>77</sup>

#### **ALCS view**

- 4.118 ALCS considers that:<sup>78</sup>

*“...the starting point for allocating licence fees should be the data on the usage of works. This then permits an analysis of the rights ownership position of those works, in the first instance. To the extent that rights data is inconclusive or inadequate, other factors relevant to collective licensing such as benchmarking against international equivalents and the application of fairness principles come into play.”*

- 4.119 However, ALCS considers that there is insufficient information available to provide a robust allocation based solely on rights ownership data, and that *“there will always be an arbitrary element to this analysis”*. As a result, ALCS recommends that *“a supplementary, more objective approach is to benchmark CLA/NLA allocations for literary works copying against the splits applied by other Reproduction Rights Organisations (RROs) internationally”*.<sup>79</sup>

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<sup>76</sup> DACS Initial Paper, page 2; BAPLA and ACS First Submission, page 3.

<sup>77</sup> DACS Second Submission, pages 14 and 15.

<sup>78</sup> ALCS First Submission, page 24.

<sup>79</sup> ALCS First Submission, page 19.

**PLS view**

- 4.120 PLS considers the UK has a different legal and copyright framework to other countries which limits the relevance of overseas RROs as comparators. It states that:<sup>80</sup>

*“...many RROs in Europe depend for their revenue on statutory levies...where issues relating to collective licensing are governed by law not by rights. We see these differences between practice in different countries as reflecting both cultural and legal traditions; and we do not believe they have a useful part to play in this valuation process.”*

- 4.121 PLS also considers that different approaches to allocating revenues to different categories of rightsholders, ranging from evidence to “rough justice”, also reduce the relevance of international comparators.<sup>81</sup>

**My decision**

- 4.122 I consider that information indicating how overseas RROs determine relative value can inform the distribution of income from UK licensees. However, care needs to be applied in considering such comparators, because legal and copyright frameworks and publishing practices differ between countries.
- 4.123 I consider international comparators in Section 9 where I review the evidence submitted by the parties and present my own research in this area.

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<sup>80</sup> PLS First Submission, paragraph 5.7.

<sup>81</sup> PLS Second Submission, paragraph 2.6.1.

## **Income from overseas RROs**

- 4.124 The Parties disagree as to the way in which revenue remitted by overseas RROs should be distributed.

### **VAs view**

- 4.125 Given that revenues received from overseas RROs relate to UK publications, BAPLA prefers to distribute these revenues in accordance with the practices that apply to income from UK licensees rather than in line with the practices of RROs in the originating territories.<sup>82</sup>

### **ALCS view**

- 4.126 ALCS considers that the share of overseas income relating to text for both title specific and non-title specific literary works should be split 50:50 between authors and publishers, in line with the prevailing international practices and CLA's current distribution arrangements.<sup>83</sup>

### **PLS view**

- 4.127 PLS considers that title-specific revenue from overseas RROs should follow the same rules as revenue earned in the UK, while non-title specific revenue should be distributed according to the rules established in the country from which the income is remitted.<sup>84</sup>
- 4.128 PLS also states that "*there should be no double-payment of revenues from overseas RROs (where, for example, graphical elements are covered by a separate organisation that remits directly to organisations in the UK)*".<sup>85</sup>

### **My decision**

- 4.129 Table 4-2 below shows the split of CLA's overseas income in the year to 31 March 2016 that it expected to earn from various countries.

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<sup>82</sup> BAPLA Second Submission, page 5.

<sup>83</sup> ALCS First Submission, page 20.

<sup>84</sup> PLS Initial Paper, paragraphs 17 to 18.

<sup>85</sup> PLS Initial Paper, paragraph 19.



**Table 4-2: CLA's forecast income from overseas RROs in the year to 31 March 2016, by country**

	<b>Title-specific</b>	<b>Non-title specific</b>	<b>Transactional</b>	<b>Total</b>
Australia	21%	0%	0%	21%
USA	7%	0%	5%	12%
Norway	0%	10%	0%	10%
Germany	2%	4%	0%	6%
Japan	5%	0%	0%	5%
France	5%	0%	0%	5%
Other	24%	15%	0%	27%
<b>Total (%)</b>	<b>63%</b>	<b>32%</b>	<b>5%</b>	<b>100%</b>
<b>Total (£m)</b>	<b>7.0</b>	<b>3.5</b>	<b>0.5</b>	<b>11.0</b>

Source: CLA.

- 4.130 I asked CLA to provide an analysis of the types of material copied in each country. Limited data was available and this was only readily available in a suitable format for my analysis for a subset of countries accounting for approximately half of overseas income. I summarise this data in Table 4-3 below. The totals include only forecast income for which the relevant detail is available – other income from these countries is expected for which this detail is not available. CLA was not able to provide a breakdown of the data for serials between magazines and journals.

**Table 4-3: CLA's forecast income from overseas RROs in the year to 31 March 2016, by format**

	<b>Books £m</b>	<b>Serials £m</b>	<b>Total £m</b>	<b>Comments</b>
Australia	1.8	0.5	2.3	Mainly education
USA	0.0	0.6	0.6	Business
Japan	0.0	0.6	0.6	Business
France	0.5	0.1	0.6	70% education
New Zealand	0.4	0.1	0.4	Mainly education
<b>Total</b>	<b>2.6</b>	<b>1.8</b>	<b>4.5</b>	
	59%	41%	100%	
Other	1.2	0.1	1.3	90% education
<b>Total</b>	<b>3.9</b>	<b>1.9</b>	<b>5.8</b>	
	67%	33%	10%	

Source: CLA.

- 4.131 The ways in which CLA content is used overseas may differ from the way in which it is used domestically. For example, I would expect (although I do not have data to show this) that the relative importance of English language books produced for children would be lower to licensees in non-English speaking countries than in the UK. However, a large portion of CLA's income (about 40%) is earned in English-speaking countries, which lessens this concern. Further, the proportion of income relating to books and serials (where this information is available) is broadly in line with CLA's assessment of the amount of its UK income relating to books (65%) and serials (35%).
- 4.132 I am not aware of any overseas RROs that apply different distributions depending upon the country from which income is received. There are likely to be differences in legal frameworks and publishing practices between countries which mean that different distributions might be appropriate in respect of works published in different countries. I therefore distribute overseas income in the same proportion as similar income from UK licensees.

### **My approach**

- 4.133 Given my decisions in this section, the remainder of this determination considers:
- (1) rights ownership;
  - (2) the relative value of text and images; and
  - (3) international comparators.

## 5. Analysis of rights ownership

### Introduction

- 5.1 In reaching my determination it is necessary to consider the extent to which relevant rights to copied material remain with the creators of the works or have been obtained by publishers. This affects the allocation of licence fees between creators (authors and VAs) and publishers.
- 5.2 In this section I summarise the information available to me regarding rights ownership.

### FTI Sample

- 5.3 I have overseen a sampling exercise to collect information about the parties holding the relevant rights to copied content and the extent of images within that content. I describe below the aspects of the sampling process relating to rights ownership and describe those relating to the relative value of text and images in Section 7.

### Selection of sample items

- 5.4 I selected random samples of 150 copied extracts from each of four sectors:
- (1) hardcopy returns provided to CLA by **schools** documenting all photocopied works during a prescribed census period;
  - (2) hardcopy returns provided to CLA by **FE** establishments documenting all photocopied works during a prescribed census period;
  - (3) a combination of data provided to CLA by all **HE** establishments recording their copying and hardcopy course packs and records from the Manchester University archive;<sup>86</sup> and
  - (4) **magazine** articles sent by Precise, a leading MMO, to its clients in March 2015.

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<sup>86</sup> The first of these sources alone was not sufficient because it does not identify the relevant issue in the case of journals. For copied journals I therefore used the other two sources.

- 5.5 It was not possible to identify similar samples in some other sectors because I did not have access to a representative sample of works copied in these sectors. While educational establishments are required to provide CLA with information about actual content copied, less such information is provided in other sectors. These sectors provide alternative data such as behavioural questionnaires regarding the format of content that is copied and information on books held in libraries.
- 5.6 Using this alternative data, it was possible to identify the most frequently copied works across all sectors, although not the specific page ranges of the works that have been copied. In addition to the items above, I selected 111 of the most frequently copied works (which I sometimes refer to as “**FCW**” in this report for convenience), being six to seven of each of books, magazines and journals across each of nine CLA subsectors<sup>87</sup> as well as additional samples for sectors not covered in the page specific samples. At the request of the Steering Group, I selected the sample so that works within each subsector were produced by different publishers, so as to ensure a wide range of coverage.
- 5.7 I included items within my sample only if:
- (1) they had received a CLA distribution the previous year; and
  - (2) the work’s publisher holds a direct mandate with PLS, as opposed to being an overseas publisher that receives its distribution from an RRO other than CLA.
- 5.8 The first of these restrictions excluded items outside the scope of the CLA licence, such as freely photocopiable books which schools often copy but which are not relevant to my determination. The second facilitated the collection of data from the publisher.
- 5.9 In some cases, despite these two checks, some items selected were later identified to fall outside of the scope of the CLA licence, so I excluded them from my research. This reduced the sample size to 643 items, with 541 relating to copied extracts and 102 being frequently copied works.
- Survey of publishers***
- 5.10 PLS contacted the 242 publishers of the sampled items (sometimes in respect of multiple items) and requested them to complete a questionnaire I designed with input from the Steering Group. The questions differed for the items relating to specific page ranges and those relating to frequently copied works.

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<sup>87</sup> The CLA subsectors were ‘Schools’, ‘Further Education’, ‘Higher Education’, ‘Business: Pharmaceutical’, ‘Business: Law’, ‘Business: Finance, accountancy, media and retail’, ‘Business: Other’, ‘Public sector: NHS’ and ‘Public sector: Other’.

- 5.11 For items relating to specific page ranges, publishers were asked to identify any text or images in the extract to which they did not have the relevant rights. The term ‘relevant rights’ was explained as follows

*“Relevant Rights are defined as the right to authorise end users to make reprographic reproductions of the work. Publishers will obtain these rights via:*

- an assignment of copyright; or*
- licence terms granting relevant rights; or*
- under a contract of employment.”*

- 5.12 Publishers were also asked to interpret the terms ‘text’ and ‘images’ in line with the CDPA definitions of ‘literary works’ and ‘artistic works’, both of which were provided.
- 5.13 For items relating to frequently copied works, publishers were asked to identify the total number of pages in the work, as well as the number of pages in the work that contain images and the number that contain text. They were also asked how many pages contain text and images to which they do not have the relevant rights.
- 5.14 PLS and ALCS have agreed to share equally income they receive in respect of books. Consequently, I requested from publishers information on the rights ownership of text and images in magazines and journals but only images in books.

#### ***Publisher responses***

- 5.15 Table 5-1 below summarises the number of items in respect of which I received responses from publishers. Where a response was received, this table distinguishes between those situations where the response was sufficient to include the item in my analysis, and where it was insufficient to do so, either because of a lack of detail in the response or because the publisher was unable to provide the information requested.

**Table 5-1: Responses received from publishers**

	<b>Copied extracts</b>	<b>FCW</b>	<b>Total</b>	<b>%</b>
Response received	352	65	417	65%
Incomplete response received	11	3	14	2%
Response, information unavailable	79	7	86	13%
No response	99	27	126	20%
<b>Requests sent to publishers</b>	<b>541</b>	<b>102</b>	<b>643</b>	<b>100%</b>

- 5.16 Table 5-2 summarises the publishers' reported rights ownership position in respect of images.
- 5.17 This table includes results in respect of both copied extracts and frequently copied works. In the case of frequently copied works, I include only the 19 responses in respect of such works copied in the business and public sectors, because these are the most relevant figures to my analysis later in this report. I set out the results for frequently copied works in respect of all sectors in Appendix 7.
- 5.18 In summarising the results of my sampling I have assumed that all serials copied by MMOs and in FE are magazines, and that all serials copied in HE are journals. This is based on my review of the samples taken from these sectors.

**Table 5-2: Publisher responses in respect of images**

	<b>Items analysed</b>	<b>Pages analysed</b>	<b>Pages with images</b>	<b>Pages where publisher does not have all relevant image rights</b>	<b>%</b>
		<b>A</b>	<b>B</b>	<b>C</b>	<b>C / B</b>
Books: Schools	70	592	204	60	29%
Books: FE	47	325	91	47	52%
Books: HE	88	1,705	145	71	49%
Books: FCW (Business and public sector only)	19	27,531	1,051	38	4%
Magazines: FE	14	60	36	24	67%
Journals: HE	13	155	13	2	15%
Magazines: MMO	125	388	255	64	25%

*Note: I have excluded two books, both Lexis Nexis encyclopaedias, from the frequently copied works analysis to avoid skewing the results towards a small number of works with a very large number of pages.*

5.19 Table 5-3 below summarises the publishers' reported rights ownership position in respect of text.

**Table 5-3: Publisher responses in respect of text**

	<b>Items analysed</b>	<b>Pages analysed</b>	<b>Pages including text where the publisher does not have relevant rights</b>	<b>%</b>
	<b>A</b>	<b>B</b>	<b>C</b>	<b>C / B</b>
Magazines: FE	12	45	2	4%
Journals: HE	12	136	7	5%
Magazines: MMO	107	344	13	4%
Magazines and Journals: FCW (Business and public sector only)	22	4,415	46	1%



- 5.20 In interpreting the data collected, I assume that copying of journals in HE is representative of journal copying in other sectors. I also assume that the magazine content distributed by MMOs is representative of magazines that are copied more generally. This assumption is supported by the similar sampling results for magazines in the MMO and FE samples.
- 5.21 In the absence of sampled extracts from books relating to the business and public sectors, I rely on the results for the frequently copied books from these two sectors.
- 5.22 The Steering Group asked me to analyse responses received over time in respect of copied extracts. The Steering Group wished to consider whether there might be a relationship between the time taken to respond and the rights held by the publisher, and hence whether any inference might be drawn from the fact that some publishers responded later in the process or did not respond at all.
- 5.23 Table 5-4 and Table 5-5 below summarise this analysis. The percentages in Table 5-4 indicate the proportion of responses received in each two week period where a publisher stated that it did not have all the relevant rights to images or text within the copied extract.

**Table 5-4: Publisher responses over time in respect of copied extracts**

	<b>Books, magazines and journals</b>	<b>Items including a relevant image</b>	<b>%</b>	<b>Magazines and journals</b>	<b>Items including relevant text</b>	<b>%</b>
1-2 weeks	179	57	32%	89	2	2%
3-4 weeks	136	85	63%	41	0	0%
5-6 weeks	55	28	51%	16	1	6%
7-8 weeks	19	11	58%	5	2	40%
9-10 weeks	1	1	100%	0	0	N/A
11-12 weeks	5	2	40%	2	0	0%
13-14 weeks	5	2	40%	3	1	33%
15-16 weeks	6	2	33%	3	0	0%
17-18 weeks	1	0	0%	1	0	0%

*Note: 'Relevant image' refers to an image to which publisher states that it does not have relevant rights. 'Relevant text' refers to text to which the publisher states that it does not have relevant rights.*

**Table 5-5: Cumulative publisher responses in respect of copied extracts**

	<b>Books, magazines and journals</b>	<b>Items including a relevant image</b>	<b>%</b>	<b>Magazines and journals</b>	<b>Items including relevant text</b>	<b>%</b>
1-2 weeks	179	57	32%	89	2	2%
3-4 weeks	315	142	45%	130	2	2%
5-6 weeks	370	170	46%	146	3	2%
7-8 weeks	389	181	47%	151	5	3%
9-10 weeks	390	182	47%	151	5	3%
11-12 weeks	395	184	47%	153	5	3%
13-14 weeks	400	186	47%	156	6	4%
15-16 weeks	406	188	46%	159	6	4%
17-18 weeks	407	188	46%	160	6	4%

**Legal review**

- 5.24 After extensive discussion, the Steering Group and I decided that approximately 10% of sampled extracts should be reviewed to test the accuracy of publisher responses to my questions.
- 5.25 I selected a random sample of 59 complete responses, consisting of 15 responses in respect of each of Schools, FE and HE samples, and 14 in respect of the MMO sample<sup>88</sup>. PLS then contacted the relevant publishers, asking them to provide documents supporting their response to the rights survey. Mr Harbottle was appointed to review this information.
- 5.26 Of the 59 samples selected for this process, one was subsequently excluded when it was determined that it fell outside the scope of the CLA licence.
- 5.27 Mr Harbottle divided the works that he reviewed between those where, in his view, the publisher's claim to the relevant rights:<sup>89</sup>
- (1) had been established;
  - (2) had been partially established;

<sup>88</sup> I originally selected 15 items in respect of the MMO sample but one was included in error (the item related to a frequently copied work rather than an MMO extract), leaving a sample of 14 items.

<sup>89</sup> Follow up provided by Mr Harbottle, page 3.

- (3) had not been established even though the publisher had the full opportunity to provide the required information; and
- (4) had not been established but the publisher did not have the opportunity to provide the required information.

5.28 I summarise Mr Harbottle's results in respect of text and images in Table 5-6 and Table 5-7 respectively.

**Table 5-6: Results of Mr Harbottle's Review in respect of text**

<b>Outcome of publisher claim</b>	<b>Magazines</b>		<b>Journals</b>	
Established	14	88%	8	80%
Partially established	1	6%	0	0%
Not established	1	6%	2	20%
Insufficient time to respond	0	0%	0	0%
<b>Total</b>	<b>16</b>		<b>10</b>	

**Table 5-7: Results of Mr Harbottle's Review in respect of images**

<b>Outcome of publisher claim</b>	<b>Books</b>		<b>Magazines</b>		<b>Journals</b>	
Established	12	52%	13	82%	3	100%
Partially established	1	4%	1	6%	0	0%
Not established	6	26%	2	13%	0	0%
Insufficient time to respond	4	17%	0	0%	0	0%
<b>Total</b>	<b>23</b>		<b>16</b>		<b>3</b>	

5.29 Table 5-6 and Table 5-7 above show that, in the majority of cases, the claims of the publishers were established. However, in the case of images in books, a significant proportion of claims could not be established, although Mr Harbottle noted that there were only two instances (out of 59 extracts), both relating to school books, where there was clear evidence provided that demonstrated that the publisher's claim was incorrect.

5.30 Mr Harbottle's conclusions were based on certain assumptions, including the following:<sup>90</sup>

- (1) **Oral agreements:** *"I have assumed that what a publisher has told me about the terms of any oral agreement or of any lost document are correct."*

<sup>90</sup> Harbottle Review, paragraphs 5c and 5f to 5h.

- (2) **Promotional material:** *“Where material has been supplied to the publisher by an advertiser for publicity/advertorial purposes without formal agreement I have assumed that the parties would have contemplated that the supplier would have wished for the widest possible dissemination of the material supplied and that this is likely to have included use within the scope of the relevant rights.”*
- (3) **Previous editions:** *“Where a publication has gone through a number of editions and I have only been supplied with the most recent author/illustrator contracts I have assumed that their terms mirror those applicable to elements of the publication which are governed by earlier contracts.”*
- (4) **Fair dealing:** *“Where the presentation of third party material in the extract would have been fair dealing for the purposes of criticism or review I have assumed that the exercise of the relevant rights would have been fair dealing for that purpose as well.”*

### **Outsell Report (commissioned by PLS)**

- 5.31 Prior to this process, PLS commissioned a report from Outsell Inc. on the contracting practices and rights negotiations between publishers, authors and VAs in the UK.
- 5.32 The study reviewed current contracting practice for different publishers and the evolution of contracting practice since a previous study in 2008. The study made recommendations regarding the Bipartite Agreement between PLS and ALCS, and arrangements with DACS.
- 5.33 The research was based on a survey of 78 publishers, of which 49 responded (a response rate of 63%). These publishers covered all CLA licence sectors and content formats (books, magazines and journals).<sup>91</sup> Outsell interviewed each publisher and verified interview responses by reviewing standard contracts used by 42 of the publishers.
- 5.34 The study found that, compared to 2008:<sup>92</sup>
- (1) publishers were more likely to use standardised contracts and tightened processes to acquire copyright from creators;
  - (2) publishers were increasingly aware of new digital formats and had added terms to standard contracts to reinforce the scope of their rights relating to digital uses of content; and

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<sup>91</sup> Outsell Report, pages 5 and 6.

<sup>92</sup> Outsell Report, page 8.

- (3) economic conditions had helped publishers secure greater flexibility in negotiations, although negotiations could still be protracted where agents or renowned contributors were involved.

5.35 In respect of rights in text, the study found that:<sup>93</sup>

- (1) the use of standard contracts was dominant practice across publisher types, with the possible exception of consumer publishing. Where exceptions existed, they accounted for a small share of overall content;
- (2) publishers owned the copyright for the majority of textual content in magazines and journals, although not necessarily in books;
- (3) in academic book publishing there were instances where *“assignment of copyright was accompanied by extensive royalty provisions for authors, including for subsidiary rights and, in two cases, explicitly for CLA copying revenues”*; and
- (4) where licence agreements were in place, reprographic rights were treated inconsistently.

5.36 In respect of rights in images, the study found that:<sup>94</sup>

- (1) contracting practices in respect of visual material varied significantly between publishers;
- (2) publishers in the schools and FE sectors typically made greater use of visual material and took steps to secure maximum rights to content;
- (3) publishers in the academic, HE and professional sectors used less visual material and were less aware of their rights position in relation to visual material;
- (4) while publishers in general sought to acquire multi-use licences for images, when using picture libraries publishers would typically accept standard terms which limit the number of uses per image and retain reprographic rights with the picture library; and
- (5) the variation in terms used by picture libraries restricted publishers’ ability to track their rights position in respect of visual material.

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<sup>93</sup> Outsell Report, pages 9 and 10.

<sup>94</sup> Outsell Report, pages 10 and 11.

**The Parties' views**

- 5.37 Three of the Parties consider that the Outsell Report supports their position regarding rights ownership:
- (1) PLS states that *“the rights analysis in the current valuation process has proved to be entirely consistent with the evidence that Outsell collected and verified from publishers in 2012”*;<sup>95</sup>
  - (2) ALCS states that the Outsell Report provided evidence in support of its position that *“publishers of magazines and journals need to acquire the rights licensed by CLA and NLA...through agreements with authors”* and that *“it is typical industry practice for freelancers to work without formal contracts”* citing *“One large publisher noted that for journals, the tradition in their sector was to have no formal licenses [sic]/agreements for journal articles and to rely on implied rights”*;<sup>96</sup> and
  - (3) DACS considers the Outsell Report to provide evidence in support of greater rights ownership in visual material by VAs and less ownership by publishers.<sup>97</sup>

**Loughborough Study (commissioned by ALCS)**

- 5.38 Prior to this determination process, ALCS appointed Dr Melanie Ramdarshan Bold of Loughborough University to prepare a report about non-staff authors contributing to magazines and newspapers.
- 5.39 This study considered price pressure experienced by non-staff authors, the level of their income, their need for additional sources of income besides writing, and rights ownership.

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<sup>95</sup> PLS First Submission, paragraph 3.1.1.

<sup>96</sup> ALCS First Submission, page 12.

<sup>97</sup> DACS First Submission, paragraph 8.2.

- 5.40 The research was based on an online survey distributed to 1,250 non-staff authors who contribute to magazines and newspapers in the UK. 268 authors responded (a response rate of 21%),<sup>98</sup> with 46% of respondents writing for magazines only, 2% for newspapers only, and 41% for both magazines and newspapers.<sup>99</sup> 81% of respondents typically published more than 5 articles per year.<sup>100</sup>
- 5.41 In respect of rights ownership of text, the study found that:
- (1) working without a written contract was common for non-staff authors;<sup>101</sup>
  - (2) over the last five years, 61% of non-staff authors writing for magazines and 71% writing for newspapers had worked without a written contract for most or all of their commissions;<sup>102</sup>
  - (3) 37% of non-staff authors writing for magazines and 20% writing for newspapers refused to sign contracts requiring them to assign copyright and/or related rights to the publisher;<sup>103</sup> and
  - (4) there was considerable ambiguity regarding sub-licensing rights, with 59% of non-staff authors writing for magazines and 57% writing for newspapers reporting that their publishers did not inform them of any sub-licensing decisions that had been made.<sup>104</sup>
- 5.42 The study did not involve an independent review of contracts but authors were asked to ensure they had all the relevant information to hand before providing their responses.

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<sup>98</sup> Loughborough Study, page 7.

<sup>99</sup> Loughborough Study, page 14.

<sup>100</sup> Loughborough Study, page 15.

<sup>101</sup> The Loughborough Study does not distinguish between written, verbal or implied contracts but I understand from the context that it refers to written contracts.

<sup>102</sup> Loughborough Study, pages 20.

<sup>103</sup> Loughborough Study, pages 28.

<sup>104</sup> Loughborough Study, pages 34.

### Howe Opinion (commissioned by ALCS)

- 5.43 ALCS instructed Martin Howe QC to provide a legal opinion on “*the rights of ALCS members in relation to articles which they contribute to magazines or other periodical publications on a freelance (i.e. non-employed) basis*”.<sup>105</sup> In particular, the Howe Opinion considers the implications of authors having no express agreement relating to their secondary rights.
- 5.44 ALCS sets out the following quotes from the Howe Opinion:<sup>106</sup>
- (1) “...there is no general presumption or rule under which the copyright of a non-employed author will vest in the publisher of a magazine or other periodical, whether or not a fee is paid. Since such vesting of copyright is not laid down by law, the onus is on the employer to demonstrate the existence of an express or implied agreement under which this will occur.”
  - (2) “...where there is no express agreement, or where for example there is a simple agreement that the author will be paid a fee without any express discussion of copyright terms, the extent of the publisher’s rights will be governed by the implied terms of the agreement.”
  - (3) “Accordingly it does not seem to me that there is sufficient basis, even acknowledging the complication that can arise from having the exploitation of the typographic and literary rights in different hands, to imply a term in normal publishing agreements whereby the rights to secondary exploitation of magazine and other periodical articles should vest in the publisher rather than the author.”

### ALCS survey of non-staff authors

- 5.45 ALCS conducted a survey among its members regarding the typical commissioning arrangements of non-staff authors contributing to magazines and journals. The survey was conducted online and non-staff authors who had previously received payments from the titles included in the FTI Sample were invited to respond.<sup>107</sup> 443 of the 733 ALCS members invited to take part completed the survey, a response rate of 60%. Responses were not subject to review.

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<sup>105</sup> Howe Opinion, paragraph 1.

<sup>106</sup> ALCS First Submission, pages 12 and 13.

<sup>107</sup> In response to my follow-up questions of 10 November, ALCS clarified that the survey encompassed the 97 titles covered in my ‘original’ sample, excluding any later amendments to titles (page 1).



- 5.46 The survey consisted of an introductory letter and four multiple-choice questions. It asked non-staff authors “*how often do you sign a written contract/commissioning form for your contributions?*”<sup>108</sup> Table 5-8 below summarises the results, which ALCS categorised between magazines and journals depending upon the title within the FTI Sample to which the author contributed.

**Table 5-8: Proportion of non-staff authors by contracting practice**

	<b>Magazines</b>	<b>Journals</b>	<b>Total</b>
Authors who never sign a contract	59%	39%	47%
Authors who sign a contract less than 50% of the time	13%	6%	9%
Authors who sign a contract more than 50% of the time	3%	5%	4%
Authors who always sign a contract	25%	50%	40%
<b>Number of respondents</b>	<b>167</b>	<b>258</b>	<b>425</b>
Respondents who did not specify	N/A	N/A	18

Source: ALCS First Submission, pages 16-17.

- 5.47 Table 5-8 above shows that 47% of non-staff authors responding to the ALCS survey state they have never signed an agreement with a publisher: 59% in the case of magazine authors and 39% in the case of journal authors.
- 5.48 ALCS notes that these responses are consistent with the Loughborough Study and the Outsell Report:<sup>109</sup>
- (1) the Loughborough Study found that 61% of non-staff contributors to magazines had worked without a written contract for most or all of their commissions in the past five years;<sup>110</sup> and
  - (2) the Outsell Report found that it was common for non-staff contributors to journals to work without formal contracts, stating “*One large publisher noted that for journals, the tradition in their sector was to have no formal licences/agreements for journal articles and to rely on implied rights*”.

<sup>108</sup> ALCS responses to my follow-up questions of 10 November 2015.

<sup>109</sup> ALCS First Submission, pages 11 and 12.

<sup>110</sup> Loughborough Study, page 20.

- 5.49 In addition to asking non-staff authors about their practices in signing contracts with publishers, ALCS asked those authors surveyed “*what rights do you typically grant to the publisher?*”<sup>111</sup> Of those who “always signed”, 19% stated they granted a “licence to publish” to the publisher but not the rights to reprographic reproduction.<sup>112</sup>
- 5.50 The survey results above apply only to content written by non-staff authors as opposed to employees. The Parties agree that publishers have the relevant rights to text written by employees. ALCS states that:<sup>113</sup>
- (1) “[Journal] *articles are all produced by external contributors, such as academics and professionals*”; and
  - (2) at least 30% of magazine content is written by non-staff authors.
- 5.51 The 30% statistic above is based on data published by the ONS as part of its Labour Force Survey, which records the number of employed and self-employed people by sector. According to the survey, approximately 30% of people employed as journalists and newspaper and periodical editors work on a self-employed basis, while 70% are employed.<sup>114</sup>

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<sup>111</sup> ALCS responses to my follow-up questions of 10 November 2015 (Survey questions).

<sup>112</sup> ALCS First Submission, page 17. I have calculated this statistic based on the total number of authors whose contracts do not grant relevant rights to publishers (32). With the data presented, it is not possible to calculate separate statistics for magazines and journals.

<sup>113</sup> ALCS First Submission, page 14. In response to my follow-up questions of 16 November 2015, ALCS provided the following statement from a representative of the National Union of Journalists (“**NUJ**”) Freelance Office:

*“Whilst there has been a tendency for newspapers to get rid of freelances/casuals and cut their freelance budgets, I don’t think this has happened in the same way with magazines. You’ll know best the huge amounts of magazines there are and quite a lot of them have very few staff – editors and subeditors – but will rely heavily on freelance contributions. Particularly the newer titles from the 90’s onwards will have been set up in this way to keep costs down.”*

<sup>114</sup> ONS Labour Force Survey, Employment status by occupation, April-June 2015. Percentage calculated using total employed and self-employed journalists, newspaper and periodical editors (SOC 2010: 2471), rounded to 30% from 29%. The calculation does not adjust for full time and part time workers.

- 5.52 ALCS states that at least 30% of magazine content is written by non-staff authors because the ONS analysis “also includes newspapers which, the NUJ has confirmed, typically have a far higher proportion of editorial staff than magazines”.<sup>115</sup>
- 5.53 ALCS does not present a calculation of the distribution that it considers the data above supports. I set out one such potential calculation in Table 5-9 below.

**Table 5-9: Proportion of authors having relevant rights in magazines and journals**

	Magazines	Journals
(A) Authors who never sign a contract	59%	39%
(B) Authors who always sign a contract	25%	50%
(C) Authors who always sign a contract but do not grant relevant rights	19%	19%
<b>(D) Authors with relevant rights = A + (B x C)</b>	<b>64%</b>	<b>49%</b>
(E) Proportion of non-staff authors	30%	100%
<b>(F) Rights held by authors = D x E</b>	<b>19%</b>	<b>49%</b>

Source: Table 5-8, ONS data.

- 5.54 To estimate the revenue allocation implied by the ALCS data I assume that the share of authors with relevant rights (D) is represented by those authors who never sign a contract (A) plus those authors who always sign but do not grant relevant rights (B x C). Multiplying this share by the proportion of non-staff authors (E) provides one possible calculation of the proportion of publisher content to which authors retain the relevant rights to text.
- 5.55 For the purposes of this calculation I assume that 30% of magazine articles are written by non-staff authors, in the absence of an alternative statistic. I implicitly assume that employed and non-staff authors produce equal amounts of content. Data published in the ONS Labour Force Survey suggests that 54% of self-employed journalists work part time, compared to 12% of employed journalists. On the basis of hours worked, 30% is therefore likely to overstate the contribution for non-staff authors, even taking account of the remarks of the NUJ.

<sup>115</sup> ALCS First Submission, page 14. In response to my follow-up questions from 10 November 2015, ALCS provided the cover letter to the survey, which defined the rights considered in the survey as “re-use of the work by third parties, such as photocopying in schools and businesses”.

- 5.56 I also assume (as ALCS does) that all journal papers are written by non-staff authors and that these authors retain their relevant rights where no contract is signed. This may overstate the relevant rights held by these authors. PLS refers to the usual licensing practices for academic journals and provides links to a series of standard terms that these publishers provide to authors and which PLS considers show that journal authors do not retain their relevant rights.<sup>116</sup>
- 5.57 My calculation suggests that authors have the relevant rights to up to 19% of magazine text and 48% of journal text, given that a proportion of contributions is provided by non-staff authors.<sup>117</sup>

### **BPC survey**

- 5.58 The BPC – an organisation that promotes the rights and interests of photographers – surveyed its members in July 2015. The survey included questions on royalties received through DACS, as well as practices of granting secondary rights.
- 5.59 The survey was open to responses between 15 June and 15 July 2015 and the 13 organisations represented on the BPC invited their members to respond. There were 901 responses.
- 5.60 The results of the BPC survey have not yet been published, and the board of BPC has not yet reviewed the full report. I have not been provided with the full results of the survey, but have seen an extract from the draft results relating to specific questions.
- 5.61 The survey defined secondary rights and asked respondents whether they would normally sign away their secondary rights willingly.<sup>118</sup> This question was answered by 48% of respondents. Of these, 3.2% confirmed that they would sign away these rights willingly, 72.9% confirmed that they would not and the remaining 23.9% were unsure.<sup>119</sup>

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<sup>116</sup> PLS Second Submission, Section 5.1.

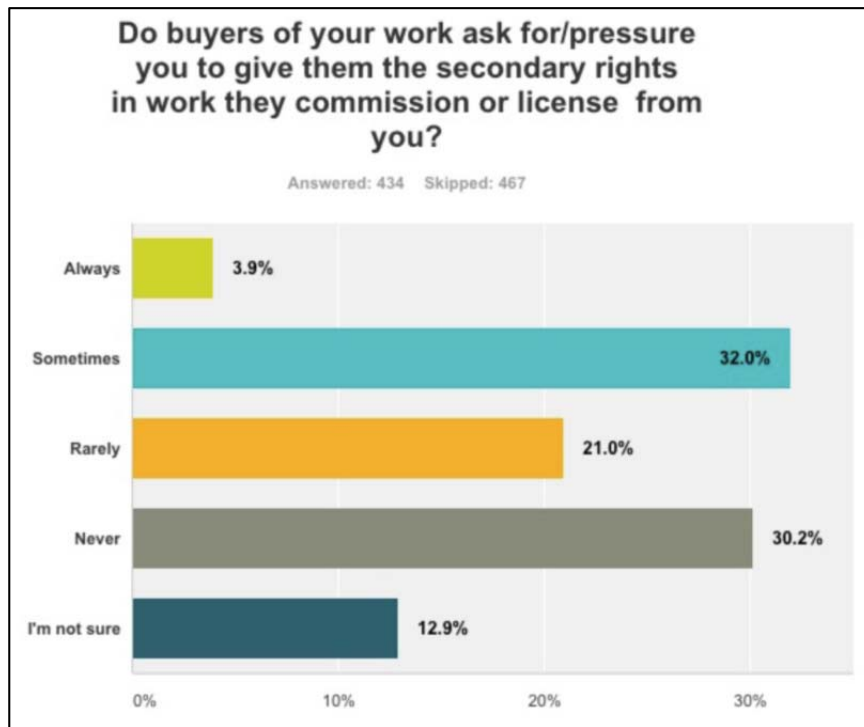
<sup>117</sup> Alternatively, assuming that authors who never sign a contract or sign a contract less than 50% of the time retain their rights, and that authors who always sign a contract or sign a contract more than 50% of the time retain their rights in 19% of cases would imply that authors have the relevant rights to 23% of magazine text and 56% of journal text, being similar percentages to those calculated above.

<sup>118</sup> BPC Survey 2015, Interim Report, question 47.

<sup>119</sup> BPC Survey 2015, Interim Report, page 9.

5.62 Respondents were then asked “Do buyers of your work ask for/pressure you to give them the secondary rights in work they commission or license from you?”<sup>120</sup> The responses to this question are shown in Figure 5-1 below.

**Figure 5-1: BPC Survey 2015, Question 48**

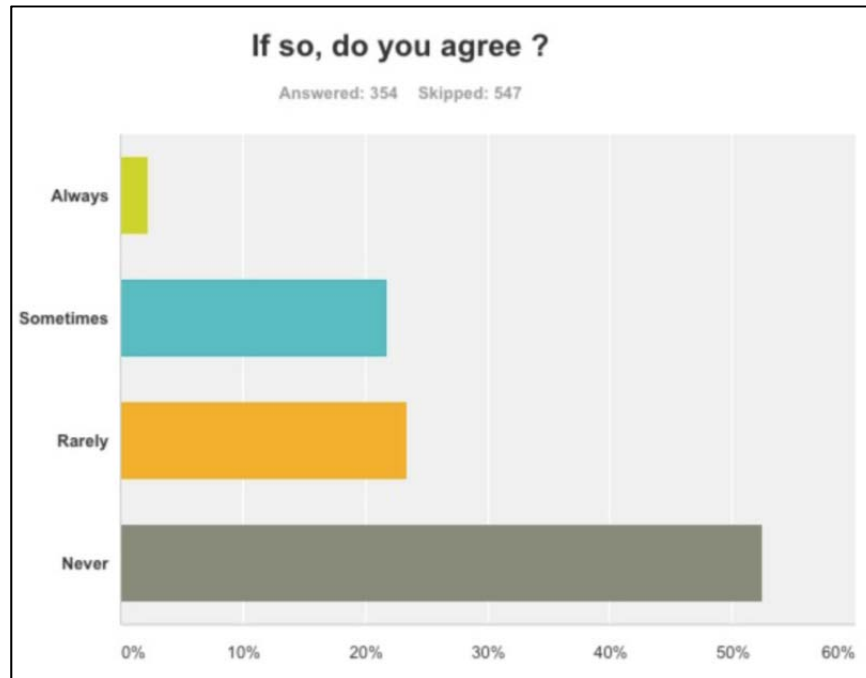


Source: BPC Survey 2015, Interim Report, page 9.

5.63 Respondents were then asked whether they agree to such requests.<sup>121</sup> This question was answered by 39% of respondents. The responses are shown in Figure 5-2 below.

<sup>120</sup> BPC Survey 2015, Interim Report, question 48.

<sup>121</sup> BPC Survey 2015, Interim Report, question 49.

**Figure 5-2: BPC Survey 2015, Question 49**

Source: BPC Survey 2015, Interim Report, page 10.

- 5.64 The report setting out the survey results notes that a misunderstanding of the term 'secondary rights' may reduce the reliability of these statistics:<sup>122</sup>

*"... the misunderstanding of "secondary rights" in [previous questions] may undermine the trust that is placed in these statistics. However, it should be remembered that this question [Q48] was asked when the definition of secondary rights was at the top of the same page."*

- 5.65 The wording of question 48, "Do buyers of your work ask for/pressure you to give them the secondary rights in work they commission or license from you?" and question 49, "If so, do you agree?" is unclear. When answering question 49, respondents may have only considered times when they have been pressured to give away secondary rights, as opposed to willingly surrendering these rights.

<sup>122</sup> BPC Survey 2015, Interim Report, page 9.

### Evidence relating to images provided by picture libraries

- 5.66 The Parties disagree whether the relevant rights to images sourced from picture libraries were acquired by publishers or remained with VAs. The VAs state that:<sup>123</sup>
- “...almost without exception, where images are licensed to publishers by picture agencies (the term picture agency is here synonymous with photo library), secondary licensing rights are not granted to the publisher. Industry practice is to grant a non-transferable, non-exclusive licence for a specific use, reserving all other rights.”*
- 5.67 This is confirmed by: (1) the Harbottle Review; and (2) a survey of contracting practices conducted by BAPLA.<sup>124</sup>
- 5.68 BAPLA surveyed 170 of its members regarding their contracting practices, including “whether BAPLA members routinely contracted to grant collective licensing remuneration to publishers”.<sup>125</sup> BAPLA received 23 responses from agencies that together comprise over 50% of the picture agency market. All but one of these stated that they never grant reprographic rights. The remaining respondents stated that they grant these rights in less than 1% of contracts.

### NLA Special Contributors Scheme

- 5.69 The NLA Special Contributors Scheme (“**SCS**”) was discussed in my meetings with the Steering Group. I describe it here for completeness but observe that none of the Parties referred to it in their submissions.
- 5.70 The SCS is designed to help identify the ownership of newspaper material that is copied under NLA licences. The SCS identifies the proportion of such content where the rights to secondary copying are held by publishers or other rightsholders. The survey relates to newspaper content only and no equivalent survey is performed for magazines.
- 5.71 The SCS survey is performed approximately every two years. The last survey was carried out in 2014 and the results published in early 2015. The survey was performed using data on actual copying provided by MMOs, which was then analysed to determine the ownership of the relevant rights.

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<sup>123</sup> BAPLA and ACS First Submission, page 12.

<sup>124</sup> BAPLA and ACS First Submission, page 13.

<sup>125</sup> BAPLA and ACS First Submission, page 13.

- 5.72 The most recent SCS survey found that approximately 2% of revenues paid by publishers were attributable to non-staff contributors and agencies.<sup>126</sup>

### **Conclusions on rights ownership**

- 5.73 I set out the views of the Parties and my own decision in respect of rights ownership in Section 6.

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<sup>126</sup> NLA website, Freelance and Agency Contributors page.



## 6. My decision in respect of rights ownership

### Introduction

6.1 The Parties interpret differently the information available in respect of the ownership of relevant rights. I summarise their views in this section then set out my decision on rights ownership.

### PLS view

6.2 PLS proposes that VAs should receive a smaller distribution than the 8% they currently receive. It proposes that ALCS and PLS share evenly the majority of licence fees in respect of books and in the case of magazines and journals, that PLS receives the vast majority of fees distributed.

6.3 PLS supports its proposal by reference to rights ownership. In particular:

- (1) **Text in magazines:**<sup>127</sup> PLS states that most magazine content is written by employees (70%) and explains that, where non-staff authors are involved, in spite of the absence in some cases of a formal contract, publishers generally have the relevant rights;
- (2) **Text in journals:**<sup>128</sup> PLS refers to the usual licensing practices for academic journals and provides links to a series of standard terms to support its position;
- (3) **Images in books:**<sup>129</sup> PLS does not offer additional analysis beyond my sampling results;
- (4) **Images in magazines:**<sup>130</sup> PLS states that the overwhelming proportion of photographs published in magazines are provided by PR firms or press offices, and so do not have third party rightsholders. It supports this view based on the magazine content that forms part of the FTI Sample; and

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<sup>127</sup> PLS Second Submission, Section 5.2.

<sup>128</sup> PLS Second Submission, Section 5.1.

<sup>129</sup> PLS Second Submission, Section 6.1.

<sup>130</sup> PLS Second Submission, Section 6.3.

- (5) **Images in journals:**<sup>131</sup> PLS states that there are no images in academic journals that are sourced from parties other than authors and other publishers. It noted that “DACs, under their current distribution arrangement, do not provide any facility for photographers to make “claims” with respect to journals”.<sup>132</sup>

**FTI Sample**

- 6.4 PLS considers the results of the FTI Sample to be robust, and largely bases its submission on these results.<sup>133</sup> It notes that the response rate from publishers was high considering the timescales available for responses, and considers that there was no correlation between the time taken to respond and the rights owned by the publisher.<sup>134</sup>
- 6.5 PLS states that it has no reason to challenge the Harbottle Review but reiterates that:<sup>135</sup>
- (1) there was no opportunity to hear submissions from the publishers on points of fact or law;
  - (2) there was no communication with creators who might have held relevant rights; and
  - (3) in some cases publishers were not able to supply the relevant documents within the required timeframe for what PLS considers to be good reasons.
- 6.6 PLS therefore advocates caution in presuming against a publisher’s claim where the claim is said not to have been established, other than in the case of those where there was actual evidence that showed that the publisher had made an inaccurate claim.<sup>136</sup>
- 6.7 Further, PLS noted that in some cases the sample size of a particular type of work in the original sample<sup>137</sup> or the subsample subject to legal review was small.<sup>138</sup>

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<sup>131</sup> PLS Second Submission, Section 6.2.

<sup>132</sup> PLS First Submission, footnote 26.

<sup>133</sup> PLS First Submission, Section 3.6.

<sup>134</sup> PLS First Submission, Section 3.3; PLS Second Submission, Section 3.4.

<sup>135</sup> PLS comments on the Harbottle Review, paragraph 2.

<sup>136</sup> PLS comments on the Harbottle Review, paragraph 3.

<sup>137</sup> PLS First Submission, paragraph 6.2.5.

<sup>138</sup> PLS comments on the Harbottle Review, paragraph 4.3.

**Howe Opinion**

- 6.8 PLS does not challenge the Howe Opinion but does not consider that this opinion has a direct bearing on the issue at hand. In particular, PLS does not consider that it is common practice for there to be no contract in place between a non-staff author and a publisher of a magazine or journal or for the author to retain relevant rights.<sup>139</sup>

**ALCS survey**

- 6.9 PLS disputes the results of the ALCS survey and its implication for rights ownership.
- 6.10 The ALCS survey asks authors specifically about written contracts. PLS refers to the Howe Opinion which confirms that an informal contract granting a publisher a licence to publish can arise between an author and a publisher through the course of dealing and need not be in writing to be binding, *“albeit the first article provided by the author will not be covered by such a contract”*.<sup>140</sup>
- 6.11 PLS also questions the accuracy of responses to the ALCS survey, noting that *“the fact that an author believes that they have never signed a contract does not of itself constitute evidence of the absence of an appropriate agreement”*. PLS notes that the results of the survey have not been independently verified.<sup>141</sup>
- 6.12 In the case of magazines:<sup>142</sup>
- (1) PLS considers that the best guide to the proportion of magazine content written by employees is the ONS data. Rather than considering, as ALCS does, that this provides a lower bound of 30% of magazine content written by non-staff authors, it considers that this indicates that *at most* 30% of text is written by non-staff authors;
  - (2) where content is written by a non-staff author, PLS states that publishers generally draw on a pool of regular contributors so that the proportion of content written by first-time authors or authors who do not know or understand the terms on which they are submitting their work is *“extremely small”*. PLS considers that authors providing content to a magazine will be aware of the activities of MMOs and therefore considers it reasonable that secondary usage is within the contemplation of the parties and so within the scope of any implied licence; and

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<sup>139</sup> PLS Second Submission, paragraphs 5.2 and 5.3.

<sup>140</sup> PLS Second Submission, paragraphs 5.6 and 5.12.

<sup>141</sup> PLS Second Submission, paragraph 3.2.

<sup>142</sup> PLS Second Submission, Section 5.2.

- (3) PLS refers to the Loughborough Study in support of the view that *“in reality most journalists will work under some sort of agreement, be it verbal, implied or in writing”*.<sup>143</sup>

6.13 In the case of journals, PLS states that:<sup>144</sup>

- (1) all journals currently require an assignment of copyright or an exclusive licence to publish content from authors and in both cases the relevant rights pass to the publisher. PLS provides a series of links to journal publisher licences and policies to support its view; and
- (2) the main reasons why the relevant rights do not pass to the publisher are administrative oversight or because the copied article is old and as such is published under different copyright policies.

### **ALCS view**

6.14 ALCS states that, in contrast to employees, non-staff authors writing for magazines and journals tend to retain the relevant rights in text because they rarely have a contract in place with publishers, or do not pass the relevant rights to publishers where such a contract exists. ALCS considers that this position is supported by its survey of its members as well as the Loughborough Study and the Outsell Report.<sup>145</sup>

6.15 The fact that authors hold a *“significant proportion of relevant rights in serials”* is one of three pieces of evidence ALCS refers to in support of an even split of licence fees between publishers and authors in respect of text.<sup>146</sup>

6.16 ALCS considers that its survey provides a *“broader perspective”* than the FTI Sample and states that:<sup>147</sup>

*“Our chief concern is that the data available to FTI from the survey of publishers provides a view of the rights acquisition policy that publishers have put in place but not the reality of how rights are dealt with in practice within the commissioning process.”*

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<sup>143</sup> PLS Second Submission, paragraph 5.12 and footnote 16. See also Loughborough Study, page 37.

<sup>144</sup> PLS Second Submission, Section 5.1.

<sup>145</sup> ALCS First Submission, pages 11 and 12; Loughborough Study, page 20.

<sup>146</sup> ALCS First Submission, page 11.

<sup>147</sup> ALCS First Submission, page 16. (Emphasis in original.)

- 6.17 ALCS expresses concern over the response rate of publishers to the FTI Sample, particularly with regards to frequently copied works. Given that publishers had three months to respond to the survey, ALCS infers that where publishers have not replied it should be assumed that they do not have the relevant rights:<sup>148</sup>

*“More importantly, the majority of FCW items surveyed received no response from publishers. Given that the survey ran for three months, providing ample time to respond, the only assumption that can be drawn is that non-responses indicate titles for which publishers do not hold the relevant rights.”*

- 6.18 ALCS considers that the number of items included in the Harbottle Review was small relative to the number of items available for copying, and suggests that *“this evidence be given appropriate weighting in the context of the overall determination”*.<sup>149</sup> It provides the following two comments:

- (1) **Oral agreements:** ALCS suggests that the evidence provided to Mr Harbottle in respect of magazines was *“speculative”*, highlighting in particular Mr Harbottle’s acceptance of representations in respect of oral agreements; and
- (2) **Promotional content:** Mr Harbottle assumed that *“Where material has been supplied to the publisher by an advertiser for publicity/advertorial purposes without a formal agreement I have assumed that the parties would have contemplated that the supplier would have wished for the widest possible dissemination of the material supplied and that this is likely to have included use within the scope of the relevant rights”*.

ALCS comments:

*“In terms of the legal analysis this seems to be a reasonable approach. Within the wider context of FTI’s brief – determining models for distribution allocations between authors, publishers and visual artists – imputing rights to the publisher based on the assumed intentions of ‘the supplier’ of content is problematic and could skew such a small sample. As neither ALCS nor PLS distributes [sic] CLA/NLA fees to the suppliers of advertising content, the significance of the rights position in these items needs to be weighted accordingly.”*

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<sup>148</sup> ALCS First Submission, page 15.

<sup>149</sup> ALCS comments on the Harbottle Review, page 1.

## VAs view

### **BAPLA and ACS view**

- 6.19 BAPLA and ACS express concern over the FTI Sample. They state:<sup>150</sup>
- “More generally, the issues around the data gathered by FTI in this exercise reflect the concerns we have expressed elsewhere in this submission about such exercises, i.e. that for all the cost, time and complexity of effort involved in securing and analysing data, we are talking about a very small sample from a limited selection of CLA licensees.”*
- 6.20 BAPLA and ACS also describe the response rate from publishers to the FTI Sample as not having been “overwhelming” but do not draw any inference from this beyond acknowledging that this places limitations on the reliability of the data.<sup>151</sup>
- 6.21 BAPLA and ACS consider that no weight should be placed on responses relating to the frequently copied works:<sup>152</sup>
- “We would argue that the results from the frequently copied works should be set aside as these comprise a large number of pages, which may skew the results, when we are not aware which pages within these works have been copied.”*
- 6.22 BAPLA and ACS agree with PLS that a significant proportion of photographs published in magazines are provided by PR firms and press offices, but do not agree that this proportion can be described as “overwhelming”. They refer to the large volume of content licensed by picture libraries to magazine publishers. BAPLA and ACS consider that the volume of PR and press release content in the sample reviewed was “unexpectedly high” and not reflective of non-MMO copying of magazines.<sup>153</sup>
- 6.23 BAPLA and ACS consider that creators of promotional pictures should be entitled to a share of licensing income. This is because, even though such pictures are provided free of charge for publication, there is no reason to assume that the relevant rights rest with the publisher. BAPLA and ACS provide two examples of standard PR terms that do not transfer the relevant rights to promotional content to publishers.<sup>154</sup>

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<sup>150</sup> BAPLA and ACS First Submission, page 4.

<sup>151</sup> BAPLA and ACS First Submission, page 4.

<sup>152</sup> BAPLA and ACS First Submission, page 5.

<sup>153</sup> BAPLA and ACS comments on the Harbottle Review, page 5.

<sup>154</sup> BAPLA and ACS comments on the Harbottle Review, page 5.

6.24 BAPLA and ACS disagree with aspects of the Harbottle Review. In particular, BAPLA and ACS consider that several of the assumptions made by Mr Harbottle were untested and were “*individually and collectively*” in favour of publishers:

- (1) **Promotional content:** BAPLA and ACS consider that assuming the supplier of promotional material would have wished for the widest possible dissemination of the material was “*untested*” and implies a second assumption “*that the supplier was entitled to grant the relevant rights to the publisher*”.<sup>155</sup>
- (2) **Employment and oral agreements:** BAPLA and ACS consider that assuming the publisher had given correct details regarding employment, lost documents, or oral agreements is inappropriate because:<sup>156</sup>

*“The [Harbottle Review] has shown that publishers’ understanding of ownership was incorrect in a significant proportion of cases that were investigated and we believe a similar pattern may have been found if it had been possible to investigate rights which are believed to have derived from employment contracts... lost documents, or if we had sought evidence from the other parties to oral agreements.”*

- (3) **Fair dealing:** BAPLA and ACS consider that the assumption regarding fair dealing “*may not be the only inference to draw with regard to fair dealing*”.<sup>157</sup>

6.25 However, BAPLA and ACS do not consider that “*publishers have attempted to withhold or misrepresent information*” but that “*the nature of the difficulties encountered by publishers in providing evidence relate to typical difficulties in establishing the rights in content within specific media*”.<sup>158</sup>

6.26 BAPLA and ACS conclude that:<sup>159</sup>

*“Obtaining useful information has been a costly, time-consuming and complex process that has produced evidence of varying quality which must be viewed pragmatically in order to draw conclusions. Accordingly there are limits to the strength of conclusions that can be drawn from any one stream of evidence. The arbiter should weigh up multiple different factors and not be too reliant on any one source of evidence.”*

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<sup>155</sup> BAPLA and ACS comments on the Harbottle Review, pages 1-2.

<sup>156</sup> BAPLA and ACS comments on the Harbottle Review, pages 3-4.

<sup>157</sup> BAPLA and ACS comments on the Harbottle Review, page 4.

<sup>158</sup> BAPLA and ACS comments on the Harbottle Review, page 3.

<sup>159</sup> BAPLA and ACS comments on the Harbottle Review, page 1.

**DACS view**

- 6.27 DACS arrives at its primary conclusion as to an appropriate distribution based upon the FTI Sample and its proposed allocation is endorsed by BAPLA and ACS.<sup>160</sup> DACS proposes that the proportion of the licence fee in each sector distributed to VAs should reflect the proportion of items in the FTI Sample containing an image to which the publisher does not have the relevant rights. The simple average of this statistic across sectors and publication types is 23%.<sup>161</sup>
- 6.28 DACS does not explain why VAs should receive the entire distribution in respect of an item where the publisher does not have the relevant rights to all images (rather than authors and/or publishers retaining a portion of the income as compensation for the copying of accompanying text).
- 6.29 DACS describes the implications of non-responses to the FTI Sample as follows:<sup>162</sup>
- “Only 52% of the responses were complete and the resulting sample size is statistically poor. Non-responses suggest that the publishers do not have very accurate records, and/or they are covering up the fact that they own fewer rights in visual works than they were originally claiming.*
- Either way, the poor response suggests a statistical bias to overstating publisher-owned rights in visual works.”*
- 6.30 DACS contrasts: (1) the publisher claims that they have the relevant image rights in all but 23% of items sampled; to (2) responses to a survey by the BPC in 2015, in which 76% of respondents reported that they rarely or never grant secondary rights to images that are commissioned or licensed.<sup>163</sup>
- 6.31 DACS proposes that the proportion of sample items containing images to which publishers do not have the relevant rights should be assessed as a multiple of 2.2 times that implied by the responses to the FTI Sample. Applying this factor, DACS estimates that VAs retain relevant rights in respect of 50% of sampled items, being the mid-point of:
- (1) the proportions reported by publishers in responding to the FTI Sample (23%);  
and

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<sup>160</sup> BAPLA and ACS First Submission, page 16.

<sup>161</sup> DACS First Submission, page 3.

<sup>162</sup> DACS First Submission, paragraph 4.1.

<sup>163</sup> DACS First Submission, paragraph 10.7.



- (2) the proportion of VAs responding to the BPC Survey who report that they rarely or never relinquish these rights (76%).
- 6.32 DACS considers that applying this multiple to the results of the FTI Sample will correct for any understatement of rights owned by VAs in the publisher responses:<sup>164</sup>
- “The 52% response rate to the FTI Consulting Inc. (FTI) survey suggests that there might be a statistical bias to overstating publisher-owned rights in visual works, and there is a case for a factoral uplift of 2.2 in the FTI’s [sic] underlying figures when assessing the true value to visual creators.”*
- 6.33 While DACS does not apply this multiple in arriving at its overall conclusion that a 23% distribution to VAs would be appropriate, it applies this factor in some of its alternative valuation approaches, including its assessment of “perceived value”, “availability value” and “rights ownership value”.<sup>165</sup>
- 6.34 DACS disagrees with aspects of the Harbottle Review. In particular, DACS:
- (1) suggests that the assumptions that Mr Harbottle made in respect of promotional content, oral agreements, earlier editions of works and fair dealing favour publishers:<sup>166</sup>
- (a) **Promotional content:** DACS considers Mr Harbottle’s assumption that relevant rights in respect of promotional content rest with the publisher is “misplaced as advertising and promotion is usually more targeted and it does not necessarily follow that the widest possible dissemination is in the interest of the advertiser/promoter and that the necessary rights have been cleared”;
- (b) **Oral agreements:** DACS considers Mr Harbottle’s reliance on representations in respect of oral agreements erroneous because “the evidence from this whole rights valuation exercise has clearly demonstrated that the reality of publishers owning rights in visual works is considerably less than they and PLS had originally claimed. It seems likely that the oral assertions will be similarly lower in reality”;
- (c) **Previous editions:** DACS considers that “to assume that earlier editions of works have the same terms and conditions is likely to be incorrect as publishers have only recently begun their attempts to acquire all rights”; and

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<sup>164</sup> DACS First Submission, page 2.

<sup>165</sup> DACS First Submission, Annex 2.

<sup>166</sup> DACS comments on the Harbottle Review, paragraph 3.1.

(d) **Fair dealing:** DACS considers that *“It is well established case law that the application of exceptions has to be assessed on a case by case basis. We do therefore not agree with the GH [Mr Harbottle] assessment that subsequent copying of a work is automatically covered by the same exception as the original reproduction”*.

(2) states that Mr Harbottle’s review does not take account of rights in **underlying artworks** depicted in photographs.<sup>167</sup>

6.35 DACS concludes that:<sup>168</sup>

*“There is no substance to the argument that primary licensing of promotional images automatically or impliedly grants secondary rights uses. PLS offers no evidence to support their position and it is contrary to established case law and legal presumptions.”*

## **My decision**

### ***FTI Sample***

6.36 The size of the FTI Sample (and the components of it subject to independent verification) was arrived at following extensive discussion within the Steering Group of logistics, cost implications and statistical considerations. The Steering Group agreed that it would be beneficial to include within the sample extracts from a range of sectors. In order to derive statistically significant conclusions for individual sectors would require a sample larger than was feasible or economical in the circumstances.

6.37 The evidence of rights ownership on which I place most weight is the FTI Sample. This is because the responses have been subject to a verification process as described in the Harbottle Review which provides a basis to adjust the publishers’ responses as I deem appropriate or necessary.

### ***Implications of limited responses to the FTI Sample***

6.38 Based upon the analysis in Table 5-4 and Table 5-5, I find no evidence to suggest that publishers who took longer to respond to the FTI Sample hold fewer rights in copied works than those who replied quickly. Further I have no reason to assume that publishers who did not respond at all did so because they do not hold the rights concerned. Some publishers explained why they could not respond.

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<sup>167</sup> DACS comments on the Harbottle Review, paragraph 3.2.

<sup>168</sup> DACS responses to my follow-up questions of 10 November 2015, paragraph 4.11.

6.39 For the purposes of this determination I assume that a non-response to the initial publisher questionnaire does not provide information one way or the other as to the relevant rights held by the publisher.

***Harbottle Review***

6.40 I invited the Parties to provide documentation to be considered by Mr Harbottle. The only information provided was by publishers.

6.41 ALCS, DACS, BAPLA and ACS state that assumptions made by Mr Harbottle were sometimes inappropriate. They note that some claims by publishers were established as a result of certain assumptions and in the absence of signed documentation, for example where the publisher made a representation regarding an oral agreement.

6.42 I invited Mr Harbottle to comment on some of the concerns raised by ALCS, DACS, BAPLA and ACS.<sup>169</sup> I comment as follows:

- (1) **Oral agreements:** Mr Harbottle confirmed that the terms of an oral agreement were fundamental in establishing the claims to the rights in the case of six extracts (with the agreement being confirmed in writing in two cases after the use in question). In the absence of written agreements, it is difficult to identify what documents a publisher should be expected to produce to support its rights ownership position. Mr Harbottle comments as follows:

*“Relevance of typical written terms to the construction of oral agreements. I doubt a court would take these into account because on what I have seen they would not satisfy the usual requirements for implication of contractual terms as a result of trade usage or customer, i.e. that they were invariable, certain and general.”*

Mr Harbottle had no reason to doubt the representations of the publishers in any of these cases;

- (2) **Promotional material:** Mr Harbottle identified one written agreement and three oral agreements in relation to promotional images and concluded in all three cases that the publisher’s claim had been established on the basis of his assumptions. Mr Harbottle confirmed that he had assumed that suppliers of promotional material were entitled to grant the relevant rights. It remained his view that, within the constraints of this exercise, this was a reasonable assumption.

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<sup>169</sup> Follow-up provided by Mr Harbottle, pages 2 to 4.

I proceed on the assumption that most non-incident promotional material is copied by businesses through MMOs rather than other means of magazine copying. In these cases, low click-through rates mean that such content is rarely accessed;

- (3) **Previous editions:** Mr Harbottle explained that his assumption that the terms of contracts relating to previous editions of works mirror those of later editions was critical to his conclusions in respect of only one publication. Given the sector in which the relevant work was published (which was not identified to the Steering Group because this would identify the work in question and so contravene the confidentiality arrangements in place), Mr Harbottle considered that DACS' concern that "*publishers have only recently begun their attempts to acquire all rights*" was not relevant;
- (4) **Fair dealing:** Mr Harbottle confirmed that, for various reasons, fair dealing was not an issue in relation to any images and that he considered his assumption in respect of fair dealing to be a reasonable one in respect of the text extracts examined; and
- (5) **Photographs of other works:** Mr Harbottle confirmed that he was aware of the issue referred to by DACS and has considered the copyright vesting in underlying works when arriving at his conclusions.

6.43 On balance, I consider that it is reasonable to proceed in reliance on the Harbottle Review, which I stress was performed by an impartial legal professional selected through a process involving the Steering Group. However, I consider the effect on my conclusions of relaxing the first three of the assumptions listed above (the "**Disputed Assumptions**").

***Adjustments to publisher responses to the FTI Sample***

6.44 There will be imprecision in adjusting the responses from publishers for the results of the Harbottle Review or in making an adjustment based on other information. Notwithstanding this, I set out my views on the most appropriate adjustment given the information available to me.

- 6.45 Mr Harbottle divided the works that he reviewed between those where the publisher's claim to the relevant rights had been established, partially established or not established. I assess a range for the proportion of instances where a claim was asserted but was inaccurate because:
- (1) in the case of image rights in books, there are items where insufficient information was provided by a publisher to establish the party having the relevant rights (for example, one publisher stated that it could not respond in the time available due to other commitments). I calculate one end of my range assuming that the publisher does not have these rights and the other assuming that these items should be excluded from the calculation; and
  - (2) where a claim is partially established, I calculate one end of my range assuming that the publisher does not have the relevant rights and the other assuming that the publisher does have the relevant rights.
- 6.46 I set out my calculations in respect of text and images in Table 6-1 and Table 6-2 respectively. These show that the Harbottle Review identifies the need for adjustments to the original publisher responses. The greatest proportion of unsupported responses was for images in books, where Mr Harbottle found that around 32% to 48% of claims to the relevant image rights may be inaccurate.

**Table 6-1: Range of publisher claims not established in respect of text**

<b>Outcome of publisher claim</b>		<b>Magazines</b>	<b>Journals</b>	<b>All serials</b>
Established	A	14	8	22
Partially established	B	1	0	1
Not established	C	1	2	3
<b>Subtotal</b>	<b>D</b>	<b>16</b>	<b>10</b>	<b>26</b>
Insufficient time to respond	E	0	0	0
<b>Total</b>	<b>F</b>	<b>16</b>	<b>10</b>	<b>26</b>
<b>Inaccurate claims (accepting Disputed Assumptions):</b>				
<b>Low</b>	<b>C / D</b>	<b>6.3%</b>	<b>20.0%</b>	<b>11.5%</b>
<b>Mid</b>		<b>9.4%</b>	<b>20.0%</b>	<b>13.5%</b>
<b>High</b>	<b>(B + C + E) / F</b>	<b>12.5%</b>	<b>20.0%</b>	<b>15.4%</b>

Source: Table 5-6.

**Table 6-2: Range of publisher claims not established in respect of images**

<b>Outcome of publisher claim</b>		<b>Books</b>	<b>Magazines</b>	<b>Journals</b>	<b>All serials</b>
Established	A	12	13	3	16
Partially established	B	1	1	0	1
Not established	C	6	2	0	2
<b>Subtotal</b>	<b>D</b>	<b>19</b>	<b>16</b>	<b>3</b>	<b>19</b>
Insufficient time to respond	E	4	0	0	0
<b>Total</b>	<b>F</b>	<b>23</b>	<b>16</b>	<b>3</b>	<b>19</b>

<b>Inaccurate claims (accepting Disputed Assumptions):</b>					
<b>Low</b>	<b>C / D</b>	<b>31.6%</b>	<b>12.5%</b>	<b>0.0%</b>	<b>10.5%</b>
<b>Mid</b>		<b>39.7%</b>	<b>15.6%</b>	<b>0.0%</b>	<b>13.2%</b>
<b>High</b>	<b>(B + C + E) / F</b>	<b>47.8%</b>	<b>18.8%</b>	<b>0.0%</b>	<b>15.8%</b>

Source: Table 5-7.

- 6.47 The final two rows of Table 6-1 and Table 6-2 should not be interpreted as ‘uplift factors’; they are the proportion of claims that are not established. Where a publisher claims to have all relevant rights in the majority of cases, even a small number of cases where the publishers’ claims are incorrect can have a material effect on the analysis.
- 6.48 The sample sizes on which the calculations above are based are relatively small. It would be possible to improve the accuracy of any proposed adjustment by performing a more extensive review. The sample size was identified taking into account the budget and timeframe available. These statistics represent the best available information as to the size of any adjustments that should be made when interpreting the results. Therefore, in relying upon the sampling results, I use the statistics above.
- 6.49 I asked Mr Harbottle to confirm the number of claims he established on the basis of one or more of the Disputed Assumptions. He confirmed that the number of such claims was three in the case of text in magazines, three in the case of images in books and six in the case of images in magazines. I then recalculated the statistics in Table 6-1 and Table 6-2 above assuming that publishers did not establish that they have the relevant rights where it was necessary to rely upon one of the Disputed Assumptions. I set out my calculations on this alternative basis in Appendix 8.
- 6.50 In Table 6-3 and Table 6-4 below I adjust the publisher responses using Mr Harbottle’s conclusions. I make separate adjustments in the cases of text and images in respect of each of books, magazines and journals.

- 6.51 The adjustments I make are based on the centre of the ranges in Table 6-1 and Table 6-2 above. In making this adjustment I therefore implicitly assume that where a publisher did not provide Mr Harbottle with sufficient information to reach an opinion, in half of the cases the publisher did not have the relevant rights.
- 6.52 In the case of Table 6-3 relating to text, in performing my calculations I also implicitly assume that all pages within magazines and journals contain text. This is consistent with the vast majority of extracts I have seen as part of this process.

**Table 6-3: Adjustment to publisher responses in respect of text**

	<b>Proportion of pages where publisher states it does not have all relevant rights</b>	<b>Proportion of pages where claim assumed incorrect</b>	<b>Adjusted proportion of pages including text where publisher does not have all relevant rights</b>
	<b>A</b>	<b>B</b>	<b>C = A + (1-A) x B</b>
Magazines	3.8%	9.4%	12.8%
Journals	5.1%	20.0%	24.1%

Source: Table 5-3; Table 6-1.

**Table 6-4: Adjustment to publisher responses in respect of images**

	<b>Proportion of pages including images where publisher states it does not have all relevant rights</b>	<b>Proportion of pages where claim assumed incorrect</b>	<b>Adjusted proportion of pages including images where publisher does not have all relevant rights</b>
	<b>A</b>	<b>B</b>	<b>C = A + (1-A) x B</b>
Books: Schools	29.4%	39.7%	57.4%
Books: FE	51.6%	39.7%	70.8%
Books: HE	49.0%	39.7%	69.2%
Books: Business and public sector	3.6%	39.7%	41.9%
Magazines	25.1%	15.6%	36.8%
Journals	15.4%	0.0%	15.4%

Source: Table 5-2; Table 6-2.

#### **ALCS survey**

- 6.53 The results of the ALCS survey imply that more authors have relevant rights than indicated by the FTI Sample, even after adjustments to reflect the outcome of the legal review. I compare the implications of the alternative calculations in Table 6-5 below.

**Table 6-5: Proportion of text to which the publisher does not have the relevant rights**

	<b>FTI Sample (adjusted)</b>	<b>ALCS survey</b>
Magazines	13%	19%
Journals	24%	48%

Source: Table 5-9; Table 6-3.

- 6.54 The ALCS survey estimates how many authors opt out of publishers' standard policies and so retain their relevant rights. At my request, ALCS provided further information on its surveying process:
- (1) authors who had previously received payments from the magazines and journals included in the FTI Sample were invited to participate in the survey;



- (2) the survey was preceded by a cover letter (which I have seen) advising of the purpose of the survey, defining the relevant rights as “*covering the re-use of the work by third parties, such as photocopying in schools and businesses*”;<sup>170</sup>
- (3) the survey consisted of four questions asking about the number of years the author had contributed to the specific title, contributions per year, and contracting arrangements; and
- (4) responses were provided on an anonymous basis, restricting the ability to verify responses.

6.55 As with publishers’ beliefs, I recognise that authors’ beliefs may not fully reflect the actual rights position. For example, individuals may have failed to review fully all policies and terms that submission and publication may entail. This may skew the results of the survey in favour of authors.

6.56 I expect that non-staff authors who contribute regularly to magazines are more likely to have a contract with their publisher (potentially an informal one) and to transfer the relevant rights to the publisher. I also expect that regular contributors are likely to create a greater share of content than irregular or one-off contributors. As such, the proportion of authors who retain relevant rights may exceed the proportion of content covered by those rights, skewing the results of the survey in favour of authors. The Howe Opinion discusses retrospective terms at paragraphs 19 to 22.

6.57 I perform my calculations relying on the results of the FTI Sample on rights ownership but also show the effect of adopting the results of the ALCS survey.

**BPC survey**

6.58 The results of the BPC survey suggest that non-staff photographers rarely grant secondary rights.<sup>171</sup> Licensing practices for other VAs may differ, although a large proportion of image content in magazines consists of photographs.

6.59 The calculation in Table 6-4 above using data from the FTI Sample indicates that publishers do not have the relevant rights to magazine images in 37% of cases. This compares to a 76% statistic that DACS calculates based on the BPC survey.

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<sup>170</sup> ALCS response to my follow-up questions from 10 November 2015.

<sup>171</sup> BPC Survey 2015, Interim Report, question 49.

- 6.60 However, I reduce the weight I place on the BPC survey because of the way in which the questions are worded. Some of the questions appear to be emotively and ambiguously phrased. BPC notes that respondents may have misunderstood the concept of secondary rights when responding to these questions. This misunderstanding may explain why a significant proportion of respondents (61%) did not state whether they grant secondary rights to their customers when responding to question 49.

***Summary***

- 6.61 The FTI Sample is the source of rights ownership information on which I place most weight. It is the only quantitative source of such information where information provided has been subject to independent review, via the Harbottle Review.

## **7. Analysis relating to the relative value of text and images**

### **Introduction**

- 7.1 In reaching my determination it is necessary to consider the relative value of text and images to those copying licensed works. This affects the allocation of licence fees between authors and VAs (or publishers if one of these two groups is more likely to transfer the relevant rights to publishers than the other).
- 7.2 In this section I summarise the information available to me regarding the relative value of text and images.

### **FTI Sample**

- 7.3 As part of the FTI Sample, I measured the frequency with which images feature in copied works. This is one potential factor in assessing the relative value of text and images.
- 7.4 I obtained copies of the extracts included in the FTI Sample:
- (1) from Precise, a leading MMO, in the case of the MMO sample;
  - (2) from publishers in most other cases; and
  - (3) if the publisher did not have a copy, from the British Library where possible.
- 7.5 I did not review the content of entire frequently copied works. Instead, publishers were asked to state the total number of pages in the work and the number of pages containing images.
- 7.6 Table 7-1 below shows the results of my review of the image content of sampled items. This shows the proportion of pages copied that contain an image (column D), as well as the average proportion of copied works, measured in terms of page coverage, consisting of images in the case of extracts (column E).

**Table 7-1: Proportion of copied works containing images**

	No. of items analysed <b>A</b>	No. of pages analysed <b>B</b>	No. of pages with images <b>C</b>	% pages with images <b>D = C/B</b>	% image page coverage <b>E</b>
Books: Schools	70	592	204	34%	9%
Books: FE	47	325	91	28%	6%
Books: HE	88	1,705	145	9%	3%
Books: FCW (Business and public sector only)	20	27,531	1,051	4%	N/A
Magazines: FE	14	60	36	60%	22%
Journals: HE	13	155	13	8%	2%
Magazines: MMO	125	388	255	66%	33%
Magazines and Journals: FCW (Business and public sector only)	22	4,415	775	18%	N/A

Source: FTI Sample.

- 7.7 As the final column of Table 7-1 shows, images account for a greater proportion of page coverage in some CLA repertoire than others.

### Survey work undertaken in the education sector

- 7.8 The Steering Group asked me to oversee research of copying behaviours in the school and HE sectors, these being sectors accounting for a relatively large amount of income and in which copying practices are likely to be more uniform than in some other sectors. This research was performed by Schoolzone, a specialist school market research organisation. Representatives of PLS, ALCS, BAPLA and a member of my team worked with Schoolzone to review and comment on all materials provided to participants as part of the research and to comment on drafts of Schoolzone's reports.
- 7.9 Schoolzone provided reports on each sector and presented their findings to the Steering Group.
- 7.10 For each sector, Schoolzone convened an online focus group. In the case of Schools, nine teachers of various subjects from both primary and secondary schools participated. In the case of HE, six staff from HE colleges participated, again representing various subjects. The aim of the focus groups was to develop questions for subsequent surveys.

- 7.11 The focus groups were followed by detailed online surveys of 88 school teachers and 87 HE staff. The surveys took each participant around 30 minutes to complete. The school teachers represented a range of primary and secondary schools. When selecting the sample, Schoolzone ensured that the respondents included teachers of arts and design technology. The HE participants were teaching staff across a wide variety of subjects and worked at institutions across the country, including Russell Group universities and other establishments.

### **School findings**

- 7.12 Schoolzone found that much copying in schools takes place outside of the scope of the CLA licence. While copying in schools under the CLA licence is almost exclusively of hardcopy books:

- (1) teachers reported that between 60% and 73% of their copying (whether or not under the CLA licence) was of content found on the internet;<sup>172</sup>
- (2) 49% of teachers said that they copy online content at least once per week compared to 23% copying textbooks and 13% copying other books every week;<sup>173</sup> and
- (3) 94% of teachers stated that when they copy content the most common source is the internet rather than other sources.<sup>174</sup>

- 7.13 Respondents were asked about the relative importance of the ability to copy text and images in their teaching. Table 7-2 below summarises the responses.

**Table 7-2: Responses to: “When you copy, how important is the ability to copy text or images for your teaching?”**

	<b>Text</b>	<b>Images</b>
Essential	59%	60%
Useful, but not critical	40%	38%
Not particularly helpful	1%	2%

Source: Schoolzone report on copying in schools, page 25.

<sup>172</sup> Schoolzone report on copying in schools, page 17.

<sup>173</sup> Schoolzone report on copying in schools, page 18.

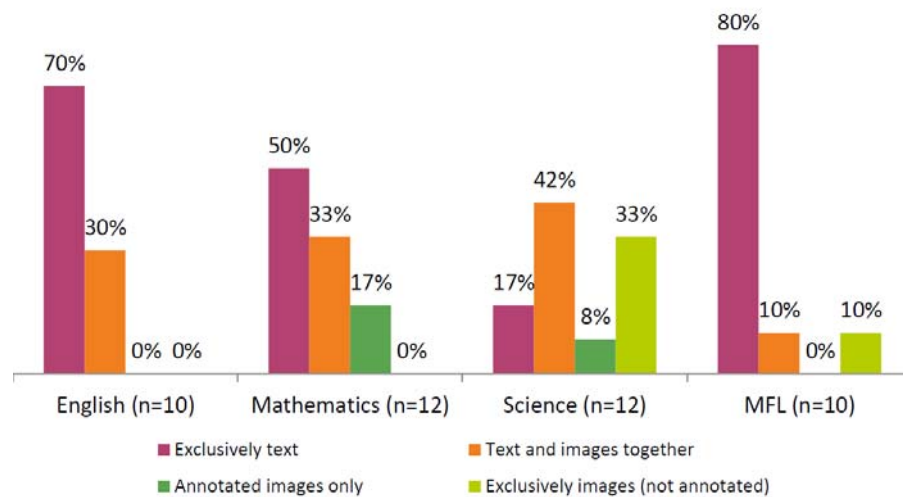
<sup>174</sup> Schoolzone report on copying in schools, page 22.

7.14 Respondents were asked to identify the most important category of content for their copying. Schoolzone summarised their findings as follows:<sup>175</sup>

- MFL [modern foreign languages], English, and mathematics teachers place most value on text.
- Science teachers place most value on text and images.
- Mathematics and science place some value on annotated images.
- Science and MFL teachers are the subject groups that value images that have not been annotated.”

7.15 Figure 7-1 below shows the data summarised by Schoolzone. The ‘n’ statistics beneath the horizontal axis indicate the number of teachers of each subject responding to the question. The sample sizes for individual subjects are relatively low.

**Figure 7-1: Responses to “Which is the most important category to you in your subject?”**



Source: Schoolzone report on copying in schools, page 27.

7.16 Teachers were asked which type of image they most valued being able to copy. Around half identified photographs, followed by diagrams (20%) and charts or tables (11%).<sup>176</sup>

<sup>175</sup> Schoolzone report on copying in schools, page 27.

<sup>176</sup> Schoolzone report on copying in schools, page 28.

- 7.17 Teachers reported that around half of their copying is currently of text and the other half images, and do not expect this proportion to change materially in the next five years.<sup>177</sup>

**HE findings**

- 7.18 Schoolzone was not able to identify HE librarians to take part in the HE research and instead surveyed teaching staff. PLS considers that the HE evidence collected is therefore “perhaps coloured by the fact that the major users of the HE licence are in fact librarians and information staff preparing course material rather than individual lecturers”.<sup>178</sup>
- 7.19 As in schools, much copying in HE was reported to be of digital rather than hardcopy content:
- (1) staff reported that around 75% of their copying was of content found on the internet;<sup>179</sup> and
  - (2) 79% of staff stated that when they copy content the most common source is the internet rather than other sources.<sup>180</sup>
- 7.20 Respondents were asked about the relative importance of the ability to copy text and images in their teaching. Table 7-3 summarises the results.

**Table 7-3: Responses to: “When you copy, how important is the ability to copy text or images for your teaching?”**

	Text	Images
Essential	47%	53%
Useful, but not critical	31%	39%
Not particularly helpful	22%	8%

Source: *Schoolzone report on copying in HE, page 35.*

- 7.21 Respondents were asked to identify the most important category of content for their copying. The results varied significantly by subject.<sup>181</sup>

<sup>177</sup> Schoolzone report on copying in schools, page 29.

<sup>178</sup> PLS First Submission, paragraph 3.1.2.

<sup>179</sup> Schoolzone report on copying in HE, page 18.

<sup>180</sup> Schoolzone report on copying in HE, page 19.

<sup>181</sup> Schoolzone report on copying in HE, page 34.

- 7.22 Respondents were asked which type of image they most valued being able to copy. The most popular response was photographs (43%), followed by diagrams (28%) and charts or tables (16%).<sup>182</sup>
- 7.23 Teachers reported that around half of their copying is currently of text and the other half images, but expect the copying of images to increase slightly relative to text over the next five years.<sup>183</sup>

### **Ribbans Report**

- 7.24 PLS commissioned a report into the use and value of different components of magazine content provided to businesses by MMOs. This report was prepared by Elisabeth Ribbans, an editorial consultant on rights management.
- 7.25 PLS summarises the findings of the Ribbans Report as follows:<sup>184</sup>

*“The value of images differs substantially from the original use and from other forms of copying. Media monitoring is a business tool that enables companies and other organisations to track mentions of their brands, personnel and competitors, measure their “share of voice” against that of competitors, analyse the effectiveness of media campaigns and react quickly to opportunities or negative press. The chief interest is what has been said, where it has been said and how much has been said.*

*For some types of MMO client (PR and marketing), pictures are also important in this analytical context, but for many they are of little or no interest.*

*A photograph within a clipping may be entirely incidental and without any relevance to the client.*

*Cuttings are primarily produced by automated keyword searching. Pictures without accompanying text do not get searched in this way; it is written content that is primarily in scope. If an article is returned by search for a chosen keyword, the picture will be included by default, even though it may be generic or address a subject outside the client’s monitoring brief.*

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<sup>182</sup> Schoolzone report on copying in HE, page 38.

<sup>183</sup> Schoolzone report on copying in HE, page 42.

<sup>184</sup> PLS First Submission, paragraph 8.5.



*The subsidiary importance of photos may also be inferred from the key information provided in daily email summaries of coverage. These alerts typically show publication name, headline, date, page number, byline, advertising-value equivalent and a snippet of the article text. They show no images, neither do they indicate if an image is present. To see the full article, including any associated image, the client must click on a link. We understand the click-through rate is generally in single percentage figures.*

*For these reasons, we believe that the allocation made to photographers in the context of magazines copied under CLA and NLA licence should not exceed 6%, even allowing for the anomaly in FE (see Section 6.2.5)."*

- 7.26 Some of the matters addressed in the Ribbans Report were also considered by other Parties, as I explain below.

### **Research referred to by DACS**

- 7.27 In its First Submission, DACS notes that a number of researchers have suggested that images are worth more than text:<sup>185</sup>

*"Numerous researchers have supported this legal precedent; they suggest that images are worth more than text to the consumer (Section 6.0) and an uplift range of 151% to tenfold is identified".*

- 7.28 This quote suggests that images are significantly more valuable than text covering the same page area. DACS quotes DoubleVerify as the source for the lower of the two statistics above:<sup>186</sup>

*"According to MRC [Media Rating Council]--accredited technology leader DoubleVerify, in-image campaigns had an average viewability of 77%, which is 51% higher than viewability benchmarks for traditional display advertising networks."*

- 7.29 I asked DACS to provide the original document on which this statement is based. DACS provided me with a report by the Internet Advertising Bureau UK, a trade association for online advertisers that also refers to the work by DoubleVerify, but has not provided me with the original source document, which I have also been unable to locate.

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<sup>185</sup> DACS First Submission, paragraph 10.8.

<sup>186</sup> DACS First Submission, paragraph 6.5.4.

- 7.30 DACS cites other research to support its view that image content is more valuable than text. This includes:
- (1) an academic paper entitled 'Correction: A Picture is Worth 84.1 Words' by Alan F. Blackwell. The value of 84.1 is based upon an experiment in which participants were asked to convey the same information through words or a diagram.<sup>187</sup> Blackwell notes that "*the conclusion is therefore more cautious than the title*";<sup>188</sup>
  - (2) research by Nielsen on the impact of images on book covers on book sales;
  - (3) research by the Interactive Advertising Bureau on the impact of images on the click-through rate of online adverts as well as on brand awareness;
  - (4) analysis produced by MDG Advertising, an advertising and marketing agency specialising in print, web and graphic design, showing that articles containing images are read more than those without; and
  - (5) a paper on the use of cartoons to convey information to patients leaving hospital.

### **Conclusions on the relative value of text and images**

- 7.31 I set out the views of the Parties and my own decision in respect of the relative value of text and images in Section 8.

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<sup>187</sup> Alan F. Blackwell, 'Correction: A Picture is Worth 84.1 Words', Section 5.

<sup>188</sup> Alan F. Blackwell, 'Correction: A Picture is Worth 84.1 Words', Abstract.

## 8. My decision in respect of the relative value of text and images

### Introduction

- 8.1 The Parties interpret differently the information available in respect of the relative value of text and images. I summarise their views in this section and set out my decision with respect to the relative value of text and images.

### PLS view

- 8.2 In Section 10 I discuss PLS' overall views on the appropriate distribution. In explaining the assumption PLS makes with respect to the relative value of text and images in the case of books, PLS refers to the work by Schoolzone:<sup>189</sup>

*"We accept the contention (supported by the data collected by SchoolZone) that images in educational use are of broadly equal value to the user with the text, and that the "percentage of cover" of images of the page copied is a reasonable guide to their value."*

### ALCS view

- 8.3 ALCS does not provide an allocation of revenues between text and images, but makes the following observations:
- (1) **Schools:** Much visual content that is copied in schools is outside of the scope of the CLA licence and so not relevant to this process.<sup>190</sup> This is particularly the case for photographs where the results of the FTI Sample indicate that the main categories of images copied from books were artwork and diagrams.<sup>191</sup> Both text and images are important for teaching but the work by Schoolzone found that text was judged to be more important in three out of four core subjects;<sup>192</sup>

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<sup>189</sup> PLS First Submission, paragraph 7.1.

<sup>190</sup> ALCS First Submission, pages 6 and 8.

<sup>191</sup> ALCS First Submission, page 9.

<sup>192</sup> ALCS First Submission, page 9.

- (2) **HE:** The FTI Sample shows a far lower incidence of images on copied pages in HE than in schools or FE;<sup>193</sup>
- (3) **Professional copying:** Third party images in content used by business professionals such as pharmaceutical, finance and legal professionals are likely to consist of photographs and are likely to be incidental to the information imparted by the copied extract. In contrast, “*tables, compilations and databases*” are defined as literary works by the CDPA and so do not fall under the scope of images;<sup>194</sup> and
- (4) **Press cuttings:** Click-through rates for MMO content are low and so while the usage of images within magazines is significant, only a small proportion of these images are seen by licensees.<sup>195</sup>

8.4 While ALCS refers to Schoolzone findings that it considers support its position, its overall conclusion on the Schoolzone research is that:<sup>196</sup>

*“...the qualitative evidence provided by the Schoolzone regarding the use of images should not substitute for the quantitative ‘image analysis’ data gathered by FTI.”*

8.5 One reason for this is that:<sup>197</sup>

*“Schoolzone was only ever asked to determine the value placed on images, not to quantify the actual amount of images used, for which the FTI image analysis provides much better, objective data. According to FTI’s image analysis for schools the most copied categories are ‘artwork’ and ‘diagrams’, rather than photographs. This supports the Schoolzone picture that while photographs are important within teaching, they are frequently used from on-line sources rather than copied from CLA repertoire.”*

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<sup>193</sup> ALCS First Submission, page 9.

<sup>194</sup> ALCS First Submission, pages 7 and 8.

<sup>195</sup> ALCS First Submission, pages 5 and 7.

<sup>196</sup> ALCS Second Submission, page 5.

<sup>197</sup> ALCS First Submission, page 9

8.6 ALCS highlights what it considers a further weakness in the Schoolzone research, namely that, because much of the copying described by respondents falls outside of the scope of the CLA licence, the responses to certain questions do not necessarily reflect the relative value of text and images for copying under the CLA licence.<sup>198</sup> That is, it may be the case that the vast majority of content that teachers copy from the internet is image-based, while copying under the CLA licence may focus on content that is more reliant on text and less reliant on images.

8.7 ALCS considers that some questions within the Schoolzone research were more informative in assessing the relative value of text and images than others. Commenting on the question “*When you copy, how important is the ability to copy text or images for your teaching?*”, ALCS states:<sup>199</sup>

*“The responses reported [by BAPLA and ACS] answer a question relating to the ability to copy text or images, unsurprisingly both are equally important. The main issue for determination by FTI, however, relates to the comparative value of text and images. This is the subject of a separate question in the Schoolzone survey the responses to which...favour text in 3 of the 4 core subjects, in each case by a significant margin.”*

8.8 ALCS also notes that some copied images fall under the definition of ‘literary works’ in the CDPA:<sup>200</sup>

*“The Schoolzone focus group attempted to identify how this value breaks down in relation to text and images. Schoolzone did not separate literary from artistic works; as such some responses for ‘images’ will actually refer to the use of literary works, such as tables, compilations and databases.”*

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<sup>198</sup> ALCS First Submission, pages 6 and 8; ALCS Second Submission, page 5; PLS First Submission, footnote 9.

<sup>199</sup> ALCS Second Submission, page 6.

<sup>200</sup> ALCS First Submission, page 8.

## VAs view

### BAPLA and ACS view

- 8.9 In its Initial Paper, BAPLA proposed that the relative value of text and images should be assessed by reference to the area of their page coverage:<sup>201</sup>

*“Page extent (the amount of a copied page being taken up by a discrete element of content) should be considered by the arbiter an effective measure of relative value between types of content.*

*As an example, a licensee may have copied a single page, which contains a single illustration which takes up 1/4 of the page. In this example, visual works comprise 1/4 of the page extent of the copied material so may be said to comprise 1/4 of the value of the copied content, the remaining 3/4 of the value being assigned to text, which comprises the remainder of the page. In light of the uncertainties relating to other comparative measurements of value, this offers a certainty in valuation, and is a relatively simple measure. Page extent has traditionally been used in this way, with publishers paying set rates for an image according to its size on the page. The publisher of the copied page, employing their extensive experience of the requirements of their customers, and seeking to produce the most commercially appropriate content, has made a decision on the relative value of text and images in this case. It would be reasonable for the arbiter to follow the publisher’s commercial judgement in assigning value.”*

- 8.10 BAPLA and ACS revised this opinion in their submissions:<sup>202</sup>

*“As the old adage goes, a picture is worth a thousand words. But the reality is that we do not have real metrics by which to measure the qualitative value placed on images in relation to the obviously larger volume of text. It would be surprising if we thought we could simply measure value by volume alone.”*

- 8.11 As an illustration to support this view, BAPLA and ACS refer to the proportion of page coverage of images within works copied in schools as compared to the value attributed to these images by teachers.<sup>203</sup> While 34% of pages copied include an image and the average proportion of pages covered in images is 9%, teachers in the Schoolzone survey indicated that the ability to copy images is much more important than this.

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<sup>201</sup> BAPLA Initial Paper, page 3.

<sup>202</sup> BAPLA and ACS First Submission, page 13.

<sup>203</sup> BAPLA and ACS First Submission, page 7.

- 8.12 BAPLA and ACS place more weight on the Schoolzone research than ALCS or PLS. They consider the research conducted by Schoolzone to be:<sup>204</sup>

*“...of particular interest and relevance to this valuation. Empirical evidence of this kind tells us a great deal about licensee attitudes and behaviours – and how these have changed and may change further over time.*

*The Schoolzone reports into copying behaviour in HE and schools sectors offer some valuable insights, which support the value of imagery within the combined licence.”*

- 8.13 The VAs consider that the Schoolzone findings are consistent with images providing significant value. BAPLA and ACS state:<sup>205</sup>

*“The Schoolzone reports into copying behaviour in HE and schools sectors offer some valuable insights, which support the value of imagery within the combined licence.*

*The headline finding is that in both sectors respondents ascribe almost equal importance to the copying of text and images, with a slight leaning toward images. In schools, 59% and 60% of respondents ascribe the ability to copy respectively text and images as essential; in HE the percentages are 47% for text and 53% for images...This finding underlines the importance of the combined licence, and for the purposes of valuation suggests a parity in value between text and images, or a slight preponderance toward images over text.”*

- 8.14 The Schoolzone research provided some insight into the type of images that are most valued. BAPLA and ACS state:<sup>206</sup>

*“Questions as to the type of images that are most valued within each sector suggest that the type of imagery where rights are more often controlled by third party providers, especially photographs, are generally viewed as more valuable by respondents than those types of images where rights are more often controlled by publishers.*

*Schools respondents most valued being able to copy photographs (48%) with figurative drawing comprising another 10%. Diagrams and charts or tables by contrast comprised 31% of the most valued images...*

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<sup>204</sup> BAPLA and ACS First Submission, page 5.

<sup>205</sup> BAPLA and ACS First Submission, page 5.

<sup>206</sup> BAPLA and ACS First Submission, pages 5 and 6.

*In HE photographs were similarly most valued by 43% of respondents, with diagrams at 28% and charts at 16%...From observation of the primary market, we understand that photographs and figurative drawings are more likely to be provided by third party visual artists who retain rights; while rights in diagrams and charts are more likely to be either owned by publishers or provided by authors and subject to similar ownership patterns as text.”*

- 8.15 In response to the references of PLS and ALCS to low click-through rates for MMO content, BAPLA and ACS state that many clippings would not exist were it not for the images they contain:<sup>207</sup>

*“Very often...regardless of the importance the licensee attributes to the image, the existence of the item to be copied is dependent on the presence of an image alongside the headline and text. In line with our argument in our earlier submission that ours is an increasingly visual culture, news items often owe their publication or the prominence of their publication to the availability of images to illustrate the magazine story.”*

#### **DACS view**

- 8.16 As explained in Section 7, DACS refers to a range of studies that it considers demonstrate the importance of images.
- 8.17 DACS also performs a series of calculations of the value of images as a percentage of the value of text and images combined using data collected by Schoolzone:<sup>208</sup>
- (1) for schools, in response to the question “Which is the most important category to you in your subject?”, the proportion of teachers across the four subject areas referring to “Text and images together”, “Annotated images only” or “Exclusively images (not annotated)” varied from 20% to 83%. DACS concludes that the value of images should fall within this percentage range of the value of the licence. I note, however, that this range is calculated assuming that “Text and images together” can be treated as relating to images rather than text. If instead this category were ascribed solely to text, the range becomes 0% (English) to 41% (Science);
  - (2) DACS performs a similar calculation for HE as the Schools calculation in (1) above. Following this approach, DACS values images at 64% of the licence. This calculation again associates all responses of “Text and images together” with images. Excluding this category, the value ascribed to images falls to 34%; and

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<sup>207</sup> BAPLA and ACS Second Submission, page 6.

<sup>208</sup> DACS First Submission, paragraph 7.



- (3) HE staff indicated that, on average, they expect approximately 56% of copying in five years' time to be of images *"suggesting that images would represent 56.3% of the value of the licence"*.

8.18 In its summary of conclusions, DACS concludes that:<sup>209</sup>

*"The Schoolzone research suggests that all the rights in images (publishers/authors/visual creators), exclusively and in combination, have a value of 64.1% of the licence."*

8.19 This is the statistic derived in (2) above which, as I have explained, may overstate the value of images.

8.20 DACS agrees with a statement in the Ribbons Report that around 75% to 80% of copied magazine articles contain images but disagrees with PLS' statement that photographs tend to be incidental and not 'relevant' to the client:<sup>210</sup>

*"This statement is contradictory to PLS' insistence elsewhere on the pivotal importance of copying data. If the clipping is copied then copyright is infringed unless it is licensed. Ergo a payment will be due to a visual creator in the case that there is an image in said clipping. Further, PLS offers no evidence that the image is 'relevant' or not to the client. The synergy and insurance principles become valuable to the client in this context."*

### **My decision**

8.21 The relative value of different types of copied content is subjective and will vary between licensees. There are, however, some patterns. For example images tend to be more prevalent and important in school books than in legal reference works.

8.22 One approach to assessing the relative value of text and images is by reference to page coverage. While this is attractive in its simplicity, it is not necessarily the case that it reflects licensee views in all sectors and across all publication formats. Table 8-1 below summarises some statistics relating to page coverage for different types of copied content.

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<sup>209</sup> DACS First Submission, page 2.

<sup>210</sup> DACS Second Submission, pages 21 and 22.

**Table 8-1: Incidence of images on copied pages**

	<b>% pages with images</b>	<b>% image page coverage</b>
Books: Schools	34%	9%
Books: FE	28%	6%
Books: HE	9%	3%
Books: Business and public sector	4%	Unknown
Magazines	66%	33%
Journals	8%	2%

*Note: business and public sector book statistics are based on frequently copied works for which page coverage data is not available.*

*Source: FTI Sample.*

- 8.23 Asking licensees to assess the relative value of different types of content is also prone to difficulties. Schoolzone included questions in its surveys in an effort to collect such information and while I place some weight on the responses, as I explain below, I recognise their limitations.

#### **Copying of books in schools and FE**

- 8.24 I have compared the estimates provided by respondents to the Schoolzone research of the proportion of their copying that consists of text versus images with data collected in the FTI Sample which includes only works copied under the CLA licence.
- 8.25 In the case of schools, the 88 teachers surveyed reported that their copying consisted of broadly equal amounts of text and images. My own research considered extracts of 70 books. Around 34% of pages included images and on those pages where there was an image, there was frequently also text so that only 9% of page coverage related to images. There is therefore some inconsistency with the Schoolzone responses. This may have occurred for a number of reasons:
- (1) responses to the Schoolzone survey captured significant amounts of online copying outside of the scope of the CLA licence. It is possible that images are more prevalent in copying of online content than content licensed by CLA;
  - (2) the differences may arise due to my analysis of images having regard to the definitions of artistic and literary works set out in the CDPA; and
  - (3) teachers may have been unable to estimate accurately the proportion of their copying that is of images and so overstated the importance of images in answering this question.

- 8.26 While the Schoolzone research indicates that the values of text and images are broadly equal, I consider that the discrepancy above indicates that the responses, for whatever reason, overstate the value of images relative to text. I am, however, satisfied that the copying of images in schools is more important than a page coverage statistic of 9% suggests. On balance, in performing my calculations I assume that **25%** of the value of books copied in schools relates to images and **75%** to text, but consider the effect of adopting alternative assumptions. I therefore assume that it is appropriate to value images at a premium to their page coverage.
- 8.27 I consider that images are likely to be less valuable in FE than in schools given their more limited usage. In performing my calculations I assume that **20%** of the value of books copied in FE relates to images and 80% to text, but consider the effect of adopting alternative assumptions.
- 8.28 Given my approach to assessing the distribution in Section 10, were I to assume instead that:
- (1) text and images in school and FE books should be valued equally, the amount of money distributed to VAs across all sectors would increase by about 54% and the amount distributed to authors would fall by 6%; or
  - (2) text and images in these books should be valued in line with page coverage, the amount of money distributed to VAs across all sectors would fall by about 34% and the amount distributed to authors would increase by 4%.

### ***Copying in HE***

- 8.29 I place more weight on Schoolzone's survey of school teachers than HE staff given that much copying in HE is, I understand, overseen by library and information staff rather than teaching staff and that it was teaching staff who participated in the Schoolzone research.
- 8.30 As for the schools analysis, I compared estimates provided by the Schoolzone research of the proportion of copying that consists of text versus images to data collected in the FTI Sample which includes only works copied under the CLA licence. The disparity was greater than in the case of the schools research. While the 87 HE staff surveyed estimate that around half of their copying consists of images, my review of extracts of 88 books and 13 magazines and journals copied under the HE CLA licence indicates that copied content includes images on only 8% of pages in books and magazines. The page coverage of these images is 3% in the case of books and 2% in the case of journals.

- 8.31 Given this finding that the vast majority of copied pages within HE do not include any pictures, I do not rely on the Schoolzone research in assessing the importance of images within HE. However, I do consider that it is appropriate to value images copied in HE at a premium to their page coverage:
- (1) images account for 3% of page coverage in HE books and appear on 9% of pages copied. I assume that **5%** of the value of books copied in HE relates to images and **95%** to text; and
  - (2) images account for 2% of page coverage in journals copied in HE and appear on 8% of pages copied. I assume that **5%** of the value of journals copied in HE relates to images and **95%** to text.

***Copying of journals in other sectors***

- 8.32 I assume that the relative value of text and images in journals copied in other sectors (for which I have limited separate information available to me) is the same as in HE.

***Copying of books in the business and public sectors***

- 8.33 CLA does not have records of specific extracts of books copied by businesses and in the public sector. However, information is available regarding the most frequently copied works in these sectors, albeit not the specific parts of those works copied.
- 8.34 Within my sample of the most frequently copied works in these sectors, 4% of pages contained images. I do not have data on the proportion of page coverage within these works that relates to images, which is likely to be less than 4%. I assume that images provide **2%** of the value of books copied in these sectors relates to images, but my calculations are not sensitive to this assumption.

***Copying of magazines***

- 8.35 PLS and ALCS consider that the relative value of text and images in magazine content is more strongly weighted towards text than page coverage would suggest. This is due to the low click-through rates in respect of MMO content, meaning that few MMO clients access the images contained in the original article. This is consistent with my discussions with representatives of NLA and Precise, but I note the BAPLA view that many published articles benefit from their image content.
- 8.36 I observe that MMO content is not the only magazine content copied by businesses. CLA was not able to provide me with information on the relative importance of MMO and other magazine content copied by businesses.
- 8.37 Of the MMO extracts identified in my sampling exercise, images had page coverage of approximately 33%. To the extent that users do not see these images due to the way the content is accessed, it would be appropriate to ascribe less than 33% of the value of copied magazines to images.

- 8.38 For the purposes of my calculations I assume that **20%** of the value of magazine content relates to images and the remaining 80% to text. This is less than the value of images implied by their page coverage. The percentage I have selected is subjective and so I have considered the effect of varying this assumption.
- 8.39 Given my approach to assessing the distribution in Section 10, were I to assume that images in magazines should be valued in line with their page coverage, the distribution to VAs would increase by approximately 0.8 percentage points.

### **Summary**

- 8.40 Table 8-2 below summarises the assumptions described above in respect of the proportion of the total value of copying related to images. For comparison, I also show the proportion of pages containing images and the overall page coverage of images.

**Table 8-2: Proportion of copying value relating to images**

	<b>Image value</b>	<b>% pages with images</b>	<b>% image page coverage</b>
Books: Schools	25%	34%	9%
Books: FE	20%	28%	6%
Books: HE	5%	9%	3%
Books: Business and public sector	2%	4%	Unknown
Magazines	20%	66%	33%
Journals	5%	8%	2%

- 8.41 As shown in the table above, except in the case of magazines where I take account of low click-through rates, I assume that it is appropriate to value images at a premium to their page coverage.
- 8.42 The premium to page coverage that I assess in the case of school books is informed in part by the Schoolzone research but is necessarily subjective. The assumptions I have made for other types of copying take into account the 25% as a starting point then adjust for differences in: (1) the proportion of copied pages containing images; and (2) the page coverage of images, as compared to schools – but without being overly mechanistic.

## 9. International comparators

### Introduction

9.1 I consider that information relating to the distribution mechanisms of overseas RROs may potentially inform the distribution of income from UK licensees.

9.2 ALCS, BAPLA, ACS and DACS all refer to comparator information in their submissions:

- (1) the only specific RRO to which ALCS refers is the Copyright Clearance Centre in the US which ALCS did not consider to be a useful comparator.<sup>211</sup> However, ALCS recommends that I consider average distributions across large numbers of RROs, as reported in the IFRRO Distributions Paper;
- (2) DACS, BAPLA and ACS refer to The Art of Copying Report, published in 2006 by IFRRO as a guide to help member organisations incorporate visual material in reprographic legal schemes and licences, including gathering data for payment purposes and making distributions;
- (3) DACS, BAPLA and ACS jointly conducted their own research on the value that overseas RROs attributed to visual material. BAPLA and ACS describe the research process as follows:<sup>212</sup>

*“We asked organisations with which DACS has reciprocal agreements to tell us how visual material was treated in their country. Because we wanted to identify meaningful comparators to the UK RRO, CLA, we did not seek information from organisations where the local RRO was still in a developmental stage, and where there may not be mandates to include visual works in reprographic licensing schemes. ...We also excluded the USA, as the US licensing model is different and not applicable to UK and European legal systems.”*

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<sup>211</sup> ALCS Second Submission, page 4.

<sup>212</sup> BAPLA and ACS First Submission, Section 4.3.

DACS explained that this research included RROs who had undertaken “*data-based analysis to establish a fair share of reprographic revenues for visual creators*”.<sup>213</sup> DACS, BAPLA and ACS refer to the distribution mechanisms used for VAs in the Netherlands, Germany, Sweden, Norway, Spain, Belgium, Denmark, France, and Canada (Quebec);<sup>214</sup>

While the focus of the research was the value attributed to visual material, DACS also provides a breakdown of allocations to publishers and authors, in addition to VAs;<sup>215</sup>

- (4) ACS recommends that I consider the distribution systems used by ADAGP<sup>216</sup> in France and Verwertungsgesellschaft Bild-Kunst (“**VG BK**”)<sup>217</sup> in Germany;<sup>218</sup> and
- (5) PLS considers the UK to have a different legal and copyright framework to other countries limiting the relevance of overseas RROs as comparators.<sup>219</sup>

9.3 The Parties agree that the US licensing model does not provide a suitable comparator for the UK.<sup>220</sup>

9.4 I conducted my own review of the distribution arrangements in five developed economies with established collective licensing regimes. I based my review on public documents, predominantly in English. My review has necessarily not been exhaustive. The RROs I have considered are:

- (1) **Australia:** the Copyright Agency (“**CA**”);
- (2) **Canada:** ACCESS Copyright (“**ACCESS**”);
- (3) **France:** the Centre Français d'exploitation du droit de Copie (“**CFC**”);
- (4) **Germany:** Verwertungsgesellschaft WORT (“**VG WORT**”) and VG BK; and

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<sup>213</sup> DACS First Submission, paragraph 9.1.2.

<sup>214</sup> DACS First Submission, Annex 1, page 4. BAPLA and ACS First Submission, page 11.

<sup>215</sup> DACS First Submission, Annex 1 (figures).

<sup>216</sup> Société des auteurs dans les arts graphiques et plastiques, the French collecting society in the field of visual arts.

<sup>217</sup> A German visual arts collecting society.

<sup>218</sup> ACS Initial Paper, page 3.

<sup>219</sup> PLS First Submission, paragraph 5.7.

<sup>220</sup> PLS Second Submission, paragraph 2.6.3; ALCS Second Submission, page 4. DACS First Submission, Annex page 3. BAPLA and ACS First Submission, page 11.

(5) **Ireland:** the Irish Copyright Licensing Agency (“**ICLA**”) and Newspaper Licensing Ireland Ltd (“**NLI**”).

- 9.5 Of the overseas RROs that I have considered, all five consider rights ownership and most consider the usage of works when making distributions. Some consider other factors, including the value of the overall repertoire, although these tend to influence only a small proportion of overall distribution.<sup>221</sup>
- 9.6 I recognise that publishing practices and the legal framework may differ between countries which would reduce the relevance of these statistics to my determination.
- 9.7 Table 9-1 below summarises some of the key figures from my review. I provide further information about these RROs in Appendix 9.

**Table 9-1: Summary of the main RROs in selected countries**

	<b>UK</b>	<b>Australia</b>	<b>Canada</b>	<b>France</b>	<b>Germany</b>	<b>Ireland</b>
Main RRO	CLA	CA	ACCESS	CFC	VG WORT	ICLA
Established	1983	1974	1988	1984	1958	1992
Statutory licence		✓		✓	✓	
Voluntary licence	✓	✓	✓	✓	✓	✓
Revenues collected (2014, £m)	74.9	73.9	11.1	40.3	116.2	1.4
Distribution:						
Title specific	✓	✓	✓	✓	✓	✓
Non-title specific			✓		✓	
Other RRO	NLA		COPIBEC		VG BK	NLI
Established	1996		1997		1969	2002
Statutory licence					✓	
Voluntary licence	✓		✓		✓	✓
Revenues collected (2014, £m)	33.3		7.5		49.4	0.78
Distribution:						
Title specific	✓		✓		✓	
Non-title specific			✓		✓	✓

Source: *IFRRO website, and other sources.*<sup>222</sup>

<sup>221</sup> ACCESS in Canada allocates 15% of the total amount equally among its members to be distributed in recognition of the value of the repertoire. This distribution is based neither on availability nor usage but is a relatively small proportion of the overall distribution.

<sup>222</sup> ICLA website, About us. CA Distribution Rules (March 2015), paragraphs 5.3-5.5. COPIBEC Annual Report, pages 7 and 8.



### ***My approach***

- 9.8 I consider that it is helpful to review separately the implications of international comparators for questions of rights ownership and for the assessment of the relative value of text and images. This is because the rights ownership situation may differ by country as a result of differences in legal framework and publishing practices. Inferences to be drawn from the relative value of text and images are more likely to be applicable across jurisdictions.
- 9.9 In the remainder of this section I consider:
- (1) information on overall distributions that have been referred to in this process;
  - (2) the revenue shares between publishers and creators adopted by overseas RROs; and
  - (3) the relative value of text and images adopted by overseas RROs.

### **Overall distributions**

#### ***Art of Copying Report***

- 9.10 The Art of Copying Report was based on surveys by the IFRRO Working Group on Copying of Visual Material from 2002 to 2005. The report found that:<sup>223</sup>
- (1) *“in 2005, RROs allocated an average of 15% of reprographic revenues collected to visual material”*; and
  - (2) allocations to visual material have increased over time, with several organisations reporting a significant increase in copying of visual material as scanning and other forms of digital copying have become available and permissible.
- 9.11 The report does not include a full assessment of rights ownership for visual material. However, the report implies that VAs will typically take steps to retain reprographic rights to material they have created:<sup>224</sup>

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<sup>223</sup> Art of Copying Report, page 18.

<sup>224</sup> Art of Copying Report, page 6.

*“Copyright licences can be granted by the creator (or owner) of the copyright in visual material or his/her agent...The licences offered by collecting societies and/or visual creators enable publishers to carry out all the relevant acts necessary for the inclusion of visual material in publications, but do not normally include a grant of rights for reprographic copying. Consequently, visual creators are entitled to receive their remuneration for such uses separately.”*

*“Sometimes publishers prefer to commission a creator to produce an original work to include in a publication. ... In some countries, the visual creator is the legitimate copyright owner unless there are specific contractual arrangements to the contrary, whereas in other countries the rights in the commissioned work belong to the commissioner rather than the artist. In the absence of specific contractual arrangements or clear provisions of the law, the visual creator is entitled to receive their remuneration for reprographic uses concerning the commissioned artistic works.”*

*“Sometimes publishers purchase rights from creators outright in preference to buying a copyright licence or a commission agreement. In such circumstances, the publisher might become the owner of some or all rights in the visual material which is assigned. Creators and their agents generally discourage assignments because licences or commission agreements are usually sufficient to enable publishers to carry out their activities, without preventing visual creators from earning income from the future exploitation of their creations through an assignment.”*

#### **DACS, BAPLA and ACS research**

- 9.12 Based on their research, DACS, BAPLA and ACS state that overseas RROs “who use an evidence base” for allocations distribute between 3% and 26.3% of revenue to VAs, with a simple average of 13.4%, as shown in Table 9-2 below.<sup>225</sup> DACS states that RROs who do not use an evidence base to determine allocations distribute between 4% and 9.2%, with a simple average of 7.1%, to VAs.<sup>226</sup> The average across all RROs considered was 10%.<sup>227</sup>

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<sup>225</sup> The BAPLA and ACS First Submission also lists the Belgian Repobel agency in a similar table with 9.2% of revenues distributed to visual creators. This changes the reported average to 12.9%, although BAPLA, ACS and DACS report 13.4% across their submissions.

<sup>226</sup> DACS First Submission, Appendix 1, page 1.

<sup>227</sup> DACS First Submission, Appendix 1, page 1; BAPLA and ACS First Submission, Section 4.3.

**Table 9-2: Distributions to rightsholders used by RROs internationally<sup>228</sup>**

<b>Country</b>	<b>RRO</b>	<b>% Publishers</b>	<b>% Authors</b>	<b>% VAs</b>
Netherlands	SR Reprorecht	36.9	36.9	26.3
Germany	VG Wort/Bild-Kunst	37.0	42.0	21.0
Sweden	PressKopia	32.3	36.6	18.9
Norway	Kopinor	31.4	45.0	13.4
Spain	CEDRO	45.0	42.5	12.5
Denmark	CopyDan Writing	50.0	43.8	6.2
France	CFC	65.0	29.0	6.0
Canada	Copibec	50.0	47.0	3.0
<b>Average (%)</b>		<b>43.4</b>	<b>40.3</b>	<b>13.4</b>
<b>Range</b>		<b>31.4 - 65.0</b>	<b>29.0 - 47.0</b>	<b>3.0 - 26.3</b>

Source: DACS First Submission, Appendix 1, page 2; BAPLA and ACS First Submission, Section 4.3.

- 9.13 DACS provides a breakdown of allocations to publishers and authors for the countries it has investigated, in addition to VAs. The allocations to publishers range from 31.4% to 65.0% with an average of 43.4%, while the allocations for authors range from 29.0% to 47.0% with an average of 40.3%.<sup>229</sup>
- 9.14 DACS states that the value assigned to artistic works by RROs is correlated with the level of representation for VAs on their governing bodies and that a higher than average share for VAs is appropriate in the current exercise:<sup>230</sup>

*“The upper quartile of the DACS analysis, Netherlands and Germany, includes, respectively, ‘various’ visual creator organisations; and 20 creator v. 13 publisher members. This contrasts with the lower quartile of CFC and Copibec where there are, respectively, 4 author board members, 8 publishers, 0 visual creators; and 1 visual out of 8. This lower quartile mirrors the DACS experience in the UK where it has been excluded from CLA membership for the last ten years and has had only 1 board seat out of 15. This suggests that a more reasonable share for visual artists would mirror the upper quartile and be in the range of 21% to 26.3%.”*

<sup>228</sup> DACS First Submission, Annex 1 (figures) notes that Sweden and Norway allocate 12.2% and 10.2% respectively to groups other than publishers, authors and VAs.

<sup>229</sup> DACS First Submission, Annex 1 (figures).

<sup>230</sup> DACS First Submission, paragraph 9.2.

- 9.15 DACS, BAPLA and ACS conclude that, based on international experience, VAs should receive distributions in the range 13.4% to 15%, if not higher.<sup>231</sup>

## Revenue shares between publishers and creators

### *IFRRO Distributions Paper*

- 9.16 The IFRRO Distributions Paper considers the different distribution practices adopted by international RROs. The findings are based on a survey undertaken by the IFRRO Secretariat among member RROs. Approximately half of the invited members completed the survey, which IFRRO considered was a balanced cross-section of the RRO models of operation and reasonably close to the IFRRO membership situation.<sup>232</sup>
- 9.17 The paper distinguishes between four distribution methods, including relying upon full reporting of usage, sample-based reporting of usage, objective availability of material, and surveying. Full reporting, sampling and objective availability are associated with title-specific distributions, while surveying is associated with non-title specific distributions.<sup>233</sup>
- 9.18 The IFRRO Distributions Paper finds that:<sup>234</sup>
- (1) *“the most common general split of the revenues between authors and publishers is 50%”* applied by 65% of RROs;
  - (2) the next most common model applied by 22% of RROs is a split favouring authors;
  - (3) the 50:50 split *“varies slightly with the type of works and materials. Authors often get a higher share for general non-fiction books, fiction books and trade and consumer periodicals, whereas publishers tend to get a higher share for newspaper and similar publications”*; and
  - (4) among the respondents to the survey, the allocation of revenues between authors and publishers *“was usually determined by agreements, followed by Statutes of the RRO or the RRO Board. More rarely it is established by national legislation or according to contracts between author and publishers.”*

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<sup>231</sup> DACS First Submission, paragraph 10.9. BAPLA and ACS First Submission, pages 10 and 11.

<sup>232</sup> IFRRO Distributions Paper, Section 1.

<sup>233</sup> IFRRO Distributions Paper, Section 3.

<sup>234</sup> IFRRO Distributions Paper, Section 4

**Distributions adopted by overseas RROs**

9.19 Table 9-3 below shows the 2014 distributions between creators (including both authors and VAs) and publishers for the comparators that I have considered. The distributions are net of operating expenses and payments to other RROs and funds.

**Table 9-3: Distributions between creators and publishers by RRO in 2014**

<b>Country</b>	<b>RRO</b>	<b>Creator</b>	<b>Publisher</b>	<b>Comment</b>
Australia	CA	14%	86%	This is the split of income distributed within Australia. Some income is also distributed to overseas RROs.
Canada	ACCESS	45%	55%	This split accounts for subsequent payments from publishers to authors under individual agreements. This is typically the case for creators who are not ACCESS members. ACCESS estimated the amount of these payments from publisher surveys. The distribution before such payments was 31% to creators and 69% to publishers.
France	CFC	36%	64%	CFC does not report an overall split; the figures shown here are based on one potential calculation that I have performed using data published by CFC.
Germany	VG WORT	N/A	N/A	Distribution not disclosed.
Germany	VG BK	N/A	N/A	Distribution not disclosed.
Ireland	ICLA	N/A	N/A	Distribution not disclosed.
Ireland	NLI	0%	100%	NLI represents publishers only.

Source: CA annual report 2014, paragraph 13.6; ACCESS annual report 2014, page 8; and Table A9-7.

- 9.20 The statistics in Table 9-3 above show the overall outcome of each distribution process. In some cases this is arrived at by applying different allocations depending upon the copying situation. For example, Table 9-4 below shows the allocations that ACCESS applies in Canada for title-specific distributions, which account for approximately two-thirds of all distributions.<sup>235</sup> Table 9-5 and Table 9-6 show equivalent allocations for CFC in France for books and press.

**Table 9-4: ACCESS allocations between creators and publishers for title-specific distributions**

	In Print		Out of Print	
	Creator	Publisher	Creator	Publisher
Trade books	50%	50%	100%	0%
Educational, technical and scholarly publications where creator assigned copyright to publisher	0%	100%	0%	100%
Educational, technical and scholarly publications where creator kept copyright	50%	50%	100%	0%
Newspapers and periodicals (employed creators)			0%	100%
Newspapers and periodicals (non-staff creator)			100%	0%
Other	50%	50%	50%	50%

Source: ACCESS website, *How We Split Royalties between Creators and Publishers*.

**Table 9-5: CFC allocations between creators and publishers for title-specific distributions in respect of books**

	Creator	Publisher
Paperbacks	50%	50%
Educational books	30%	70%
General literature	50%	50%
Academic and professional books, sales greater than 5,000	50%	50%
Academic and professional books, sales 500 to 5,000	40%	60%
Academic and professional books, sales below 500	10%	90%
Practical books	30%	70%
Highly illustrated books	50%	50%
Encyclopaedias, atlases and maps	30%	70%

Source: CFC distribution rules for books, page 14.

<sup>235</sup> ACCESS website, Creator/Publisher Distribution Guidelines page.

**Table 9-6: CFC allocations between creators and publishers for title-specific distributions in respect of press**

	<b>Creator</b>	<b>Publisher</b>
General press	50%	50%
Letters for professionals	10%	90%
Professional and cultural press – Over 75,000 in circulation	50%	50%
Professional and cultural press – 50,000 – 75,000 in circulation	40%	60%
Professional and cultural press – 25,000 – 50,000 in circulation	30%	70%
Professional and cultural press – 10,000 – 25,000 in circulation	20%	80%
Professional and cultural press – Up to 10,000 in circulation	10%	90%

Source: CFC distribution rules for press page 15.

### Relative value of text and images

- 9.21 The only overseas RRO for which I have identified data relating to the relative value of text and images is the French RRO, CFC.
- 9.22 CFC allocates revenue to different types of copied material and splits it between publishers and creators as outlined in Table 9-5 and Table 9-6 above. Revenue allocated to creators is then further divided between authors and VAs, either in accordance with agreements between the author and VA, where such agreements exist, or:
- (1) in accordance with the proportions reported in Table 9-7 below if the planned total distribution is less than *circa* £200 (EUR 300);<sup>236</sup> or
  - (2) on a case-by-case basis.

<sup>236</sup> Conversion using exchange rates published by the Bank of England (average annual spot exchange rate for relevant period).

**Table 9-7: CFC text author/VA allocation where there is no agreement between authors and VAs and the distribution is small**

	<b>Text</b>	<b>Images</b>
Paperbacks	97.3%	2.7%
Primary school educational books	70.0%	30.0%
Secondary school educational books	90.0%	10.0%
General literature	99.2%	0.8%
Academic and professional books	99.3%	0.7%
Practical books	50.0%	50.0%
Academic and professional books (Science and Medicine)	100.0%	0.0%
Highly illustrated books	50.0%	50.0%
Encyclopaedias, atlases and maps	70.0%	30.0%

Source: CFC distribution rules for books, page 15.

9.23 The data in Table 9-5, Table 9-6, and Table 9-7 above reflect both rights ownership and relative value. To the extent that the proportion of authors and VAs who retain their relevant rights differs, Table 9-7 above does not provide an assessment of the relative value of text and images. However, I observe that:

- (1) the CFC distribution of income from schools is weighted towards text rather than images, consistent with my approach; and
- (2) CFC allocates almost all income from the copying of academic and professional books to text, consistent with my approach in respect of journals and books copied in the business and public sectors.

### **My decision**

9.24 As some of the Parties have observed, collective licensing and distribution practices differ markedly from country to country. My review of international comparators indicates that overseas RROs employ a range of distribution practices depending on their national and operational context. Consequently, there is significant variation in the resulting distributions to different classes of rightsholders. In particular:

- (1) research by IFRRO suggests that the majority of RROs use a 50:50 split to distribute revenues between authors and publishers;
- (2) IFRRO also finds that, on average, VAs received 15% of RRO revenues in 2005;
- (3) research conducted by DACS, BAPLA and ACS found that overseas RROs allocated 31.4-65.0% of revenue to publishers, 29.0-47.0% to authors, and 3.0-26.3% to VAs; and



- (4) my research regarding distributions made in five developed economies suggests that publishers in these countries tend to receive a greater share of revenue than creators (over 50%).

9.25 In addition, public information regarding distribution practices rarely indicates what assumptions have been made regarding the ownership of rights or the relative value of text and images in the process of determining distributions. It is sometimes difficult to separate the effects of these two sets of assumptions in interpreting a distribution adopted by an RRO.

9.26 In particular, IFRRO notes that among the respondents to the survey, the allocation of revenues between authors and publishers “*was usually determined by agreements, followed by Statutes of the RRO or the RRO Board. More rarely it is established by national legislation or according to contracts between author and publishers.*”<sup>237</sup>

9.27 There are further limitations to the available evidence:

- (1) findings of large scale reviews potentially include a broader range of RROs than may be relevant to CLA;
- (2) research by DACS, BAPLA and ACS has, necessarily, been selective. I note that some RROs represent sub-segments of the copyright licensing market in the relevant territory, for example Copibec in Canada (Quebec). DACS, BAPLA and ACS have not provided documentary evidence published by the relevant RRO to support their research;
- (3) my review of international comparators has necessarily been selective, and restricted to public documents in the English language; and
- (4) I have audited the available information.

9.28 As a result, the conclusions that I am able to draw from international comparators in relation to key areas of my determination are limited. As discussed in Section 10, I base my determination on available UK evidence. However, I consider that my determination falls within a reasonable range of international practice.

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<sup>237</sup> IFRRO Distributions Paper, Section 4.

## 10. My determination in respect of the division of revenues

### Introduction

- 10.1 In this section I set out the views of the Parties as to the appropriate distribution of licence fees at the current date. I then set out my determination.

### PLS view

- 10.2 PLS presents the following distribution in its Second Submission.

**Table 10-1: PLS proposed distribution**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>
Books: Schools	45.5%	45.5%	9.0%
Books: FE	45.5%	45.5%	9.0%
Books: HE	49.0%	49.0%	2.0%
Books: Business and public sector	50.0%	50.0%	0.0%
Magazines	92.0%	2.0%	6.0%
Journals	96.0%	4.0%	0.0%

*Source: PLS Second Submission, paragraph 7.3.*

- 10.3 The PLS calculations are based solely on an analysis of rights ownership and an assessment of the relative value of text and images. In the case of rights ownership, PLS relies in its submissions on the results of the FTI Sample. In the case of relative value, PLS bases its assessment on the relative page coverage of text and images.

## ALCS view

- 10.4 ALCS proposes an equal split of licence fees between publishers and authors after any distribution to VAs.<sup>238</sup> ALCS states:<sup>239</sup>

*“Clearly both authors and publishers should be rewarded when their works are used but, given the specific nature of ‘secondary use’ under collective licensing schemes, it is hard to justify the application of different revenue splits as between different types of publication featuring literary works.”*

- 10.5 ALCS also refers to international evidence in support of its proposal, noting that the IFRRO Distributions Paper found that the most common split of the revenues between authors and publishers is 50% to each, applied by 65% of RROs surveyed.<sup>240</sup>

## VAs view

### DACS view

- 10.6 DACS proposes a ‘mixed methodology approach’ to assessing the distribution and presents a number of ways to determine the share of licence fees due to VAs. However, its overall conclusion is based on an analysis of information collected in the FTI Sample. Table 10-2 below summarises the proposed distribution to VAs.

**Table 10-2: DACS proposed distribution – primary valuation method**

<b>Sector</b>	<b>Publication</b>	<b>% due to VAs</b>
Business and public sector	Book	9%
Business and public sector	Serial	25%
MMO	Serial	25%
HE	Book	11%
HE	Serial	9%
FE	Book	34%
FE	Serial	58%
Schools	Book	25%
<b>Weighted average (according to items analysed)</b>		<b>23%</b>

Source: DACS First Submission, page 3.

<sup>238</sup> ALCS First Submission, page 23.

<sup>239</sup> ALCS First Submission, page 21.

<sup>240</sup> ALCS First Submission, page 19.

- 10.7 The figures in Table 10-2 above are based on the proportion of works according to the FTI Sample, before any adjustment from the results of the Harbottle Review, that contain at least one image to which the publisher does not have the relevant rights. That is, if the work includes at least one image to which the publisher does not have the rights, the VAs receive the distribution in respect of that work.
- 10.8 While the figures above represent DACS' primary suggestion for the distribution, DACS also sets out a number of calculations prepared on alternative bases to support an increase in the distribution to VAs from the current 8%. I summarise the results of these calculations in Table 10-3 below. These calculations are as follows:
- (1) **Primary valuation method:** This approach is based on rights ownership data collected in the FTI Sample, as explained above;
  - (2) **Synergy value method:** This approach considers separately the 'synergy value' and the 'content value' of the licence, sharing the synergy value equally between the Parties;
  - (3) **Availability value method:** The lower end of the range in Table 10-3 is based on the proportion of pages in the FTI Sample containing images. The result is a simple average across sectors and formats. One way to understand this calculation is to view it as making two implicit assumptions: (1) that VAs should be compensated in respect of all images regardless of the party that has the relevant rights; and (2) images are more valuable than text to the extent that the CLA licence income relating to the entire page containing an image should be payable to VAs. To arrive at the higher end of the range in Table 10-3, DACS applies a further uplift factor of 2.2. The second of the implicit assumptions above therefore becomes that images are more valuable than text to the extent that the income relating to 2.2 pages should be payable to VAs in respect of each page containing an image;
  - (4) **Perceived value method:** This approach starts by assuming that 60% of value relates to images (which DACS supports by referring to the Schoolzone research). DACS multiplies this by the result of the primary valuation method (23%) to arrive at the lower end of the range in Table 10-3. The higher end is arrived at by multiplying by 2.2;<sup>241</sup> and

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<sup>241</sup> I do not consider that this is a meaningful calculation because the primary valuation method already takes account of the relative incidence of images and text.

- (5) **Rights ownership value method:** This calculation is based on the proportion of pages in the FTI Sample containing images where the publisher does not claim to have the relevant rights. DACS multiplies this by 151% (because it considers that images are more valuable than text) to arrive at the lower end of the range in Table 10-3. To arrive at the higher end of the range, DACS further multiplies by 2.2 to reflect its view that VAs have the relevant rights in more cases than the FTI Sample suggests.

**Table 10-3: DACS' distribution calculations**

	<b>% due to VAs</b>
Primary method	23%
Synergy value method	Over 30%
Availability value method	11% - 24%
Perceived value method	14% - 30%
Rights ownership value method	19% - 43%

*Sources: DACS First Submission, pages 2-3.*

#### **BAPLA and ACS view**

- 10.9 BAPLA and ACS do not calculate their own distribution of licence fee income but support the recommendation provided by DACS of the proportion due to VAs.<sup>242</sup>

#### **My determination**

- 10.10 My determination below applies to all income within the scope of my determination that is:
- (1) invoiced for by CLA on or after 1 January 2016;
  - (2) collected by CLA from all sources, whether from licensees or under bilateral agreements, on or after 1 January 2016; and
  - (3) invoiced for or collected by NLA on or after 1 January 2016.

<sup>242</sup> BAPLA and ACS First Submissions, page 15.

***Income from UK licensees***

- 10.11 I do not adopt any of the calculations put forward by PLS or DACS for the following reasons:
- (1) when assessing rights ownership, I consider that the results of the FTI Sample should be adjusted to take account of the conclusions of Mr Harbottle. This reduces the amount of the distribution due to publishers and increases the amount due to authors and VAs;
  - (2) when assessing the relative value of text and images, I do not consider that page coverage provides a good indicator of value in each sector, and I consider that the Schoolzone research overstates the value of images as a result of considering copying outside of the CLA licence;
  - (3) some of the DACS calculations, including its primary method, do not give sufficient credit to the contributions of authors to copied content;
  - (4) I do not consider that the relevant synergy value is as great as DACS calculates; and
  - (5) I do not consider that the uplift of 2.2 adopted by DACS to arrive at the upper end of its availability value, perceived value and rights ownership value calculations is appropriate.<sup>243</sup> My adjustment is based on the Harbottle Review.
- 10.12 I set out in Table 10-4 below my calculation of the proportion of the distribution that would be allocated to VAs based upon my conclusions in Section 6 in respect of rights ownership and in Section 8 as regards the relative value of text and images. I set out a similar calculation in respect of authors in Table 10-5, except that in the case of books I allocate evenly between publishers and authors all remaining revenue after the distribution to VAs.
- 10.13 The distribution to publishers can be calculated as a balancing amount, as shown in Table 10-6.

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<sup>243</sup> See paragraphs 6.31 to 6.33.

**Table 10-4: Proportion of licence fees to distribute to VAs based on the FTI Sample (accepting Disputed Assumptions)**

	Proportion of value ascribed to images	Proportion of copied images where creators have relevant rights	Proportion of distribution ascribed to VAs
	A	B	A x B
Books: Schools	25.0%	57.4%	14.4%
Books: FE	25.0%	70.8%	14.2%
Books: HE	5.0%	69.2%	3.5%
Books: Business and public sector	2.0%	41.9%	0.8%
Magazines	20.0%	36.8%	7.4%
Journals	5.0%	15.4%	0.8%

Sources: Table 6-4; Table 8-2.

**Table 10-5: Proportion of licence fees to distribute to authors based on the FTI Sample (accepting Disputed Assumptions)**

	Proportion of value ascribed to text	Proportion of copied text where authors have relevant rights	Proportion of distribution ascribed to authors
	A	B	A x B
Books: Schools			42.8%
Books: FE			42.9%
Books: HE			48.3%
Books: Business and public sector			49.6%
	A	B	A x B
Magazines	80.0%	12.8%	10.2%
Journals	95.0%	24.1%	22.9%

Sources: Table 6-3; Table 8-2; Table 10-4.

**Table 10-6: Distribution based on the FTI Sample (accepting Disputed Assumptions)**

	<b>Publishers 1 – A – B</b>	<b>Authors A</b>	<b>VAs B</b>	<b>Sector weighting</b>
Books: Schools	42.8%	42.8%	14.4%	29%
Books: FE	42.9%	42.9%	14.2%	10%
Books: HE	48.3%	48.3%	3.5%	19%
Books: Business and public sector	49.6%	49.6%	0.8%	7%
Magazines	82.4%	10.2%	7.4%	17%
Journals	76.3%	22.9%	0.8%	19%
<b>Weighted average</b>	<b>57.4%</b>	<b>35.0%</b>	<b>7.6%</b>	<b>N/A</b>

Sources: Table 10-4; Table 10-5.

- 10.14 The final line of Table 10-6 above is for illustrative purposes only based on the amounts distributed by CLA in respect of each sector in respect of the year to March 2015. The weighted average may vary if the balance of the distribution changes.
- 10.15 In calculating the sector weightings in respect of the year to March 2015 and hence the overall split between publishers, authors and VAs, I have, on the basis of the information provided to me, assumed that:
- (1) serials copied in schools and FE are magazines, rather than journals;
  - (2) serials copied in HE are journals, rather than magazines;
  - (3) of those serials copied by the NHS, 11% are magazines and 89% journals;<sup>244</sup>
  - (4) of those serials copied in the public sector other than by the NHS, half are magazines and half journals; and
  - (5) serials copied under document delivery are journals and serials copied through MMOs are magazines.
- 10.16 I have considered the effect of varying the assumptions I made in arriving at the percentages in Table 10-6. I show this analysis in Table 10-7 and provide further detail in Appendix 10. These sensitivities are illustrative and not all equally relevant to my determination.

<sup>244</sup> This is based upon behavioural survey data provided by CLA.



**Table 10-7: Alternative distributions assuming relative importance of income streams as in the year to 31 March 2015**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>
Calculation in Table 10-6	57.4%	35.0%	7.6%
<b>Revisions to assumptions:</b>			
1. Do not accept the Disputed Assumptions	53.5%	37.0%	9.5%
2. Rights ownership in text based on ALCS survey	52.1%	40.3%	7.6%
3. Relative value of text and images in schools and FE books: 50%:50%	55.4%	32.9%	11.7%
4. Relative value of text and images in school and FE books based on page coverage	58.7%	36.3%	5.0%
5. Relative value of text and images in magazines based on page coverage	56.9%	34.7%	8.4%
6. Relative value of text and images in journals based on page coverage	57.4%	35.1%	7.5%
7. Relative value of text and images in HE books based on page coverage	57.5%	35.1%	7.3%
8. Uplift for text: High*	57.0%	35.4%	7.6%
9. Uplift for text: Low*	57.8%	34.6%	7.6%
10. Uplift for text: None*	62.1%	30.3%	7.6%
11. Uplift for images: High*	57.1%	34.7%	8.2%
12. Uplift for images: Low*	57.8%	35.3%	7.0%
13. Uplift for images: None*	59.1%	36.3%	4.6%

Notes: \* In these lines I vary my adjustment in respect of rights ownership using alternative interpretations of the Harbottle Review, depending upon whether I take the midpoint (as in my base case), or the high or low ends of the ranges that I calculate, all accepting the Disputed Assumptions.

Source: Appendix 7.

10.17 Given its importance, I set out in Table 10-8 below the first of these sensitivities.

**Table 10-8: Sensitivity 1 (Do not accept Disputed Assumptions)**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>	<b>Sector weighting</b>
Books: Schools	41.5%	41.5%	16.9%	29%
Books: FE	42.2%	42.2%	15.6%	10%
Books: HE	48.1%	48.1%	3.8%	19%
Books: Business and public sector	49.4%	49.4%	1.1%	7%
Magazines	62.3%	24.7%	13.0%	17%
Journals	76.3%	22.9%	0.8%	19%
<b>Weighted average</b>	<b>53.5%</b>	<b>37.0%</b>	<b>9.5%</b>	N/A

*Note: Percentages in this table have been rounded and so may not add to 100% across rows. (The allocation in my final determination sums to 100% exactly.)*

*Source: Appendix 10.*

- 10.18 Relying on the FTI Sample may be overly generous to publishers if the claims relying on the three Disputed Assumptions are all accepted. I have therefore adopted a determination between the base case above and the first sensitivity calculation. I have calculated this as an average of the distributions in Table 10-6 and Table 10-8, rounding the results for convenience.
- 10.19 Table 10-9 below shows my determination in respect of income from UK licensees.

**Table 10-9: My determination in respect of the division of revenues from UK licensees**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>
Books: Schools	42.0%	42.0%	16.0%
Books: FE	42.5%	42.5%	15.0%
Books: HE	48.0%	48.0%	4.0%
Books: Business and public sector	49.5%	49.5%	1.0%
Magazines	72.5%	17.5%	10.0%
Journals	76.0%	23.0%	1.0%

*Sources: Table 10-6; Table 10-8.*

- 10.20 To the extent that CLA assesses that any income relates to websites:
- (1) where these websites are online or digital versions of specific magazine, journal or book titles (such as a 'soft copy' or an 'e-book'), the distribution will follow the allocation for the relevant format;
  - (2) where websites do not relate to specific magazine, journal or book titles, allocation will follow the allocation for books; and

- (3) in the case of overseas income relating to websites, if these websites correspond to specific magazine, journal or book titles the revenue will be treated as overseas income relating to the relevant format, otherwise as income from the copying of books (see further below).

10.21 If the split of CLA's income were to remain in line with that earned in the year to 31 March 2015, then the overall distribution in respect of CLA income within the scope of this determination would be approximately 55.3% (publishers) : 35.9% (authors) : 8.7% (VAs).

***Income from overseas RROs***

10.22 Some overseas RROs provide title-specific data relating to the income remitted to CLA. That is, some or all of the income from certain RROs is allocated to individual works. Some overseas RROs also provide sector data but this is not consistent over time or across countries.

10.23 CLA should use title-specific data provided by overseas RROs to determine, where possible, the amount of the income that relates to each of books, magazines and journals. There will be a residual amount received for which title-specific information is not available and hence where it is not possible to determine the format of the works copied.

10.24 Subject to the paragraph below, I propose that CLA's overseas income for these categories be distributed between publishers, authors and VAs as follows:

- (1) where overseas income is known to relate to books, using the same overall ratio as UK licence income relating to the copying of books in the financial year immediately prior to that in which the overseas income is distributed by CLA to rightsholders;
- (2) where overseas income is known to relate to magazines, using the same ratio as UK licence income relating to the copying of magazines;
- (3) where overseas income is known to relate to journals, using the same ratio as UK licence income relating to the copying of journals; and
- (4) where it is not possible to determine the format of work copied, using the same ratio as UK licence income across all formats in the financial year immediately prior to that in which the overseas income is distributed by CLA to rightsholders.

- 10.25 The exception to this is where income relates to a sub-section, but not all classes of rightsholders. In this case the distribution should be shared only between the parties representing this subsection of rightsholders and in the same proportions.<sup>245</sup>

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<sup>245</sup> That is, rightsholders to whom the income does not relate should not participate in the distribution. The ratio between the amounts received by those groups that do participate, should be as set out in this determination, scaled as necessary to ensure that all distributions add to 100%.

## 11. My determination in respect of future reviews

### Introduction

- 11.1 My brief requires me to determine an appropriate distribution together with “a recommended mechanism by which this division of revenue can be reviewed (and where it proves necessary revised) on a periodic basis by reference to relevant data collected from time to time”.<sup>246</sup>
- 11.2 In this section, I summarise the Parties’ perspectives and then set out my recommendation in respect of future reviews.

### PLS view

- 11.3 PLS comments as follows on future reviews of the distribution:<sup>247</sup>

*“The process for arriving at the valuation has been much more time-consuming than we had anticipated, and, in particular, has involved an inordinate amount of senior management time for all the organisations involved.*

*We believe that, in principle, the valuation exercise should be repeated when there is a real reason to expect that the findings would be different from the findings made this time.*

*The likelihood of rapid change is greater in some sectors than in others, and we can see no good reason to repeat a single, full-scale valuation in future, covering all sectors and publication types at the same time.*

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<sup>246</sup> My briefing note, page 9.

<sup>247</sup> PLS First Submission, Section 12.

*However, unless there is some element of up-front commitment, any future decision to enter into a review process will necessarily involve building a consensus between the rightholder groups and agreeing the appropriate time to do so. That may not be easy if one of the rightholder sectors believes that a review is not likely to be in their best financial interests. We therefore propose that all parties should agree now to be bound to participate in future review processes.*

*There should be a commitment, as part of this determination, that all sectors will be reviewed (although not necessarily revalued) within a maximum period of 10 years, but that a rolling programme should be introduced, starting in 3 - 5 years. Our preliminary view is that the greatest change is likely to occur over that time with Magazines and websites and so these should be the first sectors to be reviewed.*

*We propose one alteration to the process for future review: all items to be included in the evaluation should be clearly identified and available. It would also be helpful if the timing of the process did not clash with points of particular resource stress for publishers.”*

11.4 In respect of websites and magazines, PLS states:<sup>248</sup>

*“During the valuation process, we have collectively spent little time in considering or discussing distributions from “websites”; to date, ALCS and PLS have agreed to distribute revenues allocated to websites (after deduction of 8% to DACS) in the same proportions as other revenue from the relevant licence sector. We recommend that broadly this same arrangement should remain in place, subject to a review in the not-too-distant future as website revenues become more significant (see Section 12).”*

11.5 After providing the views above, PLS suggested an amended approach which brought forward the review in respect of journals to be performed in 2016, followed by a review of magazines and online content in 2019.<sup>249</sup>

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<sup>248</sup> PLS First Submission, paragraph 4.5.

<sup>249</sup> PLS comments on my draft determination, Section 6.

## ALCS view

### 11.6 ALCS states:<sup>250</sup>

*“The approach to allocations we are suggesting - split by licence and then split by data (where available) between books and serials is dynamic as it will respond to the data inherent in CLA sales figures and surveys. The further splits required - between publisher and creator and between literary and artistic works can only be addressed in a process like the one we are going through, given all the factors involved.*

*More specifically, the reduction in the amount of journals covered by collective licences in future, as a result of more publications becoming open access, may necessitate adjustment to the weighting between books and serials and, within serials, between journals and magazines.”*

### 11.7 ALCS subsequently commented on PLS’ revised proposal suggesting that I should “split the difference” between the proposal by PLS and the timetable set out in the draft of this determination, so that the first review of magazines and journals would be in 2020.

## VAs view

### 11.8 BAPLA states:<sup>251</sup>

*“We would suggest that if a valuation of this kind were to result [an allocation of 23% to VAs], that it subsist for five years, with a further review at the end of another five-year period. We would suggest that during the first period, the rightsholders require CLA to seek more detailed information about copying activities and trends, in order to see if there is any merit in making different apportionments according to licensing sector and publication types.*

*If an allocation for visual creator organisations is less favourable, we would wish to see a shorter term, because there appears to be little compelling evidence presented to date to support such a decision. We would also require CLA to work with the parties to develop sample/survey methodologies which would give greater depth and granularity.*

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<sup>250</sup> ALCS First Submission, page 26.

<sup>251</sup> BAPLA and ACS First Submission, page 16.

*Regarding the scope of a review, we believe that this should be decided collectively by the steering group, prior to commencement of the process. If there are any areas (e.g. text in books) where there is agreement between the parties that existing allocations are fair, then it is appropriate for the steering group as a whole, rather than individual parties, to remove those from the process."*

11.9 After considering the views of PLS, BAPLA and ACS, DACS commented:<sup>252</sup>

*"Whilst having considerable sympathy with the BAPLA/ACS position, DACS is probably more closely aligned to PLS [before the PLS suggestion to prioritise the review of journals] and considers a review within 10 years to be reasonable with a rolling program commencing in 3 years."*

11.10 I therefore understand that DACS would support a rolling review, starting in three years' time, such that the entire review is revisited within ten years.

11.11 Regarding online content, the VA groups state:

*"Certain websites are licensed now. We should anticipate further developments of this kind. It would seem strange to us if no account were to be taken of these important behavioural trends, and associated changes to licences to incorporate utilities that licensees value."*<sup>253</sup>

*"DACS accepts that many of the visual images on the internet are not licensed through the CLA but as the world becomes more digital it would be useful if the Arbiter's conclusions anticipated such an eventuality."*<sup>254</sup>

11.12 The VA groups disagreed with the revised suggestion from PLS regarding the timetable for the review process but BAPLA and ACS state that they support a change in the order of review so that journals would be the first area reviewed.

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<sup>252</sup> DACS Second Submission, page 26.

<sup>253</sup> BAPLA and ACS Second Submission, page 4.

<sup>254</sup> DACS First Submission, paragraph 2.1.



## My determination

- 11.13 I cannot anticipate developments in the way in which content is licensed via CLA (or NLA, as appropriate) or the applicable regulatory framework. Therefore, I recommend that the relevant issues are considered at regular intervals rather than try to anticipate events or provide a formula to update the distribution. However, I highlight three areas where there is subjectivity in this determination as a result of limited information available to me. A future review could collect further information relating to:
- (1) rights ownership;
  - (2) the way in which magazines are copied, including the relative importance of MMO and other content, which affects the relevance of low click-through rates on MMO content; and
  - (3) the relative value of text and images copied under the CLA licence.
- 11.14 I consider that reviews should not be performed unless there is a realistic prospect that underlying factors may have changed or material information becomes available to reassess rights ownership, usage and relative value.
- 11.15 It is not possible to say in advance exactly when this will occur, but if the Parties agree at any time that it has happened, then they should be free to review the distribution scheme sooner than I suggest below. Equally, if there is consensus that matters have not materially changed over the recommended timescale below, the Parties should be free to agree to postpone the review. The recommendations below apply where no consensus is reached.
- 11.16 I do not consider it necessary to review the entire determination at a single time. I propose a review in respect of journals, then magazines, and then books at three yearly intervals:
- (1) I recommend that before 31 December 2018, the Parties agree to a timeline for a review of the process by which revenues from the copying of **journals** are identified and distributed. This review should be completed, at the latest, by 31 December 2019 and revisions should be applied to NLA distributions relating to 1 January 2020 onwards and CLA distributions relating to 1 April 2020 onwards (being the starts of their respective financial years). This review should include the copying of journals via websites;

- (2) I recommend that before 31 December 2021, the Parties agree to a timeline for a review of the process by which revenues from the copying of **magazines** are identified and distributed. This review should be completed, at the latest, by 31 December 2022 and revisions should be applied to NLA distributions relating to 1 January 2023 onwards and CLA distributions relating to 1 April 2020 onwards. This review should include the copying of magazines via websites; and
- (3) I recommend that before 31 December 2024, the Parties agree to a timeline for a review of the process by which revenues from the copying of **books** are identified and distributed. This review should be completed, at the latest, by 31 December 2025 and revisions should be applied to NLA distributions relating to 1 January 2026 onwards and CLA distributions relating to 1 April 2020 onwards. This review should include the copying of books via websites. It should revisit the split of income from the copying of books between publishers and authors to the extent that PLS and ALCS do not agree to extend the agreement they currently have in place.

11.17 I recommend this order of priority given that:

- (1) fewer journal articles were included in the FTI Sample than magazines or books leading to the greatest uncertainty in respect of rights ownership in this area; and
- (2) the Parties generally agree that online copying is the area in which the copying sector is changing most rapidly and a view was expressed that this is particularly relevant to the way in which magazines are copied.

11.18 I recommend that this cycle of reviews of journals, magazines and books be repeated so that part of the determination is reviewed every three years, following the times of year above.

11.19 I have selected the review periods above because they result in a complete review occurring approximately once every ten years. I do not consider that it is proportionate to revisit all aspects of the determination more frequently, given the cost and time commitments associated with a review.

## Appendix 1 Glossary

CFC	The Centre Français d'exploitation du droit de Copie.
ACS	The Artists' Collecting Society.
ALCS	The Authors' Licensing and Collecting Society Limited.
Artistic work	As defined in CDPA, Part 1, Chapter 1, Section 4: <i>"artistic work' means—</i> <i>(a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality,</i> <i>(b) a work of architecture being a building or a model for a building, or</i> <i>(c) a work of artistic craftsmanship.</i> ... <i>'graphic work' includes—</i> <i>(a) any painting, drawing, diagram, map, chart or plan, and</i> <i>(b) any engraving, etching, lithograph, woodcut or similar work;</i> <i>'photograph' means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film;"</i>
Art of Copying Report	2006 IFRRO report 'The Art of Copying'.
BAPLA	The British Association of Picture Libraries and Agencies.
Bipartite Agreement	Bilateral agreement between ALCS and PLS relating to the distribution of CLA income between authors and publishers.
BPC	British Photographic Council.

CA	The Copyright Agency.
CDPA	Copyright, Designs and Patents Act 1988.
CLA	Copyright Licensing Agency Limited.
CLARCS	Copyright Licensing Agency Rapid Clearance Service.
CMO	Collective management organisation.
DACS	The Design and Artists Copyright Society.
DACS, BAPLA and ACS Research	DACS, BAPLA and ACS Research into the value that overseas RROs attributed to visual material.
Directive	Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.
Disputed Assumptions	Assumptions made by Mr Harbottle in respect of oral agreements, promotional material and previous editions.
FCW	Frequently copied works.
FE	Further Education.
First Submissions	The submissions dated 9 October 2015 of the organisations represented on the Steering Group.
FTI Sample	A survey of 242 publishers relating to rights ownership and subsequent legal review. (Information on the incidence of images in copied works was also collected through this process.)
Mr Harbottle	Gwilym Harbottle of Hogarth Chambers, instructed by a representative of the Steering Group.
Harbottle Review	Mr Harbottle's review of evidence provided to me by publishers, the findings of which were set out in a report dated 9 November 2016 and updated on 11 November 2015, and further information provided in a separate document of the same date.
HE	Higher Education.
Howe Opinion	The opinion dated 27 September 2015 of Martin Howe QC, instructed by ALCS, on the rights of non-staff authors.

ICLA	The Irish Copyright Licensing Agency.
IFRRO	International Federation of Reproduction Rights Organisations.
IFRRO Distributions Paper	2011 IFRRO paper on revenue distributions between creators and publishers.
Initial Papers	Papers provided by ACS, ALCS, BAPLA and PLS on 2 December 2014, and DACS on 16 March 2015 setting out their initial views on the issues relevant to my determination.
Literary work	As defined in CDPA, Part 1, Chapter 1, Section 3: <i>“Literary work’ means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes—</i> <i>(a) a table or compilation (other than a database);</i> <i>(b) a computer program;</i> <i>(c) preparatory design material for a computer program; and</i> <i>(d) a database.”</i>
Loughborough Study	The report commissioned by ALCS and dated March 2014 on the rights positions of non-staff magazine and newspaper journalists.
MMO	Media monitoring organisation.
NLA	NLA Media Access Limited.
NLI	Newspaper Licensing Ireland Ltd.
NUJ	National Union of Journalists.
ONS	Office for National Statistics.
Outsell Report	The report commissioned by PLS and dated December 2012 on the contracting practices of publishers.
The Parties	ACS, ALCS, BAPLA, DACS and PLS.
PLS	Publishers Licensing Society Limited.

PwC Report	PwC report commissioned in 2011 by CLA, PLS, ALCS and DACS entitled “An economic analysis of copyright, secondary copyright and collective licensing”.
Relevant rights	The right to authorise end-users to make reprographic reproductions of a work. Publishers will acquire these rights via an assignment of copyright, licence granting relevant rights or under a contract of employment.
Ribbans Report	The report dated October 2015 of Elisabeth Ribbans, instructed by PLS, on the importance of images in the media monitoring market.
RRO	Reproduction rights organisations.
SEAM	Société des Editeurs et Auteurs de Musique.
Second Submissions	The submissions dated 23 October 2015 of the organisations represented on the Steering Group.
Steering Group	A group of representatives of ACS, ALCS, BAPLA, DACS and PLS.
UK	United Kingdom.
VA	Visual artist.
VG BK	Verwertungsgesellschaft Bild-Kunst.
VG WORT	Verwertungsgesellschaft WORT.

## Appendix 2

### Chronology of this determination

A2.1 I summarise the principal steps within the overall process in the table below.

<b>Date</b>	<b>Event</b>
27 Nov 2014	The Parties agreed the brief for the determination
1/2 Dec 2014	ACS, ALCS, PLS and BAPLA provided Initial Papers
11 Dec 2014	I attended an initial meeting with members of the Steering Group other than DACS. We discussed the Initial Papers, areas of agreement, research already performed and further research to conduct
19 Dec 2014	Date of my letter of engagement
23 Dec 2014	I met with representatives of NLA. Two members of the Steering Group also attended
12 Jan 2015	I met with members of the Steering Group to discuss research previously commissioned by ALCS and PLS and further research to conduct
22 Jan 2015	I met with representatives of CLA and members of the Steering Group to discuss data that CLA could provide and the nature of content copied in different sectors
10 Feb 2015	I provided the Steering Group with a status update on research
20 Feb 2015	I updated the Steering Group on the status of the FTI Sample
16 Mar 2015	DACS joined the process and provided an Initial Paper
23 Mar 2015	Members of my team met with a representative of Precise to discuss data that Precise could provide
15 Apr 2015	Members of my team spoke with a representative of Precise by phone to discuss data that Precise had provided
22 Apr 2015	I updated the Steering Group on the status of the FTI Sample
5 May 2015	I met with members of Steering Group to discuss the FTI Sample, the selection of frequently copied works and the use of focus groups as part of the process
6 May 2015	I updated the Steering Group on the status of the FTI Sample and other research
18 May 2015	A member of my team provided the Steering Group with details of the FTI Sample and sought feedback on the definition of "relevant rights" which several members of the Steering Group provided

<b>Date</b>	<b>Event</b>
22 May 2015	I sent the Steering Group a proposal for research in the education sector produced by Schoolzone and requesting comments on research required in other sectors
28 May 2015	I met with members of the Steering Group to discuss the FTI Sample, the legal review, focus group research and data collection in respect of business and public sector licensees
10 Jun 2015	A member of my team sent the Steering Group a summary of discussions with CLA about its negotiations with budget holders
19 Jun 2015	I updated the Steering Group on the responses received to the FTI Sample
30 Jun 2015	I met with members of the Steering Group to discuss the FTI Sample, including the process for the verification of responses from publishers
Jul to Sep 2015	The Steering Group asked me to contact a number of law firms and barristers chambers in respect of the legal review. The Steering Group identified a list of further candidates to contact on 21 Aug 2015. I provided further information on 26 Aug 2015 and the Parties identified their preferred candidates. I selected Mr Harbottle based on the views provided
8 Jul 2015	I wrote to the Steering Group regarding the number of responses within the FTI Sample that should be subject to review, inviting specific counterproposals to my suggestions
15 Jul 2015	I wrote again to the Steering Group regarding the legal review and required sample size, again inviting comments. Members of my team met with PLS representatives to discuss the logistics of data collection for the FTI Sample
17 Jul 2015	A member of my team sent the Steering Group the proposed list of items within the FTI Sample to be reviewed
21 Jul 2015	I met with members of the Steering Group to discuss the Schoolzone research, the legal review, confidentiality arrangements and other issues
28 Jul 2015	A member of my team sent the Steering Group the final versions of reports from Schoolzone
	Members of my team met with PLS representatives to discuss the logistics of data collection for the FTI Sample



<b>Date</b>	<b>Event</b>
3 Aug 2015	A member of my team sent the Steering Group the latest results of the FTI Sample and provided non-disclosure agreements required to share certain information provided by publishers. A series of such agreements were subsequently entered into between FTI and certain publishers and between me and the Steering Group
19 Aug 2015	A member of my team provided the Steering Group with analysis requested in respect of the responses to the FTI Sample over time. Further such analysis was requested and provided on 2 Oct 2015
9 Sep 2015	I met with members of the Steering Group to discuss the FTI Sample, the legal review and my requirements for the Parties' submissions
14 Sep 2015	A member of my team sent the Steering Group the latest results of the FTI Sample
22 Sep 2015	A member of my team sent the Steering Group the latest results of the FTI Sample
9 Oct 2015	The Parties provided their First Submissions
26 Oct 2016	The Parties provided their Second Submissions
9 Nov 2015	Mr Harbottle provided a first draft of his review
10 Nov 2015	I asked the Parties follow-up questions about their submissions
11 Nov 2015	Mr Harbottle updated his review and responded to follow-up questions from me and from one member of the Steering Group
13 Nov 2015	The Parties commented on the implications of the Harbottle Review
16 Nov 2015	ALCS and DACS responded to my follow-up questions of 10 Nov 2015
18 Nov 2015	I provided ALCS with further follow-up questions about its submissions and ALCS responded the same day
20 Nov 2015	Mr Harbottle produced a second report in which he considered the comments of the Parties on his review
23 Nov 2015	I sent CLA and the Steering Group a draft of my determination
1 Dec 2015	I met with members of the Steering Group to discuss my draft determination

### Appendix 3

#### Exhibits to this report

A3.1 I have provided the following exhibits to the Steering Group:

<b>Exhibit</b>	<b>Document</b>	<b>Date</b>
1	Outsell Report	14 Dec 2012
2	Loughborough Study	Mar 2014
3	My briefing note	27 Nov 2014
4	ACS Initial Paper	1 Dec 2014
5	ALCS Initial Paper	1 Dec 2014
6	BAPLA Initial Paper	1 Dec 2014
7	DACS Initial Paper	2 Dec 2014
8	PLS Initial Paper	2 Dec 2014
9	Schoolzone report on copying in schools	22 Jul 2015
10	Schoolzone report on copying in HE	28 Jul 2015
11	Howe Opinion	27 Sep 2015
12	BAPLA and ACS First Submission	Oct 2015
13	Ribbans Report	Oct 2015
14	ALCS First Submission	9 Oct 2015
15	DACS First Submission	9 Oct 2015
16	PLS First Submission	9 Oct 2015
17	BAPLA and ACS Second Submission	26 Oct 2015
18	ALCS Second Submission	26 Oct 2015
19	DACS Second Submission	26 Oct 2015
20	PLS Second Submission	26 Oct 2015
21	Harbottle Review	11 Nov 2015
22	Further information provided by Mr Harbottle	11 Nov 2015
23	BAPLA and ACS comments on the Harbottle Review	13 Nov 2015
24	DACS comments on the Harbottle Review	13 Nov 2015
25	PLS comments on the Harbottle Review	13 Nov 2015
26	ALCS responses to my follow-up questions	16 Nov 2015
27	DACS responses to my follow-up questions	16 Nov 2015
28	ALCS comments on the Harbottle Review	18 Nov 2015
29	Follow up provided by Mr Harbottle	23 Nov 2015
30	BAPLA and ACS comments on my draft determination	11 Dec 2015
31	ALCS comments on my draft determination	11 Dec 2015

<b>Exhibit</b>	<b>Document</b>	<b>Date</b>
32	DACS comments on my draft determination	11 Dec 2015
33	PLS comments on my draft determination	11 Dec 2015

## **Appendix 4**

### **The Parties' comments on my draft determination**

#### **Introduction**

- A4.1 In this appendix I summarise and respond to the main points raised by the Parties when commenting on my draft determination.

#### **ALCS**

##### ***ALCS survey of non-staff authors***

- A4.2 ALCS requests that I delete from my determination a paragraph in Section 2 relating to my calculations based on ALCS's survey of non-staff authors.<sup>255</sup> Rather than deleting the paragraph I have revised it. This does not affect my conclusions.

##### ***Adjustments to the FTI Sample based on the Harbottle Review***

- A4.3 ALCS challenges the consistency of my treatment of items within the FTI Sample and the Harbottle Review where I did not receive a response from a publisher.<sup>256</sup> In the case of my analysis of the FTI Sample (before adjustment using the Harbottle Review) I consider only those items in respect of which I received a response; I made no adverse inference where a publisher did not respond.
- A4.4 In the case of the Harbottle Review, some publishers failed to provide the support requested in respect of their original responses within the time available. All publishers invited to participate in this review were asked to provide support for a response that they had already provided as part of the FTI Sample. In this case it may be appropriate to draw an adverse conclusion from the lack of a response. This is because the publisher's original response implied that it has sufficient information to identify the relevant rights position. A delay in providing support might, in some cases, be because the support could not be located because the earlier response was incorrect. I therefore consider a range of possible adjustments where at one end I draw an adverse inference and at the other I do not.

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<sup>255</sup> ALCS comments on my draft determination, page 1.

<sup>256</sup> ALCS comments on my draft determination, page 2.

- A4.5 ALCS considers that when adjusting the results of the FTI Sample for magazines using the Harbottle Review, I should adopt the adjustment at the end of the range of possible adjustments, rather than the mid-point adjustment, which is most adverse to publishers.<sup>257</sup> This is because ALCS considers the evidence provided to Mr Harbottle in respect of magazines is “*far less clear-cut*” than for journals.
- A4.6 In the majority of cases, magazine publishers stated that the copied article was written by an employee. The Steering Group agreed that in such cases no further evidence was required. The remaining accepted claims were supported by reference to oral agreements. My approach assumes that half of such claims should be rejected. I consider that this is sufficient and that it is not necessary to draw any stronger inferences against publishers.
- A4.7 In light of comments by ALCS and PLS (discussed below), rather than applying the same adjustment in respect of magazines and journals, in this final determination I apply two separate adjustments.

***Images produced by authors***

- A4.8 ALCS comments that it has carried out a survey of its members that shows that there are authors who create images without the assistance of VAs. As I explain in Section 4, many authors who contribute to the process of producing images in their publications do not produce these images alone but do so in collaboration with a VA. Responses by authors to the ALCS survey indicate that some authors overstated their contribution to this process.<sup>258</sup>
- A4.9 I have clarified Section 4 in light of the comments by ALCS. However, in the absence of information about the proportion of images that are entirely produced by authors I continue to assume that the proportion of images that are wholly produced by authors is not material.

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<sup>257</sup> ALCS comments on my draft determination, page 2.

<sup>258</sup> Paragraph 4.95.

**Relative value of text and images**

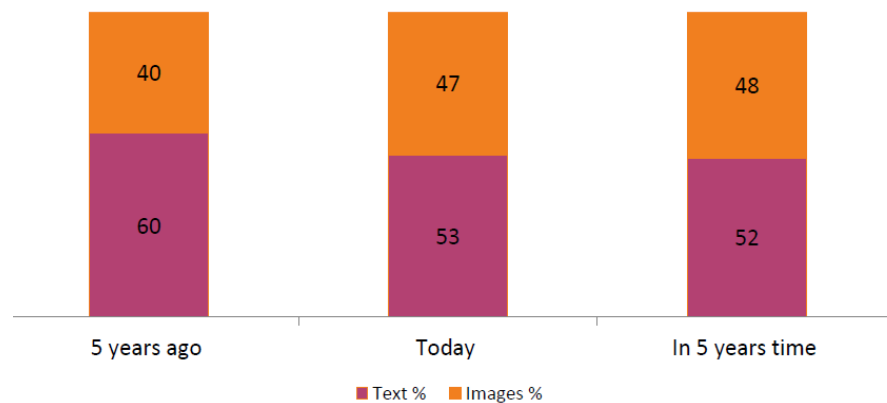
A4.10 ALCS states:<sup>259</sup>

*“In...the draft determination it is suggested that the Schoolzone report found that respondents to the schools survey “indicated that they copied approximately equal amounts of text and images”. This is inaccurate. The Schoolzone report found that the ability to copy text and images was equally valued by teachers (Schoolzone copying research for FTI Consulting – Schools Findings, page 25).”*

A4.11 I continue to consider that the Schoolzone report found that respondents to the schools survey indicated that they copy approximately equal amounts of text and images. The relevant chart is reproduced below.

**Figure A4-1: Figure reproduced from the Schoolzone report on copying in schools**

**Thinking about the balance of copies you have made between text and images over time, please adjust the following three scales. - Average**



Source: Schoolzone report on copying in schools, page 29.

A4.12 ALCS suggests that I should value images and text equally only on those pages that contain an image and that, on all other pages, the entire value resides in the text. This results in 17% of value of school content relating to images and 14% of FE content.

A4.13 I do not adopt the approach proposed by ALCS. This is because I consider that the Schoolzone research is relevant to the overall assessment of the relative value of text and images, rather than an assessment relevant only to pages including an image.

<sup>259</sup> ALCS comments on my draft determination, page 2.

### ***Income relating to websites***

- A4.14 ALCS raises a point regarding the distribution of income relating to websites. Having considered this comment and discussed it with the Steering Group, I have updated my determination in respect of income relating to websites.

### ***Income from overseas RROs***

- A4.15 ALCS suggests that overseas income be distributed in line with income from UK licensees in the same sector.<sup>260</sup> For reasons of practicality, given that sector data from overseas RROs is not consistent over time or across countries, I consider that overseas income should be distributed by reference to the format of the work (book, magazine or journal) rather than the sector (education, business, etc.).

## **BAPLA and ACS**

### ***Harbottle Review***

- A4.16 BAPLA and ACS asked me to refer explicitly to certain submissions they had made regarding assumptions used by Mr Harbottle, alongside similar arguments advanced by DACS.<sup>261</sup> I have updated this determination accordingly.

### ***Images produced by authors***

- A4.17 BAPLA and ACS sought clarification regarding images produced by authors:<sup>262</sup>

*“...the Arbiter considers the proportion of images produced wholly by text authors to be immaterial to his findings. We therefore are assuming that to the extent that any such author-produced artistic works are relevant here, these works will not affect the share awarded to VAs, and that authors who also produce artistic works will be rewarded out of the authors’ share of funds as determined by the Arbiter.”*

- A4.18 I have set an allocation between publishers, authors and VAs. Where an author is also a creator of images, I consider that the author should be able to make a claim against collecting societies licensing VA rights, rather than being barred from doing so by the fact that he is also an author.

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<sup>260</sup> ALCS comments on my draft determination, page 3.

<sup>261</sup> BAPLA and ACS comments on my draft determination, page 2.

<sup>262</sup> BAPLA and ACS comments on my draft determination, page 2.

**Income from overseas RROs**

- A4.19 BAPLA and ACS sought further clarification regarding the distribution of overseas income:<sup>263</sup>

*“We do have one practical question about the application of the proposal. Is this intended to mean that in any one CLA year (i.e. April to the following March), the international revenue allocation for that period will be determined with reference to...allocations made to each rightholder sector in the preceding year?*

*For example, is it intended that the international allocation for April 2016 to March 2017 will be fixed on the basis of the UK allocations to rightholders in the preceding CLA year, i.e. the period April 2015 to March 2016...?*

*We would appreciate clarification within the final draft of the Determination report.”*

- A4.20 Within my determination, it is correct that overseas income distributed during a given year (2016/17 for example) that relates to books, or where the format of the works copied is unknown, should be allocated based upon the distribution of UK licence fees in the preceding financial year (2015/16). In the case of magazine and journal income, I have determined a fixed allocation percentage that does not vary over time.

**Overall allocation**

- A4.21 BAPLA and ACS asked to understand how the overall distribution might vary as the relative importance of income from different sources (format and sector) changes. I have produced illustrative calculations showing how the proposed distribution would have varied had it been applied in recent years. In practice, my determination will not be applied retrospectively and so these calculations are illustrative only.
- A4.22 CLA has provided me with the necessary historical distribution data from 2012/13 to 2014/15 and forecast data for 2015/16. I have applied my proposed distribution in each year. Table A4-1 below shows the range of distributions to each of publishers, authors and VAs across the period.

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<sup>263</sup> BAPLA and ACS comments on my draft determination, page 2.



**Table A4-1: Range of distributions resulting from the application of my determination**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>
Maximum [A]	54.9%	38.6%	9.4%
Minimum [B]	52.0%	36.4%	8.7%
Variation [C] = [A]-[B]	2.9%	2.2%	0.7%

**Journals allocation**

- A4.23 BAPLA and ACS disagree with my approach is in respect of journals, stating:<sup>264</sup>
- “We remain unconvinced that the position regarding journals is satisfactory. We would not wish to relay matters by further interrogation, but we are placing a marker here to reserve our right to return to this topic later.”*
- A4.24 Given that they express no specific comments on my approach, I have not revised my determination in this regard.

**NLA income**

- A4.25 BAPLA and ACS state:<sup>265</sup>
- “It is perhaps outside the scope of the Arbiter’s review, but BAPLA and ACS would like to state for the record that we believe that NLA distributions for the VAs should be backdated to the date when NLA first started licensing this repertoire. NLA has no mandate from visual sector organisations and PLS, despite offering an indemnity, has no standing to authorise acts restricted by copyright in respect of works in which it does not control or represent rights.”*
- A4.26 This matter is outside of the scope of my determination.

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<sup>264</sup> BAPLA and ACS comments on my draft determination, page 2.

<sup>265</sup> BAPLA and ACS comments on my draft determination, page 3.

**Future reviews**

A4.27 BAPLA and ACS state:<sup>266</sup>

*“The Arbiter notes at various points lack of evidence to support claims made by BAPLA and ACS, notably in respect of the value which could be ascribed to the facility to copy 100% of an artistic work and also on the value of objective availability...We still consider these things to be relevant, and we would wish to include them in the ongoing review process. We will undertake to develop an evidence base for any claims we wish to advance in future.*

*As far as concerns the process for future reviews, we do agree with PLS’s remarks about the extent of management time taken in the current process. While we appreciate the matter has turned out to be more complex than any of us initially imagined, it may be that an appropriate and practical way to proceed with future revisions while ensuring that all stakeholders are represented is to establish a smaller executive committee from within the steering group to take the work forward, reporting back to the steering group as appropriate.”*

A4.28 To the extent that I have rejected a claim by a Party due to a lack of supporting evidence, if such evidence is provided in future, it would be appropriate to take it into account in any future review.

A4.29 If the parties would like to delegate responsibility for certain decisions within the review process, that is a matter to agree amongst themselves.

**DACS**

**Usage vs. availability**

- A4.30 ✕
- A4.31 ✕
- A4.32 ✕
- A4.33 ✕
- A4.34 ✕

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<sup>266</sup> BAPLA and ACS comments on my draft determination, page 3.

### **Synergy value**

A4.35 As I explain in Section 4, I consider the amount of any synergy value relevant to my determination to be low. This is because I consider that the synergy value relevant to a division of income between groups of authors, publishers and VAs is the increase in income earned as a result of these three groups granting combined licences rather than three separate licences.

A4.36 DACS states:<sup>267</sup>

*“...the Arbiter suggests that the counterfactual to one CLA licence would be three licences. This is incorrect. If the overall benefit of collective licensing to CLA is not shared equitably then there would be no economic incentive for creators of all kinds to participate through CLA and the appropriate counterfactual would be the situation PwC analyse. It ignores the reality of the present situation where CLA licensing is expected to continue but there is already fragmentation in the VA community...We would expect further fragmentation if CLA were to lose more ground. We estimate there would be at least 3 VA licensing bodies, 3 author licensing bodies and 3 publisher licensing bodies. More importantly, the situation would be much more complicated; it would not be as simple as, for example, a kind of CLA Wales, CLA Scotland and CLA England selling the 'same content'...across the devolved national boundaries, where we would agree the synergy value would be small, the licences would all be radically different because of their different repertoires and potential licensees would need to know which rights were held by each fragmented rightholder, which patently licensees have no way of knowing in advance of knowing what is actually copied and even then with great difficulty. Indeed, the situation might become so complex that many licensees would be disinclined to purchase all the licences, thus driving down the overall income to rightholders, and thereby driving rightholders to the PwC scenario where they decide to license directly for themselves to try to increase their secondary income. We strongly suggest that if there were not the binding force of a CLA licence, overall income to rightholders through collective licensing would diminish and this leads us to re-assert that there is a significant value in the synergy of all rightholders coming together under the CLA banner.”*

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<sup>267</sup> DACS comments on my draft determination, paragraph 5.1.

A4.37 In my view, the situation of transactions with individual rightsholders considered by PwC is not relevant to my determination. DACS suggests that in the absence of CLA there would be at least three licensing bodies in respect of each of VAs, authors and publishers and that licensees would respond to the increase in complexity to entering agreements with individual rightsholders. However, such a course of action would only increase the complexity rather than reduce it. I do not consider that an atomised model would be a viable alternative to a single collecting society or a small number of collecting societies given that the administrative costs would be unsustainable. A situation in which there are nine licensing organisations is much closer (in terms of administrative costs and economies of scale) to a situation in which there is one such organisation than transactions with individual rightsholders.

A4.38 DACS states:<sup>268</sup>

*“Paying more for synergy value: at para 4.57 the Arbitrator states that he ‘...would not expect licensees to be willing to pay materially more for the ability to license the same content through a single organisation rather than through three’. Even if our arguments as to an appropriate counterfactual are not accepted, this statement is not supported by the facts.*

*Licensees did pay more for the ability to license a repertoire including visual works as a result of the Copyright Tribunal decision. This is a concrete and robust example of synergy value. There is an argument for all of this synergy value being attributable to VAs as it was they who added that synergy value (in addition to the value of their repertoire, for which we make an adjustment) however, on balance, we propose that it would be more equitable to share the synergy value equally between VAs (the new party) and the pre-existing CLA represented rightsholders.”*

A4.39 DACS estimates that the synergy value arising from the Copyright Tribunal decision is £11.5 million. DACS calculates this amount by comparing CLA’s income in the year following the decision to that in the years before the decision, adjusted for the growth trend.<sup>269</sup>

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<sup>268</sup> DACS comments on my draft determination, paragraph 5.2.

<sup>269</sup> DACS comments on my draft determination, Annex 1.

- A4.40 The Copyright Tribunal proposed an increase in the royalty fees paid by HE institutions, from £2.75 to £4.00 per full time student.<sup>270</sup> The increase of £1.25 was intended to reflect multiple changes to the licence:
- (1) £0.70 of the increase reflected a broadening of the licence scope to include the copying of course books and other materials previously covered by the Copyright Licensing Agency Rapid Clearance Service (“**CLARCS**”).<sup>271</sup> CLARCS was a system that previously enabled the copying of course packs but which required HE institutions to request separate permissions for each course pack copied. The institution needed to provide detailed information on the packs it intended to produce. CLA would then in some cases contact the rightsholder requesting permission, before quoting a price on a pence per page basis;<sup>272</sup>
  - (2) £0.50 of the increase reflected an anticipated increase in the volume of copying due to certain materials, such as course books, being included within a blanket licence for the first time and not having to be approved through CLARCS. The value of this uplift took account of the expectation that CLA would also benefit from lower administrative costs following the change;<sup>273</sup> and
  - (3) £0.05 of the increase reflected the inclusion of separate artistic works within the licence, and the removal of uncertainty surrounding these works.<sup>274</sup>
- A4.41 The CLARCS system differed to a blanket licence and placed a high administrative burden on licensees as they had to seek individual permissions to copy materials. The willingness of licensees to pay more for the inclusion of course packs within a single licence and the removal of the administrative burden associated with CLARCS (valued at £0.50 per student, is not directly comparable to their willingness to pay for the ability to license the same content through a single organisation rather than through three. In my view, the Copyright Tribunal decision is therefore of limited relevance to the assessment of synergy value in this determination.

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<sup>270</sup> Copyright Tribunal Interim Decision of April 2002 between Universities UK and Copyright Licensing Agency Limited and Design and Artists Copyright Society Limited, paragraph 176.

<sup>271</sup> Copyright Tribunal Interim Decision of April 2002 between Universities UK and Copyright Licensing Agency Limited and Design and Artists Copyright Society Limited, paragraph 170.

<sup>272</sup> Copyright Tribunal Interim Decision of April 2002 between Universities UK and Copyright Licensing Agency Limited and Design and Artists Copyright Society Limited, paragraphs 50 to 51.

<sup>273</sup> Copyright Tribunal Interim Decision of April 2002 between Universities UK and Copyright Licensing Agency Limited and Design and Artists Copyright Society Limited, paragraph 170.

<sup>274</sup> Copyright Tribunal Interim Decision of April 2002 between Universities UK and Copyright Licensing Agency Limited and Design and Artists Copyright Society Limited, paragraph 171.

**Insurance value**

- A4.42 ✂
- A4.43 ✂
- A4.44 ✂
- A4.45 ✂
- A4.46 ✂
- A4.47 ✂
- A4.48 ✂
- A4.49 ✂
- A4.50 ✂

**Relative value of text and images**

- A4.51 DACS states:<sup>275</sup>

*“...we offered a broad range of evidence from a number of sources indicating the higher value of images over text and we strongly believe that this should not have been ignored.”*

- A4.52 I have assessed the relative value of images and text by reference to page coverage in some sectors. I have adjusted these statistics:

- (1) in the case of magazine copying based on observations regarding the way in which MMO content is used; and
- (2) in the case of school and FE books based on research by Schoolzone.

- A4.53 In the case of magazines, DACS accepts that it is appropriate to value images at a discount to their page coverage given low click-through rates for MMO content but reiterates that not all magazine copying is of MMO content.<sup>276</sup> DACS estimates that copying of physical magazines accounts for at least half of all magazine copying, then goes on to assess the valuation impact of this behaviour. In performing this calculation, DACS assumes that the allocation I proposed in my draft determination (20% of value to images and 80% to text) was appropriate for magazines copied through MMOs. However, as I explain in Section 8, my conclusion was a blended average across content copied through MMOs and physical magazines.

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<sup>275</sup> DACS comments on my draft determination, paragraph 1.2.1.

<sup>276</sup> DACS comments on my draft determination, Section 6.

- A4.54 One way to assess the relative value of images and text in magazines would be by reference to page coverage, except in the case where the article is copied via an MMO and the underlying article is not opened, in which case the value could be ascribed to text. Assuming image page coverage of 33%<sup>277</sup> and a 5% click through rate, my assessment that images account for 20% of the value of magazine copying is equivalent to an assumption that 41% of copying is of MMO content and 59% is of physical magazines.<sup>278</sup> That is, my approach implicitly assumes greater usage of physical magazines than the minimum proposed by DACS. On this basis, my assumption might be considered generous to VAs.
- A4.55 In the case of copying in schools, DACS identifies a potential reason why the amount of copying of images reported by teachers differs to the image content of items in the FTI Sample:<sup>279</sup>
- “Indeed, a number of copies will be made solely to use the image rather than the text and this might well be an explanation for this high statistic.”*
- A4.56 DACS therefore suggests that copied text may be incidental to the images being copied so that teachers underreport the amount of text copied. However, while teachers consider that they copy text and images in approximately equal amounts, approximately 66% of pages copied in schools and 92% of pages copied in HE contain no images.<sup>280</sup> Therefore, even if all text on pages containing an image is incidental copying, DACS’ hypothesis does not explain the majority of pages that include no images.
- A4.57 DACS questions why in my draft determination I applied an uplift to the value of images in books copied in schools and FE as compared to their page coverage but applied no such uplift in the case of HE copying.<sup>281</sup> Having considered the comments of all the Parties, I have updated my approach in this final determination in which I apply an effective uplift in the case of the copying of all books.<sup>282</sup>

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<sup>277</sup> Appendix 7.

<sup>278</sup>  $41\% \times 5\% \times 33\% + 59\% \times 33\% = 20\%$ .

<sup>279</sup> DACS comments on my draft determination, paragraph 7.1.

<sup>280</sup> Appendix 7.

<sup>281</sup> DACS comments on my draft determination, paragraph 7.2.

<sup>282</sup> I note that the percentages DACS presents at paragraph 7.2 of its comments relate to the relative value of images as compared to text, rather than the proportion of the distribution to VAs as suggested by DACS.

**Photographs of other works**

A4.58 DACS stated:<sup>283</sup>

*“...we pointed out that images will often have a multiplicity of rightholders (e.g. a sculptor and a photographer) and we are concerned that this appears to have been missed.”*

A4.59 As I explain in Section 6, Mr Harbottle confirmed that he was aware of the issue referred to by DACS and has considered the copyright vesting in underlying works when arriving at his conclusions.

**Harbottle Review**

A4.60 DACS states:<sup>284</sup>

*“...we offered both statistical and legal interpretation of the review which appears to have been glossed over.”*

A4.61 I consider DACS’ comments on the Harbottle Review in Section 6. I do not consider that they have been overlooked. I raised these comments with Mr Harbottle and invited him to respond to them. Having considered his responses, I adjusted my conclusions for the Disputed Assumptions.

**International comparators**

A4.62 DACS repeats its comments from its submissions that there appears to be a correlation between a low representation of VAs on a CMO governing body and a low level of distribution to VAs. It states that:<sup>285</sup>

*“DACS has, hitherto, not even been permitted membership of CLA, which accounts in large part for our low distribution percentage. We now have the expectation that our evidence, and the evidence of international CMOs with a higher level of VA representation on their governing body, will lead to a fairer and higher distribution percentage for VAs in the UK.”*

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<sup>283</sup> DACS comments on my draft determination, paragraph 1.2.2.

<sup>284</sup> DACS comments on my draft determination, paragraph 1.2.3.

<sup>285</sup> DACS comments on my draft determination, paragraph 2.2.



- A4.63 DACS then refers to two sets of data on international comparators:<sup>286</sup>
- (1) *“The IFRRO survey looked at a number of countries operating under the same requirements of The Berne Convention and the average value attributed to VAs was 15%”*; and
  - (2) *“In our DACS survey, summarised in the table on page 3, Annex 1, of the DACS Second Submission, RROs in countries operating under the same EU Directives allocated ((NE:26.3%+ DE:21%+ SW:18.9%+ NO:13.4%+ ES: 12.5%+ DK: 6.2%+ FR: 6% )/7) = 14.9% to VAs”*.
- A4.64 DACS goes on to state *that*:<sup>287</sup>
- “We could only accept this determination as being fair if it were to take greater account of our evidence...and arrive at a determination closer to the international norms of countries which, like the UK, operate under both The Berne Convention and EU Directives.”*
- A4.65 I have reviewed evidence on international comparators in Section 9. I consider the Art of Copying Report referred to by DACS, the research conducted by DACS (and BAPLA and ACS), and I have performed my own review of the distribution arrangements in five developed economies with established collective licensing regimes (Australia, Canada, France, Germany and Ireland).
- A4.66 Regarding the available evidence:
- (1) the Art of Copying Report does not provide details for the sampling approach or calculation method used in arriving at the 15% statistic, or include a full assessment of rights ownership or usage of visual material. It may include a broader range of RROs than may be relevant to CLA;
  - (2) in its research, DACS has referred to various surveys and statistics as evidence, but not provided documentation from the relevant RROs to offer further information on the nature of the data and how it has been used in the distribution process. It is unclear to what extent the distributions reflect rights ownership, usage, or other factors pertinent to my determination. However, it is evident from the ranges that DACS reports that distributions to different classes of rightsholders vary substantially from country to country; and

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<sup>286</sup> DACS comments on my draft determination, paragraph 2.3.

<sup>287</sup> DACS comments on my draft determination, paragraph 8.3.

(3) my review of international comparators has been restricted to public documents publicly in the English language. In addition, I have not audited the available information.

A4.67 My review of international comparators does not suggest that copyright licensing and revenue distribution practice is necessarily comparable across countries. In particular, I have found that the territories I have considered tend to distribute a greater proportion of revenues to publishers than suggested by the Art of Copying Report and the IFRRO Distributions Paper.

A4.68 As a result, the conclusions that I am able to draw from international comparators in relation to key areas of my determination are limited. Instead, I base my determination on available UK evidence. However, I consider that my proposed determination is not inconsistent with international practice.

#### **Copying of magazines**

A4.69 When discussing the copying of magazines, DACS states:<sup>288</sup>

*“Availability: availability is ignored by the Arbiter despite it being established by both CLA and IFRRO as a reasonable method of distribution.”*

A4.70 The IFRRO Distributions Paper states:<sup>289</sup>

*“Distributions should approximate actual use as far as possible, distribution plans should be publicised, administrative deductions should be reasonable and proportionate, and should reflect the services offered.”*

*“In some countries or licensing schemes, authors and publishers have decided that it would be impossible to collect data on the copying directly from users. A distribution method has therefore been developed based on the availability of the material in the market and the possible copying of the work.”*

A4.71 I consider IFRRO to support availability as a useful method of distribution in the absence of reliable usage data. I also consider that in the UK, there is sufficient usage data to enable me to make a determination on this basis.

#### **Hewlett Packard Belgium / Reprobel (C-572/13)**

A4.72 DACS refers to this case in commenting on my draft determination. I respond to its comments in Appendix 5.

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<sup>288</sup> DACS comments on my draft determination, paragraph 6.1.

<sup>289</sup> IFRRO Distributions Paper, Section 2.3 and Section 3.3.

## PLS

### ***Treatment of magazines and journals***

- A4.73 PLS raises both linguistic and substantive points relating to magazines and journals as discussed in my draft determination.
- A4.74 Having discussed the linguistic comments with the Steering Group, I revised the text of this determination, including the use of the terms ‘serial’ and ‘freelance author’. Where parties have referred to ‘serials’ or ‘freelancers’ in their submissions, or where historic data do not allow me to distinguish between magazines and journals, I have retained these terms.
- A4.75 PLS also suggests that magazines and journals be treated separately in the final determination for the purposes of my calculations.<sup>290</sup> This was a reference to a single step of the calculations in my draft determination. I have updated this calculation in the final determination and so all calculations in respect of magazines and journals in this final determination are performed separately. This does not have a material effect on the overall distribution to publishers, authors and VAs.

### ***Journal articles where the publisher did not provide support***

- A4.76 PLS states:<sup>291</sup>

*“In the case of the two problematic journal papers highlighted in the Harbottle Review “the publisher had not supplied a copy of a relevant document or evidence of an oral agreement in respect of the relevant rights and there was no basis for implying that it held the relevant rights.” Harbottle subsequently clarified that he could not rule out the possibility that further evidence might exist in at least one of the two cases. In other words, the publishers’ assertions of ownership may well be correct, and the documents have simply gone astray over the years; that is significantly different from saying that it was never clarified in the first place.*

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<sup>290</sup> PLS comments on my draft determination, Section 2.

<sup>291</sup> PLS comments on my draft determination, Section 3.

*The Determination typically takes a mid-way position on those cases where reliance has been placed on oral contracts, taking an average between rejecting them and accepting them. It would seem reasonable to take the same 50/50 approach where the publisher has claimed the rights but has not produced the documentation in the case of at least one of the two articles, bearing in mind that in only two instances (both relating to schoolbooks) out of fifty-nine extracts was any evidence provided that demonstrated that the publisher's claim was factually incorrect. This has not been applied in determining the low point for the inaccurate claims in Table 6-1, which in turn distorts the mid-point that is relied on in paragraph 6.49."*

- A4.77 As PLS explains, my determination takes a mid-way position where publishers have referred to oral agreements. In these cases I would not expect written documentation to exist. PLS refers to a case where the publisher neither referred to an oral agreement nor provided any evidence in support of its claim to have the relevant rights. I therefore continue to assume that the publisher did not have the relevant rights in this case.

***Rights ownership for images in magazines***

- A4.78 PLS states:<sup>292</sup>

*"The determination states in Table 5-2 that 61 pages<sup>293</sup> contain at least one image to which the publisher did not hold all the relevant image rights. We have reviewed these pages and would ask that the figure of 61 be reviewed in the light of the fact that:*

*a. 2 pages contained no image at all...*

*b. 1 page did not contain the image, described as "tidal lagoon", to which the publisher said it lacked relevant rights...*

*We believe the only likely explanation for the responses in a. and b. above is that the publishers referred to the relevant pages in the published magazine and not the sample cutting used in the research (where the MMO had omitted the images) when completing the survey return."*

- A4.79 In both cases referred to by PLS under point (a), the publisher stated that the extract included an image to which it did not have the relevant rights but the extract did not include any images. I have updated my analysis accordingly.

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<sup>292</sup> PLS comments on my draft determination, Section 4.

<sup>293</sup> This figure has been corrected to 64 in the final determination as a result of the changes discussed below and the correction of an error.

A4.80 I have not made any adjustment in respect of point (b). The page contains three images and the publisher has stated that it does not own the rights to an image on this page. The name of the image does not appear to be related to the images shown on the page but I have not confirmed with the publisher that there was any misunderstanding in completing the questionnaire. Excluding this page from my analysis would not have a material effect on my conclusions and so I have not investigated the matter further.

A4.81 PLS states:<sup>294</sup>

*“A further 3 pages were, as stated by the publisher, advertisements (for Russell & Bromley, Bimba Y Lola and Vagabond), which are not in the scope of this valuation. They were simply captured in a long editorial feature...*

*We suggest therefore that the number of pages (61) should be reduced and the percentages adjusted accordingly subject to the further points below.”*

A4.82 I agree with this point as it appears to me that the images copied were likely incidental to the articles on the same page. I have updated my calculations accordingly.

A4.83 PLS states:<sup>295</sup>

*“A further 14 of the 61 pages were accounted for by a single cutting, which was an entire annual supplement...The publisher stated that:*

*a. in some cases the photos were taken and provided freely by the group’s volunteer members; in other words they were user-generated content supplied on an unpaid, amateur basis – not by freelance photographers towards whom a share of licensing revenue is directed through this valuation process and*

*b. in other cases the photos were free of rights restrictions (we presume media handouts from rail operators etc). The publisher merely said it didn’t hold the “copyright”.*

*Given that these 14 pages account for 23% of the 61 pages identified as lacking relevant image rights, we invite the calculations to be reviewed in the light of the content of this cutting. We are concerned that this sample alone has a significant distorting effect on your calculations and risks damaging the credibility of the final Determination for magazine images if not reviewed.”*

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<sup>294</sup> PLS comments on my draft determination, Section 4.

<sup>295</sup> PLS comments on my draft determination, Section 4.

A4.84 The full response from the publisher of this extract states:

*“Photographs have been taken by [publisher name removed for confidentiality reasons] members who have given [publisher name removed for confidentiality reasons] free license [sic] to use the photographs, or are free of copyright restrictions, but [publisher name removed for confidentiality reasons] does not hold the copyright.”*

A4.85 Because the publisher explicitly stated that it does not have the copyright to the images copied, I continue to assume that it does not have the relevant rights, whether or not the original providers of the images were paid for primary use.

***Relative value of text and images***

A4.86 PLS considers that less than 25% of the value of books copied in schools and FE relates to images. This is because fewer than half of pages copied include images and the page coverage of images is even lower than this. Given the findings of the Schoolzone research, I consider it reasonable to apply an uplift to the value of images as compared to their page coverage.

A4.87 PLS states that my approach to assessing the relative value of images and text in books for schools and FE in my draft determination was inconsistent with that applied for HE books. Having considered the comments of all the Parties I have updated my approach in this regard in this final determination in which I apply an effective uplift in the case of the copying of all books.

***Future reviews***

A4.88 PLS suggested that I amend my original proposals for future reviews. I consider the PLS proposal in Section 11.

## **Appendix 5**

### **Precedents referred to by ALCS and DACS**

#### **Introduction**

- A5.1 In this appendix I consider three precedent events to which ALCS and DACS refer in their submissions.

#### **Copyright Tribunal decision in the case between Universities UK, CLA and DACS**

- A5.2 DACS states:<sup>296</sup>

*“In the Copyright Tribunal Final Decision of April 2002 in the case between Universities UK (UUK), CLA and DACS the judgement clearly stated, ‘...we do not think that the “true economic price per page” is a direct route to the assessment of a royalty...in the absence of a licence to photocopy, lecturers would not be able to hand out extracts from books and journals.’ The judgement goes on to point out that if single chapters were available for sale they would hold a higher value (and price potential) for the student than the proportion of the cover price that they represent.”*

- A5.3 DACS refers to a section of the decision which discusses the “*true economic cost per page*” of copying.<sup>297</sup> The decision states that it would be inappropriate to use the retail price of a book multiplied by the proportion of the book copied as a basis for charging users. The reason given is that photocopies are not a direct substitute for book purchases:<sup>298</sup>

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<sup>296</sup> DACS First Submission, paragraph 5.1.

<sup>297</sup> Copyright Tribunal Interim Decision of April 2002 between Universities UK and Copyright Licensing Agency Limited and Design and Artists Copyright Society Limited, paragraph 148.

<sup>298</sup> Copyright Tribunal Interim Decision of April 2002 between Universities UK and Copyright Licensing Agency Limited and Design and Artists Copyright Society Limited, paragraph 149.

*“While the concept may have some use, as we will explain, we do not think that the “true economic price per page” is a direct route to the assessment of a royalty. It could only be so if it were the case that photocopies were a substitute for the purchase of textbooks. We have already explained, in connection with CLARCS [Copyright Licensing Agency Rapid Clearance Service], why we do not think that this is the case. In the absence of a licence to photocopy, lecturers would not be able to hand out extracts from books and journals. There would be a variety of consequences. The lecturer might change the content of his lecture so as not to rely on the handout of extracts. The students might be encouraged to read the extracts in the library. We think the least likely result is that the student would go and buy an entire textbook in order to have access to the extract which is relevant to his course.”(My emphasis)*

- A5.4 The Copyright Tribunal notes that the value that copying creates for the consumer might be greater than the economic cost per page:<sup>299</sup>

*“Moreover it is relevant that the ability to photocopy means that the parts of value to the student can be obtained without the need to purchase the rest. If publishers sold their textbooks by the chapter rather than as a whole, one could imagine they could charge more than proportionately for the relevant chapter required by the student: he would rather pay £10 for the one chapter which mattered than pay £50 for nine more chapters which had nothing to do with his course.”*

- A5.5 I consider that this is consistent with my determination being based on usage rather than availability.

### **Negotiations between CLA and the Cabinet Office**

- A5.6 ✂  
 A5.7 ✂  
 A5.8 ✂  
 A5.9 ✂  
 A5.10 ✂

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<sup>299</sup> Copyright Tribunal Interim Decision of April 2002 between Universities UK and Copyright Licensing Agency Limited and Design and Artists Copyright Society Limited, paragraph 151.



## **Hewlett Packard Belgium / Reprobel (C-572/13)**

A5.11 ALCS and DACS both refer to this case heard before the Court of Justice for the European Union.

### **ALCS view**

A5.12 ALCS states:<sup>300</sup>

*“In giving his opinion on the case earlier this year the Advocate General noted the following principles concerning fair compensation:*

- *Copyright grants exclusive rights to authors, not publishers.*
- *A Member State cannot sanction schemes whereby compensation is paid to publishers without an obligation on the publishers to remit a share to authors.*
- *Member States can determine specific compensation for publishers provided this is not detrimental to the fair compensation of authors.”*

A5.13 ALCS provided further information about this case in response to my requests for clarification:

*“The European Copyright Directive was adopted by the EU in 2001 and implemented into UK law in 2003. The Directive permits Member States to provide for exceptions or limitations to copyright in certain specified cases. These include*

*in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation. (Article 5(2)(a) of the Directive).*

*Section 36 of the Copyright Designs and Patents Act (1988) is a copyright exception permitting reproduction of extracts by educational establishments. These are acts permitted by law, the effect of which is to remove a copyright owner's right to exercise control over how their works are used in this context. In line with the Directive's requirement that rightholders receive compensation, section 36 permits rightholders to offer licences covering this activity - thus CLA educational licences - however the terms of such licences can't be less generous than the rights to use works under the exception.*

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<sup>300</sup> ALCS First Submission, page 19.

*The section in our first submission where we deal with section 36 CDPA and the Directive (pages 19/20) refers to a Belgian case under review by the Court of Justice of the European Union (Hewlett Packard Belgium / Reprobel (C-572/13)); the case was ongoing and we noted the interim opinion provided by the Advocate General. The Court has since delivered its judgement...*

*The Court's decision has the potential to have a significant impact on the allocation of licensing revenues between authors and publishers within the EU. The key passages in the judgement regarding the allocation of compensation is found in paragraphs 36 and 44-49 and point 2 of the concluding ruling.*

*"36. The Court has also held that fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works. It is apparent from recitals 35 and 38 in the preamble to Directive 2001/29 that the notion and level of fair compensation are linked to the harm resulting for the author from the reproduction of his protected work without his authorisation. From that perspective, fair compensation must be regarded as recompense for the harm suffered by that author (see, to that effect, judgment in Padawan, C-467/08, EU:C:2010:620, paragraphs 40 and 42)."*

*"48. Since, first, the fair compensation which is payable under the reprography exception and the private copying exception is intended, as is apparent from paragraph 36 above, to compensate for the harm suffered by rightholders as a result of the reproduction of their works without their authorisation and, second, publishers are not exclusive reproduction rightholders pursuant to Article 2 of Directive 2001/29, publishers do not suffer any harm for the purposes of those two exceptions. They cannot, therefore, receive compensation under those exceptions when such receipt would have the result of depriving reproduction rightholders of all or part of the fair compensation to which they are entitled under those exceptions."*

#### **DACS view**

A5.14 DACS describes the case as follows:<sup>301</sup>

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<sup>301</sup> DACS First Submission, page 4.

*“...a recent European case has concluded that 100% of the value of secondary licensing is due to creators. In paragraph 124 of his Opinion, the Belgian Advocate General clearly states, under the terms of the European Directive 2001/29, article 2 sub-paragraph a), that creators only have the right to grant or withhold permission for the direct or indirect copying of their works. While DACS accepts that this matter has not concluded, this is an important element of future-proofing the Arbiter’s work because if the Opinion follows through into a final determination then clauses in publishers’ contracts that claim a share in secondary rights would be illegal and it would be helpful if the creators could use this valuation exercise to calculate the appropriate shares among themselves.”*

A5.15 DACS refers again to this case in commenting on my draft determination. It states:<sup>302</sup>

*“Belgian case: we believe there may be an underestimation of the relevance of this case. The case is not about the Belgian levy system per se, it is about who is classed as being the rightholder in Art. 2 of Directive 2001/29/EC (‘InfoSoc Directive’). The judgement of the CJEU in this case concluded that publishers are not rightholders for the purposes of fair remuneration for reprographic copying under Art. 5 (2) (a) and are not therefore entitled to compensation from reprographic copying to the detriment of the listed rightholders. This is because they are not listed in Article 2 of the InfoSoc Directive as a reproduction rightholder. This principle is potentially relevant to the UK because we also operate under EU laws and principles established by the CJEU. With the EU legal backdrop suggesting 0% to publishers, a determination in the UK which allocated more than 50% to publishers could not possibly be considered to be fair.”*

**BAPLA and ACS view**

A5.16 In email correspondence regarding the draft determination, BAPLA and ACS states:

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<sup>302</sup> DACS comments on my draft determination, paragraph 2.4.

*“It is not yet clear what implications, if any, the Belgian case will have for the UK. Therefore we believe the Arbiter should proceed with the current determination without reference to the case with respect to distribution of UK license [sic] fees.”*

**My decision**

- A5.17 This case concerns Hewlett-Packard and Repobel, a Belgian RRO. Repobel had sought payment of a levy on printers sold by Hewlett-Packard by way of fair compensation under the reprography exception to copyright in Article 5(2) of the Information Society Directive. The case was stayed before the Belgian courts which referred questions to the Court of Justice of the European Union. The Court of Justice has ruled on the reference.
- A5.18 I have made preliminary enquiries with Mr Harbottle and, based on those enquiries, I understand that the Repobel decision is concerned with entitlement to fair compensation in the case of the exercise of an exception to copyright and does not affect the ability of an author to assign copyright or grant a licence to a publisher on whatever terms may be agreed (including as to the sublicensing of relevant rights). I have not seen any legal opinions obtained by ALCS or DACS that offer a different view and so I proceed on the basis that there is no need to amend my determination in the light of this case.

## Appendix 6

### Selection of responses to the ALCS survey

<b>Proportion of images the author claims to create</b>	<b>Further comment from author</b>
25%-50%	I identify 80% of photos because I want a specific image but the publisher sorts all the permissions out. I draw drafts of all diagrams, charts etc and reconstruction drawings but these are created by artists etc commissioned by the publisher. So I design far more than 50% but the creation is carried out by the publisher.
75%-100%	"create" meaning that I supplied art work briefs including my own work and existing diagrams etc to make the art work brief clear.
25%-50%	I gave details of the illustrations, drawings etc I needed to support the text and these were then designed for me.
25%-50%	My publisher has an illustrator that draws the images for us (from my instructions).
50%-75%	I produce rough artwork to be professional[ly] drawn.
25%-50%	Some illustrations created by me as computer artwork, but then re-drawn by publisher's artist. Other items pre-existed elsewhere, but were located and recommended by myself.
100%	I supply all of the images other than photographs but many of these are not original, the sources are provided.
50%-75%	I provided sketches for diagrams, charts and graphs etc. Recently publishers have started adding a copyright line giving them copyright of illustrations.
25%-50%	The questions do not enable me to respond with clarity.
100%	There are a small number of illustrations to, the illustrator was paid by the publisher and retains no rights over them.
100%	There are two maps in the book. I supplied them to the publisher, and the publisher re-drew them.
0%-25%	There are cartoons, charts, graphs, diagrams and figures, all of which are sourced or produced by the publisher.

*Source: ALCS responses to my follow-up questions of 10 November 2015.*

**Appendix 7**  
**FTI Sample results before adjustment**

## Response analysis

	No. items	% of total
Received - Complete	339	53%
Received - Complete (missing extract provided by BL)	30	5%
<b>Total complete</b>	<b>369</b>	<b>57%</b>
(1) Received - Missing extract	32	5%
(1) Received - Missing imprint	16	2%
Received - Extra information required	14	2%
Not received	121	19%
(2) Received - information provided by the BL	5	1%
Unavailable	86	13%
<b>Sub-total</b>	<b>643</b>	<b>100%</b>
Excluded	66	
<b>Total</b>	<b>709</b>	

## Rights analysis

	FCW: Business and Public (books)	FCW: Business and Public (serials)	FCW: Other (books)	FCW: Other (serials)	FCW (all)	MMO (magazines)	HE (books)	HE (journals)	HE (all)	FE (books)	FE (magazines)	FE (all)	Schools (books)
(3) Items included in analysis	20	22	13	10	65	107	85	12	97	59	12	71	73
Items including at least one image to which publisher states that it does not hold relevant rights	1	5	2	3	11	24	12	2	14	20	7	27	18
%	5%	23%	15%	30%	17%	22%	14%	17%	14%	34%	58%	38%	25%
(5) Pages analysed	27,531	4,415	4,784	820	37,550	344	1,603	136	1,739	397	45	442	519
Pages including at least one image to which publisher states that it does not hold relevant rights	38	107	77	59	281	64	71	2	73	47	24	71	60
%	0%	2%	2%	7%	1%	19%	4%	1%	4%	12%	53%	16%	12%
(6) Pages in serials	N/A	4,415	N/A	820	5,235	344	N/A	136	136	N/A	45	45	N/A
Pages including text to which the publisher does not hold relevant rights	N/A	46	N/A	0	46	13	N/A	7	7	N/A	2	2	N/A
%	N/A	1%	N/A	0%	1%	4%	N/A	5%	5%	N/A	4%	4%	N/A

Note: FCW stands for frequently copied works.

## Image analysis

	FCW: Business and Public (books)	FCW: Business and Public (serials)	FCW: Other (books)	FCW: Other (serials)	FCW (all)	MMO (magazines)	HE (books)	HE (journals)	HE (all)	FE (books)	FE (magazines)	FE (all)	Schools (books)
(7) Items analysed	20	22	13	10	65	125	88	13	101	47	14	61	70
Pages analysed	27,531	4,415	4,784	820	37,550	388	1,705	155	1,860	325	60	385	592
(8) Pages with images	1,051	775	1,529	0	3355	255	145	13	158	91	36	127	204
% of pages with images	4%	18%	32%	0%	9%	66%	9%	8%	8%	28%	60%	33%	34%
(9) Average % of extract covered by images					n/a	33%	3%	2%	3%	6%	22%	9%	9%

#### Notes

- (1) Some additional information is potentially also missing in respect of these items as well as the missing extract and/or imprint.
- (2) These items are books containing no images, where we have received the extract from the British Library but have received no response from the publisher. We exclude these items from our analysis.
- (3) I have assumed that all serials copied by MMOs and in FE are magazines and that all serials copied in HE are journals.
- (4) Number of items for which we have complete responses (but potentially with a missing imprint or extract). Each item refers to one copied part of a work.
- (5) Total pages across all items in line (2). The number of pages for frequently copied works is higher than for the other sectors. This is because the page counts refer to the entire work in the case of the frequently copied works, and to only the copied part of that work in the other cases.
- (6) Total pages across all items in line (2) other than books. We exclude books from this analysis because PLS and ALCS have reached an agreement in respect of books.
- (7) Results shown for frequently copied works are as reported by publishers. Lexis Nexis encyclopaedia items are not included in the frequently copied works summary due to the particularly large number of pages. In the case of these encyclopaedias, around 10% of pages include images and the publisher claim to hold all the rights. The publisher states that it holds all the relevant rights.

In the other columns to the right of the frequently copied works, the statistics are calculated based on our review of the copied extracts.

- (8) This line shows the number of pages that include an image, regardless of the size of the image or the relevant rights position in respect of that image.
- (9) The percentage in this line shows the approximate proportion of all page area that is covered in images. It is calculated across all pages, including those with no pictures.

#### Glossary

The definitions provided to publishers were as set out below. When conducting our own image analysis, we have had regard to the definition of an image as set out below.

#### **Definition of relevant rights:**

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Relevant Rights are defined as the right to authorise end users to make reprographic reproductions of the work. Publishers will obtain these rights via:

- an assignment of copyright; or
- licence terms granting relevant rights; or
- under a contract of employment.

#### **Definition of literary works (text) - CDPA, Part 1, Chapter 1, Section 3**

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"Literary work" means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes—

- (a) a table or compilation (other than a database);
- (b) a computer program;
- (c) preparatory design material for a computer program; and
- (d) a database.

#### **Definition of artistic works (images) - CDPA, Part 1, Chapter 1, Section 4**

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"artistic work" means—

- (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality,
- (b) a work of architecture being a building or a model for a building, or
- (c) a work of artistic craftsmanship.

...

"graphic work" includes—

- (a) any painting, drawing, diagram, map, chart or plan, and
- (b) any engraving, etching, lithograph, woodcut or similar work;

"photograph" means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film;



## Appendix 8

### Alternative calculations relating to the Disputed Assumptions

A8.1 In this appendix I present alternative analysis based on the FTI Sample, assuming that publishers have not established claims where it is necessary to rely upon one of the Disputed Assumptions.

**Table A8-1: Range of publisher claims not established in respect of images (rejecting Disputed Assumptions)**

Outcome of publisher claim		Books	Magazines	Journals	All serials
Established	A	9	7	3	10
Partially established	B	1	1	0	1
Not established	C	9	8	0	8
<b>Subtotal</b>	<b>D</b>	<b>19</b>	<b>16</b>	<b>3</b>	<b>19</b>
Insufficient time to respond	E	4	0	0	0
<b>Total</b>	<b>F</b>	<b>23</b>	<b>16</b>	<b>3</b>	<b>19</b>

Inaccurate claims (rejecting Disputed Assumptions):					
<b>Low</b>	<b>C / D</b>	<b>47.4%</b>	<b>50.0%</b>	<b>0.0%</b>	<b>42.1%</b>
<b>Mid</b>		<b>54.1%</b>	<b>53.1%</b>	<b>0.0%</b>	<b>44.7%</b>
<b>High</b>	<b>(B + C + E) / F</b>	<b>60.9%</b>	<b>56.3%</b>	<b>0.0%</b>	<b>47.4%</b>

**Table A8-2: Range of publisher claims not established in respect of text (rejecting Disputed Assumptions)**

Outcome of publisher claim		Magazines	Journals	All serials
Established	A	11	8	19
Partially established	B	1	0	1
Not established	C	4	2	6
<b>Subtotal</b>	<b>D</b>	<b>16</b>	<b>10</b>	<b>26</b>
Insufficient time to respond	E	0	0	0
<b>Total</b>	<b>F</b>	<b>16</b>	<b>10</b>	<b>26</b>

Inaccurate claims (rejecting Disputed Assumptions):				
<b>Low</b>	<b>C / D</b>	<b>25.0%</b>	<b>20.0%</b>	<b>23.1%</b>
<b>Mid</b>		<b>28.1%</b>	<b>20.0%</b>	<b>25.0%</b>
<b>High</b>	<b>(B + C + E) / F</b>	<b>31.3%</b>	<b>20.0%</b>	<b>26.9%</b>

**Table A8-3: Adjustment to publisher responses in respect of images (rejecting Disputed Assumptions)**

	Proportion of pages including images where publisher states it does not have all relevant rights	Proportion of pages where claim assumed incorrect	Adjusted proportion of pages including images where publisher does not have all relevant rights
	A	B	$C = A + (1-A) \times B$
Books: Schools	29.4%	54.1%	67.6%
Books: FE	51.6%	54.1%	77.8%
Books: HE	49.0%	54.1%	76.6%
Books: Business and public sector	3.6%	54.1%	55.8%
Magazines	25.1%	53.1%	64.9%
Journals	15.4%	0.0%	15.4%

**Table A8-4: Adjustment to publisher responses in respect of text (rejecting Disputed Assumptions)**

	<b>Proportion of pages where publisher states it does not have all relevant rights</b>	<b>Proportion of pages where claim assumed incorrect</b>	<b>Adjusted proportion of pages including text where publisher does not have all relevant rights</b>
	<b>A</b>	<b>B</b>	<b><math>C = A + (1-A) \times B</math></b>
Magazines	3.8%	28.1%	30.8%
Journals	5.1%	20.0%	24.1%

## **Appendix 9**

### **International comparators**

#### **Introduction**

- A9.1 In this appendix I present the detailed results of my research on foreign RROs' distribution rules, which are discussed in Section 9. I consider five countries: Australia, Canada, France, Germany and Ireland. For each country I analyse the legal basis for copyrights, their ownership and provision for licensing schemes. I then outline the distribution rules for the main RROs in each country obtained from public documents.

#### **Australia**

- A9.2 CA manages reproduction and communication rights in text and images, licensing the secondary use of books, magazines, journals, newspapers, accompanying illustrations, photographs, and surveyors' plans. CA represents authors, VAs and publishers and has a membership base of over 28,000,<sup>303</sup> including 27 member associations.<sup>304</sup>
- A9.3 CA issues and manages the statutory licences for education and government services as well as voluntary licences principally for the corporate sector.<sup>305</sup> In 2014, it collected £70.6 million (AUD 129m) in licence revenues.<sup>306</sup>

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<sup>303</sup> CA annual report 2013/14, page 4.

<sup>304</sup> IFRRO website, CA member page. Accessed 12 November 2015.

<sup>305</sup> CA annual report 2013/14, chapters 6, 8 and 10.

<sup>306</sup> CA Annual Report 2013/14, page 26. I note that IFRRO reports a total revenue of AUD 135m on the CA member page. I believe the difference arises due to the use of different time periods, and may include revenues from different licences.

***Legal framework and ownership of rights***

A9.4 Copyright and related rights are governed by Australia's common law legal system. Australia is a signatory to the Berne Convention, implemented under the Copyright Act 1968. The Berne Convention and Copyright Act 1968 vest copyright in the creator at the moment of creation,<sup>307</sup> except in the case of:<sup>308</sup>

- (1) content created by employees as part of their usual employment;
- (2) portraits, engravings, and in some cases photographs created on commission, when the rights belong to the commissioner of the work; and
- (3) films and sound recordings, which are governed by separate rules.

A9.5 Copyright is transferable under contract.<sup>309</sup>

***Approach to distributions***

A9.6 CA follows a four step approach to distribution:<sup>310</sup>

- (1) CA creates a series of 'distribution pools'. In most cases, distribution pools include fees from a single licence scheme. However, some smaller licences may be grouped in a single distribution pool.<sup>311</sup> Administrative fees (usually in the range of 10-20%) and operating costs are deducted from each distribution pool, and a further 1.5% of revenue is allocated for the CA Cultural Fund that provides support to the Australian publishing and visual arts industries;<sup>312</sup>

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<sup>307</sup> World Intellectual Property Organization summary of the Berne convention, point 1b.

<sup>308</sup> Australian Copyright Council, An Introduction to Copyright in Australia, pages 3-4.

<sup>309</sup> Australian Copyright Council, An Introduction to Copyright in Australia, pages 3-4.

<sup>310</sup> CA distribution rules (May 2015), page 11-12, 17-20.

<sup>311</sup> CA distribution rules (May 2014), Section 3.3.

<sup>312</sup> CA distribution rules (March 2015), paragraphs 5.3 to 5.5.

- (2) CA identifies works and their uses within each distribution pool. Surveys provide information on the copied content, amount of copying and the copyright owner. The survey data is extrapolated for similar licensees.<sup>313</sup> CA can use other sources of indicative data where no reliable survey exists, especially in the case of non-statutory licensees. Examples of such indicative data include interviews with officers of licensees; data from other licence schemes or from past surveys; analyses of database records by licensees; sales, subscriptions, newspaper circulation figures; and reading lists and citations.<sup>314</sup> The CA board has a broad discretion to allocate non-statutory licence fees;<sup>315</sup>
- (3) CA allocates payments to each use of each work. Works within a distribution pool can be split further into sub-pools based on types of work (e.g. images, poetry), uses (e.g. course packs, digital use) and users (e.g. primary schools).<sup>316</sup> These pools may be assigned different weights. For example, CA suggests that artistic works and course materials in universities are assigned a higher weight;<sup>317</sup> and
- (4) CA identifies the rightsholder for each work and allocates revenues to them. In the first instance, CA checks its database of prior distributions for the owner of the rights. CA also invites members to provide information on copyright ownership and contractual arrangements. In the case that multiple rightsholders are identified (e.g. co-authors) CA applies splits agreed by the parties. If CA does not possess such information it pays a selected rightsholder on their undertaking to pay to other rightsholders the amounts due to them within 60 days. In such cases, CA prioritises member creators (in alphabetical order) over member publishers and non-members. CA has dispute resolution procedures for members who disagree about royalties splits.<sup>318</sup>

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<sup>313</sup> CA Hardcopy Data Processing Protocol for Schools, page 5 and CA distribution rules (May 2014), Section 3.4 and CA distribution rules (March 2015), paragraph 10.2.

<sup>314</sup> CA distribution rules (March 2015), Section 7.3.

<sup>315</sup> CA distribution rules (March 2015), Section 6.2.

<sup>316</sup> CA distribution rules (March 2015), Section 10.1.

<sup>317</sup> CA distribution rules (May 2014), Section 3.4.3.

<sup>318</sup> CA distribution rules (May 2014), pages 17 to 20 and CA distribution rules (March 2015), Section 12.

- A9.7 In 2014, CA distributed 12% of revenue to authors and 73% to publishers. The remaining 14% was allocated to international RROs and 1% to other collecting societies.<sup>319</sup>
- A9.8 In 2014 CA collected £0.65 million (AUD 1.18m) on behalf of VAs from statutory licences.<sup>320</sup> However, no detailed information is available on the rules CA uses to split royalties between authors and VAs.

## Canada

- A9.9 ACCESS licenses secondary use of published literary, dramatic, musical and artistic works in the form of books, magazines, journals and newspapers. ACCESS issues and manages voluntary licences for education and government services as well as for the corporate sector. ACCESS represents 11,000 rightsholders, who include authors, VAs and publishers.<sup>321</sup> In 2014 it collected £11.5 million (CAD 21m) in licence fees.<sup>322</sup>
- A9.10 COPIBEC licenses similar works, mainly for rightsholders based in Quebec. COPIBEC represents 23,900 rightsholders<sup>323</sup> and in 2014 it collected £8.41 million (CAD 15.3m).<sup>324</sup> Given limited public information on its approach to distributions, I do not consider COPIBEC further.

### *Legal framework and ownership of rights*

- A9.11 Copyright and related rights are governed under Canada's common law legal system. Canada is a signatory to the Berne Convention which it implements under the Copyright Act 1985. The Berne Convention and the Copyright Act 1985 vest copyright in the creator at the moment of creation. Exceptions apply to work created in the course of employment, when the copyright belongs to the employer, typically a publisher. The copyright is transferable.<sup>325</sup>

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<sup>319</sup> CA annual report 2014, paragraph 13.6.

<sup>320</sup> CA annual report 2014, paragraph 11.4.

<sup>321</sup> IFRRO website, ACCESS member page. Accessed 12 November 2015.

<sup>322</sup> ACCESS annual report 2014, page 6 and 27.

<sup>323</sup> IFRRO website, COPIBEC member page. Accessed 12 November 2015.

<sup>324</sup> COPIBEC annual report 2014, page 7.

<sup>325</sup> World Intellectual Property Organization summary of the Berne convention, point 1b and Copyright Act 1985, articles 13.(1) to (4)

**Approach to distributions**

- A9.12 Where possible, ACCESS distributes revenues on a title-specific basis. It makes approximately two-thirds of distributions in this way, with the remaining one-third being distributed on a non-title specific basis.<sup>326</sup> These distributions are made after deducting administrative costs of approximately 30% of income collected.<sup>327</sup>
- A9.13 To operate the title-specific distribution ACCESS collects information on copied material from licensees (“full reporting”) or extrapolates collected information to similar licensees (“partial reporting”).<sup>328</sup> It then identifies rightsholders for each use of each work and allocates royalties between creators and publishers.
- A9.14 Table A9-1 summarises ACCESS allocation rules between creators and publishers that ACCESS applies to title-specific distributions.

**Table A9-1: ACCESS creator/publisher title-specific allocation**

	In Print		Out of Print	
	Creator	Publisher	Creator	Publisher
Trade books	50%	50%	100%	0%
Educational, technical and scholarly publications where creator assigned copyright to publisher	0%	100%	0%	100%
Educational, technical and scholarly publications where creator kept copyright	50%	50%	100%	0%
Newspapers and periodicals (employed creators)			0%	100%
Newspapers and periodicals (non-staff creators)			100%	0%
Other	50%	50%	50%	50%

Source: ACCESS website, *How We Split Royalties between Creators and Publishers* page.

<sup>326</sup> ACCESS website, Creator/Publisher Distribution Guidelines page.

<sup>327</sup> ACCESS annual report, page 27.

<sup>328</sup> ACCESS website, Title Specific Distributions page.



- A9.15 ACCESS uses the non-title specific distribution when it is difficult or impractical to collect information on actual works copied. In such situations ACCESS splits revenue equally between affiliated creators and publishers. Of the amount distributed to creators, 40% is distributed equally among all creator members and 60% is distributed based on type of work created and availability.<sup>329</sup>
- A9.16 ACCESS also allocates 15% of the total distributable amount to all creators and publishers under a 50:50 split “*in recognition of the value our affiliates provide to our repertoire*”.<sup>330</sup>
- A9.17 In 2014, the above approach resulted in a distribution of 69% to publishers and 31% to creators. However, there were subsequent payments from publishers to authors under separate agreements that resulted in an overall split of 55% to publishers and 45% to creators. CA obtained information about these payments from surveying the publishers.<sup>331</sup>
- A9.18 There is no detailed information available on the way in which CA splits royalties between authors and VAs. CA recognises both authors and VAs under the term ‘creators’.<sup>332</sup>

## France

- A9.19 CFC is the legally provisioned licensing organisation in France and runs an obligatory collective licensing regime. It licenses secondary use of books, magazines, journals, newspapers, accompanying illustrations and photographs, and surveyors’ plans. CFC represents 8 creators’ associations and 425 individual publishers. It provides statutory licences to educational institutions and government departments as well as voluntary licences to corporations, associations and local government. In 2014, it collected licence fees of £40.3 million (EUR 50m).<sup>333</sup>

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<sup>329</sup> ACCESS website, Non-Title Specific Distributions page.

<sup>330</sup> ACCESS website, Non-Title Specific Distributions page.

<sup>331</sup> ACCESS annual report 2014, page 8.

<sup>332</sup> ACCESS website, Creators page (the red box in the top left implies creators comprise both authors and visual artists).

<sup>333</sup> IFRRO website, CFC member page.

- A9.20 In addition to the CFC, Société des Editeurs et Auteurs de Musique (“**SEAM**”), licenses secondary uses of music sheets, songs texts and teaching music books. SEAM represents approximately 130 rightsholders in the form of creators’ and publishers’ associations and individual music publishers. SEAM collected £3.93 million (EUR 4.87m) in 2014.<sup>334</sup> Its operations are less relevant to my determination so I focus below on CFC.
- A9.21 ACS states that I should consider the distribution systems used by ADAGP. ADAGP is one of the board members of CFC. ADAGP passes all duties related to reprographic licences to CFC.<sup>335</sup> Hence I do not consider ADAGP further.

***Legal framework and ownership of rights***

- A9.22 Copyright and related rights are governed under the French civil law legal system. France is a signatory to the Berne Convention and implements it under the Code de la propriété intellectuelle (1994). The Berne Convention and the Code de la propriété intellectuelle vest copyright in the creator at the moment of creation. Exceptions apply to work created in the course of employment and to government employees. The copyright is transferable.<sup>336</sup>

***Approach to distributions***

- A9.23 CFC makes title specific distributions. It relies on licensees’ survey data to identify the copied material and the amount of copying.
- A9.24 CFC has separate procedures for distributing revenue from copying of books and press.

***Revenue from books***

- A9.25 CFC allocates revenue to copied books based on the General Royalty Tariff presented in Table A9-2. The tariff is set by the CFC and determines the price per page for the right to copy across multiple categories of books. Prices are based on representative sampling of average retail prices per page for each category.

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<sup>334</sup> IFRRO website, SEAM membership page.

<sup>335</sup> ADAGP website, Reprographics page.

<sup>336</sup> Code de la propriété intellectuelle, article L122-7 and World Intellectual Property Organization summary of the Berne convention, point 1b.

**Table A9-2: CFC general Royalty Tariff for books**

<b>Royalties (pre-tax)</b>	<b>£ / A4 page</b>	<b>EUR /A4 page</b>
Paperbacks	0.0278	0.0382
Educational books <sup>337</sup>	0.0682	0.0938
General literature <sup>338</sup>	0.0739	0.1017
Academic and professional <sup>339</sup>	0.0701	0.0965
Practical books <sup>340</sup>	0.1010	0.1389

*Note: Amounts converted to British Pound from Euros, as stated by CFC. Source: CFC distribution rules for books, page 20.*

- A9.26 CFC splits the amount allocated to a given book between a creator and a publisher based on the rules presented in Table A9-3. These rules are set by the CFC Committee, which includes representatives of creators and publishers.<sup>341</sup>

**Table A9-3: CFC allocations between creators and publishers for title-specific distributions in respect of books**

	<b>Creator</b>	<b>Publisher</b>
Paperbacks	50%	50%
Educational books	30%	70%
General literature	50%	50%
Academic and professional books, sales greater than 5,000	50%	50%
Academic and professional books, sales 500 to 5,000	40%	60%
Academic and professional books, sales below 500	10%	90%
Practical books	30%	70%
Highly illustrated books	50%	50%
Encyclopaedias, atlases and maps	30%	70%

*Source: CFC distribution rules for books, page 14.*

<sup>337</sup> Manuals, support or training books, books for support for education, dictionaries, Encyclopaedias and atlases.

<sup>338</sup> Novels, short stories, poetry, theatre, news, religious.

<sup>339</sup> All disciplines except sciences and medicine.

<sup>340</sup> Guides, self-help and informative books, consumer directories.

<sup>341</sup> CFC distribution rules for books, page 13.

- A9.27 CFC divides distributions to creators between authors and VAs based on agreements between the two parties. In the absence of such agreements CFC makes distributions using the percentages in Table A9-4 below, established through analysis of sampled books.<sup>342</sup>

**Table A9-4: CFC allocations between authors and VAs for title-specific distributions in respect of books**

	<b>Author</b>	<b>VA</b>
Paperbacks	97.3%	2.7%
Primary school educational books	70.0%	30.0%
Secondary school educational books	90.0%	10.0%
General literature	99.2%	0.8%
Academic and professional books	99.3%	0.7%
Practical books	50.0%	50.0%
Academic and professional books (Science and Medicine)	100.0%	0.0%
Highly illustrated books	50.0%	50.0%
Encyclopaedias, atlases and maps	70.0%	30.0%

*Source: CFC distribution rules for books, page 15.*

- A9.28 In the event that the distributable amount exceeds approximately £200 (EUR 300), CFC performs individual analysis of the value of the text and images in the book concerned.<sup>343</sup>
- A9.29 CFC pays publishers and provides them with instructions on how to split the royalties between publisher, author and VA based on the above rules. In some cases, where splits are dependent on the volume of sales, publishers have to perform a calculation themselves. The publisher can opt to have CFC distribute the money directly to creators, but must provide information on sales volume to CFC if necessary.<sup>344</sup>

#### **Royalties from press**

- A9.30 CFC allocates royalties to copied press based on the General Royalty Tariff presented in Table A9-2. It is set by the CFC and determines the price per page for the right to copy across multiple categories of press. Prices are based on representative sampling of average retail prices per page for each category.

<sup>342</sup> CFC distribution rules for books, page 15.

<sup>343</sup> CFC distribution rules for books, page 15.

<sup>344</sup> CFC website, FAQ page and CFC distribution rules for books, page 4 and page 5.

**Table A9-5: General Royalty Tariff for press**

<b>Royalties (pre-tax)</b>	<b>£ / A4 page</b>	<b>EUR / A4 page</b>
General press – circulation over 150,000	0.0250	0.0344
General press – circulation under 150,000	0.0525	0.0723
Letters for professionals	0.5540	0.7622
Professional press – circulation over 15,000	0.0885	0.1217
Professional press – circulation under 15,000, and cultural serials	0.1402	0.1929
Professional press in sciences and medicine	0.3612	0.4970
Professional press in engineering	0.4543	0.6250

*Note: Amounts converted to British Pound from Euros, as stated by CFC. Source: CFC distribution rules for press, page 20.*

- A9.31 CFC distributes revenues allocated to press between the creator and the publisher based on the rules presented in Table A9-6. These rules are set by the CFC Committee, which includes representatives of creators and publishers. CFC makes no distinction between employees and non-staff authors.<sup>345</sup>

**Table A9-6: CFC creator/publisher title-specific allocation for press**

	<b>Creator</b>	<b>Publisher</b>
General press	50%	50%
Letters for professionals	10%	90%
In case of types below the splits depend on circulation volume:		
Professional press		
Professional and cultural press		
Professional press in sciences and medicine		
Professional press in engineering		
Over 75,000	50%	50%
50,000 – 75,000	40%	60%
25,000 – 50,000	30%	70%
10,000 – 25,000	20%	80%
Less than 10,000	10%	90%

*Source: CFC distribution rules for press, page 15 and 16.*

- A9.32 CFC further splits the creators' allocation between authors and VAs.<sup>346</sup> I was unable to find details on rules governing this procedure.

<sup>345</sup> CFC distribution rules for press, pages 13 and 18.

<sup>346</sup> CFC distribution rules for press, page 18.

**Distribution between creators and publishers in 2014**

A9.33 I have calculated the split in distribution between creators and publishers in 2014. I estimate it to be 36% to 64% in favour of publishers. I relied on data in Table A9-3 and Table A9-6, which describe distribution splits between creators and publishers for different categories of books and press. I also used data from the CFC website, which provide total revenue in 2014 for the different categories.

**Table A9-7: CFC creator/publisher distribution calculation**

	<b>Amounts per type, (EUR, 000) A</b>	<b>Allocation Creator B</b>	<b>Allocation Publisher C</b>	<b>Amount Creator A x B</b>	<b>Amount Publisher A x C</b>
Paperbacks	1,021	50%	50%	511	511
Educational books	12,523	30%	70%	3,757	8,766
General literature	1,228	50%	50%	614	614
Academic and professional books	4,214	40%	60%	1,686	2,528
Practical books	189	30%	70%	57	132
Academic and professional books (Science and Medicine)	50	40%	60%	20	30
Highly illustrated books	2,348	40%	60%	939	1,409
<b>TOTAL BOOK</b>	<b>21,573</b>			<b>7,583</b>	<b>13,990</b>
General press	471	50%	50%	236	236
General press small circulation	710	50%	50%	355	355
Professional press	325	35%	65%	114	211
Professional and cultural press	2,741	35%	65%	959	1,782
Professional press in sciences and medicine	528	35%	65%	185	343
Professional press in engineering	29	35%	65%	10	19
Letters for professionals	46	10%	90%	5	41
<b>TOTAL PRESS</b>	<b>4,850</b>			<b>1,863</b>	<b>2,987</b>
<b>TOTAL</b>	<b>26,423</b>			<b>9,446</b>	<b>16,977</b>
<b>Final allocations</b>		<b>36%</b>	<b>64%</b>		

Sources: Table A9-3, Table A9-6 and CFC website, Key Figures page.

- A9.34 In the case of academic books and professional press the distribution between creators and publishers depends on the volume of sales. I used the average split in case of these material types, which is 40:60 and 35:65 for academic books and professional press respectively in favour of publishers. I note that these splits can vary from 10:90 to 50:50 depending on volume of sales.<sup>347</sup> I performed a sensitivity study and found that the final split may vary from 27:73 to 39:61 in favour of publishers depending on sales volume.

## Germany

- A9.35 VG WORT licenses secondary uses of literary and scientific works; and audio and audio-visual works<sup>348</sup>. VG WORT represents 489,143 authors and 14,790 publishers. It provides statutory licences to educational institutions and government departments as well as voluntary licences to corporations, associations and local government. In 2014, it collected £116.2 million (EUR 144.2m) from licence fees.<sup>349</sup>
- A9.36 VG BK licenses reprographic, digital and public lending rights licences for fine art, photography, design and illustration.<sup>350</sup> VG BK represents 51,000 rightsholders. It provides statutory licences to educational institutions and government departments as well as voluntary licences to corporations, associations and local government. It also issues direct primary licences for fine art. In 2014, it collected £49.4 million (EUR 61.35m) from licence fees.<sup>351</sup>

### *Legal framework and ownership of rights*

- A9.37 Copyright and related rights are governed under the German civil law legal system. Germany is a signatory to the Berne Convention and implements it under the Copyright in the Federal Republic of Germany (1998). The Berne Convention and Copyright in the Federal Republic of Germany vest copyright in the creator at the moment of creation. The copyright is transferable.<sup>352</sup>

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<sup>347</sup> CFC distribution rules for books, page 14 and CFC distribution rules for press, page 15.

<sup>348</sup> VG Wort website, About Us page.

<sup>349</sup> IFRRO website, VG WORT member page.

<sup>350</sup> VG Wort website, About Us page.

<sup>351</sup> IFRRO website, VG WORT member page.

<sup>352</sup> Copyright in the Federal Republic of Germany (1998), pages 8, 9, 29 and 32.

- A9.38 In Germany, VG WORT and VG BK are recognised by law and run obligatory collective management licensing regimes. As such they are the only sanctioned organisations for collecting and distributing copyright royalties from works described in paragraphs A9.35 and A9.36.<sup>353</sup>

#### ***Approach to distributions***

- A9.39 VG WORT uses both title specific and non-title specific distribution. In its approach, it considers copyright ownership, sector and usage and availability and possibility to copy. It collects information in usage from full reporting, sampling, and surveys, depending on sector.
- A9.40 VG BK also uses both title specific and non-title specific distribution. Both are primarily based on rights and usage. VG BK collects information on usage from full reporting, sampling and surveys. Where these are difficult to establish, general rules are applied. In case of a reproduction, 90% is allocated to rightsholder and 10% to society support activities.<sup>354</sup>

#### **Ireland**

- A9.41 The Irish Copyright Licensing Agency (“**ICLA**”) licenses reprographic and digital reproduction of published literary, scientific and artistic works in the form of books, magazines, journals and newspapers. ICLA represents authors, VAs and publishers and has a membership base of 3,500 authors and 650 publishers. ICLA issues and manages voluntary licences. In 2014, ICLA collected £1.42 million (EUR 1.76m) from licence fees.<sup>355</sup>
- A9.42 Newspaper Licensing Ireland Ltd (“**NLI**”) licenses secondary use of newspapers, magazines and journals, representing 36 individual publishers of national and local newspapers. NLI issues and manages voluntary licences. In 2014 NLI collected £0.77 million (EUR 0.96m) in licence fees.<sup>356</sup>

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<sup>353</sup> IFRRO website, VG WORT member page.

<sup>354</sup> Distribution Plan of VG Bild-Kunst (06/07/2013).

<sup>355</sup> IFRRO website, ICLA membership page and ICLA website.

<sup>356</sup> IFRRO website, NLI membership page.



**Legal framework and ownership of rights**

A9.43 Copyright and related rights are governed under a common law legal system. Ireland is a signatory to the Berne Convention and implements it under the Copyright & Related Rights Act, 2000. The Berne Convention and the Copyright & Related Rights Act, 2000 vest copyright in the creator at the moment of creation. Exceptions apply to work created in the course of employment and to government employees.<sup>357</sup>

A9.44 In respect of newspapers and magazines, the NLI notes that publishers as *“those who have invested in the generation of original news content”* have relevant rights to material licensed by the NLI and that *“in keeping with the Copyright & Related Rights Act 2000, and in the context of the NLI licence framework, the copyright in the article content of newspaper and magazines is held by the publishers, except where indicated to the contrary”*.<sup>358</sup>

**Approach to distributions**

A9.45 ICLA preforms surveys every three years on a rotational basis to collect information about copied content. It distributes royalties annually based on survey results.<sup>359</sup> I have found limited information on the details of the ICLA distribution scheme, although IFRRO reports this to be title-specific.<sup>360</sup>

A9.46 NLI makes distributions to publishers only. NLI represents only publishers because on the basis of Copyright & Related Rights Act, 2000 paragraph 23.(1)(a) the copyrights of newspapers and magazine content belong to publishers.

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<sup>357</sup> World Intellectual Property Organization summary of the Berne convention, point 1b and Copyright & Related Rights Act, 2000 paragraph 23.(1).

<sup>358</sup> NLI website, Copyright page.

<sup>359</sup> ICLA website, Surveys page.

<sup>360</sup> IFRRO website, ICLA membership page.

## **Appendix 10**

### **Sensitivity analysis**

A10.1 I set out in Table 10-6 my calculation of the distribution between VAs, authors and publishers based on one set of assumptions. In Table 10-7 I show the effect on my calculations of adopting different assumptions. In Table A10-1 below I provide further details of these alternative assumptions.

**Table A10-1: Further detail of alternative assumptions**

<b>Calculation</b>	<b>Assumption</b>	<b>Table 10-6 assumption</b>	<b>Alternative assumption in Table 10-7</b>
1.	Rights ownership	Based on FTI Sample, adjusting for Harbottle Review accepting the Disputed Assumptions	Based on FTI Sample, adjusting for Harbottle Review rejecting the Disputed Assumptions
2.	Rights ownership in respect of text	Based on FTI Sample, adjusting for Harbottle Review accepting the Disputed Assumptions	Based on my interpretation of the results of the ALCS survey, as set out in Table 5-9
3.	Relative value of text and images in schools and FE	75% text; 25% images in schools 80% text; 20% images in FE	50% text; 50% images
4.	Relative value of text and images in schools and FE	75% text; 25% images in schools 80% text; 20% images in FE	Based on page coverage
5.	Relative value of text and images in magazines	80% text; 20% images	Based on page coverage
6.	Relative value of text and images in journals	95% text; 5% images	Based on page coverage

<b>Calculation</b>	<b>Assumption</b>	<b>Table 10-6 assumption</b>	<b>Alternative assumption in Table 10-7</b>
7.	Relative value of text and images in HE books	95% text; 5% images	Based on page coverage
8.	Adjustment to rights ownership in FTI Sample	Use midpoint uplift for text	Use high uplift for text
9.	Adjustment to rights ownership in FTI Sample	Use midpoint uplift for text	Use low uplift for text
10.	Adjustment to rights ownership in FTI Sample	Use midpoint uplift for text	Apply no uplift for text
11.	Adjustment to rights ownership in FTI Sample	Use midpoint uplift for images	Use high uplift for images
12.	Adjustment to rights ownership in FTI Sample	Use midpoint uplift for images	Use low uplift for images

<b>Calculation</b>	<b>Assumption</b>	<b>Table 10-6 assumption</b>	<b>Alternative assumption in Table 10-7</b>
13.	Adjustment to rights ownership in FTI Sample	Use midpoint uplift for images	Apply no uplift for images

- A10.2 The tables in the remainder of this appendix show the effect of these alternative assumptions on the distribution for different types of content. The final row of each table shows the overall distribution of CLA income within the scope of this determination were the split of CLA's income were to remain in line with that earned in the year to 31 March 2015.

**Table A10-2: Sensitivity 1 (Do not accept Disputed Assumptions)**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>	<b>Sector weighting</b>
Books: Schools	41.5%	41.5%	16.9%	29%
Books: FE	42.2%	42.2%	15.6%	10%
Books: HE	48.1%	48.1%	3.8%	19%
Books: Business and public sector	49.4%	49.4%	1.1%	7%
Magazines	62.3%	24.7%	13.0%	17%
Journals	76.3%	22.9%	0.8%	19%
<b>Weighted average</b>	<b>53.5%</b>	<b>37.0%</b>	<b>9.5%</b>	<b>N/A</b>

**Table A10-3: Sensitivity 2 (Rights ownership in text based on ALCS survey)**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>	<b>Sector weighting</b>
Books: Schools	42.8%	42.8%	14.4%	29%
Books: FE	42.9%	42.9%	14.2%	10%
Books: HE	48.3%	48.3%	3.5%	19%
Books: Business and public sector	49.6%	49.6%	0.8%	7%
Magazines	77.3%	15.3%	7.4%	17%
Journals	53.2%	46.1%	0.8%	19%
<b>Weighted average</b>	<b>52.1%</b>	<b>40.3%</b>	<b>7.6%</b>	<b>N/A</b>

**Table A10-4: Sensitivity 3 (Relative value of text and images in schools and FE books: 50%:50%)**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>	<b>Sector weighting</b>
Books: Schools	35.6%	35.6%	28.7%	29%
Books: FE	42.9%	42.9%	14.2%	10%
Books: HE	48.3%	48.3%	3.5%	19%
Books: Business and public sector	49.6%	49.6%	0.8%	7%
Magazines	82.4%	10.2%	7.4%	17%
Journals	76.3%	22.9%	0.8%	19%
<b>Weighted average</b>	<b>55.4%</b>	<b>32.9%</b>	<b>11.7%</b>	<b>N/A</b>

**Table A10-5: Sensitivity 4 (Relative value of text and images in schools and FE books based on page coverage)**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>	<b>Sector weighting</b>
Books: Schools	47.4%	47.4%	5.3%	29%
Books: FE	42.9%	42.9%	14.2%	10%
Books: HE	48.3%	48.3%	3.5%	19%
Books: Business and public sector	49.6%	49.6%	0.8%	7%
Magazines	82.4%	10.2%	7.4%	17%
Journals	76.3%	22.9%	0.8%	19%
<b>Weighted average</b>	<b>58.7%</b>	<b>36.3%</b>	<b>5.0%</b>	<b>N/A</b>

**Table A10-6: Sensitivity 5 (Relative value of text and images in magazines based on page coverage)**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>	<b>Sector weighting</b>
Books: Schools	42.8%	42.8%	14.4%	29%
Books: FE	42.9%	42.9%	14.2%	10%
Books: HE	48.3%	48.3%	3.5%	19%
Books: Business and public sector	49.6%	49.6%	0.8%	7%
Magazines	79.3%	8.6%	12.2%	17%
Journals	76.3%	22.9%	0.8%	19%
<b>Weighted average</b>	<b>56.9%</b>	<b>34.7%</b>	<b>8.4%</b>	<b>N/A</b>

**Table A10-7: Sensitivity 6 (Relative value of text and images in journals based on page coverage)**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>	<b>Sector weighting</b>
Books: Schools	42.8%	42.8%	14.4%	29%
Books: FE	42.9%	42.9%	14.2%	10%
Books: HE	48.3%	48.3%	3.5%	19%
Books: Business and public sector	49.6%	49.6%	0.8%	7%
Magazines	82.4%	10.2%	7.4%	17%
Journals	76.1%	23.5%	0.4%	19%
<b>Weighted average</b>	<b>57.4%</b>	<b>35.1%</b>	<b>7.5%</b>	<b>N/A</b>

**Table A10-8: Sensitivity 7 (Relative value of text and images in HE books based on page coverage)**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>	<b>Sector weighting</b>
Books: Schools	42.8%	42.8%	14.4%	29%
Books: FE	42.9%	42.9%	14.2%	10%
Books: HE	48.9%	48.9%	2.1%	19%
Books: Business and public sector	49.6%	49.6%	0.8%	7%
Magazines	82.4%	10.2%	7.4%	17%
Journals	76.3%	22.9%	0.8%	19%
<b>Weighted average</b>	<b>57.5%</b>	<b>35.1%</b>	<b>7.3%</b>	<b>N/A</b>

**Table A10-9: Sensitivity 8 (Uplift for text: High)**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>	<b>Sector weighting</b>
Books: Schools	42.8%	42.8%	14.4%	29%
Books: FE	42.9%	42.9%	14.2%	10%
Books: HE	48.3%	48.3%	3.5%	19%
Books: Business and public sector	49.6%	49.6%	0.8%	7%
Magazines	80.0%	12.6%	7.4%	17%
Journals	76.3%	22.9%	0.8%	19%
<b>Weighted average</b>	<b>57.0%</b>	<b>35.4%</b>	<b>7.6%</b>	<b>N/A</b>



**Table A10-10: Sensitivity 9 (Uplift for text: Low)**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>	<b>Sector weighting</b>
Books: Schools	42.8%	42.8%	14.4%	29%
Books: FE	42.9%	42.9%	14.2%	10%
Books: HE	48.3%	48.3%	3.5%	19%
Books: Business and public sector	49.6%	49.6%	0.8%	7%
Magazines	84.8%	7.8%	7.4%	17%
Journals	76.3%	22.9%	0.8%	19%
<b>Weighted average</b>	<b>57.8%</b>	<b>34.6%</b>	<b>7.6%</b>	<b>N/A</b>

**Table A10-11: Sensitivity 10 (Uplift for text: None)**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>	<b>Sector weighting</b>
Books: Schools	42.8%	42.8%	14.4%	29%
Books: FE	42.9%	42.9%	14.2%	10%
Books: HE	48.3%	48.3%	3.5%	19%
Books: Business and public sector	49.6%	49.6%	0.8%	7%
Magazines	89.6%	3.0%	7.4%	17%
Journals	94.3%	4.9%	0.8%	19%
<b>Weighted average</b>	<b>62.1%</b>	<b>30.3%</b>	<b>7.6%</b>	<b>N/A</b>

**Table A10-12: Sensitivity 11 (Uplift for images: High)**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>	<b>Sector weighting</b>
Books: Schools	42.1%	42.1%	15.8%	29%
Books: FE	42.5%	42.5%	15.0%	10%
Books: HE	48.2%	48.2%	3.7%	19%
Books: Business and public sector	49.5%	49.5%	1.0%	7%
Magazines	81.9%	10.2%	7.8%	17%
Journals	76.3%	22.9%	0.8%	19%
<b>Weighted average</b>	<b>57.1%</b>	<b>34.7%</b>	<b>8.2%</b>	<b>N/A</b>

**Table A10-13: Sensitivity 12 (Uplift for images: Low)**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>	<b>Sector weighting</b>
Books: Schools	43.5%	43.5%	12.9%	29%
Books: FE	43.3%	43.3%	13.4%	10%
Books: HE	48.4%	48.4%	3.3%	19%
Books: Business and public sector	49.7%	49.7%	0.7%	7%
Magazines	82.9%	10.2%	6.9%	17%
Journals	76.3%	22.9%	0.8%	19%
<b>Weighted average</b>	<b>57.8%</b>	<b>35.3%</b>	<b>7.0%</b>	<b>N/A</b>

**Table A10-14: Sensitivity 13 (Uplift for images: None)**

	<b>Publishers</b>	<b>Authors</b>	<b>VAs</b>	<b>Sector weighting</b>
Books: Schools	46.3%	46.3%	7.4%	29%
Books: FE	44.8%	44.8%	10.3%	10%
Books: HE	48.8%	48.8%	2.4%	19%
Books: Business and public sector	50.0%	50.0%	0.1%	7%
Magazines	84.7%	10.2%	5.0%	17%
Journals	76.3%	22.9%	0.8%	19%
<b>Weighted average</b>	<b>59.1%</b>	<b>36.3%</b>	<b>4.6%</b>	<b>N/A</b>