

29 October 2015

Attn: Chair and members of the Business, Innovation and Skills Committee

Business Innovation and Skills Committee inquiry on the digital economy

Does the UK's intellectual property regulatory regime provide effective protection for the digital economy and sufficient scope for innovation and competition?

DACS is the representative for rightholders of visual works in the UK and welcomes the opportunity to contribute to this inquiry on the digital economy. DACS is a member of the Alliance for Intellectual Property and we support their submission which addresses the need for developing an evidence base to understand better the creative industries in the UK and to promote intellectual property through education and awareness initiatives. DACS will be responding to question 4 of the inquiry (as per the title of this submission) and strongly believes that:

- Digital businesses with intellectual property liabilities, such as auction houses, must be regulated to prevent tax and liability evasion;
- UK Government needs to ensure effective education of users and enforcement is fit for the digital economy;
- Licensing of rights and enforcement measures will not constrict an innovative and competitive market;
- The UK's intellectual property (IP) laws need to be strengthened to give greater protection for those distributing creative content through digital means.

About DACS

Established by artists for artists, DACS is a not-for-profit visual artists' rights management organisation. Passionate about transforming the financial landscape for visual artists through innovative new products and services, DACS acts as a trusted broker for 90,000 artists worldwide. Founded over 30 years ago, DACS is a flagship organisation that has and continues to campaign for artists' rights, championing their sustained and vital contribution to the creative economy. In our support of artists and their work, DACS collects and distributes royalties to visual artists and their estates through Artist's Resale Right, Copyright Licensing, Artimage, and Payback. More information can be found on the [DACS website](#), in particular our latest annual review [here](#).

The Artist's Resale Right

The Artist's Resale Right (ARR) provides a royalty for artists and artists' estates whenever their work is resold by a dealer, gallery or auctioneer for €1,000 or more. It was introduced in the UK through The Artist's Resale Right Regulation in 2006 on the basis of the European Resale Right Directive 2001/84/EC and fully implemented in 2012 to include deceased artists (artists' estates), whose works are still in copyright. It enables artists to share in the increasing value of their work and allows artists' estates to continue to look after an artist's legacy. DACS has almost 10 years of experience in this field of collecting and distributing these royalties to members and non-members alike.

ARR is a valuable and essential revenue stream for UK and international artists. To date DACS has distributed nearly £43m in ARR royalties to nearly 4,000 artists and estates. There has been an exponential rise year on year: DACS distributed £4.5m in 2012 which more nearly doubled in 2 years to just under £9m in 2014. Artists and their beneficiaries use ARR royalties to help secure cultural heritage. A large percentage of artists use their ARR royalties to sustain their practice and many artists' estates pay for storing, restoration and preserving artists' work. This is essential work that benefits museums and gallery exhibition programmes and supports cultural tourism, but also the art market itself which often draws on the expertise of heirs and beneficiaries for the authentication of works and proof of provenance.

There are mechanisms in place that ensure that ARR also protects the interest of the art trade: royalty rates are cumulative on a sliding scale moving from 4% on works sold at €50,000 or less down to 0.25% for works that exceed sale prices of €500,000 with a cap of €12,500 per sale. The UK Government was free to decide that a threshold of €1,000 should be implemented so ARR only becomes due on sales for or above that price.

Some jurisdictions (both within and outside of the EEA) have not implemented ARR. These countries are being used as safe harbours by online auction houses and other sales platform providers to avoid the payment of ARR royalties even when the location of the work or either party is within a jurisdiction that has implemented ARR.

Auction houses in the digital economy need to be regulated

World-famous auction houses are entering into the online art market, which has grown at a phenomenal rate, reaching \$2.64 billion in 2014¹ up from \$1.57 billion in 2013. In doing so, some are moving their operations to other jurisdictions to avoid paying the ARR royalty. Auction house Fine Art Bourse stated in an interview with The Financial Times² that their strapline for their business was "No sales tax, no resale royalty, no copyright fee" as they were running auctions out of Hong Kong. Although Fine Art Bourse was a UK registered company with London offices, they have now gone into receivership but the path remains open for other art market operations to follow³

The disregard not only for copyright and ARR royalties but also for tax payments is detrimental to the UK's digital economy – and indeed the UK's economy overall. The UK and EU should both continue to actively investigate and fine, where appropriate, tax evasion. Examples such as the recent competition inquiry into private tax deals⁴ and news that a UK retailer faced a £22.4m tax bill after a court found that it utilised tax havens in May 2015⁵ are well received, however online auction houses should be subject to the same level of scrutiny for their practices as other businesses.

¹ *Hiscox Online Art Trade Report 2015*, p.6 Executive Summary

² 9th January 2015 *Brass tacks: from online auctions to flipping* - FT.com <http://www.ft.com/cms/s/0/73d0d824-967e-11e4-922f-00144feabdc0.html>

³ *Antiques Trade Gazette*, *Tim Goodman's Fine Art Bourse in receivership before first sale*, 10 August 2015: <http://www.antiquetrade gazette.com/news/2015/aug/10/tim-goodman%E2%80%99s-fine-art-bourse-in-receivership-before-first-sale/>

⁴ http://europa.eu/rapid/press-release_IP-15-5880_en.htm

⁵ <https://www.gov.uk/government/news/clothing-giant-next-loses-tax-avoidance-case>

Whilst ARR is adopted throughout the EU and across 81 countries worldwide, it has not yet been implemented in places such as Switzerland, the USA and China, therefore providing scope for an online auction house to choose to form the contract in one of these jurisdictions to avoid payment of royalties. Auction houses not operating online may also choose to administer sales through an arm of their company located overseas. There is a lack of clarity over what factors are required for the law to apply, and whether location of the goods or one of the parties can give rise to ARR liability. The UK Government should seek to close the gaps in this international market with regulatory reforms. Big companies need to take responsibility for their legal liabilities and should not be allowed to use loopholes to avoid payment of royalties.

Education and Enforcement

The online regulatory framework must protect rightholders in the same way as it does for businesses or users. Online infringements not only harm the digital economy but also perpetuate the notion that content is cheap or free, which in turn damages the value of physical products too. The Minister of State for Culture and the Digital Economy, Ed Vaizey MP recently responded to written question on the arts stating that for every £1 of gross value added generated by the arts and culture industry, an additional £1.43 of gross added value is generated in the wider UK economy⁶. However the UK's strong creative economy will not continue to thrive if there is no value in rights.

Education and enforcement are key areas that need to be bolstered to ensure the value of intellectual property in the digital economy remains strong. DACS believes that penalties for online infringement should match those of physical infringements and supports the amendment of the Copyright Designs and Patents Act 1988 in this respect. The internet is often perceived as a rights-free environment and an extension to the criminal sanctions for online infringements to equal the provisions for physical infringements is justified. Equally, educational campaigns should highlight the value of creative content online and encourage a rights-respecting behaviour. DACS supports the Alliance for IP's proposals in their response to this consultation in this respect.

Innovation and competition

a) Licensing

We are aware that the European Commission's Digital Single Market strategy proposals to prevent unjustified geo-blocking and address portability aims to address concerns about anti-competitive practices in the EU. Whilst DACS is supportive of these intentions and indeed proposals that promote the free movement of goods and services, we are concerned that licensing practices are being perceived incorrectly as anti-competitive.

DACS licenses the use of copyright-protected artistic works on either a UK or worldwide basis for both physical (e.g. print) and digital uses. This is a successful venture in which DACS has, through more than 30 years of experience, created fair, balanced and proportionate pricing structures in consultation with our clients. The Commission's reforms could impose pricing structures on DACS, and other similar organisations, which we would view as potentially more harmful than good as it would prevent us from being able to keep prices competitive for the consumer. Licensing has also

⁶ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-10-16/12250/>



allowed for plentiful innovation, as DACS recently launched a one-stop-shop image bank called Artimage where the licensing customer can obtain both a high resolution, commercial-ready image together with the necessary rights clearances.

b) Definition of 'artistic works'

DACS is also concerned that the narrow remit of artistic works under the UK law (s.4 Copyright Designs and Patents Act 1988) prevents the UK from being competitive within the EU market. Artistic works have been given an exhaustive definition in the UK law, which is antiquated in comparison to the way in which some new art forms are being created. In contrast, laws in other European jurisdictions have a more fluid and less prescriptive approach to what constitutes an artistic work⁷. DACS calls on the Government to change the remit of 'artistic works' under UK law to allow all artists to benefit from copyright, in turn giving them the opportunity to earn royalties for the subsequent exploitation of their works, redress for infringement and to share in the increased value of their works.

Conclusion

The value of the digital economy is driven more by content than by goods, hence why many successful internet businesses are 'platforms' rather than shops. The value of content therefore needs to be safeguarded and protected as the creative industries will not thrive unless creators can receive a fair remuneration for their work. The landscape of rights management in the UK is one of competitive, innovative and flexible licensing deals, which aim to benefit consumers and rightholders in equal measure. DACS urges the Government to support licensing, to help prevent infringements by educating users and more importantly to prevent British businesses using tax havens abroad to evade their liabilities.

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⁷ The French Intellectual Property Code states that it will "protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose" at Article L112-2. A list of works which will in particular fall within this definition is given at Article L112-2.