

By email to: digitalstrategy@culture.gov.uk

19 January 2016

Dear Mr Vaizey,

A response to call for views on the UK's digital strategy

DACS is the representative for rightsholders of visual works in the UK and welcomes the opportunity to contribute to this call for views on the UK's digital strategy. We will be outlining 4 policy areas where digital affects the rights of creators. Additionally, we would like to highlight some of the key research in the field of visual arts practices in a digital environment, which we believe the Department of Culture Media and Sport (DCMS) would find of interest. Our key policy areas are:

- Online auction houses and the Artist's Resale Right (ARR)
- Social media platforms and digital infringement of copyright
- Digital single market proposals
- Copyright protection for digital works

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 its 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](#).

Background information

It is natural to all of us that digital forms part of our lives and our work. For artists, however, the digital environment can be a double-edged sword: whilst many benefit from the ability to promote their works and reach a wider audience, artists suffer greatly from a lack of protection of their rights.

Copyright and the Artist's Resale Right (ARR) are important ways for an artist to reap benefits from their work and facilitate their ability to continue their practice. This is especially crucial in the face of funding pressures both on a national and local level as it allows the artist to achieve economic results independently. A recent study¹ found that 71% of artists who exhibit in public galleries receive no pay at all, 59% cover exhibition expenses themselves and 63% have turned down requests to exhibit because they cannot afford to do so.

¹ 'Cultural Times: The first global map of cultural and creative industries' – a study produced by the International Confederation of Societies of Authors and Composers (CISAC) and the United Nations Educational Scientific and Cultural Organisation (UNESCO), published by EY (formerly Ernst and Young), 2015, page 51.

ARR provides a royalty for artists and artists' estates whenever their work is resold by a gallery or auctioneer (an art market professional) for €1,000 or more. It was introduced in the UK through The Artist's Resale Right Regulations 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 have a share in the increasing value of their work and allows artists' estates to continue to care for an artist's legacy.

ARR is a valuable and essential revenue stream for UK artists. To date DACS has distributed over £43m in royalties to over 3,900 artists and estates. Artists and their beneficiaries use ARR royalties to help safeguard cultural heritage by paying 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.

Online auction houses and ARR

As stated above, ARR is due when a work of art is sold for the second time via an art market professional, for example a traditional auction house such as Sotheby's, Christie's or Bonham's. Some auction houses are teaming up with eBay to sell works through their platform, whilst other auction houses are adopting digital and holding online-only auctions. However, as ARR has not been implemented as a law in countries such as Switzerland, the USA or China, these countries can be used as safe havens to avoid the payment of ARR. An auction house that recently went into administration, Fine Art Bourse, set up online sales through Hong Kong with the deliberate aim to sidestep ARR and other liabilities, which they made clear with their strapline "No sales tax, no resale royalty, no copyright fee"². Fine Art Bourse was a UK registered company with London offices. Whilst this auction house is no longer operating, many other similar businesses are forum shopping to avoid complying with EU and national law.

- We call on DCMS to consider in the Digital Strategy the potential ways in which emerging digital marketplaces may evade EU and national legislation at the detriment of rightsholders and small businesses.

Online platforms and infringement of rights

DACS runs an enforcement service for our members whose works we license through our copyright licensing scheme, which entails pursuing infringements of copyright on behalf of artists. This gives us an insight into the prolific use of our members' works online where neither authorisation nor a licence has been sought from the creator. As social media platforms rely heavily on the use and sharing of images, creators constantly find that the unauthorised use of their work becomes impossible to manage and to license properly. DACS is in the process of undertaking research to determine the value lost to artists for unauthorised use of their works online, in particular through social media sites, with a view to seek licensing of artworks.

² Article in the Financial Times, 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>

- We call on DCMS to help foster relations and support licensing of works through digital platforms. DACS will share any research findings with DCMS.

Digital Single Market Proposals

The European Commission's proposals on the Digital Single Market seek to create greater access to creative content within a fully functioning internal market, which is overall a positive intention. However, some of the proposals may conflict with the UK approach to copyright. In October 2014, the UK implemented new copyright exceptions with both the knowledge and contemplation of how digital services are and will be used by museums, galleries and archives in respect of artistic works.

We believe that these exceptions sufficiently allow digitising of works in a museum's permanent collection and provide a good balance between user and creator. However, the European Commission is now proposing to revisit exceptions despite the fact that these have been well provided for with appropriate safeguards and mechanisms in the EU Copyright Directive (2000/29/EC).

One example is the 'panorama' exception which can be found in s.62 of the Copyright Design and Patents Act 1988 (CDPA) allowing for reproductions of certain works that are permanently located on public display. The campaign for an extension of this exception across the EU has been spearheaded by Julia Reda MEP and member of the German Pirate Party who has used the term 'Freedom of Panorama' rather than exception. This causes a problem that goes to the heart of copyright which confers a number of rights onto the creator of qualifying works, but does not grant rights or freedoms to users. The term 'freedom' rather than defence or exception also skews the notion established in copyright law that an exception is applied in 'certain special cases'³.

- We urge DCMS to ensure that the status quo of UK copyright exceptions is maintained as far as possible in terms of the European Commission's Digital Single Market proposals.

Copyright Protection for Digital Works

Artists are not just using digital technologies to promote and disseminate their works; many artists are also now creating digital works too. Such works may use software, computer graphics, emerging technologies or be installation based. Some of these have been showcased in exhibitions throughout the UK, including the very popular [Digital Revolution exhibition](#) at the Barbican gallery in 2014.

Artists are using digital technologies in new and innovative ways that go beyond digital graphics. These artistic expressions can be interactive in nature or require reaction and participation from the spectator. However, these types of works may not be considered an 'artistic work' under UK copyright law. Section 4 of the CDPA is prescriptive and provides a very narrow list of what is considered an artistic work, which allows for traditional fine arts, crafts and photography but not for works such as an interactive digital installation. This is not a recent problem – before the emergence of digital artists were making works that now draw huge crowds to modern galleries but would not necessarily be afforded copyright protection under UK law, such as the 1917 work '*Fountain*' by Marcel Duchamp. As artists engage more with digital technologies to showcase innovation, educate and move their

³ As per Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works, 1886 and Article 5(5) of the Copyright Directive (2001/29/EC) – i.e. the 'three step test'.



audience, it is worrying that their works are offered no copyright protection. We consider that a change to the law is long overdue to protect works of art of contemporary practices.

- We call on DCMS to engage further with DACCS and with the IPO to review s.4 of the CDPA to ensure artistic works involving digital technologies are given equal copyright protection as non-digital works.

DACCS' Research

DACCS has partnered with the Oxford Internet Institute (OII) and Ruskin School of Art to award a Doctoral Knowledge Exchange Studentship to Laura Molloy who is investigating the economic and policy-making landscape for visual artists in the UK. Laura will build on her previous academic research at the University of Glasgow to look into how artists use digital environments to support their practice. As part of her PhD research, Laura will identify where artists can get better value from their use and management of digital resources to help make their practices more sustainable.

- DACCS will share any public research with DCMS in this area in due course.

For further information please contact

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