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15 April 2016

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Dear Sirs,

Case ID reference: 3d6b8cc9-f1dd-4195-baaf-b7098d53ec02

Transparency Register ID no: 103615018634-15

Response to the European Commission's public consultation on the evaluation and modernisation of the legal framework for enforcement of Intellectual Property Rights (IPRs).

DACS welcomes the opportunity to share views on this consultation on the legal framework for enforcing IPRs, in particular Directive 2004/48/EC – herein the 'Enforcement Directive'. DACS will restrict our answer to observations regarding enforcement and compliance issues experienced by visual creators and their representative rights management organisations, which the questionnaire does not seem aimed at.

This response will consist of two sections: the first will examine instances of copyright infringement as experienced by DACS. The second section will focus on how the legal framework for enforcement is incompatible with violations of artists' rights in respect of the Artist's Resale Right (derived from European Directive 2001/84/EC).

DACS is a member of the Alliance for Intellectual Property (the Alliance) and the British Copyright Council (the BCC) and supports the views shared in their respective consultation responses.

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.



Section One: Copyright Infringement

DACS only represents visual artists whose works fall within section 4 of the Copyright Designs and Patents Act 1988 (the CDPA). Visual artistic work has a very different use and application online to, for example, a film, broadcast or song. Torrent sites are unlikely to distribute visual works as these are rarely of the size requiring peer to peer file-sharing. Instead, visual works are rife on almost any website: they can be embedded, frame and in-lined from other websites without rights being cleared. They are easily copied, downloaded and reproduced without authorisation on a vast and prolific scale, often automatically removing any metadata incorporated in them, which makes quantifying infringements an insurmountable task. Social media platforms regularly distribute unlicensed images, and encourage user generated content, itself copyright protected, without allowing neither the user generating this new content nor the original creator to license the work effectively or be compensated for its reuse. These indomitable platforms sell advertising space which generates vast incomes, yet they are unwilling to engage in licensing schemes to remunerate visual creators.

Copyright Infringement

DACS operates an enforcement service for our members who have granted exclusive rights to DACS and therefore DACS can enforce copyright violations on their behalf. This service commenced in 2006 in response to a rising number of members requesting help for enforcement. DACS has kept data on these cases since inauguration of the service, and between then and 2015 DACS has dealt with 1,446 cases which included both online and physical infringements. Additionally, DACS operates a copyright advice line and has advised many visual artists who are not eligible for the enforcement service on how to deal with infringements, particularly where they appear online.

Overall, DACS is successful in achieving a positive resolution to enforcement, most often by putting in place retrospective licences, for example where a user failed to authorise the use of our member's work. DACS also receives settlements to avoid litigating in certain cases and DACS settles an average of 54 cases a year. However DACS has found that enforcing rights of visual artists in an online environment is increasingly difficult. Online platforms with a large audience and a strong presence are often unresponsive and it can be very hard to get a result for infringements on these sites. The sites are opaque and there is no access to contact details of a person to communicate with.

eBay operates an infringement programme called VeRO (Verified Rights Owner) that deals with infringement notices. In the past DACS has had a good response from VeRO but we recently have experienced them to be less reactive. Additionally, DACS requires the contact details of the sellers of infringing works so that we can establish direct communication with them but VeRO have been slow and reluctant at providing this data.

Cross border issues

VeRO operates worldwide but DACS deals with their UK contacts. VeRO generally proves difficult dealing with infringements where the seller is located outside of the UK, even though the item for sale is available on the eBay.co.uk website and can be bought by UK buyers. This further demonstrates the limited scope that VeRO operates in, and the challenges faced to attempt enforcement of our members' rights.

DACS has 34 sister societies internationally who deal with infringements of our members in their territory and vice versa. This is generally successful but there are some jurisdictions, such as China, where this can be more difficult, or where organisations representing rights and rightsholders are



automatically blocked from accessing the site to disguise the infringements taking place. Some jurisdictions do not offer any infringement programmes or do not have either the necessary legislation in place or don't provide for any processes for take down requests.

DACS has had prior experience of restrictive enforcement clauses in an internet service provider's terms and conditions. For example, Google Images has claimed that as their servers are situated in California, all images are subject only to US copyright law, regardless of the jurisdiction of upload or other factors. We acknowledge that some recent European case law has been encouraging, such as the decision in the recent French case involving Facebook where the Paris Court of Appeal upheld the decision that allows Facebook to be sued in France rather than just California. However, this has no direct application in other EU Member States, and further litigation would come at a cost for rights holders, generating a real need for legislative reform.

Another particularly worrying feature of online enforcement is the extent that non-USA based websites adopt the American approach to notice and takedowns under the Digital Millennium Copyright Act (DMCA) where it does not apply. This involves copyright law concepts that are not necessarily part of the law in the relevant jurisdictions, whether EU Member State or otherwise, such as fair use.

As a representative body with access to resources, DACS finds enforcement of rights in an online environment difficult, therefore individuals enforcing their own rights will find the process much harder. Where we cannot enforce rights on behalf of rightsholders, we explain the process for them to carry out themselves, but unlike publishers or record labels, rightsholders in artistic works are usually individuals or small businesses with far fewer resources and they are deterred from enforcing their rights.

DACS calls on the European Commission to ensure that the Enforcement Directive allows individuals and small businesses to use the enforcement procedures in an online environment effectively, including an obligation to provide for affordable avenues to courts that cannot be circumvented by the defendants. Additionally, we consider that online intermediaries and service providers should be more accountable and submit to greater transparency requirements in relation to providing infringement claimants with necessary information on use and a recognised, non-anonymised complaints procedure. We consider that the ability for online providers to forum shop and effectively chose a favourable law to stipulate enforcement procedures is unfair. The practice is not well tolerated by national courts in European Member States and DACS considers that a reform of the Enforcement Directive should reflect this sentiment.

Section Two: Artist's Resale Right (ARR)

About ARR

ARR, or droit de suite, was implemented in the UK through the Artist's Resale Right Regulations 2006 (ARRR), which adopted the 2001 'Resale Right Directive'. In the UK, ARR initially applied only to living artists but was extended in 2012 to also benefit artists' heirs and beneficiaries. As per the Resale Right Directive, ARR in the UK provides a royalty to rightsholders whenever their works are resold on the art market for at least €1,000. The royalties are calculated as a percentage of the sale price on a cumulative sliding scale from 4% to 0.25% and they are capped at €12,500 per sale which is ignited when a work sells for over €2m.

ARR is an extremely beneficial and essential right for artists. Since it was enacted in the UK, DACS has distributed £46.9m in ARR royalties to more than 3,900 artists and their heirs. Nevertheless, art market professionals who are jointly and severally liable with the seller of an artwork to pay ARR, often may not comply with the legislation. We believe that this is supported by the fact that the implementation into UK law does not provide for an efficient enforcement mechanism nor for effective sanctions. As such, the legal framework for the enforcement of IPRs does not assist artists in receiving their rightful and legal remuneration from ARR.

We consider that ARR is an IP right as the royalty paid to artists is on the basis of the copyright in their work and it is commensurate with the way creators of other types of creative works receive royalties from subsequent exploitation of their works. This is highlighted very firmly in recital 4 of the Resale Right Directive. Additionally, a work needs to meet the criteria for protection under copyright, as per Article 10 of the Resale Right Directive, and in the UK under section 3 ARRR. Despite the fact that ARR is an integral part of the IP family in the EU and a substantial number of non-EU countries, non-compliance with ARR does not fit into the traditional concept of 'IP enforcement', even though visual artists suffer the same loss as their non-visual creator counterparts when ARR royalties are not being paid. DACS therefore considers the Enforcement Directive is not working for ARR for a number of reasons and we advocate that the Directive be amended to level the playing field between artists and other creators.

Non-compliance with ARR

Under section 13 ARRR the seller of an art work and the 'agent' have joint and several liability to pay the royalty. In practice, it is almost always the agent, being an auction house, gallery or art dealer, who makes this payment. We refer to these agents as art market professionals (AMPs). The ARRR does not compel AMPs to make payments; however, instead section 15 ARRR states that a resale rightsholder or their agent (i.e. a society such as DACS) has the right to obtain information about a sale – in order to establish its qualification for ARR – and the person receiving such request "shall do everything within his power to supply the information". However, this drafting is ineffective and DACS has had to devise mechanisms to determine whether qualifying sales have been made whilst all the while minimising any administrative burden on AMPs.

Mechanisms in place

DACS has identified AMPs who deal in secondary sales of visual art works that are protected by copyright, where they are likely to sell for over the necessary threshold of €1000 and hence are likely to qualify for ARR payments. These AMPs are contacted on a quarterly basis with a Request for Information (RFI) form that DACS devised, which is simple and easy to fill out and requires only

information on qualifying sales. The form is accompanied by a nil declaration form that can be signed and dated if an AMP has made no qualifying sales that quarter. These forms are attached at **Appendix 1**.

DACS monitors this RFI mailing list closely and adds or removes as necessary AMPs who deal with qualifying or non-qualifying sales. The RFI mailing list currently records 1705 AMPs whom DACS sends RFIs to each quarter, so since 2006 many AMPs will have received 40 RFIs mailings. Whilst the majority of AMPs are compliant with paying ARR when due, hence the vast sums DACS has been able to distribute in the past decade, there are a number of AMPs who have not responded and RFIs go unreturned: about 10% of AMPs have never responded to any requests since 2006. Due to the lack of proper legal mechanisms, RFIs may from time to time go unreturned even from AMPs who have paid royalties historically as there is no legal obligation for AMPs to declare when no sale has taken place. DACS identified that information is overdue – i.e. has not been returned for at least one quarter – from 1,115 AMPs, representing 65% of all AMPs DACS contacts. DACS will communicate this to AMPs in further mailings. This leads to a lack of clarity on whether qualifying sales are taking place. DACS is unable to turn to legal mechanisms under Article 8 of the Enforcement Directive to rectify this.

In other words, DACS has to rely on AMPs' co-operation, rather than the law, to ensure ARR royalties are being declared. Without a right to have information provided to DACS, the process is not efficient and many artists are unfairly left without the royalties they are rightfully owed. Mechanisms under the Enforcement Directive that provide a right to information from AMPs at the moment a royalty becomes due would provide distinctly more clarity and allow for stronger compliance with the ARRR.

Methods of investigating sales

DACS combats this lack of information by conducting research into qualifying sales. DACS' artists' services team spend time researching through art market trade reports, art newspapers and other journals that indicate what sales have been made on the art market. The artists' services team also take screen shots of AMPs' websites and refer back to these at regular intervals to determine if a sale has been made. Often artists will be in contact with the team when they are aware of their works being sold by their AMP but have not received a royalty payment.

The artists' services team correspond with AMPs when they identify that qualifying sales have not been reported and no royalty payment has been made. Some AMPs are contacted multiple times and may also involve the input of a member of the legal team to outline the law under the ARRR and the obligations of AMPs. Searching for undeclared sales or royalties and contacting AMPs is time consuming and expends a lot of DACS' resource, which is overall detrimental to rightsholders. As such, DACS deals with each instance of non-compliance with ARR on a case-by-case basis. In 2015, DACS obtained over £164,000 in ARR royalties through the non-compliance process from four auction houses and 17 galleries, as per the table on the following page:

2015 Non-compliance data

Type of AMP	Amount of royalties received
Gallery	£91,005.36
Auction house	£22,485.62
Auction house	£1,284.00
Gallery	£66.67
Gallery	£1,283.00
Gallery	£287.60
Gallery	£296.71
Gallery	£600.00
Gallery	£970.00
Gallery	£490.76
Auction house	£6,855.12
Gallery	£1,811.13
Gallery	£401.77
Gallery	£18,287.21
Auction house	£192.00
Gallery	£15,587.15
Gallery	£2,131.59
	£164,035.69

The largest sum recouped in 2015 was £91,005.36 from a gallery based in the heart of London's gallery quarter in Mayfair, and in 2016 DACS received a further £27,006.52. They are a member of the Society of London Art Dealers, a trade body who were engaged in the implementation of the ARRR in 2006 and who make their members aware of the process and obligations under UK law. The amount recouped from this gallery in total now amounts to **£118,011.88**, which relates to 165 independent sales over a period of four years. DACS communicated with this gallery a multitude of times, both through email and formal pre-action correspondence. For such a large amount of royalties to go undeclared is damaging to the spirit of the law, to the AMPs that are compliant and to the artists relying on these royalties. This demonstrates the extent at which some AMPs are avoiding payment of ARR royalties without sanction, and the amount of resources DACS must expend to obtain the royalties rightfully owed to artists.

In our opinion the amount recouped in 2015 alone may represent a very small percentage of the amount of unpaid royalties in the UK: £164,000 was obtained from only 21 AMPs in 2015. However, we also know that RFIs are still outstanding from 1,115 AMPs – effectively the AMPs we have contacted in this way represent only 1.8% of AMPs with outstanding information, but the resource spent on compliance procedures is high. Without an effective right to information, DACS is unable to determine the extent of what monies are owed and these royalties could be very significant. The fact that AMPs have no obligation to declare when a sale has not taken place deepens the level of non-compliance.



Non-compliance with ARR is very hard to quantify and the powers granted to DACCS to address this lack of clarity and unfairness is limited. DACCS considers that the Enforcement Directive should be redrafted to provide a mechanism by which artists or their agents are able to request the information needed to seek the royalties rightfully owed to artists.

Drafting and language of the Enforcement Directive

The language used in the Enforcement Directive does not contemplate the way in which the right to receive remuneration may be avoided or circumvented, as the act of avoidance is always referred to as 'infringement'. If we take the stance that an infringement is an activity that gives rise to a claim then this would not encompass an inaction that gives rise to the claim - ARR is avoided because AMPs that do not comply with the law do so in a passive rather than an active way. We believe this distinction is key.

In respect of Article 8 (right of information) of the Enforcement Directive, we consider that this is not fit for purpose for the enforcement of the right to ARR royalties. ARRR section 15 gives the rightsholder or a person to act on their behalf, which we take to mean include a collecting society, a right to request information about a sale, in our opinion to determine if a royalty is due and if so, how much. This takes into account that sales can be made without public record. There is little sanction on an AMP who does not respond to this request, or to declare that no monies are due. This situation would not fit into the requirements under Article 8 of the Enforcement Directive where the 'right of information' is only applied where litigation is contemplated. The language here also does not assist as it refers to infringing goods, services and activities. As such, an artist or their mandated collecting society would be powerless to invoke any judicial pressure against non-compliant AMPs.

The Enforcement Directive was enacted three years after the Resale Right Directive yet it did not contemplate the reliance of those in the visual sector on the enforcement of their rights. We consider that the Directive should be changed to take this into account, to level the playing field between different types of creators and to encompass all relevant EU law.

We call on the European Commission to amend the wording of the Enforcement Directive to ensure that creators who receive ARR royalties have the same level of protection and can enforce their rights in the same way as those who receive royalties through copyright licensing. In particular, DACCS believes it is necessary to amend Article 8 of the Enforcement Directive to provide a right to information not only in the 'context of proceedings' but in anticipation of, or to avoid proceedings. Any mention of 'infringement' would also state non-compliance with obligations to act in compliance with the law e.g. as set out in the Resale Directive. We also consider that Article 8 should be redrafted to include, in section 1(e), 'was found to be avoiding payment of a royalty pursuant to Directive 2001/84/EC' or such words to that effect.

Although many AMPs regularly respond to DACCS' communications and generally are compliant with ARR, the fact that there is no obligation to report when no sales take place and that DACCS is not empowered through legislative mechanisms to gain this information means there is a distinct lack of clarity on qualifying sales. This results in either resource heavy compliance procedures or royalties going unpaid. The high amounts of royalties DACCS has been able to obtain from just a handful of AMPs in 2015 is testament to the fact that immeasurable royalties could be going unpaid to the detriment of the creators the ARRR sought to remunerate. DACCS considers that the Enforcement Directive has been drafted incorrectly as it did not contemplate how creators receive remuneration through ARR, despite the fact the Resale Right Directive came into force three years prior. DACCS calls

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on the European Commission to rectify this imbalance and make the appropriate amendments to the Enforcement Directive so it is fit for purpose.

Appendix 1

Request for Information form and Nil Declaration Form