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## **EVA Membership survey: DACS' response**

### **Works in public places and agreements/enforcement experiences with platforms**

#### **1. Membership**

DACS does not collect information on our members' repertoire and therefore we do not have a number of artist member for each professional group identified.

#### **2. Protection of Architecture**

A work of architecture (being a building or model for a building) is considered an artistic work under s.4(1)(b) of the Copyright Designs and Patents Act 1988 (CDPA). Section 4(1)(c) CDPA also considers an artistic work to be a 'work of artistic craftsmanship', and therefore may include permanent fixtures such as stained glass windows.

Under s.62 CDPA, the copyright in buildings on permanent public display is not infringed by making a graphic work, photograph or broadcast of a visual image of it, nor by issuing copies to the public or communication to the public (the distribution right and communication right respectively) of that graphic work, photograph or broadcast.

#### **3. Application of three-step test**

The remit of s.62 CDPA allows distribution and communication of copies of anything that is not an infringement of copyright under that section. We do not believe the remit of s.62 CDPA extends to the use of a work inside a publication as this is a composite work and separate to the distribution or communication of the work under s.62 as a standalone work. Additionally, the exception under s.62 CDPA only applies in the UK. Any worldwide or online publication cannot rely on the exception and therefore we will license the use of these works in the normal way.

Further, we apply the three-step test under the Berne Convention for the Protection of Literary and Artistic Works (the 'Berne Convention') and, for example, if an advertising company wanted to produce a TV advert including a work listed under s. 62 CDPA, this would require a licence or else the use may prejudice the legitimate interests of the artist and conflict with their normal exploitation of the work.

#### **4. Moral Rights**

##### **a. Right to be identified as the author**

Section 77(4)(a) CDPA provides that the author of an artistic work has the right to be identified whenever the work is exhibited in public. Section 77(4)(c) CDPA states that in the case of a work of architecture, sculpture or work of artistic craftsmanship, when copies of a graphic work representing it are issued to the public, the author has a right to be identified as its author.

Unlike in some jurisdictions, the UK impose a criteria that the paternity right needs to be asserted under s.78 CDPA, for example by an instrument signed in writing.

There are exceptions to the paternity right under s.79 CDPA: the right is not infringed when the work is used for the reporting of current events, incidental inclusion in a recording or broadcast, or for examination questions. The paternity right does not apply in newspaper, magazines or similar periodicals or in encyclopaedia, dictionaries or collective reference that has been made available with the consent of the author for the purpose of such publication.

## **b. Right to object to derogatory treatment of a work**

Section 80 CDPA provides the right to object to derogatory treatment and in s. 80(4)(c) CDPA states that this right is infringed in respect of a work of architecture, sculpture or artistic craftsmanship when a person issues to the public representations of a derogatory treatment of that work. This does not apply to a work of architecture in the form of a building.

There are also exceptions to the right to object to derogatory treatment. Section 81 CDPA states that the right does not apply when reporting current events or in a newspaper or reference work (as above). Two other moral rights provided under ss. 84 and 85 CDPA do not require the creation of a work to be enjoyed (the right to object to false attribution and the right to privacy in certain photos respectively).

## **5. Remuneration for secondary use**

In general we do not think it is likely that secondary uses will apply under the exception in s.62 CDPA. From our experience, secondary uses tend not to be of standalone works but reproductions of published composite works (i.e. a book containing an image), and in this case the exception would not apply for the primary use let alone the secondary use. In the UK the exception allowing private copying of works has been quashed.

## **6. Other exceptions applying to works in public places**

Mainly s.62 CDPA provides the exception that a reproduction of (and making available of) a work of architecture, sculpture or work of artistic craftsmanship does not infringe copyright. The other general copyright exceptions under the CDPA do also apply. These are:

- Research and private study (subject to fair dealing)
- Criticism, review and reporting current events (subject to fair dealing)
- Incidental inclusion
- Reproducing the work for the sole purpose of advertising the work for sale
- Educational uses: copying in the course of or in preparation for instruction or for setting exam or answering exam questions
- For libraries archives and research (subject to fair dealing)
- Parody, caricature and pastiche (subject to fair dealing)
- Quotation (subject to fair dealing)

## **7. Other legal limitations for use of works in public places**

In the UK members of the public have the freedom to photograph or film in public places without any restrictions such as protection of landmarks. Whilst there is not a legal restriction on photography of public places for security reasons, the police are not impeded from questioning the intention of photographers or requesting that they refrain from photography, although this cannot be enforced. Under the Terrorism Act 2000, the police have a power to stop and search a person who they suspect to be a terrorist and in doing so can seize and retain articles such as digital photographic files and camera equipment if the police believe this constitutes evidence of terrorist acts. There are also some prohibitions around photography in certain places, if privately owned and for certain uses.

## **8. Negotiations with platforms**

DACS does not have any agreements in place with social media platforms.

## **9. Enforcement**

DACS operates an enforcement service for members to deal with copyright infringement. Broadly speaking, infringements can fall into one of two categories: one is where the copyright has been infringed outright and no exception applies, whereas the other type of infringement is where a use of a work has fallen outside of an exception believed to apply. The latter type of enforcement is generally harder to conclude as the remit of an exception can be unclear: there is little case law for guidance and some elements of exceptions under copyright law can be subjective. Nevertheless, the enforcement service is successful. For example, DACS were able to enforce against an infringement of the use of works on the '4<sup>th</sup> plinth' in Trafalgar Square where sculptural works are only on display for a limited time then rotated, therefore the works did not fit the criteria under the exception in s.62 CDPA of 'permanent' public display.



#### **10. Studies on impact**

We do not have any such studies.

#### **Additional question on platforms**

We have not had any conversations with platforms or providers about licensing their content or making our repertoire available. The only requests that the licensing team have received are from users like the National Galleries of Scotland or Tate Galleries requesting to use our members' works which are in their permanent collection on their news feeds and/or social media pages.

#### **For further information please contact**

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