

Dear Sirs,

DACS' response to the questionnaire on contract rules for online purchases of digital content and tangible goods

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DACS is the representative for rightholders of visual works in the UK. DACS is responding to select questions in Part 2 of the questionnaire to highlight the urgent problems that artists are facing through loss of remuneration as online auction houses evade European law when selling artworks (tangible works) in an online marketplace. This response will generally cover the remit of questions 29-32 and 35-37.

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 via Payback. More information can be found on the [DACS website](#), in particular our latest annual review [here](#).

The Artist's Resale Right and the online sale of tangible goods.

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 70 years after their death. 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. DACS has almost 10 years' of experience in this field.

ARR is a valuable and essential revenue stream for European artists. To date DACS has distributed nearly £41m in royalties to over 3,700 artists and estates. Since 2012, when ARR was fully implemented, DACS distributed £13m to European artists outside of the UK. There has been an exponential rise year on year: DACS distributed £2.3m in 2012 which more than doubled in 2 years to £5.4m in 2014. Artists use ARR royalties to help secure cultural heritage as 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.

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. The UK Government was free to decide that a threshold of €1,000 should be implemented so ARR is only activated on sales for or above that price.



Online traders and European Law

Online traders adapt to different jurisdictions and in particular are free to base contracts in any jurisdiction they please. Online art auction houses often base their contracts in Switzerland, who have not introduced ARR, or outside of Europe sometimes in order to intentionally circumvent the law. Auction house Fine Art Bourse stated in an interview with The Financial Times¹ that their strapline for their business is “No sales tax, no resale royalty, no copyright fee” as they are running auctions out of Hong Kong. Fine Art Bourse are a UK registered company with London offices.

The clear disregard for not only copyright and ARR royalties but also for tax payments is detrimental to the internal market. Tax evasion practices are not legal nor are they generally tolerated by society: a UK retailer faced a £22.4m tax bill after a court found that it utilised tax havens in May 2015², meanwhile boycott actions over tax evading high street shops and amenities are well documented in the press³. Online retailers of tangible goods, such as auction houses, should be subject to the same level of scrutiny for their practices.

Whilst ARR is adopted throughout the EU and in 81 countries worldwide, it has not been adopted in places such as Switzerland, the USA and China, therefore providing scope for contracts to be based in one of these jurisdictions to avoid payment of royalties. There is not sufficient legal clarity as to where contracts are formed in auction situations and indeed whether this depends on the location of the seller, of the buyer or of the object being sold. We urge the European Commission to consider the scope of territoriality of contracts, and to address the opaque nature of current contract law on this issue⁴.

The questionnaire asks at question 35 whether business to business contracts need to be considered by the European Commission. DACS consider this to be necessary as businesses may include a sole trader or a small business, whose bargaining position against a larger corporation may not be equal. Additionally, we believe there is a real need for the rights of third parties under contract to be considered too. ARR is a third party right as it does not affect the seller nor the buyer of an artwork, but instead the artist who has not provided any consideration under the contract of sale. In the UK, the doctrine preventing a third party enforcing rights in this way was heavily criticised and abolished by the Contracts (Rights of Third Parties Act) 1999.

DACS believes that there are several areas that require attention in order to ensure that the real harm to individuals with rights and to the functioning of the European market place is avoided. Third party rights should be recognised, as should the open disregard of EU law through contractual loopholes.

For further information please contact

Reema Selhi
Legal and Policy Manager
DACs
T 020 7553 9063
reema.selhi@dacs.org.uk

¹ 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>

² <https://www.gov.uk/government/news/clothing-giant-next-loses-tax-avoidance-case>

³ 18th February 2015 *Ipsos Mori: Nearly half of British consumers boycott firms over tax avoidance* – International Business Times <http://www.ibtimes.co.uk/ipsos-mori-nearly-half-british-consumers-boycott-firms-over-tax-avoidance-1488549>

⁴ *LICRA v Yahoo!* 2000-2006: this case was brought on the grounds of whether Yahoo! could be prosecuted in France under French law and then whether the US courts should enforce the ruling.