

Attn: Lord Whitty and the Members of the House of Lords Select Committee on the European Union

## **House of Lords Select Committee on the European Union: Call for Evidence into Online Platforms and the EU Digital Single Market**

DACS is the representative for rightholders of visual works in the UK and welcomes the opportunity to contribute to this call for evidence on online platforms. DACS is a member of the Alliance for Intellectual Property and we support their submission which addresses in particular the access to infringing content online. DACS strongly believes that:

- The definition of online platform by the European commission (the 'Commission') is unnecessary and it creates loopholes for some businesses
- Auction houses also maintain online platforms and should be held accountable in the same way as other platform providers
- Online platforms are abusing jurisdictional immunity to avoid payment of tax and fulfilling their royalty liabilities

### **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](#).

### **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 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 of collecting and distributing these royalties to members and non-members.

ARR is a valuable and essential revenue stream for UK and European artists. To date DACS has distributed nearly £41m in royalties to over 3,700 artists and estates. 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 and their beneficiaries 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, 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 havens 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.

## Defining Online Platforms

The Commission has defined online platforms as *'software-based facilities offering two or even multi-sided markets where **providers** and **users** of content (etc.) can **meet**'*. Defining platforms in any meaningful way is a difficult task as it may rule out new business models, or create loopholes that certain types of businesses may be able to exploit. Further problems arise in determining what would constitute a 'provider' or 'user' for example. DACS considers there is a risk of loopholes manifesting when considering ARR royalty payments.

The ARR royalty payment is due when a work is sold for at least the second time by 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 holding online-only auctions. The Commission has identified eBay as a provider but it is not clear whether they would also consider an auction house in the same manner. Therefore, defining a platform one way or another is problematic as it does not examine the practical realities of the online art market. If eBay and an auction house are both auctioning artworks to the same audience, the fairest approach to regulation would be to examine the behaviour of all businesses in a market place to ensure natural competitors are evenly regulated.

The extent of online platforms is undeniably emphatic. Many services currently considered to be an online platform have only recently formed as a business model but are vastly adopted. Innovative new economies will continue to flourish, so flexibility in the approach to what constitutes an online platform is essential to futureproof any proposals.

## Effects on consumers, suppliers, competitors and society

Online platforms are frequently praised for their enterprising marketplaces, but it is clear that many are content to appeal to a global audience yet shield their corporate liabilities behind the laws of a specific and favourable jurisdiction. World-famous auction houses are now following suit and shamelessly promote their tax (and other liability) avoidance to their audience. Auction house Fine Art

Bourse stated in an interview with The Financial Times<sup>1</sup> 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 not only for 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 2015<sup>2</sup>, meanwhile boycott actions over tax evading high street shops and amenities are well documented in the press<sup>3</sup>. Online platforms, such as those that auction houses use or maintain themselves, should be subject to the same level of scrutiny for their practices as other businesses.

Whilst ARR is adopted throughout the EU and overall in 81 countries worldwide, it has not yet been adopted in places such as Switzerland, the USA and China, therefore providing scope for structures where the contracts are agreed to be formed/entered into 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 either the location of the seller, of the buyer or of the object being sold or all of them.

We refer to the submission from the Alliance for Intellectual Property in respect of the access to infringing content that online platforms provide.

## **The current regulatory environment**

Online platforms are dominant globally but are not sufficiently regulated. It must not be the case that a European Directive can be so routinely flouted by a company either simply setting up a side branch of their business in a favourable jurisdiction or even only stipulate the formation of the contract under the law of such jurisdiction. There needs to be international cooperation to ensure that laws are abided and to create robust barriers to prevent law evasion and the payment of royalties which ultimately has a detrimental effect on the UK economy.

## **For further information please contact**

Reema Selhi  
Legal and Policy Manager  
DACs  
T 020 7553 9063  
[reema.selhi@dacs.org.uk](mailto:reema.selhi@dacs.org.uk)

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<sup>1</sup> 9<sup>th</sup> January 2015 *Brass tacks: from online auctions to flipping* - FT.com <http://www.ft.com/cms/s/0/73d0d824-967e-11e4-922f-00144feabdc0.html>

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

<sup>3</sup> 18<sup>th</sup> 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>