



Response to the IPO Consultation on Copyright

**DACS Submission
March 2012**

Contents

02	Executive Summary
06	Orphan Works
19	Extended Collective Licensing
26	Codes of Conduct
31	Exceptions to Copyright
56	Copyright Notices

Executive Summary

Established by artists for artists, DACS (the Design and Artists Copyright Society) is an innovative visual artists' rights management organisation, representing 80,000 creative individuals including artists, photographers and illustrators from the UK and abroad. Part of a global network of visual arts collecting societies, DACS is committed to maximising revenues for visual artists so that they can continue to create and innovate, thereby contributing to the UK economically, socially and culturally during a period of rapid and far-reaching change.¹

We welcome the Government's objective to achieve strong, sustainable and balanced growth in the UK as well as the Government's recognition of the significant contribution that UK creators make to the UK economy. We welcome some of the proposals in the Government's Consultation on Copyright but we also have grave concerns that a number of these proposals could undermine the sustainability of many thousands of visual artists, photographers and illustrators who contribute significantly to the UK economy.

Copyright provides powerful incentives for artists to carry on producing works. Licensing and royalty payments benefit the very people whose content drives their invaluable contribution to the UK economy, and our reputation as a creative, dynamic and innovative nation.

Orphan Works

Any orphan works solution has to have as a starting point the property right of the creator in their work rather than an undefined and unarticulated "wish" of users to use works. Individual creators should not be put in the position of subsidising the mass digitisation projects of public institutions and Government. DACS therefore supports the orphan works solution proposed by the British Copyright Council (BCC).

Any use of orphan works should be limited to non-commercial uses which should not extend to include the legally fictitious notion of "pre-commercial" use. 78% of respondents to DACS' Artists' Survey said 'no' to public bodies using works for commercial gain and 92% said 'no' to commercial bodies using works for commercial gain.² In addition, these non-commercial uses should be remunerated at market rates.

Moral Rights remain paramount and the unintended creation of further orphan works should be prevented.

A diligent search has to be conducted in order to qualify a work as an orphan work. DACS does not believe that the ultimate use of a work should determine what constitutes a diligent search.

Providing for an upfront payment will ensure parity between orphan and non-orphan works, will help avoid fraudulent claims to orphan works status and will ensure parity between orphan and non-orphan works.

Extended Collective Licensing

Extended collective licensing provides valuable solutions for rightsholders and users where it is impracticable to license rights individually. However, rights should not be licensed collectively if rightsholders wish to reserve the exercise of their exclusive rights for themselves: rightsholders should be free to choose what is licensed collectively, and what is licensed directly into a primary market.

¹ For more information on DACS, visit www.dacs.org.uk

² DACS Artists' Survey 2012 www.dacs.org.uk

Executive Summary

DACS would only support extended collective licensing schemes if they:

- are approved by a majority of rightsholders
- do not negatively impact on primary markets
- allow rightsholders to opt out

DACS' existing distribution of collective royalties (called Payback) demonstrates the value of such schemes. In 2011, DACS efficiently distributed over £4 million in royalties to 14,000 rightsholders.

Codes of Conduct for Collecting Societies

DACS supports the development of self-regulation through codes of conduct as promoted by the British Copyright Council (BCC) and opposes a statutory imposed code. The BCC proposal deserves to be tested in practice, and collecting societies should be given the opportunity to develop their codes from these principles.

A commitment to principles of good governance, transparency and customer service should apply to all licensing bodies regardless of size.

DACS supports the principle of an external third party considering the final stage of a complaint raised under a formal procedure, provided that the costs of such a service are proportionate. However, we advise against levying fines on collecting societies: this is because collecting society revenues comprise rightsholder royalties.

Exceptions to Copyright

DACS agrees that policy and legislation should create the right conditions for economic growth in the UK. But we do not agree that the proposals to extend or introduce copyright exceptions presented in the Consultation are necessarily the means to achieve this objective.

The evidence given is unconvincing and the Consultation fails to predict and cater for the consequential shortfalls in earnings from copyright uses of copyright protected works as well as the knock-on effects these changes will have.

The Three Step Test should be formally implemented into the CDPA 1988. A formal adoption into national law would greatly improve the concept of this established principle and would promote clarity amongst rightsholders and users alike that there is a general basis for the application and interpretation of exceptions to copyright.

Private Copying Exception

Article 5(2)(b) of Directive 2001/29/EC allows for a private copying exception limited to the reproduction right only, in exchange for fair compensation to the rightsholder.

The Consultation highlights the work categories of musical works/sound recordings and films as examples where users wish to be able to format shift for private purposes the contents of products they have legally purchased. It is different for artistic works because for the most part, they are not available for purchase in the same way and therefore do not lend themselves to being format shifted as described in the Consultation. Artistic works as such should be excluded from the scope of any exception.

Preservations by Libraries and Archives

Any safeguard around fair and appropriate remuneration for rightsholders will be undermined by the extension of the preservation exception as described in the Consultation and needs to be avoided or restricted.

To do otherwise will force individual creators to subsidise the digitisation efforts of Government and public institutions without receiving remuneration.

Executive Summary

To accommodate the need to preserve works which are unique, we propose allowing for an additional digital copy which cannot be made available, or substitute the work in the permanent collection, but which will serve as a backup copy in cases where substituting copies are deteriorating or mislaid.

Research and Private Study

The expansion of the existing exception to include sound recordings, films and broadcasts will have a negative impact on rightsholders and they will lose an established revenue stream. The scope for misapplication of the exception giving rise to a de facto private copying exception will have a further detrimental effect on individual rightsholders and ultimately on the creative industries in the UK as a whole, which makes it of utmost importance to limit the exception in a meaningful way and/or to provide for fair compensation for rightsholders.

There should be no such extension of Section 29 CDPA 1988 to educational establishments and other institutions as suggested in the Consultation. It is not helpful to broaden the legal definition of 'educational institutions' to include libraries, archives and museums and granting them a right to communicate and to make available works that are themselves not further defined.

Text and Data Mining for Research

No new exception should be introduced. We do not believe the proposals here are covered by Article 5 of Directive 2001/29/EC. Article 5 (3) (a) i states that any exception under this provision has to be for the sole purpose of the illustration for teaching or scientific research.

Arguments that text and data mining technologies would save time for researchers do not automatically lead or amount to evidence that any such exception would support the economic growth of the UK, particularly where the implications and effects cannot at present be fully perceived or understood. Further research and clarification in this area are necessary before any legislative intervention occurs.

Ownership and copyright in works that may result from the process of text and data mining are not addressed in the Consultation. It seems unfair if the "creator" of such databases would be able to use the results in competition with the "contributors" to these databases. This would not only impact on the primary market of rightsholders but would additionally grant an anti-competitive advantage to the beneficiaries of such an exception.

Parody, Caricature and Pastiche

Britain has a long and vibrant tradition of comedy and satire, and parody, caricature and pastiche have long been used to comment on the society, culture and politics of the day. This tradition has thrived even though UK copyright law does not recognise an express parody exception.

The Consultation is flawed in its attempt to make a case for the introduction of a parody exception and fails to provide the economic evidence advocated for it by Professor Hargreaves.

In jurisdictions where moral rights are non-waivable and are equally enforceable as economic rights, authors are more likely to accept a notion of parody as any distortion of their work will find a natural limitation in the integrity right attaching to their work. In the UK, moral rights are waivable and more limited without the provision of meaningful damages; it is questionable therefore whether the integrity right creates any meaningful limitation to what could be done under a parody exception.

Use of Works for Education

The educational licences offered by the Copyright Licensing Agency (CLA) and the Educational Recording Agency (ERA) offer great value for money to licensees. Rightsholders have supported the innovations and developments both ERA and CLA have brought to their education licences to reflect changes in technology and the way this influences how education is provided.

Executive Summary

Impact Assessment BIS 0317 fails to provide meaningful evidence to support claims for the restriction or removal of licensing schemes currently applying to educational recording and reprographic copying.

DACS agrees with CLA and ERA that innovations and developments already introduced with the agreement of rightsholders in to licensing schemes should be supported and complemented by any changes in the law.

Copyright Exceptions for People with Disabilities

DACS supports the Government's ambition to make more content available for people with disabilities. There has been a great deal of licensing innovation and flexibility from rightsholders already, especially in relation to providing appropriate arrangements for people with visual impairments. There is evidence of existing positive partnership models between rightsholders and user groups, and we would like to allow these stakeholders to develop more market-led solutions.

Use of Works for Quotation and Reporting Current Events

There should be no amendment of Section 30 CDPA regarding criticism and review as suggested. Without clear cut definitions and the formal inclusion of the Three Step Test into UK legislation, the described expansion of Section 30 CDPA clearly undermines the rights of creators and risks impacting on established primary markets.

Public Exhibition or Sale of Artistic Works on the Internet

There seems to be a conceptual misunderstanding of the scope of Section 63 CDPA 1988 as well as of the authorisation in Article 5 (3)(j) Directive 2001/29/EC. Both provisions allow for the reproduction of an artistic work for the purposes of advertising the sale of that artistic work.

The exception should not be extended to include the advertising activities of museums and galleries. The uses proposed for inclusion in an extended exception at Section 63 CDPA 1988 are well established primary licensing markets. Extending the exception would therefore jeopardise the earning potential of visual artists significantly.

I Orphan Works

Introduction

The question of 'orphan works' has stirred up a great deal of controversy among rightsholders and there are many conflicting views, divergences of opinion and uncertainties generally about what is intended by those arguing for orphan works provision. This state of affairs has been compounded by the distinction within the present Consultation between orphan works and extended collective licensing (ECL).

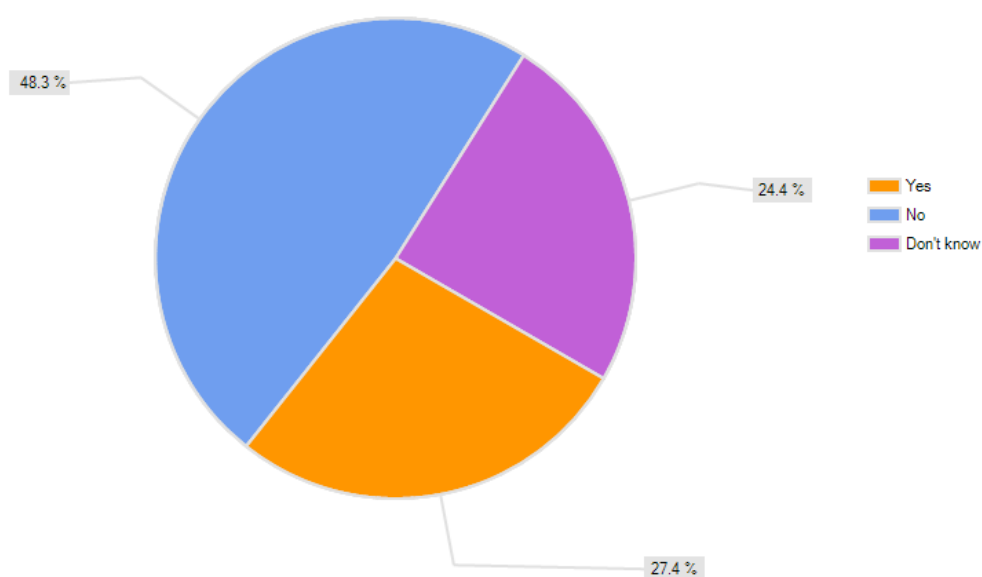
The extended collective licensing framework appears to be designed to deal with mass digitisation. This may make some sense (though we discuss this below) but given that orphan works initiatives (including developments such as ARROW and the like) were ostensibly the answer to the need for cultural institutions to have a legal framework permitting lawful mass digitisation and making available, the question arises now about who the orphan works proposal is intended to benefit if ECL takes care of cultural institutions.

Our general position on orphan works can be summarised as follows:

- We support the solution proposed by the British Copyright Council (BCC);
- Individual creators should not be put in the position of subsidising the mass digitisation projects of public institutions and Government;
- Any solution has to have as a starting point the property right of the creator in their work rather than an undefined and unarticulated "wish" of users to use works which apparently are not made available;
- Moral Rights remain paramount and the unintended creation of further orphan works should be prevented.

We asked our members what they thought about this proposal and we show the results below.

Should a scheme be introduced in the UK to legitimise the use of orphan works?



48% of respondents to DACS' survey³ felt that an orphan work scheme should not be introduced in the UK. 27% felt that a scheme should be introduced.

³ DACS Artists' Survey 2012 www.dacs.org.uk

I Orphan Works

Question 4

What do you consider are the constraints on the UK authorising the use of UK orphan works outside the UK? How advantageous would it be for the UK to authorise the use of such works outside the UK?

One of the main constraints regarding the UK authorising the use of orphan works outside the UK is that the UK does not have jurisdiction to do so. Apart from copyright being a territorial right, the UK simply does not have the right to legislate outside UK territory. Besides this more general issue, other territories may already have licensing or legislative solutions in place to deal with orphan works and in addition may have developed different definitions. Before considering such an expansion of orphan works legislation it would be important to be clear about definitions and parameters of any orphan works solution.

A further potential issue in this respect arises if the UK assumes a position where it can license the use of orphan works for other territories; this may enable other parties to license the use of orphan works in the UK on terms which undercut local arrangements, with the consequent flow of revenues out of the UK and the corresponding inhibition on growth.

It will therefore be necessary to consider carefully the impact on UK business of any solution adopted, as these may distort the balance of trade. If the UK were to introduce disincentives for licensing in the UK this may encourage licensing abroad which will lead to a loss of revenue for rightsholders and the UK economy.

Question 5

What do you consider are the constraints on the UK authorising the use of orphan works in the possession of an organisation/individual in the UK but appearing to originate from outside the UK:

- a) for use in the UK only
- b) for use outside the UK? How advantageous would it be for the UK to authorise the use of such works in the UK and elsewhere?

We do not believe that the UK can assume jurisdiction for territories outside the UK and any solution regarding orphan works will have to take into account any solution required by the EU. It is likely that the EU will adopt a solution that is universally accepted but in order to be able to judge the scope of such solution it will be necessary to align the approach of the UK with that of the EU. It would also be necessary to be clear about the exact scope of any orphan work solution before being able to judge the territoriality issue described in question 5. If any such solution was to concentrate on true orphans, in the sense that the rightsholder is unknown and/or cannot be traced, it seems unlikely to be able to judge the country of origin precisely in the majority of cases. There is obviously also a risk that a work which may qualify under UK legislation and any local definition of an orphan work is in fact not considered an orphan work in the country of origin. This could then lead to a situation that the protection of foreign works in the UK could be less than in their home jurisdiction which in turn could lead to a situation where foreign rightsholders are reluctant to make works available in the UK.

It therefore seems essential to find a uniform approach to the issue of orphan works and the UK should avoid manoeuvring itself into a disadvantaged position, in particular within the European context.

I Orphan Works

Question 8

What would be the pros and cons of limiting the term of copyright in unpublished and in anonymous and in pseudonymous literary, dramatic and musical works to the life of the author plus 70 years or to 70 years from the date of creation, rather than to 2039 at the earliest?

We believe it very problematic to change this provision with retrospective effect. The 50 year term with expiry in 2039 was introduced as a transitional provision in Schedule 1 Section 3 (b) to the Copyright, Designs and Patents Act 1988 (as amended) ("CDPA") as the previous copyright acts did not limit the duration of copyright in unpublished works as such. We therefore believe that it is not possible to change this provision now without unduly prejudicing those rightsholders who may be affected by or who currently rely on the current provisions.

In any case we do not believe that an orphan works solution which attempts to provide workable solutions for the use of works where the author is unknown should lead to a change of the law regarding unpublished works in general, irrespective of their status as an orphan work. We also cannot see how this change would be helpful in determining the duration of copyright of orphan works as in cases where the author is unknown; how would it be possible to establish when an author died, or when the work was created? The 2039 rule therefore at least gives legal certainty and Government should refrain from introducing more uncertainty by legislating in the proposed way.

Question 9

In your view, what would be the effects of limiting an orphan works' provision to non-commercial uses? How would this affect the Government's agenda for economic growth?

If preservation of works and access to previously unavailable works is at the heart of the proposal to stimulate growth through the creation of new works and IP, non-commercial use should be sufficient for policy purposes. Any commercial use of orphans would not lead to the envisaged growth but to a substitution of works already available in the free market.

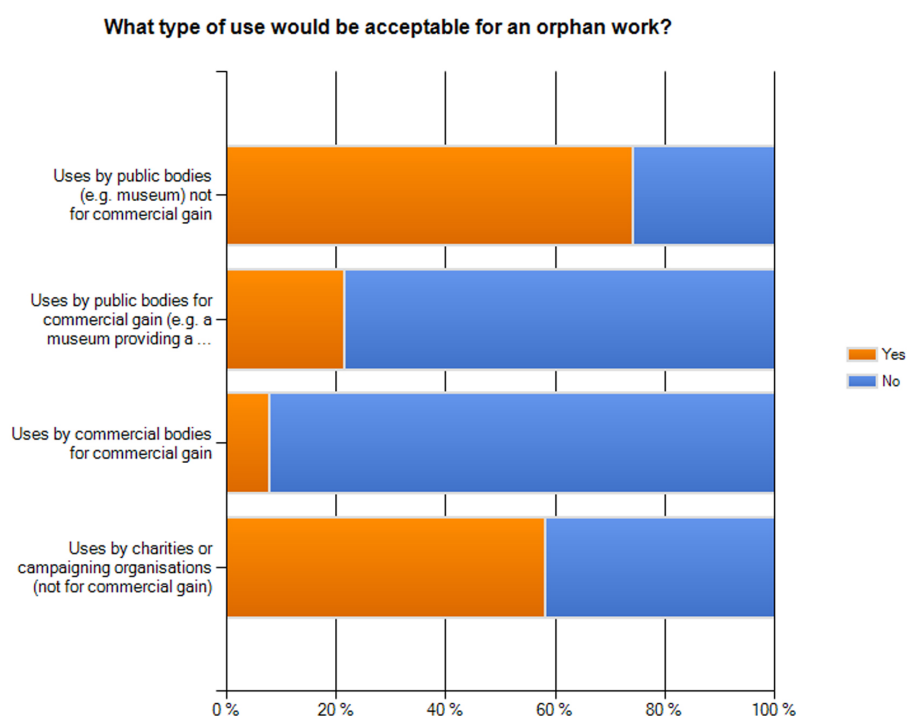
Introducing an exception limited to non-commercial use would achieve the main policy objective without unduly prejudicing the rights of the author. However, as outlined in the Consultation, it would be necessary to find a strict definition of commercial and non-commercial use. The argument that any definition would always result in a debate about the differentiation as outlined in paragraph 4.30 is not convincing, as there has been some discussion of the definition of these terms for some time and as Government seems to rely on this concept of non-commercial in various other places throughout the Consultation. Any use of orphan works should therefore be limited to non-commercial uses which should not extend to include the legally fictitious notion of "pre-commercial" use.

In addition, these non-commercial uses should be remunerated at market rates which will need to be applied according to the type and extent of use. As Government tries to make the case that publicly funded institutions should not have to finance the preservation and making available of orphan works, it seems incomprehensible why rightsholders should be compelled to subsidise the digitisation projects of such institutions without being remunerated for it. Appropriate remuneration would further the Government's agenda for economic growth as it would enable rightsholders to invest more in the creation of content which in the end is the asset that creates the profit, rather than the possibility that archives of digitised orphan works will alone stimulate growth.

We do not believe that the case has been made for the growth envisaged from the proposed change.

I Orphan Works

Respondents to DACS' Artists' Survey felt that there should be no commercial use of orphan works, with 78% saying 'no' to public bodies using works for commercial gain and 92% saying 'no' to commercial bodies using works for commercial gain. Respondents were more willing to allow public bodies to use orphan works for non-commercial purposes (74% in favour) but less favourable to charities using orphan works (58% in favour). This response could reflect concerns relating to moral rights issues, whereby rightsholders could find a previously orphaned work had been used to support causes the rightsholder would have otherwise not supported.⁴



"Many of my images have been redistributed online without attribution or a clear link to my original post/source. They could too easily be deemed Orphan Works and could have been used by someone for commercial use since there is no way to track and trace images online. This category of work should not be implemented until technology is far more sophisticated and allows a visual tracing of imagery online to find sources."

Tina Mammoser, designer/painter

⁴ DACS Artists' Survey 2012 www.dacs.org.uk

I Orphan Works

Question 10

Please provide any evidence you have about the potential effects of introducing an orphan works provision on competition in particular markets. Which works are substitutable and which are not (depending on circumstances of use)?

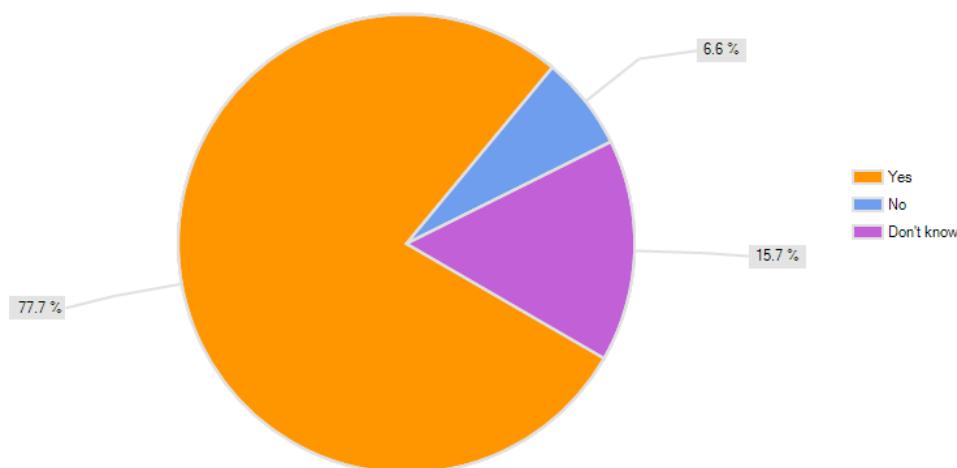
We surveyed our members on this point and we share our findings below.

The impact of stock libraries on the primary market of photographers

DACS questioned photographers about the impact of the rise of free (or very cheap) stock photography on photographers' ability to generate an income. 78% responded that the increase in low value stock images had affected their ability to sell work or win commissions.

A majority of photographer respondents considered the impact to be 'significant' (58%) while 27% considered the impact to be 'moderate'. 14% of respondents measured the financial impact to be greater than £10,000 per annum.⁵

Has the increase in stock images available at low cost or no cost affected your ability to sell work or win commissions?

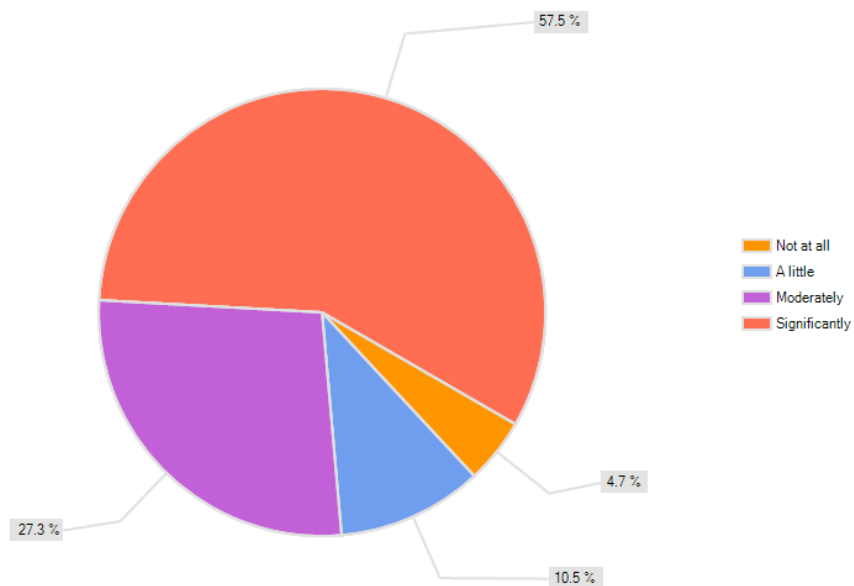


"One marketing company told me that they would rather suggest cheap stock to a client than original photography because they were worried that the client would think they were too expensive and go elsewhere. If even cheaper orphan works appeared this would make this situation worse as images could be used for free, further limiting people's willingness to understand or appreciate the value of photography."

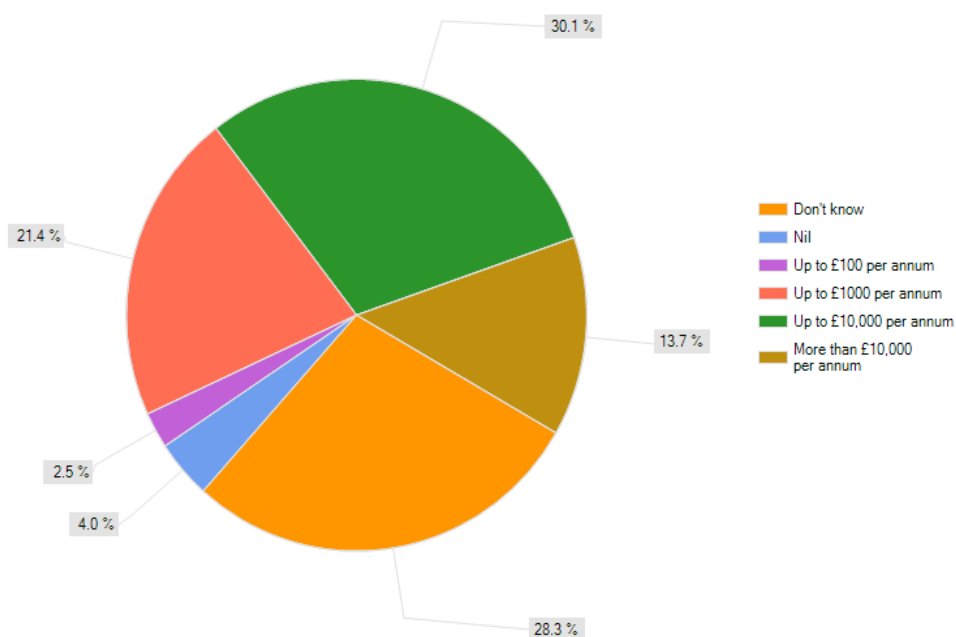
Richard Stonehouse, photographer

I Orphan Works

If yes, to what extent has it affected you?



What do you estimate as the current financial impact on you?



I Orphan Works

Question 11

Who should authorise use of orphan works and why? What costs would be involved and how should they be funded?

DACS believes that the Secretary of State should be empowered to authorise collecting societies to administer orphan works schemes and to issue licences for the use of such works in their sector. We do not believe that the Copyright Tribunal, as a Tribunal, is in a position to grant such authorisation nor to issue licences for the use of orphan works.

We do not believe that users of orphan works should be allowed to 'self-license' as this clearly creates a conflict of interest. In the majority of cases such bodies are usually not active licensors which means that it would be difficult for them to establish the market rate for the works they wish to license and if self-licensing is being considered as an option, the relevant institutions should be made aware that they will fall within the definition of a collecting society and would therefore be subject to the regulation of collecting societies.

DACS does not consider that the criticisms and concerns raised against the administration of licensing schemes for orphan works by collecting societies are justified. As the Consultation clarifies, there should not be differential treatment between orphan works and non-orphan works. Collecting societies in general have well-established and published tariffs that could serve as the general market rate for the relevant type of work or use. The same Consultation paper proposes a regulatory framework for collecting societies. Alongside initiatives in preparation by the EC on a Europe-wide level, critics should feel sufficiently reassured that even if operating in a quasi-monopoly sufficient regulation of some order is in place to avoid anti-competitive behaviour by a collecting society. In addition, the Copyright Tribunal is able to assess available licensing schemes for fairness and furthermore proportionality, and the Secretary of State, if given the necessary authority and remit, could authorise a collecting society's administration of an orphan works scheme in their sector subject to conditions or special stipulations if concerns about the conduct of the collecting society exist.

Further benefits of having orphan works schemes operated by collecting societies would be that they are in general set up to collect and distribute royalties to rightsholders, are rightsholder owned or managed, are nearly always not-for-profit and mostly operate as part of an international network, which may support the application on a European and/or international level. In many cases, collecting societies are representative of the rightsholders within their sector which would mean that they are best placed to speak on behalf of rightsholders in their sector.

It remains to be seen how such a scheme could best be funded as collecting societies would need to resource the practical challenges of locating orphan authors; the necessary funding may initially have to be charged on the fees collected, which makes it essential that any such solution provides for an up-front payment.

Question 12

In your view what should constitute a diligent search? Should there be mandatory elements and if so what and why?

As highlighted on many occasions before, it is not possible to provide an all-embracing definition for diligent search and any such definition should be industry sector specific. DACS believes that these definitions should not be made part of the actual legislation as these definitions obviously depend on technological development and tools available in the establishing of rightsholders and in tracing them. Any such change in the circumstances would then demand a change in legislation which should be avoided. We would like to express our support to the solutions presented by the BCC which started to develop such industry sector specific definitions.

I Orphan Works

We would be very concerned if, as raised in a recent IPO discussion on orphan works, there were to be a less stringent search requirement in cases where particular uses of works are considered to be of little or no commercial value. In our view, a work can only acquire orphan status for the purposes of the law if a diligent search has been conducted, irrespective of the envisaged use. Any other interpretation would in our opinion exacerbate the orphan works problem as it would follow that in cases where the use is less commercial it would be easier to find that a work is an orphan work. The due diligence search process cannot be influenced by the proposed use of the work.

Certain minimum requirements could be used as a standard basis across the industry and could, in light of the definition in Section 178 CDPA 1988 under “sufficient acknowledgement”, be modelled on the understanding of reasonable enquiry, which in turn could be informed by the civil litigation principles of reasonable search under standard disclosure provisions.

Question 13

Do you see merit in the authorising body offering a service to conduct diligent searches? Why/why not?

The answer to this question largely depends on who will be nominated to authorise the use of orphan works. We do not believe that self-licensing should be an option as this will inevitably lead to a conflict of interest that should be avoided. If the authorising body is a rightsholder representative such a service may be possible. But it will result in additional costs associated with the conducting of the diligent search.

DACS does not believe that the Government's ambition to stimulate growth will be achieved by shifting the costs of conducting a diligent search on to the rightsholders.

We also think that it should be the potential user of a work who should conduct the diligent search, initially at least, as this seems necessary to establish that it is possible that the user is dealing with an orphan work, before the obligation of a further diligent search is transferred on to the authorising body. It would not be acceptable if authorising bodies were inundated with requests for diligent searches (with the corresponding expenditure of time, effort and resources), where potential users did not exercise at least a minimum of effort to establish the correct rightsholder and/or their whereabouts. We also believe that making the diligent search primarily the task of the potential user, who is not self-licensing, may help to verify the seriousness of the request in the first place, and as such reflects on the true value of the use of the work as far as growth in the UK is concerned.

Question 14

Are there circumstances in which you think that a diligent search could be dispensed with for the licensing of individual orphan works, such as by publishing an awaiting claim list on a central, public database?

A diligent search has to be conducted in order to qualify a work as an orphan work. DACS does not believe that the ultimate use of a work can or should have any implications on what constitutes a diligent search.

Question 15

Once a work is on an orphan works registry, following a diligent search, to what extent can that search be relied upon for further uses? Would this vary according to the type of work, the type of use etc? If so, why?

We believe that once a true and properly verified diligent search has been conducted the work could be classified as a potential orphan work and the inclusion in a registry would demonstrate that a true diligent search regarding this work has been conducted. We do not see any reason

I Orphan Works

why this could not then be relied upon for future uses. There would obviously need to be review points as developments in technology and search optimisations will make it necessary to repeat these searches and to confirm the status of the work as an orphan. As licences for the use of the work have been issued and payments collected for these uses, the body holding these royalties and administering the licences will be looking for the relevant rightsholders.

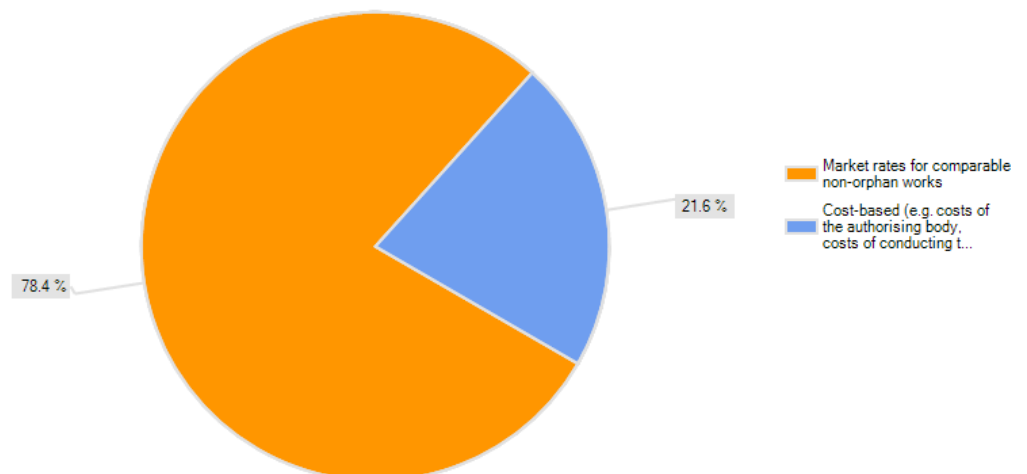
Question 16

Are there circumstances in which market rate remuneration would not be appropriate? If so, why?

DACS does not think that there are circumstances in which market rate remuneration is not appropriate, as any lower charge than market rate would not only negatively impact on the “orphan” but also on non-orphan works and their market in the same category.

Respondents to our survey felt strongly that remuneration for the use of orphan works should be set at market rates, in order not to undermine creators’ primary markets (78% in favour of market rates).⁶

On what basis should orphan works be priced once their use is authorised?



I Orphan Works

Question 17

How should the authorising body determine what a market rate is for any particular work and use (if the upfront payment system is introduced)?

Where collecting societies act as authorising bodies, DACS believes that the majority will have well-established licensing practices with well-established and published tariffs which could be helpful in determining the market value for non-exclusive licensing of uses of orphan works.

It is not a viable option to introduce any system which favours delaying the payment of appropriate fees for the use of orphan works until the rightsholder has been found. The delayed payment option would not encourage the on-going search for the rightsholder; the user would potentially have an incentive not to find the rightsholder as claims for the use of the work would be barred by the statutory limitation of six years in the Limitation Act 1980 for this class of claim. In the meantime, a collecting society would be required to take money from other rightsholders for whom it had collected royalties in order to fund the search. The delayed payment option would also discriminate against non-orphan works where an upfront payment would be necessary.

But in order for this system to work, it is essential that all authorising bodies are subject to any regulatory codes or other framework as may be applied to existing collecting societies, and are obliged to adhere to the same standards of transparency as is necessary to guarantee an open and accountable administration of these orphan works systems.

It would be nearly impossible to monitor the use and establish the applicable market rate over the period of use of the work under the delayed payment option as the market rate is subject to change; this would not only unjustifiably prejudice the user of the work who may have used the work four years ago when the market rate was substantially lower than at the time the owner is found. It would also be unreasonable to require authorising bodies to apply different market rates depending on the time the work was used and the time the owner was found. The market rate should be determined by the type of use, and the regular licensing fees in place for the use in question. Only when applying this concept can one ensure that users of the works as well as rightsholders are not discriminated against and that authorising bodies will be able to administer the system effectively.

DACS does not believe that it is a viable option to negotiate the applicable fee for the use between the rightsholder and the user at the time the rightsholder is found. Firstly, this would be a disincentive for the user to continue searching for the rightsholder, and secondly this would unjustifiably prejudice the position of the rightsholder who starts from the irreversible negotiation position of the work already having been used. We also understand that the 'revenue' rightsholder will not be able to bring a claim before the Copyright Tribunal, as this is reserved to the user of copyright protected works rather than the rightsholders.

Bearing in mind the alleged scale of the "orphan works problem", this position represents a feasible, and appropriate, solution as it will require heavy users of orphan works to make substantial reservations of fees that they may have to pay out to rightsholders at some point in the future.

I Orphan Works

Question 18

Do you favour an upfront payment system with an escrow account or a delayed payment system if and when a reventant copyright holder appears? Why?

As already explained DACS believes that a delayed payment should not and cannot be introduced, as we believe it will create an unjustified differentiation between orphan works and non-orphan works that would not only discriminate between rightsholders but also negatively impact on established primary markets and jeopardise Government's aim to support the economic growth of the UK.

Only a system providing for an upfront payment will ensure parity between orphan and non-orphan works, will help avoid fraudulent claims of orphan works status and provide sufficient flexibility regarding the continuous search for the rightsholders. Upfront payments will further prevent any discrimination of users regarding the applicable market rate and will therefore help to avoid any distortion or potential manipulation of the market place.

Question 19

What are your views about attribution in relation to use of orphan works?

It seems contradictory to try and safeguard the moral right of attribution whilst allowing the reproduction and use of the work where the copyright owner is not known and cannot consent to the use of their work.

However, DACS agrees that the moral rights of authors should be respected in the same way as their economic rights under copyright.

To do this, it is essential to strengthen the moral rights protection of authors under UK copyright law, by making them unwaivable, automatic – meaning no need to assert – and by providing for appropriate damages in the case of infringement of moral rights.

We do not understand some of the comments in paragraph 4.46 of the Consultation. If the need to attribute works to their authors were automatic there would not be a need to "clear" moral rights with contributors in order to respect moral rights; simply attributing the work for future uses would suffice.

An automatic right to attribution would help avoid situations where works need to be credited but current contact details are unknown.

Metadata is important: older works may need to be researched, and data added to the files when the works are digitised. Greater resources should be made available to find ways to prevent the stripping of metadata from works in the future.

Any orphan works solution should include obligations on users to attribute the work whenever and wherever used. This will support attempts to find the relevant rightsholders, and to alert possible rightsholders about the use of the work.

Schemes should also provide signposting to rightsholders about where they can find further information about particular uses and/or the licensing fees that were collected for this use by the licensing body authorising the use so that the respective rightsholders are provided with a means to claim their royalties.

Schemes will ideally include an obligation to address the missing attribution to the author once the rightsholder's identity is known and the accurate facts about the work have been established.

I Orphan Works

Question 20

What are your views about protecting the owners of moral rights in orphan works from derogatory treatment?

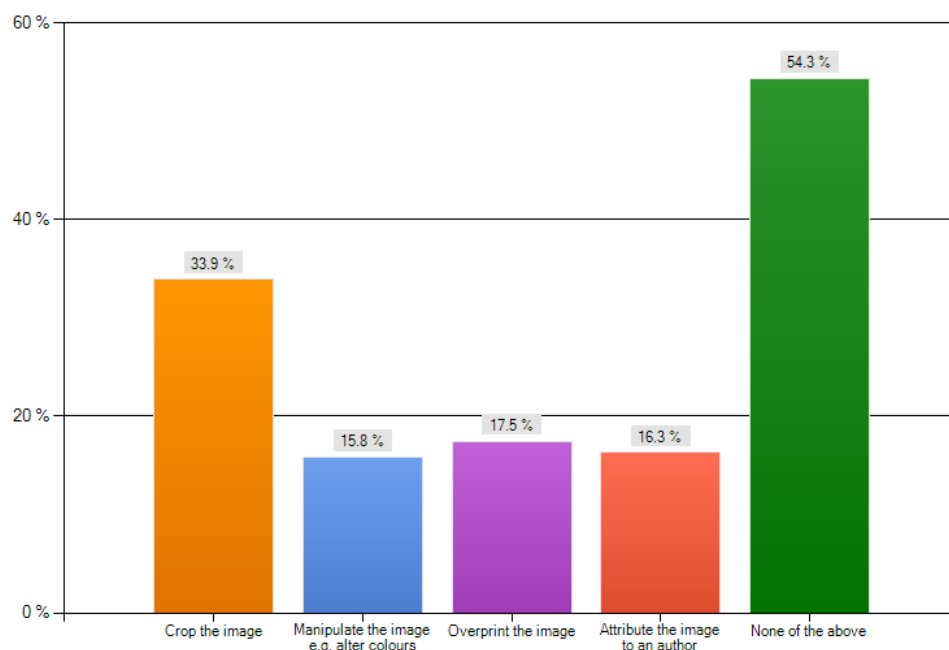
As regards the integrity right, there should be no difference in treatment of these works compared to non-orphan works. Any discrimination of rightsholders of orphan works may lead to a market distortion as this may make orphan works more attractive to users who wish to manipulate works in derogatory ways which rightsholders when approached would not authorise.

It is important to bear in mind when assessing moral rights (and also economic rights) in respect of orphan works, that the works in question do have rightsholders. It is simply that they may not be known and/or traceable at a particular point in time.

As we note elsewhere, in the majority of cases the divorce between the rightsholders and the works they hold rights in will not have happened voluntarily and/or under the condition that rights in the work have been relinquished. This means that the fact that the rightsholder in a work cannot at the moment of use be contacted cannot lead to a situation where the rights in the work are disregarded. The moral rights of the author should therefore be respected in the same way as if the rightsholder could be contacted.

DACS asked survey respondents their views on the impact of the proposed orphan works scheme on creators' moral rights. DACS listed some of the key activities that undermine creators' moral rights and asked what users should be allowed to do with an image if it were to be cleared for use under such a scheme. Respondents felt strongly about this issue with 54% responding that they felt none of the proposed activities should take place. 34% of respondents were happy to allow the cropping of works.⁷

What should a user of an orphan work be allowed to do with the work once its use has been authorised?



⁷ DACS Artists' Survey 2012 www.dacs.org.uk

I Orphan Works

Question 21

What are your views about what a user of orphan works can do with that work in terms of duration of the authorisation?

In the interest of avoiding any distortion between the markets, the duration of use should be linked to the market rate charge described above. But no use should go so far as to prejudice the legitimate interests of rightsholders, namely to deprive them of any rights, for example by granting exclusive licences for the use of the works. This means all licences granted for the use of orphan works should always only be non-exclusive and limited in duration or in another meaningful way (e.g. by print run) as well as reflect the industry standards in the markets they are used and licensed in. This again strongly suggests that any orphan works scheme should be operated by licensing bodies who have experience in the field they operate in and who will have established guidelines and standards they are working with, being able to limit the use of the works to specific uses and in a meaningful and sector specific way.

II Extended Collective Licensing

Introduction

DACS believes that collective licensing provides valuable solutions for rightsholders and users in a range of circumstances, notably where it is impracticable to license rights individually.

However, rights should not be licensed collectively if rightsholders wish to reserve the exercise of their exclusive rights for themselves: rightsholders should be free to choose what is licensed collectively, and what is licensed directly into a primary market.

We see merits in the Government's proposals to introduce provisions for an extended collective licensing framework into UK law if it removes current legal risks where not all members of a class of rightsholder have joined a licensing body and where the licensing body is genuinely representative of a class of rightsholder.

We are alive to the worries expressed by many in the visual community about possible negative impacts on their ability to control use of their works, and whether collective licensing arrangements will undermine or destroy their existing and developing primary markets.

Therefore DACS would only support extended collective licensing schemes if they:

- are approved by a majority of rightsholders
- do not negatively impact on primary markets
- allow rightsholders to opt out.

Question 22

What aspects of the current collective licensing system work well for users and rights holders and what are the areas for improvement? Please give reasons for your answers?

As outlined above, collective licensing provides solutions where it is impractical and impossible for rightsholders and users to negotiate individual agreements. It therefore works best with high volume, at low cost, and ensures the necessary rights are granted to users, and that remuneration for rightsholders is secured. DACS' existing distribution of collective royalties (called Payback) demonstrates the value of such schemes. In 2011 DACS efficiently distributed over £4 million in royalties to 14,000 rightsholders.

Question 23

In the Impact Assessment which accompanies this consultation, it has been estimated that the efficiencies generated by ECL could reduce administrative costs within collecting societies by 2-5%. What level of cost savings do you think might be generated by the efficiency gains from ECL? What do you think the cost savings might be for businesses seeking to negotiate licences for content in comparison to the current system?

This completely depends on the ECL provisions the Government intends to introduce and the regulation attached to it. If Government were to refrain from over-regulating and let the market find suitable solutions, a reduction in administration costs that may be passed on to users and rightsholders seems more likely than in cases where Government intends to regulate heavily. Also, the nature of ECL should be limited to high volume, low impact reproductions as any other form of ECL risks causing a negative impact on primary markets of creators that would not be compensated for by royalties from ECL schemes.

II Extended Collective Licensing

Question 24

Should the savings be applied elsewhere e.g. to reduce the cost of a licence? Please provide reasons and evidence for your answers.

This again depends on the markets involved and depending on the applicable licensing fees which may already be very low. It may be fairer to pass these savings through to rightsholders. Again it seems just to let the market regulate itself in this respect rather than to interfere on a legislative basis.

Question 25

The Government assumes in the impact assessment for these proposals that the cost of a licence will remain the same if a collecting society operates in extended mode. Do you think that increased repertoire could or should lead to an increase in the price of the licence? Please provide reasons for your answers.

The availability of additional repertoire through an extended collective licence may well attract a justifiable increase in price on the basis that more rightsholders' works are included within a licensing scheme – and therefore the overall value enhanced. At the same time, taking rights into an extended scheme will reduce transaction costs to users, who will not be required to make transactional permissions clearances. There may also be economies of scope and scale enjoyed by the licensing body as a result of a statutory-backed authorisation to license all works within a relevant class for particular uses; in which case there may be justification for not increasing or even reducing costs. Ultimately, answers to this question must be answered in accordance with the individual circumstances of an individual extended collective licence.

Question 26

If you are a collecting society, can you say what proportion of rights holders you currently represent in your sector?

Research published in September 2011 conservatively estimates that there are 28,500 visual artists in the UK.⁸ It is assumed that this figure does not include the thousands of commercial photographers and illustrators etc. DACS represents 18,400 visual artists representing a broad range of practice from fine art through to commercial photography and illustration in the UK, and a further 66,100 worldwide through reciprocal agreements with foreign rights management organisations. On this basis, we believe we can be considered representative of the broad and varied visual sector and those who create artistic works as defined in s. 4 of the CDPA.

Question 27

Would your collecting society consider operating in extended licensing mode, and in which circumstances? If so, what benefits do you think it would offer to your members and to your licensees?

We believe there are merits to our operating in this way provided that any legislative solution holds collecting societies free from any risk arising under s. 107 of the CDPA.

Other benefits would include a clear authority for us to act on an extended basis, provided that such licensing arrangements are limited to specific uses, such as high volume low costs scenarios that do not impact on primary markets or individual rights licensing set ups. Rightsholders must have the right to opt out and to have unprejudiced opportunities to seek to exercise their exclusive rights directly if they wish.

II Extended Collective Licensing

Question 29

Who else do you think might be affected by the introduction of extended collective licensing? What would the impact be on those parties? Please provide reasons and evidence to support your arguments?

We limit our response to issues as they affect rightsholders, users and intermediaries such as collecting societies for the purposes of this section.

Question 30

Question 30: What criteria do you think should be used to demonstrate that a collecting society is “representative”? Please provide reasons for your answer?

There could be any number of ways to determine who is representative, but some ideas could include evidence of members or rightsholders in a relationship with the society; scope of coverage of licensing market, breadth of international repertoire as well domestic rightsholders, evidence that the aim or main aim of the organisation is managing rights on a broadly collective basis, and evidence of how long the organisation has been undertaking rights management on a broadly collective basis.

Question 31

Do you think that it is necessary for a collecting society to obtain the consent of its members to apply for an ECL authorisation? What should qualify as consent- for example, would the collecting society need to show that a simple majority of its members have agreed to the application being made?

This again depends on the way the ECL is introduced. In general it is better if the collecting society operating an ECL has the authority from its members to do so. The fact that the collecting society operates the ECL should be sufficient as any other consent requirement would be in breach of the concepts of transparency and accountability. Also the introduction should be part of an approval process so any claim of being representative would be tested by the authorising body being able to require the proof they need.

Question 32

Apart from securing the consent of its members and showing that it is representative, are there other criteria that you think a collecting society should meet before it can approach the Government for an ECL authorisation? Please give reasons for your answer.

We believe that any body seeking ECL authorisation should show that it has practical mechanisms for collecting, allocating and distributing royalties on the type of scale necessitated by an extended collective licence; that it has sufficiently robust accounting systems, that it has a published distribution policy, and that the organisation can show that it has a history of seeking to act on a broad collective basis in the interests of a class or classes of rightsholder rather than a private, selective agency model of representation. Collecting societies should also adhere to any relevant codes of conduct.

II Extended Collective Licensing

Question 33

When, if ever, would a collecting society have reasonable grounds to treat members and non-member rights holders differently? Please give reasons and provide evidence to support your response.

A discriminating treatment of non-members in the framework of an ECL scheme would only be acceptable if there are justifiable reasons for the different treatment; for example the fact that non-members have to be found in order to distribute money to them, etc. Members may pay extra fees for certain services which are agreed on a contractual basis.

Question 34

Do you have any specific concerns about any additional powers that could accrue to a collecting society under an ECL scheme? If so, please say what these are and what checks and balances you think are necessary to counter them? Please also give reasons and evidence for your concerns?

No.

Question 35

Are there any other conditions you think a collecting society should commit to adhering to or other factors which the Government should be required to consider, before an ECL authorisation could be granted? Please say what these additional conditions would help achieve?

No.

Question 36

What are the best ways of ensuring that non-member rights holders are made aware of the introduction of an ECL scheme and that as many as possible have the opportunity to opt out, should they wish to?

There are many ways in which this could be approached, and one suggestion would be to use the existing communication channels within sectors. For example, many of the creators to whom DACS pays collective licensing royalties are members of trade unions and professional associations. We communicate our annual Payback campaign through these bodies in addition to our own marketing efforts elsewhere. As we have increased claimants from a couple of thousand to over 14,000 in the past seven years we believe we have developed some good communications channels.

We surveyed our constituents about opt-outs and how to communicate with them. Generally, respondents indicated that they would prefer to be consulted by email regarding any proposed licences under this scheme (74.5%). Others suggested using the network of professional bodies. Care should be taken to ensure that rightsholders who may not be part of such organisations are not excluded from the scope of our communications.⁹

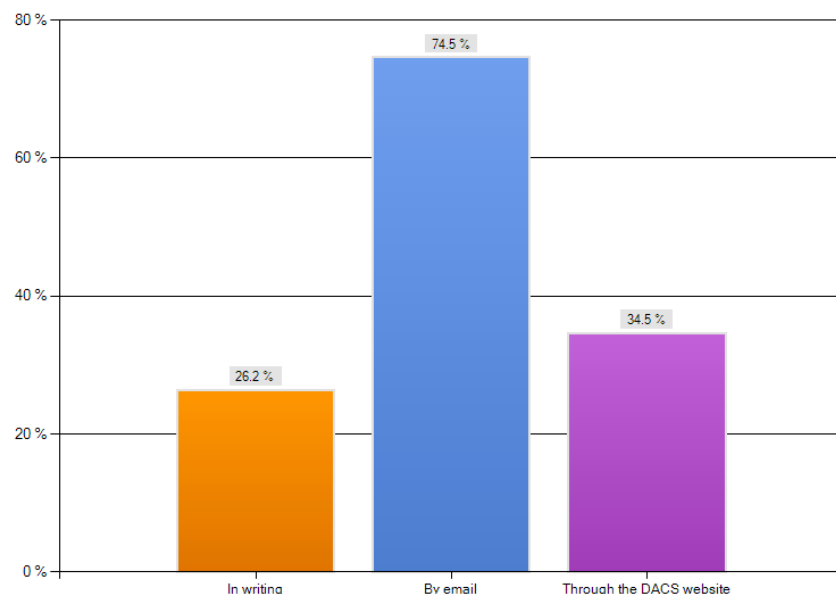
"I am concerned that a great many rightsholders will be unknown to DACS or any organisation looking to petition them. There would in the first instance need to be a publicity campaign to make sure such people know that these issues were being discussed."

Michael Cockerham, photographer.

⁹ DACS Artists' Survey 2012 www.dacs.org.uk

II Extended Collective Licensing

How would you expect to be consulted on any proposed extended collective licence?



Question 37

What type of collecting society should be required to advertise in national media? For example, should it need to be a certain size, have a certain number of members, or collect a certain amount of money?

We would advocate that all collecting societies involved in extended licensing arrangements should seek to make the most optimal use of technologies which enable onward sharing through multiple networks rather than being reliant on more static approaches such as advertising in traditional media. There may even be scope for collecting societies to share approaches and communications initiatives.

Question 38

What would you suggest are the least onerous ways for a rights holder to opt out of a proposed extended licensing scheme?

Notification via secure website form with hard copies of appropriate identification material would appear a simple way. We suggest that the issue will need some modelling in practice.

Question 39

Should a collecting society be required to show that it has taken account of all opt out notifications? If so, how should it do so? Please provide reasons for your answers?

The list of those rightsholders who have opted out of an extended collective licence should be available to customers who have purchased such a licence, in order for them to be aware of the limitations on the content that is covered. This can be made available online by the collecting society operating the licence.

II Extended Collective Licensing

Question 40

Are there any groups of rightsholders who are at a higher risk of not receiving information about the introduction of an ECL scheme, or for whom the opt-out process may be more difficult? What steps could be taken to alleviate these risks?

Beneficiaries of deceased artists in copyright would be at a higher risk of not receiving information about the introduction of an extended collective licensing scheme, as there is less chance of an artist's beneficiaries being connected to trade associations and professional bodies.

DACS has extensive contacts with estates and beneficiaries through our existing licensing however there would still be a need to consult widely outside of the existing networks.

Question 41

What measures should a collecting society take to find a non-member or missing rights owner after the distribution notice fails to bring them forward?

DACS has operated the Artist's Resale Right scheme since its introduction into UK law in 2006. In much the same way as is being proposed in the Government's system of Extended Collective Licensing, DACS holds royalties while we search for the artist for whom we have collected the royalties. From over £1m collected in 2006, less than £9,000 remains undistributed. This search process includes initial internal checks and extensive online and offline research, with regular review points over a period of six years.

Question 42

How long should a collecting society allow for a non-member rights holder to come forward?

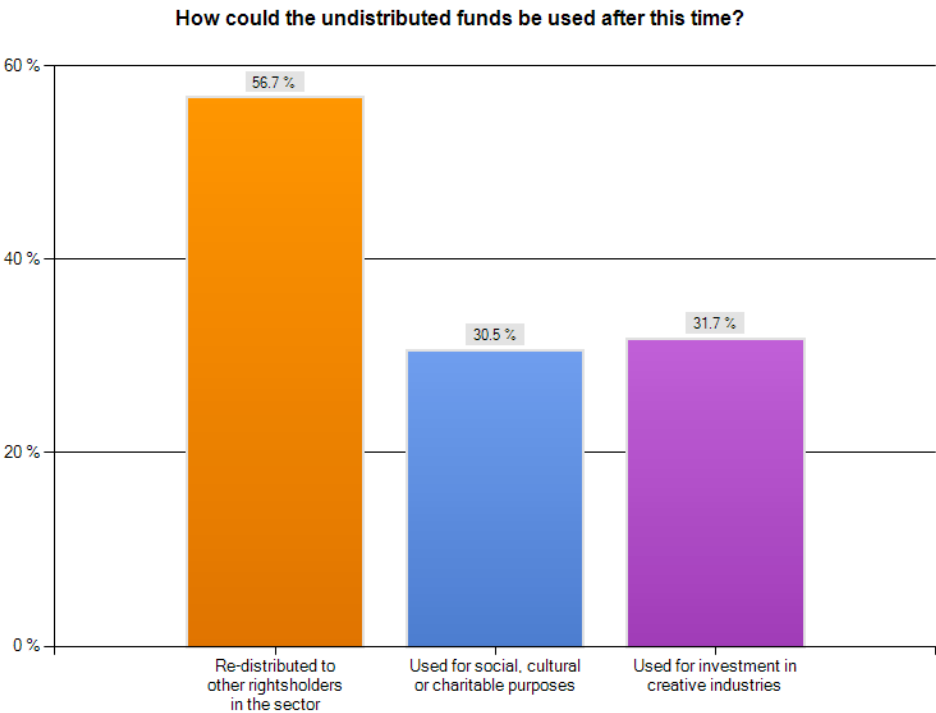
The Limitation Act 1980 gives some guidance on matters of this kind and we suggest that this is considered in the first instance.

Question 43

Aside from retention by the collecting society or redistribution to other rights holders in the sector, in what other ways might unclaimed funds be used? Please state why you think so?

Respondents to DACS' Artists' Survey were asked how they would prefer these funds to be used should they remain undistributed after a period of time. 57% felt the remaining funds should be redistributed out to other rightsholders within the sector.¹⁰

II Extended Collective Licensing



III Codes of Conduct

Introduction

We welcome the Government's recognition of the value of the voluntary collective licensing model.

There seems to be general agreement that collecting societies serve to support growth and innovation by allowing creative individuals, rightsholders and users of copyright works to meet in the market in a dynamic way which:

- Provides efficient many to many licensing solutions;
- Reduces transaction costs for users clearing rights and reduces coordination problems for users identifying rightsholders;
- Pays royalties to rightsholders to enable them to invest in new businesses that create value for UK economy domestically and that drive success in international markets.

Collecting societies can deliver economies of scale through shared centralised investment in databases and international metadata standards that provide the backbone support for accurate licensing and payment systems.

Societies are membership-governed. All the royalties they collect are distributed to their members after deduction of cost. This drives a strong accountability model, ensuring high standards of service and transparency.

With this in mind, it is unfortunate that the language of some of the Impact Assessments appears to be at odds with the broader positive statements made in the Consultation itself; in particular:

- Exceptions IA: licences are expressed as costs.
- Codes of Conduct IA: p.5 asserts inefficiency of licensing but then gives the example of multiple licences (silos).
- Reference to 'deadweight losses' when referring to the operating costs of collecting societies. This misunderstands
 - o that the administration costs of the society are the costs to the authors of reaching their market.
 - o administration charges are also used in order to invest in the systems and infrastructure that support innovation in licensing and deliver licensing efficiencies.

DACS supports the development of self-regulation through codes of conduct as promoted by the British Copyright Council (BCC). We were part of the working group which drafted the proposals which have subsequently been the subject of discussion between the Intellectual Property Office and the BCC.

We believe that collecting societies as a whole should be subject to the appropriate degree of scrutiny by their members on whose behalf they act, and we also believe that collecting societies should maintain close and meaningful relations with licensees.

More particularly, we support Option 1 of the Impact Assessment.

We also ask the Government to note that in the voluntary licensing environment which operates in the UK, collecting societies themselves are voluntary mechanisms. Therefore to this extent, they should be seen as the outcome of a set of choices the market has made in the interests of good order and efficiency in rights management. The other way of viewing the perceived 'monopoly' is that it is in the interests of rightsholders and those wishing to use copyright works for these arrangements to arise in this way. The 'monopoly' may arise because competition, while valued as an ideological outcome, is not valued as a practical outcome for the players in the market.

We believe that the BCC proposal deserves to be tested in practice, and collecting societies given the opportunity to develop their codes from the BCC principles.

III Codes of Conduct

Question 44

What do collecting societies do well under the current system? Who benefits from the way they operate? Please explain your response and provide evidence for it.

The key characteristic of collective management societies is the efficiencies and savings in transaction costs they bring to the market. Rightsholders and users – current and potential – benefit from the vast economies of scale and elimination of individual transactions brought about by collective management of rights.

Question 45

What are the areas for improvement in the way that collecting societies operate at present? Who would benefit from these improvements, and what current costs (if any) could be avoided? Please give reasons and provide evidence for your response.

In common with any other business, collecting societies should be committed at all times to continual improvement for the general benefit of their members and those for whom they provide licensing services.

Question 46

Do you agree with the analysis contained in the impact assessment of the costs and benefits for collecting societies and their users? Are there additional costs and benefits which have not been included, or which you are able to quantify? Please provide reasons and evidence for your response.

We agree wholeheartedly with the comment on p. 4 of the Impact Assessment which states that “there are around 15 collecting societies in the UK and the majority are monopoly suppliers of the licence for the sector they represents. This is market efficient: it enables many-to-many licensing which significantly reduces transaction costs for licensees and rightsholders by allowing them to manage their rights or use of rights through a single organisation. Thus, it would not make sense to break up the monopolies.”

Question 47

Who else do you think would be affected by a requirement for collecting societies to adhere to codes of conduct? What would the impact be on them? Please provide reasons and evidence for your response.

In some sectors, a range of organisations may be involved in licensing rights in the same category of copyright work. For example, in the visual sector, rights for primary market reproductions (e.g. to publishers of books, periodicals, newspapers, broadcasters, merchandise companies, etc.) can be handled by DACS, by photographic libraries, by illustrators' agents and by individuals themselves. In terms of transactions and the relative distribution of power between rightsholders, their appointed representatives, and users, the transactions all appear to amount to the same thing. But not all entities involved in such licensing may identify themselves as collecting societies, although they may satisfy the requirements of s. 116 of the CDPA. In the interests of fairness and a level approach to a regulatory environment, Government should clarify the scope of the regulatory framework and to whom it is intended to be applied, and justifications provided if entities undertaking broadly similar activities are to be treated differently.

III Codes of Conduct

Question 48

Is one year a sufficient period of time for collecting societies to put in place a code of conduct? Please provide reasons for why you agree or disagree? Please also provide evidence to show what a workable timeline would be?

We believe that this may be reasonable to put a code in place, although there may be further work to do to support the code (e.g. to set up systems to support service levels defined in a code).

Question 49

What other benefits or rewards could accrue to a collecting society for putting in place a voluntary code? Please provide evidence for your answer.

The emphasis of the question should perhaps be on the benefits or rewards accruing to a collecting society's members or its licensees. We touch on some of these in our introductory remarks to this section.

Question 50

In your view, does it make a difference whether there is a single code, one joint code, or several joint codes? Please give reasons for your answer.

We support the BCC proposal which allows each society to develop a code which matches its resources, its membership and all the specific and distinctive elements of the organisation as we believe this will allow for a greater level of detailed engagement and commitment than would be possible through a higher level code as of necessity this would have to be framed in more general terms in order to accommodate differences between societies.

Question 51

Are there any other areas that you think should be covered in the minimum standards, or areas which you think should be excluded? Please give reasons for your response, including evidence of alternative means of securing protection in relation to any areas you propose should be excluded from the minimum standard.

We believe the principles of the BCC proposal provide the basis for an acceptable minimum standard. This response holds for questions 52- 57 below.

Question 58

Are these criteria sufficient for the creation of a complaints procedure that is regarded as fair and reasonable by the members and users of collecting societies? Should any proposed criteria be excluded? Please provide reasons and evidence to support your response.

We consider these the criteria (all of which appear in the BCC proposals) provide the basis for a fair complaints procedure, although it will be for the members and/or licensees to make their views known to a collecting society if they feel a code is not providing the basis for a satisfactory complaints procedure.

III Codes of Conduct

Question 59

Please indicate whether you think a joint ombudsman or individual ombudsmen would work better. Please say why you would prefer one over the other?

The question is whether setting up an ombudsman scheme is a proportionate cost for a small society to bear. The figures in the IA suggest a rather heavy burden. DACS supports the principle of an external third party considering the final stage of a complaint raised under a formal procedure, provided that the costs of providing such a service is proportionate. We have no particular view on whether there should be a single or joint ombudsman although one can conceive that economies of scope and scale may arise to beneficial effect if the relevant knowledge and skills required do not need to be replicated in multiple instances.

Question 60

Is the ombudsman the right person to review the codes of conduct? Please give reasons for your answer, and propose alternatives if think the ombudsman is not best placed to be the code reviewer.

There could be a number of suitable options for this purpose, an ombudsman being one. Alternatively, legal experts with experience of collective rights management licensing bodies may also fit the bill.

Question 61

What do you think about the intervals for review? Are they too frequent or too far apart? Please provide reasons for your answers.

The Consultation proposal does not appear unrealistic.

Question 63

What do you consider the process and threshold for non-compliance should be? For example, should Government test compliance on a regular basis (say by following Ombudsman's reports) or on an ad-hoc basis? What evidence would be appropriate to demonstrate non-compliance? Please give reasons for your response?

We think that the Government should elaborate further on how it may classify any code breaches or non-compliance in terms of seriousness of effect. Any process should be fair, reasonable and proportionate to the scale of the society's operations.

Question 64

What, in your view, are suitable penalties for non-compliance with a statutory code of practice? For example, are financial penalties appropriate, and, if so, what order of magnitude would be suitable? Please give reasons and provide evidence for your answer.

We would advise against levying fines on collecting societies: this is because collecting society revenues comprise rightsholder royalties. A fine simply means rightsholder money is diverted from rightsholders. We do not think that rightsholder money should be paid to Government or anywhere else, even if a collecting society has breached a code. This is demonstrably unfair.

III

Codes of Conduct

Question 65

Do you agree that the imposition of a statutory code should be subject to review? How long should such a code be in place before it is reviewed? Please give reasons for your response.

We are opposed to a statutory imposed code.

Question 66

If you are a collecting society which may qualify as a micro-business, would you be likely to introduce a voluntary code? If you are a user of collecting societies, what do you believe the Government should do to encourage good practice in any collecting societies which are exempt from the power to introduce a statutory code? Please give reasons for your response.

We question the concept of differential handling of collecting societies or those entities considered to be the equivalents of collecting societies: a commitment to principles of good governance, transparency and customer service should apply to all bodies regardless of size. That is why we prefer the non-statutory approach proposed by the BCC as it is something that all societies are likely to be able to accommodate at some level. This is preferable to an imposed statutory solution which is subject to exception.

Were DACS to be considered a micro-business for these purposes, we would still introduce a code of practice following the BCC principles.

IV Exceptions to Copyright

Introduction

DACS appreciates the Government's efforts to enable everybody to play a more active part in society and to create the right conditions for economic growth in the UK. But we do not believe that the majority of proposals under this section, namely the creation of new and the extension of existing exceptions, is necessarily the correct approach to achieve this.

There is a lack of evidence to support the view that the proposed changes will have the envisaged effect of increasing productivity and enhanced creative output. Furthermore the Consultation fails to predict and cater for the consequential shortfalls in earnings from copyright uses of copyright protected works as well as the knock-on effects these changes will have. The answers to the questions in this section aim to highlight these failures as well as perceived misinterpretations of existing provisions under national, European as well as international copyright law and tries to establish how far the proposals in this Consultation paper follow Hargreaves' prerogative to maintain the central objective of copyright, namely the provision of incentives to creators without reverting to prejudicial over-regulation.

One of the fundamental criticisms to raise regarding the justifications used throughout this chapter of the Consultation is that Government proposes to align the exceptions in the UK's copyright legislation with the exceptions allowed under the European Directive 2001/29/EC in a way that tries simply to copy the provisions and wording from the Directive rather than to transcribe the provisions into the existing national framework. Under European law directives do not have a direct application in national law but have to be transferred into national law, taking into account the specific national circumstances, harmonising not only that law throughout Europe, but also the national law with the European law and binding Member States to achieve the aims of European legislation.

It is also important to note that the Consultation repeatedly refers to the Three Step Test established under the Berne Convention, which was adopted into European law by Article 5 subsection 5 2001/29/EC but which has so far not been formally transcribed into the CDPA 1988. A formal adoption into national law would greatly improve the concept of this established principle and would promote clarity amongst rightsholders and users alike that there is a general basis for the application and interpretation of exceptions to copyright.

We would further challenge the perception expressed throughout the Consultation paper that there is a general right of the public to use copyright protected material. Copyright is a property right which grants its owner a set of exclusive rights enabling the owner to restrict certain activities with regards to the work attracting this protection.

To balance the effect of this exclusivity with colliding rights of third parties it is necessary to create certain limitations to the exclusivity of copyright which should be reassessed from time to time. For example, such rights may include the fundamental human rights of freedom of expression/ speech and the freedom of to receive and/or impart information.

Whilst it is understandable and accepted that it is important to balance the rights of individuals in a meaningful way to give each of these rights its fullest possible potential, it is unclear where the perceived right of "access and use" to somebody else's property derives from, and from where Government derives its perception that depriving creators of their lawfully owned property will enable and support economic growth for the nation as a whole.

On the contrary, we believe that by restricting rights of individual creators further in the way described without safeguarding established primary and secondary copyright revenue streams, the Government will discourage the creation of new, original content in favour of re-use of existing content on social media websites, search engines and other databases.

Copyright does not seek or claim powers to limit the use and re-use of innovative ideas and concepts. It does place some limits on the "free" use of specific expressions of these ideas. We do not think that the case has been made for restricting the scope of rights further to support the growth of the UK economy in the long term.

IV Exceptions to Copyright

We further believe that isolated, de-contextualised comparisons with concepts from other jurisdictions within and outside Europe is not always helpful or useful.

For example, looking at the flexibility of the fair use doctrine in the US without considering the enormous amount of litigation around the interpretation of the fair use concept conveys a distorted picture of the merits of the doctrine. In similar fashion, we believe it is misleading to highlight the provision of a parody exception under French copyright law but omit the fact that the same law safeguards the reputation of its authors by an unwaivable, perpetual integrity right that limits the application of the exception. Likewise the fact that the private copying exception in Germany is fully compensated through an extensive levy system applying to blank media and copying/multimedia devices rarely receives attention in this discussion: the remuneration part of the German private copy legislation is omitted from official discussions about the private copy arrangement.

Some of the exceptions proposed in our view fall outside the scope permitted by Article 5 (2) (a) of Directive 2001/29/EC, which specifies the framework for lawful exceptions to copyright. We would also refer you to the submission made by the Copyright Licensing Agency (CLA), which includes reference to the Opinion CLA sought from leading Counsel on this question. We support CLA's interpretation of the Opinion.

We take the exceptions discussed in the Consultation in turn.

Private Copying

As a preliminary point we would like to highlight that the fact that Article 5(2)(b) of Directive 2001/29/EC ('the Information Society Directive') allows for a private copying exception limited to the reproduction right only, in exchange for fair compensation to the rightsholder, seems to be omitted from the Consultation paper. Subsequently the concept of fair compensation has been interpreted by the CJEU in its decisions in *Stichting de Thuiskopie v Opus Supplies Deutschland GmbH and others* 16 June 2011 (C462-09) and *Padawan v SGAE*, 21 October 2010 (C 467-08), finding that fair compensation cannot be zero as copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the author of the work concerned (paragraph 40 Padawan).

The concept of 'fair compensation', within the meaning of Article 5(2)(b) of Directive 2001/29, is an autonomous concept of European Union law which must be interpreted uniformly in all the Member States that have introduced a private copying exception, irrespective of the power conferred on them to determine, within the limits imposed by European Union law and in particular by that directive, the format, detailed arrangements for financing and collection, and the level of that fair compensation.¹¹

Thus, with regard to that last condition, the Member States, if they decide to introduce the private copying exception into their national law, are, in particular, required to provide, in application of Article 5(2)(b) of Directive 2001/29, for the payment of 'fair compensation' to rightsholders, Case C 462/09.¹²

The Consultation further fails to provide sufficient information about the concept of "content" and ownership of this content which seem to be necessary elements in order to establish the extent of this private copying exception and to make a meaningful discussion possible.

It further seems necessary to highlight the fact that Article 5 Subsection (2) (b) of Directive 2001/29/EC stipulates that the private use is neither directly or indirectly commercial, a concept which also seems to be missing from the Government proposal in the Consultation and which will require further clarification and definition.

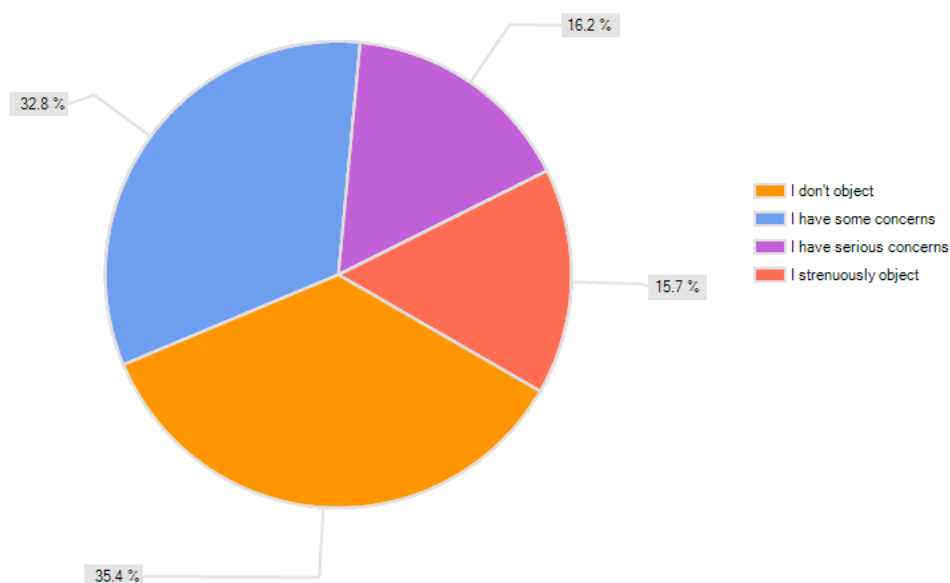
¹¹ <http://curia.europa.eu/juris/document/document.jsf?text=&docid=83635&pageIndex=0&doclang=EN&mod e=doc&dir=&occ=first&part=1&cid=606630>

¹² <http://curia.europa.eu/juris/document/document.jsf?text=&docid=85089&pageIndex=0&doclang=EN&mod e=doc& dir=&occ=first&part=1&cid=606147>

IV Exceptions to Copyright

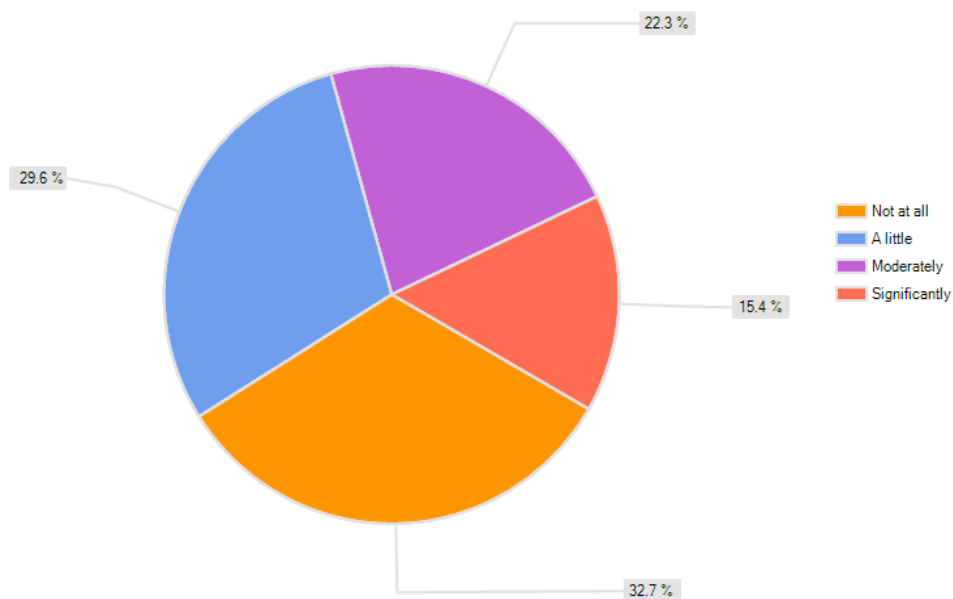
Views on this issue from respondents to DACS' Artists' Survey were mixed. 16% of respondents to DACS' survey strongly objected to the introduction of a private copying exception. 16% had 'serious concerns'. A majority of 35% of respondents did not object to this proposed exception.

How do you feel about the introduction of a private copying exception?



Fewer respondents correspondingly felt that the introduction of a private copying exception would significantly impact their work as a visual artist, with 15% indicating that they felt it would have a significant effect and 33% indicating that it would have no effect.¹³

How much would the introduction of a private copying exception affect your work as a visual artist?



IV Exceptions to Copyright

Question 67

Private Copying: Do you agree that a private copying exception should not permit copying of content that the copier does not own?

DACS believes that the concept of “content that they own” needs further elaboration as ownership can be manifold. This is compounded by the fact that the Consultation introduces a concept of content which does not exist in legal terms, as it is the individual works and contributions that attract copyright protection and not the content as such. We appreciate that it may prove difficult to separate out the different concepts in this respect but we also believe that in order to avoid any future ambiguity and uncertainty it is of utmost importance to clarify the extent of a private use exception.

It is also important to note that the physical properties of an object are independent of the intellectual property that may manifest or be incorporated in the physical object; while the physical object (including a digital object, such as an mp3) may be, or may incorporate, a copy of a copyright work, and a consumer may well believe s/he now owns something, the copyright in a work remains (in general) with the author of the work.

We further believe that the concept of a private copying exception as described in the Consultation does not fit with all the work categories prescribed in the CDPA 1988, in particular where the typical manifestation of the work is not a universally available product. The Consultation in particular highlights the work categories of musical works/sound recordings and films as examples where users wish to be able to format shift for private purposes the contents of products they have legally purchased.

According to the Consultation these works are often incorporated in CDs and DVDs that end users wish to copy for private purposes. It is different for artistic works because for the most part, they are not available for purchase in this way and therefore do not lend themselves to being format shifted in the way described in the Consultation.

It is therefore our opinion that artistic works as such should be excluded from the scope of any exception.

This defeats the supposition within the Consultation that an additional “format shifted” version can be embedded somewhere in the original purchase price. On the contrary, any such format shifted version would interfere with an established primary market. For example, it does not seem sensible that the price for a poster of an artistic work automatically comprises the use of the same artistic work as a screen saver on a mobile phone and/or a desktop background; these are different products with different established retail channels. Similarly when purchasing a digital version from an image bank it should not be possible to produce various different print outs which are normally sold separately as merchandise products. Any such activity would significantly impact on established primary licensing market and would cause significant harm to rightsholders, for which they would need to be fairly compensated. It would not be possible to recognise such fair remuneration in the original purchase price.

We also believe that the Consultation does not follow the spirit within Hargreaves which stated that over-regulation should be avoided. The Government also recognises in the Consultation that the market has found suitable solutions to the problem of format shifting by allowing purchasers of one product to use it on several different media platforms and to “format” shift between their devices through the inclusion of digital download codes and the granting of licences for these uses. There is therefore no need for Government to intervene as proposed and to make life difficult by introducing new concepts that do not seem to reflect practical experience.

IV Exceptions to Copyright

Question 68

Should the private copying exception allow copying of legally-owned content for use within a domestic circle, such as a family or household? What would be the costs and benefits of such an exception?

The broadening of any concept of private use to include members of a household and/or family, thus going beyond the private individual, seems inconsistent with the concept of private use. How would the law define the term 'family' and 'household' in copyright-related terms, and how should this concept be enforced? Membership of households and families is not necessarily static.

Broadening any private use exception in this way would also negatively impact on rightsholders; whereas before multiple copies would have been sold within one household, now only one copy is necessary as it can be copied for everybody "living" in this household.

In this respect we would also like to question the argument which opposes introduction of a levy system in the UK for these types of uses while favouring the concept of an increased retail purchase price for the "original" content. It seems that Government is opposed to the introduction of a levy system because of its discriminating effect against people who do not wish to use the device or blank media for copying purposes or whose copying activity is exempt from the licensing requirement under a different exception.

However, in our opinion the mechanism to charge a higher price when selling the "original" content has in our opinion exactly the same effect as buyers of the same content who do not wish to format shift or copy the content for private purposes will be charged the higher price as somebody who will shift the content multiple times. Also, when looking at the concept of multiple uses/copies within the same household – how would this multiple use be considered when determining the retail price and is there not a similar risk that the single household will be required to pay the same price as a family household with three children? We also object to the notion expressed in paragraph 7.44 of the Consultation which concludes that potential purchasers may be likely to pay higher prices if more individuals in their household can benefit from the same product. This statement omits all the other relevant factors when making purchasing decisions and does not reflect the practical reality.

In any case concepts like "family" and "household" are in flux and subject to constant changes which could not be accurately reflected in copyright legislation.

Question 69

Should a private copying exception be limited so that it only allows copying of legally-owned content for personal use? Would an exception limited in this way cause minimal harm to copyright owners, or would further restrictions be required? What would be the costs and benefits of such an exception?

As highlighted above, it is not clear how Government envisages the enforcement of rights against activities that take place in the private sphere. The CDPA itself and the exception do not provide for the means for rightsholders to monitor whether the conditions for applying the exception are met, nor the means to enforce their rights if the conditions are not met.

In this respect it is questionable how rightsholders would be able to monitor the use of their works in general let alone if content is only format shifted when it is "legally" owned. Again, there is no definition supplied in the Consultation paper of the concept of 'legally owned'.

The suggested limitation of not allowing the sharing of content that is legitimately owned seems unrealistic and fails to acknowledge the fact that format shifting of content is currently not allowed under UK copyright law but is a widespread phenomenon. We therefore doubt that any restriction in the way described in the Consultation would be able to control and limit the

IV Exceptions to Copyright

phenomenon of sharing content in the private sphere in any way, which will make it necessary to find a way to safeguard the fair compensation of rightsholders for these activities.

We also believe it is speculative at best to state that the new exceptions proposed will cause minimal harm to rightsholders. It is simply not possible to say at this stage. We also believe that it is a high risk approach to introduce new exceptions and concepts into UK copyright law which undermine the current position of creators and to base new legislation on untested/non-validated assumptions of achieving innovation and growth. In our opinion, the market for private copying devices is rather saturated and it seems very doubtful that the introduction of a private copying exception will therefore have the envisaged effect of supporting growth of the UK economy.

Question 70

Should a private copying exception be explicitly limited so that it only applies when harm caused by copying is minimal? Is this sufficient limitation by itself, or should it be applied in combination with other measures? What are the costs and benefits of this option?

As described above we do not believe that this is a meaningful way of limiting any private use exception, and that individual users are not in a position to judge when the harm done to the respective rightsholder is minimal. The introduction of this concept will lead to uncertainty and will unjustifiably prejudice rightsholders who are burdened with establishing the limitation of this exception.

New concepts and undefined terms are detrimental to the interest of the copyright owner who would be forced to incur expenses to establish the limitation of these exceptions through case law as described in the Consultation, paragraph 7.51.

We also believe that the Consultation confuses a meaningful limitation of the very broad suggested exception and cases when rightsholders should be compensated. In line with case law of the CJEU cited above, fair compensation for rightsholders is necessary when the harm done to their rights is more than minimal, which means that the criterion cannot at the same time be used to justify the exception.

On the contrary, we believe that any introduction of a private use exception needs to remain within the limitations of Directive 2001/29/EC and must be limited to the reproduction right, and has to provide for fair compensation to rightsholders. The exceptions proposed in the Consultation would all cause significant harm to rightsholders who will be deprived of substantial revenues if such an exception is introduced. Such circumstances are only acceptable under European law if rightsholders are fairly compensated for their loss.

Question 72

Preservations by Libraries and Archives: Should the preservation exception be extended:

- to include more types of work?
 - to allow multiple copies to be made?
 - to apply to more types of cultural organisations, such as museums?
- How might this be done, and what would be the costs and benefits of doing it?**

It is necessary to establish the potential overlap between any orphan works solution and the potential introduction of extended collective licensing schemes discussed under Part I and Part II of this submission and the Consultation itself. It seems unclear how far mass digitisation projects of cultural institutions (as described under this section, paragraphs 7.56–7.67) would fall within any possible orphan works or ECL scheme if they are exempt under any new or extended exception for preservation purposes.

IV Exceptions to Copyright

Any safeguard around fair and appropriate remuneration for rightsholders will be undermined by the extension of the preservation exception as described and in our view therefore needs to be avoided or restricted.

Any such extension of the existing exception has to be avoided if this forces individual creators to subsidise the digitisation efforts of Government and public institutions without receiving remuneration.

DACS does not believe that any extension of Section 42 CDPA 1988 should cover artistic works – we do not know if this is intended as the Consultation omits any mention of them in paragraph 7.66. In any case DACS does not believe that the reproduction of artistic works follows the same rules as for the work categories currently covered by Section 42 CDPA 1988 and that the intention of section 42 CDPA is not achieved through the copying of an artistic work. It cannot be assumed that in the field of artistic works, in particular where the works are not incorporated in other works, copies made of originals will be used to preserve or replace the original. An original artistic work exhibited in a library/archive, or a museum/gallery, is not usually exposed to the same wear and tear as for example books in a library's collection. It can not be assumed that any extended exception should enable named institutions to substitute original artistic works with copies made under this exception, as part of the experience is also looking at an original artistic work rather than a copy.

Any extension to the preservation exception will therefore need to be sufficiently narrowly drafted and care has to be taken not to exempt the use of copyright protected works by named institutions. It is accepted that the digital preservation of copyright protected works is a cheaper and more secure way to archive and store works, but individual rightsholders should not be forced to subsidise the global move into digital, whilst an ECL scheme could provide for the fair remuneration of rightsholders.

Without compensation any expansion of the exception will have a negative impact on revenue streams for copyright owners of works that were previously not included in the exception. Care also has to be taken as the exception will have retrospective effect and involve works which were created before the extension of the exception. As such, the situation of the rightsholders of such works will be worsened.

The Government should also take into account that libraries and archives are not only used for preservation purposes but can also substitute the purchase of a licensed copy through members of the public who lend from or view the works in the named institutions. Perpetuating the use of the same copy of a work through libraries and archives and giving these institutions the right to make unlimited copies of works will therefore negatively impact on established markets for certain types of works. Through the extension of the exception libraries and archives should not become substitutes for video rental shops or substantially interfere with other commercial activities of rightsholders.

In DACS' opinion it seems unrealistic to suppose that libraries, archives, museums, and galleries making preservation and archival copies of works in their collections will not try and put their digital assets to use.

It seems reasonable to envisage a further push from named institutions that once these archives have been established, these "preservation" copies should be made available more generally to the public, which will ultimately prejudice the financial situation of rightsholders further. The British Film Institute for example has already highlighted the immense costs to the taxpayer of their archiving and preservation activities and that the maintenance and expansion of such archives comes with substantial costs which justify the making available of these works to the public.

DACS further believes that the number of copies should be restricted. Named institutions should not be able to make unlimited copies of works which could potentially interfere with established markets of rightsholders. The aim of the exception is to preserve cultural heritage

IV Exceptions to Copyright

and to aid named institutions in the process of preservation or replacement of items in permanent collections where it is not reasonable or practicable to purchase a copy.

The solution adopted in New Zealand to limit the number of copies to the number of originals legally owned in the permanent collection of the named institution seems reasonable. This solution would serve the purpose of preserving the works legally owned by the institution and would not unreasonably interfere with the legitimate interest of rightsholders, as long as this is done with sufficient remuneration to rightsholders, like through an ECL scheme.

To accommodate the need to preserve works which are unique, we propose allowing for an additional digital copy which cannot be made available, or substitute the work in the permanent collection, but which will serve as a backup copy in cases where substituting copies are deteriorating or mislaid.

Also, the exception should not cover additional activities as in the current section 42 CDPA. The exception currently enables named institutions to make a copy of the work to preserve and replace existing items. The permitted format shift should not enable libraries and archives to exploit works copied for preservation purposes to the detriment of the market for reproductions of the original work.

As described above, DACS believes that artistic works in general should be excluded from any such exception as the preservation activity as described by the section does not apply to artistic works as such and apart from that the restriction contained in Section 42 (2) CDPA 1988 seems also meaningless in the area of artistic works. Artistic works are predominantly unique and it therefore will hardly ever be possible to purchase an additional copy of the work, meaning that the exception would not be sufficiently limited to certain special cases and fall foul of the Three Step Test.

Question 75

Research and Private Study: Would extending the copyright exception for research and private study to include sound recordings, film and broadcasts achieve the aims described above? Can you provide evidence of its costs and benefits?

The same proposal for an extension to the research and private study exception at s.29 of the CDPA was made within the Gower's Review. The Government at the time openly acknowledged that further research and impact assessment is necessary before widening the exception in the proposed manner. We would therefore like to ask whether this research was undertaken, as the Consultation does not seem to make any mention of it.

DACS would further like to point out that Directive 2001/29/EC does not explicitly provide for a private study or non-commercial research exception as contained in Section 29 CDPA 1988. Rather, Article 5 (2) (b) of the Directive, which provides for the possibility of introducing a private copying exception, was used to justify the already existing provision in the CDPA 1988 as initially introduced by the UK's 1911 Act.

Art 5 (3) (a) of the Directive only allows for the use of works for the sole purpose of illustration for teaching or non-commercial scientific research and Art 5 (3) (n) only concerns the communication/making available right to individual persons on the premises of named institutions.

It therefore has to be assumed that the private study exception as the proposed private use exception is subject to the requirement of fair compensation of rightsholders within the meaning of Art 5 (2) (b) of Directive 2001/29/EC (which requirement is at present not reflected in Section 29 CDPA 1988). Further, the requirement that copying works private purposes shall only be allowed for non-commercial purposes (directly and indirectly) is not yet reflected in s.29 (2) CDPA, but in the definition section 178 CDPA, which is possibly rather remote for users of this exception. The text should be consolidated.

IV Exceptions to Copyright

DACS assumes that the expansion of the existing exception to include sound recordings, films and broadcasts will have a negative impact on rightsholders in these sectors as they will lose an established revenue stream. The scope for misapplication of the exception giving rise to a de facto private copying exception will have a further detrimental effect on individual rightsholders and ultimately on creative industries in the UK as a whole, which makes it of utmost importance to limit the exception in a meaningful way and/or to provide for fair compensation for rightsholders.

DACS fully supports ERA's submission on this point.

Question 76

Should the copyright exception for research and private study permit educational establishments, libraries, archives or museums to make works available for research or private study on their premises by electronic means? What would be the costs and benefits of doing this?

There should be no such extension of Section 29 CDPA 1988 to educational establishments and other institutions as suggested in the Consultation. We do not believe that an extension to the communication and making available through educational institutions on their premises should be covered by the exception in Section 29 CDPA 1988 as the institutions themselves are not covered by the current Section and any confusion of authorisation will lead to uncertainty regarding the scope of the Section.

We also do not believe that it is helpful to broaden the legal definition of 'educational institutions' to include libraries, archives and museums and grant them a right to communicate and to make available works that are themselves not further defined.

As pointed out above, any such extension would undermine Government's efforts regarding an orphan works scheme and/or an ECL scheme as named institutions would be able to communicate copyright protected works freely on their premises.

This clearly links in with the suggested preservation and archiving exception, the effect of which is not only to give institutions like libraries, museums and archives an unfair advantage over their commercial competitors, but also to elevate a substantial part of their activities into the 'free from permission' sphere of copyright relevant activities, which in turn will deprive rightsholders of significant revenues.

We would like to highlight that the authorisation in Article 5 (3) (n) of Directive 2001/29/EC contains a further specification "not subject to purchase or licensing terms" which as a restriction seems to be missing from the proposal in the Consultation but which seems to be essential in order to comply with the Three Step Test.

Question 77

Text and data mining for research: Would an exception for text and data mining that is limited to non-commercial research be capable of delivering the intended benefits? Can you provide evidence of the costs and benefits of this measure? Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?

We do not believe that the activities described under the heading of Text and Data Mining for Research is covered by any of the exceptions contained in Article 5 of Directive 2001/29/EC. The cited non-commercial research exception in Article 5 (3) (a) is not likely to cover the activities described as it clearly states that any exception under this provision has to be for the sole purpose of the illustration for teaching or scientific research.

IV Exceptions to Copyright

Considering that the exception further explicitly refers to the citation requirement it cannot be extended to cover multiple reproductions to feed information through technological processes for text and data mining purposes.

Article 5 (3) (a) does not, in our opinion, contain a free pass for all non-commercial research but rather is in line with the Three Step Test and thus limited to certain special cases, including the illustration of teaching and scientific research for non-commercial purposes. Any extension hinted at in the Consultation to commercial research would also not be covered by this provision.

The case made in the Consultation for the introduction also seems very unclear and does not contain any of the essential definitions in order to discuss meaningfully the issue at hand. Arguments that text and data mining technologies would save time for researchers does not automatically lead or amount to evidence that any such exception would support the economic growth of the UK to an extent that warrants the introduction of a new exception, particularly where, even according to the Consultation, the implications and effects cannot at present be fully perceived or understood. We believe that further research and clarification in this area are necessary before any legislative intervention occurs.

We would also like to highlight the issue of unintended consequences, as the proposed exception does not address in any way the ownership and copyright in any works that may result from the process of text and data mining as described. From the description in the Consultation it seems apparent that any such text and data mining activity will result in databases which may in their own right attract copyright protection although solely consisting of third party works and created by automated processes. It would seem unfair if the "creator" of such databases would be able to use the results in competition with the "contributors" to these databases. This would not only impact on the primary market of rightsholders but would additionally grant an anti-competitive advantage to the beneficiaries of such an exception.

DACS therefore believe that Government should refrain from introducing the described exception as there is no legal basis for such an exception in Directive 2001/29/EC and further research into the benefit and impact of such an exception will be necessary together with clear definitions.

Parody, Caricature and Pastiche

We believe that the Government will not achieve the envisaged growth of the UK economy by introducing a parody exception into UK law. It is more likely that the unintended consequences of such an exception will outweigh any perceived benefits.

In any event, it is difficult to understand where the claimed need (which is not substantiated) for a parody exception derives. The Consultation in paragraph 7.100 clearly states that Britain has a long and vibrant tradition of comedy and satire and that parody, caricature and pastiche have long been used to comment on the society, culture and politics of the day, despite the fact that UK copyright law does not recognise an express parody exception.

When the exception was proposed in 2008, Lord Triesman stated that the tradition of parody in the UK is alive and well, and in fact the introduction of a parody exception was discarded in the process of the Gower's Review (at paragraph 329 of *TAKING FORWARD THE GOWERS REVIEW OF INTELLECTUAL PROPERTY: Second Stage Consultation on Copyright Exceptions*): "Although the current regime does not go as far as many would like to see, it does afford some basis for permitting parodies, etc. to be created for example by taking parts from underlying works which are not considered substantial or by using parts of works under the fair dealing exception for criticism or by seeking permission, through licensing, to use the underlying work."¹⁴

The Consultation is flawed in its attempt to make a case for the introduction of a parody exception and fails to provide the economic evidence advocated for by Professor Hargreaves.

¹⁴ <http://www.ipo.gov.uk/consult-gowers2.pdf>

IV Exceptions to Copyright

The repeated comparison to the fair use doctrine in the US is not meaningful as Hargreaves established that this concept does not have any basis in the UK or in the European copyright system, and should therefore be avoided. Also, the Consultation paper simply claims that certain uses were justified under the fair use doctrine although this was neither tested in courts nor verified; the same items could equally have been licensed or authorised. The fair use doctrine also contains limitations with regards to the commerciality of the use which the Consultation does not seem to mirror when arguing that "comedy is big business" and that the introduction of a parody exception would thus enable and support economic growth.

The portrayal of the situation in France and the fact that a parody exception in France is possible despite strong moral rights protection is misleading. We believe that because French copyright law contains a strong and meaningful protection of moral rights, where moral rights are non-waivable and on a par with economic rights regarding their enforcement, authors are more likely to accept a notion of parody as any distortion of their work will find a natural limitation in the integrity right attaching to their work. In the UK however, moral rights were only formally introduced into UK copyright law with effect from 1989. Rights are waivable and of very limited application, as only treatments of works which are prejudicial to the honour and reputation of an author are actionable, and without the provision of meaningful damages in the UK, it seems questionable if the integrity right creates a meaningful limitation to what could be done under a parody exception.

A further flaw in the Consultation is the substitution of comedy for parody: 'comedy' is far broader than the concept of parody and the failure to provide a parody exception does not hinder the development and exploitation of comedy in a meaningful way.

In any event, parody is already possible under the existing regime through the doctrine of substantiality, which does allow parodists to copy non-substantial parts of copyright protected works or to create parodying works in the style of existing works. Section 30 CDA 1988 also allows for the use of parody to criticise and review another work or for the purposes of news reporting, as does the possibility of licensing works that are to be parodied. The argument that creating a parody exception would save costs for licensees, paragraph 7.110, is in our opinion insufficient as a justification for introducing a new exception, and in contrast to Government's objective to safeguard remuneration to rightsholders.

In DACS' licensing practice, we regularly encounter unlicensed uses of our members' works. In many cases, these are clearly instances of a substantial taking of members' work, without permission, and which are used in order to create products with substantial commercial value in the market – this value deriving in significant measure from the incorporation of and manipulation to an un-credited, unauthorised copy of a copyright protected work.

We believe a new parody exception will make matters worse, as the exception is created to justify the taking of copyright protected works, with the consequence that the creator of the original work must prove that the derivative work is not a caricature, a parody or a pastiche within the meaning of the new exception. They will not be aided in this task by the absence of any intended definitions of the terms in the proposed exception.

As highlighted in paragraph 7.116 it will be up to the courts to determine the meaning of these terms – but the economic impact of initiating such adjudication will fall to the rightsholders who seek to defend their work from the type of uses described here.

Clearly this worsens the position of rightsholder of the original works. Defendants will argue that they can rely on a new lawful exception to the exclusive rights of the creator, and may also be able to argue that their activities are covered under other existing exceptions.

Visual artists would also have to argue that the disputed work was not a parody, pastiche or caricature for the purpose of the new exception – and the courts would need to develop jurisprudence around what constitutes a work of parody etc. within the meaning of the law – all

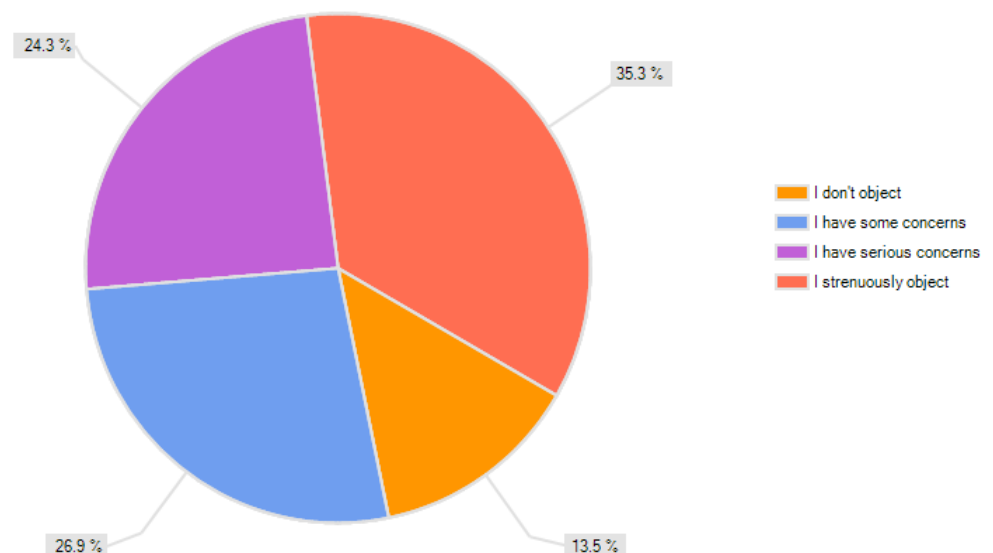
IV Exceptions to Copyright

of which suggests a painful re-run of the lengthy jurisprudential development of the correct interpretation of 'works of artistic craftsmanship' (CDPA 1988, s.4 (1) (c)).

This cannot be in the interests of authors of artistic works whose exclusive rights are already substantially limited by existing exceptions.

In DACS' survey of visual artists, 35% of respondents strenuously objected to the introduction of an exception for parody, caricature and pastiche, with 24% having serious concerns. 14% of respondents had no objection.

How do you feel about the introduction of a parody exception?

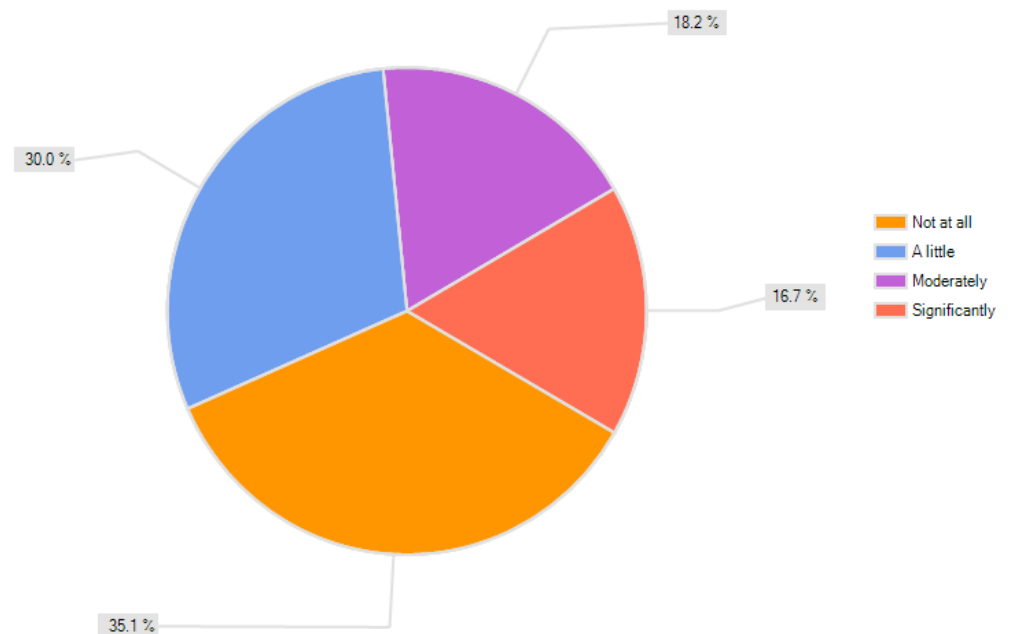


35% of survey respondents felt that the introduction of such an exception would 'significantly' or 'moderately' affect their work as a visual artist, with another 35% considering it to have no impact on their work. This response reflects the fact that many artists themselves parody work in their own practice, without, it seems, running into problems. However, when asked how they felt about business or organisations being able to use their work for parody, 51% strenuously objected, while a further 21% had serious concerns.¹⁵

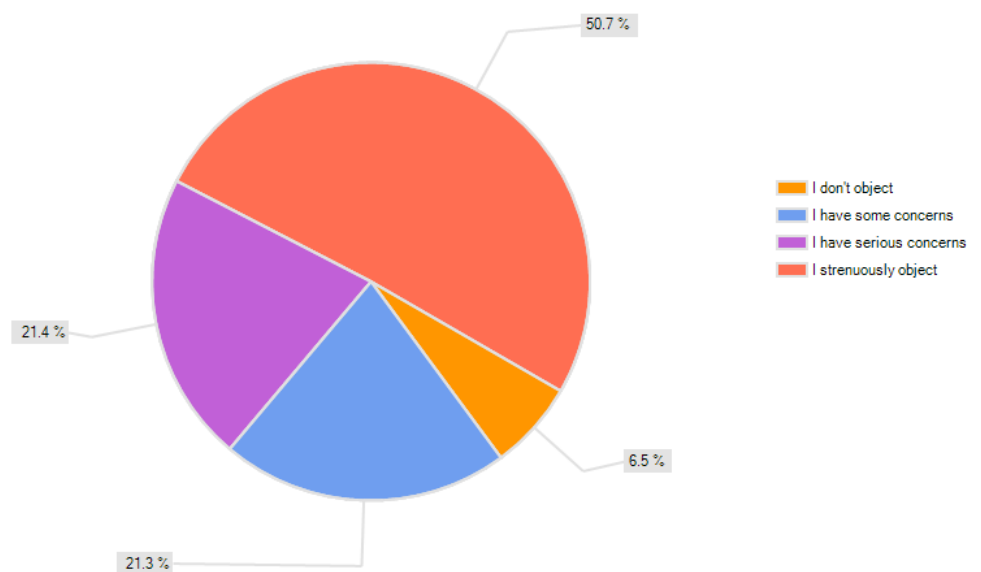
¹⁵ DACS' Artists' Survey 2012 www.dacs.org.uk

IV Exceptions to Copyright

How much would the introduction of a parody exception affect your work as a visual artist?



Do you have any concerns about allowing business or organisations to use your work for parody without your permission?



IV Exceptions to Copyright

Question 78

Parody, Caricature and Pastiche: Do you agree that a parody exception could create new opportunities for economic growth?

DACS does not agree that the economic benefits of the proposed exception will outweigh the disadvantages in a meaningful way. On the contrary, the proposal in the Consultation seems to suggest that the benefits arising from any such exception lie in the saving of costs for permissions. Furthermore, the proposal burdens the rightsholder of original works with the enforcement of their rights and the costs of establishing the exact scope of the exception through case law.

We fail to see how a system based on copying other works for free and without their permission will create substantial economic growth for the UK. Neither the Consultation nor Professor Hargreaves in his earlier report, provide any concrete evidence to substantiate the real economic case for such an exception. As we note above, comedy is distinct from the concept of parody, and parodying uses of copyright protected works are already possible to a certain extent under the current copyright system in the UK.

Question 79

What is the value of the market for parody works in the UK and globally?

As has been stated there is no evidence to support the claim that permitting uses without payment to rightsholders because the uses are parody, would increase the market and support economic growth. In any event, even if it was possible to substantiate such a claim, it would need to be offset by taking into account costs to rightsholders of loss of licensing revenues and also the costs of enforcement actions.

As confirmed by the Consultation, and before by the Gower's Review, there is a market for parody in the UK and it is evident that parody is happening within the limitations currently placed upon parodists. So it seems that neither public policy nor the economic interests of parodists are coming to any real harm, despite the claims made in this Consultation.

Question 80

How might a parody exception impact on creators of original works and creators of parodies? What would be the costs and benefits of such an exception?

DACS believes that the introduction of the exception will have a negative impact, particularly in relation to artistic works.

Recent industry and technological developments in respect of already existing exceptions, but also in the field of digital reproductions in the online environment lead to a constant devaluation of copyright and the trust individual creators have in the existing system.

The introduction of a new parody exception means this trust in the system will be further diminished, as the scope of protection experiences a further limitation. Rightsholders will experience an additional loss of control over how their works are used, without any real means to establish the legal limitations of this new exception and without any real possibility of receiving revenues and enforcing their rights where the requirements of the exception are clearly not met.

The new exception will open up an additional avenue for third parties to take unfair advantage of the investments of individual visual artists while minimising the effort required to create new, commercially viable works which may be exploited without further consideration to the original author. Rightsholders will lose an established stream of revenue from the licensing of their work for parodies which go beyond the established limitations of substantial taking and criticism and review.

IV Exceptions to Copyright

Further costs will accrue for rightsholders requiring legal support regarding the scope and impact of this new exception, to establish clear definitions through jurisprudence, and in order to enforce their rights where the limits of the exception are clearly overstepped.

DACS further foresees an impact on the creative content available online as creators of artistic works in particular may become reluctant to make their works available online for fear of their works being altered in a humorous way and redistributed as parody.

DACS believes that any exception will undermine the interests of copyright in the underlying work. Owners of rights in the underlying work will in practice lose complete control over the inclusion of the work in the parody and the subsequent use of the work in the parody. It will be the parodist who controls the new work and therefore controls any reproduction of the original work incorporated in the parody, to the exclusion of the copyright owner in the underlying work.

Restrictions in the exception regarding subsequent dealing of the parodying work would be contrary to general principles where the parody amounts to a derivative work which attracts its own copyright protection. Restrictions like that also have the potential to deter parodists from employing sufficient skill, labour and judgement when creating the parodying work as they would not be able to subsequently deal with their works which in turn may result in uncreative straightforward reproductions masquerading as parody.

In cases where a subsequent dealing takes place the existing enforcement provisions make it practically impossible for rightsholders to pursue successful actions for infringements of their copyright. This means that even when introducing a limited exception, there would be no real possibility for rightsholders in the underlying work to stop the use of the parody in which their work is incorporated for advertising or product endorsements which may be contrary to their commercial interests or simply their ideals.

In the field of artistic works, an important aspect of the value of the works protected is the uniqueness of the original. This is often reflected in the existence of the exclusive advertising, promotional or merchandising deals visual artists or their beneficiaries enter into. This exclusivity and uniqueness will be jeopardised by introducing an unlimited exception which allows users simply to alter the original work in a 'humorous' way and to incorporate the result in their services and products. The rightsholders in the underlying work will not only be deprived of their lawful remuneration for this type of use, but also existing agreements will be devalued through this open access to their works.

We do not agree with the rather simplistic view that tries to classify the possible effects of a parody exception in four different categories. A more sophisticated approach will be necessary in order to determine the real economic impact of such an exception on established markets of copyright owners.

DACS is also aware that many parodies thrive on the comparison with the "real" work, in particular when artistic works are concerned and it would be essential to know how far any proposed exception in this area is envisaged to cover these comparative uses alongside the parodying work.

IV Exceptions to Copyright

Question 81

When introducing an exception for parody, caricature and pastiche, will it be necessary to define these terms? If so, how should this be done?

Government acknowledges that exceptions for parody are dealt with differently throughout the European Union and internationally. This is partly because the Copyright Directive does not contain any definitions of these terms. However, just as national laws and principles cannot be employed to interpret European law, the Directive should not introduce definitions for terms that are heavily influenced and interpreted by national and cultural understandings and traditions. In particular in the area of humour, national interpretations are very distinct and slight nuances can distinguish a humoristic interpretation from bad taste.

The reference to the Oxford English Dictionary and to the determination of definitions by courts is insufficient and leaves rightsholders as well as parodists in a state of uncertainty. As shown in the case of criticism and review, courts tend to refer to dictionary definitions to establish the correct meaning of certain terminology used in the Act (see *Fraser-Woodward v BBC*, as above), but fail to deliver guidance as to the precise legal definition of these terms (see *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] F.S.R. 60 [Fn2] at 620, where the court determined that the term 'criticism and review' has to be interpreted liberally).

It would therefore be desirable for the legislator to define clearly the scope of any parody exception they wish to introduce rather than encumbering rightsholders with the burden of financing the correct interpretation of these terms through court actions case law.

DACS does not believe that the cited definition of pastiche falls within the realm of uses the Government aims to cover by the introduction of a new parody exception. The Oxford English Dictionary definition of pastiche, contrary to the French interpretation of the term, does not require the derivative work to be humorous or to have a comic effect on its audience. The inclusion of the cited pastiche definition in any parody exception will therefore open up the possibility for forgery and to pass off works as works by famous artists. To create works in the style of existing copyright protected works is already possible under the substantiality test, which leaves open to question what the inclusion of this term in the scope of the exception aims to cover other than straightforward copies.

There are multiple examples where one to one copies of artistic works, sometimes in a different medium, are labelled as being "in the style of" certain works, one such example being that of a convicted forger of famous artistic works specialising in the reproduction of art works 'in the style of' famous artists.

We are certain that Government does not want to encourage this type of activity being covered by an exception.

As stated previously DACS does not believe that there is any need for the introduction of a parody exception into UK law as the concept as such is well established and recognised. UK law allows for the non-substantial taking of existing copyright protected works which, in a manner similar to German copyright law, allows for the humorous reproduction of the style of pre-existing works. In DACS' opinion it is therefore not necessary to find definitions for the terms of parody, caricature and pastiche.

IV Exceptions to Copyright

Question 82

How should an exception for parody, caricature and pastiche be framed in order to mitigate some of the potential costs described above?

As described above DACS does not believe that the case has been made for an exception for parody, caricature and pastiche, either on policy or economic grounds. In any event, these types of derivative works are possible under current UK copyright legislation.

A one to one implementation of the provision in Article 5 (3) (k) of Directive 2001/29/EC seems to be incompatible with UK copyright law, as the fact that the right of integrity is waivable and UK law does not provide for sufficient damages, does not constitute an appropriate limitation to this exception such as exists under French law or even the American fair use concept with its commerciality criterion. We further wish to draw Government's attention to the fact Article 5 (3) of Directive 2001/29/EC states clearly that the subsequent provisions, including (n), can limit the rights of Article 2 and 3 of Directive 2001/29/EC only.

In DACS' opinion the right to adapt a work for example is not covered by the exception. Article 12 of the Berne Convention grants authors of literary and artistic works the exclusive rights to adapt their works and to authorise these adaptations which means that any provision of a parody exception concerning these two work categories would be in direct contravention of the Berne Convention.

Question 83

Would making this a “fair dealing” exception sufficiently minimise negative impacts to copyright owners, or would more specific measures need to be taken?

DACS does not believe that framing any parody exception as a fair dealing exception in itself would sufficiently minimise the negative impacts to copyright owners. As explained above it is not only the parodying use that negatively impacts on the position of rightsholders but the subsequent uses of the parodying work which could result in a complete loss of control of the use of the work by the rightsholder in the parodied work.

The interpretation of the existing fair dealing exception through case law shows (in particular in the area of criticism and review of artistic works) that this type of exception does not sufficiently balance the rights of rightsholders and users.

Classing a parody exception as a fair dealing exception is likely only to allow even further scope for loss of control over the work. From this perspective, it is difficult to see anything other than harm arising to rightsholders if parody is considered as one of the fair dealing exceptions.

At this point we would also like to question the anticipated positive impact on the original work as described in paragraph 7.113 of the Consultation as it seems unlikely that the demand in original artistic works will be heightened by the parodying use of the work. To create a Homer Simpson version of Edvard Munch's *The Scream* would not lead to greater sales of the original artworks by Edvard Munch.

A fair dealing exception with a further limitation placed on parodists that prohibits any subsequent exploitation of the parodying work, similar to the provision in Section 63 (2) CDPA 1988 seems to be the best means to limit the negative impacts on rightsholders, together with stronger and more effective moral rights protection, guidance on fair dealing, a formal implementation of the Three Step Test into UK law, narrowly defined terms and a limitation to the exclusive acts that can be restricted according to Directive 2001/29/EC and the Berne Convention.

IV Exceptions to Copyright

Question 84

Are you able to provide evidence of the costs and benefits of such an exception?

It is not possible for DACS to provide evidence for the costs and benefits of such an exception; but we would urge Government to follow their own guidelines and produce evidence as to the extent such an exception would lead to economic growth that outweighs the harm being done to individual creators and rightsholders. We would also caution against seeing an exception under which licensing fees are no longer payable to rightsholders as a 'benefit' to the UK as a whole: clearly, it is not.

DACS can provide various examples where "parody" has been claimed in the past, which not only treated the original work in a derogatory way but also involved products which were highly commercial in nature.

Uses for work in education

DACS is a member of the Educational Recording Agency (ERA) and has an agency agreement with the Copyright Licensing Agency (CLA) by which visual works embedded in books and periodicals can be licensed to users through CLA's wide range of licences.

We would take the liberty of referring to the Consultation responses made by ERA and CLA for much of the detailed evidence supporting the case made by those organisations on behalf of their rightsholders. But we would state here our support for the cases made by both, in respect of the ERA scheme certified under s.35 of the Act, and the licences offered by CLA relating to s.36.

It is vitally important that exceptions are not introduced which would have the unintended consequences of undermining the UK's world-leading publishing sector. Changes, if introduced, must complement the innovation and greater utility already offered by the ERA licences, and in particular the ERA Plus scheme which provides for recordings of broadcasts made for educational purposes to be accessed off-campus. Some of the options proposed in the Impact Assessment BIS 0317 will increase complexity for users and damage the interests of rights owners, whilst failing to recognise why the structure of the current s 35 of the Act was put in place in the first instance.

We also consider that Impact Assessment BIS 0317 is seriously lacking in meaningful evidence to support the general proposition in the Consultation that there is a case for removing or restricting the scope of licensing schemes which currently apply to the recording of broadcasts and the reprographic copying of published material.

ERA's submission, for example, lists the ways in which the Impact Assessment fails to make any mention of the benefits to users of the licensing scheme, including the massive savings in transaction costs, the innovations made within the licence to support new ways of delivering education, the steps taken to develop the scope of the licence to link up with new online services offered by the BBC and Channel 4, to ensure that educational licensees can make use of new services under their ERA licence.

IV Exceptions to Copyright

Question 85

Use of Works for Education: How should the Government extend the education exceptions to cover more types of work? Can you provide evidence of the costs and benefits of doing this?

We believe that between s.34, s.35 and s.36, all categories of copyright work are already dealt with as far as non-commercial educational purposes are concerned.

S.35 already covers provisions for the recording of broadcasts (or parts of them). The section also covers use of artistic works when embedded in broadcast programmes. However, it would be impossible to apply 1% of an artistic work as a meaningful limit on the amount that might be copied for educational use under the licensing options afforded by s.36. Artistic works, where embedded in literary works (books, journals and magazines) can be covered by the 1% exception, but self standing works are not suitable for this sort of treatment, as there is clearly a potential danger to markets for new commissions, primary sales or licensing.

Question 86

Would provision of “fair dealing” exceptions for reprographic copying by educational establishments provide the greater flexibility that is intended? Can you provide evidence of the costs and benefits of such an exception?

We agree with the conclusions of CLA and ERA on this question, and we oppose the idea of a ‘fair dealing’ approach here. We suggest that the removal of the current numerical limit on use specified in s.36 in favour of a generalised “fair dealing” approach would fail to take into account the significantly different impacts on recognition of the rights in copyright works arising from uses by or for educational establishments on the one hand, and uses by individuals in a private non-commercial on the other. We question whether in any event this approach would comply with the provisions of the Directive 29/2001/EC, and the Berne Three Step Test.

Question 87

What is the best way to allow the transmission of copyright works used in teaching to distance learners? What types of work should be covered under such an exception? Should on-demand as well as traditional broadcasts be covered? What would be the costs and benefits of such an exception?

Examples exist already which show the way forward, particularly the ERA Plus licence. Following discussions with the BBC and Channel 4, changes have been made to the terms and conditions applicable to the access of some BBC and Channel 4 online services.

The changes allow educational establishments holding a current ERA Licence to:

- (a) record and access BBC Content in relevant BBC Online Services for educational purposes under the terms of an ERA Licence; and
- (b) apply non-commercial educational use within the scope of the ERA Licence to access to 4oD Content within Channel 4 Online Services on the conditions that would otherwise be limited to personal, non-commercial use. Age of consent and viewer guidance terms continue to apply to any educational access.

IV Exceptions to Copyright

Question 88

Should these exceptions be amended so that more types of educational body can benefit from them? How should an “educational establishment” be defined? Can you provide evidence of the costs and benefits of doing this?

No, the extension should not be adopted. Museums and galleries are completely different entities to schools and universities and many companies would argue that they have some educational purpose of some kind which justifies their benefitting from being considered an educational establishment. This phenomenon is not limited to cultural institutions – see Deutsche Bank: <http://www.db.com/unitedkingdom/content/en/education.html>

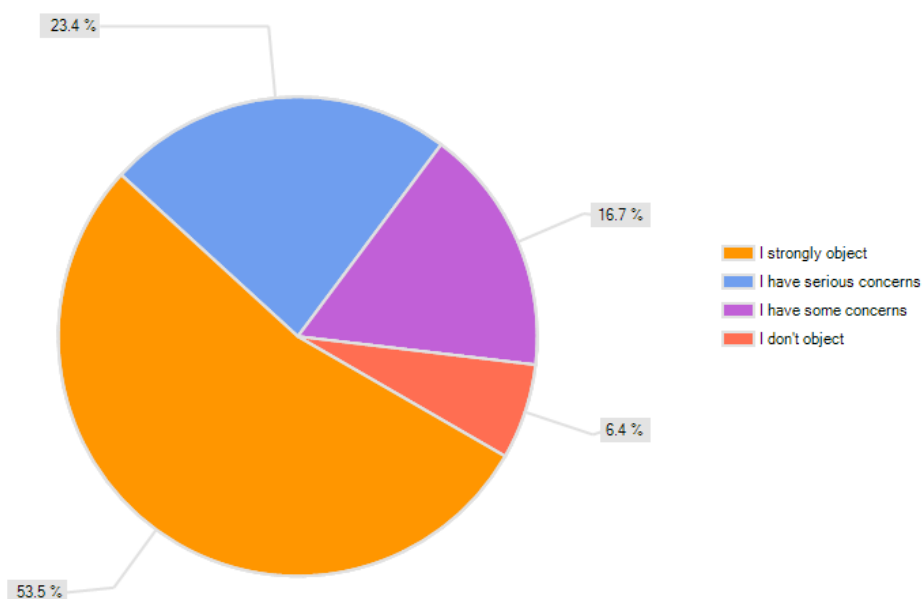
Question 89

Is there a case for removing or restricting the licensing schemes that currently apply to the educational exceptions for recording broadcasts and reprographic copying? Can you provide evidence of the costs and benefits of doing this, in particular financial implications and impacts on educational provision and incentives to creators?

No, there is not. The schemes operated by CLA and ERA are well established licensing schemes which are completely in line with the aims expressed elsewhere in the Consultation (ECL, orphan works). Loss of these schemes would significantly impact on creators who are benefitting from the royalties they receive from these schemes.

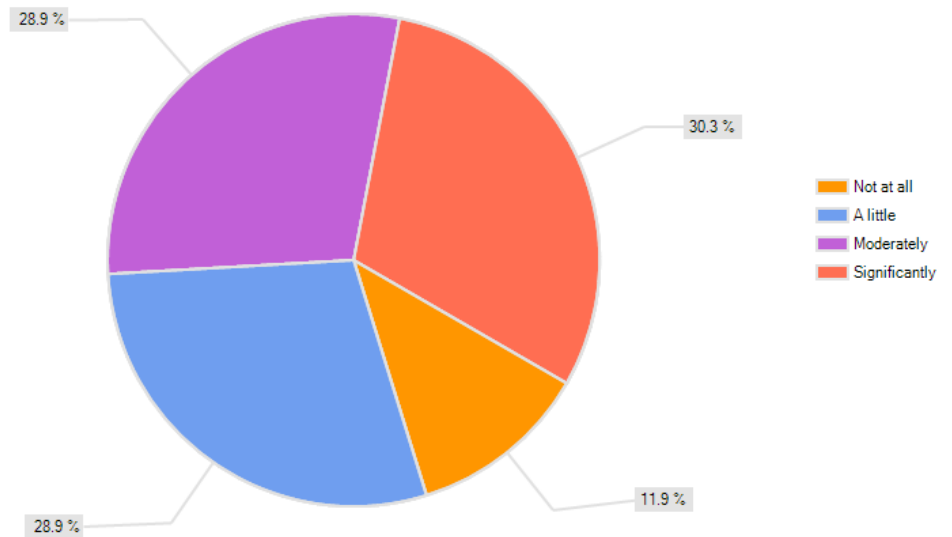
In our survey, 54% of respondents strongly objected to the widening of copyright exceptions relating to educational use. 24% had serious concerns. Only 7% of respondents did not object to a widening of educational exceptions. 30% of respondents felt that the reduction in royalties resulting from the widening of educational exceptions would ‘significantly’ impact them. 29% felt they would be ‘moderately’ impacted.¹⁶

How do you feel about educational institutions being able to use more copyright works without permission or remuneration?



IV Exceptions to Copyright

How would this reduction in royalties impact you?



Question 90

Copyright Exceptions for People with Disabilities: How should the current disability exceptions be amended so that more people are able to benefit from them? Can you provide evidence of the costs and benefits of doing this?

DACS supports the Government's ambition to make more content available for people with disabilities. There has been a great deal of licensing innovation and flexibility from rightsholders already, especially in relation to providing appropriate arrangements for people with visual impairments (for example the Copyright Licensing Agency (CLA) zero-rated licences). We believe there is a great deal of evidence of existing positive partnership models between rightsholders and user groups, and we would like to allow these stakeholders to develop more market-led solutions. Not least because the Consultation clearly highlights the problem of finding an acceptable and meaningful definition for "disability" in copyright terms and at the same time avoiding unnecessary and unhelpful over-regulation. At the same time other legislation seeks to give precise definition to the term 'disability', such as the Disability Discrimination Act 2005 and the Equality Act 2010 (which are accompanied by a 47 page document issued by Directgov which attempts to define 'disability').¹⁷

The Consultation does not tell us what the problems are for which this proposal is a solution, and we do not think that a proposal which would result in free copying of copyright protected works in all cases involving disabilities as defined in the various legislative texts can be considered to be in the interests of wider public policy.

It is not clear in how far activities as described in paragraph 7.167 for example constitute copyright relevant activities. Facts like the CLA offering zero rated licences as described in paragraph 7.168 fulfil the need for rightsholders to keep control over the exact use of their work while at the same time enabling greater access to works to people with disabilities.

Unintended consequences should be avoided, especially if operating a new exception requires data processors to handle the sensitive personal data of those with disabilities if they are required to produce evidence of disability for the purposes of benefitting from the exception to the law.

Question 94

Use of Works for Quotation and Reporting Current Events: Should the current exception for criticism and review be amended so that it covers more uses of quotations? If so, should it be extended to cover any quotation, or only cover specific categories of use? Can you provide evidence of the costs or benefits of amending this exception?

There should be no amendment of Section 30 CDPA regarding criticism and review as suggested. Without clear cut definitions and the formal inclusion of the Three Step Test into UK legislation, the described expansion of Section 30 CDPA clearly undermines the rights of creators and risks impacting on established primary markets. No case has been made that the proposed amendment would support the aim of the Consultation process to enable growth of the UK economy; rather, it is explicitly stated that if introduced this exception will reduce licensing transaction costs (and licensing fees) which will have a direct negative impact on rightsholders.

The fair dealing provision in Section 30 CDPA has been tried several times since its introduction into UK law and a body of well-established case law supplements and interprets the application of the exception. To introduce further concepts like "specific purpose", another undefined

¹⁷ http://www.equalityhumanrights.com/uploaded_files/guidance_on_matters_to_be_taken_into_account_in_determining_questions_relating_to_the_definition_of_disability.pdf

IV Exceptions to Copyright

term, would not help in clarifying the extent of the exception and would be detrimental to the position of rightsholders who would be forced to finance the interpretation of these terms through the courts. Also, as explained above, in the case of artistic works it is well established in case law that it is the whole of the work which is wanted in the majority of cases, which would be incompatible with the concept that “quotations” should be allowed; these already accommodated through the concept of substantiality and therefore sufficiently covered¹⁸.

We would like to express concern about the possible consequences of such widening as relates to the potential use of excerpts of copyright protected works by users on social networking sites. The majority of these sites impose terms and conditions of their own in which users of the site warrant that they own or are authorised to upload the content that they choose to so share¹⁹. Although this may be covered by the envisaged broadening of such exception, the same terms and conditions stipulate that by uploading these works the user grants a licence to the operator of the site, which in our opinion would be beyond the “specific purpose” of the use and therefore falls foul of the exception. But this would be unmanageable from the point of view of the site operator but also impossible to monitor through rightsholders.

A further point to raise is that the Government in its argument in paragraph 7.188 of the Consultation, seems to indicate that fair dealing only applies to the non-commercial use of works but that this is currently not clarified through case law as the commerciality of a use may weigh against the fairness of the use but does not rule it out²⁰. Further clarification may be needed here.

Question 95

Is there a need to amend or clarify the exception for reporting current events? Could this be done as part of a quotation exception, or would a separate measure be needed? What would be the costs and benefits of doing this?

DACS does not believe that an extension of Section 30 (2) CDPA 1988 is necessary, independent from the extension of Section 30 (1) CDPA 1988. As with s. 30 (1), s. 30 (2) has been subject to case law and is sufficiently established and clear. We also believe that the UK opted for alternative 2 in Article 5 (3) (c) Directive 2001/29/EC when implementing an exception for the reporting of current events and that a further implementation of Article 5 (3) (c) Directive 2001/29/EC about the copying and communication by the press of published articles on current economic, political or religious topics is therefore no longer available. Also, the specification that these uses only be permitted if not expressly reserved by the copyright owner does not sit well with copyright in the UK.

Apart from there not being any scope available to widen the existing exception under UK copyright law we also believe that current arrangements sufficiently accommodate third party rights of freedom of speech and freedom of expression, and that the current copyright restrictions do not impede these fundamental rights due to the provision of existing exceptions in Section 30 CDPA 1988, the substantiality criteria and the very liberal interpretation of the exceptions through the courts. Any further legislative extension of the provisions will have a detrimental effect on the position of rightsholders without achieving the benefits aimed for by Government, namely to support the economic growth of the UK.

18 “the nature of the medium means that any reference is likely to be by means of an inclusion of most of the work, because otherwise the reference will not make much sense.” (as found by the court in *Fraser-Woodward Ltd v BBC* [2005] EWHC 472 (Ch), in the case of photographs)

19 <http://www.facebook.com/legal/terms?ref=pf>: Sharing Your Content and Information
You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition:

1. For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.

20 See *Fraser-Woodward Ltd v BBC* [2005] EWHC 472 (Ch)

IV Exceptions to Copyright

Other Exceptions allowed by the Copyright Directive

Question 99

Should a new exception for time-shifting of broadcasts by social institutions be introduced? What would be the costs and benefits of doing this?

We believe that the aim outlined in paragraph 7.209 of the Consultation stands in direct contrast to the explicit objective to provide and safeguard remuneration for rightsholders when stating that the exception should be introduced "...so that it expressly permits hospitals, care homes, prisons, and other social organisations to record broadcasts for later viewing by their residents [would] ensure[s] that the benefits of this exception were realised without having to provide compensation to copyright owners."

Firstly it is not clear from this proposal how this would achieve the aim of Government to support economic growth in the UK and secondly it is not clear why rightsholders should be forced to subsidise social institutions in the way described. Not only would this constitute an unjustified restriction of the right to property, it also seems obsolete in particular with regards to the development of the broadcasting sector. The majority of broadcasts are already available online through Video on Demand or Catch Up services and these are licensed in the case of artistic works for example, to the producer of the programme and/or broadcaster of the programme who makes these subsequently available.

If Government therefore sees a need for the introduction of such an exception this should only be done under a licensing scheme like the ERA licensing scheme operated on Section 35 CDPA 1988 and providing for fair remuneration for rightsholders.

Question 100

Should a new exception for use during religious celebrations or official celebrations organised by public authorities be introduced? What would be the costs and benefits of doing this?

As pointed out previously in this submission we do not believe that exceptions to a fundamental property right such as copyright should be introduced merely for reasons of convenience. There are various instruments available to address situations like the ones described under this heading and according to paragraph 7.211 the market has found its own solutions. All of which suggests that any form of legislation might amount to over-regulation: something the Hargreaves Review warns against.

We also do not believe that Article 5 (3) (g) of Directive 2001/29/EC which Government does not intend to rely on according to paragraph 7.214 or the Consultation can be used to introduce an exception for the free playing of copyright protected music at weddings and funerals in general, as the authorisation in the Directive is limited to an organisation through public authorities rather than trying to guarantee the "public's freedom".

Question 101

Should our current exceptions be expanded to cover use for public exhibition or sale of artistic works on the internet? What would be the costs and benefits of doing this?

There seems to be a conceptual misunderstanding of the scope of Section 63 CDPA 1988 as well as of the authorisation in Article 5 (3)(j) Directive 2001/29/EC. Both provisions allow for the reproduction of an artistic work for the purposes of advertising the sale of that artistic work. The example therefore used in paragraph 7.215 about the advertisement of the sale of a second hand book does not fall within the realm of this exception.

IV Exceptions to Copyright

In our experience the majority of sellers of artistic works are already advertising online the sale of the original works, as they believe that online use is already covered by the existing Section 63 CDPA 1988. DACS does not therefore envisage any major difficulties for the inclusion of the communication right in Section 63 CDPA 1988 as long as it is emphasised that any subsequent dealing with the works (including archiving, storing and on-going communication to the public) is an infringement and requires licensing through the rightsholders (or their representative). Although the provision already restricts the subsequent dealing with reproductions of the works, sellers of artistic works tend to archive the reproductions made for the purposes of advertising the sale and to use these for other promotional activities or to create databases of works they have sold or had for sale in the past. Other uses have also included the storage of works in order to operate an image bank.

The exception should not be extended to include the advertising activities of museums and galleries. The uses proposed for inclusion in an extended exception at Section 63 CDPA 1988 exception are well established primary licensing markets. Extending the exception would therefore jeopardise the earning potential of visual artists significantly.

It is also important to take into account that other countries within Europe which may have adopted this exception for the advertising of public exhibition in accordance with Article 5 (3) (j) of Directive 2001/29/EC also provide for a display right under which rightsholders are entitled to receive remuneration for the public display of their works. Development of this right alongside an exception for the advertising of the exhibition of the work may well be beneficial to rightsholders. However, as the UK does not provide for such a right, the proposed exception as currently framed will have severe negative consequences on rightsholders.

DACS agrees with the Government that any such exception would need to be worded narrowly and could not extend any online uses, as indicated in paragraph 7.217 of the Consultation, as this falls beyond the scope of Directive 2001/29/EC.

Question 103

Protecting Copyright Exceptions from Override by Contract: What are the advantages and disadvantages of allowing copyright exceptions to be overridden by contracts? Can you provide evidence of the costs or benefits of introducing a contract-override clause of the type described above?

DACS generally agrees with the position advanced by ERA, CLA and the BCC on this point and favours an approach where the possibility of qualified exceptions is preserved. By way of example, the current provision at s. 35 CDPA 1988 allows for an “override” of the statutory exception through a certified licensing scheme pursuant to s. 143 CDPA 1988. Likewise s. 36 CDPA 1988 clarifies that in cases where licences for the described activities are available, the exception does not apply.

We further agree with the point made in the submission of the CLA that contract law and principles should in general not be inhibited by stipulations which seek to prohibit an override of copyright exceptions.

It is important, in our opinion, to affirm that the exceptions in the Act are predominantly drafted as defences against alleged copyright infringements. Such defences are still applicable if challenged in court, even where contracts purport to override them. Although the exceptions aim to balance different interests and rights of rightsholders and users, we do not believe that exceptions confer any actual rights on to users which consequently require protection in law against contractual override.

V Copyright Notices

We do not propose to answer the questions in this section individually, although we think the idea of copyright notices (and the motivation behind the proposal) is positive. We hope that our comments are seen in a similarly positive light.

We agree in general terms with the proposition that access to justice can be expensive and risky. To a large extent, this reflects the reality of professional costs and the inherent uncertainty in litigating in a specialist area within an adversarial legal system.

So we appreciate the positive intent behind the proposal to introduce a Copyright Notices service, and we can see the creative thinking that has sought to apply the practices and ideas in a well-functioning system relating to another intellectual property right (patents) to the field of copyright.

But we think that the likely benefits to the proposal in the present Consultation, as articulated in the Impact Assessment (IA) BIS1056, are somewhat overstated given the scale and nature of the problem described in the IA, not least because the Option 1 proposal favoured by the Government appears to remove only £3.5m in costs from the system at best – thus leaving £11m still being paid out in advice.

We have taken the assumptions in the IA to calculate our figure: 4.8m SMEs x 1.6% = 76,800, each with one hour's legal advice at £190 equals £14.592m. Subtract best case savings in IA (&£3.5m) equals £11.092m costs remaining.

The value of the savings relative the costs will obviously change if the average legal consultation is for more than the hypothesised one hour at the assumed rate.

On the face of it, the conclusion of the Impact Assessment does not appear to support the weight of the argument placed upon it if the financial case on which it is based is undermined by relatively small fluctuations in circumstances.

Nevertheless we do believe that there is a role for the Intellectual Property Office (IPO) in providing enhanced information and guidance on rights, providing some educational and awareness programmes to promote copyright and support business.

DACS

33 Great Sutton Street,
London, EC1V 0DX
T +44 (0) 20 7336 8811
F +44 (0) 20 7336 8822
E info@dacs.org.uk
www.dacs.org.uk