



Independent Review of Intellectual Property and Growth

DACS Submission 2011

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Introduction

Licensing visual works in the digital age

Established by artists for artists, DACS (the Design and Artists Copyright Society) is an innovative visual artists' rights management organisation, representing over 60,000 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.

The artists, photographers and illustrators we represent are largely self-employed individuals or 'micro-businesses', generating original, creative content which fuels the UK's creative industries and its position as Europe's leading creative nation and one of the most flourishing contemporary art markets in the world.

Supported by the UK's copyright regime, the impressive achievements of the UK's creative industries and their significant contribution to the UK's GDP has to be understood as a function of a dynamic ecology and set of inter-dependencies between creative individuals and the industry as a whole. This intricate value chain connects thousands of individuals and micro-businesses to institutions like Tate Modern, for example, which now attracts 4.75 million visitors a year and is London's third leading tourist visitor attraction; it connects teams of artists and designers to publishers, computer games manufacturers and Hollywood film companies.

Copyright royalties contribute to the financial sustainability of thousands of individuals and micro-businesses. Whilst the individual payments may appear modest, they are disproportionately significant for visual artists who earn considerably less than the UK national median wage and who rely on a portfolio of earnings from a variety of different sources. The current recession coupled with public funding cuts will have a disproportionate impact on these individuals and micro-businesses for whom royalty earnings have become even more significant.

Over the past five years, DACS has distributed £34.5 million in royalties to visual artists for copyright licensing, Artist's Resale Right and collective licensing. This represents a direct financial investment into creativity and innovation which in turn fuels the development of original creative products which accumulate financial, social and cultural value. DACS' distributions to artists represent almost twice as much as the investment made by the Arts Council England to individuals for visual arts activities over a similar period.¹

In 2010, DACS established its own innovation and research team to implement our core mission of translating rights into revenues for visual artists in new and innovative ways. As a consequence, DACS is now working on a number of projects which will make the works of visual artists more accessible to a wider public, facilitate quicker and more effective licensing and maximise the earnings of visual artists through efficient rights management and distribution.

We welcome the Hargreaves Review of Intellectual Property and believe that the Government's ambition to support economic growth and innovation through an effective copyright regime can be achieved by the following means:

- Stimulate and expand the UK's knowledge economy by examining and introducing options for licensing solutions which have worked well in other European states; one example might include a **broadband levy** which will remunerate creative individuals and micro-businesses whilst ensuring that there is a sustainable flow of original creative content to support the business models of Internet Service Providers and other content distributors/aggregators. Following the model of existing secondary rights collection schemes, the levy can be most conveniently distributed by collecting societies to stakeholders across different sectors.

¹ *Briefing Note: Visual Arts*, Arts Council England, February 2010, p.7

Introduction

- Increase public access to orphan works by introducing **measures to resolve the unintended criminal consequences of section 107** of the Copyright, Designs & Patents Act 1988 (CDPA) which inhibits contractual solutions for flexible licensing of orphan works through collective rights management organisations.
- Support the **extension of Artist's Resale Right to artists' beneficiaries and heirs** to ensure that artists' estates are able to bear the burden of preserving and safeguarding the UK's cultural heritage for future generations.
- Stimulate **public and private investment to support innovation in the digital domain**, including investment in new technologies to make artists' works accessible in a secure and respectful way, promote the development of new tools to protect artists' works, make available funding for digitisation projects and introduce incentives to remunerate artists, photographers and illustrators for the use of their works.
- Support creative individuals and encourage them to be innovative by ensuring that the integrity and attribution rights in their works are not undermined, particularly in the digital domain. This can be achieved by **strengthening moral rights** in the UK, abolishing the need to assert rights and ensuring that creators remain able to exercise these rights (i.e. non-waivable nor subject to exceptions) thereby increasing the confidence of rightsholders in digital platforms.
- Promote innovation and creativity in the digital domain by introducing **effective sanctions against those who strip or alter meta-data** attached to images, thereby reducing the 'creation' of orphan(ed) works in the future.
- Introduce **more effective and accessible legal remedies** for visual artists, photographers and illustrators who feel increasingly powerless to challenge the unauthorised use of their work due to the high costs of enforcement and the limited damages available.
- Ensure that public institutions support, rather than undermine, innovation and creativity, by promoting remuneration for use of artists' works by public institutions. This can be achieved by including **a contractual responsibility to remunerate creative individuals** fairly in funding agreements between public institutions and government agencies.
- Promote **greater public understanding** of the importance of remuneration for the use of artists' works in the digital domain and encourage cultural acceptance of licensing and payment so that it is recognised as being as important, necessary and accepted as computer software licensing. This can be achieved by presenting copyright to the public in more digestible ways via the introduction of official guidelines and codes of practice.
- Enable organisations like DACS to expand its offer of cost-effective and flexible licensing services by introducing measures to resolve the existing tension between the demand for efficient and attractive copyright licensing mechanisms for business customers and the **constraints imposed by competition law** through the granting of legal mandates to collecting societies.
- Protect innovation and creativity by developing **independent and light-touch regulation of collecting societies** which ensures a level playing-field between existing and new entrants to the marketplace. Whilst ensuring transparency, accountability and protection for individual rightsholders, this will also reassure business customers and offer them legal certainty and assurance of a well-regulated sector.
- **Facilitate increased recognition of rightsholder representatives** and the positive role that they can play in mediating between the rights of creators and the interests of users by facilitating new licensing initiatives which makes visual works more widely available in the digital domain. Rights management organisations like DACS can play an ongoing role in the gathering of evidence and data on the impact of royalties on visual artists which is not available elsewhere.

Your Questions: Copyright

1. Is there evidence from other national frameworks to suggest how the UK (and EU) copyright systems could better support innovation?

In general, the Copyright Design & Patents Act 1988 (CPDA), does strike the right balance between the rights of copyright owners and the ability of copyright users to access copyright protected works: through established licensing schemes; under exceptions to the exclusivity of copyright; or through individual permission of the rights owner.

However, the UK's copyright system could be improved to support innovation and growth more effectively. Extended Collected Licensing or levy systems like in the Nordic Countries and Germany could serve as valuable examples of how to strike the right balance between the introduction of a private copying exception whilst safeguarding fair remuneration for rights owners. Moral rights protection, along the lines of that in continental Europe, would give greater confidence to photographers and illustrators in digital and online technologies in relation to the creation and distribution of their works.

The UK could benefit from an Extended Collective Licensing (ECL) system similar to that which operates in Sweden. The system is considered of primary benefit where it is not possible, or extremely difficult, to negotiate individual licences. The system is widely considered as offering a balance of interests between fair remuneration and incentivisation for creators, and greater opportunities for the licensee to use protected work legitimately in their field of business. Individuals are granted the ability to opt out of ECL agreements if they have particular concerns over how their work will be used or remunerated. ECL has enabled use of work which otherwise would have been difficult to copy lawfully.

The UK has traditionally resisted the introduction of a levy system particularly for blank media and copying devices, as private copying was understood to occur purely for "time shifting" reasons; in other words, to enable users to re-play content at a more convenient time. It is increasingly difficult to sustain this argument in the face of the extensive volume of format shifting for private purposes. We believe the UK should make use of the authorisation under Article 5 subsection 2 (b) of Directive 2001/29/EC to introduce an exception for the purposes of private copying on condition of fair remuneration of rightsholders. As is clear from Recital 38 and 39 of the Directive, private copying does have an economic impact on the rights holder and any argument that a fair and balanced remuneration for this type of copying should equate to zero is unjustified and unsustainable in particular after the recent European Court of Justice (ECJ) decision in the case number C-467/08 Padawan SL v Sociedad General de Autores y Editores (SGAE) in which the ECJ decided that levy systems are an adequate measure to account for private copying exceptions and that the concept of fair remuneration is an autonomous concept of European Union law that has to be interpreted uniformly in all the member states providing for a private copying exception.

DACS believes that moral rights under UK law should be strengthened in line with moral rights protection in continental Europe. A system like the German model would increase the confidence of visual artists in their moral rights significantly without incurring substantial costs for the industry and encourage them to innovate and disseminate their works more widely, in particular in the digital and online environment where works are generally more vulnerable.

A stronger protection of the moral right of attribution would also ensure that artists are recognised as the creator of their work, thereby building their reputation and reaping appropriate reward. Strong moral rights protection would also prevent the artificial creation of "orphan" works given the speed at which images can be transferred in the digital environment and the ease with which an artistic work can become divorced from its source.

CASE STUDY

1 Extended Collective Licensing in Sweden and Denmark

Sweden operates an Extended Collective Licensing (ECL) system in common with the “Nordic model” which was first introduced in a limited form in the 1960s. ECL allows collecting societies to assume responsibility for representing and negotiating the collective rights for all copyright holders in certain areas and for paying out relevant royalties regardless of whether the beneficiary is a member of that society or not.

The system is considered of primary benefit where it is not possible, or extremely difficult, to negotiate individual licences where the alternative would be no legal exploitation at all. A significant example of how this works in practice is the “free to use in the business licence” where the broadcaster Sveriges Television is able to broadcast all works of visual arts and photography in exchange for reporting on the usage of works and paying an annual lump sum to Swedish visual collecting society BUS, which administers the royalties accordingly. Similarly, ECL agreements are common in the field of education, allowing institutions to make copies of protected work for educational purposes while providing adequate compensation to artists and photographers whose works may be featured in these reproductions.

In 2010, over 9.5 million Swedish kronor (SEK) was distributed to 1,334 visual artists by BUS, and since 2005 nearly SEK 36m has been paid out, while the number of individual artists benefitting has more than doubled over that period.

The system is widely considered as offering a balance of interests between fair remuneration and incentivisation for creators and greater opportunities for the licensee to use protected work legitimately in their field of business. Individuals are granted the ability to opt out of ECL agreements if they have particular concerns over how their work will be used or remunerated. ECL has enabled use of work which otherwise would have languished unseen: most significantly, a single ECL licence allows Swedish broadcasters to screen archive material on catch-up, on-demand services. The freedom to exploit work to the general satisfaction of licensee and rights-holder, enabled by the streamlined service of ECL, is an obvious benefit to the economy and society as a whole.

A 2008 report carried out on behalf of the Swedish government by Professor Jan Rosén found that “*nothing has come to light to suggest that there are irregularities concerning payments.*”² His report concluded that existing ECLs should be broadened and new agreements introduced where appropriate.

“In 2010, over 9.5 million Swedish kronor (SEK) was distributed to 1,334 visual artists by BUS, and since 2005 nearly SEK 36m has been paid out, while the number of individual artists benefitting has more than doubled over that period.”

² Rosén, Professor Jan, *Avtalad upphovsrätt, delbetänkande av upphovsrättutredning, Statens Offentliga Utredningar*, SOU 2010:24, p.34

CASE STUDY

2 Private Copying Levy in Germany

In Germany, VG Bild-Kunst administers the private copying levy for visual artists which, in their view, provides for a fair balance between the rights of copyright owners and the use of their works by private individuals. Levies usually adhere to a simple and coherent collection procedure with little administrative effort which differentiates them from primary licensing, which can be time-consuming.

Until 2008, German copyright law provided for a fixed list of technical equipment which attracted the levy, as well as fixed rates to be charged and collected by the collecting societies. A change in legislation in 2008 sought to make the levy system even fairer and to include newly developed technical equipment by dispensing with the fixed list and tariffs and by allowing the industry and rightsholders to negotiate on eligible types of equipment as well as chargeable rates. Although this initially increased the administrative effort substantially, once consensus between the industry and rights holder organisations was achieved, the administration of the system once again provided a solution covering all types of private uses in Germany.

Apart from the benefits of low cost and modest administration, levy systems also provide for substantial remuneration for rightsholders. Although levies are usually charged to the industry, manufacturers and sellers of levied equipment usually charge the cost to the end user as part of the overall price of the equipment, which results in a relatively low fee to a large number of individuals.

According to VG Bild-Kunst's 2009 *Annual Review*, revenue collected for photocopying equipment in 2009 alone amounted to €95,728,000 including a retrospective settlement for multimedia equipment for the years 2002-2007 amounting to €72.1 million. Looking at the figures from 2005 until 2009 the economic value and benefit to rightsholders becomes apparent, with a collection of €7.73 million in 2005, €6.67 million in 2006, €7.12 million in 2007 and €12.9 million in 2008. An additional amount of nearly €4 million is also collected annually for CD/DVD blank media levies.³

Rightsholders benefit significantly from the collection and distribution of these monies that they themselves would not be able to collect, whilst the end user of the copyright protected material does not feel the impact of the additional levy which has been paid when purchasing blank media or technical copying equipment. The end user gets peace of mind regarding any copyright responsibility and wins the right to use the equipment/blank media to copy copyright protected material. Recognition that not all users will copy works protected by copyright is reflected in negotiations on pricing between industry and rightsholders.

In addition publishers also benefit from levy revenues which they would not be able to realise through primary licensing. Their sales revenue is augmented significantly by these revenues, enabling them to invest in new projects in turn benefiting individual contributors to their projects but also the public as a whole through the production of new products.

One of the biggest arguments against levies in Germany is the lack of harmonisation of levies throughout Europe, particularly in relation to international companies which have bases in different territories who use the fact that countries like the UK do not have a levy system to avoid payment of levies in countries like Germany. According to submissions made by VG Bild-Kunst and VG Wort to the European Commission's public consultation in 2008, studies confirmed that there is no correlation between levies and the price of a device and that the same device is often cheaper in a levy country than in a non-levy country. On the contrary, a levy is often seen as a benefit enabling the use of the device for lawful private copying without risk of civil or criminal liability.

³ For further information please see *Annual Review 2009 of VG Bild-Kunst* at <http://www.Bild-Kunst.de/index.html>

CASE STUDY

3 Moral Rights in Germany

German copyright law not only provides for additional moral rights like the right of first publication or the right of access to the work, but also has stronger moral rights to the ones recognised under UK law. §§ 13 and 14 Urheberrechtsgesetz (right of attribution, right of integrity) exist irrespective of an assertion of rights unlike in the UK as for example required by Section 78 CDPA for the right of attribution.

The rights are also non-waivable and not subject to exceptions which gives authors of copyright protected works confidence in embracing new ways of distributing their works , particularly in the digital domain. This stronger protection also manifests itself in the fact that any infringement of moral rights of the author results in the same damages as an infringement of the economic rights of the author, §§ 97 – 105 Urheberrechtsgesetz.

Unlike in the UK where the right of integrity is merely understood as a right to preserve the internal integrity of a work, German copyright law also protects the external integrity of a work, which can for example be infringed by putting the work into a derogatory context.

Your Questions: Copyright

2. Are markets involving copyright more competitive in any other countries, while still providing satisfactory incentives to creators and investors?

Much has been made of the US doctrine of 'fair use' and the extent to which this doctrine provides a competitive advantage for creative industries in the United States. We take the view that the perceived advantages of the 'fair use' doctrine have been overstated.

US copyright law in general provides a similar system to that in the UK and Europe, namely of exclusive rights for owners or creators of certain categories of works, together with certain limitations on those rights. The 'fair use' provisions of US law limit exclusive rights by providing that the 'fair use' of a work "...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright."⁴

It is important to note also that s. 107 of the US Copyright Act 1976 also states that it is necessary to consider the following factors when determining whether the use made of a work in any particular case is a 'fair use':

- "(1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work."

All this clearly has strong resonances and similarities with the UK's own provisions for fair dealing within the Copyright, Designs & Patents Act (1988).⁵

In both cases, agreed interpretations of the meaning of the provisions have been developed through case law, which is to say that the application of the provisions has been contested through the courts of both countries. The US Copyright Office also notes on its website that "the distinction between fair use and infringement may be unclear and not easily defined. There is no specific number of words, lines or notes that may safely be taken without permission".⁶

So it would seem that the fair use provisions in US law are perhaps not so wide-ranging as a general enabler for innovation and growth. The 2005 class action brought against Google by the Authors Guild of America⁷ and the case brought on behalf of several US publishers by the Association of American Publishers⁸ the same year in respect of Google's Book Search programme is an interesting case in point.

Rightsholders alleged that Google had infringed. Google's defence of fair use was, ultimately, not adjudicated by the court, as the parties sought to settle the matter between themselves. While a preliminary settlement was announced in autumn 2008, the matter is yet to be fully resolved.

The settlement takes us no further forward in a judicial interpretation of 'fair use', and Google Book Search as a whole cannot be seen as an example where US copyright arrangements provide a better basis for innovation than those in the UK. Given the reality of two major legal actions brought by rightsholders in this instance, it is also difficult to argue that there is evidence of incentives existing for rightsholders.

We would also argue that the interests of all parties are not best served where introduction of new laws requires court decisions to determine the meaning and application of those laws, not least because of the weaknesses of the enforcement system in the UK and the advantages conferred to those with sufficient resources to expend on litigation (i.e. not individual creators or small businesses) – the *Jackson Review of Civil Litigation Costs* (2010)⁹ as a whole standing as our evidence in this respect.

⁴ S.107, *US Copyright Act of 1976*

⁵ For an analysis of copyright exceptions please see Pricewaterhouse Coopers LLP *An Economic Analysis of Copyright and Collective Licensing (PwC)*, March 2011

⁶ <http://www.copyright.gov/fls/fl102.html> viewed 21 February 2011

⁷ Complaint 05 CV 8136: *Author's Guild v. Google*, *United States District Court for the Southern District of New York*.

⁸ Complaint 05 CV 8881: *McGraw-Hill v. Google*, *United States District Court for the Southern District of New York*.

⁹ The Right Honourable Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report (2010)*, Ministry of Justice, London

Your Questions: Copyright

3. Is there evidence of how the UK copyright framework supports growth and innovation?

The UK has established itself as the biggest producer of original creative content in Europe supported by the UK's copyright regime. According to Jeremy Hunt MP, Secretary of State for Culture: "At 6.2% GVA, the UK has the largest creative sector in Europe – with an influence out of all proportion to our size and talent, that is in demand the world over. It is a sector that has held up strongly during the recession, and has been predicted by NESTA to grow at 4% – around twice the rate of the rest of the economy – in the years ahead."¹⁰

The impressive achievements of the UK's creative industries and their significant contribution to the UK's GDP need to be understood as a function of a dynamic ecology and set of inter-dependencies. This intricate value chain connects thousands of individuals and micro-businesses to institutions such as the Tate Modern which now attracts 4.75 million visitors a year and is London's third leading visitor attraction; it connects teams of artists and designers to publishers, computer games manufacturers and Hollywood film companies.

Copyright royalties contribute to the financial sustainability of thousands of artists, photographers, designers and illustrators. Whilst the sums may appear modest, they are disproportionately significant for visual artists who rely on a portfolio of earnings from different sources and whose median salary is between £15,723 and £10,000 compared with the UK national median wage of £21,320.¹¹ Although royalty earnings often represent small sums individually for artists, their status as 'unrestricted funds' means that they are not tied to a particular activity and can be used to support an artist's practice by paying for studio rent or purchase of equipment and materials. 56% of respondents to the recent DACS Artist's Rights Survey in 2011¹² said their royalties were spent on purchasing equipment and materials, and 18% used royalties to fund professional development. Furthermore, many artists value the recognition and validation of their creativity conferred by royalty payments as much as the financial remuneration they represent.

CASE STUDY

4 DACS royalty distributions to visual artists (2005-2010)

Evidence of how the existing UK copyright framework supports growth and innovation can be seen in the growth of DACS' payments to visual artists in recent years. Since 2005 DACS has paid visual artists a total of nearly £35 million in royalties. Royalty payments have risen from £3.5 million in 2005 to a high of £7.2 million in 2008. In 2010 DACS paid visual artists royalties of £7.1 million.

This represents a direct financial investment in visual artists who, in turn, create innovative products which accumulate financial, social and cultural value over time.

Over a comparable five year period, the Arts Council England has distributed a total of £18.46 million in the form of grants to individuals for visual arts-related activity. Arts Council funding has decreased year on year at a significant rate. In 2006/7, the Arts Council invested £4.21m; in 2007/8, this figure fell by 28% to £3.02m; and fell again by 17.5% to £2.49m in 2008/9.¹³

¹⁰ Hunt MP, Jeremy, *A Creative Recovery: How the UK's creative industries can regain their competitive edge*, Reform, September 2010, p.8

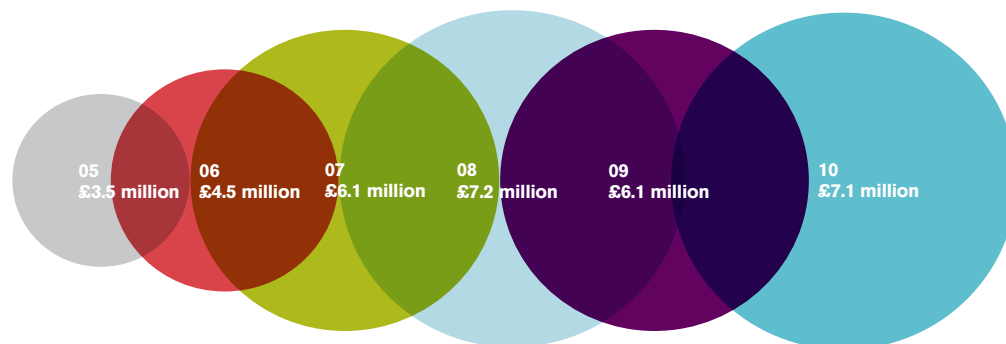
¹¹ Visual artists have precarious careers, with typical earnings well below the UK national median wage of £21,320. In 2009/10, the typical photographer earned £15,000 (median), the illustrator earned £15,723 while the typical fine artist earns only £10,000 (median). Source: Kretschmer, Martin, Lionel Bently et al, *Copyright contracts and earnings of visual creators: A survey of 5,800 British designers, fine artists, illustrators and photographers*, Bournemouth: CIPPM, 2011

¹² *DACS Artists' Rights Survey*, February 2011, visit www.dacs.org.uk for more information.

¹³ *Briefing Note: Visual Arts*, p.7

CASE STUDY

£ Royalties paid to visual artists (and their beneficiaries) by DACS (2005-2010)

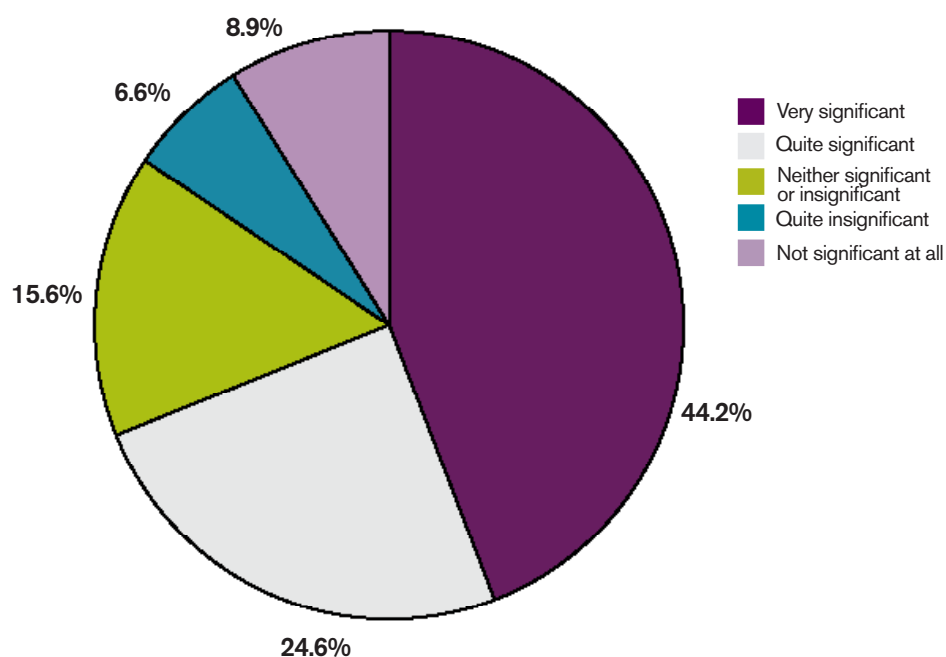


A total of £34.5 million of royalties paid to visual artists (and their beneficiaries) by DACS

DACS conducted a survey of visual artists in January 2011 which attracted 1,870 responses. The DACS Artists' Rights Survey showed that 69% of respondents felt that their royalties were a 'very significant' or 'quite significant' incentive, although for 61% of respondents, royalty income contributed less than 10% of their total income. These results show that artists view the significance of royalties in a broader way than just financial remuneration. Small royalty payments matter to visual artists, whose income is often made up of a portfolio of earnings. The result also confirms that for many artists it is the recognition that this remuneration represents which is equally valued by them. These findings are represented in the two charts below.

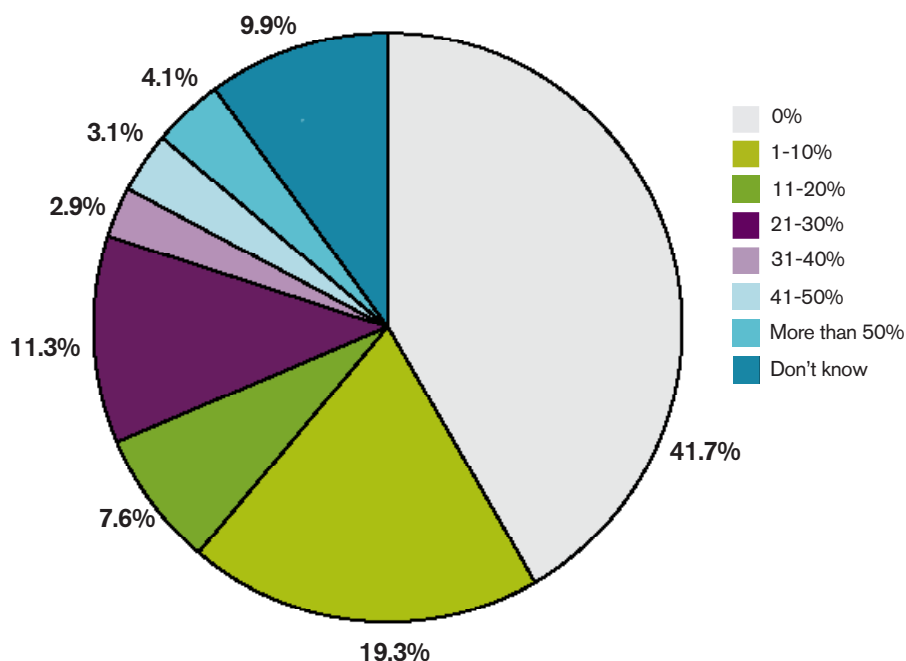
Royalties are also important for the estates of visual artists, with 73% of survey respondents considering royalty income to be 'very significant' or 'quite significant' for the estate. For 21% of estates, royalty income made up more than 50% of their entire income, illustrating the increased importance rights have for the families and beneficiaries who inherit an artist's estate, and the burdens and responsibilities that go with it.

Thinking about your royalties/earnings from copyright (i.e. Copyright Licensing, Artist's Resale Right, Payback) how significant an incentive are they for you?



CASE STUDY

What percentage of your income (or the estate's income) is derived from copyright royalties?



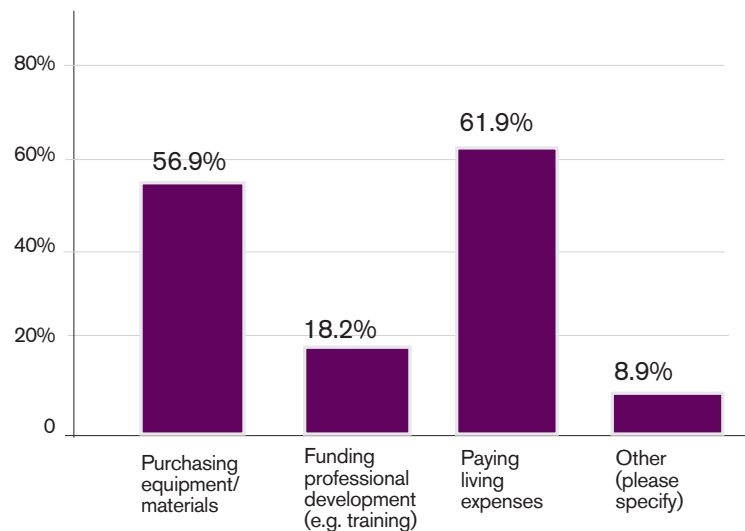
DACS Royalty Payments 2010 (Collective Licensing, Artist's Resale Right & Copyright Licensing)

Bands of revenue £	No. of Payees	% of Payees	Cumulated % from top	£	% of total payments	Cumulated % from top
£0-£500	12,767	77.71	100.00	1,901,468	26.85	100.00
£501-£1,000	2480	15.10	22.29	1,715,324	24.22	73.15
£1,001-£2,000	763	4.64	7.19	927,562	13.10	48.93
£2,000-£5000	264	1.61	2.54	791,686	11.18	35.84
£5,001-£10,000	98	0.60	0.94	656,846	9.27	24.66
£10,000+	56	0.34	0.34	1,089,513	15.38	15.38
	16,428	100		7,082,399	100	

In 2010, 78% of artists received payments from DACS of £500 or less. Although royalty earnings often represent small sums individually for artists, their status as 'unrestricted funds' means that they are not tied to a particular activity and can be used to support an artist's practice by paying for studio rent or purchase of equipment and materials. 56% of respondents to DACS' 2011 Artists' Rights Survey said their royalties were spent on purchasing equipment and materials, while 18% used royalties towards funding professional development. 61% also reported that royalties contributed to their general living costs.

CASE STUDY

If you are an artist: How have you used these royalties/earnings?



“The DACS Artists’ Rights Survey showed that 69% of respondents felt that their royalties were a ‘very significant’ or ‘quite significant’ incentive, although for 61% of respondents, royalty income contributed less than 10% of their total income.”

“56% of respondents to DACS’ 2011 Artists’ Rights Survey said their royalties were spent on purchasing equipment and materials, while 18% used royalties towards funding professional development. 61% also reported that royalties contributed to their general living costs.”

CASE STUDY

5 The Artist's Resale Right

The introduction of Artist's Resale Right in the UK in 2006 has resulted in a significant increase in revenues to visual artists, amounting to £11.4 million over the past five years.

The ability of an artist to reinvest in their career benefits the wider art market as the value of an artist's work increases. The introduction of the Artist's Resale Right in the UK seeks to recognise this by paying a modest, capped royalty to visual artists when their works are resold by an auction house, art gallery or dealer (the maximum royalty is capped at €12,500). It also gives visual artists a stake in the on-going commercial success of their work.

Peter Doig

The illustrations below indicate how three individual paintings – Concrete Cabin (1994), Grasshopper (1990) and Tunnel Passing, Country Rock (2000) – by British artist Peter Doig (b.1959) have increased in value over a four to eight year period.

From 2006, the artist was eligible for a royalty payment on secondary sales of his works amounting to £7,982, £6,239 and £5,847 respectively compared with buyer's premiums paid to the auction house amounting to £130,000, £68,500 and £45,250.

Concrete Cabin (1994)

Painting, oil on canvas

18/05/2000	Phillips, New York	USD \$140,000 (GBP £94,374)
27/02/2008	Sotheby's London	£920,000
	Buyers' premium paid to auction house: £130,000 Resale royalty paid to artist: £7,982	

Grasshopper (1990)

Painting, oil on canvas

18/05/2000	Sotheby's London	£200,000
12/10/2007	Sotheby's London	£400,000
	Buyers' premium paid to auction house: £68,500 Resale royalty paid to artist: £6,239	

Tunnel Passing, Country Rock (2000)

Painting, oil on canvas

12/05/2006	Phillips, New York	USD \$95,000 (GBP £50,920)
29/06/2010	Sotheby's London	£220,000
	Buyers' premium paid to auction house: £45,250 Resale royalty paid to artist: £5,847	

The decision by the UK Government in 2008 to delay the full implementation of the Artist's Resale Right from 2010 to 2012 has prevented the families and beneficiaries of deceased artists from enjoying this important right.

The impact of this can be calculated in the loss of earnings experienced by artists' estates. A market analysis conducted by DACS of the most significant auctions of the two biggest auction houses in the UK (Sotheby's and Christies) showed that out of an overall sales value of more than £460 million, over £5 million worth of royalties which could have arisen for artists' estates were lost in 2010 alone. Looking at the same auction houses for the years 2008, 2009, and 2010, more than £9.1 million royalties for estates were lost due to the delay in implementation of the right for deceased artists in that period (overall sales value £1.7 billion).

CASE STUDY

The William Scott Foundation

Mr Robert Scott, jointly with his brother James, runs the William Scott Foundation, named after their artist father who lived from 1913 to 1989. The Foundation undertakes all the activities that give rise to costs, such as cataloguing, preservation, exhibitions, transport and insurance, and in addition has to engage in dealing with fakes and assisting art students with their research.

The running costs of the Foundation are now between £250,000 and £500,000 per annum, and rising. The Foundation's income does not even begin to approach that sum, so the Scott brothers are obliged to sell the paintings that they own, which in the end means that the Foundation will have to close. Robert Scott is vocal on the significant difference that the Artist's Resale Right would make to the estate.

If artists' families and beneficiaries had been entitled to enjoy the Artist's Resale Right from when it was first introduced for living artists in 2006, on the basis of auction sales alone, the William Scott Foundation would have received more than £160,000 in royalties. This sum would have significantly contributed to relieving the burden of costs.

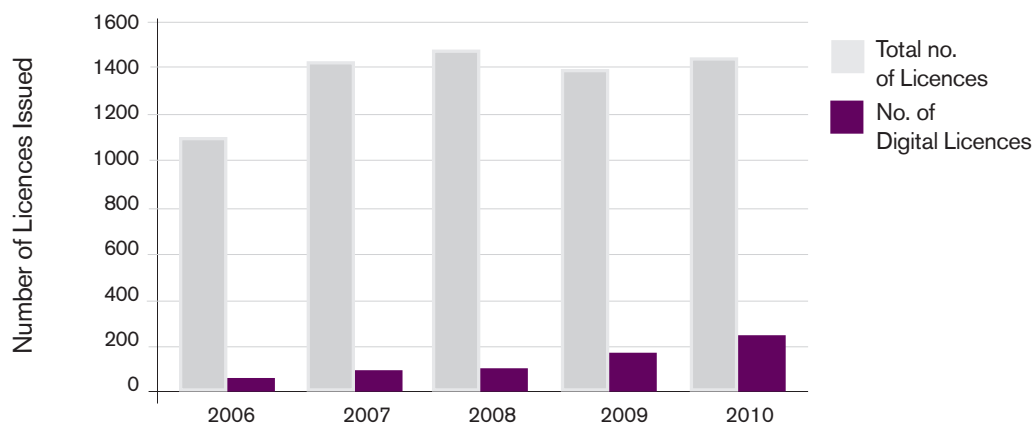
Your Questions: Copyright

3. Is there evidence of how the UK copyright framework supports growth and innovation?

Copyright licensing in the digital domain

We believe that the UK framework generally provides the correct balance between the protection of rightsholders and access to copyright protected materials. The emphasis on economic rights and the specific application of exceptions encourages copyright owners to make their works available without fear that, once disseminated, they will lose all control over the use of their work.

On the other hand the UK copyright framework provides for sufficient flexibility to accommodate new business models and the exploitation of copyright protected works through the involvement of the copyright owner. By way of example: between 2006 and 2010, with the advent and growing availability of high speed broadband connections, DACS has seen a substantial increase in digital and IT licensing alongside traditional offline/print media. During this period, the proportion of digital licences that DACS issues has nearly quadrupled and now amounts to approximately 15% of DACS individual copyright licensing transactions.



Compared with the official figures of the International Confederation of Societies of Authors and Composers (CISAC), DACS' digital transactional licensing in the UK grew significantly faster than on an international basis. According to CISAC annual reports from 2006 to 2009 where digital licensing was nominal in 2006 and 2007 and represented only 1% of all licensing in 2008, the latest figures from 2009 indicate that digital licensing internationally only accounted for 1.6%. This demonstrates the suitability of the UK's framework for this type of licensing in the visual arts field where, in 2009, 12% of all individual licensing revenues were derived from digital licensing.¹⁴

A further example of the suitability of the UK's framework for supporting innovation and growth is Saatchi Online which has recently attracted significant investment. The success of Saatchi Online is largely dependent on the large volume of amateur and professional artists who have participated (approximately 1.5 million). The fact that it was taken up by artists who felt sufficiently protected to make their works available in this way and the flexibility of the copyright system that allowed these works to be licensed for the Saatchi Online website without depriving artists of their economic and moral rights, secured the success of the project.

¹⁴ For further information on how collecting societies respond to the digital challenge, please see Pricewaterhouse Coopers LLP *An Economic Analysis of Copyright and Collective Licensing (PwC)*, March 2011

CASE STUDY

6 Saatchi Online

Saatchi Online is a good example of how the UK copyright framework supports growth and innovation by providing the right incentive for investors (by generating a high volume of engaged participants, thereby increasing chances for returns on investments) and creators (by providing dynamic new channels to market, and using social media to redefine those markets) in the digital age.

Saatchi Online is “an open social platform providing the global art community with a new way to discover, share, exhibit, promote, discuss and sell art online. [...] [The site is aimed at] artists, art lovers, and anyone who appreciates a creative environment. It is a free and open landscape to foster talent, support the process, share ideas and influences and exhibit the result of artistic self-expression.”¹⁵

The terms and conditions on the Saatchi Online site stipulate that Saatchi is granted a non-exclusive licence to publicly display and perform the content, to reproduce and reformat such content only for the purposes of making available the content on the website, whilst the uploading party retains ownership and control of all content they submit to Saatchi via the website. Saatchi Online further operates a strict take-down policy and provides for a notification procedure in their copyright policy.

Due to its success Saatchi Online now comprises a forum, a live chat, blogs, videos, a daily magazine featuring 24 hour news containing articles by internationally acclaimed critics, an area to publish funding opportunities and most recently the site even broadcasts an online television channel with video access to exhibition openings, artists' studios, performances and interviews.

According to Saatchi's Wikipedia entry, it was estimated that by November 2007 professional artists registered were selling over US\$100 million (currently nearly £63 million) of art directly from the site each year. In 2008 Saatchi Online launched a “saleroom” section hosting over 84,000 entries from artists wishing to sell their work. The site takes no commission from either buyer or seller.¹⁶ In September 2008, Saatchi Online was ranked among the leading 300 websites in the world. As of 2010 over 100,000 artists had registered with Saatchi Online, and the site receives an estimated 73 million hits per day.

¹⁵ See <http://www.saatchionline.com/about> (accessed: 14:22, 01/03/2011)

¹⁶ See http://en.wikipedia.org/wiki/Saatchi_Online (accessed: 14:23, 01/03/2011)

CASE STUDY

7 Online Art (OLA): A one-stop shop for worldwide licensing of visual images online (www.onlineart.info)

OLA was founded in 2002 by international visual arts collective management societies (including DACS) from across the world and today comprises thirteen bodies with more than 30,000 member artists. OLA enables users to license works administered by OLA members on a world-wide basis for use on the internet. It is the one-stop shop for worldwide licensing of a certain repertoire of works of art for uses on the internet, whether commercial or non-commercial.

By licensing the relevant rights from the member societies, OLA creates an interface between users and artists and artists' estates. OLA licences offer legal certainty and artists find themselves in an environment where the value they add to the culture and growth of the economy is equitably rewarded.

OLA's members are part of the distinct cultural and linguistic environment in which they operate. They have long-standing relationships with museums, educational institutions, libraries, broadcasters and art publishers, thus extending the network of users in their territories. With their services they contribute significantly to the maintenance and further development of cultural diversity and the growth of the creative industries in their countries but also on a worldwide basis.

Cross-border licences provide rights necessary for uses on web sites, including scanning/reproducing, digitising and storing reproductions of a work, the right of communication to the public and the right of making available. National laws or language barriers are overcome by the service provided by the collecting societies in their respective territories, all experts in the licensing of copyright protected works.

By licensing back the pooled rights in its repertoire to the national rightsholder organisations, OLA brings considerable efficiencies and a practical solution to the legal complexities of licensing national and foreign repertoire in one country for worldwide communication to the public.

OLA members also share a common server where all licences are registered, from the first request for a use and ending with the transfer of royalties to the rightsholders. In this manner a highly valuable database is built up which enables OLA members to track market trends, to inform rightsholders about legal uses around the globe and to monitor illegal uses.

The OLA licensing system provides for a standard set of conditions and definitions which ensures that users around the world are treated equally and receive a consistent, transparent and customer-friendly licensing service.

Your Questions: Copyright

3. Is there evidence of how the UK copyright framework supports growth and innovation?

'Rights-grabbing' and the public understanding of copyright law

There are also instances where the UK framework or rather, the perception of this framework, endangers or hinders growth and innovation. One of these scenarios is the misunderstanding of how copyright works by the general public. For example, photographers are frequently asked to assign the copyright of their work to a client who commissions work. If the photographer declines, the client may choose not to offer the commission to that photographer, even though the photographer offers to give the client a licence which allows them full control of the use of the images, but without the photographer losing all his rights and future earning potential of his work.

Commissioning a photograph is often confused with purchasing the copyright of an image. Although people buy licences to use computer software on a daily basis without expecting to own the copyright on the software or to be able to sell the software on to others, there is less public understanding of the same concepts when it comes to artistic works.

This could be addressed through education and information and by raising awareness of the value of copyright to creative individuals and businesses, and hence to society as a whole. We recognise that there has been an absence of evidence and systematic gathering of data. Rights management organisations like DACS can play an ongoing role in the gathering of evidence and data on the impact of royalties on visual artists which is not available elsewhere.

In a recent research study by Professors Martin Kretschmer and Lionel Bently (commissioned by DACS) which looked at changing contractual practice amongst visual artists, they concluded that photographers had fared worse than any other group within the visual arts sector with 49% of photographers saying their bargaining position had worsened over the past decade, whilst a significant number of photographers (40%) report an increase in assignments of their rights.¹⁷

In DACS' 2011 Artists' Rights Survey of artists, photographers and illustrators, 29% of rightsholders answered that copyright issues have already been a barrier to their creative output, of which 63% specified that this was due to rights grabbing practices. Most commonly described were instances where visual artists lost a contract as they were not prepared to assign their rights.

A workshop and research report undertaken in 2009 and published in 2010 by the Strategic Advisory Board for Intellectual Property (SABIP)¹⁸, the UK Government's former IP advisory body, into the complexity of the current copyright system recommended that two issues should be the focus of further activities. First, a call for action to increase the general level of understanding of the existing principles and language of copyright law, and second, to find ways to address the perceptions of complexity in licensing systems (which it did not consider were always justified) and how to improve the efficiency of copyright licensing and enforcement.

The research report found that the current legal framework was experienced by some to be inadequate, or even 'unrealistic'. The creative industries were said to be facing a genuine threat from younger generations who are growing up without a solid understanding of the costs involved in creating content. It was suggested that compliance may be improved if copyright could be presented to the public in a more digestible way. This need not involve legal reform but additional effort directed at improving the public's understanding of copyright and copyright licensing and enforcement, via the introduction of official guidelines and codes of practice.

¹⁷ Kretschmer, Martin, Lionel Bently et al, *Copyright contracts and earnings of visual creators: A survey of 5,800 British designers, fine artists, illustrators and photographers*, Bournemouth: CIPPM, 2011, p.75

¹⁸ Frabboni, Maria Mercedes, *Exploring the Case for the Simplification of the Copyright Framework - Report of Proceedings*, (SABIP), IPO, February 2010, p. 5 <http://www.ipa.gov.uk/ipresearch-exploring-201002.pdf> (accessed: 10:49am, 04/03/2011)

CASE STUDY

8 Rights-grabbing and public understanding of copyright

A recent study carried out by Professors Martin Kretschmer and Lionel Bently into copyright contracts and earnings of visual creators examined whether the terms under which artists work are getting worse. In particular, they tested 'the common perception that exploiters insist on "grabbing rights" (i.e. broadly conceived assignments of rights), that visual artists are not able to negotiate, that they are paid less and less, and that they are compelled to waive their moral rights'.¹⁹

The study established an uneven picture of contractual practice across different groups within the visual arts sector and concluded that photographers had fared worse than any other group with 49% of photographers saying their bargaining position had worsened over the past decade, whilst a significant number of photographers (40%) reported an increase in assignments of their rights.

One member of professional photographers' advisory network Editorial Photography UK (EPUK) was asked by a company to produce portraits for use on their company website and promotional material. The company seemed happy with the photographer's terms until the issue of copyright was broached. The company wanted the photographer to assign his copyright to them. The photographer refused and explained that he could offer the company an extended licence to suit their needs without assigning his copyright.

The company challenged the photographer's understanding of copyright law but the photographer stood his ground and refused to assign his copyright, which would in no way have restricted the company's original request to use the images unless they wanted to sell or exploit them commercially. The company then withdrew the offer of a commission, causing the photographer to lose a valuable work opportunity and potential earnings.

Similar examples were given by photographers and illustrators who responded to DACS' recent survey of visual artists: 29% of rightsholders answered that copyright issues have already been a barrier to their creative output, of which 63% specified that this was due to rights grabbing practices. Most commonly described were instances where visual artists lost a contract as they were not prepared to assign their rights.

"I have had to turn down jobs because a book publisher was insisting on having the copyright of the work and would not budge. They were also not going to pay any more money to buy the copyright either. Other clients try to attain the copyright and I have had to get them to change the contract which they did agree to do. This of course takes up time. If I had assigned my copyright, I would lose the right to use it myself, even to promote myself as an illustrator."

Tina Macnaughton, illustrator

"Potential clients often want to own the copyright to images they are asking me to create. I only license usage to my images, as I believe the copyright should remain with the artist. In many cases I have had to turn down work I would like to do because of this."

Robert Fairer, photographer.

¹⁹ Kretschmer, Martin, Lionel Bently et al, *Copyright contracts and earnings of visual creators: A survey of 5,800 British designers, fine artists, illustrators and photographers*, Bournemouth: CIPPM, 2011, p.4

Your Questions: Copyright

CASE STUDY

4. Is there any evidence of areas where the UK copyright framework does not deliver optimal outcomes?

5. Is there evidence to suggest that the current framework impacts the production and delivery of goods and services which consumers want?

There are many examples where the UK copyright framework delivers very positive outcomes, as can be seen with the example of picture libraries and the introduction of the Artist's Resale Right. However, in the past DACS has also encountered barriers to the development of new licensing solutions in particular for orphan works through the criminal provisions in Section 107 of Copyright, Design & Patents Act 1988 (as amended), as well as through the application of competition law to companies with a dominant or quasi-dominant position.

9 Picture Libraries in the digital age

The internet has brought the world closer together and has made concepts like space and time relative in particular when it comes to consumer expectations. Internet users can browse online shops at any time, can place orders and often, where the product is digital, purchase or download the product for free irrespective of the location of the original item and unhindered by opening hours.

This expectation of instantaneity has further expanded and influenced social behaviour but also work flows. A very good example of this phenomenon is image banks and picture libraries whose business model has completely changed due to the move online and into digital and whose new business models are supported by the current UK copyright framework.

Traditionally picture libraries created and stored physical transparencies of artworks and photographs for reproduction purposes. Not only did this require a substantial investment in the creation of the transparencies, storage and transport to the potential user but was also a slow and inefficient process. The transparency would have to be sent back and forth between picture library and user, between user and printer, and so on, which meant that potential users had to either wait until the image bank had received the transparency back and/or had more than one transparency, or had to choose another image provider.

According to a 2008 report by the Coordination by European Picture Agencies Press Stock Heritage (CEPIC), the Chief Executive of the time of the British Association of Picture Libraries and Agencies (BAPLA), had questioned in 1993 how any image bank could even consider going online.²⁰

Less than ten years later, in 2003, more than 90% of sales by Getty Images were being made online. Today, the majority of image banks sell digital images online rather than provide physical transparencies.

This development was fostered by the UK copyright framework, which provides that every original photograph – and under the UK definition this also includes photographs of artistic works – is copyright protected; since the implementation in the UK of the communication right following Directive 2001/29/EC in 2003, this protection is extended to the online environment, and therefore provides both sufficient protection and incentive to make these works available online and to distribute them electronically. Apart from reducing costs significantly as regards production, storage, preservation, conservation, and delivery of image media, the digital distribution model also allows for catalogue browsing online at any time, delivery of low resolution imagery for design and layout purposes, as well as for multiple deliveries of the same image, simultaneously.

²⁰ Glückler, Professor Johannes and Franck Perrier, *Knowing Your Industry*; CEPIC Report, 06 June 2008: http://www.cepic.org/sites/cepic/assets/The_Picture_Industry_In_Facts_And_Figures.pdf (accessed: 17:16; 01/03/2011)

CASE STUDY

10 Barriers to the development of new licensing solutions (1) DACS' 'Superlicence'

DACS is a licensing body for the purposes of Section 116 of the Copyright, Designs & Patents Act 1988 (as amended). In this context, DACS is subject to the jurisdiction of the Copyright Tribunal, and, as an exclusive licensor of rights on behalf of multiple rightsholders, is also located within a wider context of competition law principles which require that DACS does not introduce distortions or practices in the market place which may be considered anti-competitive. At the same time, DACS seeks to develop licensing solutions which deliver rights to users at a fair price, and fair value back to rightsholders. Occasionally, the tensions between innovation in rights management and the requirements of competition law can result in limitations on how far we can innovate.

In 2005 DACS introduced a form of primary copyright licence that was administratively simple for the licensing client and encouraged the high volume use of works by DACS members. These 'Superlicences' were based on the idea that the licensee made an advance payment of a fixed agreed fee based on the licensee's anticipated use of DACS' members' works. The fee per work was set at a low level to reflect the large up front payment and distribution was to be based on retrospective reporting. The advantage for the client was that they received a low fee per use and importantly there was no requirement to obtain permission in advance for use so that the client's administration costs would be low.

These licences were withdrawn in 2006 when our lawyers advised us that, because these licences contained pricing per usage that could only be offered to 'high volume' clients, they were anti-competitive in structure, and that we risked a legal challenge from a client who would not qualify for the licence. Our legal advice was that because of our dominant position in the market we had to offer the same price per usage to all our clients within identifiable market segments. Although DACS has subsequently introduced multiple-work discount structures to encourage high-volume usage within individual projects, these have to be offered to all clients within a market segment and are based on prior approval which adds complexity and time to the licensing process compared with the intended operation of the original 'superlicences'.

CASE STUDY

11 Barriers to the development of new licensing solutions (2) DACs' Museum Licence

There is also evidence that current arrangements within UK copyright legislation have unintended consequences which hamper development of effective licensing solutions or other innovations. We would cite s.107 of the CDPA 1988 as one such example, where the criminal offences in respect of copyright infringement were largely intended to deal with systematic infringement of copyright content and selling counterfeit CDs, DVDs, videotapes and the like. But it would be wrong to conclude that such provisions are limited only to those involved in the creation and distribution of illegal copies of such material.

DACS was asked by the Museums Copyright Group about its attitude to licensing of artistic works, where publicly-funded collections had received grants to digitise their collections with a view to making them available digitally to the public at a later point, in the interests of enhancing public access to works in these collections.

DACS was in favour of developing a licensing scheme for museums for a range of non-commercial purposes and set about the task of constructing a licensing framework which would include works by unknown authors – the so-called 'orphan works'. Museums had told DACS that in some cases, there were many thousands of works whose authors could not be identified without significant investment in research, with no guarantees that the identities of rightsholders of visual works could be confirmed in all cases.

At the same time, there was increasing interest in the provisions of s.107, including at UK Government level, as it sought to explore means of solving the conundrum of orphan works. Would collecting societies and their customers also be caught by these provisions?

The question of potential liability under s.107 did not escape the attention of those museums we were consulting about a potential licence. Would customers be buying a licence which could see them prosecuted under s.107?

We decided that further legal advice was necessary. Advice confirmed what we feared: on the one hand, the collecting society was authorising a third party to make copies without the necessary consents (and thereby infringing copyright under s.107 of the CDPA 1988). On the other, the licensing customers themselves would also be committing infringing acts, by copying, making available, and generally doing all the things which would form part of a licensing arrangement.

If infringement was established, the provisions of s.107 could also come into play, both for the collecting society and the customer.

It was perhaps not surprising that DACS felt it could not pursue development of the proposed licence further on account of the unacceptable risks to itself and to its customers arising from potential commission of criminal offences, penalties for which included fines and imprisonment.

Licensing bodies are sometimes criticised for failing to develop licensing solutions. In this case, a licensing body was prevented from introducing a broad-ranging licensing solution because of the unintended consequences of criminal provisions within UK copyright law.

Your Questions: Copyright

CASE STUDY

6. What evidence is there that the necessity/complexity/cost of obtaining permissions from existing rightsholders constrains economic growth?

Transactional licensing through collecting societies is a cost effective and efficient solution for customers whilst ensuring that the rights of copyright owners are respected and the use of copyright protected works are appropriately remunerated. In the majority of cases copyright licensing through collecting societies is easy and cost-effective and complaints of complexity by users who retrospectively try to rectify mistakes should not distort that fact.

12 Examples of DACS' Global Licensing

As part of a network of sister societies representing more than 60,000 artists worldwide, DACS has 26 years' experience in transactional licensing as a one-stop shop. DACS has many examples of projects involving artists from all over the world and available internationally which were enabled through the involvement of collecting societies, ensuring a fast and cost effective copyright clearance for their members' rights.

DACS' repertoire is growing steadily as a result of an increasingly global marketplace where artists feel that collective representation is helpful in administering their rights effectively and providing them with greater protection in the face of larger copyright users with greater bargaining power. Since 2006 DACS' individual copyright licensing activities have increased by more than 30% from 1,095 transactional licences issued in 2006 to 1,441 transactional licences in 2010.

The examples below give some indication of the scale, complexity and international nature of licences which DACS routinely issues to facilitate publishing and broadcasting projects.

Modern Masters – IWC Media

The production was a four-part programme charting the life and work of modern artists Picasso, Matisse, Dalí and Warhol, and looking at their influence on contemporary art, design and architecture, reproducing nearly 150 licensable works by 10 different DACS artists. The programme was licensed for unlimited broadcast in the UK for five years with provision for broadcaster's catch-up video on demand rights, which allows the dissemination of the programme online. The programme was also accompanied by a dedicated website reproducing another 39 works by named artists, all of which enabled a virtual gallery, art walks, further background information and films about the artists accompanying the programme and much more. At the same time, we involved the estates of the artists very closely with this production, protecting their rights and securing adequate remuneration for the use of their copyright protected works.

Dorling Kindersley Ltd – ART

This 600-page volume was published in hardback and paperback and contains more than 8,000 reproductions of artistic works, many of which are still copyright protected. The publication was licensed with a print run of more than 100,000 copies for worldwide distribution, with provisions agreed for translation into many languages. DACS licensed the reproduction of 511 works by 174 DACS members.

Quintessence – 1001 Paintings You Have To See Before You Die

The book was published as a flexi-cover publication with a print run of 100,000 copies to be distributed worldwide and translated into 21 different languages. DACS alone was able to provide copyright clearance for 206 of the 1001 works reproduced within the book, of which many were already out of copyright. The publisher confirmed on many occasions that they would not have been able to realise this project without the help of a collecting society managing permissions for multiple artists, when set against the scale of the task involved had they been required to clear such a large number of works with artists and estates directly, not to mention the potential language barrier they would have experienced when licensing works by international authors.

Your Questions: Copyright

7. What non-legislative changes could improve practices around copyright to improve overall outcomes?

There are three key areas in which the Government could make non-legislative changes to improve outcomes: education, technology and the practice of public institutions.

Promotion of greater public understanding of the importance of remuneration for the use of artists' works in the digital domain and of cultural acceptance of licensing as a feature of everyday life (in the same vein as software licensing and purchase which has greater public acceptance.) For example, we all take it for granted that we have purchased software as an integral part of the price of computer hardware and we routinely 'sign' licensing agreements with software manufacturers when we update and download software on to our computers. This can be achieved through public education campaigns, educational materials, and through the school curriculum. Visual artists recognise the importance of public education as a way of improving practices around copyright. 83% of respondents to DACS' Artists' Rights survey recommended 'better public education about copyright' as an enhancement to the existing copyright framework.

One of the major issues confronting visual artists (and, in particular, photographers in the digital domain) is the absence of a universal protocol and method for tagging visual images or indeed of finding and monitoring the use of images on the Internet. While a number of technical tools have been developed by private companies e.g. Picscout, TinEye among others, these tools are neither universally adopted nor comprehensively applied. Incentives for private/public partnership to develop an optimal solution that could be established as a universal protocol for locating and tagging images in the digital domain would contribute significantly to the release of images into the public domain and to ensuring the continued supply of original content by professional artists, illustrators and photographers. Coupled with effective sanctions against those who strip or alter Metadata attached to images, this would reduce the 'creation' of orphan(ed) works in the future and promote innovation and creativity.

If a balance is to be achieved between public access of creative content and fair remuneration for visual artists, Government should ensure that public institutions support, rather than undermine, innovation and creativity, by promoting remuneration for use of artists' works by public institutions. This can be achieved in two ways: (1) by including a contractual responsibility to remunerate creative individuals fairly in funding agreements between public institutions and government agencies; and (2) by ensuring that rights are not 'grabbed' by institutions when they purchase works for public collections, thereby restricting the future earnings of visual artists.

Your Questions: Copyright

8. Is there evidence of difficulties in obtaining financing relating to copyright?

It is becoming extremely difficult for creative individuals and small and medium-sized enterprises (SMEs) in the cultural and creative sector to unlock funding and investment, as reflected in the fact that direct Arts Council England visual arts grants to individuals fell by 40% between 2008 and 2009.²¹ Venture capital, guarantees and other risk sharing instruments delivered through market players can play an important role in facilitating access to funding and investment. But this is unlikely to help very small businesses, not-for-profit or membership organisations who could potentially develop new business models, the profits of which would be re-invested into further cultural production, thereby ensuring the continuing creation of material into the future. Government should consider targeting innovation funding to SMEs in creative and cultural industries that develop innovative business models which ensure continuing re-investment into the creation of cultural material.

Government should also consider establishing a digitisation fund (possibly in collaboration with other European Union member states) which could be used to support delivery of public access to creative content in the digital domain whilst ensuring that visual artists and other individual creators (for whom royalties are materially significant) are properly remunerated. The importance of public funding for digitisation of Europe's cultural heritage is underlined in *The New Renaissance*, the report of the European Commission's Comité des Sages (Reflection Group on Bringing Europe's Cultural Heritage Online) which states: "The public sector has the primary responsibility to fund digitisation, and Member States will need to considerably step up their investments in digitisation. The current financial crisis cannot be ignored, but equally cannot be a reason for not acting."²²

²¹ *Briefing Note: Visual Arts*, p.7

²² De Decker, Jacques, Maurice Lévy and Elisabeth Niggemann, *The New Renaissance: Report of the 'Comité des Sages' (Reflection Group on Bringing Europe's Cultural Heritage Online)*, European Commission, 11 January 2011, p.34: http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/final_report_cds.pdf

Your Questions: Copyright

9. To what extent are the international rules around copyright more or less important than those in the UK? How should the UK approach this matter?

Copyright is and should remain a national matter. But European and international instruments concerning copyright provide a valuable framework which ensure the inter-operability of the different national systems. Indeed, the huge advantages to rightsholders and users of copyright works conferred by the system of agreements by which repertoires are cross-licensed internationally would not be possible without the common understanding adopted throughout much of the world as a result of developments such as the Berne Convention for the Protection of Literary and Artistic Works, which dates back to 1886, and subsequent refinements of the principles on which this important convention is founded.

In more recent times, the current list of voluntary exceptions and limitations in Directive 2001/29/EC was the result of lengthy negotiations between all European Union member states to incorporate country-specific exceptions that mirrored certain standards and uses prevalent under national copyright law. Whole industry sectors and businesses now depend on the existence of these exceptions, participating in shaping the creative landscape of the different member states.

Similarly, the different interpretation of originality and infringement in different countries can provide incentives for different ways of creating copyright protected works and can influence the emergence of different ways of expressing creative thought. These differences, although sometimes difficult to understand, help to support and preserve the cultural diversity that makes Europe unique and that provide a valuable counterbalance to, for example, American creative industries.

At the same time international instruments play an important role in safeguarding a minimum level of protection and in laying down certain rules for the inter-operability of copyright systems on an international basis.

The minimum protection afforded under the Berne Convention is essential in ensuring a level playing field across the convention countries and in aligning protection in a way that enables transactions between Convention countries. For example, the fundamental principle of affording copyright protection without any formality criteria enshrined in Article 5, subsection 2 of the Berne Convention is essential for the protection of copyright works. Contrary to the argument by the Comité de Sages, which recommends an amendment to this principle of the Berne Convention in its report *The New Renaissance*²³ we believe that this principle should be left untouched, and should have overriding effect over any national solution that requires any form of registration and/or formality. The argument that a registration system would prevent the creation of orphan works does not take into account that even in the US, where the registration requirement was upheld until 1989, orphan works constitute a serious problem. In this respect we believe that international instruments should have overriding effect on national legislation in preference to any principles agreed locally by Convention countries contrary to these conventions, such as the quasi-formal requirement of assertion of the right of attribution in section 78 of the UK's CDPA 1988.

Taking the example of registration as a prerequisite for copyright protection the US Copyright Office estimated a total revenue from fees for registration and supporting services in 2009 of \$27,764,716.²⁴ These revenues directly translate into costs for creative individuals and businesses – even though in the USA today registration is no longer a prerequisite for copyright protection (although it is beneficial to register the rights for litigation purposes). It can be anticipated that a majority of individual creators and SMEs could not afford these expenses in addition to any administrative costs arising from a registration system, not least when considering that in many cases remuneration for licensed uses of works is at a low level.

A further example of the importance of international instruments is the three step test, enshrined in the Berne Convention in Article 9 subsection 2 and confirmed in Article 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) which was adopted by Directive 2001/29/EC ('the Copyright Directive'). The Three Step Test has never been enacted into

²³ *The New Renaissance*, pp.5, 19, 20

²⁴ Peters, Marybeth, *Analysis and Proposed Copyright Fee Adjustments to Go into Effect on or about 01 August, 2009*, United States Copyright Office, p.16: <http://www.copyright.gov/reports/fees2009.pdf> (accessed: 14:30; 01/03/2011)

Your Questions: Copyright

English law. It is an important safeguard for the interests of rightsholders; it stipulates that the exclusivity of the rights granted in law can only be exempt in certain special cases. Although the test has not been formally implemented into UK legislation, the fact remains that the Copyright Directive obliged member states to implement the test into national laws. Therefore the UK courts, when assessing whether or not an exception to copyright applies, must take the test into account and apply its different steps to the case at hand.

The UK should consider the benefits of the existing copyright system and be wary of the unintended consequences of over-riding the Berne Convention, which could jeopardise the future sustainability of visual artists and small creative businesses.

Your Questions: Enforcement of Rights

1. Is there any evidence of the relationship between the overall IP enforcement framework and economic growth or innovation?

There is a direct relationship between the IP enforcement framework and economic growth and innovation. Rights are always only as strong as their enforcement allows them to be; a right without the means of effective enforcement is meaningless. Attempts to strengthen the rights of rightsholders through digital rights management technology have failed as they are circumvented soon after any new DRM system is developed.

The sanctions under the CDPA 1988 for circumvention of technological measures are perceived as weak by rightsholders, as are the sanctions for copyright infringement itself. Apart from a civil liability which is mostly limited to the payment of a regular licensing fee, and liability for breach of statutory duty for moral rights infringement, the criminal liability in section 107 CDPA 1988 does not act as a deterrent for anyone determined to infringe copyright. Furthermore, there is little basis for the argument that the current legal framework criminalises private users format-shifting music from CDs to personal computers to MP3 players, since section 107 CDPA 1988 clearly requires an element of monetising of this activity in order to attract criminal liability.

The very high legal costs and lengthy procedures for enforcing rights in the UK, coupled with the limited damages available under the CDPA 1988, constitute a barrier for creative individuals and businesses to make their works freely available or to invest in the production of new works.

It is essential to provide for better access to justice for SMEs and individuals. As a recent IPI study demonstrates, the value of an IP right to a business depends on its ability to enforce it. More broadly, the incentive to innovate will be undermined if IP rights cannot be defended. The study even goes so far as to suggest that a system with high costs and no valid protection would arguably lead to less innovation and to slower diffusion of new ideas, which in turn would imply that by reducing the costs associated with enforcement and therefore validating the protection afforded by law, innovation would be supported and new ideas would be diffused more quickly.²⁵

Very few visual artists are able to make a living purely from their activities as artists. Having to deal with additional losses through infringement of works and a lack of affordable remedies to rectify matters constitutes a further deterrent to becoming an artist and participating in the creative industries.

²⁵ Greenhalgh, Christine, Jeremy Phillips, Robert Pitkethly, Mark Rogers, and Joshua Tomalin, *Intellectual Property Enforcement in Smaller UK Firms: a report for the Strategic Advisory Board for Intellectual Property Policy* (SABIP), IPO, October 2010, p.3: <http://www.ipo.gov.uk/ipresearch-ipenforcement-201010.pdf> (accessed: 13:41; 01/03/2011)

CASE STUDY

13 Loss of earnings through infringement

According to a literature review conducted by SABIP and published in 2009, it is almost impossible to get reliable data about the extent of infringements of IP rights. This seems to be even more so in the case of copyright infringements.²⁶

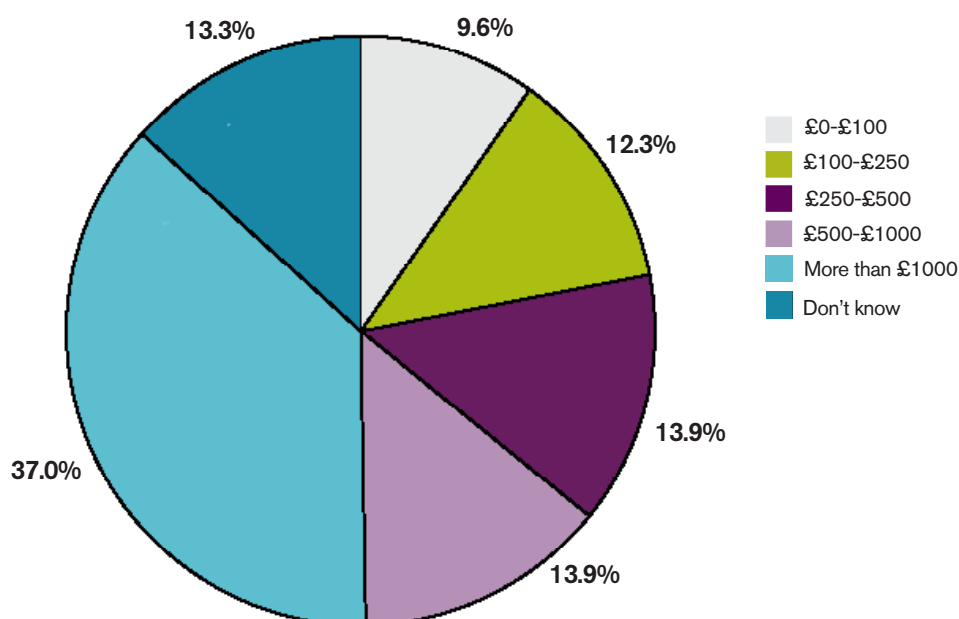
In 2003, the World Intellectual Property Organisation (WIPO) published its *Guide on Surveying the Economic Contribution of the Copyright Based Industries*, which differentiated between four different types of copyright (related) industries which, according to WIPO, were not clearly identified in statistical and economic terms. The guide aims to redress this situation by outlining a methodology for identifying the contribution of copyright-based industries to the national economy and differentiates between core copyright industries, interdependent copyright industries, the partial copyright industries and the non-dedicated support industries. However even this methodology fails to measure the impact (or benefit) of copyright law as such; nor does the guide offer a method for studying the level of pirated goods that are being produced and distributed or the impact of such piracy.

A further set of studies carried out by the Organisation for Economic Co-operation and Development (OECD) under its 'digital content' research concentrated on different industry sectors rather than content providers/creators as such. In SABIP's opinion both approaches were rather limited in their relevance regarding enforcement. SABIP therefore commissioned an IPI Study published in October 2010 under the title *Intellectual Property Enforcement in Smaller UK Firms*, which provides some data and evidence about the relationship between the overall IP enforcement framework and economic growth and innovation.²⁷

In the field of copyright the study concludes that infringements have significant disruptive effects on some sectors within the creative industries whilst the cost of enforcing rights using legal routes is prohibitively high.

This is confirmed by DACS' own survey²⁸ of creative individuals who experience infringements of their rights as discouraging and the lack of enforcement possibilities as rendering their rights obsolete. Repeat infringements also lead to a damaging loss of income for which compensation can hardly ever be realised.

Infringements: Can you estimate the financial value of the remuneration had you been paid?



²⁶ Bently, Lionel, Kimberlee Weatherall and Elizabeth Webster, *IP Enforcement in the UK and Beyond: a literature review*, SABIP Report EC001, 18 May 2009, p.6: <http://www.ipo.gov.uk/ipresearch-ipenforcement-200905.pdf> (accessed: 14:32; 01/03/2011)

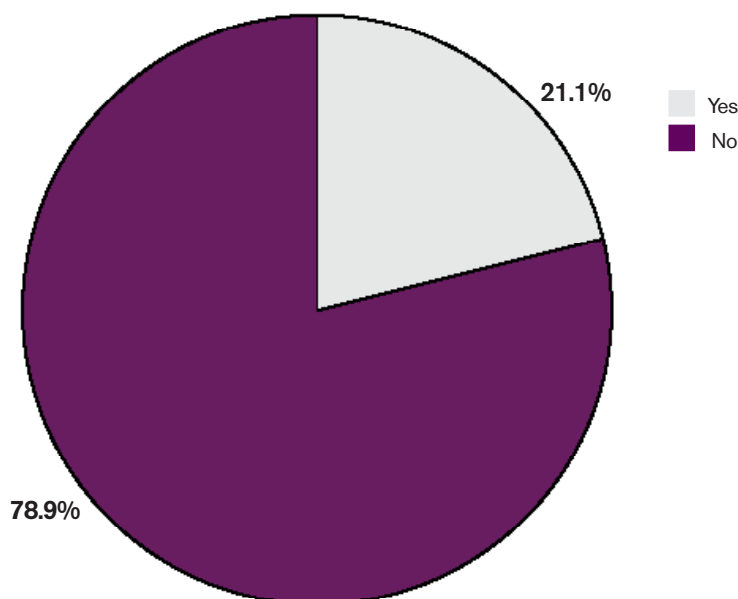
²⁷ Greenhalgh, Christine, Jeremy Phillips, Robert Pitkethly, Mark Rogers, and Joshua Tomalin, *Intellectual Property Enforcement in Smaller UK Firms: a report for the Strategic Advisory Board for Intellectual Property Policy* (SABIP), IPO, October 2010, p.3: <http://www.ipo.gov.uk/ipresearch-ipenforcement-201010.pdf> (accessed: 13:41; 01/03/2011)

²⁸ DACS Artists' Rights Survey, February 2011, visit www.dacs.org.uk for more information.

CASE STUDY

37% of visual artists whose work had been infringed indicated they had lost more than £1000 in potential income because of the infringement. Only 21% of respondents took legal action against the infringer.

If it was an infringement: did you take any legal action?



42% of people who did not take legal action said it was the cost of taking the action which prevented them from doing so. Other key reasons were the time it involved, and the lack of knowledge of how to go about tackling an infringement.

A number of respondents said that the infringement had occurred overseas and they lacked the knowledge and resources to pursue such an infringement.

Comments

"The cost of pursuing action in court outweighed the benefit of the infringement since it was a larger amount than would be handled in small claims court, but not significant enough to pay the legal costs involved in pursuing." **Brian Cairns, illustrator**

"It's not worth the hassle in most cases. Low remuneration and no ability to fine or charge more for the infringement, just what they should have paid in the first place." **Kevin Foy, photographer**

"Too costly: Infringers are in a stronger position to fight legal cases and, even if they lose, they only have to pay the fee that they should have paid in the first place. In other words, there is no incentive to be honest." **Chris Mattison, photographer**

Nearly a third of respondents asked had already experienced copyright as a barrier in their career, of which 63% stated that this is due to rights grabbing practices by copyright users and another 21% stated that this is due to the risk of their works being infringed particularly in the online environment.

"I am reluctant to post images on the internet or to allow others free use of my images in case they are passed on." **Chris Mattison, photographer**

"It prevents me feeling able to post my work online or other, in order to promote myself. Many people in mainstream areas (i.e. not in the art/creative industries) just don't seem to respect copyright." **Karen Middleton, illustrator**

"It started with people demanding copyright in contracts. Photographers were being forced to set unhelpful precedents by giving away their copyright. When the internet arrived it became a case of 'catch me and I might pay'. There are no punitive damages for copyright infringements, so people take the risk rather than licence, and just wait to be caught. The quantity of my works being infringed has increased exponentially but it would not make business sense to pursue them." **Peter Dazeley, photographer**

CASE STUDY

The difficulty in the current enforcement framework is that IP litigation insurance is already too expensive for many smaller businesses and even more so for creative individuals. The costs of self-funded litigation make it too prohibitive to pursue infringements through the courts. According to the IPI Study, only 25% of SMEs have IP litigation insurance, and 75% of SMEs without insurance stated that the costs of taking out insurance were too high.²⁹ It is reasonable to suppose that in the case of creative individuals, the percentage of those without such insurance is even higher.

That the costs of litigation in IP disputes are disproportionately high was also recently accepted in the *Jackson Review of Civil Litigation Costs*, where Lord Jackson found that from the sample taken, the average costs of IP litigation per case amounts to nearly £700,000.³⁰ Although these cases deal predominantly with patent litigation³¹, the data collected for the report shows the total cost incurred up to various stages in the litigation process (service of claim, defence, disclosure, witness statements, trial, etc.) and can therefore serve as an indication of the costs involved in court procedures in any IP claim.

Commenting on very low value IP disputes, Lord Jackson acknowledged that a photographer whose photographs have been downloaded from the internet and reproduced without permission might have a claim for a few hundred pounds, and it may therefore be difficult for such claims to be pursued as there is no small claims route currently available and none with any relevant IP experience³². The effects noted in this finding are exacerbated when one considers that a photographer may miss out on many separate opportunities to earn a few hundred pounds each time someone new uses their work. It is conceivable that the rights in the same photograph may potentially be infringed numerous times, by different users; the photographer is therefore faced with the burden of having to initiate proceedings against multiple infringers.

A simple example may illustrate the point. The iconic photograph of Che Guevara by Alexander Korda is known all over the world. It regularly appears on posters, t-shirts, websites, in publications, on record covers – anywhere an artistic work can be reproduced. Very few of these reproductions are licensed (the rights are controlled on behalf of the Estate of Alexander Korda by French visual society ADAGP and its partners – which include DACS – throughout the world). Such massive global infringement presents an impossible enforcement task.

29 Greenhalgh, Christine, Jeremy Phillips, Robert Pitkethly, Mark Rogers, and Joshua Tomalin, *Intellectual Property Enforcement in Smaller UK Firms: a report for the Strategic Advisory Board for Intellectual Property Policy (SABIP)*, IPO, October 2010, p.3: <http://www.ipo.gov.uk/ipresearch-ipenforcement-201010.pdf> (accessed: 13:41; 01/03/2011 p.9

30 Jackson, Lord Justice, *Review of Civil Litigation Costs: Final Report*, TSO, 14 January 2010, p. 24 n.8.1

31 Ibid, appendix 3

32 Ibid, p.255, pt.4.3

Your Questions: Enforcement of Rights

2. In terms of promoting economic growth, what should be the objective of the overall framework for enforcing IP rights?

Universal compliance should be the objective of the overall framework for enforcing IP rights. A healthy and strong IP framework encouraging and incentivising creators to create, coupled with meaningful deterrents and remedies for the infringement of rights would result in more creative output and wider dissemination of and access to creative content.

This principle applies regardless of the type of licensing framework which may be established by law (for example, a mix of voluntary contractual licensing and statutory requirements, such as levies). The objective of the enforcement framework should therefore ensure that rightsholders have feasible means of seeking redress against unauthorised uses of their work, and a feasible means of enforcing contractual agreements made with licensees.

At the same time, rightsholders should also have a realistic means of ensuring that in circumstances where their permission is not required for reproduction and distribution of their work (for example under a levy arrangement), they are in a position to enforce their rights to remuneration against those whom the law holds liable for that remuneration without excessive cost or undue burden.

We have argued elsewhere in support of the principle of levy arrangements as a means of providing rewards for creative people when their works are used in ways which would be difficult to license transactionally even though rightsholders may have exclusive rights in relation to their works.

A further advantage arises in relation to enforcement issues because an arrangement such as a levy for private non-commercial use removes the requirement for individual licensing arrangements – and therefore minimises the risk of non-compliance, and the need for multiple costly enforcement actions – at the individual level. Such arrangements introduce significant efficiencies into the overall IP framework, and potentially provide for a more beneficial allocation of resources into measures to support investment, innovation and growth, rather than being held in an economically unproductive manner as a financial reserve to fund enforcement activities, whether as a claimant or defendant.

Your Questions: Enforcement of Rights

CASE STUDY

3. How can the effectiveness of the enforcement framework be measured?

The effectiveness of the enforcement framework in copyright disputes could be measured through a decreasing number of copyright infringements. However, a large number of copyright infringements remain undetected and never reach court. In this respect we therefore believe that at least initially after implementation of improved accessibility to legal remedies, the effectiveness of the enforcement framework can be measured through an increase in copyright litigation.

14 Auction houses

Auction houses are a heavy user of copyright protected artistic works in particular for their marketing purposes and sales catalogues with which they advertise the sale of works in upcoming auctions. Apart from the actual works for sale which are reproduced for free in the sales catalogues under application of the exception contained in Section 63 CDPA 1988, auction houses often also reproduce copyright protected works in these catalogues which are not for sale and which illustrate certain points about the works for sale or which show similarities to other artists/works. These other works, so-called comparative works, require permission from the copyright owner for their reproduction and a licence.

In DACS' practice as a licensing body, we are aware that the copyright clearance process is one of the last stages the auction houses engage in when compiling their catalogues. In the majority of cases the auction house will contact DACS for copyright clearance well after the images to be reproduced in the catalogue have been sourced, the layout of the catalogue designed, the accompanying text written and the printing of the catalogue is imminent. In many cases the copyright clearance enquiry is made so late in the day that permission cannot be granted before the actual printing of the catalogue goes ahead and the auction house therefore infringes copyright in comparative works. This however does not deter the auction houses from printing the catalogues.

Various efforts to streamline processes, to raise awareness about realistic time frames for permission requests, in particular, considering how much time has already been invested in the compilation of the catalogue before contacting the rights holder, have been unsuccessful. This is because even in the case of infringement the auction houses know that they will attract no penalty greater than the sum due for a normal licensing fee as a result of their infringing activities.

Your Questions: Enforcement of Rights

4. What evidence is there of the effectiveness, in terms of promoting economic growth, of various approaches to improving compliance with IP rights?

We believe that the examples given above in the copyright section about levy systems and extended collective licensing solutions provide evidence that compliance is more easily achieved where the consumer pays the rightsholder as part of a bundle of rights/products for which payment is made.

Certified licensing schemes³³ like the Educational Recording Agency (ERA) licence or systems like the Copyright Licensing Agency (CLA) licence are meaningful solutions that ensure access to information and deliver solutions to consumers whilst ensuring a high compliance rate. All this generates revenue for creative individuals and businesses who may then use this remuneration to maintain their artistic practice and to create new content helps to further economic growth and innovation.

5. To what extent is the cost of litigation a factor in the effectiveness of civil remedies?

As outlined above, the *Jackson Review* highlighted that in particular in the field of copyright infringement, no viable enforcement mechanisms through the court exist and that the possible damages and the costs of involving legal experts and the courts deter almost all, and in particular individual rightsholders, from enforcing their rights formally. The cited IPI study comes to the same conclusion: litigation is too costly and time consuming for many to enforce their rights in this way.

DACS' Artists' Rights survey data confirms these findings. Only 21% of rightsholders whose works have been infringed took legal action (by asking DACS to intervene, or by appointing an external solicitor), whilst 42% of people who did not follow up with the infringer were deterred by the costs involved, and we have referred earlier in this section to the prohibitive costs to individuals of insurance as a potential means of mitigating litigation costs.

³³ For further information on collective licensing please see Pricewaterhouse Coopers LLP *An Economic Analysis of Copyright and Collective Licensing (PwC)*, March 2011

Your Questions: Enforcement of Rights

6. To what extent, if any, does the enforcement of IP rights operate as a trade barrier, particularly for UK companies attempting to expand overseas? Are there particular issues with particular countries?

According to the IPI study cited on page 28, several interviewees stated that pursuing infringements overseas was even more costly than UK litigation and often beyond their resources. Unsurprisingly, language barriers and unfamiliarity with the legal system and concepts of other jurisdictions make it more difficult for UK firms, SMEs and individuals to enforce their rights in other jurisdictions. Enforcing rights in the US for example is increasingly difficult due to their quasi registration requirement to bring an infringement copyright claim to the US courts. Following the general argument that rights are perceived as being only as strong as their enforceability, difficulties in enforcing IP rights in other countries can therefore operate as a trade barrier.

This barrier has been overcome in part by international treaties guaranteeing a minimum of rights on a more or less worldwide basis. Within the European Union a partial harmonisation of copyright through the European Copyright Directives safeguard a more unified approach towards copyright, although it is important to note that the UK is less aligned in its approach to copyright than the majority of other European Union member states.

DACS is also part of a network of international sister societies which represent each other's repertoire reciprocally, meaning that each sister society can represent the whole repertoire in their territory under their national laws. This means that DACS members benefit from a network of national copyright law specialists, representing and licensing their rights in other territories. This also applies to infringements of their works and the enforcement of rights in these territories. The majority of these sister societies also form part of OLA (as described above) which enables the sister society in whose territory the servers hosting infringing materials are located to enforce our members rights in the online environment.

Due to the prohibitive costs and the complexity of the system of enforcing IP rights in the UK, DACS is aware of instances where rights owners were forced to bring an action against cross border infringements in continental Europe as they would not have been able to enforce their rights in the UK. This imbalance in particular within Europe risks the UK becoming 'a safe harbour' for infringers which should be avoided in order to safeguard the productivity and profitability of the UK's creative industries.

From a rightsholder's point of view, the US system's requirement to register copyright in order to benefit fully from the court system and damage provisions under US copyright law, actively discriminates against UK rightsholders.

There is an increasing need for clarifying the parameters about the making available right, in particular with regards to the place of "making available" and the application of national laws. There has not yet been a universally valid and accepted definition of the place of making available which causes uncertainty as to the application of national laws where online communications are concerned.

This is important because such uncertainty can deter companies from expanding into foreign territories because potential risks relating to exploitation and enforcement of rights cannot be easily determined in advance.

Following the "emission theory" (i.e. that a work is considered as "made available" in the country where it is uploaded to the internet) one implication is that companies choosing to operate in jurisdictions with unsophisticated legal systems and lesser copyright protection will be at an advantage. For example, a company could use content created in the UK and place it on a server in a country with a lesser or no copyright protection. The company could then communicate the content back to the UK public, without any means for the content creator in the UK to prohibit this communication or making available, or to claim remuneration for this use.

Likewise, UK companies wanting to expand into a different jurisdiction do not have any certainty regarding the application of the relevant law, which can constitute a barrier to innovation and growth. In this scenario, a company might be discouraged from pursuing new ideas, because it does not know what law should apply, and hence, the extent of its potential liabilities and obligations.

Your Questions: Enforcement of Rights

7. To what extent would international courts, or similar bodies, make a difference to enforcement of rights and hence the UK economy?

DACS does not have any relevant data in this respect, but believes that as outlined above international courts or similar bodies can only play a role in the enforcement of rights if they are accessible and affordable.

In any case, we believe that the UK economy would benefit more directly by enabling an effective and affordable enforcement mechanism for rightsholders.

Your Questions: Intellectual Property and Competition

1. To what extent do the IP and competition frameworks complement or conflict with each other?

By their very nature IP rights grant their owners a monopoly, which depending on the right can be more or less absolute. In the case of copyright this monopoly is limited through time as copyright expires after a certain period of time as well as limited by exceptions to the right. Certain collecting societies in the UK administering the copyright of their members are therefore seen as holding a dominant or at least quasi dominant position which means that they are restricted in what they can and can't do by competition law.

There is no law directly prescribing what requirements or conditions a company has to fulfil in order to act as a collecting society and while there is no regulation of collecting societies UK law also does not provide for a legal guarantee for collecting societies as exists in some other European Union member states. This can be seen as an advantage but often gives rise to complaints and a perceived unfairness if the collecting society has to manage the rights it administers for a variety of members but also for a variety of users that perceive differences between themselves and other comparable users of copyright protected material.

The combined effects of a lack of regulation of collecting societies in the area of IP law and the application of competition laws to collecting societies holding a dominant position mean competition law can act as a barrier to the introduction of new services and products which could benefit their members and also users of copyright protected material. Allowing competitors into the market acts in this respect as a hindrance rather than a stimulant of competition; unlike, for example, in Germany where VG Bild-Kunst operates as an incorporated society guaranteed by governmental grant for the collection and distribution of copyright royalties for visual creators, DACS operates as a not-for-profit company in a competitive environment.

This has implications on how transparent DACS can be, in particular with regards to sensitive information that can be used by its competitors, but also when determining levels of administration charge, as any reduction of rates could be interpreted as anti-competitive if the rate substantially undercuts competitors' rates and therefore hinders existing players from expanding their business or even prevents new entrants from entering the market. However, it is in the nature of collective management that with increased membership transaction costs can be brought down, which should lead to a reduction of costs to members and customers in the case of not-for-profit organisations. In the case of Artist's Resale Royalties, where the royalty is prescribed by law any cost reduction could not be passed on to the liable party, but only to the beneficiary, by reducing the administration charges.

As outlined above in the case study on DACS' Superlicence, the development of new products benefiting users of copyright protected material is hindered by competition law stipulations. Article 82 EC Treaty forbids price discrimination and discrimination between customers, in particular where non-cost related prices are charged. For example, dominant businesses are constrained by the type of quantity discounts they should offer. Bona fide quantity discounts that reflect actual cost savings on an order by order basis or are justified by the business they bring are seen as permissible (Portuguese Airports Case C-163/99). Quantity discounts should also be linear in progression unless objectively justified. These considerations seem however contrary to the operation of a collective rights management organisation, which can only reduce costs by streamlining processes and by managing rights and uses on a more collective rather than an individual case by case basis. This streamlining is hindered by competition law, as any potential cost savings would be absorbed by a case by case assessment of whether a discount can be granted.

Collecting societies should be exempt from the constraints of competition laws by creating true monopolies through legal guarantee, which could be safeguarded through regulation of these collecting societies rather than through encouraging competition which is equally detrimental to the interests of rightsholders and copyright users.

Your Questions: Intellectual Property and Competition

The possibility of assigning copyright under the UK system creates the risk of anti-competitive behaviour and an accumulation of rights in the hands of bigger market players. As outlined above, there are very many instances where rightsholders are asked to assign the copyright in their work to commissioners due to a general misunderstanding that the same effects can be achieved by agreeing a licence whilst guaranteeing future earnings for the creator.

However, due to the highly competitive market place in the creative industries, bigger entities often require an assignment of rights as a standard and therefore accumulate rights of contributors to their products and services en masse. The greater bargaining power of these entities means that creators often find themselves in a situation where they have to sign their rights over or risk losing the commission. In DACS' experience this also happens in cases where pre-existing works are to be used in the production and the creator or rights holder is asked to assign the rights in the work rather than granting a licence for a particular use.

Apart from bigger entities being in an advantageous situation in which they can force creators to assign their copyright to them, the transferability of copyright through assignments potentially also leads to a concentration of rights in the hands of a few at the detriment of the many, thus creating unfair advantages for these bigger entities.

Your Questions: Intellectual Property and Competition

2. Could growth and innovation be stimulated by a different balance between competition and IP?

We have submitted elsewhere that tensions between the IP framework and competition can result in sub-optimal outcomes. One possible solution to some manifestations of this phenomenon is to guarantee a true monopoly to a collecting society by statute in certain circumstances.

For example, where there may be two or more collecting societies administering the same rights, individuals are free to choose which society to join. In theory, such a choice may be guided by factors such as price, service or other differentiation. The problem arises if one of the organisations for whatever reason is considered to occupy a dominant position within the market place concerned. Even though that organisation may be able to differentiate on price (e.g. the administration charge to current and potential members) as a result of technical innovation, it may be prevented from offering more favourable prices because to do so would mean that it was an abuse of its dominant position and an unfair distortion to the market. One outcome is that its prices cannot adapt to provide greater competition and choice within the market without risk of falling foul of competition rules. Competition rules therefore defeat their own ends in this scenario.

On the other hand, if a sole right of administration were granted to one body by statute, it is likely that a corresponding accountability to Government would be introduced. This would provide strong incentives to the organisation to manage its administration on an efficient and effective basis, as it would be subject to a level of official scrutiny which does not apply to non-statutory bodies. This may provide the basis for better outcomes to customers than could be provided by the market alone.

Debates around 'rebalancing' IP and competition have tended to favour the introduction or expansion of exceptions to copyright as an appropriate way forward. However, these could give rise to unintended consequences which jeopardise incentives and inhibit the capacity for innovation and creation (which may in turn harm growth elsewhere in the economy).

For example, there has been plenty of discussion about whether copyright content should in some circumstances be the subject of an exception where certain digitisation initiatives are envisaged. There has been less discussion about what happens to any assets created by this digitisation process, and whether they attract a new copyright themselves.

If so, and if such copyrights can be monetised by the owners of the rights in these assets, several issues arise.

If the rights holder has received public money to create and monetise the assets, is there in fact a distortion to the market and a competitive advantage conferred compared with other rightsholders who are not awarded public money (or have no entitlement even to make a claim for it)?

Would a further distortion arise if assets could be monetised, and where the effects of any exception to copyright also extended to the monetising activities? This would exclude the underlying rightsholders from the economic returns on the monetised assets, even though much of the value of the assets actually resides in the underlying work, because it is the text, or artistic work – i.e. the content, not the carrier – that is of interest to the paying public?

Your Questions: SME access to Intellectual Property Services

1. Are there cases where SMEs face barriers in accessing IP services to help them to protect and exploit their IP?

2. What can be done to overcome these barriers?

Copyright is a complex subject and, unlike the other IP rights, it is bordered by exceptions, the scope and extent of which are subject to determination by the courts. Inevitably, associated questions about whether individual uses are licensable, or are covered by an exception, can and do arise with great frequency, certainly at DACS.

In some instances there are no easy answers and expert advice may be necessary to form a view. We perceive that there is a lack of general provision in this area, where arguably it is most needed (i.e. by individuals or small businesses who create copyright works, who mainly lack the resources to seek expert legal advice on a regular basis).

The trade unions and professional associations provide a great deal by way of support to their members, and DACS itself offers a telephone-based legal advisory service to its copyright licensing members. But the extent to which such bodies are able to provide support services is very much related to the question of the costs of providing them.

Legal expenses insurance may be available to individuals to help with costs of contractual disputes or advice. But it is notable that copyright and intellectual property issues do not as a rule form part of the package available through legal expenses insurance.

Advice of copyright solicitors may be an option, but this is not necessarily a route available to all, because of the costs involved.

Recent research by the Universities of Bournemouth and Cambridge³⁴ show that there is a strong and positive correlation between membership of expert bodies such as unions and professional associations, with the education and support they may provide, and contractual bargaining outcomes. In other words, those who could rely on advice and guidance achieved better contractual terms, including retention of their rights, which in turn led to higher earnings – and the ability to continue earning through exploitation of the rights in their works because creators had retained the right to them.

³⁴ Kretschmer, Martin, Lionel Bently et al, *Copyright contracts and earnings of visual creators: A survey of 5,800 British designers, fine artists, illustrators and photographers*, Bournemouth: CIPPM, 2011

Appendix 1

About DACS

Established by artists for artists, DACS is a not-for-profit visual arts rights management organisation representing over 60,000 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. In 2010 DACS paid royalties of £7.1 million to visual artists.

We are a membership organisation, a company limited by guarantee and a collecting society as defined under UK law.

DACS provides three rights management services for artists and their beneficiaries:

Collective rights management (Payback)

Negotiating on behalf of visual artists, DACS secures a share of collective licensing revenue which we distribute to thousands of artists each year. These royalties come from a range of collective licensing schemes, which include photocopying books and magazines and the recording of TV programmes by schools, colleges and universities.

Copyright licensing

We manage copyright on behalf of individual artists by acting as agent and selling licences to a wide range of customers. Examples of activities we license in this way include book publishing, advertising and merchandising.

Artist's Resale Right

We collect royalties arising from art works resold by art market professionals on behalf of our members, and all those artists who are not represented by another collecting society under a compulsory collective scheme.

Our charges to artists are made by retaining a percentage of the royalties we collect. This charge varies depending on the service. In 2011 our charges are:

Service	DACS Charge
Payback	21%
Copyright Licensing	25%
Artist's Resale Right	15%

In addition to these services, DACS provides copyright information for visual artists via our website and actively campaigns on behalf of visual artists and their right to be recognised and rewarded for their work.

We belong to a number of national and international bodies, including:

- British Copyright Council
- International Federation of Reproduction Rights Organisations (IFRRO)
- International Confederation of Societies of Authors and Composers (CISAC)
- European Visual Artists (EVA)
- Alliance Against IP Theft
- Creative Coalition Campaign

DACS is governed by a Board of Directors that includes artists, lawyers and other professionals with an interest in artists and their intellectual property. DACS also convenes a Creators' Council – a dynamic forum of visual artists who act as advisors to DACS, providing insight into the current work and practice of visual artists as well as acting as a sounding board for new ideas.

DACS

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