

Submission
To: Gowers Review of Intellectual Property - HM Treasury



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Submitted by

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General observations

DACS would like to thank the Treasury for seeking its opinion through this consultation. As representative of a substantial and varied constituency of copyright owners, we wish to participate in what we hope will be a constructive debate, leading to a recommendation which balances the interests of all stakeholders involved.

As a general foreword, in consideration of DACs' area of expertise and activity, the following submission mainly focuses on copyright, and in particular copyright in artistic works (as defined in s. 4 of the CDPA, as amended (CDPA)) and the licensing thereof.

DACS presents this submission on behalf of the thousands of visual creators and artists it represents and in order to better represent their interests will comment only on issues relating to the protection and promotion of their rights.

Introduction to DACs - the Design and Artists Copyright Society

This submission is made by the Design and Artists Copyright Society (DACs). DACs is the UK's copyright and collecting society for artists and visual creators. Established in 1984 as a not-for-profit organisation to promote and protect the copyright and related rights of artists and visual creators, DACs is constituted as a company limited by guarantee under UK law, and is currently governed by a board of non-executive directors comprising representatives from a range of artistic disciplines alongside others drawn from business and the legal profession.

DACS achieves its objectives of promoting and protecting visual creators' intellectual property rights (IPRs) by offering the following services:

- Individual Rights Management as an agent for our UK and international membership of over 36,000 artists. Our authority for individual rights licensing comes from individual mandates from creators or their beneficiaries in the UK appointing us as their exclusive

agent to administer rights conferred under s. 16 of the CDPA, and via reciprocal agreements with similar visual arts copyright societies (Associated Societies) in 27 countries around the world.

- Collective Rights Management for the entire UK visual repertoire through participation in a range of collective licensing schemes, supported by mandates from fourteen professional associations and trade unions representing 15,000 visual creators, and several thousand visual creators participating in our annual collective licensing distributions.
- Artist's Resale Right administration: new service of collection and distribution of resale royalties launched by DACS in February 2006 pursuant to UK implementation of Directive 2001/84/EC.

For further information on DACS' activities, please refer to our official website: www.dacs.org.uk .

General Questions

1. How IP is awarded

(a) Are there any barriers to obtaining IP rights due to system complexity? What could be done to improve the situation?

In accordance with article 5(2) of the Berne Convention for the Protection of Literary and Artistic Works, the enjoyment and exercise of copyright is not subject to any formality in the UK. DACS supports the view that copyright should subsist in works automatically, with no formality requirement.

The system does not pose any barriers to obtaining protection. We do not believe a system of registration should be introduced. On the other hand, it could be helpful to introduce official and legally recognised procedures for testifying the creation and copyright ownership of unpublished works for evidential purposes. It would give greater certainty and an extra layer of security to copyright owners when enforcing their rights. If this were not possible, a good alternative would be to produce guidelines presenting a range of options to be used by visual creators to record the creation of their works and add certainty to the enjoyment as well as the enforcement of their rights.

In our experience authors of copyright works do not always understand the automatic subsistence of copyright arising at law in their creations. As we are often contacted by creators wishing to "register" their copyright, we believe that the Patent Office could play a fundamental role in increasing awareness and promoting education.

(b) How easy is it to find out about obtaining IP rights? What could be done to improve awareness for business and innovators? Is there sufficient awareness of the need to protect IP internationally?

As noted above, DACS believes that government institutions could invest in education and provide creators with basic but fundamental information on: subsistence of copyright and moral rights, nature of the rights, ownership and transfer of ownership, use and exploitation, and enforcement.

On the other hand, awareness should also be improved among businesses wanting to exploit other people's copyright works. Users should be educated on the importance of having to obtain a licence from visual creators and artists before carrying out any of the restricted acts listed in s. 16 of the CDPA.

DACS has offered licensing services in the field of visual arts for over 20 years and we still encounter businesses, which do not recognise the necessity and the importance of obtaining a licence from visual creators before reproducing their artistic works in their products. In many cases, they are not aware of their legal obligations. The evident ignorance of the law makes the need to educate them pressing.

As far as our industry is concerned, we believe that it is necessary to increase the level of awareness amongst copyright users. DACS finds that other copyright works, musical works, sound recordings and films in particular, receive a greater amount of attention. DACS would stress the fact that online users can exchange visual files incorporating artistic works with the

same facility with which they exchange music files. The same holds true for the facility with which it is possible to "right-click" on an image uploaded on the internet, save it on one's desktop and subsequently exploit it, unless the individual creator has been able to apply copy protection mechanisms (CPMs) to the digital reproduction in question.

However effective CPMs may be, they are far from being the only and best solution (CPMs and DRMs will be specifically addressed in the appropriate section of this submission). DACS believes that a strategy aimed at educating market operators in the relevant industries of all nine categories of copyright works would prove beneficial in the long-term.

DACS appreciates that the Patent Office could find an effective solution to implement such a strategy by developing educational partnerships with relevant stakeholders (e.g. collecting societies, copyright societies, creators' professional associations, etc.) with appropriate resources to support such a measure.

DACS believes that international protection is a real need for visual creators. We are often contacted by artists wanting to post reproductions of their works on their websites and wondering what remedies are available in case of infringements carried out by individuals or businesses in other countries. They recognise the importance of promoting their work by showing it online, but are also conscious of their weak position in case of cross-border disputes.

Copyright enforcement is expensive and time-consuming for individual creators and can also prove difficult for copyright societies representing them. Additional uncertainty is created by the lack of homogeneity in the varying domestic copyright legislations of other countries. On occasions this makes for an awkward fit with the ever-increasing international dimension of copyright exploitation.

(c) DACS is not responding to this question.

(d) DACS is not responding to this question.

(e) DACS is not responding to this question.

(f) DACS is not responding to this question.

(g) Are there specific barriers to obtaining IP rights in your sector?

The main barrier to the obtainment of IP rights in our sector is the limited and dated scope of s. 4 of the Copyright, Designs and Patents Act 1988 (as amended).

The current definition of artistic work struggles to accommodate the following contemporary forms of artistic expression in which many contemporary artists practise, (and which we therefore consider worthy of copyright protection): appropriation art, *found objects*, installations, kinetic art, performance art, etc. This situation is not in line with the copyright protection offered in other countries (e.g. France and Germany) and is effectively an obstacle to EU harmonisation and efficient cross-border licensing.

There is an evident asynchrony between the definition of artistic work in the art world and the legal world. The art world has conferred the status of artistic work to all of the above mentioned creations, whereas the law lags behind it, trying to catch up through several pronouncements in case law extending the application of s. 4. DACS finds the situation confusing for both artists and copyright users. This inconsistency is a barrier to both obtaining IP rights in an efficient way and to effectively licensing the use of visual creations.

We believe that the CDPA needs to be updated in this area, in order to guarantee a higher degree of protection to creators and prevent users from carrying out unauthorised reproductions.

(h) DACS is not responding to this question.

(i) DACS is not responding to this question.

2. How IP is used

(a) What types of IP does your organisation use and why?

For a brief description of the services offered by DACS, please refer to the introduction to this submission.

Our core activities do not involve the use of other types of IP (we do hold licences for our business software, broadcast and reprographic licences, and from time to time we do acquire licences where relevant from freelance creators for contributions of literary and artistic works for incorporation in our publications).

(b) To what extent do you seek multiple overlapping forms of IP protection?

DACS members do not seek multiple forms of IP protection. Certain artistic creations of DACS members could theoretically be protected both by copyright law and by unregistered design rights (both Community and UK), especially in the case of works of artistic craftsmanship (s. 4(1)(c) CDPA). However, since our membership agreements do not include an exclusive licence for the administration of design rights on behalf of our members, we do not license design rights to third parties.

(c) DACS is not responding to this question.

(d) DACS is not responding to this question.

(e) DACS is not responding to this question.

(f) How well does the UK IP system promote innovation?

We know that income derived from copyright fees represents an important revenue stream for artists, and so do royalties collected by virtue of the Artist's Resale Right. The very welcome introduction of the Artist's Resale Right in the UK represents a fundamental achievement for visual creators. By way of example, in 2005 we distributed to one of our highest earning members £ 39,000.00 for Individual Rights Management and £ 617.92 for Collective Rights Management.

DACS interprets the current system and the approach supported by the Government as recognition that fostering creativity supports creators, our dynamic publishing and media industries, and the pre-eminence of the UK art market: all this is only possible if visual creators have enforceable statutory mechanisms to recognise and reward their creative effort.

Copyright and related rights are an indispensable incentive for creators to pursue their careers. The benefit for society is threefold: firstly, emerging artists are less discouraged by the possible

economic uncertainty characterising their profession; secondly, artistic cultural debate grows and develops and new talents emerge; thirdly, the contemporary art market benefits from the consequently increased artistic production.

Moreover, DACS believes that subsequent incorporations of visual creations by copyright users in derivative works, such as the use of an artistic work in an advertisement, are a form of innovation, a valid contribution to intellectual and cultural debate, and the proof that the licensing of copyright works benefits both creativity and innovation.

However, whilst trying to strike a balance between the interests of creators and the interests of the public at large, the current IP system seemed to be flawed in one respect, i.e. the identification of only two parties between whose interests the balance should be achieved. DACS believes that 'the public' embraces two distinct categories with very differing interests: users of copyright for commercial purposes and users of copyright for cultural, educational and private purposes. It is here submitted that a fair and just balance amongst the various interests at stake can only be achieved if the particular nature of these interests is recognised. (This will be further discussed in section 3 of the submission).

Although discussed in more detail in section 4 below, comment on the positive aspects of copyright protection in relation to creativity and innovation cannot be separated from the reality of what is entailed for individual creators in seeking to enforce intellectual property rights, either at the point of negotiating commissions for new works, or when it becomes necessary to enforce exclusive rights to control copying of original works where the rights have been infringed.

(g) To what extent does your organisation make use of other methods used by Government to encourage innovation, such as public funding?

DACS does not benefit from any public funding scheme at present, but would welcome the allocation of public funds aimed at financing the creation of services to promote the protection of copyright and increase copyright awareness among the creative community. In particular, DACS would be eager to benefit from such funds to help create educational programmes and access to justice via *pro bono* legal services schemes for the benefit of art students and visual creators to help develop their professional practice.

(h) DACS is not responding to this question.

(i) DACS is not responding to this question.

(j) DACS is not responding to this question.

3. How IP is licensed and exchanged

(a) How easy is it to negotiate licences to use others' IP for commercial or non –profit purposes?

Aside from the minimal exceptions noted above, DACS does not negotiate licences to use others' IP. On the other hand, we provide copyright consumers with licence agreements, which enable them to incorporate artistic works created by DACS members in their products. As a licensor, we believe it is extremely easy and straightforward to obtain a licence from us for works in our repertoire. We recognise that it would be much more difficult for users if they had to contact all our members individually. The rights clearance process for one publication featuring copyright works by hundreds of different artists could constitute a serious obstacle. DACS believes that collecting societies provide a valid solution by reducing transaction costs and overhead, saving time for the identification and research of visual creators, and providing a consistent approach.

DACS is committed to continuous refinement and process innovation to ease the overhead on copyright consumers seeking to license the works we control.

(b) DACS is not responding to this question.

(c) How easy is it to use others' IP for research purposes? Have you experienced difficulty around research exemptions?

As a copyright user, DACS has not experienced any difficulties in using others' IP for research purposes.

As an agent representing visual creators, we are repeatedly approached by academics and students carrying out research projects potentially benefiting from the research and private study for non-commercial purposes exception (s. 29 CDPA). Where valid, we have recognised the applicability of the exception, confirmed that sufficient acknowledgement of the author was necessary, and that the applicable moral rights were to be respected. At the same time, we have informed the relevant creators of the existence of these projects, so that they are aware of research projects regarding their creations.

As far as research and private study for commercial purposes are concerned, DACS would like to openly condemn a recurring practice in the publishing world. Publishers often shift the burden (administrative as well as financial) of rights clearance to the actual authors of the publications, who are often academics with limited budgets. In order to have their books published, authors are required by the publishers to obtain clearance from visual creators for the use of their works in their publications. Authors are not in a position of sustaining the real costs of rights clearance as opposed to publishers, which will be reaping the benefits of the sale of the books.

Authors end up obtaining rights clearance at a price lower than the current market rates by virtue of their economic status and the purpose of their activities. DACS believes that this "instrumentalisation" of authors to the economic advantage of publishers should be discouraged, especially in consideration of the fact that the resulting situation is one in which authors are put in conflict with visual creators, whereas both categories of creators should be fully rewarded for their creative endeavours.

(d) Are there specific barriers to licensing in the main forms of IP currently used: patents, copyright, trade marks, and designs?

As stated in answer 1(g) of this submission, certain contemporary forms of artistic expressions are not recognised as such by the CDPA and receive protection only through a combined application of other provisions in the statute.

DACS finds that the taxonomic approach characterising s. 4 is not up to date with developments in the art world. Granting protection only to the types of artistic works listed in s. 4 does not reflect the existing (and developing) panorama of artistic creations.

DACS believes that in some instances creators can be deprived of enforceable rights and are also denied opportunities to license the use of their works.

We would like to reinforce the fact that the inconsistency between the definition of artistic work in the CDPA and the definition (and practice) in the art world should be solved, in order to eliminate the confusion and uncertainty surrounding the activities of visual creators.

(e) Are there barriers to licensing IP on grounds of cost? What drive these costs?

By virtue of the monopolistic nature of IP rights, individual copyright owners are theoretically entitled to command licence fees as they see fit. There is potentially the risk that licensing costs can be so high to constitute a real barrier for users, but it is impossible to make any generalisations.

Collecting societies such as DACS are in a very different position. Licensing arrangements that meet the definition of 'licensing schemes' within the legislation can be referred by copyright consumers to the Copyright Tribunal in case of a dispute with users (Chp VII CDPA). It is here submitted that this factor tends to eliminate the possibility of unfair pricing resulting in a barrier to licensing.

DACS' current pricing structure is based on two variables: market sector (and consequent commercial bias) in which the copyright users operate, and number of art works requested for use in one individual transaction. DACS has created a single unit price for the use of one work for each of the market sectors we work with. A discount structure common to all market sectors is applied as the volume of licensed works increases: the rationale is the more works used the greater the discount applied. DACS' pricing structure aims to strike a balance between the commercial orientation and business needs of copyright users and the legal rights of copyright owners. Prices are competitive because DACS and its members want to facilitate licensing for copyright consumers and encourage a properly licensed use of artistic works. At the same time, competitive pricing is not a synonym for wholesale selling; prices must also reflect the value of the creative endeavour of visual artists in producing their work.

DACS believes that its costs are market-driven. Our interaction with market operators is in accordance with competition law rules and prices are negotiated and determined without distortions.

(f) Are there specific barriers to licensing IP in your sector?

DACS notes with serious concern the emergence of contracts for commissioned works which feature unfair terms detrimental to the rights of visual creators. Because of their strong bargaining power, some copyright consumers commission the creation of copyright works requiring authors to assign copyright, waive moral rights and accept less than equitable (or even no) compensation. Costs of licensing are in this way driven down to nil and statutory protections contractually eliminated.

Collecting societies are criticised on occasion for constituting natural monopolies. It is here submitted that copyright users can often be in an equally monopolistic position, and can dictate the terms of licensing by virtue of superior market strength in contract negotiations. On the other hand, the Copyright Tribunal has no jurisdiction over such contracts, the Unfair Contract Terms Act 1977 does not apply to contracts for the creation or transfer of IP rights, and the CDPA as amended recognises the right to equitable remuneration only for the transferral of rental right in film production agreements and exploitation of commercially published sound recordings incorporating performers' contributions thereto.

DACS notes that collecting societies in the field of visual arts represent an evident advantage for copyright users and an instrument to facilitate the licensing of artistic works. As one-stop shops, we enable purchasers of licences to clear world rights for a vast repertoire of visual creators. Customers can choose from a number of Associated Societies located in various countries and

tend to prefer the copyright society based in their own jurisdiction. We believe that the following factors can play a role in determining their decisions:

- language barriers;
- geographical proximity;
- knowledge of the domestic law;
- possible private international law issues arising from infringements occurring in a third country, when the copyright user is in country A and the copyright society is in country B;
- overall desire for convenience.

As noted above, lack of education and awareness amongst creators facilitates this imposition of unfair prices and unfair contractual terms. Hence, the need to invest in education.

This phenomenon appears to show no sign of abating, and the licensing of rights could be gradually replaced by wholesale assignment. The impact of this would be that the earning potential of creators would be substantially reduced and the incentive to create artistic works consequently diminished. Such assignments can result in a creator being denied the opportunity to participate in the continuing commercial success of a product incorporating their work by way of royalties or the chance to renegotiate contractual terms on expiry of an initial contract. Furthermore, where rights are assigned to the commissioner, the creator may well be deprived of the opportunity to participate in any collective licensing of such products (for example, photographs or illustrations licensed for reproduction in a book can be photocopied: reprographic copying of publications (statutory exceptions aside) also requires a licence.

Reprographic licensing is administered in the UK by the Copyright Licensing Agency Ltd. (CLA) for the benefit of copyright consumers on the one hand and publishers, writers and visual creators on the other. Owners of rights in artistic works published in books, journals and magazines are entitled to share in the revenue allocation DACS has negotiated with CLA for artistic works. A visual creator is denied the opportunity to access a share of these royalties where rights have been contractually assigned to a publisher or other content packager, even if the circumstances under which the rights were assigned could constitute an instance of duress or undue influence within the meaning and application of contract law generally.

(g) Does your organisation use methods to facilitate exchange of IP – such as cross-licensing or pooling IP rights with other firms or organisations?

DACS belongs to an international network of visual artists organisations and currently holds reciprocal agreements with 32 other copyright societies (Associated Societies) in 27 countries. All agreements cover individual and collective rights management (including the administration of the artist's resale right).

These agreements enable all Associated Societies to increase their respective repertoire by pooling IP rights and also facilitate cross-border licensing for the convenience of the user. DACS is currently issuing licence agreements for world rights, effectively creating a one-stop shop for copyright consumers.

(h) DACS is not responding to this question.

(i) Are there barriers to trade and exchange of IP internationally?

As a result of its participation in the network of Associated Societies mentioned above, DACS has not encountered any barriers to trading or exchanging IP internationally. The presence of Associated Societies in other jurisdictions is a great comfort for our members because each Society has undertaken to protect and promote the rights of all members (both by direct mandate from individual creators, and indirectly by collective mandates from other societies' members). This factor increases the confidence that our members have in our ability to assert and enforce their rights abroad and, by the same token enables us to reduce barriers for our licensing customers by granting permission for world rights in our licence agreements.

DACS believes that the network of Associated Societies in the field of visual arts is of a very flexible nature in addressing the needs of copyright users and visual creators. Both categories can shop around and decide which society will offer them the best licensing service.

(j) DACS is not responding to this question.

(k) DACS is not responding to this question.

(l) DACS is not responding to this question.

4. How IP is challenged and enforced

(a) Are there specific problems with enforcing the main different forms of IP: patents, copyright, trade marks and designs?

The lack of clarity in the interpretation of certain exceptions (s. 30, 31, 62, 63 CDPA) makes it more difficult for visual creators to argue their cases and more complicated to reach a settlement of the dispute. The theoretical complexity of certain disputes may necessitate professional legal intervention and associated costs for copyright owners (see answer 4(b)). The balance of costs and financial gains from challenging infringement is often negative, rendering enforcement measures under the CDPA problematic.

Repeated lack of enforcement also sends the wrong signal to infringers, who may equate non-enforcement as legitimisation of their conduct.

DACS does not believe this state of affairs is the intention of legislation which creates exclusive and enforceable rights for creators of copyright works, nor do we believe it to be compatible with broader public policy objectives which purport to value creativity by providing a highly sophisticated, publicly funded infrastructure committed to developing art forms on a broad level and supporting creators at an individual level by way of education, training, funding, grants and subsidies.

(b) Are there barriers to challenging infringement and enforcing your IP rights on grounds of cost? What drive these costs?

Legal costs for challenging infringements and enforcing IP rights are often very high not only for individual artists but also for copyright societies because of our not-for-profit status. Considering that the vast majority of disputes are settled out of court, the infringer is often not liable for them. Moreover, the fact that the maximum amount that can be recovered for an infringement is the actual cost of the licence for the infringing use, if one subtracts legal fees from it, the actual financial gain is often minimal if not absent.

The drivers in this context, quite simply, are the costs of the professional legal intervention necessary in IP disputes. There is a substantial disincentive to the individual creator of artistic works (and for not-for profit representatives thereof) inherent in the process.

The wider context to this is surely the debate around access to justice generally, and indeed the barriers to such access. While creators of artistic works are not alone in facing these hurdles, this reality scarcely seems compatible with the express rights created at law for the specific purpose of providing enforceable mechanisms to reward creative endeavour.

(c) To what extent does your organisation make use of other methods than litigation to resolve IP infringement cases, for example the Patent Office opinion service, mediation services, Alternative Dispute Resolution, or Copyright Tribunal?

DACS has mainly adopted ADR mechanisms to resolve IP infringements, but they often prove to be lengthy processes, often concluding in a settlement that simply involves the cessation of the infringing act without compensation for the past infringement. DACS has established relations with a law firm to assist in the policing of infringement on a *pro bono* basis.

In 2001 DACS was involved as intervenor on the side of the respondent in a case before the Copyright Tribunal (*Universities UK Ltd v Copyright Licensing Agency Ltd*, 13 December 2001, [2002] E.M.L.R. 35) concerning the licensing scheme offered by the respondent to Higher Education Institutions.

(d) To what extent do you use IP litigation insurance? How effective is it?

DACS does not use IP litigation insurance. In relation to our licensing activities, we do offer legal certainty to licensees in our individual rights and collectively managed licences by way of indemnity.

(e) Are there barriers to using such methods to settle IP disputes without recourse to litigation? How might they be removed?

The lack of clarity of certain provisions of the CDPA is the main barrier to the successful adoption of ADR techniques in the resolution of disputes. Legal uncertainty results in the necessary intervention of legal advisers and in a sharp increase in costs.

The resolution of disputes through alternative methods presents advantages in the case of infringements committed by individuals or small businesses. This is because the threat of litigation is a useful tool for compliance. On the other hand, powerful copyright users are not deterred by soaring legal costs, whereas individual creators often are.

DACS believes that a fundamental message needs to be communicated to the public: not all artists are wealthy celebrities or global corporate entities, and not all copyright users are harmless academics in small universities in rural idylls.

(f) DACS is not responding to this question.

(g) DACS is not responding to this question.

(h) What are the principal barriers to efficient and successful challenge and enforcement internationally?

Thanks to our network of Associated Societies, DACS is able to police infringements in all the countries in which our network operates. On the other hand, in the absence of a contract of reciprocal representation with a local copyright society in a foreign country, DACS and its members are not able to effectively enforce their rights.

The territorial nature of IP rights makes it impossible to assert one's rights if the state in which the infringing act is carried out is not part to bilateral or multilateral agreements for the recognition and protection of IP rights.

Even in the case of international agreements granting copyright protection to UK nationals abroad, the application of the principle of national treatment and the lack of homogeneity of copyright legislation can impede the enforcement of IP rights.

Legal costs are obviously an additional factor preventing visual artists (or their not-for-profit representatives) from enforcing their rights and so is the limited amount of damages that can be recovered for infringements. For example, the posting of a reproduction of an artistic work on a website can be licensed by DACS for as little as £8.00 a year. It is self-evident that in case of an infringement, if a foreign user does not wish to comply there is little financial incentive for individual creators to pursue the matter, because the maximum recoverable would be the cost of the licence, and the expenses connected with enforcing the rights would exceed the stated amount.

Specific Issues

1. Current term of protection on sound recordings and performers' rights

DACS is not responding to this question.

2. Copyright exceptions – fair use / fair dealing

(a) What are your views on the current exceptions in copyright law?

There are two possible approaches to the establishment of permitted acts. On the one hand, a limited number of broadly laid principles (e.g. fair use doctrine), on the other hand, a greater number of technical provisions, aimed at describing specific situations (e.g. fair dealing exceptions).

In our analysis, the CDPA tends to be closer to the second approach, featuring numerous exceptions, relatively elaborated, creating permitted acts for copyright users.

DACS believes that, even if the original aim of the CDPA was to describe specific situations, the end result is that some of the sections feature unclear or ambiguous wording which complicates the relationship between visual artists and users.

DACS recognises and supports the fundamental function of copyright exceptions and appreciates the fact that they are the main means by which the statute strikes a balance between the rights of the copyright owners and the interests of the general public.

DACS also notes that in establishing exceptions and limitations to the rights of visual creators (and copyright owners in general) legislators should incorporate the three-step test as described in Article 5(5) of the InfoSociety Directive 2001/29/EC, i.e. that the mentioned exceptions and limitations:

- shall be applied only to special cases;
- do not conflict with a normal exploitation of the work or other subject matter;
- do not unreasonably prejudice the legitimate interests of the rights holder.

The importance of the three-step test is in that it provides an instrument to determine whether the use made by the copyright user is potentially in conflict with the commercial interests of visual creators. If the use conflicts with a normal exploitation of the work and prejudices the legitimate interests of artists, DACS believes that there are no grounds for the recognition of an exception or a limitation.

Following is a brief analysis of some problems we have encountered with certain copyright exceptions:

- S. 30 – Fair dealing for the purposes of criticism and review: DACS believes that the fairness of the dealing described in s. 30 should be made conditional upon the non-commercial nature of the dealing. Moreover, the section should reflect the indications of the three-step test (see art. 5 (5) InfoSociety Directive and art. 13 of the TRIPS Agreement). A few publishers still try to argue that the reproduction of artistic works in publications falls within the exception laid out in S. 30, because their publications incorporate elements of criticism and review of the artistic works reproduced. It is self-evident that, by applying the three-step test, the use made would not fall within the exception, because the “type of dealing” conflicts with the normal exploitation of the work and unreasonably prejudices the legitimate interests of visual artists.
- S. 31 – Incidental inclusion of copyright material: DACS does not find it justifiable that under S. 31(3) only musical works and sound recordings shall not be found incidentally included if deliberately included. DACS agrees with the logic of subsection 3, because it is self-evident that deliberately including a copyright work automatically rules out the possibility that the inclusion is inessential and accessory. On the other hand, we find it difficult to understand why only two types of protected works would benefit from this added protection. For example, artistic works could be used in the background of a photographic or cinematographic set. Their inclusion is evidently deliberate and it is impossible to argue that their incorporation is incidental. The majority of copyright users recognise this fact and are happy to obtain licences, but we still encounter users arguing the exception laid in s. 31. DACS believes that s. 31 is in need of an update in order to grant the same level of protection to creators of all protected types of copyright works.
- S. 35 – Recording by educational establishments of broadcasts: s. 35 (1A) currently provides that copyright is not infringed where a recording of a broadcast or a copy of such a recording, whose making was by virtue of subsection 35 (1) not an infringement of copyright, is communicated to the public by a person situated within the premises of an educational establishment, provided that the communication cannot be received by any person situated outside the premises of that

establishment. DACS believes that limiting the applicability of the section to communication received within the premises of the establishment does not take into consideration the developing use of intranets and their use by educational establishments and the needs of institutions and students. For instance, many universities offer distance learning courses or online facilities creating electronic interactive training environments that can be accessed by students outside the premises of the establishment. Existing licensing schemes operated under section 35(2) for the benefit of educational institutions (e.g. Educational Recording Agency Ltd (ERA)) cannot include additional licensing of communication to students when off campus within the scope of the currently certified scheme. DACS supports the recommendation we understand ERA to be making to enable the scope of certified licence schemes under section 35 to be widened to accommodate this additional licence. We should also declare that DACS is a member of ERA, and as such our constituents would stand to benefit from modification to s. 35(2) as proposed to the extent that ERA licensees may be more likely to take up an extension to the licensing scheme if operated within s. 35 on the grounds of ability to rely on a broader indemnity as outlined.

- S. 62 – representation of certain works on public display: DACS finds the following elements in need of clarification and/or amendment:
 - S. 62 (1)(b) – “public places and premises open to the public” should not cover premises to which the public do not have an automatic right of access but to which they are admitted at the licence of the person or body controlling those premises the payment of an entrance fee;
 - The exception should be confined to the case in which the exploitation of the works does not conflict with the normal exploitation of the works. To do otherwise would be to endorse an unjust enrichment: e.g. posters incorporating the reproduction of an artistic work permanently situated in a public display generate revenue for the poster manufacturer and for the copyright owner in the photograph of the artistic work. It seems unjust in these circumstances that the creator of the artistic work expressly selected for inclusion in such products created solely for commercial gain is excluded from sharing in the commercial success of the products.

For example, *The Endless Column* by Constantin Brancusi is a sculpture located in a public square in a Romanian city (Târgu Jiu). UK copyright users could incorporate a reproduction of the artistic works in posters, postcards and other items of merchandise and sell them to the public. The application of the exception under s. 62 prevents the creator (or their beneficiary) from receiving equitable remuneration for the commercial exploitation of their artistic creation. If the three-step test was correctly transposed in s. 62, the exception would not apply, because the use conflicts with a normal exploitation of the work and the legitimate interests of the creator. What is even more inconsistent and cause of concern is that a photograph of the mentioned sculpture would receive copyright protection, whereas the sculpture itself would not.

- S. 63 – Advertisement of sale of artistic works: DACS suggests that this section should further clarify what constitutes ‘advertisement’, its features and the indications that a reproduction is made for the purposes of an actual sale rather than

to attract readers of a publication incorporating the reproduced work to learn more about the company selling the work and its services.

Is the indication of the price, date and venue of the sale sufficient indication? Is the reproduction of an artistic work on the cover of a brochure advertising the sale of a work an advertisement for the purpose of sale, if to the reasonable observer there are no clear indications pointing to the fact that the work is for sale?

(b) Could more be done to clarify the various exceptions?

DACS believes that if the UK maintains its "specific" approach to copyright exceptions, these should be clarified. We have commented only on the exceptions that directly affect our activities but we are sure that other stakeholders will highlight problems with other sections.

(c) Are there other areas where copyright exceptions should apply?

DACS has found it is possible to achieve a balance between rights holders of existing works and creators of new works derived in substantial measure therefrom. As such, we think existing arrangements can accommodate this development in contemporary art practice. But DACS believes that practitioners of "appropriation art" would benefit from better education as to the implications of their practice at an earlier stage in their artistic careers. We believe this point has general force across all creative fields, and thus reinforces our point under 1(a) above in respect of a role for relevant authorities in promoting initiatives to develop greater copyright awareness among creators.

(d) Are the current exceptions adequate or in need of updating to reflect technological change?

As it will be discussed below in the section on digital rights management, the application of fair dealing exceptions can be circumvented by digital rights management (DRM) technologies, which are not currently sophisticated enough to distinguish between lawful uses and unlawful ones.

The digital environment can sometimes create systems whereby the combination of contract and copy protection mechanisms makes it impossible for users to access works unless they pay a fee or a subscription. This phenomenon is acceptable when it comes to copyright works, but it is unacceptable when the works in question are in the public domain or when users intend to access copyright works for purposes coming under the fair dealing provisions.

The upshot is that content can be locked even for lawful uses and potentially works in the public domain can receive a form of protection identical to the one granted to copyright works, rendering copyright protection effectively perennial.

More generally, cheap and accessible technological tools means the scope for copying works has dramatically increased. This gives rise to broad cultural concerns in respect to the perceived value of copyright when it is possible for anyone with relevant tools to exercise all the rights reserved under s.16 to rights owners with little difficulty. Again, education could mitigate some of the effects of this culture on perceived values of copying.

Less dramatically, DACS recognises the need to introduce a private fair use. What private individuals do is an act of copying, and copying is a restricted act under the CDPA in the absence of an applicable exception or limitation. It is impracticable for individual copyright owners to

license individual users for their private copying, at the moment we cannot envisage a viable system of transactional licensing to do it.

It is a fact that this practice is currently happening and the public is confused about what their rights are. It is necessary to find a way to allow the public to carry out what is now a phenomenon more easily described as "large scale unlicensed copying". In order to recognise the situation and legalise the practice, it would be necessary to introduce a private fair use exception in the statute, but this should be indispensably combined with an efficient mechanism to compensate content owners (see answer below).

(e) How would you see content owners being compensated for such use?

It is difficult to find an ideal solution in this situation, because it is impossible to monitor who is copying what and how many times. It would be difficult if not impossible to compensate content owners for "effective use".

The introduction of a levy system could be a possible solution. UK manufacturers of equipment that enables users to copy copyright works, such as scanners, cd-burners, PCs, etc and UK distributors of such equipment manufactured abroad in countries without levy systems could pay a levy on each device sold to the relevant collecting society(ies), which would then be distributed to content owners; the amount to be paid could be determined either by Parliament or by the Copyright Tribunal.

(f) DACS is not responding to this question.

(g) DACS is not responding to this question.

3. Copyright – Digital rights management

(a) Do you have any view on how the use of digital rights management technologies should be regulated?

DACS believes that copy protection mechanisms should not be applied to works which are in the public domain. Restricting access to works in the public domain is an encroachment of the rights of the public as well as a hindrance to education and the diffusion of culture. Moreover, when access to and use of works in the public domain is made conditional upon the payment of a fee, DACS believes that this constitutes an unjust enrichment, because the person (or business) providing the content has no title to charge in the absence of copyright.

As far as copyright works are concerned, the statute should clearly state that DRMs (and copy protection mechanisms in particular) cannot undermine legitimate rights to access and use of copyright works as stated in Chp III of the CDPA. DACS cannot provide the technological solution for DRM users but firmly believes that the mentioned technologies should take into account the statutory exceptions.

A person who manufactures, imports, offers, sells, possesses, distributes, etc. devices, products or components thereof designed for the purpose of enabling or facilitating the circumvention of effective technological measure commits an offence (s. 296ZB); likewise, from a public policy perspective, it is arguable that someone applying copy protection mechanisms for purposes not recognised by the law is committing an offence by restricting the public's rights as recognised by the CDPA.

4. Copyright – Orphan works

(a) Have you experienced any difficulties in identifying the owners of copyright content when seeking permission to use that content?

Some of our clients have informed us that they sometimes encounter artistic works of unknown authorship or works of known authorship but untraceable owner, thus creating dilemmas over whether to proceed in making copies of such works.

DACS finds the term “orphan works” unhelpful at best and misleading at worst because of its ambiguous interpretation and inference of an abandonment which has been taken too readily to legitimise certain behaviours.

A rigorous definition of the term should therefore be developed. It is here suggested that three categories should be identified:

- anonymous works for which it is reasonable to assume that copyright has expired;
- anonymous works for which it is reasonable to assume that copyright has not expired;
- works of known authorship, whose copyright owner cannot be traced even after reasonable inquiry.

DACS has observed that these are the three main categories of works presenting difficulties to copyright users seeking permission to use the content.

(b) Do you have any suggestions on how this problem could be overcome?

It is here submitted that the defence provided by s. 57 CDPA is a limited and weak one. Copyright in a literary, dramatic, musical or artistic work of unknown authorship (an author is defined as unknown if it is not possible to ascertain their identity by reasonable inquiry) is not infringed by carrying out any of the restricted acts in s. 16 CDPA, if it is reasonable to assume the following:

- a) copyright in the work has expired;
- b) the author died 70 years or more before the beginning the calendar year in which the potentially infringing act is done.

The section does not consider the possibility that the author of a work in copyright is known but that the copyright holder cannot be traced.

Additionally, considering that it can prove extremely difficult to assume and establish that copyright in a work has expired, it is here submitted that the defence should be granted in these circumstances:

- a) the authorship cannot be ascertained by reasonable inquiry;
- b) the copyright owner cannot be traced by reasonable inquiry.

DACS suggests that the amended version of the section is made conditional on the following:

- 1) the copyright users agrees to pay the cost of the licence should someone at a later stage claim copyright ownership and establish title; the cost of the licence to be determined according to market rates;
- 2) claims from copyright owners are subject to statutory limitations.

DACS would suggest that 1) is replaced by a licensing scheme, whereby copyright users contact the collecting society(ies) in the relevant field and obtain a licence (indemnity) from them towards payment of a licence fee according to the standard market rates at the time of the licence. The collecting society would undertake to keep the licence in escrow for the copyright owner to claim it within a period determined by statute.

Should the copyright owner never claim the licence fee from the collecting society, the amount could be donated to the public by way of grants to deserving members of the constituency represented by the collecting society.

DACS believes that this would be a mechanism to recognise the importance of copyright in anonymous works in line with the incentive theory, because the profits of copyright exploitation (if not claimed by the copyright owner) would constitute an incentive for emerging creators.

5. Coherence between competition policy and IP policy

DACS firmly believes in the role of competition policy in the IP market. Vigilance from the relevant institutions is fundamental in order to monitor the market and verify that key players in a dominant position do not abuse it. It is of great importance that the exchange and exploitation of IP rights is compliant with the existing competition policy for the benefit of end consumers.

A common charge brought against collecting societies is that they abuse their dominant position in the Common Market contravening art. 82 of the EC Treaty. DACS believes that there are ways to ensure that collecting societies do not abuse their status of natural monopoly and believes that collecting societies in the field of visual arts adopt all necessary measures to be compliant with competition law provisions. In particular, visual arts copyright societies emphasise the importance of transparency and openness of their operations.

Individual creators are free to join any copyright society of their choice in the Member States of the EU, depending on their own individual choices; DACS has in fact direct members from more than one jurisdiction. At the same time, copyright customers can obtain from all the Associated Societies belonging to our network licence agreements for world rights, without having to seek clearance in each country of operation.

As noted before (General issue, Q. 3(f)) DACS believes that the following factors play a fundamental role in determining the choice of the collecting society for both visual creators and copyright users:

- language barriers;
- geographical proximity;
- knowledge of the domestic law;
- possible private international law issues arising from infringements occurring in a third country, when the copyright user is in country A and the copyright society is in country B;
- overall desire for convenience.

DACS welcomes increased levels of intervention of domestic and EU institutions in the regulation of the market of cross-border licensing and would like to remind the UK institutions that regulation should be made considering the specificity of each copyright market and protected copyright work, and the different ways of transacting.

6. Other Issues

(a) Limited scope of moral rights protection

DACS finds that the recognition and protection of the right of paternity (s. 77 CDPA) is weakened by the requirement of assertion at s. 78 CDPA. DACS believes that the enjoyment of the right should not be conditional upon this requirement, and that copyright users should be under the unqualified obligation to identify the author each time any of the acts listed in s. 77(4)(b) is carried out.

In addition, under S. 23 of Schedule I CDPA, the rights granted in ss. 77 (right to be identified as author or director) and 80 (objection to derogatory treatment) do not apply to artistic works the author of which died before commencement (i.e. before 1989). We find this provision profoundly discriminatory and unjustifiable.