



DACS
valuing visual arts

Creative Content in a European Digital Single Market: Challenges for the Future

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Executive Summary

DACS appreciates the European Commission's ambition to create a modern, pro-competitive and consumer-friendly legal framework for a genuine Single Market for Creative Content Online.

- DACS wishes to emphasise the needs and requirements of individual creators and rights holders.
- Importantly, the paper does not address the serious consequences for European culture of failing to support and sustain the livelihoods of individual European creators in a digital age.
- When talking about rights holders the paper also focuses on publishers without acknowledging the fact that these mainly facilitate the exploitation of creative contributions of individual creators when exploiting their own copyrights rather than accounting for the individual creator as the centre of creative output.
- DACS believes that Europe's cultural diversity is partly a result of the national differences in copyright law and is at the very least preserved by these differences in national laws.
- DACS is not opposed to a general regulation of collecting societies but we do not believe that this should happen at a European level. National collective societies were created under, and have adapted to, national legislation and country specific stipulations.
- We believe that extended collective licensing is a potentially useful mechanism to enable Reproduction Rights Organisations to provide workable solutions for rights holders in certain circumstances.

- Any extended collective licensing schemes should always be limited to a specific area as these schemes result in an inversion of the exclusive nature of copyright and substantially reduces copyright to a right to remuneration.
- We do not believe that making works available en masse accommodates the exclusive nature of copyright and risks undermining visual artists' livelihoods, control over their creativity as well as damaging existing markets.
- DACS believes that the industry is in a position to find suitable solutions to address the issues of orphan works and out of print titles, while ensuring adequate remuneration for rights holders.
- DACS would wish to see strict boundaries created around discussions about commercial and non-commercial uses of copyright protected works to ensure that every use which prejudices the commercial interests of the copyright owner requires permission from the copyright owner.

As a representative of a substantial constituency of visual artists, DACS would like to ensure that the Commission takes into account the interest of individual creators and in particular visual artists, who substantially contribute to the diversity of European visual culture.

I. Introduction

DACS thanks the European Commission for seeking our opinion through this reflection paper. As representative of a substantial and varied constituency of copyright owners, we wish to participate in what we hope will be a constructive debate and to inform the development of a new strategy for the European Digital Agenda. As a licensing body representing the interests of visual artists, DACS is an associate member of the International Federation of Reproduction Rights Organisations (IFRRO) and we would ask you to note our general agreement with the points raised by IFRRO in their response to this reflection paper. Rather than reiterating these points here, may we take the liberty of referring you to the submission prepared by IFRRO on behalf of its members as a complement to the comments submitted below.

About DACS

DACS (The Design and Artists Copyright Society) is the UK's leading visual arts rights management organisation representing nearly 60,000 visual artists. Established by artists for artists in 1984 as a not-for-profit organisation to promote and protect the copyright and related rights of visual artists, 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 translating rights into revenues and recognition for visual artists by offering the following services:

Copyright licensing: We act as an agent for our UK and international membership of over 54,000 visual artists. Our authority for copyright licensing for individuals comes from mandates from artists or their beneficiaries in the UK and via reciprocal agreements with similar visual arts copyright societies (Associated Societies) in 28 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 16,000 visual artists, and several thousand individual visual artists participating in our annual collective licensing distributions. In 2009, DACS paid over £3m for nearly 12,000 claims for a share of collective licensing royalties.

Artist's Resale Right: Our service of collection and distribution of resale royalties which we launched in February 2006 pursuant to UK implementation of Directive 2001/84/EC. Since the introduction of the right DACS has paid over £9 million to more than 1,700 visual artists.

For further information about DACS, please visit our website: www.dacs.org.uk.

II. General

DACS appreciates the European Commission's ambition to create a modern, pro-competitive and consumer-friendly legal framework for a genuine Single Market for Creative Content Online by creating a favourable environment for creators and rights holders, by encouraging the provision of attractive legal offers to consumers and by promoting a level playing field for new business models and innovative solutions.

However, we would like to raise concerns about the focus of this strategy as the reflection paper fails to address the needs and requirements of individual creators and rights holders and it also fails to provide for specifics about how creators will be paid for their creative efforts. Importantly, the paper does not address the serious consequences for European culture of failing to support and sustain the livelihoods of individual European creators in a digital age. Instead the Reflection Paper focuses on consumer demands for access to whatever they like whenever they like, without questioning the reasonableness of these demands in the light of the exclusivity of the underlying copyright in certain content. The paper also emphasises the need for the development of new business models to exploit creative works and to facilitate the growing consumer demand without paying due attention to the creation of this content.

When talking about rights holders the paper also focuses on publishers without acknowledging the fact that these mainly facilitate the exploitation of creative contributions of individual creators when exploiting their own copyrights rather than accounting for the individual creator as the centre of creative output. The Reflection Paper also appears to create a flat hierarchy with consumers, commercial users and rights holders all equal, not taking into account that not every rights holder is necessarily also a creator and vice versa. The paper therefore fails to address the point that without creative people there is no value being created and therefore it is of the utmost importance that we secure and protect their rights and remuneration, before focusing on access to creations and business models to exploit them.

We further note that the Reflection Paper primarily focuses on music, audiovisual works and games, all products that in general comprise a multitude of creators and rights holders. Although we appreciate that it may not always be possible to address each and every group of creators in every consultation or communication, we note that visual artists are frequently overlooked by the Commission.

DACS represents nearly 60,000 artists who contribute in a dynamic way to the development of European visual culture, creating works which populate our museums and galleries and create the basis for a multi-million euro contemporary art market as well as establishing the visual framework for European culture and society.

We are therefore concerned that there is little reference to visual artists (fine artists, illustrators, photographers, architects etc) and the critical role that they play in Europe's cultural heritage and the digital domain. The Commission is rightly concerned with ensuring a thriving European culture, including a flourishing visual culture. This will depend to a large extent on the sustainability of visual artists and their practice. Proper remuneration and recognition of visual artists' rights is essential to sustain European visual culture now and in the future.

DACS therefore believes that any future strategy for the creation of a genuine Single Market for Creative Content Online needs to focus on the protection and promotion of the rights and the remuneration for creators of copyright material to encourage and promote the creation and dissemination of creative content, without which a Single Market for Creative Content Online will have no sustainable future.

III. Comments

1. Unified European Copyright Law

DACS does not believe that a unified European Copyright Law irrespective of its taking precedent over national laws or merely providing an additional, parallel title to national copyright titles should be a preferred option. On the contrary we believe that Europe's cultural diversity is partly a result of the national differences in copyright law and is at the very least preserved by these differences in national laws.

Differences in law create diversity

For example we understand that the current list of voluntary exceptions and limitations in Directive 2001/29/EC was the result of lengthy negotiations with all different Member States to incorporate country specific exceptions that mirrored certain standards and uses prevalent under national copyright law. Whole industry sectors and businesses 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. We believe that these differences, although sometimes difficult to understand, help to support and preserve the cultural diversity that makes Europe unique and that provides for a valuable counterbalance to for example the American creative industry.

Potentially detrimental effect of unified European law

A unified European copyright law would risk eliminating these differences and introducing concepts into national legislation that are completely foreign to this system, distorting and complicating the application of the law to existing creative processes, or to disincentivise longstanding creative practices and to wipe out existing business sectors. In the UK for example photographs of artistic works are protected under copyright in their own right which has led to the emergence of a multitude of image banks, conducting business by hiring out images of works for reproductions. In France, for example, fashion is one of the protected categories of works which has resulted in a longstanding and profitable fashion industry in particular in haute couture. By over-harmonising European copyright law differences in national laws that have resulted in the emergence or strengthening of certain industry sectors would potentially be eradicated.

DACS therefore believes that the current system of non mandatory exceptions accurately reflects the fact that copyright, though partially harmonised, remains an intellectual property right which is strongly influenced by the culture and tradition of the respective Member State and constitutes the correct instrument to provide for sufficient flexibility for the Member States while guaranteeing a certain degree of harmonisation and security for users of copyright protected works on a European level.

Licensing schemes

The current copyright system in the UK further facilitates the implementation of licensing schemes within the scope of certain exceptions in which DACS participates for visual artists. These licensing schemes provide flexibility and clarity for users of copyright protected works. The existing schemes DACS participates in are functioning well under the current national legislation and DACS therefore sees no need for any further measures by the Commission in this respect.

Potentially adverse effects of dual protection

It is difficult to see how the suggested introduction of an additional, optional level of protection of copyright on the European level would work without creating confusion, additional costs and uncertainty. It is also important to bear in mind that any increase in administration costs for rights holders, but also any decrease in the revenue rights holders are relying on, will in turn result in an increase in costs for consumers accessing and using their works. We further fail to see how an additional level of regulation would result in a more coherent application of the law and how consumers apparently already complaining about the complexity of national laws, would be in the position to navigate through two levels of protection.

DACS understands and appreciates the Commission's internal market argument, but we would like to draw the Commission's attention to the fact that one of the greatest advantages of the internet is worldwide accessibility and availability of information. To create a Europe-specific solution to the problems arising from this platform therefore seems very limited and it is questionable in how far the introduction of a unified European copyright law can address the issues outlined in the Reflection Paper, which need to be seen in a global context. We therefore believe that apart from further reflection on the future of European rights management in an international context, the effects of a unified European copyright law on matters of cultural diversity and preservation of the cultural individuality of each Member State would need to be explored in more detail.

2. User Generated Content

The Reflection Paper outlines the importance of making this distinction and attaches a right for appropriate remuneration only to the rights of professional creators (page 4 of the Reflection Paper). DACS notes the European Commission distinguishes between professionally created content and user generated content which it defines as content made publicly available through telecommunication networks, and which reflects a certain amount of creative efforts outside of professional practices.

We do not believe that this definition and differentiation between user generated content as opposed to professionally created content is helpful in determining the value of the creative contribution nor if one category of works should receive a higher protection than the other or indeed any protection at all.

Additional protection criteria

This differentiation introduces a new requirement for copyright protection or at least removes the right to receive remuneration for certain types of content. In our opinion this is contrary to international stipulations. The personality of the creator of a work is not a valid criterion for determining if a work should receive copyright protection hence if the author of the work is entitled to the exclusive rights under copyright law and therefore has the possibility to exploit these rights. The European Commission should therefore refrain from adopting this notion as many past examples have shown that works created outside professional practices have received greater recognition than those created professionally. For example, the paintings of the artist Jack Vettriano are very widely reproduced and achieve substantial prices, although he has never received a professional education as a painter.

Definitional problems

We further believe that the adopted definition creates definitional problems when determining if something was created within professional practices. Would this require the creator to have a formal education in the respective field of practice or would the creator need to dedicate most of his/her time to the creation of works in order to qualify under this criterion? Would part-time creators fall within this definition? Also, with respect to user generated content, why would the work of a non-professional creator not attract the same protection as a professionally created work, in particular if this work later turns out to be more successful and provokes greater demand or as much demand as a professionally created work? Would works that start off as user generated content but develop into significant cultural contributions due to the public interest in and the uptake of the work never be able to generate remuneration for their creators?

Adverse effects

We believe that the adoption of this notion undermines one of the most significant benefits of the internet which is enabling the public to decide what has success and what doesn't. Excluding creators from protection or at least from the right to remuneration purely because they are not professional creators is also contrary to the European Commission's objective to ensure cultural diversity within Europe and to provide for a legal framework that incentivises the creation of new works and encourages investment into the provision of creative content and its dissemination.

We further want to emphasise that many creators have embraced this new channel of communicating their works and are themselves engaged in creating user generated content. It would therefore be difficult to differentiate between true user generated content and content created within professional routines and practices.

However, we welcome the Commission's recognition that individual creators are dependant on the remuneration they receive for the use of their works and we would therefore like to stress again the importance for the protection and strengthening of the rights copyright confers onto creators. The remuneration received from licensing practices constitutes a substantial part of many creators' income necessary to sustain a living and incentivising them to invest in the further creation of works, which form the basis of a thriving and successful creative industry on a national as well as on a European level. In particular 'professional' creators rely on the earnings from their work which help support the viability of their artistic practices. To remove or restrict this possibility of exploiting works, be it through additional qualification criteria or by creating an artificial two tier protection, will therefore have an adverse impact on Europe's creative output and its cultural diversity.

Education and information

Furthermore, DACS does not believe that the introduction of this differentiation will assist in making copyright legislation more accessible nor that the consumer confusion described on page 10 of the Reflection Paper will be adequately addressed by introducing more qualification criteria. We appreciate the problem that consumers expect more freedom and flexibility to express themselves through interactive services. However, we reject the notion that this should be possible by appropriating other people's property. On the contrary, extensive education and information campaigns should inform consumers what they can and what they cannot do in respect of copyright protected material. Further it would be beneficial to openly inform users of social networking sites in particular about the contractual obligations that are placed upon them when using these sites, which often require them to warrant that they are the sole owner of the rights in the content that they upload to these sites, often granting all embracing licences permitting the owner of the site to make extensive use of this content.

3. Multi-territorial Licensing

Although the Reflection Paper presents a less than complimentary view about collecting societies and current practices regarding multi-territorial licensing we would like to point out that DACS has already very successfully embraced multi-territorial licensing models.

In line with the submission by IFRRO (see above) we would like to emphasise that multi-territorial licensing within the Community does already take place. As outlined above, DACS operates as part of a network of associated societies through reciprocal representation. The network currently subsists of 32 collecting societies in 28 countries worldwide, whereby most of the Member States of the European Union are covered. The network is therefore in a position to operate on a multi-territorial licensing basis which benefits consumers as well as commercial users of copyright material whilst ensuring that rights holders receive the remuneration they are entitled to. We also believe that this system greatly benefits consumers and commercial users who can choose which society of the network they would like to approach and to license the use of the members' works on a national, European or international basis.

We also believe that copyright as a territorial right should be strengthened in particular in the light of preserving and promoting Europe's cultural diversity. We would welcome further information and education of consumers and other stakeholders (for example ISPs) about the fact that copyright regulation has only been partially harmonised throughout the Community and that rights have to be generally obtained for each Member State in which the content should be, or has been, made available. As a result individual Member States' copyright laws have to be respected when licensing on a multi-territorial basis.

We do not believe that the concept of multi-territorial rights licensing should be abused to create safe-harbours within the Community, but on the contrary that the cultural diversity within Europe should be maintained and respected.

4. Extended Collective Licensing (including regulation of collecting societies)

We believe that extended collective licensing is a potentially useful mechanism to enable Reproduction Rights Organisations to provide workable solutions for rights holders. The system of extended collective licensing is currently part of the Digital Economy Bill in the UK which will provide for a valuable solution to the access to and licensing of orphan works, decriminalising any authorisation activity by collecting societies and at the same time safeguarding the right of creators to adequate remuneration for the use of their works. However, we would like to point out that any extended collective licensing schemes should always be limited to a specific area as these schemes result in an inversion of the exclusive nature of copyright and substantially reduce copyright to a right to remuneration. We therefore believe that it should be reserved to the national laws to devise these schemes and establish areas where extended collective licensing can actually address a specific access and licensing problem rather than adopting a broader European approach that can by its very nature not account for specific national issues.

DACS is in general not opposed to a general regulation of collecting societies, but for the reason stated above, we do not believe that this should happen on European level. National collective societies were created under and have adapted to national legislation and country specific stipulations. Any European regulation therefore has to be on a more general level and would not be able to accommodate every set up developed in line with national regulations. DACS as a collecting society for visual artists for example is already committed to transparency and accountability and therefore welcomes the development of discussions around regulations or other mechanisms to ensure the accountability of collecting societies, but believes that these discussions should be reserved to the national level and that any interference by the European Commission is unnecessary.

5. Orphan Works/Out-of-Print Titles

Regarding the discussions of orphan works and out-of-print titles we would like to refer mainly to the submission by IFRRO, which we believe contains an in-depth analysis of the issues associated with these categories of works. However, we would like to raise our concerns about the inclusion of out-of-print titles into the orphan works discussion.

As outlined by IFRRO, the exclusive right of the rights holder must enable the rights owner to withdraw works from general circulation and it should not be a matter of default to make these works available against the will of the respective rights holder. Copyright is a limited right and works are freely accessible after the expiry of the copyright term. We therefore do not believe that the exclusivity of the right should be undermined by substituting the will of the rights holder and defaulting the status of works to “accessible” where this might not always be the case.

We would further like to draw the Commission’s attention to national ambitions to address the orphan works problem and highlight that the industry is in a position to find suitable solutions that address the issues outlined in the Reflection Paper whilst ensuring adequate remuneration for rights holders. DACS for example is currently negotiating a solution for museums and galleries to make their whole repertoire available, including orphan works, through a digital museums licence. In our opinion collective rights management bodies have a clear role to play in solutions for the orphan works problem, ideally backed up through legislative support on a national level by removing some of the indemnity risk associated with these solutions.

6. Remuneration for Rights Holders

As mentioned above we do not believe that the Reflection Paper contains much information on the main objective to ensure appropriate remuneration for individual creators. As a matter of fact, the Reflection Paper fails to focus on individual creators at all and – apart from mentioning ‘alternative forms of remuneration’ (page 19) – does not address the issue that any form of fair compensation for the efforts of creators conflicts with the dominant notion that consumers and commercial users of copyright protected content wish to access and use works online for free.

Reduction of revenue for creators impacts negatively on creative output

This is emphasised by some of the observations in the Reflection Paper. For example, it is acknowledged that revenue streams of traditional analogue and physical distribution of creative works are declining (page 10), yet, the problem is associated with businesses making this content available rather than realising that it is the individual creators whose opportunity to receive remuneration from licensing this traditional exploitation of their works is disappearing. A further argument used for the justification for the introduction of a unified European copyright law is that it would greatly reduce the transaction and licensing costs associated with the territoriality of copyright. Although this reduction in cost for users is a worthwhile goal, it is important to be bear in mind that the value to the user for the rights granted still has to be recognised in the same way, and that one of the unintended consequences of the reduction of licensing costs could be the diminishing of remuneration for creators who were previously in the position to charge for the use of their works for each territory.

Management of Rights

Apart from the direct monetary aspect, the exclusivity of copyright not only gives creators the possibility of actively managing the exploitation of their works, but also to market themselves and their works appropriately. As with every other property right, intellectual property gives, and should continue to give, rights holders the possibility of actively managing the access to their property and to create demand for their works, for example, through limited access to their works. By enabling access to works at any time from any place the Commission risks devaluing works and contributions, access to which has been actively managed, is privileged or limited by the creator, although access to these works is guaranteed once copyright protection expires. We therefore do not believe that the envisaged strategy of making works available en masse accommodates the exclusive nature of copyright and risks undermining visual artists' livelihoods, control over their creativity as well as damaging existing markets.

Commercial vs. non-commercial

DACS further notes the ongoing discussions about the commerciality of uses when considering the introduction of new or the widening of existing exceptions. We believe that uses of copyright protected works which create a commercial benefit to the user should in general not be exempt from the requirement of authorisation through the copyright owner. In addition and in line with our explanations above, we do not believe that every non-commercial use of copyright protected works should be per se exempt from the licensing requirement and that it is the nature of exclusivity of copyright that the copyright owner is in the position to manage the usage of the work. We further believe that not every use which may qualify as a non-commercial use under legal definitions is in fact a use which does not carry a direct commercial benefit for the user. It is therefore essential to create strict boundaries around these discussions about commercial and non-commercial uses of copyright protected works and to ensure that the three step test is observed and every use which prejudices the commercial interests of the copyright owner requires permission from the copyright owner.

For example, public institutions such as museums and libraries are relying increasingly on reproductions of works to generate commercial revenues. In these instances individual creators should not be in the position of subsidising public institutions which profit from the exploitation of works in copyright.

When determining these boundaries it is further important to bear in mind that not every use initially qualifying as non-commercial remains non-commercial in the longer term and on the contrary can create substantial benefits or revenue for the user later on. This is particularly the case where the European Union but also Member States try to encourage new business models by exempting the use of copyright protected works from the licensing requirement, as these are likely to generate revenue for their owners when successful.

Alternative forms of remuneration

With regards to the Commission's reflection on alternative forms of remuneration for creators, DACS is unfortunately not in the position to supply substantiated comments and contributions by way of examples, but we would like to express our interest in participating in further discussions on this point. We are convinced that any alternative system should prioritise the rewarding of people on whose back public benefits are made and at the same time recognise that remuneration is one of the main drivers for creations, as creators rely on the revenue for exploiting their works for a living. We further want to ensure that any alternative form of remuneration takes into account the contribution of every creator participating in the creation of a product including visual artists who are frequently excluded. Each of the products listed in the Reflection Paper as examples (music, audiovisual works and games) is a cooperation of many creators whose contributions are used to create the final product and should therefore be taken into account when discussing alternative forms of remuneration.

IV. Conclusion

DACS appreciates the European Commission's ambition to find workable solutions for the challenges the digital environment and the resulting change in consumer behaviour and expectation bring. As a representative of a substantial constituency of visual artists, DACS would like to ensure that the Commission takes into account the interest of individual creators and in particular visual artists, who contribute substantially to the diversity of European visual culture. National solutions are being developed and implemented and the Commission should therefore restrict their actions to supporting these ambitions on a national level rather than imposing new legislation on Member States which risk diminishing the cultural diversity between the different Member States.

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