DACS

DACS
33 Old Bethnal Green Road
London
E2 6AA

T +44 (0) 20 7336 8811
F +44 (0) 20 7336 8822
E info@dacs.org.uk

dacs.org.uk

By email to: crowland@loc.gov

Dear Ms Rowland,

US Copyright Office Notice of Inquiry: Copyright Protection for Certain Visual Works

DACS is the UK representative for rights holders of visual works and welcomes the opportunity to contribute to the US Copyright Office's discussion of copyright. We support the submissions of European Visual Arts (EVA), of whom we are a member, as well as submissions from our sister societies, in particular Artists Rights Society (ARS), in respect of orphan works. We will also be referring to the Artist's Resale Right in our contribution to this inquiry.

About DACS

Established by artists for artists, DACS is a not-for-profit visual artists' rights management organisation in the UK. Passionate about transforming the financial landscape for visual artists through innovative new products and services, DACS acts as a trusted broker for 90,000 artists worldwide. Founded over 30 years ago, DACS is a flagship organisation that has and continues to campaign for artists' rights, championing their sustained and vital contribution to the creative economy. In its support of artists and their work, DACS collects and distributes royalties to visual artists and their estates through Artist's Resale Right, Copyright Licensing and Artimage, and via Payback and Dutch Public Lending Right.

Orphan Works

1. Commercial Use

DACS supports the statements made by ARS on the problems caused by the wide remit of the Orphan Works Bill, which includes commercial uses of orphan works. Under the EU Directive on orphan works, the exception for the use of a work after a diligent search is strictly limited to certain situations. The UK law that implemented the EU Directive[1] states that the exception may only be used by a non-commercial public institution and covers certain works (i.e. not standalone photographs or unpublished works). The use is equally restricted to non-commercial use for display or digitisation only. The intent and effect of the exception therefore does not interfere with existing licensing models, nor does it prejudice a rights holder's access to remuneration as it is limited in scope.

2. Diligent Searches

Further harm may be caused by the unqualified adoption of a diligent search requirement. In the UK orphan works that are not privy to the exception provided in the EU Directive may be licensed through the UK Government, who will grant a licence on satisfaction that the diligent search criteria has been met. This provides a balanced solution: if a user wants to use the work they can, for a reasonable fee, so long as they can prove they have actually searched for the rights holder. Allowing users free reign in which to decide whether or not their search has been 'diligent' only seeks to legitimise bad practice,

[1] Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014

rather than providing a workable solution that does not eventually deprive a rights holder of their rightful remuneration.

3. Embedded Images

Visual works behave differently to some other types of copyright-protected works, insofar as they have the ability to be incorporated into a publication, as well as existing in a standalone format: a photograph may be published in a magazine, for example. A person seeking to use any part of a publication must search and licence each work independently. The user cannot rely on having determined orphan work status for a publication alone as a way of using the images inside it. The law needs to be very clear on its approach to composite works and embedded images and must not allow the use of orphaned publications to become a vehicle in which to use legitimately copyright-protected content without authorisation.

4. Registries

Whilst DACS does not believe that the Orphan Works Bill should apply to foreign works at all, at the very least foreign artists should not be required to register their works on commercial registries to be searched by users. This is an undue burden on creators who, under laws of their own country, have an exclusive right in their work that arises on creation in a fixed form. For artists to have to go an extra step to prevent their works from being used is very detrimental to their rights as they exist: they should not have to enforce a right that has already been granted to them.

5. Future orphans

Many of the proposals under the Orphan Works Bill will not actually deal with the problem of using orphan works legitimately, but rather encourage a certain type of behaviour towards copyright-protected material and allow users to use any image they want without much consequence. It erodes the rights of artists and may create more orphan works as images continue to be disseminated licence free and without any recourse available for the artist.

Artist's Resale Right

DACS has followed with interest the recent decision from the Ninth Circuit Court of Appeal to sever from the California Resale Royalty Act the offending provision that contravened the Commerce Clause, and welcome this outcome.

Artist's Resale Right provides a royalty for artists when their work is resold on the art market for over 1,000 Euros by an art market professional. It enables artists to share with collectors and dealers in the increasing value of their work and helps enable the art community to be self-sufficient. DACS collects and distributes royalties to eligible artists and beneficiaries and, since its inception in 2006, DACS has distributed over £40m (~$62m) in resale royalties to almost 4,000 artists. The Artist's Resale Right has mechanisms in place to protect the interests of the art trade, including a 12,500 Euro cap on the maximum level of royalty paid on individual works.

The Artist's Resale Right also provides additional funding for artists' families and beneficiaries, who inherit the responsibility of managing the artist's estate. Beneficiaries are often required to store, preserve and restore original works. This essential work helps secure the UK's cultural legacy, benefits our museums and galleries exhibitions programme and supports the UK's position as a key destination for cultural tourism.

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There is no evidence that Artist's Resale Right has had a negative impact on the UK art market. In fact, the British art and antiques market generated £8 billion in sales in 2013, meaning Artist's Resale Right payments represented just 0.1 percent of these revenues.

In the interest of creating a level playing field between international markets, DACS believes that the US should implement a Bill for a country-wide resale right for visual artists. Adopting the appropriate measures and safeguards as the UK has done will allow the art trade to prosper and provide a working wage to artists and their estates.

For further information please contact

Reema Selhi
Legal and Policy Manager
DACS
T 020 7553 9063
reema.selhi@dacs.org.uk