

## DACS Image Licence Agreement Terms and Conditions November 2013

### 1. Definitions and Interpretation

1.1 In this Agreement capitalised terms shall have the meanings given to them in the Term Sheet or as set out below:

**"Artimage"** means DACS's image library at the URL [www.artimage.org.uk](http://www.artimage.org.uk);

**"Artistic Work Licence"** means any licence of rights in a copyright artistic work contained in the Image required by the Licensee in order to exploit the Image in accordance with this Agreement;

**"Associate"** shall have the same meaning as defined in section 435 of the Insolvency Act 1986;

**"Commencement Date"** means the Commencement Date as set out in the Term Sheet;

**"Credit"** means a Credit as set out in the Term Sheet;

**"Force Majeure Event"** means any event arising that is beyond the reasonable control of the affected party (including any industrial dispute affecting any third party, governmental regulations, fire, flood, disaster, civil riot or war);

**"Image"** means the photographic image set out in the Term Sheet, or any transparencies, digital format images, negatives, prints, footage or other representations of the Image;

**"Licence"** means the Licence of rights granted to the Licensee by DACS under this Agreement;

**"Licence Fee"** means the Licence Fee as set out in the Term Sheet;

**"Licensed Acts"** means the right to:

- (a) copy the Image only as necessary for inclusion in or on the Licensed Products;
- (b) include such copies of the Image in or on the Licensed Products;
- (c) make physical copies of the Licensed Products available to the public;
- (d) sell physical copies of the Licensed Products; and
- (e) to communicate copies of the Licensed Products to the public

but not the right to:

- (i) alter or adapt the Image; or
- (ii) sell or distribute copies of the Image separate from the Licensed Product;

**"Licensed Product"** means the product, in the form approved by DACS or Owner (as applicable), as set out in the Term Sheet;

**"Owner"** means the Owner of the copyright in the Image;

**"Payment Date"** means the Payment Date as set out in the Term Sheet;

**"Qualifying Claim"** means any written claim made by a third party that the Licensee's use of the Image in accordance with this Licence infringes intellectual property rights owned or controlled by that third party;

**"Sales Tax"** means any sales or other taxes (other than VAT) levied on sales or supplies of goods which are recovered directly or indirectly as part of the selling or supply price and which are paid over to or collected by the direction of the relevant governmental authority;

**"Term"** means the Term as set out in the Term Sheet;

**"Term Sheet"** means the DACS Image Licence Term Sheet signed on behalf of DACS and the Licensee setting out the principle deal terms of this Agreement;

**"Territory"** means the Territory as set out in the Term Sheet;

**"VAT"** means value added tax pursuant to the Value Added Tax Act 1994 and each like tax imposed in addition or in substitution thereof.

- 1.2 References to **"including"** and **"include"** mean respectively including without limitation and include without limitation.
- 1.3 The words **"other"** and **"otherwise"** are not to be construed as being limited by any words preceding them.
- 1.4 A **"person"** includes all forms of legal entity including an individual, company, body corporate (wherever incorporated or carrying on a business), unincorporated association, governmental entity and a partnership and, in relation to a party who is an individual, his legal personal representatives.
- 1.5 The words **"writing"** or **"written"** includes faxes, emails, and scanned documents sent by email.
- 1.6 Any expressions used but not defined in this Agreement, but which are defined in the Copyright, Designs and Patents Act 1988 (the **"Act"**) shall have the meaning ascribed to them in that Act.
- 1.7 Words in the singular include the plural, and those in the plural include the singular.
- 1.8 Clause and schedule headings shall not affect the interpretation of this Agreement. References to clauses and schedules are (unless otherwise provided) references to the clauses and schedules of this Agreement.
- 1.9 A reference to a particular law is a reference to it as it is in force for the time being taking account of any amendment, extension, application or re-enactment and includes any subordinate legislation for the time being in force made under it.

## 2. Grant of Rights

- 2.1 Subject to Clause 2.2, and in consideration of DACS' receipt of the Licence Fee on the Payment Date, DACS grants to the Licensee a non-exclusive licence to perform the Licensed Acts during the Term in the Territory.

2.2 The grant of rights in Clause 2 is conditional upon (a) the Licensee's continued compliance with the terms and conditions of this Agreement and (b) the Licensee having the benefit of (and continuing to comply with) any Artistic Work Licence that may be required.

### 3. Term

This Agreement shall commence on the Commencement Date and shall continue until the expiry of the Term unless earlier terminated in accordance with the termination provisions set out in Clause 12.

### 4. Restrictions

4.1 Title to, and ownership of, all copyright in the Image shall remain with DACS and/or the Owner, as applicable. The Licensee acknowledges that the Image itself is an original artistic work protected by copyright.

4.2 The Licensee acknowledges that all rights, whether now existing or created or discovered in the future and howsoever arising, which are not expressly granted to the Licensee in this Agreement are expressly reserved to DACS or the Owner (as appropriate), and the Licensee shall not assert or represent to any person that it has any right, title or interest in the Image or any part thereof other than the rights expressly granted under this Agreement.

#### Separate Licence Required

4.3 Where there are joint owners of the copyright in an Image and DACS does not represent all of the parties owning or controlling the rights in such Image, the Licence is not a licence for the rights owned or controlled by the joint owner(s) whom DACS does not represent.

4.4 The Licensee acknowledges that this Licence relates only to the copyright in the Image itself, and it does not include a grant of rights or any copyright, trade mark, likeness or image right that may be contained in the Image for which a separate licence may be required. For the avoidance of doubt, unless expressly given by DACS in any Artistic Work Licence, neither DACS nor the Owner gives any representation or warranty in respect of rights in any works or rights contained in or relating to the Image.

#### No Promotional Use

4.5 Unless expressly set out in the Term Sheet or the Artistic Work Licence, the Licensee shall not use the Image or part of the Image in such a way as to imply approval or endorsement of a product, a service, the Licensee or any Associate of the Licensee, or in any promotional message whatsoever, other than those directly relating to the Licensed Products.

#### No Alterations to Work

4.6 This Licence does not include the right to alter or adapt the Image (other than to copy the Image into a different format in accordance with exigencies of the publishing or production process) or do any act which may infringe upon the moral rights of the Owner or the creator of any work contained in the Image.

4.7 Nothing in this Agreement shall affect the moral rights of the Owner nor shall it be interpreted as a waiver of any moral rights of the Owner where subsisting.

## No Direct Contact with Owner

- 4.8 The Licensee agrees to refrain from initiating any direct contact with the Owner in order to obtain waivers or separate agreements with respect to the delivery of the Image or the copyright in the Image outside this Agreement. The Licensee also agrees to refrain from initiating any direct contact with the Owner or author of the principal copyright work contained in the Image in order to obtain an Artistic Work Licence without DACS' prior written approval.

## **5. Delivery of Image**

- 5.1 A low resolution watermarked copy of the Image will be made available for the Licensee to download from the Artimage website alternatively the Licensee may download a low-resolution watermarked copy of the Image via a unique link created by the Artimage image-management system sent to the Licensee. The Licensee shall be entitled to use such copy only for internal evaluation purposes and for producing draft or pre-production versions of the Licensed Products for approval, if required pursuant to the Artistic Work Licence or the Term Sheet, as applicable.
- 5.2 Once the Licensee has provided DACS with written evidence that either (a) it has secured all necessary approvals required pursuant to the Artistic Work Licence or (b) no approvals are required, DACS shall provide the Licensee with a unique link generated by the Artimage image-management system which will enable the Licensee to download the high resolution copy of the Image within one week of the link being generated.
- 5.3 The Licensee shall use all reasonable care in storing the high resolution copy of the Image in order to prevent any unauthorised duplication or reproduction of the same.
- 5.4 The Licensee will examine the high resolution copy of the Image for possible defects (whether digital or otherwise) before sending the same for publication or reproduction. In the event there are any defects in the Image, the Licensee shall notify DACS in writing and shall refrain from using such defective Image, and DACS shall provide the Licensee with a further copy of the Image with the defect rectified, or (at its sole discretion) refund any Licence Fee paid by the Licensee and terminate this Agreement without further liability.
- 5.5 Following the Licensee's use of the Image in accordance with this Agreement, the Licensee shall delete all copies of the Image from its servers.

## **6. Manufacture by Third Parties**

- 6.1 The Licensee agrees and undertakes that, if it sub-licenses the right to manufacture or print part or all of the Licensed Products which features the Image, it shall ensure that such sub-licensee observes all of the restrictions set out in this Agreement and does not sell or offer for sale any of the Licensed Products to any person other than the Licensee.

## **7. Licence Fee**

- 7.1 The Licensee undertakes to pay to DACS the Licence Fee on the Payment Date.
- 7.2 All payments shall be remitted by the Licensee in GB pounds sterling payable to the bank account nominated by DACS. All currency exchange fees, remittance fees or other charges connected with payments by the Licensee hereunder shall be borne by the Licensee and shall not be deducted from the amount due to DACS.

- 7.3 All sums payable hereunder by the Licensee are exclusive of VAT and/or any Sales Taxes applicable from time to time, which shall, where appropriate, be payable by the Licensee in addition to the Licence Fee.
- 7.4 Without prejudice to any other right or remedy of DACS, and without imposing an obligation to accept late payment, where any fees payable under this Agreement are not paid within 30 days of the due date, DACS shall exercise its statutory right to claim interest under the Late Payment of Commercial Debts (Interest) Act 1998.
- 7.5 Acceptance by DACS of any sums shall not prevent DACS at any later date disputing the correctness of the sums paid or demanding particulars from the Licensee concerning the amount finally due, and neither shall acceptance of any sum by DACS constitute a waiver of any breach of any term of this Agreement by the Licensee if any such breach shall have taken place.

## 8. Credits and Notices

The Licensee shall ensure that the Credit appears on or in each copy of the Licensed Products with reasonable prominence. By way of illustration, the inclusion of the Credit adjacent to the licensed reproduction of the Image shall constitute reasonable prominence.

## 9. Warranties and Representations

- 9.1 The Licensee warrants and represents to DACS that:
- (a) it has full right and title to enter into this Agreement;
  - (b) its use of the Image shall not reflect adversely on the image, goodwill or reputation of DACS or the Owner;
  - (c) it will not reproduce the Image in any material or in any way which is illegal, obscene, pornographic, indecent, defamatory or constitutes a malicious falsehood, constitutes an infringement of third party rights, or an invasion of privacy;
  - (d) unless expressly permitted in the Term Sheet, it will not include any Image or part thereof in a promotional or sponsorship message for the Licensee or any third party;
  - (e) it will not alter or adapt any Image or do any act which may infringe the moral rights of the Owner, unless expressly set out herein or as expressly agreed in writing by the Owner;
  - (f) it will be solely responsible for ensuring that the manufacture, marketing, distribution and sale of the Licensed Products does not infringe any intellectual property rights of any third party (save that the Licensee may rely on the warranties to title in respect of the Image given by DACS below);
  - (g) each and every one of the Licensed Products shall contain the Credit;
  - (h) it will not at any time do or suffer to be done any act or thing which will in any way impair or affect the copyright in the Image;
  - (i) it will ensure that no exploitation of the Licensed Product shall facilitate or encourage reproduction by unlicensed third parties of an Image alone and out of context;
  - (j) it will not remove any watermarks or copyright notices or similar notices or protections in connection with the Image nor circumvent any copy protection or similar technologies used by DACS or the Owner;

- (k) it will use its best endeavours to ensure that the colour of the printed copies of the Image in or on the Licensed Products matches the colour of the original Image;
- (l) it will co-operate fully and in good faith with DACS and / or the Owner for the purpose of securing or preserving their rights in and to the Image.

9.2 The Licensee hereby indemnifies and agrees to indemnify and save and hold the Owner and DACS harmless and to keep the Owner and DACS at all times fully and completely indemnified of, against and from any claims, actions, proceedings, liability, loss, damage, costs and expenses which the Owner and/or DACS incur or suffer by reason of the Licensee being in breach of or failing to perform or which arise out of any non-performance by the Licensee of any of the warranties in Clause 9.1 or arising out of any claim by a third party claiming relief against the Owner or DACS by reason of the exercise of the rights granted in this Agreement.

9.3 DACS warrants and represents to the Licensee that it has been granted the right to enter into this Agreement by the Owner. DACS gives no warranties, representations or undertakings in respect of the Image, save that DACS, as agent for the Owner, warrants that, to the best of its knowledge and belief, the Owner owns and/or controls all right, title and interest in the copyright in the Image, unless otherwise advised in writing. Save as set out in this clause, DACS gives no warranties, representations or undertakings in respect of the Image.

9.4 DACS hereby indemnifies and agrees to indemnify and save and hold the Licensee harmless and to keep the Licensee at all times fully and completely indemnified of, against and from any claims, actions, proceedings, liability, loss, damage, costs and expenses which the Licensee incurs or suffers by reason of DACS being in breach of any of the warranties in Clause 9.3.

## 10. Infringement

### Claims Against Third Parties

10.1 The Licensee shall, as soon as it becomes aware, give DACS in writing full particulars of any infringements or violations of any of DACS' or the Owner's rights in the Image.

10.2 The Licensee agrees not to take any action against any third party who it believes has infringed the Image without the prior written consent of DACS (however, nothing in this clause shall restrict the Licensee's ability to take any action against a third party in relation to an infringement of the Licensee's own intellectual property rights).

10.3 The Licensee will, at the written request of DACS, give full cooperation to DACS in any action, claim or proceedings brought or threatened in respect of the Image, including joining in proceedings (at DACS' cost). All recoveries in any such action, claim or proceedings shall belong to DACS.

### Claims By Third Parties

10.4 If the Licensee becomes aware that its use of the Image infringes any rights of another party, the Licensee shall immediately give DACS full particulars of the same in writing and shall make no comment or admission or compromise to any third party.

10.5 If any third party makes a Qualifying Claim, or notifies an intention to make a Qualifying Claim, against the Licensee, the Licensee shall:

- (a) as soon as reasonably practicable give written notice to DACS of the Qualifying Claim specifying the nature of the Qualifying Claim in detail;

- (b) not make any admission of liability, agreement or compromise in relation to the Qualifying Claim without the prior written consent of DACS;
- (c) give DACS and its professional advisers access at reasonable times (on reasonable prior notice) to its premises and its officers, directors, employees, agents, representatives or advisers, and to any relevant assets, accounts, documents and records within the power or control of the Licensee, so as to enable DACS and its professional advisers to examine them and to take copies (at DACS' expense) for the purpose of assessing the Qualifying Claim;
- (d) give DACS the conduct of all proceedings and responsibility for any proceedings or negotiations for the settlement of any Qualifying Claim and DACS shall, in its sole discretion, decide what action, if any, to take in respect of any such Qualifying Claim; and
- (e) at DACS' cost take such action as DACS may reasonably request to avoid, dispute, compromise or defend the Qualifying Claim.

10.6 Subject to the Licensee's full compliance with Clause 10.5, DACS shall indemnify the Licensee against all liabilities, third party costs, expenses, damages and losses (including reasonable professional costs and expenses) suffered or incurred by the Licensee directly arising from a Qualifying Claim. However, in the event that a Qualifying Claim also includes a claim for any use of the Image by the Licensee in breach of this Agreement, the indemnity above shall not apply. Nothing in this clause shall restrict or limit the Licensee's general obligation at law to mitigate any loss it may suffer or incur as a result of a Qualifying Claim.

## 11. Limitation of Liability

11.1 Nothing in this Agreement shall operate to exclude or limit DACS' liability for:

- (a) death or personal injury caused by its negligence; or
- (b) any breach of the terms implied by section 12 of the Sale of Goods Act 1979 or section 2 of the Supply of Goods and Services Act 1982; or
- (c) fraud; or
- (d) any other liability which cannot be excluded or limited under applicable law.

11.2 Save as expressly set out, DACS shall not be liable to the Licensee for any damage to software, damage to or loss of data, loss of profit, anticipated profits, revenues, anticipated savings, goodwill or business opportunity, or for any indirect or consequential loss or damage.

11.3 Save as set out in Clauses 10.6 and 11.1, DACS' total liability under this Agreement shall be limited to the amount of the Licence Fee actually received by DACS.

## 12. Termination

Either party may terminate this Agreement immediately at any time by written notice to the other party if that other party commits any material breach of its obligations under this Agreement which (if remediable) is not remedied within ten business days after the service of written notice specifying the breach and requiring it to be remedied (for the avoidance of doubt, the following shall be considered a material breach:

- (a) a failure to make payment by the Payment Date;

- (b) any use of the Image beyond the scope of the Licence; or
- (c) any failure to accord the Credit.

## 13. Provisions after Termination

### 13.1 Upon termination of this Agreement:

- (a) all rights and licences granted in this Agreement shall cease and the Licensee shall immediately discontinue all manufacture or publication of the Licensed Products incorporating the Image;
- (b) in the event that the Licensee is not in breach of this Agreement, it may sell off any remaining stock of the Licensed Products and the provisions of this Agreement shall apply in respect of such sales for so long as the Licensee continues to receive monies from the sale of the Licensed Products;
- (c) in the event that the Licensee is in material breach of this Agreement, it will not have the right to sell off any remaining stock of the Licensed Products.

13.2 Any expiry or termination of this Agreement shall not terminate any obligation or right which is expressed to arise on or continue after expiry or termination.

## 14. Force Majeure

A party who becomes aware of a Force Majeure Event which gives rise to, or which is likely to give rise to, any failure or delay to perform its obligations under this Agreement shall forthwith notify the other and shall inform the other of the period for which it is estimated that such failure or delay shall continue. The affected party shall take reasonable steps to mitigate the effect of the Force Majeure Event.

## 15. Notices

### 15.1 A notice given under this Agreement:

- (a) shall be sent (in the case of DACS for the attention of the Commercial Manager to the address set out in the Term Sheet (or such other address as the receiving party may have notified to the other, such notice to take effect five days from the notice being received); and
- (b) shall be:
  - (i) delivered personally; or
  - (ii) sent by fax; or
  - (iii) sent by pre-paid first class post, recorded delivery or registered post; or
  - (iv) (if the notice is to be served by post outside the country from which it is sent) sent by registered air mail.

### 15.2 A notice is deemed to have been received:

- (a) if delivered personally, at the time of delivery; or
- (b) in the case of fax, at the time of transmission; or



- (c) in the case of pre-paid first class post, recorded delivery or registered post, 48 hours from the date of posting; or
- (d) in the case of registered air mail, five days from the date of posting; or
- (e) if deemed receipt under the previous paragraphs of this clause is not within business hours (meaning 9.00am to 5.30pm Monday to Friday on a day that is not a public holiday in the place of receipt), when business next starts in the place of receipt.

15.3 To prove service, it is sufficient to prove that the notice was transmitted by fax to the correct fax number of the relevant party or, in the case of post, that the envelope containing the notice was properly addressed and posted.

## **16. Assignment and Licence**

Save as expressly set out, the Licensee may not transfer or sub-license the Licence or assign this Agreement to any third party.

## **17. Third Party Rights**

Save for the Owner, this Agreement is not intended to be enforceable by any third party.

## **18. Variation and Waiver**

18.1 Any variation of this Agreement shall be in writing and signed by or on behalf of both parties.

18.2 Any waiver of any right under this Agreement is only effective if it is in writing and applies only to the party to whom the waiver is addressed and the circumstances for which it is given. No waiver shall be implied by taking or failing to take any other action.

18.3 Unless specifically provided otherwise, rights arising under this Agreement are cumulative and do not exclude rights provided by law.

## **19. Further Assurance**

Each party hereto agrees upon request of any other party hereto from time to time promptly to execute and deliver all deeds and documents and to do all acts and things as shall be necessary, expedient or desirable to give effect to the terms and/or purpose of this Agreement.

## **20. Severance**

20.1 If any provision (or part of a provision) of this Agreement is found by any court or administrative body of competent jurisdiction to be invalid, unenforceable or illegal, the other provisions shall remain in force.

20.2 If any invalid, unenforceable or illegal provision would be valid, enforceable or legal if some part of it were deleted, the provision shall apply with whatever modification is necessary to give effect to the commercial intention of the parties.

## **21. Entire Agreement**

The Term Sheet and these Terms and Conditions along with, if applicable, any Artistic Work Licence, embody all the terms agreed between the parties relating to the inclusion of a copy of the Image in the Licensed Product and no oral representations, statements, inducements, warranties or promises by either

party shall be binding and valid and this Agreement shall not be altered except by separate agreement signed by both parties.

## **22. Governing Law and Jurisdiction**

22.1 This Agreement and any disputes or claims arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) are governed by and construed in accordance with the law of England.

22.2 The parties irrevocably agree that the courts of England have non-exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).

## **23. Execution**

This Agreement may be executed in any number of counterparts (including by way of faxed or scanned counterparts) and all counterparts shall together constitute one and the same Agreement, and the date of the Agreement shall be the date specified on the Term Sheet, or, if not specified, the date on which it is executed by the last party.