

The Digital Economy Bill - Bad For Business

This Bill, which goes to the Report stage in the Lords today, is potentially damaging to the UK Advertising Industry.

Section 42 of the Bill introduces the idea that "**orphan works**" (photographs, illustrations and other artworks whose creators and copyright holders cannot be found) may be licensed for commercial use by paying a fee to a Government-appointed licensing body and therefore **used in ways not intended or authorised by the rights holder**.

POTENTIAL DAMAGE TO UK CREATIVE INDUSTRIES

In all of the Creative Industries, models, actors, artistes, composers, rights holders of embedded copyright works and others customarily contract for and charge usage fees and limit usage based on the assumption that the primary rights holder will retain control of the copyright and be bound by their contractual obligations. The very existence of orphan works licensing is likely to result in **photographers being unable to contract for exclusive use** because they will be **unable to guarantee** that any given work will not at some point become orphaned and legitimately licensed to other users, competitors etc. **Orphan works licensing will destroy** the tissue of these **contractual relationships**. Therefore, orphan works licensing will **disrupt the entire functioning of all of the UK Creative Industries** by removing the contractual bedrock of guaranteed rights ownership, limited usage, and exclusivity.

A probable consequence of orphan works licensing would be a **chilling effect on the UK advertising industry** as multinationals shun UK agencies, photographers and shoots because **we will no longer be able to guarantee exclusivity** (our work can be orphaned and used by others beyond our control) and those multinationals seek to remove the **risk of their campaign assets becoming orphaned**.

EFFECT ON EXISTING CONTRACTUAL OBLIGATIONS

Orphan works licensing in effect will be **retrospective legislation**, as photographers who have engaged models via agencies for specific usages and licensed those images for specific usages, for specific fees, were in a position to make and honour those commitments when those contracts were signed, but their ability to do so will have been subsequently and unpredictably legislated away. **Orphan works licensing will throw the network of contractual obligations tied to current commercial imagery into chaos**.

Whereas the established legal doctrine of Impossibility may protect photographers from being sued by models, their agencies and other contractual stakeholders in a photograph, this defence in itself will **preclude those stakeholders from obtaining any legal relief from the destruction of their contractual arrangements and consequent loss of revenue**.

POTENTIAL DAMAGE TO THE WIDER ECONOMY

Section 42 breaches Article 9 of The Berne Agreement and Article 13 of TRIPS [the trade-related aspects of intellectual property rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994], to both of which the UK is signatory, by enacting domestic legislation allowing use of orphan works in a way unauthorised by the works' copyright holders that will "conflict with normal exploitation of the work".

By breaching our international treaty commitments, **orphan works licensing exposes licensees of works declared as orphans in the UK to litigation from their foreign owners**. For example, let's say Botswana adopts orphan works legislation and the UK doesn't. If a Botswanan company uses your work, and you sue the Botswanan company in the UK courts, the UK courts will apply UK law, not Botswanan law, in deciding whether the Botswanan company owes you any money for breach of copyright. The UK courts will ignore the Botswanan orphan works laws and the fact that the Botswanan government think that they've licensed your work out on your behalf.

Now substitute UK for Botswana, and US for UK. A plausible scenario would be that of a US subsidiary of a UK multinational being sued in the US courts under US law for copyright infringement, **the statutory financial penalties for which can be severe**. Many other examples could be made.

UNCONSTITUTIONAL AND UNDEMOCRATIC

Few of these provisions are specifically defined and included in the Bill. Instead, the Bill confers powers on the Secretary of State to enact them at a later date via Statutory Instruments. **Section 45 is particularly contentious** as it **grants to the Secretary of State massive powers** to amend existing legislation by Statutory Instrument and thereby **re-introduce or delete provisions** in Section 42 (and Section 17) after the fact and **outwith Parliamentary debate**.

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The Lords Select Committee on the Constitution has stated: "The Committee's view is that **this is inappropriate**.... it would greatly assist the Committee if you could explain why you consider it to be constitutionally appropriate for what appear to be such wide-ranging and open-ended rule-making powers to be conferred on you as Secretary of State."

It has been publicly announced that **Tories and Liberal Democrats will vote against Section 17** for this reason.

TOO COMPLEX

Orphan works is **too deep and subtle a subject** to be dealt with by vague unspecified "intentions" which will only be made explicit in secondary legislation that will not be subject to Parliamentary debate and amendment. It deserves to be introduced properly in its own Bill and not summarily dealt with as it is in the Digital Economy Bill as currently drafted.

We urge you to apply pressure on the Government to remove Sections 42 and 45 from the Digital Economy Bill.