

The Digital Economy Bill - Bad For Business

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

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 copyright holder**.

POTENTIAL DAMAGE TO UK CREATIVE INDUSTRIES

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.

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**.

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.