Action on Authors' Rights

Briefing on the Copyright Clauses in the Digital Economy Bill

Action on Authors' Rights is a network of authors and agents campaigning from the grass-roots in support of authors' rights

Without the original creative work of authors, publishers and booksellers would have nothing to sell. It is authors who produce the value on which the entire publishing industry depends.

> Publishing in the UK is the largest media sector, and the biggest creative industry. … The value of UK book exports is higher than the export turnover of any other creative industry – Publishers Association (PA), 'Publishing Touches Everyone', 2009[1]

The Government has stated that the aim of the Digital Economy Bill is to 'drive the UK's vital creative and digital sectors to bolster future growth and jobs'.[2] This can only be achieved under conditions that sustain the work of freelance authors and other creators.

Control of their copyrights provides authors with an indispensable incentive: it is the basis on which they negotiate payment for their work, and it is also the basis on which they are able to plan and shape their careers, and manage their personal 'brand'.

Copyright is the exclusive right to authorize the reproduction of the work in any medium or format. It cannot be reduced to a simple right to remuneration.

Clause 43 of the Digital Economy Bill contains highly controversial provisions for changing copyright law. If implemented, they would, at best, damage the copyright regime, on which so much depends, and impose onerous and unnecessary burdens on creators. At worst, they would permit authors' work to be appropriated wholesale with the thinnest veneer of legitimacy, to the short-term gain of certain media interests, and the long-term devastation of the UK's cultural life and creative industries.

The proposal to impose extended collective licensing in the case of works whose authors are known or easily traced is thoroughly objectionable. The Government has presented no arguments to justify its introduction.

The proposals for 'orphan works' licensing are crucially lacking in the safeguards required to protect the rights of unlocated authors and prevent abuses.

Clause 43 should be removed from the Bill.

So should clause 46, a 'Henry VIII' clause that would confer on the executive very wide-ranging powers to modify primary legislation .

Summary of Provisions in Clause 43

1) A new clause 116A to be inserted in the Copyright, Designs and Patents Act 1988 confers on the Secretary of State for Business, Innovation and Skills the power to authorise a licensing body or other person to publish/broadcast/perform/copy/adapt a work that is in copyright, or to grant

---

[1] Publishers Association, 'Publishing Touches Everyone', 2009 [http://www.publishers.org.uk/download.cfm?docid=080B9DB1-4DF7-4EAA-B5BEDD2D7CE464B7]

[2] Department for Business, Innovation and Skills, 'Digital Economy Bill', web page, accessed on 29/03/10 [http://interactive.bis.gov.uk/digitalbritain/digital-economy-bill/]

licences to do any of these things, in the event that the work is an 'orphan work' (in principle, a work whose copyright owner cannot be found after a diligent search).

2) A new clause 116B confers on the Secretary of State the power to authorise a licensing body to grant copyright licences to publish/broadcast/perform/copy/adapt published works regardless of whether any of the people for whom it acts as the agreed agent owns the copyright in them ('extended licensing'). Copyright owners would be able to exclude rights from use by giving notice.[3]

3) Licenses will be issued on a non-exclusive basis.[4]

4) Works used under clause 116A may include unpublished works.[5]

5) In the event that a copyright owner cannot be traced, then an authorisation under either clause for the use of a work will only have effect if the licensing body or other authorised person enters the copyright interest in a register kept by themselves and made available to the public.[6]

These provisions depart from the fundamental principle of copyright: that the author alone possesses the right to authorise any reproduction of his or her works.

Orphan works might be considered to constitute a special case, potentially justifying certain closely defined exceptions to the usual rules of copyright law. The orphan works provisions in the Bill will be discussed later in this paper.

Extended licensing

The extended licensing provisions will apply to works whose copyright-owners are traceable, as well as to orphan works. The Secretary of State may authorise a licensing body to license works for use even in cases where the author is not a member of the body and has not delegated any authority to that body to act as his or her agent.

The extended licensing provisions contain no requirement that the licensing body, or the person obtaining a licence, should carry out a search for holders/owners of rights who are not members of the licensing body. This is in distinction to the orphan works provisions, under which no use may be made of a work until a diligent search for the rights-owners has been conducted.

> It seems almost absurd to have one part of the Bill devoted to protecting copyrights and another devoted to taking them away. I simply do not understand why safeguards inserted to protect copyright owners from having their works mistakenly classified as orphan are not extended to this proposed new section – Lord de Mauley, Shadow Minister for Innovation, Universities and Skills, House of Lords, 8 February 2010[7]

There are indications that one of the intentions behind the extended licensing provisions as drafted is to circumvent the 'diligent search' requirement in the case of orphan works.[8]

---

[3] See Latest Bill, accessed on 24/03/10
[http://www.publications.parliament.uk/pa/cm200910/cmbills/089/10089.49-55.html#j901]; also the Copyright, Designs and Patents Act 1988, Chapter Two, paragraph 16: 'The acts restricted by copyright in a work'

[4] 116A(3); 116B(4)

[5] 116C(5)(b)

[6] 116D(1)

[7] Hansard HL Deb, 8 February 2010, c579
[http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/100208-0016.htm#10020866000058]

[8] Copyright Action: 'IPO meeting stalemate', posted 26/02/10 [http://copyrightaction.com/ipo-meeting-stalemate]

> Extended collective licensing should not be used as an excuse to reduce the obligation on users to trace right holders, [or] to seek permission from the right holders concerned – British Copyright Council, response to 'Creative Content in the European Digital Single Market', December 2009[9]

As currently drafted, the provisions in the Digital Economy Bill would potentially place on published authors who wish to keep control of their copyrights the extraordinarily heavy burden of opting out of schemes run by organizations with which they have no connection and that have no obligation to seek to inform them that the scheme exists.

> The only way that you can respond … as a creator is by opting out, assuming you knew that process was going on in the first place. We just think it's incredibly broadly, incredibly badly worded and you cannot begin to believe how open-ended it is. – Feargal Sharkey, chief executive of UK Music, on clause 116B[10]

Collective copyright licensing was developed for use in special cases. Typically, these are cases involving secondary uses, as in the photocopying of already published material, or the broadcasting of recorded music. In such cases, collective licensing may suit the convenience of rights-owners and licensees, who are relieved from the burden of individually negotiating numerous small payments with multiple parties.

Extended collective licensing, in which licensing bodies are empowered by legislation to license works whose rights belong to persons whom they do not represent, developed in the Nordic countries, where it has mainly been applied in much the same cases as voluntary collective licensing elsewhere: chiefly reprographics and broadcasting.

> The broader cultural background may … be said to be small homogenous societies built on a high degree of trust and transparency. – Thomas Riis and Jens Schovsbo, 'Extended Collective Licenses and the Nordic Experience' (January 2010)[11]

The Government has not indicated publicly any compelling special cases that might conceivably justify a departure from the UK's present voluntary collective licensing arrangements. It has resisted calls to confine the orphan works and extended licensing provisions to educational and cultural uses of the works.[12] It has made it clear that it intends the extended licensing provisions to apply to works whose rights-owners are known or easily traced as well as to orphan works.

---

[9] British Copyright Council, 'Creative Content in a European Digital Single Market: Challenges for the Future – Response', p. 2 [http://www.britishcopyright.org/pdfs/policy/2010_004.pdf]

[10] 'UK Music chief: 'Digital Economy Bill will be passed before election', Daily Telegraph, 19 March 2010 [http://www.telegraph.co.uk/technology/sxsw/7478728/UK-Music-chief-Digital-Economy-Bill-will-be-passed-before-election.html]

[11] 'Extended Collective Licenses and the Nordic Experience - It's a Hybrid but is It a Volvo or a Lemon?', Columbia Journal of Law and the Arts, Vol. 33, Issue IV, p. 24 [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1537788_code110134.pdf?abstractid=1535230&mirid=1]

[12] Copyright Action: 'IPO to meet with photographers and play games', posted 23/02/10 [http://copyrightaction.com/forum/ipo-to-meet-with-photographers-and-play-games]

> The [extended] collective scheme should only operate in cases where the prospective user of the work has expended reasonable endeavours and resource in locating the rightsholder. Remuneration schemes, by definition, are not designed to replace individual licensing arrangements. – Authors' Licensing and Collecting Society (ALCS), in evidence to the Gowers Review[13]

It is known that one of the principal lobbyists for extended licensing is the BBC. An extended licensing scheme would assist it in putting its archives of programmes online without its having to track down each individual rights-owner. However, industry representatives consider that there are no grounds for believing that orphan works are a problem in the area of TV drama, comedy and feature films, and that extended licensing would compromise the legitimate interests of authors and other creators in negotiating a fair system of payments.

Under collective licensing, fees are paid at a flat rate and terms of use are identical in every case; yet not all rights are of equal value, even where they pertain to works of a similar kind. It is essential that creators are rewarded in a way that takes into account the demand for their work. Moreover, authors and other creators working in television depend on income from repeats and other commercial uses. If this revenue stream is undermined, creative talent will no longer be able to afford to work in the UK.

> There is a danger ... that without thorough study of potential new business models the demands of public access as regards, for example, the BBC's archive, will trample too heavily on either artistic integrity or the rights of creators to be rewarded for their work and their consequent ability to produce new work. – Personal Managers Association (PMA), evidence to the Gowers Review[14]

There are some resemblances between extended collective licensing schemes and the scheme proposed in the Google Book Settlement agreement, under which Google would market digitised editions of previously published books, but authors and other rights-holders would have the right to remove books from sale. Payments would be channelled through a registry; only registered rights-holders would receive payment for the exploitation of their works, or be permitted to control the uses made of them. The settlement has been heavily criticised, not least by the US Department of Justice.

> [The settlement] essentially … turn[s] copyright law on its head because it eviscerates the requirement of prior approval from the copyright holder. … It is the right to control one's work that creates the incentive to produce it. – William Cavanaugh, Deputy Assistant Attorney General, US Department of Justice, at the Fairness Hearing for the Google Book Settlement[15]

Most professional authors, authors' agents and intellectual property lawyers who have looked closely into the settlement agreement have been appalled by it. A large number of well-known UK authors took the opportunity to opt out of the settlement before the deadline on 28 January.[16]

---

[13] ALCS, evidence to the Gowers Review, p. 25
[http://www.hm-treasury.gov.uk/d/authors_licensing_and_collecting_society_limited_385_341kb.pdf]
[14] PMA, evidence to the Gowers Review, [p. 4]
[http://www.hm-treasury.gov.uk/d/personal_managers_association_352_55kb.pdf]
[15] The Authors Guild et al, v. Google Inc, 18 February, 2010, p. 124
[http://thepublicindex.org/docs/case_order/fairness-hearing-transcript.pdf]
[16] 'Usborne, Phaidon, Sheil Land and leading authors say no to Google', The Bookseller, 22 February 2010

It is a matter of concern and anger to authors that the Government has refused to take up the challenge of defending our rights.[17] Instead, it has been showing a troubling fascination with the deeply flawed model of rights clearance exemplified in the settlement: to wit, appropriating rights en masse, decreeing the terms for use, and leaving it to the authors to opt out.[18]

There have been rumours that Google has been one of the parties lobbying for clause 43, and indications that one of the extended licensing schemes envisaged is a UK Google Books-style operation. There are many problems with the Google Book Settlement, but one of the biggest is that the project would corner, and stifle, an important emerging market for digital books. The settlement is now awaiting judgement in a New York court; there is no knowing how matters will turn out, but many commentators think it unlikely that it will go through in its present form, given the opposition expressed by the Department of Justice. The DoJ has called, at a minimum, for the default opt-in arrangement to be dropped, and for authors to be given a choice whether or not to opt in. It would be sad, to say the least, if the UK were to adopt a version of a flawed system devised across the Atlantic that the US, following careful scrutiny, found to be unwise and unacceptable.

The right to issue a work in a digital edition, including any reissue of a work that has been published in print, has to be regarded as a primary right, like the right to publish a work as a printed book. In a world in which digital publishing is widely expected to overtake the market in printed copies, it cannot be viewed in any other light. The right to license photocopying is an example of a secondary right. Existing collective licensing schemes in the UK apply to secondary rights. Any proposal to apply extended collective licensing to primary rights (such as book digitization) is a matter of special concern.

> The purpose of collective management of copyright is never to substitute for the primary sales market – Caroline Morgan, Copyright Agency Limited, Australia, 'Collective Management of Copyright and Neighbouring Rights' [19]

There are very sound reasons why primary rights are licensed on the basis of contracts that are negotiated on an individual basis between the author and the publisher (or other licensee):

- This allows the author to make the best agreement he or she can for the exploitation of the work, based on the known or likely demand.
- It gives the author control over where the work will appear, and in what form and context, which are matters in which every author has a legitimate interest.

[http://www.thebookseller.com/news/113012-usborne-phaidon-sheil-land-and-leading-authors-say-no-to-google.html]; 'Thousands of authors opt out of Google book settlement', The Guardian, 23 February 2010 [http://www.guardian.co.uk/books/2010/feb/23/authors-opt-out-google-book-settlement]

[17] 'Government slammed by authors over Google', The Bookseller, 4 February, 2010 [http://www.thebookseller.com/news/111639-government-slammed-by-authors-over-google.html]

[18] David Lammy, 'Google book search deal is good news for copyright law', The Times, 19 November 2008 [http://business.timesonline.co.uk/tol/business/law/article5187385.ece]

[19] Caroline Morgan, Copyright Agency Limited, Australia, 'Collective Management of Copyright and Neighbouring Rights', National Workshop for Copyright Awareness and Production, Ulaanbaatar, Mongolia, October 2006 [http://www.accu.or.jp/appreb/10copyr/pdf_ws0610/c2_06.pdf]

> This clause could potentially destroy the principle of direct licensing, which is the most efficient means of ensuring that a rights holder is remunerated exactly and properly for the use of their work, and lose creators the right to control their own economic and moral rights. – Paul Brown, Chairman of the British Association of Picture Libraries and Agencies (BAPLA)[20]

Collective licensing run on a mass basis for fixed-rate fees will not remunerate freelance authors at a level that will sustain high-quality work, nor reward the most popular authors on a basis proportionate to the revenue earned by their work. If primary rights were licensed collectively, instead of on a work-by-work basis, many of the authors who currently make all or part of their living by writing would be unable to continue doing so.

Primary rights are typically licensed on an exclusive basis. This guarantees best return to the licensee on the resources invested in developing and exploiting the work, and the author, in turn, is remunerated appropriately.

Collective licensing schemes issue licenses on a non-exclusive basis. In clause 43 this is prescribed under 116A.3 (which also governs the provisions in 116B): 'An authorisation or licence under the regulations in favour of any person must not preclude any authorisation or licence in favour of another person.'

This is another very important reason why extended collective licensing is not an appropriate way to license primary rights, including digitization rights. The licensing body has no way of knowing what exclusive agreements may be in force, or in process of negotiation. The rights-owner has no necessary knowledge of the licenses issued by the licensing body. If an extended licensing scheme is instituted in respect of primary rights, this will break the system of licensing rights on an exclusive basis and compromise the normal exploitation of published works.

The Google Book Settlement agreement tries to deal with this problem by restricting Google's right to exploit books commercially to books not in print. However, it has been demonstrated that Google's database is highly unreliable when it comes to marking books as unavailable.[21] There is no mechanism for linking different editions of the same work (which may have different ISBN numbers, publishers and even titles), so that older editions are marked as available for commercial exploitation by Google at the same time as newer editions are on sale from booksellers. The potential losses to rights-owners are enormous, from damage to the value of rights and undermined sales. It is impossible that this problem can be avoided under any system by which works are opted in as the default, with the user, or licensing body, having no direct knowledge of the publishing history of any of them. (Under the proposed settlement agreement, Google is not liable for damages for such mistakes; the onus is on the rights-owners to spot them and flag them up: just one of many reasons why it is an abysmal deal for authors.)

It should also be noted that in some cases there are good reasons why certain books should not be reissued: notably books that have been the subject of successful libel suits, or prosecutions under the Official Secrets Act. This the Google Book Settlement agreement fails to consider, and it is hard to see how any extended collective licensing scheme could easily take account of such issues.

---

[20] BAPLA press release: 'How the proposed Digital Economy Bill could kill parts of the photography business', 18 January 2010 [http://www.bapla.org.uk/index.php?option=com_content&task=view&id=46&Itemid=89&favm=3487]

[21] Diana Kimpton, Objection to the Amended Google Book Settlement Agreement, pp. 2–3, 5–6, and attachments (at end) [http://thepublicindex.org/docs/amended_settlement/kimpton.pdf]

Under extended licensing, authors would be co-opted into schemes without their explicit consent, and in many cases without their knowledge. Any system under which publishing rights were licensed over the heads of the authors would conflict with the moral rights legislation in the Copyright, Designs and Patents Bill 1988: in particular, with the right of authors to object to distortion, mutilation or other derogatory treatment of their work. This is an important right because it protects authors' reputations. It depends on the author, and the work, as to what might constitute 'derogatory treatment ': it cannot be dealt with on a mass basis. Moral rights may be waived by the author, but according to the Intellectual Property Office (IPO), only in writing.[22] Research published by IPO last autumn found that authors value their moral rights and would like to see them strengthened.[23]

> Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author – Universal Declaration of Human Rights adopted by the United Nations[24]

The Government has given assurances that opting out of extended licensing schemes will be a simple process.[25] The British Association of Picture Libraries and Agencies (BAPLA) believes that IPO intends that registration to opt out will be 'free to rights holders and managed on a non-commercial basis'.[26]

Nonetheless, it remains the case that extended licensing removes from licensees (typically, well-resourced publishers or media companies) the burden of finding and negotiating with the author, and instead places on authors the burden of finding out that schemes exist and opting out of them (or claiming their share of revenue). This is, let's be clear, a major point of the plan to introduce extended licensing: transferring the transaction costs from the licensee to the creator.

> The right holder to whom it is crucial that her works are not exploited under an E[xtended] C[ollective] L[icensing scheme] has to establish mechanisms for monitoring the market and bear the costs associated with such efforts of monitoring – Thomas Riis and Jens Schovsbo, 'Extended Collective Licenses and the Nordic Experience'[27]

Not all authors are members of professional organisations, or in touch with authors' networks; indeed, not all published authors are professional writers. It is inconceivable to most creative people working in the UK that they should have to take formal action to protect their rights in their published works.

---

[22] Intellectual Property Office, 'Using and buying other people's copyright works', web page, accessed on 24/03/10 [http://ns3.patent.gov.uk/types/copy/c-other/c-usebuy.htm]

[23] '© the way ahead: A Copyright Strategy for the Digital Age', 2009, pp. 20, 27 [http://www.ipo.gov.uk/c-strategy-digitalage.pdf]

[24] Universal Declaration of Human Rights adopted by the United Nations General Assemby, 10 December 1948, Article 27.2 [http://www.un.org/en/documents/udhr/]

[25] 'Easy to opt out of collective licensing says government', The Bookseller, 23 March, 2010 [http://www.thebookseller.com/news/114922-digital-economy-bill-government-says-opting-out-of-collective-licensing.html]

[26] 'The Digital Economy Bill – The BAPLA position', web page, accessed on 24/03/10; [http://www.bapla.org.uk/index.php?option=com_content&task=view&id=46&Itemid=89&favm=3556&stype=story]

[27] 'Extended Collective Licenses and the Nordic Experience ', p. 12 [http://papers.ssrn.com/sol3/Delivery.cfm/ SSRN_ID1537788_code110134.pdf?abstractid=1535230&mirid=1]

> The system [of extended collective licensing] is best suited for countries where rights holders are well organized. – World Intellectual Property Organization (WIPO) and International Federation of Reproduction Rights Organisations (IFRRO), April 2005[28]

The Nordic countries that developed extended licensing have small populations. The largest is Sweden, with a population of nine million. Their languages are not world languages, as English is. Very many works by authors from other English-speaking countries are published or distributed in the UK.

Even defenders of the extended licensing system recognise that it is unfair to foreign rights-owners.

> It may be very difficult for foreign right holders to find out that their works are being used under an E[xtended] C[ollective] L[icensing scheme] and consequently they cannot claim remuneration (or opt out of the ECL for that matter) – Thomas Riis and Jens Schovsbo, 'Extended Collective Licenses and the Nordic Experience'[29]

Unless applied very narrowly and in very limited, specific circumstances , extended licensing may place the UK in breach of its obligations under the Berne Convention. Signatories to the Berne Convention guarantee that 'the enjoyment and the exercise' by foreign authors of the protected rights 'shall not be subject to any formality'.[30]

> The purpose of … article [5.2 of the Berne Convention] is to avoid constraining the rights holder to check the exercise of his rights in each country. Since extended collective management is country based … it means that the rights holder has to actually check each country, with potential linguistic problems and – even small – variations in procedures, to keep control of the exercise of his rights … This is hardly simple, even with the help of modern communication media. Furthermore, given the nature of the problem addressed, the formality prohibition is necessarily intended to apply to any type of national formality, however instituted – Bernard Lang, 'Orphan Works and the Google Book Search Settlement – an International Perspective'[31]

Exceptions to the Berne Convention are permitted by legislation, but only in 'certain special cases'. Any reproduction in such cases 'must not conflict with a normal exploitation of the work' or 'unreasonably prejudice the legitimate interests of the author'. All three of these conditions must apply.

The powers granted to the Secretary of State under clause 116B are extremely broad. The Government has cited no special cases to justify the imposition of extended licensing on works whose authors are known or may be easily traced. The clause contains no limitations to prevent its application to uses that would interfere with a work's normal exploitation or operate to the detriment of the author's legitimate interests.[32]

---

[28] Joint document on collective management in reprography, p. 18 [http://www.ifrro.org/upload/documents/wipo_ifrro_collective_management.pdf]

[29] 'Extended Collective Licenses and the Nordic Experience ', p. 19 [http://papers.ssrn.com/sol3/Delivery.cfm/ SSRN_ID1537788_code110134.pdf?abstractid=1535230&mirid=1]

[30] Berne Convention, Article 5.2 [http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P109_16834]

[31] Bernard Lang, Institut National de Recherche en Informatique et en Automatique (INRIA), 'Orphan Works and the Google Book Search Settlement – an International Perspective', September 17, 2009, p. 6 [http://pauillac.inria.fr/~lang/ecrits/liste/orphan-gbs.pdf]

[32] Berne Convention, Article 9.2 [http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P140_25350]

> We do not understand or accept the need for extended licensing schemes, other than in relation to orphan works, except possibly in very limited and specific circumstances and after the fullest consultation with copyright owners likely to be affected. By contrast, the breadth of the power given to the Secretary of State is very wide and lacks any detail or limitations – The Society of Authors[33]

One of the fears of UK authors, and authors world-wide, is that extended collective licensing and similar schemes will be brought in separately on a broad basis by countries across the world, imposing impossible administrative burdens.

If this were to happen, the international copyright regime would have ceased to function to protect authors' rights. The consequences would be disastrous – not least for the UK's creative industries.

Orphan Works

The Bill would permit works whose rights-owners reportedly could not be traced to be used for commercial purposes. It is regrettable that the Bill uses the emotive and inaccurate term 'orphan works' for what might be more properly termed 'works with unlocated copyright-owners'.

In the case of printed written works, it has not been shown that legislation of this kind is needed. No evidence has been produced that publishers seeking to reprint, editors seeking to anthologise, or authors wishing to make adaptations experience significant difficulties in tracing rights-owners of out-of-print written works, and there is plenty of anecdotal evidence to the contrary. Moreover, the ALCS reports a very high degree of success in identifying and contacting authors of out-of-print works for the purpose of paying fees for photocopy revenues.[34]

Books and other print publications are among the least likely creative products to become 'orphaned'. Virtually all published written works carry the names of author and publisher and the publisher's address. Meanwhile, since the development of the web, it has never been easier to trace authors, authors' representatives, publishers, and, where relevant, business takeovers.

Regrettably, it is not unknown for publishers, media companies or editors to use works (especially short works and excerpts) without troubling to clear permissions, even in cases where the author could easily be contacted; they simply wait to see if he or she finds out. There is a serious risk that the orphan works provisions in the Bill will encourage this kind of behaviour.

In response to concerns expressed by professional photographers, the Government has asserted that 'Any use of an orphan work will require payment of a fair licence fee, and this fee will be held safely and kept available to be claimed by the rightful owner should they come forwards.'[35] But for publishing or broadcasting uses there is no such thing as a 'fair licence fee'; there is only the market rate for the work, as established in negotiations between the rights-owner and the licensee. This rate will vary depending on a number of factors that may include the likely profitability of the intended use, the quality of the work, the reputation of the author, the value of the work in terms of its

---

[33] 'The Digital Economy Bill', web page, accessed on 25/3/10 [http://www.societyofauthors.org/information-and-news/news-for-authors/news_detail.html?newsarticlepk=05AE1091D44E558B00741DE4CEE781BD]

[34] Declaration of Owen Atkinson, CEO of ALCS, attached to the Plaintiffs' Memorandum in Support of Motion for Final Approval in The Authors Guild et al, v. Google Inc, 11 February 2010, pp. 3–4 [http://thepublicindex.org/docs/amended_settlement/owen_atkinson_declaration.pdf]; see also evidence to the Gowers Review, p. 37 [http://www.hm-treasury.gov.uk/d/authors_licensing_and_collecting_society_limited_385_341kb.pdf]

[35] Department for Business, Innovation and Skills, Intellectual Property Office and Department for Culture, Media and Sport, 'What the Bill means for photographers ', 2 March 2010 [http://interactive.bis.gov.uk/digitalbritain/wp-content/uploads/2010/03/Copyright-Modernisation-Photographers.pdf]

specific contribution to the creative project, the extent to which another work might be substituted for it, and so on. This 'fair licence fee' is a chimera.

There has been no explanation as to who is going to fix the rates for the use of works with unlocated owners, and on what principles. Nor is it specified who shall hold the unclaimed fees in trust.

When owners of works that have been treated as orphans come forward to claim their property, they may feel that their works have been licensed at too cheap a rate, or they may have objections on business or moral rights grounds to the uses made of their works. Certain kinds of exploitation may injure the value of a work and/or damage the author's reputation. What remedies will be available in such cases?

It is certain that in some cases works will be used without credit or attribution, in a breach of the author's moral right to be identified.

Orphan works are defined in 116C as a work for which someone has carried out a diligent search to find the owner of the copyright, or an interest in the copyright, and has failed to find them.

Clause 116A provides for orphan works to be licensed in two ways. Licensing bodies may be authorised to issue licences to users, but the Secretary of State may also grant authorisations directly. Every licensing body that licenses orphan works, either directly or under an extended licensing scheme, must keep an orphan works register, available to the public. Every user who is directly authorised by the Secretary of State must do the same.

Any orphan works scheme would impose on all authors a burden of constant vigilance, on pain of harm to their copyrights. But this system of multiple registers seems calculated to make it as difficult as possible for authors to check to see if any of their works have been misclassed as orphans.

The Government has stated that 'before a user can apply for a licence to use the work, they must first carry out a diligent search for the original owner of the right'.[36] This is not strictly true. Subclause 116D(4)(b) states that a work may be entered in an orphan works register if 'the authorised person' has either carried out a diligent search along lines laid down in the Bill or 'has reasonable grounds for believing that another person has taken those steps and that the owner of the interest has not been found'. So only the first person interested in licensing a work needs to actually carry out a search for the owner of the rights, and on the basis of that search a work may be entered in more than one register.

Under paragraph 4 of Schedule A1 (Schedule 2 of the Digital Economy Bill), the Secretary of State is empowered, but not compelled, to introduce penalties, including fines, for breaches of the duty to carry out a diligent search/have reasonable grounds to believe that such a search has been conducted before entering a work in an orphan register, and for not removing a work from the register if it appears that the required search was not, after all, carried out, or if the copyright-owner is found. Possible financial penalties are capped at £50,000. It is not clear whether this is an overall cap, or whether, in the event of breaches affecting multiple works, multiple penalties would be imposed.

[36] ibid

In the event that the Secretary of State does not take up the powers to impose penalties, there will, apparently, be no restraint on infringers beyond the risk of legal action by a rights-owner. More on that in a moment.

Subclause 116D(7) is very disturbing: it permits the Secretary of State to make regulations that would set aside the requirements for diligent search, or for reasonable belief that such a search had been conducted. All that would be needed would be for an authorised user to list the work in an 'orphan works' register. Worse: even if an authorised user were to find the copyright-owner of a work that had been registered as an orphan, there would be no obligation to remove the work from the register.

It is bizarre and disquieting that the orphan works provisions should contain a subclause that entirely subverts the safeguards written into these clauses, and nullifies the definition of an orphan work incorporated in the Bill. It does not inspire the confidence that there ought to be in the good faith intentions behind the orphan works provisions.

Subclause 116D(8) refers forward to Schedule A1: in the event that any authorised user took advantage of regulations made under 116D(7), he/she would remain liable to any penalties imposed under paragraph 4. However, as noted above, there is no requirement that such penalties should be imposed. If the Secretary of State sees fit to make regulations under subclause 116D(7), it is the less likely, presumably, that penalties will be imposed under paragraph 4.

Subclause 116D(8) also states that in cases where the Secretary of State had set aside the requirement for diligent search, etc, the failure to carry out the required steps would nonetheless be 'actionable as a breach of statutory duty owed to the owner of the [copyright] interest': it would be open to the copyright-owner to take action in the courts.

The National Union of Journalists (NUJ) and other organisations have made sure that the Government is well informed about the difficulties that freelance creators face when attempting to use the courts, especially when suing well-resourced corporate infringers.[37] The Government must be fully aware that under the present arrangements, a right to sue is no protection at all. Most copyright cases brought by freelance creators involve relatively small sums, which nonetheless are important to small creative businesses. It is no longer possible to bring copyright cases in the small claims courts.[38] Even claims involving small amounts must be dealt with in the County Court 'multi-track process', and claimants will be liable for substantial costs if they lose their case, or the court makes an award that is lower than, or the same as, an offer made by the defendant. This system favours litigants who have good representation and deep pockets, and companies are well aware of this.

In Canada, where orphan works legislation is in force, licences for the use of works with unlocated copyright-owners are issued by the Copyright Board of Canada, a statutory body.[39] By contrast, clause 116A provides for licences to be issued by licensing societies, and also for certain bodies to self-license.

---

[37] National Union of Journalists response to the Gowers Review, p. 8 [http://www.hm-treasury.gov.uk/d/national_union_of_journalists_387_1013kb.pdf]

[38] London Freelance, 'Copyright cases covered', web page, accessed on 29/03/10 [http://www.londonfreelance.org/fl/0803scc.html]

[39] Copyright Board of Canada, 'Unlocatable Copyright Owners', web page, accessed on 29/03/10 [http://www.cb-cda.gc.ca/unlocatable-introuvables/brochure2-e.html]

Licensing societies are answerable to their membership, who are copyright-owners or other rights-holders, with an interest in seeing that any licensing scheme is properly conducted, and that adequate safeguards are in place, and are duly complied with. Nonetheless, it should be clearly laid down that they have a duty of care towards rights-holders who are not members of their society.

Self-licensing arrangements are altogether more problematic. The British Library, the BBC and Channel Four are all rumoured to be planning to seek authorisation to issue themselves licenses for the use of works whose copyright-owners they have failed to locate.

There is a glaring conflict of interest apparent in these cases. Who is going to look out for the interests of the absent copyright-owners? Particular areas of concern are:

- Who will ensure that 'diligent search' procedures are properly carried out?
- Who will hold the unclaimed payments in readiness?
- Who will certify the claims of absent rights-holders who come forward, and on what basis?

Licensing societies are active in continually seeking out prospective members and people for whom they hold payments. No obligation is placed on self-licensing bodies under this legislation to search for absent copyright-owners beyond the initial effort; and if the work appears on a copyright register held by someone else, they are even spared from conducting that.

The self-licensing procedure is fraught with dangers for the absent copyright-owners.

Clause 46

Clause 46[40] of the Digital Economy Bill confers on the Secretary of State wide-ranging, ill-defined powers, 'in connection with the amendments' made in the Bill, to amend, repeal or revoke by statutory instrument Acts passed before it or in the same session, or subordinate legislation made before it is passed.

> In agreeing to such provisions, Parliament is giving up its powers of legislative oversight to the executive. Liberty has consistently said that secondary legislation should not be used to amend primary legislation. It is the role of Parliament to scrutinise all substantive legislative changes – Liberty, 'Briefing on the Digital Economy Bill'[41]

This is a 'Henry VIII' clause of a similar nature to the original clause 17, which was thrown out in the House of Lords. It is unconstitutional and unnecessary, and, like clause 43, should be removed from the Bill.

Gillian Spraggs

30 March, 2010

[40] See Latest Bill, accessed on 29/03/10 [http://www.publications.parliament.uk/pa/cm200910/cmbills/089/10089.56-59.html#jConseq]

[41] Liberty, objecting to the original clause 17 in 'Report Stage Briefing on the Digital Economy Bill in the House of Lords', p. 10 [http://www.liberty-human-rights.org.uk/pdfs/policy10/digital-economy-bill-house-of-lords-report-briefing.pdf]