

November 8, 2012

Dr. Vince Cable,
Secretary of State for Business, Innovation and Skills
House of Commons London,
SW1A 0AA United Kingdom

Dear Dr. Cable

We collectively represent the interests of creators and copyright owners of visual works in the United States. We respectfully submit this letter to express our deep concern with the provisions in Clause 68 of the Enterprise and Regulatory Reform Bill affecting copyright owners in visual works.

Among copyright-protected works, photographs and illustrations are perhaps most vulnerable to loss or removal of information identifying the creator and copyright owner. As their livelihoods are fundamentally dependent upon income earned by licensing the copyrights underlying their works, professional photographers and illustrators routinely append identifying information to their works prior to distribution. Despite their best efforts, rights holders are powerless to prevent the loss or removal of this vital information from their works after distribution. "Created today, orphaned tomorrow" is an unfortunate reality for professional visual artists. As images move through the digital space, identifying information is routinely stripped from the files.

In a globally networked marketplace, images published in any one country are instantly available to persons in all other countries. Despite advances in technology, there is no viable means by which any person or business might reliably and consistently ensure that photographs or illustrations of unknown origin are UK works, eligible for unlicensed or collectively licensed usage in the UK under the Bill.

A UK work, created and owned by a UK citizen:



© 2012 Pete Jenkins, UK

A USA work, created and owned by a USA citizen



© 2012 Jeff Sedlik, USA

We assert that the majority of photographs and illustrations deemed to be “orphan works” in the UK under the Bill will be works created and owned by foreign persons and businesses. Involuntary injection of these foreign works into a UK Extended Collective Licensing program or similar legalized infringement scheme with neither the knowledge or consent of the foreign copyright holders is morally reprehensible, contrary to the letter and spirit of UK and USA copyright laws, and unquestionably violates the provisions of Berne and TRIPS.

If enacted, the Bill will permit foreign works to be used without the permission of or credit and compensation to their rights holders. The prospect of unknown, ongoing unlicensed usage of foreign works in the UK will prevent any rights holder in any country from licensing exclusive rights to any party. In many instances, unlicensed usage of foreign work in the UK will drastically devalue the works throughout their copyright life. For example, a foreign “orphan work” used by a UK Publisher on a UK book cover under the Bill would never be considered by any other publisher for licensed use on another book cover in the UK or in any other country. By legalizing the unlicensed exploitation of copyrighted works created and owned by foreign rights holders, the Bill will conflict with (and in some instances, prevent) their normal exploitation of the works, unreasonably prejudicing their legitimate interests.

Foreign copyright owners cannot reasonably be expected or required to monitor orphan works listings and notifications in the UK and all countries

in order to protect their works and receive compensation. Foreign copyright owners cannot be expected or required to register as copyright owners in the UK and every other country of the world in order to protect their works and receive compensation. The UK has no legal right to determine the fees or other compensation due foreign creators in exchange for the exploitation of their copyrights in the UK. Legalizing the usage of foreign works without the knowledge and permission of the copyright owners will jeopardize the exclusive rights of those owners.

If the use of foreign works in the UK is directly or indirectly permitted by this Bill, a firestorm of international litigation will immediately ensue, and any persons, businesses or institutions making use of foreign works under this Bill would be well served to expect to be promptly sued by the copyright holders, incurring significant liability for copyright infringement. Our members are likely to aggressively pursue legal remedies for any copyright infringements resulting from this Bill. Such remedies will include injunctive relief, actual damages, disgorgement of profits, statutory damages of up to \$150,000 USD per infringement, and reimbursement of (considerable) attorneys' fees and costs of suit.

While we understand and agree that a solution to the orphan works challenge must be identified and implemented, this Bill permitting legalized infringement of foreign works and injecting foreign works into a UK Extended Collective Licensing scheme creates more problems than it solves. We encourage the UK Government to work with stakeholders to redraft the Bill so as to protect and maintain the exclusive rights of foreign copyright holders, in compliance with Berne and TRIPS.

Respectfully Submitted,

Mr. Eugene Mopsik
Executive Director

American Society of Media Photographers

Mr. David Trust
Chief Executive officer

Professional Photographers of America

Mr. Sean D. Elliot
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