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© + IP – THE BACKGROUND

Creative industries currently account for 8.2% of the UK GDP and growing at twice the rate of the economy as a whole – averaging 5 per cent a year.

Copyright law and IP are long overdue a legal review, reflecting the digital age in which we all live.

This is now under way. The Gowers review of IP in 2006 set the ball in motion, and this is being followed by consultation under David Lammy MP.

Some publishers and broadcasters rely on “due diligence”, “fair use” “fair dealing” and other instruments to protect themselves from transparency in IP, copyright and license management. This has become increasingly problematic, especially when re-licensing material in a new project or in a revised edition is required.

DUE DILIGENCE - ORPHAN WORKS - CHEAP STOCK

THE PROBLEM

It is sometimes impossible to identify or contact the original source of some of the content required for licensing (or re-licensing in a new edition or when adding supplementary electronic rights etc.)

Where Zooid were not the original researchers, the original licensing data may not always be available, may be on old systems or may be inaccurate.

PAST SOLUTIONS

Zooid and clients have occasionally exercised “due diligence”, in order to demonstrate that all reasonable means have been used to identify and licence so-called ‘orphan works’ from photographers / agencies / footage libraries etc. who are now beyond reach (died, bought-out, pictures withdrawn, moved away etc.)

SOLUTION SHORT-FALL

Due diligence *might* mitigate against claims made by copyright holders, but can not be depended upon to limit claims to a ‘reasonable fee’. The future accepted definition of ‘due diligence’ is now likely to change and become much more onerous on the ‘publisher’ (see below)

RECENT DEVELOPMENTS

The USA will pass an Orphan Works Act in the near future and the UK now wishes to take a lead in Europe on copyright matters following the Gowers Report. Consultation on IP in the UK is now underway.

Furthermore, developments in IPTC metadata, XML compatibility, a new US Copyright Registry, acceptance of PLUS (the Picture Licensing Universal System, of which Zoid is a member) by large US educational publishing houses, make a compelling case for establishing a comprehensive IP policy sooner rather than later. Zoid is already providing this to several clients. The widespread use of microstock agency assets is also set to decline rapidly for related reasons.

LIKELY OUTCOME

Copyright Registries and/or the deposit of orphan licensing fees with collecting societies are most likely to be promoted as solutions. Neither are likely to satisfy the transparency that most of our clients will feel most comfortable with and many archives actively oppose this proposal.

A robust IP policy will be needed to circumnavigate concerns over orphan works, due diligence and fair use.

In Zoid's 30+ years of experience, it is very unlikely that any form of copyright registry or due diligence guidelines will provide any comfort to licensees (publishers, broadcasters etc.) Zoid's research already uncovers such 'orphan' sources where these exist, even under current conditions, and clients will therefore not benefit from these new proposals. Crucially, works are also unlikely to incorporate the metadata required in order to locate them. Finally, **the establishment of strictly defined 'due diligence' procedures will, in any event, make such searches uneconomic and self-defeating for licensees.**

RESOLUTION

Establishing an IP policy (incorporating orphan works) sooner rather than later and avoiding 'due diligence' and unreliable or missing metadata in cheap stock is necessary to meet the licensing requirements of tomorrow and mitigate the dangers of **heavy fines** in IP and copyright prosecutions. Without such a policy, licensees may soon find themselves questioning the status of their licensing even when it has only recently been cleared as some assets now become unacceptable for reliable re-use (re-licensing).

The huge growth in IP as a significant part of US and UK economies makes safe licensing more important than ever as copyright infringements become more commonly contested. Legal developments already underway make it vital than licensees can reliably continue to expect a long-term return on their investments in IP assets.

Please call me on +44 20 7267 9990 if you would like to discuss any of the above.
Richard Philpott, Monday, 23 March 2009



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