



You think you own your own photographs? Think again.

The UK Government wants to introduce a law to allow anyone to use your photographs commercially, or in ways you might not like, without asking you first. www.stop43.org.uk



EXECUTIVE SUMMARY

Stop43 strongly advocate the establishment by statute of a Digital Copyright Exchange to fulfil the purposes and functions of our proposed National Cultural Archive¹, at least for photographs, and perhaps also for other media types.

ABOUT STOP43

Stop43 is a self-funded collective of professional freelance and micro-business image creators, between them members of [Artists' Bill of Rights](#), [The Association of Illustrators](#), [The Association of Photographers](#), [The British Institute of Professional Photography](#), [The British Press Photographers' Association](#), [Copyright Action](#), [EPUK](#), [The National Union of Journalists](#), and [Pro-Imaging](#): professionals who were sufficiently concerned and motivated by the threat that [Digital Economy Bill Clause 43](#) posed to our livelihoods that we took [direct action](#). We had [the support of the 16,000 members of the ten organisations listed on our website](#), and that of **thousands of photographers**, as proven by their direct lobbying action that resulted in Clause 43 being removed from the Digital Economy Bill. Since then, professional illustrators and members of the cultural heritage sector who understand and support our position have joined us and contributed to this submission. **Stop43 have a mandate to lobby for our [8 tenets](#) from the 2,100+ members of our [Facebook Group](#).**

QUESTION ONE

Stop43 agree with some stated reasons and assertions, and disagree with others. We will restrict our answers and examples to those which apply to photography. Production, ownership, usage and value chains, market customs and the degree of professionalisation and corporatisation of the other major media types vary from that of photography, in some cases markedly. **One size does not fit all.**

"Copyright licensing, involving rights owners, rights managers, rights users and end users across the different media types, in the three defined copyright markets, is not fit for purpose for the digital age."

There are seven reasons given for this. Copyright licensing is:

1. expensive (both the licensing process and the cost of rights)

We will answer these two assertions separately.

a. **The licensing process** can be regarded as being expensive if a significant proportion of the final sum paid by the licensee is lost to the licensing process itself, rather than contributing towards the value gained by the licensee. This largely results from two factors:

- For existing work, inefficiencies in identifying or contacting the rights owner or manager; establishing, communicating and agreeing requirements and usage, and making payment;
- for commissioned work, inefficiencies in establishing, communicating and agreeing requirements and usage, and making payment.

¹ <http://www.stop43.org.uk/proposals/ipreview/ipreview/nca.html>

It is now true to say that almost all image distribution and licensing is electronic. Almost all professional photographers (the rights owners) have websites; a significant proportion operate their own web shops. All intermediaries (stock image libraries, photo agencies) have websites; rights users and end users in Markets B and C (and occasional users in Market A) can conclude preset licensing transactions via the libraries' websites, pay by various electronic means, and immediately download usable files of a quality suitable for the licensed purposes. The fact of this is immediately evident to anyone who visits the websites of Getty Images², Corbis Images³, Alamy⁴, any number of microstock⁵ libraries⁶, and photographers who manage their own licensing^{7,8}.

A DCE as envisaged in Stop43's National Cultural Archive proposal⁹ could be expected to bring the brand recognition and efficiencies of scale offered by traditional intermediaries to rights owners who are not represented by rights managers, such as amateurs. This should result in increased trading volume. It will also result in a higher proportion of the fee paid by the licensee to be retained by the rights owner, with commensurate increase in tax take from the transaction and an increase in tax take overall as a proportion of the market.

RECOMMENDATION; A DCE which functions as a widely known platform for image search software that has the functionality demonstrated by the Picscout ImageIRC¹⁰ system can be expected to reduce the costs of the licensing process, and make legal licensing of 'found' photographs a practical alternative to simple infringing use, which at present is endemic and of catastrophic proportions.

b. The cost of rights in an undistorted, functioning free market is no-one's business save that between licensor and licensee: to assert or try to legislate otherwise is to attempt to distort and undermine the market.

Like other forms of IP, photographic licensing in the higher markets is usually based on a mutual agreement of the value of the image to its licensee^{11,12}. In a free market no-one is obliged to sell; if a rights owner or rights manager regards the maximum fee offered by a potential licensee insufficient in return for the value the licensee can be expected to gain from their use of an image, or objects to the use to which the image is to be put, it is perfectly right and proper for that rights owner or rights manager to terminate the negotiation. **No-one must be obliged to trade at a loss or undervalue their property.**

Therefore the fact that intending rights users complain that the cost of rights is too high merely reveals the structural weakness at the heart of their businesses: they cannot afford or do not wish to pay a proper market rate for the assets they intend to use. In effect they are running (or intend to run) an insolvent

² http://www.gettyimages.co.uk/CreativeImages?isource=gbr_home_FTV_quicklinks_allStockPhotos

³ <http://www.corbisimages.com/>

⁴ <http://www.alamy.com/>

⁵ http://en.wikipedia.org/wiki/Microstock_photography

⁶ <http://www.istockphoto.com/>

⁷ <http://www.webbaviation.co.uk/>

⁸ <http://www.agripicture.com/>

⁹ <http://www.stop43.org.uk/proposals/ipreview/ipreview/nca.html>

¹⁰ <http://www.picscout.com/imageirc.html>

¹¹ http://c4c.the-aop.org/pdfs/Licensing_Guidelines.pdf

¹² <http://www.ampimage.com/bur.htm>

business based on undervaluing the assets they use, or simple theft. There is ample evidence that both situations prevail^{13, 14, 15}.

RECOMMENDATION: A DCE which is constructed to:

- *Allow prices to be set or negotiated by the rights holder, subject to controls on unfair competition (such as the tariffs currently set by the Copyright Tribunal);*
- *Serve as a genuine marketplace independent of sellers and purchasers, for example on the model of independent traders using amazon.co.uk to sell goods, rather than simply being an aggregated rights database;*
- *Be open to access by individuals and businesses, free at the point of use, to open standards that mean firms can readily write software to automate access and provide services that rely on information gathered or licences purchased via the DCE, to facilitate the development of businesses in the emerging markets supported by the DCE.*

- as the Government Response to Hargreaves¹⁶ says it should, can be expected to minimise transaction costs as far as is practicable, and facilitate achievement of the optimal level of transaction fee appropriate to each individual transaction. This is what a genuinely free market is expected to provide.

2. *The intercession of intermediaries and middlemen*

The intercession of large agencies in the image licensing process has not driven up the cost to licensees: quite the opposite¹⁷. Rather, the oligopsonist¹⁸ nature of the small number of large picture libraries vs. the large number of supplier rights owners has resulted in an overall reduction in average levels of licence fees paid by licensees, and a near-catastrophic collapse in fees received by rights owners.

For example, Getty Images now typically retains up to 70% of a license fee, passing on a mere 30% to the rights owner¹⁹ who has assumed all of the costs of the image's production, and risk if the image does not sell. When an image has been licensed as part of a subscription deal²⁰ to a Market A bulk user such as a newspaper, the eventual fee received by the rights owner can be less than one dollar. Contributors to the EPUK professional editorial photographers' forum frequently report licence sales made in this way of just a few pence.

Stop43 should point out that in an industry such as photography, in which compared to many of the other major media types the cost of production, cost of distribution, and corporatisation of the sector are all relatively low, it is in the Treasury's interest that the creator rights owner retains as much value as possible, because this will result in the maximum tax take from the sector. Corporatisation reduces tax take as a proportion of the value of the market, not least because multinational corporations can base themselves in the most favourable tax jurisdictions, operate complex schemes such as the Dutch Sandwich to reduce their tax liabilities, and export their profits out of the UK economy²¹. Getty Images does all of these things.

¹³ <http://www.thelawyer.com/permission-before-you-publish/78733.article>

¹⁴ <http://www.stop43.org.uk/proposals/ipreview/ipreview/ipreview/evidence.html>

¹⁵ http://www.jeremynicholl.com/blog/wp-content/uploads/2010/12/DM_COMPLAINT.pdf

¹⁶ <http://www.ipo.gov.uk/ipresponse-full.pdf> page 5

¹⁷ <http://www.aphotoeditor.com/2011/04/05/new-getty-contract-met-with-apathy/>

¹⁸ <http://en.wikipedia.org/wiki/Oligopsony>

¹⁹ <http://www.aphotoeditor.com/wp-content/uploads/2011/04/2011-contributor-agreement-v.4.0-d-sample-english.pdf>

²⁰ <http://www.quora.com/How-do-you-negotiate-a-good-subscription-deal-with-a-digital-photo-agency-library>

²¹ <http://www.stop43.org.uk/proposals/ipreview/ipreview/ipreview/proof.html>

RECOMMENDATION: A DCE which acts as a platform uniting intending users of images 'found' on the Internet²² with their rights owners or managers can be expected to reduce the adverse effects of intermediary aggregators on licence fees received by rights owners whilst not necessarily increasing the overall costs of the licences to rights users and end users. In facilitating transactions at this level, rather than allowing the market for stock to be dominated by multinational corporations, more of the economic benefit from this sector will remain within the UK economy, more tax paid to the UK Treasury, and less profit from the sector exported from the UK. All of these consequences must be considered desirable under current economic circumstances.

3. difficult to use

In terms of the licensing process, the profitability of the large intermediaries is a direct function of the efficiency of their websites in enabling a prospective licensee find the appropriate image for their purpose, construct the appropriate licence, pay, and download the image file. The best of these websites are among the most efficient on the commercial Internet in terms of ease of use and transaction, and it is difficult to see how this situation might generally be improved, given that existing market competition drives this efficiency of design and use.

RECOMMENDATION: A DCE as envisaged in Stop43's National Cultural Archive proposal can be expected to bring a similar standard of ease of use and transactional efficiency to intending users of images they have found on the Internet which are not managed by picture libraries or agencies, and this can be expected to result in growth of such transactions.

4. difficult to access

There is little difficulty in licensing photographs when the rights owner or manager is known.

Photo licensing and distribution made a very early move to the Internet. Most professional photographers have their own websites; many run their own stock libraries from which licenses can be negotiated and bought, and photographs downloaded, quickly and efficiently. Corporate libraries such as Getty Images, Corbis Images, Alamy, iStockPhoto and others make huge numbers of photographs available for straightforward, quick, standardised licensing.

The licensing process can be difficult to access if the rights owner or manager cannot easily be found and contact made. This, of course, is a characteristic of 'orphan works'. For photographs, image search software is improving rapidly and the Picscout ImageIRC system is fully capable of connecting an intending user of a found image to its rights owner or manager for licensing directly, if that image is registered with Picscout. Stop43 regard the provision of a platform for functionality such as this as a crucial requirement for a DCE.

RECOMMENDATION: A DCE for photographs modelled on the best practice of the large commercial libraries, including where appropriate simple single-click licence terms for amateurs and the general public not conversant with the jargon of professional licensing, can only serve to stimulate licensing activity in this sector.

5. insufficiently transparent

When licensing existing photographs the negotiation takes place either with the rights owning photographer, or their appointed agent, usually a picture library. This process is usually straightforward. Given the lack of layers of intermediaries it is hard to see how the process could be made more transparent than it already is.

That said, the royalty split between rights manager (commercial library) and rights owner (photographer) is rarely apparent to rights user and end users.

RECOMMENDATION: A DCE structured for licensing photographs should offer high levels of transparency, especially when licensees understand that the bulk of the licence fee will reach the rights owner. This form

²² <http://images.google.co.uk/imghp?hl=en&tab=wi>

of transparency can be expected to reduce public hostility towards what they often perceive to be exploitative corporate intermediaries.

6. *siloed within individual media types (at a time when more and more digital content is **mixed media** and **cross-media**)*

It is perfectly reasonable and appropriate for licensing processes and terms to be tailored to the requirements of individual media types and uses.

Individual types of media differ, whether or not they are used in mixed-media or cross-media contexts, and **let's not forget that 'cross-media' simply means extra uses**, with which photographers are familiar and can usually accommodate in their licensing terms.

Some media such as music and audio-visual are real-time and temporal, others are not. They are 'consumed' differently, and have different usage and value chains²³.

Take the example of an illustrated book. The text author might have an exclusive agreement with the book's publisher. Its photographs might not be exclusive to the book, but also be licensed elsewhere, and licensed to the book's publisher strictly for a certain territory, for a specific length of time, and for a defined print run. Yes, the book is 'mixed media' (text and pictures) but its embedded licensing structure is not necessarily homogenous or simple. Any attempt to treat it as a single entity for subsequent re-licensing is likely to breach licensing agreements elsewhere.

A DCE in which all of the component parts of that book were individually registered would facilitate proper re-licensing without breaching underlying contractual obligations.

RECOMMENDATION: A DCE which simplifies and reduces licensing transactions and transaction costs, as described earlier, will in turn simplify licensing for mixed media and cross-media usage.

7. *victim to a misalignment of incentives between rights owners, rights managers, rights users and end users*

This is certainly the case in markets dominated by oligopsonistic market bullies such as the Editorial, PR, and Corporate Photography markets²⁴. It is also becoming true of the stock image market: see remarks made above.

RECOMMENDATION: A DCE which acts as a neutral, trusted rights exchange and market facilitator, impartial and not favouring any party within a transaction, with all of its costs out in the open, can be expected substantially to correct misalignment of incentives between rights owners, rights managers, rights users and end users^{25,26}.

8. *insufficiently international in focus and scope*

Professional photographers generally wish to license their work for commercial use as widely as possible. Few photographers refuse international licences when the fees are appropriate and the chances of their client evading payment or making infringing use are low. Sadly, this is not always the case. For example, several EU countries are notoriously bad payers and many photographers are wary of dealing with them.

RECOMMENDATION: A properly-constructed DCE should improve the international focus and scope of UK image licensing.

As a result of copyright licensing not being fit for purpose, the following seven claims are made:

²³ <http://www.stop43.org.uk/proposals/ipreview/ipreview/ipreview/use.html>

²⁴ <http://www.stop43.org.uk/proposals/ipreview/ipreview/ipreview/markets.html>

²⁵ <http://www.useplus.com/index.asp?>

²⁶ <http://www.epuk.org/Opinion/985/on-the-plus-side>

1. the size of the pie for rights owners/managers is smaller than it could be

In photography it is definitely true that the size of the pie for rights owners/managers is smaller than it could be. However, this has little to do with the 'unfitness for purpose of copyright licensing'. It is more a consequence of the predatory actions of Market A oligopsonists upon Market C suppliers, and catastrophic, widespread copyright infringement in all markets.

Ignoring for the moment the encroachment of inexperienced amateurs into business territory that was once the preserve of experienced professionals, a combination of the corporatisation of stock photography (with its concomitant and ongoing adjustment of typical royalty splits to the benefit of the library, and to the detriment of the photographer rights owner) and the extremely widespread and endemic infringement of photographers' copyright, not least by large media organisations^{27,28}, rights owners and managers suffer increasingly unmanageable losses.

These can be put down to:

- The widespread belief among the general public and businesses that 'everything on the Internet is free';
- The widespread belief among businesses that their infringement of photographs will go undetected;
- The knowledge that if their infringement is detected, the damages they will have to pay are unlikely to exceed the licence fee they would have paid for that use at first; and therefore
- The positive incentive to infringe, because in aggregate such businesses will pay less for the copyright assets they use than if they were to licence every use properly.

A DCE operating as a platform for automated picture search software can be expected significantly to increase the detection rate by photographers of infringements of their work. This in turn can be expected to influence infringers' expectations of being caught. In tandem with simple and cheap access to effective, proportionate and dissuasive remedies for infringement the result should be a net reduction in infringement.

If infringement of a DCE-registered image were to be treated by the courts as being flagrant²⁹ by definition, and the enhanced penalties for flagrancy awarded as a matter of course³⁰, this could be expected to lead to a very significant reduction in infringement by businesses leading to an immediate improvement in trading conditions for rights owners and managers.

Most digital photograph files on the Internet are 'orphaned' in the sense that, having been stripped of whatever metadata they possessed^{31,32}, they have become anonymised and their rights owners can be hard to find. Anyone wishing to make legal use of these photographs cannot, and so they usually make infringing use instead. This creates a very severe reduction in the size of the overall pie available to rights owners and managers.

RECOMMENDATION: A DCE which operates as a 'de-orphaning' platform, leading intending users to rights owners for proper licensing as the PicScout ImageIRC system demonstrably does, can be expected to increase markedly the size of the pie for rights owners and managers.

2. the share of the pie going to rights owners is smaller than it could be

Oligopsonist Market A/B intermediaries and rights users have between them caused a near-catastrophic crash in licence fees received by photographer rights owners at a time when their costs in turnover of expensive and relatively short-lived digital equipment, and additional unpaid digital processing work

²⁷ http://www.stop43.org.uk/proposals/ipreview/ipreview/ipreview/evidence.html#Serial_Infringement_by_the_Dail

²⁸ <http://www.bjp-online.com/tag/daily-mail>

²⁹ <http://www.bmnyman.co.uk/legal-notice/70-what-are-the-remedies-for-infringement-of-copyright>

³⁰ <http://www.epuk.org/Opinion/994/stolen-photographs-what-to-do?pg=2>

³¹ http://www.stop43.org.uk/proposals/ipreview/ipreview/ipreview/evidence.html#Metadata_Stripping_by_the_BBC_W

³² http://www.stop43.org.uk/proposals/ipreview/ipreview/ipreview/evidence.html#Metadata_stripped_by_Newspaper_

irrelevant to analogue photographic capture and delivery, have substantially increased photographers' costs and workloads.

Photographers do not object to technological change; they are adaptable. However, the corporatisation of the photo stock industry by multinational companies exporting their profits from and paying little corporation tax in the UK has done huge damage to photographers.

RECOMMENDATION: A commercial DCE which enables intending users who find pictures using general-purpose search engines to discover and contact their rights owners for immediate licensing, as the Picscout ImageIRC system facilitates, can be expected significantly to improve the share of the pie going to rights owners. Let's not forget that freelance and micro-businesses in general pay a larger proportion of their income in tax than multinational corporations do. Therefore, a shift in the pie to the benefit of rights owners can be expected to have a disproportionately beneficial effect on tax take.

3. new digital businesses within the creative industries are being held back

For photography we find this assertion doubtful. Photographs are generally easy to licence.

RECOMMENDATION: A DCE acting as a platform for image search software and facilitating direct licensing should alleviate the problem of new digital businesses within the creative industries being held back, if indeed they are, and such a platform can be expected to stimulate new digital businesses. Furthermore, it will itself act as a platform for new digital businesses.

4. innovation is being held back

For photography we find this assertion doubtful. Photographs are generally easy to licence; by nature and necessity photographers tend to be innovative.

RECOMMENDATION: A DCE acting as a platform for image search software and facilitating direct licensing can be expected to stimulate new digital businesses.

5. infringement of copyrighted content remains persistent

Infringement of copyright in photographs is systemic and overwhelming. Never mind the 'orphan works problem'; unrestrained digital infringement represents the starkest failure of the current copyright framework. Stop43 can provide unlimited evidence of its operation and effects³³.

A DCE can be expected to rectify this failure by

- making rights owners of photographs easier to find and negotiate licences with;
- educating the general public about copyright by interceding at the point of potential infringement;
- increasing the likelihood of infringement being discovered and legally challenged;
- acting as a means of anti-orphaning and de-orphaning digital image files.

These functions are vital to safeguard rights owners, and for any proposed orphan works or extended collective licensing scheme to be judged legally proportionate.

RECOMMENDATION: A DCE fulfilling the functions listed above is necessary not only to reduce infringement overall, but to safeguard rights owners' rights should commercial Orphan Works or Extended

³³ *'I have just done a quick Google Image Search on my 'most popular' image and got 173 hits. I reckon out of all of these only a couple are properly licensed. This image was a problem from day one. As soon as it was published in the Sun and then on the Daily Mail website, it was stolen immediately. The agency tried to follow up the usages but it just got out of control very quickly. The agency is no more so I do follow up on the odd infringement where I can trace the website. If I could trace down all of the usages and get paid for them, then I would be a very rich man'. - Photographer contact details available on request. Google Image Search results page: <http://bit.ly/p7ztkV>*

Collective Licensing schemes come into being in the UK. Subject to judicial review, such schemes would probably fail the legal test of Proportionality³⁴ without a platform for such practical safeguards.

6. the end user is deprived of access to a significant amount of commercially and culturally valuable content, e.g. archive material

This is true of digital access to orphan works. To solve this problem, Stop43 devised the concept of a National Cultural Archive, in which orphan works could be displayed, strictly for cultural uses³⁵, without infringing copyright. Of course, once one has such a facility it becomes a straightforward extension to use it also for parented work, develop it into a platform for image search software able to switch intending users from orphan images to parented images for normal licensing, supporting itself via levies on such transactions, and thereby enable it to become an engine of economic growth. This concept is described in detail in our Hargreaves submission³⁶.

RECOMMENDATION: The DCE should fulfil the role and functions of Stop43's proposed National Cultural Archive in making works of all kinds available to the public for their defined Cultural Use.

7. UK GDP should grow by an extra £2 billion per year by 2020, if barriers in the digital copyright market were reduced.

Think of a number and double it. We regard any such simplistic projection as wildly inaccurate and probably highly misleading. It is impossible to predict whether a DCE will cover its running costs and be an engine of growth, or not. That depends on whether the commercial value asserted for orphan works is real or not. On the other hand, if orphan works are really as culturally valuable as is claimed, then a great deal of economic growth should indirectly be stimulated as a result of the general educational and en-culturing effect public access to these orphan works should have.

RECOMMENDATION: In the absence of practical evidence, a DCE system as advocated throughout this submission should be set up, not least to gather that evidence. Given that it will support current, viable businesses rather than merely attempt to set the stage for as-yet unknown 'startup' businesses to grow, it can be expected to generate more growth, more quickly, than the growth Hargreaves envisages. It might well generate growth of more than £2 billion p.a. If it fails, in comparison with many other stimulus projects³⁷ it will have been a cheap experiment.

IN SUMMARY

Stop43 urge the Government to set up a DCE, at least for photography, broadly along the lines of our proposed National Cultural Archive proposal, and to do so without delay. The technology is maturing; there is a real need from rights owners, rights users and end users, as we see it there is little to lose and much to gain, and the gain could be realised quickly.

QUESTION TWO

Copyright Licensing Definitions

Stop43 agree with the Feasibility Study's definitions of the **licensing process** and its stages, the important distinctions, and the definitions of **Rights Owners, Rights Managers, Rights Users and End Users**, and of the nine major **Media Types**.

The Three Defined Copyright Markets

³⁴ <http://regulatorylaw.co.uk/Proportionality.html> "in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself: "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

³⁵ http://www.stop43.org.uk/proposals/ipreview/ipreview/ipreview/cultural_use.html

³⁶ <http://www.stop43.org.uk/proposals/ipreview/ipreview.html>

³⁷ <http://www.highspeedrail.org.uk/>

Stop43 disagree with the concept of the **three defined copyright markets** and their functions, as applied to photography. Our world mostly does not operate in this way³⁸.

Most originators of photography, and photographic libraries excluding the large corporates, are freelance sole-trader or micro-businesses. They therefore sit in Market C. However, their clients sit in markets A, B and C.

This gives rise to market distortion and market failure when Market A oligopsonist buyers are able to use their market dominance and power to force down rates and impose onerous contract terms on Market C photographic suppliers. The Editorial, Corporate and PR markets suffer from exactly this market distortion and failure, with Editorial being the worst.

This market failure is evident not only in commissioned photography, but also in the stock image market, where powerful Market A rights users have deployed their bargaining power to negotiate subscription usage deals with the major corporate image libraries (Getty Images, Corbis Images and Alamy), resulting in a catastrophic crash in royalty payments to photographic rights owners.

The outsourcing trend that has resulted in most photographic staff jobs being terminated³⁹ has reinforced this power imbalance, market distortion and market failure, as has the trend for the major corporate libraries to buy up small independent libraries.

Only the C - to - C and C - to - B markets can be regarded as functional. In photography these markets are Weddings & Social Photography, Art, and Advertising. [The Advertising market largely consists of Market C photographic image suppliers being commissioned by Market C/B intermediaries (design and advertising agencies) to create and supply imagery for use in advertising campaigns for Market A/B companies.]

Features of The Digital Age

- *the creative destruction of incumbent analogue businesses*

Agree.

- *rapid change and uncertainty*

Agree.

- *low barriers to entry and intensifying competition*

Agree.

- *disintermediation (squeezing or bypassing the middle man/intermediary)*

Disagree. In theory this ought to be true; in practice the Internet is dominated by a very few huge, powerful intermediary aggregators. Most of the world's web search (and web advertising revenue) routes through Google; most social networking is carried out via Facebook and Twitter; most web video is watched via YouTube; most 'content' on physical media is bought via Amazon; most of it is then re-sold second hand via eBay; much payment is made via PayPal; most of the market in stock photography is dominated by Getty Images, Corbis Images, Alamy, and their subsidiaries.

The Internet in practice does not even match the diversity of an old-fashioned High Street. It actually looks like a modern shopping mall dominated by chain stores.

- *the cost of copying and distributing digital content is much less than the cost of copying and distributing analogue content*

³⁸ <http://www.stop43.org.uk/proposals/ipreview/ipreview/ipreview/markets.html>

³⁹ <http://www.british-photographic-council.org/survey/2010>

Agree.

- *a digital copy shows little or no degradation from the original, an analogue copy does*

Agree.

- *lower prices and lower profits (it is said that pounds in the analogue space become pennies in the digital space)*

Agree, in most instances, unless one is referring to the profits made by the major Web intermediaries.

- *the erosion of monopoly status*

Disagree. Google, FaceBook and Twitter can all be considered near-monopolies. Google is under investigation by the EU on this basis⁴⁰. To confirm this fact look at any contemporary commercial web page or print advert: the overwhelming majority include Facebook and Twitter buttons or links to the advertiser's Facebook and Twitter accounts. In practice they are at present de-facto monopolies.

- *spectrum and advertising inventory go from scarcity in the analogue age to abundance in the digital age*

If one considers the deliverables as being merely digital data, agree. However, if one considers the deliverables as **the rights to use** digital data, **disagree**. Under Human Rights⁴¹ and international copyright law⁴² those rights remain with the rights owner, the new-fangled digital age notwithstanding, and their scarcity endures.

- *the ownership of content model (a physical CD at home) transforms into an access model (accessing the song from a cloud-based music service)*

Partially agree, but **disagree with terms used. Stop43 object strongly to the assertion, which pollutes this whole discourse, that end users 'own' content.** This is a false premise: how can we have a rational discussion on this basis? Notwithstanding their ownership of physical media, end users own Licenses to use the 'content' carried on those media in certain specified and limited ways. Their misapprehension of this fact appears largely to be the cause of their uncertainty about copyright, and that by perpetuating this misapprehension the wording of this statement does absolutely nothing to change that.

The conflation of ownership of a physical object with 'ownership' of the 'content' carried upon that object must cease, and the first place for it to cease is in official documents such as this and the IPO's Consultation Document⁴³.

- *the traditional "push" model of broadcasting (one-way with a distant editor deciding what you will receive, e.g. BBC Radio) is joined by the "pull" model of on demand (you deciding what you want and retrieving it, e.g. a radio programme on the BBC i- player)*

Agree.

- *passive consumers become active creators, UGC (user generated content)*

Agree that this is a continuing trend. Disagree in that many users still wish passively to be entertained, either by watching and listening to streamed content, or by 'surfing the web' in a more-or-less aimless manner.

- *if the content is digitisable, then sooner or later in the digital age it will be digitised*

⁴⁰ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1624>

⁴¹ <http://www.un.org/en/documents/udhr/index.shtml#a27>

⁴² http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

⁴³ <http://www.ipo.gov.uk/consult-2011-copyright.pdf>

Agree.

- *the fixed internet is effectively borderless, a global service on a single platform.*

Agree that this used to be the case. However, it is not impossible to restrict distribution: BBC iPlayer 'content' is restricted to IP addresses within the UK geographical area⁴⁴. We note that Google have started to restrict visibility of content hosted on their blogging services based on country of access⁴⁵. This trend is likely to continue for geopolitical and geocultural reasons.

- *Traditional copyright licensing in the analogue age was/is managed by territory (e.g. Canada) and by platform (e.g. terrestrial free to air television).*

Agree, although territoriality and platform are only two management parameters, others being specific use (or usages), exclusivity, and licence duration. As an example, a photographic Advertising licence might be issued for so-called 'below-the-line' print media such as point-of-sale materials and brochures, but not 'above-the-line' print media such as magazine or billboards.

This granularity of licensing by usage is both important and efficient:

- it minimises costs for rights users and end users, as they only have to pay for the usages they actually need; and
- by making it available for further licensing for other uses, usage granularity maximises the value of a copyright asset and the return on investment in creating it, and the tax collected as a result of its exploitation.

Professional photographers generally wish to license their work for commercial use as widely as possible. In primary licensing they aim to negotiate equitable licence fees tailored to the specific requirements of their clients, on the basis that less usages are cheaper, more usages more costly. This is reasonable and normal.

Attempts to 'simplify' licensing by removing scope for defining usages in this way might reduce licence fees paid by some rights users and end users, but will drastically reduce the overall value realised by the creation of the copyright work itself. The end result will be an overall loss of economic value from the copyright industries.

For all of the reasons cited above it is reasonable to retain territoriality as a condition of copyright licensing.

Furthermore, territoriality becomes extremely important when a use of a copyright work is legal in one jurisdiction but not in another, which also has severe penalties for infringement. As an example, should commercial Orphan Works or Extended Collective Licensing schemes come into effect in the UK and a work be licensed that turns out to have been registered with the US Copyright Office, that will be considered an infringing use by its rights owner with the user liable to statutory Damages of up to \$150, 000 per infringement⁴⁶. The user does not even have to have US-based assets to be vulnerable: under the doctrine of Enforcement of Foreign Judgements⁴⁷ a UK court could be obliged to enforce a US infringement judgement here. There has been no indication that the Government intends to indemnify UK orphan works and ECL licensees against such a threat.

IN SUMMARY

Stop43 strongly advocate the establishment of a DCE having the following functions, in this order:

- Anti-orphaning of copyright works
- Blanket assertion of authors' Moral Rights

⁴⁴ http://iplayerhelp.external.bbc.co.uk/help/outside_the_uk/outsideuk

⁴⁵ <http://support.google.com/blogger/bin/answer.py?hl=en&answer=2402711>

⁴⁶ <http://www.jeremynicholl.com/blog/2011/06/13/the-10-rules-of-us-copyright-infringement/>

⁴⁷ http://www.loble.co.uk/Enforcement_of_Foreign_Judgments.html

- Blanket opt-out of any and all Extended Collective Licensing schemes
- 'Cultural' access to orphan works (within the meaning of the term 'Cultural Use' as Stop43 have defined it⁴⁸, or something very similar)
- De-orphaning of copyright works
- Disintermediated access to new digital markets

If the Government intends to legislate for a system enabling use of orphaned works, to comply with the legal doctrine of Proportionality⁴⁹ they must in parallel legislate for a system that enables rights owners to prevent their work from becoming orphaned in the first place. If there were no orphans, there would be no orphan problem, and primary licensing is not only fair, equitable and within Human Rights legislation and the Berne Agreement, where it can be applied it can also be expected to generate better fees for rights owners (stimulating more and better production) and increased tax revenue from the sector (freelance and micro-business rights owners pay more tax as a proportion of income than large businesses do) than blanket collective licensing of any kind.

This is why we also need a DCE as a trading platform, and it must be big and visible enough to the public to be their first port of call. It requires that level of brand visibility. Left to its own devices the private sector is unlikely to establish such a thing.

CLOSING REMARKS

It has been reported⁵⁰ that:

'One solution is the proposal of a Digital Copyright Exchange but he stressed:

1. - that it was not considered along the lines of a copyright registry,
2. - the solutions are voluntary,
3. - it was not a government IT project,
4. - it will not operate as a transaction exchange,
5. - it should be funded by industry to the benefit of industry,
6. - moral rights will be preserved,
7. they are working to remove the barriers between IP holders and users, not to add them.'

To take these points in order:

1. In proposing the commercial use of orphan works and the Extended Collective Licensing of works the Government, 'in the public interest', intends to introduce legislation that clearly and indisputably will breach international and domestic Human Rights law, and Berne Article 9⁵¹. To have any hope of being found legally proportionate, such legislation must be accompanied by measures to minimise the chance of a work being declared orphan in the first place, and in the digital era this implies a rights registry of some kind, but it seems the Government refuses to introduce such measures for fear of breaching Berne Article 5 (2)⁵².

However, the Government says that its proposed legislation will require a registry or registries of orphaned works. Such registries will in effect be copyright registries in reverse. It will be necessary for absent rights owners to refer to these registries in order to discover and re-assert their ownership of their 'orphaned' works, with the result that the exercise of their rights will be subject to formality. Why, then, will orphan works registries also not breach Berne Article 5 (2)?

⁴⁸ http://www.stop43.org.uk/proposals/ipreview/ipreview/ipreview/cultural_use.html

⁴⁹ <http://regulatorylaw.co.uk/Proportionality.html>

⁵⁰ <http://www.photoarchivenews.com/pan-report-2-bapla-meet-the-ipo/>

⁵¹ http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P140_25350

⁵² http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P109_16834

It has been said⁵³ that by law only a statutory body will be able to issue ECL licenses.

The only practical solution to digital image file metadata stripping, orphaning, and copyright infringement is image search software able to reunite a digital file with its rights information. To do this the software must refer to a database. To be effective on a scale large enough to reduce significantly the problems of digital orphaning and infringement this software must be widely known, widely used, and there must be a legal presumption that it has been used in any search. Stop43 fail to see how this situation can come about without suitable legislation.

2. There are already voluntary solutions, PLUS+⁵⁴ being one of the most elegant, but left to the private sector no overall solution is likely to achieve the degree of ubiquity required to influence digital orphaning and infringement in a meaningful way.
3. It does not have to be a Government IT project. It merely requires Government oversight.
4. If it does not operate as a transaction exchange, or transaction facilitator, then why is it called a 'Digital Copyright Exchange' and what is its purpose in terms of boosting growth?
5. It must be funded by all parties, not just 'industry', because it will be of benefit to all parties, not least the Cultural Heritage Sector. Stop43's National Cultural Archive proposal includes a description of a possible funding process⁵⁵ with which the Government, in its Response to Hargreaves, agrees⁵⁶. Why the change of heart?
6. Of course moral rights must be preserved.
7. The whole purpose of the National Cultural Archive proposal is to remove barriers between IP holders and users, and if a DCE is formulated along similar lines it can be expected to do the same.

⁵³ Copyright consultant Tom Rivers, speaking at the IPO Orphan Works/Extended Collective Licensing consultation event, 27 January 2012

⁵⁴ <http://www.useplus.com/index.asp?>

⁵⁵ http://www.stop43.org.uk/proposals/ipreview/ipreview/nca.html#Be_a_financially_self-supportin

⁵⁶ <http://www.ipso.gov.uk/ipresponse-full.pdf> page 5