



EXECUTIVE SUMMARY

Stop43 strongly advocate the establishment of a Small Claims Track in the Patents County Court to provide cost-effective access to remedies that are effective, proportionate and dissuasive, such that infringements of photographic copyright to a value of as little as £25 are worth pursuing. If this is not the result, it will be uneconomic and impossible to protect copyright in photographs.

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](#).**

OBSERVATIONS

'In my view there is an unmet need for justice in this regard. One can cite many other examples beyond those mentioned by the Federation of Small Businesses (FSB). For example, a journalist whose articles have been reprinted without permission might have a claim for a few hundred pounds. A photographer whose photographs have been downloaded from the internet and reproduced without permission might have a claim for a few hundred pounds.' - Lord Justice Jackson, Review of Civil Litigation Costs: Final Report, page 255¹

Given that photographs are now among the most infringed of works, Stop43 note with surprise and disappointment that not a single photographic organisation appears in the list of Organisations/Bodies consulted in Annexe A of this consultation document. This does not exactly inspire confidence in the conduct of this consultation.

Appearing before the BIS Select Committee, Sir Robin Jacob took part in the following exchange²:

Q139 Katy Clark: *'So what do you think of the Government's proposals for a small claims track in the Patents County Court?'*

Sir Robin Jacob: *'Well, it is a small claims track. That is what the PCC is. Very small claims-£5,000, £10,000-clearly are not worth worrying about from the point of view of the economy of the country. They are almost certainly unimportant.'*

Katy Clark: *'They may be important for the individuals, of course.'*

Sir Robin Jacob: *'Well, if it is only £10,000, is it? It is going to be more about, "Oh, you have pinched my right. I hate you. You are my brother and you stole it," or whatever it is. I am afraid it is apt to be obsessive or hate litigation.'*

¹ <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf>

² <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmbis/uc1498-ii/uc149801.htm>

Q140 Katy Clark: 'Yes, I suspect many of our constituents will think it is quite important when they come to see us.'

Sir Robin Jacob: 'I dare say they will. They do. There are people who pursue the smallest claims. The courts are all vexed by vexatious litigants. It is a huge problem. There are now more people in the courts who have not got lawyers who are not vexatious-who simply have not got lawyers and are reasonable people. But I am afraid there are some people who are unreasonable too. The Patents County Court under Judge Fysh was quite vexed with some really ludicrous claims.'

Stop43 wonder if Sir Robin has ever been subjected to a small mugging, not very vicious assault, burglary of just a few personal effects, or considers that pursuing shoplifters is an insult to the precious time of the courts?

Perhaps if he were to be punched in the face, just the once and not too hard, he wouldn't mind. But by the time 100 people have done the same, he'd be in the same position as photographers, at death's door as a consequence of the unprecedented scale of digital infringement of their copyright.

PIRACY OF PHOTOGRAPHS: NEW EVIDENCE OF THE SCALE OF THE PROBLEM

The recent introduction of Google Image Search (GIS)³, by which a photograph can be uploaded to Google, analysed by image recognition software, and online uses of that image displayed in search results, finally allows photographers to get a proper understanding of the scale of piracy to which they are subject. This facility was not available for public use when Hargreaves conducted his review. The results are shocking and entirely contradict Hargreaves' assertions. Hargreaves says:

8.19 Another way of looking at economic impact of copyright infringement is to calculate it with regard to the creative industries, rather than to the whole economy, in order to assess the sectoral point of view. A study conducted for Business Action to Stop Counterfeiting and Piracy (BASCAP) puts a value on losses from piracy equivalent to 1.24 per cent of the contribution that the core copyright industries make to the UK economy. We have examined this frequently cited study and found a number of methodological limitations, which together indicate likely overstatement of the extent and impact of piracy. This suggests that the 1.24 per cent figure is also at the upper end of probability.

8.23 What conclusions can we draw from these wildly differing perspectives? Certainly that many creative businesses are experiencing turbulence, which translates into fears about the further, future impact of copyright infringement on sales, profitability and sources of investment. However, at the level of the whole economy or even at the level of whole creative business sectors, the measured impacts to date are not as stark as is sometimes suggested by the language used to describe them.

In just one day, photographers posted this evidence to EPUK⁴, a professional photographers' email list:

'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'.⁵

'I have dropped about 20 images into GIS. Four of those images have thrown up numerous unauthorised web uses. For example, I dropped an image into GIS and got 103 uses, probably 80% blogs (?) 10% foreign language russian, japanese, anyway stuff I couldn't understand and at least 5 commercial websites of which 4 were small UK websites and one London travel booking agency Another image produced 30 + uses, everything ranging from newspapers websites that have forgotten to pay [photo stock library] Alamy to UK,

³ <http://www.google.co.uk/imghp?hl=en&tab=wi> Click on the camera icon and upload a digital image file.

⁴ <http://www.epuk.org/>

⁵ Photographer contact details available on request. Google Image Search results page: <http://bit.ly/p7ztkV>

US on line magazines, Doctors healthcare websites. Some online game website.⁶

*'Just done the same for one of my Two Fat Ladies pics.....70 GIS hits. Some [photo agency] REX and Alamy sales which have been paid for but MOST are from Greek and Turkish web sites....from looking at the pics used it looks like someone has scanned a newspaper repro, you can see back to front print text showing through the image, and then just bunged it up and now everyone is using the pics.....do I spend time chasing the southern european blaggers for tuppence, ignore and only go for the thieves most likely to pay, such as The Irish Medical Times.....as well as Greek-Turkish there seems to be Hungarian (I think) and mis use in the far east as well.'*⁷

'Well, do you remember the stolen picture on the University crime fighting page⁸ ... I've just done a search for images like it and there are 153 results. I'm not sure if that's 153 users or 153 pages of users, all I know is its almost all the same image, its my image and few or none of them have paid for it. There are hundreds of them.

I have just run my calculator across those 153 stolen images from the image results. If they had bought through my shopping cart at my standard price that would be 300 pounds each..... 153 x300 is £45,900! That's absolutely staggering £45,900 just for one image and the results from just one image search!

I have clearly had more stolen than ever paid for and I am owed much more than I have ever earned, certainly 100s of thousands and maybe millions if it were possible to trace every stolen image. It explains how I have 1.3 million visitors to my main website in a year but only sell one or 2 images a week! Since my nightmare experience of actually taking somebody to court I have pretty much ignored theft and only contacted less than half a dozen infringers who have particularly hacked me off. I knew the problem was widespread but not this widespread. Its no wonder I live in poverty despite being reasonably successful in my field.⁹ (our emphasis).

It is clear from this evidence that piracy of photographs, including commercial piracy, is a much larger problem resulting in far greater loss of earnings for photographic rights-holders than Hargreaves asserts. To paraphrase Hargreaves, the measured impacts to date are far starker than is sometimes suggested by the language previously used to describe them.

The EU Copyright Directive calls for remedies that are 'effective, proportionate and dissuasive'¹⁰. Research conducted by the British Photographic Council¹¹ has shown that most infringements of photographic copyright lie within a range of £25 - £350¹². Are we to assume that all such claims are 'vexatious'? If we do we will remove any chance of legal redress from the plaintiffs and in effect remove copyright protection from photographs, in clear breach of the Berne Convention and the Human Rights Act.

⁶ Photographer contact details available on request. Google Image Search results pages: <http://bit.ly/mTEQbq>, <http://bit.ly/qsOtpm>, <http://bit.ly/pUpX2s>, <http://bit.ly/qJ4zh>

⁷ Photographer contact details available on request. Google Image Search results page: <http://bit.ly/pS9zXQ>

⁸ http://www.research.salford.ac.uk/page/crime_security Unlicensed use of image in academic report on human rights; will probably be removed shortly

⁹ Photographer's website <http://www.webbaviation.co.uk/>. Google Image Search results page: <http://bit.ly/oTb7VK>

¹⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML> (58) Member States should provide for effective sanctions and remedies for infringements of rights and obligations as set out in this Directive. They should take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for should be effective, proportionate and dissuasive and should include the possibility of seeking damages and/or injunctive relief and, where appropriate, of applying for seizure of infringing material.

¹¹ <http://www.british-photographic-council.org/survey/2010>

¹² <http://www.british-photographic-council.org/news/british-photographic-council-industry-survey-shows-true-value-of-creators-copyright>

Stop43 recommends that infringement of any work registered with the Digital Copyright Exchange, or any database of copyright which should be consulted in the course of a 'diligent search' for the rights owner of an 'orphan work', should automatically be regarded as flagrant.

On this basis, simple proof of registration plus proof of the fee received for similar use of a work, or fees received for normal use in the rights owners usual markets, should be sufficient to secure remedies including uplift for flagrancy against any business which makes infringing use of that work. To be worthwhile for the rights owner the process of claiming must be online, simple, straightforward, and short. If it is not, the losses in time and disruption to business will render the claim not worth making.

A note to employees: sole traders and owners of micro-businesses only make money when they are working productively. 'Back-office' functions such as accounting, administration, marketing and so on are pure costs of business which must be supported by fees received from productive work. Consequently, time spent pursuing infringement must be as productive financially as the same time spent creating new work. If it is not, the pursuit of remedy will not be worthwhile, rendering copyright protection uneconomic, and making a mockery of copyright law.

QUESTIONS

a. Do you agree that the small claims track for IP claims should work largely the same as the general small claims track? Please provide supporting evidence.

Stop43 do not know in detail the differences between current Small Claims procedure and that proposed for the PCC Small Claims procedure. We simply make this point: **if practical copyright protection is to be available for photographs it follows that any small claims procedure must offer to rights owners who have suffered even the smallest of losses access to remedies that are genuinely 'effective, proportionate and dissuasive', and for the time and disruption suffered as a result of seeking remedies for such small individual losses to have been worthwhile for the rights owner.**

At present, for the majority of individual infringements, remedy is not worth pursuing. Infringers very often know this, and deliberately make infringing use of photographs on this basis, as was revealed by the Banier Judgement¹³. However, the number of individual infringements, can rapidly accumulate for a photographer, and become a significant loss, as evidenced above.

Stop43 note that despite the Banier Judgement, serial infringement remains the norm in the editorial photography market^{14,15}. This is because in aggregate such infringers save money overall in comparison to the fees they would pay if they were to license every asset they use properly.

For this behaviour to change, serial infringers must be subject to dissuasive penalties from a sufficient number of infringement actions such that it becomes more economic for them to licence properly than to infringe. From an editorial photographer's perspective this will become the primary function of the Small Claims track.

Stop43 are concerned that reimbursement for loss of earnings for each party attending a hearing is not to exceed £90 per day for each person. This is a remarkably low figure. To reimburse properly a professional photographer the daily rate must be a minimum of £250. Stop43 recommend this rate be set at the claimant's usual daily rate for creating work of the type infringed, as proven by invoices issued for similar work.

b. Do you agree with the type of IP claims that can be brought before the small claims track?

The Small Claims track must be capable of providing effective, proportionate and dissuasive remedies for photographic infringements valued at as little as £25, and the simplicity and costs of the procedure must be such that claims of this value are worth pursuing.

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

¹⁴ <http://www.bjp-online.com/tag/daily-mail>

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

Stop43 recommend that in light of *Hoffman v Drug Abuse Resistance Education (UK) Ltd* [2012] EWPC 2 (19 January 2012)¹⁶, any infringement carried out by a business should be presumed to be flagrant, and appropriate additional penalties imposed over and above whatever the normal licence fee for that specific use of the work might have been.

c. Would you find increasing the upper damages limit for the small claims track from £5,000 to be beneficial? If so – please provide details why this would affect how certain IP disputes are resolved?

It may be worth considering raising the upper limit to £10,000.

Of more concern is the proposal to limit costs. A small claims process must make even an infringement of £25 worth pursuing, because this is the standard 'web rate' offered for publication of a photograph by the Daily Telegraph¹⁷. The Daily Mail, known as one of the worst serial infringers¹⁸, pays similar rates. If penalties for copyright infringement are genuinely to be 'effective, proportionate and dissuasive' then they must be sufficient to dissuade the Daily Mail and other similar infringers from continuing this practice.

For this reason Stop43 are sceptical of the practical use of limits to costs. Stop43 fully expect that in aggregate, given the widespread infringing use made of photographs by organisations such as the Daily Mail, the amount they ought to pay in licence fees, and the number of infringements actually brought to court, it is likely that such organisations will continue to find serial infringement to be less costly overall than legal licensing of the work, as it is at present. If this continues to be the case, the cost-limited nature of the Small Claims track will act as a perverse incentive for them to continue to infringe.

d. Taking into account the rules governing interim injunctions, do you consider that the small claims track for IP claims should provide for these? If so – please detail why.

In general, except rarely for Moral Rights reasons, photographers do not seek injunctions. They want payment for infringing use made of their work.

e. Do you think the Patents County Court should be renamed to better reflect the range of intellectual property cases it considers?

Stop43 recommend the Patents County Court be renamed either to the Intellectual Property County Court, or the Patents and Copyright County Court.

¹⁶ <http://www.bailii.org/ew/cases/EWPC/2012/2.html>

¹⁷ <http://www.bjp-online.com/british-journal-of-photography/news/2145296/telegraphs-picture-editor-caught-copyright-infringement-blunder>

¹⁸ <http://www.bjp-online.com/tag/daily-mail>