

Stop43 campaigns for change in UK copyright and contract law to strengthen creators' rights and improve the functioning of photography markets to the benefit of photographers, users of photography, and the UK economy in general. We have eight requirements:

No blanket commercial use of Orphan Works; Cultural Use encouraged

Stop43 have always argued from the basis of pure principle. Stop43 believe that commercial use of orphan works, that is cultural works such as photographs for which the author and rights-holder is unknown or cannot be contacted, would be in breach of international and UK copyright and human rights law. We remain opposed to it.

Principles are perfect and absolute, but the real world is not, and legislation based on principles has to be effective in the real world. From this standpoint, Stop43 would not object to Collective Licensing schemes which occasionally and inadvertently result in orphan works being licensed commercially:

- o when such licensing is very clearly the exception rather than the rule;
- o when most authors whose works are covered by that collecting society are in a position to know of its existence and function, and be members;
- o when the practical effect of the scheme is clearly and obviously to the benefit of authors; and
- o when the rights being licensed are secondary rights which clearly and obviously cannot practicably be negotiated as primary licences in the normal way.

[DACS' Payback](#) photocopying Licence scheme, and the [Kopinor](#) ECL scheme, within its geographical, linguistic and cultural area of effect, are clearly not objectionable. Evidently WIPO agrees, which is why it has allowed these schemes to operate even though they breach the letter of [Berne Article 9](#).

In contrast, any Collective Licensing scheme intended to Extend to fulfil Professor Ian Hargreaves' desire to enable the mass commercial use of orphan works would be illegal according to human rights and international copyright law, and Stop43 remain implacably opposed to it.

[We recognise that historical orphan works represent a huge and untapped cultural resource and have proposed the creation of a National Cultural Archive](#) so that the public might make cultural use of this resource, without harming the interests of absent authors and rights-holders, and Professor Hargreaves has based his Digital Copyright Exchange proposal on our idea. But what is Cultural Use?

Stop43 have defined it thus:

Cultural use (including use for preservation, private study and private research) enables the free display of a digital object devoid of any kind of revenue generation or advertising, that does not promote any kind of commercial, educational, political, religious or charitable organisation or their objectives, does not include any right to copy or include in derivative works, and does not in any way conflict with "a normal exploitation of the work" as defined by the [Berne Convention Article 9](#) and [TRIPS Article 13](#). In this context well-established examples of Cultural Use are:

1. Viewing in-copyright pictures hanging on the wall of a public art gallery;
2. Viewing in-copyright manuscripts and similar works in a museum;
3. Online public gallery use.

Examples (i) and (ii) require a positive activity on the part of the viewer - one has to go to the gallery to see the picture, or the library to physically read the book. **One is not allowed to**

remove, copy or change the artefact - just look at it or read it, and thereby gain cultural enrichment. In example (iii) digital networking brings the art gallery or library to the viewer, replacing the requirement that the viewer physically visit the gallery or library. Apart from that, there should be no conceptual or practical difference.

We prefer to use the term "Cultural Use" rather than the more vague "Non-commercial Use", but for the sake of clarity have distinguished between what we regard as "Commercial" and "Non-commercial" uses:

Commercial Use is any use (including use for preservation, private study and private research) that directly or indirectly generates revenue for the user, including the rights holders, promotes their educational, political, religious or charitable objectives, allow copying; allow inclusion in derivative works.

Non-commercial Use is any use (including use for preservation, private study and private research) that DOES NOT directly or indirectly generate revenue for the user, including the rights holders; promote their educational, political, religious or charitable objectives, allow copying; allow inclusion in derivative works.

COMMENTARY

We distinguish by use, not category of user. Many advocate limiting usage based upon whether the licensor or user is a "cultural" or "commercial" entity. What, then, is the BBC? What are our great "cultural" institutions, with their commercial publishing arms and gallery shops? What of great corporations such as BP with their archives of historically significant photographs, films and documents? It is impossible to define an entity as being wholly "cultural" or wholly "commercial". Therefore we distinguish by use alone, and wish to see organisations of all kinds making their archives available in the National Cultural Archive.

Cultural use is not an exception to copyright. Rights holders retain all of their rights at all times. It could be enabled by the grant of a statutory license for Cultural Use of works in their custody to any entity that demonstrates compliance with the legal, administrative and technical requirements of our proposed National Cultural Archive scheme.

Cultural Use is revokable. If the rights-holder of an orphan work readopts that work and wishes it to be removed from public display it must be removed and any digital facsimiles of that work, including backups, must be surrendered to the rights-holder by its Cultural Use custodian. This is in contrast to [Creative Commons](#) licensing which irrevocably grants certain rights in a work to the public.

Cultural use is not "private, non-commercial" use. It does not include any right to re-use, copy, amend, share or "mash up". It is strictly limited to viewing. The viewing link should be freely sharable.

The educational sector should be able to make Cultural Use of our orphan works.

"Educational use", while including elements of cultural use, also contains elements of "commercial use": [United Kingdom universities alone generated £59 billion for the UK economy in 2009, more than the pharmaceutical industry or the agricultural sector.](#)

Cultural use by the educational sector must be implemented in a way that does not materially influence conventional primary licensing of our intellectual property for educational use. Many creators depend on such licensing for their primary income.

No advertising, political, religious, charitable or sponsorship images or links are to be permitted in any Cultural Use context, but links to other similar Cultural Use galleries are to be allowed. PayPal-type micropayment voluntary contribution links are to be allowed, functioning as museum donation boxes. Galleries can of course be "themed", as public exhibitions are, but are not to take an actively political, religious or "charitable" stance. A

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National Cultural Archive gallery must not itself be accessible to search engines such as Google, but every image in it must be linked to a normally-searchable thumbnails gallery, thumbnails being full-image watermarked.

In this way The National Cultural Archive scheme would allow the public to travel to a "virtual museum" to see the pictures and gain cultural enrichment from having done so, but do nothing else with them. All of this could easily be implemented by existing technology (much of it is required of ISPs in other parts of the [Digital Economy Act](#)) and puts the onus on public institutions, not creators, to police usage. Although not entirely damage-free, this scheme would cause minimal economic damage to creators compared with every other so-called orphan works licensing scheme so far proposed. It does not make art prints valueless, for example, and deals as far as is practicable with the existing-orphans problem.

Automatic, unwaivable Moral Rights

Authors' Moral Rights are guaranteed in both international and UK [copyright](#) and [human rights](#) law. [In UK law](#) they are:

- o [The Right to be identified as author or director](#)
- o [The Right to object to derogatory treatment of work](#)
- o [The Right to object to false attribution of work](#)
- o [The Right to privacy of certain photographs and films](#)

[In UK Law as it stands these rights are not automatic but must actively be asserted.](#)

Furthermore, they are [subject to certain crucial exceptions](#): use in newspapers, magazines & periodicals and some books is exempt from Moral Rights. Huge numbers of photographs become orphaned because of these exceptions.

[Moral Rights can be waived](#): photographers can be and are regularly [coerced into giving up their Moral Rights](#).

You can't have an economy without a market. You can't have a market without property rights. It follows, then, that you can't have a functioning market in photographs if photographers are denied their property rights. How are we properly to trade our property if we do not have the unwaivable right to assert our ownership of it?

The creator's unwaivable, inalienable and automatically-asserted Moral Rights and Copyright should obtain for all photographs in all circumstances with no exceptions, unless the creator expressly, voluntarily and without contractual coercion requires anonymity.

Small Claims fast track through the courts for IP cases

Professor Hargreaves has said that [Lord Justice Sir Rupert Jackson's recommendations should be implemented and the Government has agreed.](#)

Stop43 wholeheartedly support this proposal, so long as it results in a process that is genuinely of practical use to photographers pursuing infringements of the typical small value of between £50 - £350, and if accompanied by damages provisions that amount to the ['effective, proportionate and dissuasive' remedies required by EU Directive Directive 2004/48/EC](#), and which UK law patently lacks.

Enact [Lord Justice Sir Rupert Jackson's recommendations](#); give them teeth; and DO IT NOW.

Fair Contract Law for Intellectual Property

Fair Contract law takes into account the imbalances of power between parties to a contract and renders invalid any contract that imposes inequitable terms to the detriment of the weaker party. In UK law at present, it does not extend to Intellectual Property:

[Schedule 1, clause 1\(c\) of The Unfair Contract Terms Act 1977](#) (UCTA) states:

Sections 2 to 4 of this Act do not extend to-

(c) any contract so far as it relates to the creation or transfer of a right or interest in any patent, trade mark, copyright [or design right], registered design, technical or commercial information or other intellectual property, or relates to the termination of any such right or interest;

Sections 2 to 4 of the Act deal with Negligence Liability, Liability arising in Contract and Unreasonable Indemnity Clauses. These subjects are the real financial killers for creators on the receiving end of them. **Schedule 1, clause 1(c) effectively deprives creators of protection under UCTA and leaves us prey to oligopsonistic market bullies**, as detailed in [our evidence to the Hargreaves Review](#).

[Stop43 have described how several of the photographic markets have failed as a consequence of endemic predatory contract terms and rights-grabs.](#) **This situation can only be improved, and proper, tax-yielding growth stimulated in these markets, by the immediate repeal of Schedule 1, clause 1(c) of The Unfair Contract Terms Act 1977.**
.....

Effective penalties for copyright infringement

Looking at the operation of property laws in other economic sectors, and referencing physical property, it is reasonable to conclude that the existence of laws against property theft accompanied by deterrent and punitive sanctions accessible at reasonable cost commensurate with the size of the theft, such as claims for £5,000 or less pursued via the Small Claims Court, provide sufficient protection of that property to enable its owners to trade it in ways that promote economic growth.

Photographers require the same practical levels of property protection and access to deterrent and punitive sanctions as other property owners. In this we are not asking for any special treatment.

In their submissions to Hargreaves' [review](#), all photographers' representative organisations called for better remedies for infringement.

[EU Directive 2004/48/EC](#) says:

3.5. The compensatory and dissuasive effect of damages

Measures, procedures and remedies provided for by the Directive must be effective, proportionate and dissuasive. At present, damages awarded in intellectual property rights cases remain comparatively low. Only a few Member States have reported an increase in the damages awarded, as a result of implementing the Directive.

According to information received from rightholders, damages awards do not currently appear to effectively dissuade potential infringers from engaging in illegal activities. This is particularly so where damages awarded by the courts fail to match the level of profit made by the infringers.

*The main aim of awarding damages is to place the rightholders in the same situation as they would have been in, in the absence of the infringement. Nowadays, however, **infringers' profits (unjust enrichment) often appear to be substantially higher than the actual damage incurred by the rightholder. In such cases, it could be considered whether the courts should have the power to grant damages commensurate with the infringer's unjust enrichment, even if they exceed the actual damage incurred by the rightholder. Equally, there could be a case for making greater use of the possibility to award damages for other economic consequences and moral damages.*** (our emphasis).

[Civil remedies against infringement currently available under UK law are very clearly not effective, proportionate and dissuasive](#), notwithstanding the [blandishments of No. 10 Downing St.](#)

An IP Ombudsman to arbitrate in disputes

Contract disputes require a recourse to arbitration.

In his Report, '[Digital Opportunity](#)', Professor Ian Hargreaves suggests that the Intellectual Property Office could offer 'statutory opinions' or Ofcom might arbitrate:

10. An IP system responsive to change. The IPO should be given the necessary powers and mandate in law to ensure that it focuses on its central task of ensuring that the UK's IP system promotes innovation and growth through efficient, contestable markets. It should be empowered to issue statutory opinions where these will help clarify copyright law.

4.37 The IPO might take responsibility for oversight of the new Digital Copyright Exchange, as part of its responsibility for copyright policy. An alternative would be to look to Ofcom which already has experience and expertise in issuing and overseeing national and international licensing processes, along with experience and responsibilities in online enforcement. Ofcom also has Competition Act powers, which would enable it to act as an effective first tier watchdog of competition issues in the growing UK digital rights market.

Stop43 are wary of both of these proposals.

We believe that the IPO's constitution as a quasi-independent governmental executive Agency, run as a self-supporting business, creates a conflict of interest. **Since the appointment of [British Library CEO Dame Lynne Brindley to Ofcom](#) we have lost confidence in its impartiality:** whenever we find a public sector body promoting extended collective licensing or commercial orphan works usage, we invariably find Brindley or [Ben White](#), her Head of Intellectual Property, in there somewhere, cheerleading:

'The proposal [Clause 43] was nearly... enacted as part of the Digital Economy Bill for orphan works. It's our view that that was and still remains fit for purpose and should be reintroduced to Parliament, hopefully as part of the Communications Bill planned by the Coalition Government.'
- [Dame Lynne Brindley, Chief Executive, The British Library, speaking at the IP for Innovation and Growth event at the RSA, 2nd. March 2011](#). Speech written by Ben White.

Creators and rights-holders will only have confidence in an arbitrator untainted by commercial orphan works lobbying.

An online copyright and rights registry, Cultural Use gallery, and commercial rights exchange

In the networked digital era a machine-searchable rights registry is the only practical defence against orphaning. But we need more than this: we also need a way for the public to make Cultural Use of all appropriate cultural works, whether orphaned or parented, and to promote growth we need to establish new markets in IP rights.

Professor Hargreaves has recommended the establishment of a Digital Copyright Exchange, an idea clearly based on [Stop43's National Cultural Archive proposal](#). For this to be effective it must obviously fulfil three separate but related functions:

1. a copyright and rights registry, to prove ownership and prevent orphaning;
2. a gallery or repository of appropriate parented and orphaned cultural IP, so that the public can make cultural use of it;
3. a commercial rights exchange, to create new IP markets and promote growth.

The Government have said that the Digital Copyright Exchange must:

- o *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);*
- o *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;*
- o *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;*
- o *Be run on a self funding basis, fees being charged on licensing transactions through the exchange rather than the upload of rights data or search of the database.*

Stop43 wholeheartedly support these proposals.

However, a huge amount of detail still needs to be filled in. Stop43 are engaged in the consultation process and will be pressing for the DCE to resemble more closely our National Cultural Archive proposal.

No Extended Collective Licensing of any works

Collective Licensing is the process by which a 'collecting society' negotiates and grants usage rights for the intellectual property of its members. An example is [PRS](#), which sells Licences to play music in public to bars, restaurants and shops, and divides the licence fee equally between its members. It is a system which works well for 'secondary licensing' in circumstances in which it is impractical for a rights-holder to negotiate individual Licences to Use with users.

Extended Collective Licensing allows collecting societies to license works belonging to rights-holders who are not members of those societies. It breaches international copyright and human rights law.

[The Berne Convention Article 9](#) is simple, straightforward and unequivocal:

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

In its entirety, the Berne Convention guarantees creators the rights to decide whether and where they are going to publish, and in what format(s); freely to negotiate their own publishing contracts and licensing agreements; and to negotiate in person, or through agents of their own choice, as they see fit.

Extended Collective Licensing attempts to redefine copyright from being the right of the creator to control the making of copies to a right to be paid something for the use of that copy, if he or she is lucky. Creators do not want this: they wish to retain the rights Berne confers upon them, to manage their own copyrights, or negotiate with agents of their choice to do it for them. They do not want the whole process taken out of their hands. It disempowers them, and it will undermine what they get paid, and kill this country's cultural industries.

[The British Screen Advisory Council's Orphan Works and Orphan Rights paper's Annexe C](#) describes eight possible means by which the commercial use of orphaned works might be legislatively enabled. **Of these eight, six definitely breach international law, EU law, or both; one probably breaches Berne; and the remainder only avoids breaking these laws by removing any practical legal remedies against infringement, inviting massive piracy and destroying creators' and rights-holders' livelihoods.**

Strictly speaking, any collective licensing scheme that extends the licensing of works beyond those of authors who have voluntarily placed their work under the control of a collecting society breaches Berne Article 9. [WIPO](#), which is responsible for administering Berne, TRIPS and other international IP treaties, appears to turn a blind eye to existing extended collective licensing schemes such as [DACS' photocopying licence](#) and the Nordic [Kopinor](#) ECL scheme in which the vast majority of authors can be expected to be professional, aware of the existence and function of the relevant collecting society, be members of that society, and properly receive remuneration from it for secondary uses such as photocopying that cannot practically be licensed in the normal way.

[The British Screen Advisory Council's Orphan Works and Orphan Rights paper's Annexe D](#) provides a clear and succinct description of Kopinor ECL, from which it can readily be concluded that the 'collateral damage' of illegal orphan works licensing is small, and in practice acceptable in relation to the benefit enjoyed by the vast majority of properly registered authors, as is the 'collateral damage' similarly caused by DACS' schemes.

Hargreaves' Extended Collective Licensing proposal is the diametric opposite of Kopinor: the vast majority of works will be orphan, not registered with the DCE, and collecting society members will be reimbursed disproportionately at the expense of the absent orphan authors. No matter how you try to finesse the argument, this is clearly in breach of both the spirit and the letter of the Berne Convention.

Hargreaves says that Extended Collective Licensing:

4.51 ...should not be imposed on a sector as a compulsory measure where there is no call for it, and individual creators should always retain the ability to opt out of ECL arrangements.

Who constitutes a 'sector'? Who will make the call? How will it be made? What happens if aggregators and marketers 'call' for it, but creators and rights-holders do not? Must the call be unanimous, or will large vested interests prevail?

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