

## Frequently Asked Questions

Much of what is written here is understandably difficult for those not familiar with copyright and the world that photographers inhabit. We have created this FAQ in order to make our proposal more approachable, and to answer criticism and objections. For ease of use we have divided this FAQ into sections:

- [About Stop43, Intellectual Property, Copyright, Orphan Works and Extended Collective Licensing](#)
- [About the National Cultural Archive proposal](#)
- [About the Cultural Heritage sector](#)
- [About the Commercial sector](#)
- [Objections to our proposal](#)

This FAQ is being frequently updated and added to as our proposal evolves.

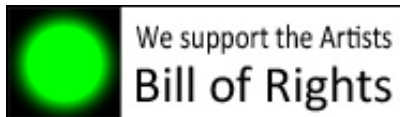
### Who are Stop43?

**Stop43** is composed of a handful of activists, between them members of [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](#), 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 no mandate as such; only [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. This website and its accompanying [Facebook group](#) were instrumental in driving that effort.

Since then, our core group has expanded to include members of the cultural heritage sector.

**We should make clear that at this stage we have not formally sought the blessings of our previous supporters for our New Thinking proposals.**



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### What is Intellectual Property"?

Your original creative thought and ideas made concrete. In other words, anything you write, draw, paint, photograph, compose, film, invent, record. Ideas in themselves are not Intellectual Property.

[http://en.wikipedia.org/wiki/Intellectual\\_property](http://en.wikipedia.org/wiki/Intellectual_property)

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### What is "Copyright"?

Your right to control your Intellectual Property: literally, your control over whether and how it is copied, distributed and used.

<http://en.wikipedia.org/wiki/Copyright>

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### What is "Fair Contract Law"?

Contract law which takes into account the imbalances of power between parties to a contract

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and renders invalid any contract that imposes inequitable terms to the detriment of the weaker party.

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### What are "Moral Rights"?

According to the [Intellectual Property Office](#), (IPO) the Government department that deals with the matters of copyright in the UK:

"Moral rights give the authors of literary, dramatic, musical, artistic works and film directors the right:

- o to be **identified as the author** of the work or director of the film in certain circumstances, e.g. when copies are issued to the public.
- o to **object to derogatory treatment** of the work or film which amounts to a distortion or mutilation or is otherwise prejudicial to the honour or reputation of the author or director.

In contrast to the economic rights under copyright, moral rights are concerned with protecting the personality and reputation of authors.

The right to be identified cannot be exercised unless it has been asserted, that is, the author or director has indicated their wish to exercise the right by giving notice to this effect (which generally has to be in writing and signed) to those seeking to use or exploit the work or film.

Moreover, the author or director can waive both the right to be identified and the right to object to derogatory treatment.

There are a number of situations within which these rights **do not apply** including:

- o where the work is a computer program
- o where ownership of a work originally vested in an author's employer
- o where the material is being used in newspapers or magazines
- o reference works such as encyclopaedias or dictionaries

Authors of literary, dramatic, musical and artistic works and film directors are also granted the moral right not to have a work or film falsely attributed to them.

**Performers** also have Moral rights which include the right:

- o to be identified as the performer and
- o to object to derogatory treatment of performance.

Moral rights last for as long as copyright lasts in the work although the creator may waive, that is choose not to exercise, his or her moral rights. Unlike copyright they cannot be sold or assigned to another person."

In the UK, (currently), as is suggested in the IPO explanation, there are a number of differences between copyright here and say in Germany and France and other sectors of Europe. In the UK, several publishing arenas (most notably Newspaper and magazine publishing and some book sectors) are classed, as an exception to the general rule and the publisher is not obliged to recognise the creator/author.

In addition, **in the UK, unlike other areas of Europe, the right to be recognised as the author of ones own work has to be asserted, and is not automatic. In the UK a creator has to demand his or her moral rights and cannot expect them as in other countries to be applied automatically.**

Further to the [IPO definitions](#), we can add three other moral rights which are recognised widely other than in the UK. They are:

- o The right to have a work published anonymously or pseudonymously

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- o The right to decide whether a work may be used or not
- o The right not to have work falsely attributed to you.

Moral rights vary by country. [Wikipedia has a full description](#).

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### Why do I need them?

Apart from the moral reasons outlined above, philosophers and economists from Adam Smith to Friedrich Hayek agree that a properly functioning market depends upon strong, enforced property rights. The property rights of owners of Intellectual Property can only be properly enforced by the mandatory, automatic assertion of their Moral Rights, and in particular the right to be identified as the creator or author.

- o How would you feel if a major newspaper took your image from your Facebook site and published it, but didn't give you a credit or pay you?
- o How would you feel if an oil company followed your Twitter link and took an image of yours and used it in a ad campaign and didn't ask you first?
- o How would you react if the BNP took a personal image from your website and used it as part of their party literature, didn't ask you, didn't credit you and didn't pay you?

*All of the above have happened. Similar events occur daily. Stop43 has the evidence, first-hand.*

Moreover, Moral Rights are not just about authorship and crediting but also concerned with protecting the personality and reputation of authors. While crediting should be unwaivable (with the anonymity exception) because one must not ascribe authorship of a work to someone who did not create it, derogatory treatment must be both unwaivable and inalienable, as under the current law it appears to be possible for someone to be parted, alienated, from their right to object to derogatory treatment.

If you can't assert and prove your ownership of something you cannot properly trade it, benefit from its economic value, control its distribution or object when it or you are subject to derogatory treatment.

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### What are "Orphan Works"?

Definitions vary. Properly they are **in-copyright Intellectual Property for which the original creator and rights holders are unknown and cannot be discovered after a "diligent search"**. Some entities, including the British Library, also wish to classify works for which the creator and current rights holders *are known but hard to find* as so-called Orphan Works.

**The term "Orphan Works" is a misnomer**, as it suggests that they have been abandoned by their owners. In fact, **the majority of digital so-called Orphan Works are unauthorised copies made without the knowledge of their owners**, and then distributed via the Internet. This is why Stop43 refers to them as "so-called Orphan Works": they were not abandoned but stolen from their owners.

So-called Orphan Works on traditional media such as manuscripts, photographic prints, celluloid film, shellac sound recordings, etc. held by museums and archives are problematic. For many of them the original creator is known but the current rights holders are unknown. As the law stands such works cannot legally be copied to preserve them. **Stop43 proposes that the law be changed as the [Gowers Review](#) recommended to legalise the "format-shifting" of the Intellectual Property embedded in traditional media to digital media to ensure its preservation, no matter what its "orphan" status.**

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### Why are they a problem?

They present several inter-related problems:

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1. The cultural heritage sector has custody of large numbers of works of unknown provenance in all media. Fading photographic prints, decaying film on nitrate stock, old audio recordings, etc. They want to be able to "format-shift" this IP onto digital media so that it may be more easily preserved, and to make this work generally available for study by academics and the general public. Under the current copyright laws, they can't.

**Stop43 proposes that the law be changed as the [Gowers Review](#) recommended to legalise this "format-shifting", and that these works be made available for cultural uses such as academic study.**

2. Authorship and rights information is attached to digital media files in the form of [metadata](#). Many widely-used digital file formats (e.g. BMP, WAV, text, html) don't support metadata; those formats that do (e.g. JPEG, TIFF) do not "lock" this metadata, making it trivially easy to remove. Even if a photographer knows how to add metadata to a digital photograph, the very act of uploading it to most image-sharing or social networking sites, or the BBC, will result in the metadata being stripped from their file. The moment the file is then copied elsewhere from that site it becomes "orphaned" and stands little chance of being reunited with its author. This happens to thousands of photographs daily.

The digital file formats widely used by digital cameras, mobile phones and other devices, and on the Internet, are so deeply entrenched that there is no realistic prospect of them being superseded by formats that have "robust" metadata.

3. Commercial organisations daily create thousands of orphans as described above. Many of these orphans are of commercial value. These commercial organisations would like to use these orphans commercially and profit from them, without the permission of or payment to the unknown rights holders. Not only would this be inequitable for the rights holders, such use would severely undermine the market for new commissioned work.

4. Such use would probably fail the [Berne 3-step test](#) and be in breach of [the UK's commitments under international law](#).

5. There are [insurmountable problems and dangers](#) associated with the commercial use of "orphan" photographs.

Nonetheless there remains great international pressure from [vested interests that stand to make or save a great deal of money](#) from so-called orphan works to have the law changed to enable them to do so.

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### **What is Stop43's position on Orphan Works?**

"It is a logical and legal absurdity to talk of licensing works whose authors cannot be identified while there are still significant groups of authors who do not have the right to be identified."  
*Viscount Bridgeman, speaking in the House of Lords during debate on the Digital Economy Bill Clause 43*

This debate can be reduced to a single question:

**"When is it right to entitle people to use a copyright work without the owner's permission?"**

Orphan Works legislation means selling this right to anybody who can claim to have made a "diligent search" (whatever that means; see below) and then paid an agreed fee to a quango or commercial organisation with a shared interest in trading in so-called orphans works. Image makers have nothing to gain and everything to lose in this cosy arrangement between two groups who both profit (or fund themselves) through the exploitation of other people's work.

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Many so-called Orphan Works are of potential cultural value. Many could also be of economic value. As creators and supporters of copyright and moral rights we are implacably opposed to any commercial, educational (in the conventional sense), political, religious or social (charity) use of so-called Orphan Works. However, [we are in favour of Cultural Use of orphan works](#) in return for the changes in copyright and contract law we need, and our proposal describes how this might be made possible.

Having said that, Stop43 have yet to see any example of a "culturally significant orphan" that makes us think it is worth all of us giving up the right to determine if and how our own work should be used, beyond our proposal, as desired by advocates of Orphan Works legislation.

### **What is "Extended Collective Licensing" ?**

It is a scheme by which organisations known as "collecting societies" issue Licenses to Use copyright works to prospective users instead of those users directly licensing the works from the rights holders themselves. In so doing it intercedes in and replaces direct licensing between rights holders and users.

According to the [Creators' Rights Alliance](#):

"UK law already provides something like this: when a TV programme is re-transmitted on satellite television, a single fee is paid to a collecting society under a 'collective licence' that it has negotiated with the satellite operator. The 'collective licence' is 'extended' by law to cover creators who do not belong to that collecting society – hence 'extended collective licence'. These non-members can still claim their share of the cash from the collecting society."

### **Why is it a problem?**

ECL schemes are typically advocated as a "solution" to "the orphan works problem". However, as proposed in the [Digital Economy Bill Clause 43](#) and by the [British Copyright Council's](#) current proposal on orphan works, these schemes would also encompass works of known provenance.

Under these proposals, the creator or rights holder of the work in question would probably have no idea that it had been so licensed, no opportunity to approve or restrict the use to be made of it, and no chance to negotiate a fee for the use: this would all done by the collecting society.

As Extended Collective Licensing provides a licensing mechanism that bypasses the need to obtain owner's permission or negotiate a fee, fees will be imposed at whatever the publisher considers is a fair market rate, even though there is [no such thing for photographs](#). Moreover fees will not actually be paid unless the rights owner has opted in to the particular ECL scheme; it will be up to the photographer to find out about the usage and claim the fee.

Consequently, under ECL all the publishers' costs and effort required by copyright law will be transferred to the photographer, and (since there will be dozens of ECLs to monitor) with little prospect of getting paid at all. This inversion of copyright is what is behind the relentless pressure for orphan works & ECL for the future profitability and economic efficiency of commercial publishers.

In the run-up to the DEB debate in April 2010 at least 25 organisations were known to have expressed an interest in becoming ECL collecting societies, including organisations such as the BBC which would then have been in the position of being able to license orphan works in its custody to itself for its own use, at a fee acceptable to itself, with that fee being held in escrow for eventual disbursement to the rights holder should he appear, or after an an undefined period of time for redistribution to a society or societies of authors in the way [DACS](#) money is distributed.

In those instances in which it would be feasible for a prospective user to negotiate directly with the creator or rights holder (almost all of them), such ECL schemes probably fail the [Berne 3-step test](#) and would be in breach of [the UK's commitments under international law](#).

### **What is Stop43's position on Extended Collective Licensing?**

**We do not think it is necessary for photographs** beyond that [already in place and administered by DACS](#). Moreover we believe that digital technology, databases, networks and image registries make it *easier and cheaper* for prospective users to negotiate Licenses to Use with rights holders - not more difficult. Look at [Getty Images](#), [Corbis Images](#) and [Alamy](#) - three successful businesses that could not exist in their present form without digital media and the Internet. So we think that increasing digitisation renders Extended Collective Licensing *less* necessary than before.

Many media organisations would benefit financially if they were able to make commercial use of orphan photographs, which is why efforts to introduce Orphan Works legislation generally have their active support. However, the commercialisation of Orphan Works is in breach of international law, violating the [Berne 3-step test](#) and [the UK's obligations under WTO TRIPS](#). This is the reason such proposed legislation is usually accompanied by Extended Collective Licensing proposals; it is an attempt to work around the Berne and TRIPS obstacles. [Such workarounds usually fail with regard to photographs, as Stop43 have demonstrated](#).

Our photographs are *our* property; it is for *us* to decide if they are to be used commercially, and how, and for how much. **Stop43 opposes all forms of Extended Collective Licensing for photographs beyond those already in place.**

### **What is a "Diligent Search" ?**

As far as photographs are concerned, the [current EU definition of a diligent search](#) amounts to [finding a needle in a field-full of haystacks at midnight](#).

Put bluntly, **it is impossible to carry out a conclusive manual "diligent search" for the creator or rights holder of an orphan photograph**. There are *billions* of them. Only automated picture-recognition software stands a chance of successfully concluding such a search. Stop43's National Cultural Archive proposal is built upon on exactly that, founded on a machine-searchable Registry to which all works that are to be made available to the public for its Cultural Use must be submitted. A Diligent Search of such a Registry is not only possible but will return an authoritative answer in moments.

### **What does the Government think of the value of Intellectual Property?**

According to [this leaflet](#) published by the IPO, quite a lot. It thinks that Intellectual Property Rights (IPR) are difficult to value and that primary licensing between rights holder and user is key. Clearly, according to the IPO, Extended Collective Licensing schemes represent a very poor way of valuing and licensing IPR. The document acknowledges early on that:-

**"There is no easy or foolproof way to value IPR, and it can become complicated."**

There is more.

Page 3: **Valuing IPRs can seem difficult and complicated** because:

- o there is no easily-understood set of valuation rules which can be applied in every circumstance;
- o no one knows what benefits owning or using the IPRs will bring in future; and
- o when you value IPRs, the unique qualities which give them their competitive edge mean that you cannot easily obtain information about sales or licences of similar IPR.

Page 4: **"The value of IPRs to the seller and to the buyer depends on the circumstances**

**at that time and in that place."**

Page 5: "**Unless IPRs help to create, maintain or increase cash flow, they may have no real value.**" And: "**The value of the IPR will change over time.**"

Page 8 - how to value IP: "**In theory, you should be able to value IPRs by looking at sales or licences of similar IPRs.**" But the publication quickly acknowledges that in practice, it is often difficult to use this method because:

- o It is difficult to obtain information about other transactions – they are often kept confidential;
- o There are sources of transaction data for various sectors, but they tend to give a wide range of figures for sales and licences which are only broadly comparable;
- o Few transactions are sufficiently similar to allow a valid comparison. Your arrangements might differ from other arrangements in terms of: exclusivity; the payment structure; whether any technical or other support is provided; the territory; the economic climate and market conditions;
- o You are unlikely to know whether, for instance, a lower royalty rate was agreed because the buyer/licensee brought some other advantage to the seller/licensor; and
- o No two deals are really the same. You have to take into account unknowns such as the position of the parties, the characters of the people involved in the negotiations and the economic climate.

And on page 10: "**Industry norms do not take account of: the strength of the IPRs; the potential market; the competition; the position of the parties; or their relative bargaining power. They ignore the current economic climate; the specifics of the sale or licence; and the characters and skills of the negotiators.**"

*Oh dear. That rather puts paid to the commercialisation of Orphan Works and Extended Collective Licensing, then. The IPO's parting shot:*

**"A licensee will not be willing to pay a generous royalty if the licence is restricted to a country where the law affords little protection for the IPR. In those circumstances others may (unlawfully) exploit the IPR even though the licensee is granted exclusive rights."**

### **Why do photographs require special treatment?**

**All media require special treatment.** Different media require different treatment because of their [differing uses and value chains](#). Creators such as photographers, music producers and others recognise this and are adamant that proper consideration be given to these differences - they do **not** want a one-size-fits-all straitjacket applied to them.

Digital media in general have been covered in depth in these essays:

- o [The Characteristics of Digital Media and Networking](#)
- o [The Uses of Creative Intellectual Property in the Networked Era](#)

Photography's unique requirements have been covered in depth in these essays:

- o [The Photography Markets](#)
- o [The Insurmountable Arguments Against Clause 43](#)

From this it becomes clear that "orphan" photographs cannot be dealt with in the same way as "orphan" music, "orphan" film or "orphan" text, no matter what proponents of the [Google Book Settlement](#) or [Kopinor Extended Collective Licensing](#) might wish.

### **What is wrong with current copyright law?**

- o Moral Rights for photographers are not inalienable, and not automatic - they must be actively asserted

- o Sectors such as newspapers, magazines and some books are exempt from current Moral Rights provisions
  - o Copyright law can be trumped by contract law, leaving photographers vulnerable to take-it-or-leave-it rights-grabbing contracts imposed by market-dominating media combines
  - o Current law provides no cheap and easy way by which claims against infringement might be made and damages awarded in sums significantly greater than the licence fee would have been, to make the pursuit of claims for infringements worthwhile and thereby deter infringers.
- 

### **How exactly do photographers want the law to be changed?**

We want:

- o Inalienable and automatic Moral Rights and Copyright for all photographs in all circumstances with no exceptions, unless the creator expressly, voluntarily and without contractual coercion desires anonymity
- o Fair Contract Law applied to Intellectual Property
- o Outlawing the creation of Orphan Photographs
- o A free-to-use mechanism to enable photographers to find and readopt their orphans
- o A simple and straightforward system by which claims against infringement might be made and damages awarded in sums significantly greater than the licence fee would have been, to make the pursuit of claims for infringements worthwhile and thereby deter infringers.

This begs the question of how those demands are to be fulfilled and what we might offer in return.

To answer that question, Stop43 have devised a set of proposals based on a software structure enabling the reattachment of authorial metadata to orphaned digital photographs - the digital problem gets a digital solution. Taking the idea further, we developed it into a method for preventing the orphaning of works, for creators to readopt them, for allowing the "cultural use" of all works, and for creating a new one-to-one market in non-orphan IP between rights holders and prospective users.

This proposal is based on the use of existing software, technology and infrastructure - nothing needs to be invented - all the components of which are working and visible on the Internet today. Briefly, we propose:

- o that Copyright Law be amended to properly recognise the differences in character, value chain and usage of different forms of digital IP;
- o that creators' rights be strengthened both by the provision in Copyright Law of automatic, inalienable Copyright and Moral Rights (the right to be identified as the creator), and Fair Contract Law on the [German model](#), and also by a proper system of practical sanctions to deter copyright infringers that can be accessed and applied in a straightforward, worthwhile and low-cost manner;
- o That "format-shifting" to digital of orphan works on traditional media be legalised, as the [Gowers Report](#) recommended;
- o that an IP Registry, which we refer to as The National Cultural Archive, be established by defining a system of technological and administrative requirements with which custodians of cultural digital IP must comply;
- o that this National Cultural Archive should be created by a simple redefinition of existing digital infrastructure, technology, products and services such as broadband, search engines, image search software, digital registries, libraries and collections;
- o that this National Cultural Archive should be a repository of all appropriate forms of digital media, not just photographs;
- o that it should be free to use and make IP freely available to the public for its Cultural

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Use, which we have [defined](#);

- o that it should act as a market-maker and connect all other intending users of IP to the pertinent rights holders in a simple and straightforward way through the use of appropriate internet technologies, picture recognition software, etc.;
  - o that it should assist IP creators to negotiate equitable licensing agreements with prospective users by way of impartial template-based advice, agreements and facilities;
  - o that by providing these functions it will act as an agent of public cultural enrichment and economic stimulus;
  - o that by providing these functions it will act as an agent of public education concerning copyright and intellectual property in general;
  - o and that it be financially self-supporting by means of a small percentage levy applied to each successfully concluded license agreement that it facilitates.
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### **Are you proposing an exception to copyright, and would that not fatally undermine copyright law?**

**No. In effect we are proposing the creation by statute of a temporary, revokable License to Use** allowing accredited members of the National Cultural Archive, in compliance with its software, administrative and Code of Conduct requirements, to display the so-called orphan works in their custody to the public for its "cultural use", this license to be revoked if and when an orphan work is readopted by its creator or rights holder, and if they so wish.

**We do not see this as an exception to copyright, because it is revokable.** We do not think any exceptions to copyright are necessary to achieve our purpose and we oppose them. As creators benefitting from the economic proceeds of licensing our creations we support and uphold the principle of copyright.

Despite [objections that this may be a concept novel to UK law](#), we note that [novel concepts have been introduced to UK law before](#) and that we see no reason why they cannot be introduced again.

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### **How is the German system of inalienable Moral Rights and Fair Contract Law different to ours?**

- o [It enshrines automatic inalienable Copyright and Moral Rights in law](#)
- o [It provides for Fair Contract law to cover IP](#)

This law has been proven effective in practice, as [the recent legal action in Germany against Heinrich Bauer Verlag](#) has shown.

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Next: [About the National Cultural Archive proposal](#)



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