EXECUTIVE SUMMARY

This submission consists of evidence concerning:

- Moral rights
- Attitudes to Copyright in Academia
- Orphan Works
- Mass Digitisation
- Extended Collective Licensing in other jurisdictions
- Extnded Collective Licensing in general
- Content and Data Mining
- Preservation of Digital File Metadata
- Fair Contract Law
- Small Claims Track in the Patents County Court
- Ombudsman for IP
- Differences between the National Cultural Archive and the Digital Copyright Exchange concepts
- Misrepresentation.

It is supplementary to and should be read in conjunction with Stop43's primary submission to the Committee.

ABOUT STOP43

Stop43 is composed of 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.**

MORAL RIGHTS

1. **Apart perhaps from databases, copyright works are primarily *cultural* artefacts. Almost all copyright works are expressions of their creators' likes or dislikes, wishes, beliefs or opinions. They express their creators' personalities.**

2. At Q177, Paul Ellis invited the Committee to consider that in creating works that are meaningful to them, authors and creators know this intuitively and do regard their creations as expressions of their personalities: *'Again, bringing it back to the idea that all of us are amateur photographers, you take your photographs: how do you feel about your photographs? Do any of you enter your photographs into photographic competitions? If so, why do you do it? If they win or if they are published, do you not feel a certain amount of pride that you, as a photographer and creator, have been validated? Your work has been found to be good enough to be used in this way. I certainly do as a photographer. I therefore propose that authors and creators do feel that their creations are an expression of their personality.'*

3. It is for this reason that Moral Rights exist: to allow a creator to assert his authorship and ownership of this expression of his personality, his reputation; and to protect it from derogatory treatment. It is in this way, as well as physically, that amateurs feel that they 'own' the things which they create.

4. It is for this reason that the Moral Rights exceptions in Chapter IV of the Copyright, Designs and Patents Act 1988[1] should be repealed, and it is for this reason that the commercial use of orphan works and extended collective licensing of any works breach the authors' moral rights, and because they are enshrined in international Human Rights treaties and laws, their human rights. Such breach is *serious*, and this problem must be treated *seriously*. Hargreaves ignores it.

5. Perhaps because of the veil of euphemism and jargon in which it is wrapped, the general public appears largely to be blissfully ignorant of what is being proposed to do with their expressions of their personalities. Stop43 put it to you that if the general public properly understood what was being proposed for their rights, their outcry would be deafening and their resistance implacable.

6. Some of this informed opposition was demonstrated by the successful campaign against Clause 43 of the Digital Economy Bill, led in large part by Stop43.

ATTITUDES TO COPYRIGHT IN ACADEMIA

7. At Q203, Jim Killock stated: *'there is a lot of academic study globally around questions about copyright infringement' and 'The academics … show very different sort of pictures often than the copyright owners show'.*

8. **With regard to copyright, academics have distinct interests of their own.** The system for publishing academic research is notoriously dysfunctional. Journal publishers accept research papers on condition that the author signs over the copyright for nothing. Meanwhile institutional libraries are compelled to pay out for very expensive subscriptions so that academic staff can access the latest research.[2],[3],[4] Accordingly, **academics are inclined to view copyright chiefly as a barrier to access. They typically show little interest in the economics of small creative businesses or the crucial role of copyright in sustaining the markets in cultural products.**

ORPHAN WORKS

9. A JISC study in 2009 found that the average proportion of orphan works estimated to be in public collections in the UK was between 5% and 10%[5]. The figure was higher in archives, as high as 21% to 30%, because of the much higher percentage of unpublished material they hold. In other words, most so-called 'orphans' are works that have never been published.

10. Note that these are *estimates*, but they sound more plausible than other figures being touted. The British Library has stated[6] that it 'estimates that well over forty percent of all creative works in existence are potentially orphaned.' 'Estimates' – or speculates? 'Potentially' – it really has no idea. This figure of 40% has been widely quoted. Stop43 think it is meaningless.

11. At Q161, Ben White said: *'The economic benefits of mass digitisation are enormous. We have just published a study ourselves, where 43% of books from 1870 to 2010 were orphan works. In any large scale projects, orphan works will be an important part.'*

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[1] http://www.legislation.gov.uk/ukpga/1988/48/part/I/chapter/IV

[2] http://www.economist.com/node/18744177

[3] http://www.guardian.co.uk/commentisfree/2011/aug/29/academic-publishers-murdoch-socialist

[4] http://www.timeshighereducation.co.uk/story.asp?storycode=417576

[5] http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf p. 18

[6] http://web.archive.org/web/20100827021717/http://www.bl.uk/news/pdf/ipmanifesto.pdf

12. He is referring to a study by Barbara Stratton, 'Seeking New Landscapes: A rights clearance study in the context of mass digitisation of 140 books published between 1870 and 2010', British Library, Sept 2011.[7] For key findings see p. 5.

13. He did not mention that of the rights-holders traced, more than half did not want their work digitised:

- Permission to digitise was sought for 73% of the books in the sample. Of these:
- rights-holders gave permission for just 17% of the books to be digitised;
- **permission was not granted for 26% of the titles.**

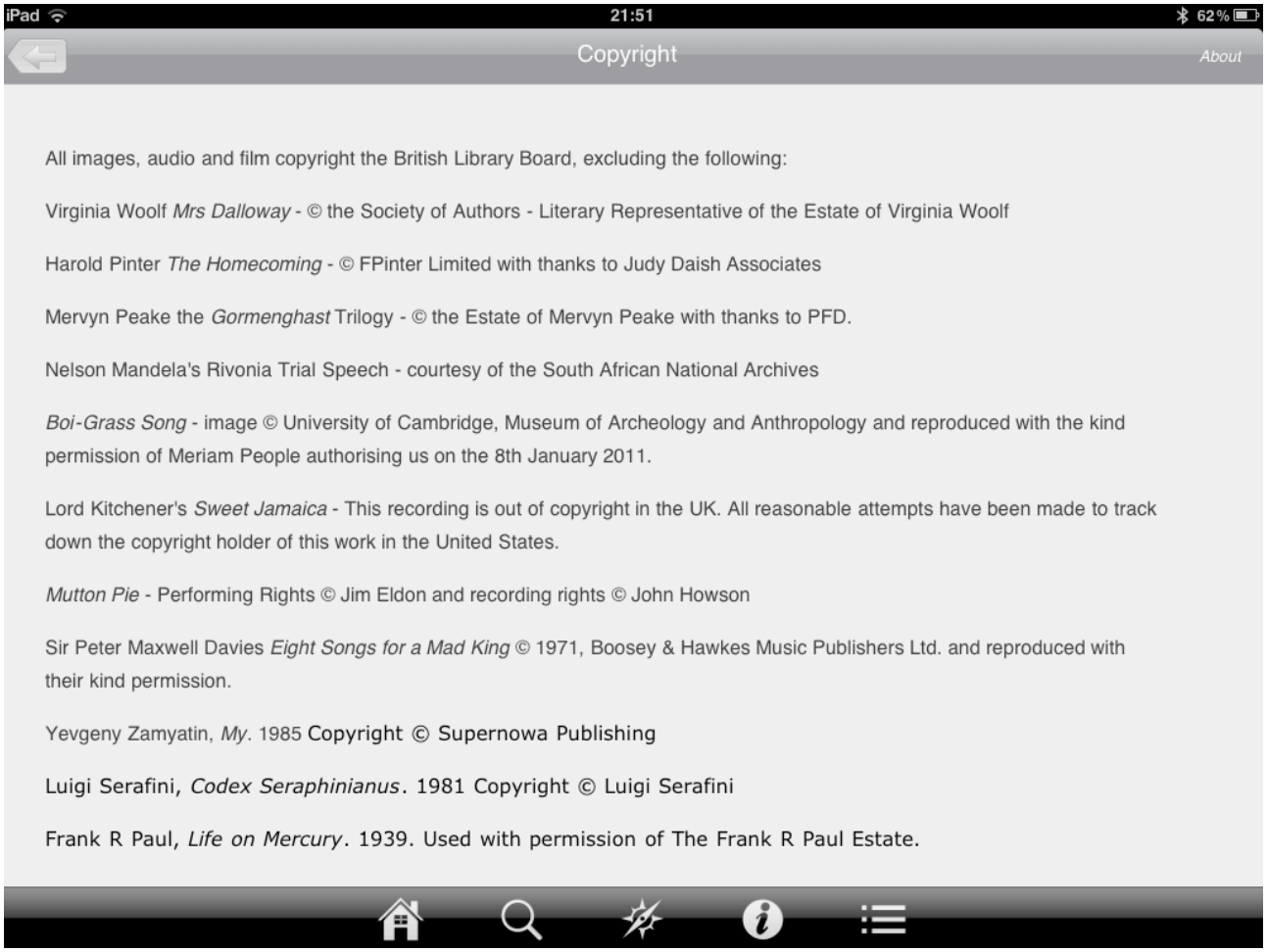
14. 56.5% of books in the sample were published by non-mainstream publishers such as professional associations, institutions and political organisations. The type of publisher had a large impact on whether works were orphaned, with self-published works accounting for 51% of all orphan works in the study.

15. On average it took 4 hours per book to undertake a 'diligent search'. This involved clarifying the copyright status of the work and then identifying rights-holders and requesting permissions. From a rights-holder's perspective this does not appear to be excessive.

16. Is it really worth disrupting the functioning market in rights to make these self-published and institutionally published 'orphans' more widely available? What are the justifications, cultural and economic? What is the value of this material? And to whom the profit, if any? Is this *really* a 'treasure trove', as Hargreaves and British Library CEO Dame Lynne Brindley insist?

17. At Q167, Ben White said: *'One thing again we have to be very mindful of here is that there is a lot of demand for English language material abroad. We have worked with Apple and have put on the iPad some 19th century books. It was the third most downloaded app in the UK in June, and now there are 250,000 subscribers globally.'*

[7] http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=1197



18. This is the Copyright screen of the British Library's iPad app[8]. Stop43 note that the British Library has asserted copyright over digital facsimiles of work that is out of copyright and in the public domain, and that one work included with this app, Lord Kitchener's *Sweet Jamaica*, appears to be orphan:

19. We cannot imagine that the British Library was unable to compile a selection of works that was wholly in the public domain or rights-cleared and we wonder at the inclusion of this item.

MASS DIGITISATION

20. Mass digitisation is touted by its proponents as an unalloyed good. Few things in life are, and this is no exception.

21. In October 2011 the US Office of the Register of Copyrights produced a study entitled 'The Legal Issues in Mass Digitisation: A Preliminary Analysis and Discussion Document'[9].

22. '*In most countries where it exists, extended collective licensing only applies to limited types of works and uses, such as the use of published works for educational and scientific purposes, or the reproduction of works within an organization solely for internal use. Applying extended collective licensing to a mass digitization project that provides access to a wide range of works would be a dramatic extension of the concept.*' (p. 36)

23. At Q 174, Ben White said: *'What we have seen more recently is that extended collective licensing has been adapted to facilitate mass digitisation. Again going back, I have been part of stakeholder discussions all last year in Brussels. There is an MoU [Memorandum of Understanding], which the*

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[8] http://itunes.apple.com/gb/app/british-library-19th-century/id439911364?mt=8

[9] http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf

publishers, the collection society sign, that essentially envisages extended collective licensing for what are known as "out of commerce works", so again in our case millions of works across the 20th century.'

24. **This is a blueprint for a forced collectivisation programme.**

25. We have seen the results of previous forced collectivisation programmes. In the Soviet Union, Stalin collectivised the farms and expropriated the kulaks - independent peasant farmers. This did severe damage to agricultural production, resulting in widespread famine. One can also consider the farm 'reform' in Zimbabwe, the result of which is similar: the transformation from a country once called 'The Breadbasket of Africa' into one that is almost entirely reliant on humanitarian aid, as most of its farming expertise has gone.

26. **Western market economies no longer look to nationalisation, the public collectivisation of work and property, as an efficient solution to structural economic problems. It is a last resort.**

27. Of course there is also such a thing as corporate collectivisation. The Google Book Settlement was an attempt to get the state, in the shape of the US courts, to enable the collectivisation of book copyrights by and in favour of Google Inc.

28. **Forced collectivisation of our culture and the destruction or severe weakening of the market economy that supports freelance creators will lead inevitably to a deterioration in the quality and quantity of our cultural products, and lead to market distortion.**

29. We don't want a market economy that is completely unfettered: we want the government to retain control, as it should, and ensure that contracts are both fair and enforceable, and unauthorised use without payment is discouraged - but we don't want to see the markets for creative works:

- stifled by gargantuan public (or public-private) projects (like the mass-digitisation schemes plugged by the BL and JISC)
- burdened by unnecessary bureaucratic requirements (like having to find out about and opt out of such schemes)
- undermined by legislation designed to favour big technology companies such as Google at the expense of creators and media companies.

30. At Q161, Ben White asserted: *'The economic benefits of mass digitisation are enormous.'* **Not only is this assertion entirely unproven, it rests upon the IPO's risible 'Economic Impact' document[10], which has comprehensively been discredited not only by UK Music in their submission to this Committee[11], but also Sir Robin Jacob in his oral evidence**[12], in which he says at Q86:

    'There are some amazing numbers in the Government's response, and I do not believe that there is any reliable basis for any of those, I am sorry to say. I can remember when the Trade Marks Act was introduced in 1994. The Minister said it was going to save British industry £30 million a year. I shouldn't think there is a single trade mark department in any company that is smaller now than it was then. I think they are all bigger. Somebody gave the Minister that figure. I said at the time I did not believe it and I am afraid some of these numbers in Hargreaves I do not believe. I do not know whether you have probed into where those figures came from and how robust they are-to use another modern word-but I cannot prove it and I do not believe anybody can prove it.'

    On this basis the British Library would deprive the general public of their human rights.

31. **Ben White promotes the requirement for diligent search, and then contradicts himself when complaining of the costs and delays occasioned by such diligent search. He can't have it both ways. The British Library obviously wants a form of commercial ECL that bypasses the need for diligent search.**

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10 http://www.ipo.gov.uk/ipreview-doc-ee.pdf

11 http://www.publications.parliament.uk/pa/cm201012/cmselect/cmbis/writev/1498/m68.htm

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

32. **Stop43's Cultural Use concept obviates the need for diligent search, without harming creators and rights-holders.**

EXTENDED COLLECTIVE LICENSING IN OTHER JURISDICTIONS

33. At Q161, Ben White asserted: *'What the Government is suggesting in terms of a licensing solution is pragmatic, sensible and of course something that exists in Canada, Japan, Scandinavia and Hungary. There are many countries that are doing this.'*

    At Q166, he asserted: *'In Scandinavia, this has been going on for 50 years; it has not really been an issue.'*

    These assertions paint a highly inaccurate and somewhat misleading picture of the nature and purpose of ECL schemes in those countries. None of those schemes are designed to facilitate mass digitisation and the kind of mass use of orphan works and mass ECL that Hargreaves envisages. Most appear to be little-used.

34. **CANADA**: scheme running for around 20 years. **Only 249 licenses have been granted in twenty years.**

35. **JAPAN**: scheme running since 1970. **Only 82 licenses have been granted since 1972** for recording, publishing (print and digital) and ringtones[13]. Of the 82, seven applications were made by the National Diet [Parliament] Library for their Digital Library[14].

36. New rules came into force last year[15] allowing applicants to make use of orphans while their applications are pending[16]. Application must be advertised. **At the time of writing, only three advertisements for orphan work usage licences are published there**[17] [link to translation[18]].

37. Rather alarmingly, there appears to be no straightforward way for revenant rights-holders who discover their property being used under this scheme to claim royalties owed to them for use of their work. Stop43 have been unable to discover any single point of contact.

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[13] http://www.bunka.go.jp/1tyosaku/c-l/results_past.html

[14] http://kindai.ndl.go.jp/information/shiryo_arekore/shiryo_arekore_10.html

[15] http://www.cric.or.jp/cric_e/clj/cl2_2.html#cl2_2+S8

[16] The main points of the Japanese scheme are:
- The scheme is administered by the Commissioner of the Agency for Cultural Affairs
- The work must have been previously published
- There must be a diligent search for the copyright owner
- Compensation for the copyright owner 'corresponding to an ordinary rate of royalty in the case' must be deposited
- The intended means of exploitation must be set out in the application to the Commissioner
- Any copies of the work made under this licence must carry a notice to the effect that it has been licensed in accordance with the relevant paragraph of the law. This is to include the date when the licence was issued.
- On issuing a licence the Commissioner must publish a notice in the Official Gazette.
- Article 68 appears to authorise a compulsory licensing scheme for previously broadcast works;
- Article 69 covers 'commercial phonograms': audio recordings.

These are the only cases in which non-orphans are to be subject to compulsory licences: broadcast works and previously issued sound recordings.

[17] http://www.cric.or.jp/c_search/c_search2.html

[18] http://translate.google.co.uk/translate?sl=auto&tl=en&js=n&prev=_t&hl=en&ie=UTF-8&layout=2&eotf=1&u=http%3A%2F%2Fwww.cric.or.jp%2Fc_search%2Fc_search2.html

38. **HUNGARY**: scheme running for only one year. Commentator Aniko Gynge writes: *I have to admit that although under certain circumstances a single licence can be requested for multiple orphan works, the scheme is not fully suited to deal with mass-scale digitisation projects involving a large number of works. Nevertheless – as far as I know –* ***the Hungarian Patent Office has received a serious request from the National Audiovisual Archive to license 370 works and one other from the Library of the Hungarian Parliament for about 1000 works.***..[19]

39. ...***As a final remark I have to emphasise that a new legal regime in its first working year should not be adjudicated upon. We cannot yet judge its effectiveness.***' - *'Aniko GYENGE: The Hungarian model of licensing orphan works Presentation at the ES Presidency conference on „Digitisation of cultural material. Digital libraries and copyright" 14 March 2010, Madrid*[20]

40. This web page[21] contains a form in English for searching the Hungarian orphan works register. There is no facility provided for browsing the list, but use of the wild card token * in author and title returns **a list of 16 applications which appear to have been granted to date.**

41. **SCANDINAVIA**: see BSAC Orphan Works paper Annexe D[22]. Scandinavia is obviously a unique situation: '*The broader cultural background may … be said to be small homogenous societies built on a high degree of trust and transparency. – Thomas Riis and Jens Schovsbo, 'Extended Collective Licenses and the Nordic Experience' (January 2010)*[23]

42. [The Nordic countries that developed extended collective licensing have relatively small populations. The largest is Sweden, with a population of nine million. As a comparison, Greater London has a population of 7.75 million.]

43. '*The system [of extended collective licensing] is best suited for countries where rights holders are well organized.' – World Intellectual Property Organization (WIPO) and International Federation of Reproduction Rights Organisations (IFRRO), April 2005*[24]

44. '*In Sweden, the ECL regime covers several types of works, including:*

- *certain reproduction (including digital reproduction) for educational purposes;*
- *governmental, municipal, business and organization reprographic reproduction of published literaryworks (including works of fine art within such literary works) for internal purposes;*
- *archival and library use to provide works to the public; and*
- *certain retransmission of broadcasts.' - 'The Legal Issues in Mass Digitisation: A Preliminary Analysis and Discussion Document', US Office of the Register of Copyrights*[25]

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[19] Hungary appears to be a unique situation:
...in Hungary there was another and perhaps more important argument... and that was the legal situation of our national film heritage. Most of the rights of the older Hungarian films are owned by the state, thanks to a nationalization during the communist area. The nationalization covered all the rights which were guaranteed by the 1969 copyright act. Nevertheless the digital rights (and especially the right to make the work available to the public online) remained behind with the original right holders who are mostly unknown or we do not know where they can be found. This was due to a very old principle of Hungarian law, namely that no licence can be validly granted for a means of use that is unknown at the time a contract is concluded... - Aniko Gynge, op. cit.

[20] http://www.mcu.es/principal/docs/MC/PresidenciaUE2010/Aniko_Gyenge_presentation.pdf

[21] http://epub.hpo.hu/e-kutatas/?lang=EN

[22] http://www.bsac.uk.com/files/orphan%20works%20paper%20-%20june%202011%20_2_.pdf

[23] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535230

[24] http://www.ifrro.org/upload/documents/wipo_ifrro_collective_management.pdf

[25] http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf p. 93/ Appendix p.3

45. If the British Library thinks these schemes provide important evidence for its case it should provide detailed information about them, with references, rather than the vague statements it has made thus far.

46. ECL for repeat broadcast rights, photocopying, etc has certainly been around for quite a while - in Scandinavia. It apparently works well in those small countries, and is not so different to the voluntary collective licensing schemes that operate in the UK.

47. ECL in respect of primary publishing rights and to facilitate mass-digitisation schemes is another matter. There is *no* report that we can find anywhere of a scheme of that kind that has advanced far enough to review and report on how well it works, and its economic impact on the creative industries.

48. The KOPINOR scheme[26] is a pilot, and limited in scope. It has only been running since 2009. **It terminates at the end of this year.**

49. Regardless of the British Library's claims, we are in largely uncharted territory, both with regard to mass-digitisation of in-copyright works for access and also with respect to the use of ECL schemes to facilitate it.

50. At Q166, Ben White said: *'I would like to make two points: one is again to stress that in Japan, Canada and Scandinavia, where they do have solutions for orphan works, photographs are not treated any differently from any other work.'*

51. Stop43 have detailed at great length the reasons why each medium must be assessed, treated and regulated for on its own merits. These reasons include the specific and unique problems consequent on the commercial use of orphan photographs[27], and the different usage and value chains characteristic of each medium[28]. **One size does not fit all**. In their evidence, Chris Marcich representing audiovisual rights-holders, Richard Mollet representing text rights-holders and Robert Ashcroft representing musicians and composers all agreed with this point. **The creator and rights-holder community is unanimous.**

52. At Q166, Ben White asserted: *'The other important thing to understand is that, from the cultural sector, what we are talking about is putting up books, photographs or artistic works of about 500 kilobytes. I used to run the picture library at the British Library. Nobody approaches us for 500kilobyte web resolution photographs or artistic works; it is 50 megabytes. It is 100 times larger. We need to make a clear distinction between webready and commercially viable photographs. There is a huge difference. We need to look in the details of this.'*

53. This assertion is demonstrably absurd.

54. Most commercial websites feature photographs and other visual imagery. Look at this list[29] of the world's 15 most-visited news websites. By definition, this imagery is 'webready'; each image typically has a filesize of less than 100 kilobytes. Does Mr. White seriously expect us to believe that such images are not 'commercially viable'? They are clearly of such commercial value to those publishers that they are allowed to occupy space on those highly valuable web-pages.

55. **White conflates the technical demands of print publishing with the main aim of mass digitisation, which is to enable the use of imagery on websites.**

56. As Robert Ashcroft said at Q207, many collecting societies are monopolies. They are mature businesses. For most of them, one of the few remaining ways to expand their business is to extend the

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[26] http://www.ifla.org/files/rare-books-and-manuscripts/rbms-newsletters/rarenewsletter-jan2010.pdf

[27] http://www.stop43.org.uk/orphan_works/orphan_works_problems.html

[28] http://www.stop43.org.uk/proposals/ipreview/ipreview/ipreview/use.html

[29] http://www.ebizmba.com/articles/news-websites

rights they license beyond those assigned to them by their memberships. Consequently they tend to be in favour of ECL.

57. It is therefore unsurprising that photographers' and illustrators' interests have been sold out by the collecting societies under the recent EU Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of-Commerce Work[30] in order to facilitate mass digitisation projects. Authors can opt out. Illustrators and photographers cannot. That's a very big deal.

EXTENDED COLLECTIVE LICENSING IN GENERAL

58. The UK has limited scope within which to legislate. It cannot introduce exceptions that go beyond those are specifically allowed under article 5 of the EU InformationSociety Directive, clause 5 of which states:

(5) The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

59. **No matter what others might assert, Extended Collective Licensing is not a normal exploitation of the work**. Primary licensing, and the voluntary and specific assignment of rights to collecting societies to carry out secondary licensing, are the normal exploitation of the work. Because of this:

60. Commercial use of orphan works and ECL will distort the market, conceivably leading to market failure, when it becomes uneconomic for creators to continue to produce.

61. The Government acknowledges publicly that market distortion is to be avoided:

'We believe compulsory participation could be contrary to the Berne Convention and, more importantly, distort the market.' - Response to Hargreaves, p. 5

62. **Under such schemes the market value of the individual work would be ignored; charges for use would be made at a predetermined flat rate. This is anti-competitive.**

63. **They may well undercut sales of new works, imposing an effective price ceiling across the board.** This is particularly likely in areas where there is high substitutability, such as stock photography. This would be anti-competitive and likely to lead to market failure. Costs could easily be brought down to the point where continued professional creative production is uneconomic.

64. Hargreaves acknowledges this, and thinks it doesn't matter. [Review 4.58] The Government has more sense: they say OW legislation would include 'licensing at market rates for commercial use' [Response to Hargreaves, p. 6]. But it is easier to promise this than to fix a 'market rate'. A fixed market rate, indeed, is not a market rate. The promise, we are sure, was made because **to undersell licences for orphan works would be transparently non-competitive and would distort the market.**

65. **OW and ECL would impose an unprecedented burden of administration on many creators as the price of continuing to control and exploit their works; as a cost of doing business, in other words.**

This would involve:

• keeping a close eye on 'orphan' registers
• registering opt-outs from ECL schemes: this will be more or less burdensome, depending upon how these opt-outs are managed.

66. 'The right holder to whom it is crucial that her works are not exploited under an E[xtended] C[ollective] L [icensing scheme] has to establish mechanisms for monitoring the market and bear the costs associated

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[30] http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20110920-mou_en.pdf

with such efforts of monitoring' – Thomas Riis and Jens Schovsbo, 'Extended Collective Licenses and the Nordic Experience' - Jan 2010[31]

67. **Any new regulatory burdens imposed on creators should be fully proportionate to the social and economic benefits likely to flow from the schemes that these regulations facilitate.** We have heard far too little justification for the mass-digitising of in-copyright works: it has simply been taken for granted as a self-evident and indispensable good. Some "treasure troves" can cost far more to exploit than they are worth.

68. **Commercial use of orphan works and ECL would undermine intellectual property rights by making it harder for creators to control the use of their work**. (See 3. above.) Textual works, photographs, films and recorded music are all very easily copied these days, whether or not they are 'born digital'. If IP rights were not recognised and (to some extent) protected, no one working in these media would be able to participate in any sort of market. **Anything that weakens property rights is a threat to the continued existence of the markets in those properties.**

69. **Orphan works legislation would facilitate the illegal use of some works. Theft is inherently anti-competitive and if not kept under control, leads directly to market failure.**

70. **Big mass-digitisation schemes run under ECL will stifle emerging digital markets and will become effective monopolies in the areas they cover, which will hold back innovation in digital publishing.**

71. They will also very likely become monopsonies. Authors who elect to opt out of ECL schemes and seek alternative publishing opportunities for their out-of-print works may find themselves unable to find a publisher who wants to license them; there might simply be no market, except through monopsony ECL schemes paying a flat rate.

72. Which publisher is going to take the risk of bringing out e-editions of out-of-print books if there is a huge digital repository of scanned copies run under the auspices of the BL (or Google) that is known to customers as the cheap go-to place for such works? This is a problem for publishers in that it removes useful publishing opportunities; but it is also an issue for writers and illustrators. This is a threat to continued innovation.

73. Note that in the past reprint editions have often had new introductions, etc, and sometimes illustrations, whether stock or newly commissioned, that were not in the original publication. Scanned versions of old editions will not contain new commissioned or bought-in content. They will also not be the innovative e-book formats we should be seeing: they will just be a set of scans and/or more or less badly OCR'd epubs. such as those typically available from Google Editions.

74. Finally, for photographers and illustrators in particular, there is the fact that under the EU MoU there would be no opt-out for work published previously in printed publications. Once sold, then out of your control; flat rate fees only, paid through DACS.

75. ECL is largely irrelevant to out-of-commerce books now that authors and/or publishers can re-publish at minimal material costs electronically, and without capital outlay through print on demand. Creators should be incentivised to take their futures, and indeed our cultural heritage, into their own hands.

76. Stop43 fully endorse Richard Mollet's statement at Q176: '*...in a conversation about extended collective licensing, it is always blithely said, "Oh, well if you do not like it, you can opt out."... Not all rights holders, especially small rights holders, will know that they have been opted in.*'

77. In order to opt out, rights-holders must register. The requirement to register in order to avoid one's work being used under ECL breaches Berne Article 5 (2)[32]**.**

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[31] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535230

[32] http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P109_16834

CONTENT AND DATA MINING

78. Stop43 agree in general with the statements made by Richard Mollet on this subject.

79. His statements appear to assume that the 'content' to be 'mined' has already been digitised, but there is also the question of mass-digitising material that is not currently in digital form specifically in order to mine it. This was apparently Google's main aim with its Google Books library project; selling books was an afterthought. This is part of the 'justification' for mass-digitisation projects: that they will facilitate data-mining.

80. Of course, this is one of the risks: that data-mining may be used as an excuse for mass-digitising large bodies of work, which would then most likely be put to other uses.

81. Stop43 note that in lacking any form of search save for title or author, the British Library's iPad app is almost *entirely useless* for data mining.

82. There are good arguments in favour of data mining. Photographers using automated systems to search for infringing uses of their copyright work could be considered to be data mining.

PRESERVATION OF DIGITAL FILE METADATA

83. At Q161, Ben White said: *'At the moment, the problem that Paul and has colleagues perhaps have with the BBC and Facebook is they need to take these organisations to court; there needs to be an injunction to stop the use.'*

84. The Copyright, Designs and Patents Act 1988 Section 296ZG[33] states that an offence has been committed:
- where [person] D knows, or has reason to believe, that by so doing [removing metadata] he is inducing, enabling, facilitating or concealing an infringement of copyright.

85. In practice this offence is almost impossible to prove. Stop43 know of no action brought under Section 296ZG.

86. Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code, Chapter 12, Section 1202 (b)[34], states:

(b) Removal or Alteration of Copyright Management Information. — No person shall, without the authority of the copyright owner or the law —
(1) intentionally remove or alter any copyright management information,
(2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or
(3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law,
knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

87. A US Lawyer brought this to our attention, stating that stripping copyright management information is illegal in the US but continues because it goes unchallenged. Given that Facebook and Twitter are amongst the prime culprits, as with the BBC and national newspapers it would take deep pockets to challenge these behemoths.

88. The UK could easily solve the metadata stripping problem by giving a regulatory authority the power to order an organisation to cease such a practice, and effective, proportionate and dissuasive penalties with which to do so.

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[33] http://www.legislation.gov.uk/ukpga/1988/48/section/296ZG

[34] http://www.copyright.gov/title17/92chap12.html#1202

89. Put such a provision into any proposed legislation and you can be sure that corporations whose businesses benefit from metadata stripping would mount a huge challenge to it, as it would affect their worldwide operations in that it is unlikely they could cease metadata stripping on a country by country basis. How would they be able to do that with any certainty?

90. However, their problem is their problem. **It is right that such a provision be legislated for to protect the moral, property and economic rights of creators, to prevent the orphaning of their copyright works, and the ensuing market distortion and market failure such orphaning facilitates.**

91. That said, Stop43 favour market solutions which overcome in practice the consequences of metadata stripping, such as the capabilities demonstrated by the Picscout[35] system.

FAIR CONTRACT LAW

92. Stop43 provided Hargreaves with clear evidence of the market failure consequent upon oligopsonies in photographic markets and the onerous contracts they impose upon suppliers. More examples appear daily. The five-employee-or-less micro-businesses that comprise nearly 90% of the creative sector, create its primary value, and pay most of the tax, require Government to carry out its duty and redress this power imbalance.

93. Alongside remedial legislation, this would be a suitable task for an IP Ombudsman.

SMALL CLAIMS TRACK IN THE PATENTS COUNTY COURT

94. Stop43 wish to comment on the following exchange:

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.'*

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.'*

95. Lord Justice Jackson spoke of 'unmet need for justice' in his report calling for the institution of a small-claims track for IP cases[36], saying:

'4.3 Unmet need for justice. In my view there is an unmet need for justice in this regard. One can cite many other examples beyond those mentioned by the FSB 0Federation of Small Businesses]. 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

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[35] http://www.picscout.com/imageexchange/

[36] http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf

reproduced without permission might have a claim for a few hundred pounds. It may be difficult for such claims be pursued at the moment. There is no small claims track in the PCC and there is little IP expertise in most other county courts.'

96. According to research conducted by the British Photographic Council, the typical value of a photographic infringement claim ranges from £50 - £350[37]. 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.

OMBUDSMAN FOR IP

97. To alleviate problems with metadata stripping, onerous contracts and vexatious legal cases, an Ombudsman should be appointed who has the powers to penalise companies stripping metadata, operating in the same way as Ofcom, the Information Commissioner, etc. and to arbitrate contractual disputes under Fair Contract law, for which we call and which should unburden the Courts.

98. DIFFERENCES BETWEEN THE NATIONAL CULTURAL ARCHIVE AND THE DIGITAL COPYRIGHT EXCHANGE

99. Hargreaves' DCE is intended to have two primary functions:

- to enable the mass-marketing of works commercialised under ECL; and
- to force corporate rights-holders to licence their rights to Internet startup companies more cheaply and quickly.

100. Stop43's National Cultural Archive concept is by definition far less coercive. It is described in detail here[38], but in brief it is intended to be:

- a machine-readable online metadata repository for all suitable kinds of cultural digital intellectual property, both orphan and non-orphan, that is free to submit to and use and which makes its contents and the digital objects to which it refers freely available to the public for its Cultural Use;
- 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 and established by defining a common framework of legal, technological and administrative requirements with which affiliated custodians of cultural digital intellectual property must comply;
- a practical means of educating the public about intellectual property rights by automatically interceding in potential breaches of copyright at the point of potential breach, and of enforcing copyright in the digital domain whereby creators and rights holders can reassert their rights and reestablish control over unauthorised or orphaned copies of their work, thereby preventing the future creation of orphan works;
- a market-maker and engine of economic stimulus, connecting all other intending extra-Cultural users to the revenant rights holders of its registered non-orphan cultural digital intellectual property in a quick and simple way and enabling creators and rights holders to conclude equitable licensing transactions with prospective users by way of impartial template-based advice, standard machine-readable licenses and agreements, and facilities;
- financially self-supporting by means of a small percentage levy applied to each successfully concluded license agreement that it facilitates.

101. Its intended frictionless licensing and de-orphaning characteristics can be demonstrated simply with a combination of the Picscout browser plugin[39] and Google Image Search[40].

- Install the Picscout browser plugin.

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37 http://www.british-photographic-council.org/survey/2010

38 http://www.stop43.org.uk/proposals/ipreview/ipreview/nca.html

39 http://www.picscout.com/imageexchange/

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

- Direct your browser to Google Images and search for ‘dolphin’.
- Click on the Picscout button in your browser toolbar. The Picscout software displays a selection of thumbnails of licensable images. In our test, stop43 chose an image of two dolphins jumping.
- Picscout led us to its page on image library SuperStock[41].
- Click ‘Add to Cart’.

102. This process takes as long to carry out as to read these instructions.

103. Stop43 then went back to Google Images and followed our chosen image thumbnail on that page to its originating site, which happened to be the Telegraph[42], copied the image to our computer’s Desktop and opened it in Phase One MediaPro[43] (any software that can display image metadata will do) to reveal its total lack of metadata. Picscout had not only de-orphaned that file, it had led us straight to a commercial source from which to license it, and proved metadata stripping by a national newspaper.

104. Stop43 then re-uploaded the image to Google Image Search, which revealed a page of results that included a selection of similar, alternative images[44].

105. This procedure demonstrates:

- The ability of current software systems to lead a prospective user to a source from which to license that image for use, even if its metadata has been stripped; and
- Provide a selection of alternative images which might be functionally equivalent to the first image for the intending user’s purpose.

106. This is the heart of the National Cultural Archive proposal, intended to work with *any* image, and not just those that have been ‘fingerprinted’ by commercial image libraries.

MISREPRESENTATION

107. At Q163, Paul Ellis stated: *‘Recently we have just seen a poster in Camden of Boris Johnson apparently endorsing a website that facilitates extramarital affairs. Now, Boris’s private reputation and, indeed, his public reputation notwithstanding, I am quite sure that Boris did not choose to endorse that website. He has been misrepresented. This will be a consequence of the commercial use of orphan works.’*

Here is that poster.

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41 http://www.superstock.com/preview.asp?image=1848r-337487

42 http://www.telegraph.co.uk/health/7269309/AAAS-Study-on-dolphin-ability-to-switch-on-and-off-diabetes-could-lead-to-human-cure.html

43 http://www.phaseone.com/media-pro

44 http://bit.ly/teEj8U

Misrepresentation

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** 43