

THE NEW THINKING

A PROPOSAL TO RECTIFY DEFICIENCIES IN CURRENT COPYRIGHT LAW AND ENABLE THE USE OF SO-CALLED ORPHAN WORKS FOR DEFINED CULTURAL PURPOSES.

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It has been claimed repeatedly that so-called “orphan works” are a wasted cultural resource of immense value, and that they are also of great potential economic value.

As creators we are opposed to the commercial use of our so-called orphan works because of [these insurmountable problems](#), but wish to realise the cultural value of our so-called orphan works. We believe that our proposal does exactly that, with the additional benefit of stimulating further cultural and economic activity via [The National Cultural Archive](#).

OUR PROPOSAL

- We are willing to grant access to our genuine orphan works for strictly non-commercial cultural purposes as defined by creators, quid pro quo for granting of inalienable moral rights, copyright and fair contract law on the German model applied to Intellectual Property, and the implementation of effective measures to re-establish the ownership of current orphan works and prevent the generation of future orphan works.
- This access is to be a 'loan', not an exception to or transfer of copyright. Cultural access must not damage the careers of creators or their ability to remain in business and create new work. As soon as an author is rediscovered all control of their work must be returned to them.
- To enable this we propose some changes to current copyright law and the establishment of a National Cultural Archive, which must be free to use.
- All costs of cultural access by the nation must be borne by the nation.
- We want the new Parliament to look at ways to do this and intend to be fully involved in discussions and the drafting of future primary legislation and structures.

This proposal is in three main parts:

- [The arguments against Clause 43's proposals](#).
- [The National Cultural Archive](#) outlined, and in detail
- Background information including [the characteristics of digital media and networking](#), [how digital intellectual property is used](#), and [the different photography markets](#)

It can be read and understood in essence by following the links at the bottom of each page, but we strongly recommend you also read the detailed sections in order to gain a proper

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grasp of the proposal, and to prevent misunderstanding.

This proposal was first presented at the British Photography Symposium on 8th May 2010. At the end of the presentation a vote was called, asking the audience if they supported the proposal in principle. They expressed almost unanimous support.

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 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.

That effort did not cease with the removal of Clause 43 from the Bill. Clause 43's provisions were and continue to be ardently desired by many sections of "the creative industries" and others, not least because [they stood to make or save a great deal of money](#) from their commercial use of our so-called orphan works. Consequently, **our efforts continue** to replace the inequitable and unworkable proposals contained in the failed Clause 43 with **New Thinking, which we believe should benefit all.**

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The Insurmountable Arguments Against Clause 43

First it is necessary to understand why we opposed Clause 43 and its proposals for commercial so-called Orphan Works Licensing and Extended Collective Licensing. Clause 43 was removed from the Digital Economy Bill because the Conservatives and Liberal Democrats understood and appreciated the insurmountable problems inherent in those proposals, as illustrated by Stop43's "viral" images and their accompanying arguments. **All of these arguments are soundly based on principle and practicality. We have yet to hear of any principled rebuttal of them from any quarter.**

They are:

• The Privacy & Exclusivity Problems



Q: Is this girl...

- an MP's daughter?
- a professional model?
- a Ward of Court?
- on the *At Risk* register?

A: Any of the above. There is no way to tell - this photo is an orphan work.

• The "Market Rate" Myth



Q: Is this photo...

- a press photograph (£65 – £150)?
- a PR shot for an events company (£75 – £150)?
- a privately-commissioned portrait, not legally publishable without the commissioner's consent (£250 – £450)?
- a commercial catalogue shot, using a professional model, for exclusive use by the client (£650 – 1,500)?

A: Any of the above. There is no way to tell - this photo is an orphan work.

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- Identifying “Contemporary Photography”



Q: Was this photo taken...

before 1950?

after 1950?

A: Either of the above. There is no way to tell - this photo is an orphan work.

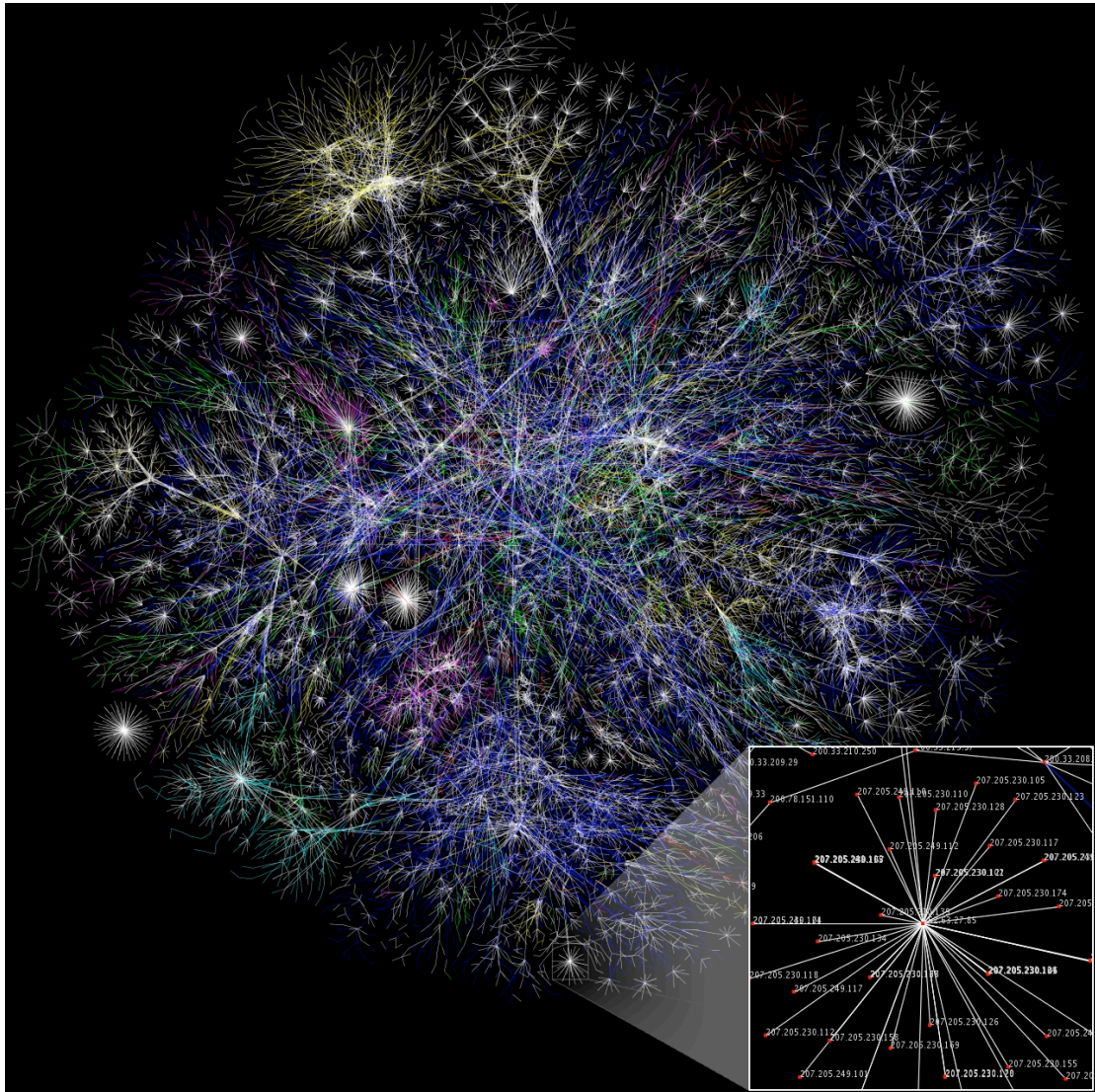
- Misrepresentation



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- The Impossibility of performing a “Diligent Search”



A map of the Internet, from *Wikipedia*

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The Privacy & Exclusivity Problems



Q: Is this girl...

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- a professional model?
- a Ward of Court?
- on the *At Risk* register?

A: Any of the above. There is no way to tell - this photo is an orphan work.

Privacy

Photographs commissioned from wedding, portrait and social photographers for private purposes are **prevented from publication without permission of the subject** by the **Copyright, Designs & Patents Act 1988**. Many photographers working for charities in sensitive areas do so with the explicit agreement that use of the photographs will be restricted to appropriate contexts, with all other uses being prohibited. Some children depicted in such photographs could be **Wards of Court** or on the **At Risk register** and have special privacy rights.

Exclusivity

Commercially-produced imagery usually includes models and proprietary artefacts, whose consents and fees have been based on limited, defined usages of those photographs - other usages would have commanded extra fees. The photograph's copyright holder or other stakeholders in the image such as models, their agencies and others might have commercial, political, religious, moral or ethical objections to some possible uses to which the picture might be put, and if permission were sought, would refuse that permission under all circumstances. The client for whom the photograph has been made is **likely to have contracted for exclusive use**.

Provisions in Clause 43 would probably have undermined the ability of UK professional photographers to undertake exclusive contracts, since it would never have been possible for them to guarantee that their work would not have been orphaned and subsequently licensed to third parties including competitors.

These **rights of exclusivity** are guaranteed by international law, **Article 9 of The Berne Agreement** and **Article 13 of TRIPS** [the trade-related aspects of intellectual property rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization], to both

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of which The UK is signatory, both of which forbid the enactment of domestic legislation that allows any kind of licensing scheme "which conflicts with normal exploitation of the work" or will "unreasonably prejudice the legitimate interests of the author" (reasonably interpreted as meaning that the rights holder must be able to control, limit and directly benefit from the work's exploitation).

By definition, it is impossible for a licensee of an orphan photograph to know conclusively whether or not any of this applies. **No statement issued by the previous Government has satisfactorily addressed this concern.**

The "Market Rate" Myth

Former Labour MP Michael Wills wrote the following in reply to a letter from a constituent:

"It is [also] not the case that users will be able to make (sic.) an 'arbitrary fee' to use an image. The Government has made it clear that 'there should be no financial advantage from mis-identifying a work as an orphan work and that deliberate or negligent mis-identification should carry an appropriate penalty.' Therefore, any regulations would aim to ensure that licensing of orphan works would be at the market rate."



Q: Is this photo...

- a press photograph (£65 – £150)?
- a PR shot for an events company (£75 – £150)?
- a privately-commissioned portrait, not legally publishable without the commissioner's consent (£250 – £450)?
- a commercial catalogue shot, using a professional model, for exclusive use by the client (£650 – 1,500)?

A: Any of the above. There is no way to tell - this photo is an orphan work.

There can be no mechanism for determining the accurate market rate for any piece of Intellectual Property such as a photograph without knowledge of its provenance - i.e. who created it, how it was created, for whom, for what purpose, and who owns its copyright. For example, anyone attending a public airshow can easily shoot pictures of aircraft from the ground for the price of the entry ticket. Photographing the same aircraft air-to-air from another is a far more demanding and costly affair. It is well established that artworks lacking provenance cannot be properly valued, and that works previously wrongly attributed, for which the correct artist subsequently has been identified, have been drastically re-valued. Is your rumpled bed worth as much as Tracy Emin's? Probably not, but if it looked the same to an inadequately-informed observer it might easily be over-valued. The converse might also

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easily happen. **There can logically be no such thing as a “market rate” for orphan photographs**, in the same way that there is no “market rate” for art. Consequently, there can be no mechanism by which a licensing body might determine a “fair license fee” for any specific orphan. It is therefore accurate and correct to describe any such fee as being arbitrary. **No statement issued by the previous Government has satisfactorily addressed this concern.**

Identifying Contemporary Photography

Towards the end of the Digital Economy Bill debate the Liberal Democrats proposed an **amendment to Clause 43** that would have excluded photographs made after 1950 from any so-called “orphan works” licensing schemes. Stop43 also know that such a distinction is under consideration in the USA as part of attempts, yet again, to introduce law enabling the commercial use of so-called “orphan works” there following the failure of the previous attempt when President Obama took power.



Q: Was this photo taken...

before 1950?

after 1950?

A: Either of the above. There is no way to tell - this photo is an orphan work.

How does one tell the date an unknown photograph was made? With the greatest of respect to others we would submit that we, photographers, some of us professionally active before 1950 and still active, are the authority on this subject. We have conferred among ourselves and **cannot conceive of a reliable way to accurately identify that cut-off point for a very substantial proportion of photographs.** The problem also remains of damage to the residual value of pre-1950 photographs bequeathed in wills to photographers' children and successors. Although an admittedly small number of photographers will be very significantly affected in this way, we see no reason why they should suffer when we believe that **our new thinking** might avoid such damage whilst simultaneously giving the cultural sector what they say they need. **No statement issued by the previous Government has satisfactorily addressed this concern.**

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Misrepresentation



This pair of mock advertisements points out the dangers of **misrepresentation** in Orphan Works Licensing and Extended Collective Licensing. **The image, “Only The Best”, is apolitical and not derogatory:** the text reads “When only the very best is good enough”, **Google-translated** into **Russian** and **Chinese**. In the UK, the use of images of people in advertisements and thereby endorsing products and services must have their subjects’ prior permission in the form of industry-standard signed **Model Releases**, which act as a contract between the subject and photographer. If orphan images are used in advertising, it cannot be known whether their subjects have given permission in this way. Furthermore, **there is no-one for a subject to sue for damages** if their image is used in a way in which they don’t agree and have not or would not give permission. **By definition, the photographers who created the photographs and hold the model releases if they exist, cannot be found.** There is nothing wrong with vodka or skin-care products. However, given their prominent public positions in the UK, it is unlikely that either **Lord Mandelson** or **David Cameron** would have given permission for their portraits to be used to endorse these products in such a way - these “advertisements” are likely to **misrepresent** their views. **No statement issued by the previous Government has satisfactorily addressed this concern.**

A Diligent Search?

During the Digital Economy Bill’s passage through the last Parliament there was a lot of assertion by Labour MPs of the requirement for a “diligent search” to be carried out before a so-called orphan work could be licensed, and the “substantial financial penalties” to be meted out to those proven to have failed to search diligently. Here’s an example, written by David Lammy’s Intellectual Property Office and regurgitated by former MP **Michael Wills** in reply to a letter from a constituent:

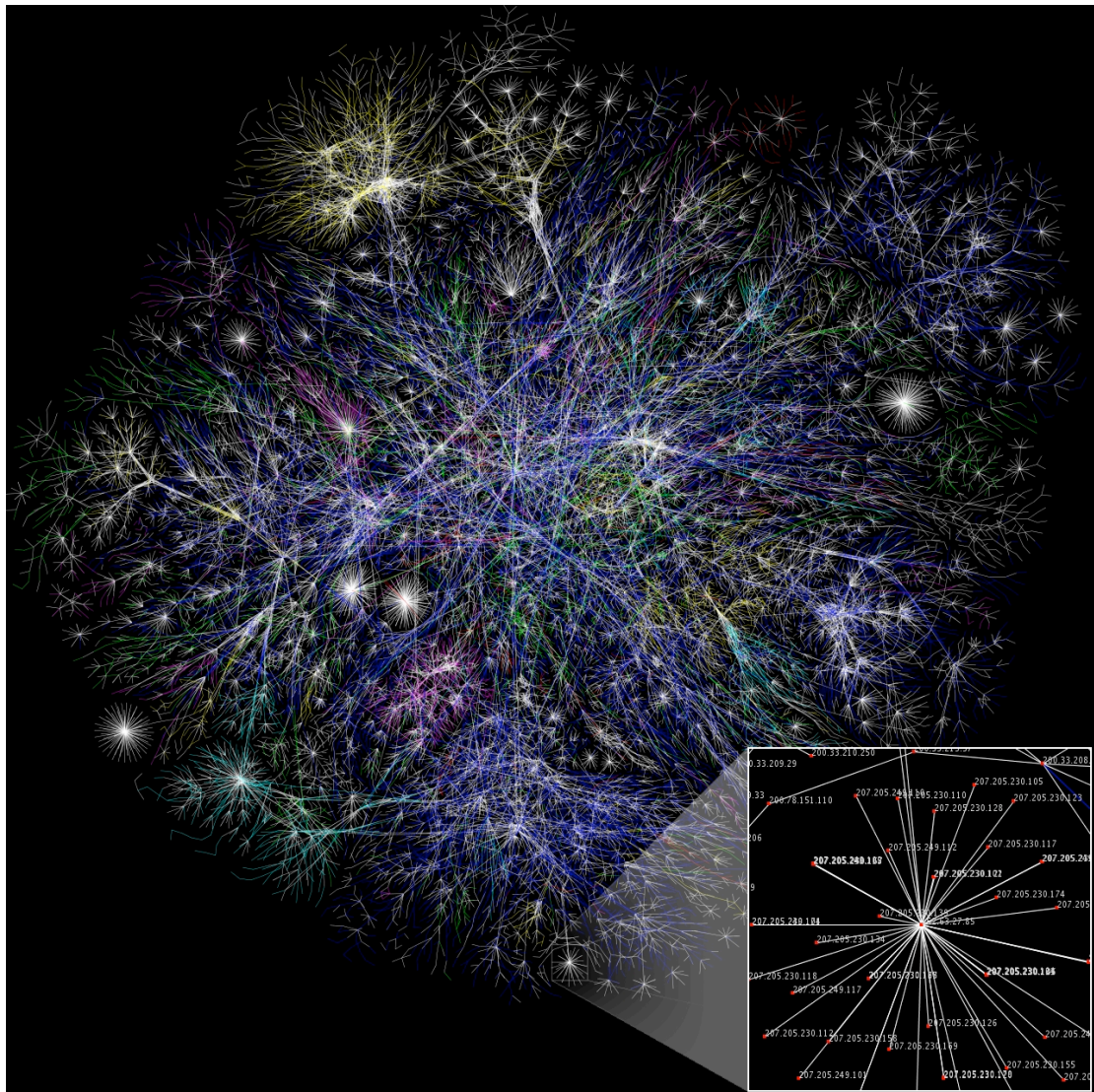
“it is not the case that the legislation says that ‘if someone finds your photograph, wants to use it and decides that they can’t trace you, they can do whatever they like with it after paying an arbitrary fee’, as the [Stop43.org website claims](#). Anyone wishing to use an image

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will have to conduct a diligent search for the owner of the right, and failure to do so would result in revocation of permissions and liability for substantial financial penalties.”

The Bill's proponents **did not define “diligent search” in Clause 43, not because they don't know, but because a manual “diligent search” for the creator and owner of a photograph is practically impossible.**



A map of the Internet, from *Wikipedia*

Every single day, thousands of photographs are uploaded to **Facebook** alone in a process that strips them of identifying metadata even if they had originally contained it, and thereby potentially “orphaning” them. Nobody knows how many billions of photos are on the Internet, let alone which are original works of contactable authors. **As many as 90% of the billions are infringing copies** according to **American Society of Media Photographers’** attorney Vic Perlman’s testimony to US Congress in 2007. There is no cursory, let alone diligent, search mechanism for finding their rightful owners. **Diligent search would require**

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visual search capabilities of visually-searchable registries, databases or archives that barely exist today. Text searches are especially liable to fail given absent bylines and erased metadata.

The Previous Government proposed that all licensed works shall be available for inspection in a register, so that reventant authors may reclaim their copyright and a proportion of licensing fees. Photographers are already obliged to expend large amounts of time and effort searching for and deterring infringing use. This register, or registers – the nature and number of which was to be deferred until the then Secretary of State could hopefully come up with a workable scheme – would demand every photographer in the UK periodically search in case any of his or her work had become orphaned and licensed by third parties. Why is this business burden on photographers acceptable as a means to allow others to use their work?

Clause 43 also proposed the introduction of so-called “Extended Collective Licensing” schemes that would have applied to *all* works; “known” works as well as so-called “orphan works”, and created an alternative to primary license negotiations between rights-holder and client as enshrined in the [Berne Agreement](#) and [TRIPS](#).

"The extended licensing provisions will apply to works whose rights-holders are traceable, as well as to orphan works. The Secretary of State may authorize a licensing body to license works for use even in cases where the author is not a member of the body and has not delegated any authority to that body to act as his or her agent.

The extended licensing provisions contain no requirement that the licensing body, or the person obtaining a licence, should carry out a search for holders/owners of rights who are not members of the licensing body. This is in distinction to the orphan works provisions, under which (in theory) no use may be made of a work until a diligent search for the rights-holders has been conducted." - [Action on Authors Rights](#)

In the Bill, as drafted:

- There was no provision that demanded that the licensing society and the potential user must both carry out diligent searches, or even that either of them must: the only requirement was that they reasonably believed that someone had.
- There was no statement at all in the Bill as to what happens should the author have come forward, except that he/she got paid - something.
- Furthermore, under subclause 116D(7) the Secretary of State could have waived the requirement for a diligent search, and even the requirement that if the author was found, the work must be removed from the orphan works register(s) - seriously, that is really what it said.

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So all you had to do was to say “There’s been a diligent search, I’m sure there has”; to which the licensing society could reply “We believe you. Here’s a license. That’ll be a quid - the rate you’d have paid on a microstock site. Now run off and do with it what you will.”

In Clause 43’s proposals, for an “orphan work licensee” to lose a claim for deliberate orphaning of a photographer’s work it would have been necessary to prove that a 'diligent search' had not been carried out. At what point were you to decide that your search had been “diligent”? Just how many haystacks were you going to have to say that you had searched, looking for that needle? How were you supposed to search them? What proof were you supposed to offer that you had? And in the improbable event that you had lost the claim, to what “substantial financial penalties” would you have been subject? The previous Government remained resoundingly silent on these points **after five years of "consultation"**. **No statement issued by the previous Government has satisfactorily addressed this concern.**

The National Cultural Archive

We propose to allow **cultural use** of so-called “**orphan works**” and for this cultural use to switch all other uses and users to “known” works, to stimulate cultural and economic activity to the benefit of everyone. To achieve it we propose some changes to **current copyright law** and the establishment of a National Cultural Archive, which must be free to use.

- **Digital solution to digital problem**

So-called “orphan works” are copyright works for which their owners cannot be found. The so-called “orphan works problem” is almost entirely the result of **the unprecedented ease with which the Internet makes it possible to propagate digital intellectual property** - the vast majority of images on the Internet lack ownership information and are so-called “orphan works” or illegal copies of known works, made without reference to the original creator.

Properly developed and implemented, **image recognition software** such as **Picscout ImageIRC (1), (2)** makes it equally easy to propagate creators’ and rights holders’ information, reunite it with “orphaned” digital files, and thereby **re-establish proper ownership and control** of them. **The Picscout ImageIRC represents an existing, functioning example of the technical basis of this proposal.** There may be others that can also be used as examples.

The National Cultural Archive should be a "virtual" entity consisting not of an institution

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in the conventional sense but **a registry and specialised search engine composed of a suite of technical specifications, software protocols and administrative obligations** that displays cultural assets in a defined way. This will enable existing digital collections, public, private and commercial, to become part of The National Cultural Archive. **The digital problem has a digital solution.**

• Cultural Use

We propose to allow **cultural use of so-called "orphan works"**. Two well-established and uncontentious examples of "cultural use" are:

- a. Viewing pictures hanging on the wall of a public art gallery
- b. Reading illustrated books in a public library.

• **Creators are willing to "loan" their orphan works to the nation** via The National Cultural Archive so that the public might culturally enrich itself by viewing them.

• **Cultural use is not a transfer of rights or an exception to copyright. Rights holders retain all of their rights at all times**, which is why we are willing to "loan" our orphan works to the National Cultural Archive. Furthermore:

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

• Stimulate cultural and economic activity

The main purposes of the The National Cultural Archive are to encourage cultural enrichment and stimulate economic activity by enabling the cultural use of so-called orphan works to switch all other uses and users to works of known provenance, so that they can be properly licensed for use to the economic benefit of everyone.

• Free to submit & use

• **Submission to and search of The National Cultural Archive must be automated and free of charge**, in exactly the same way that submission to and use of Google and other **Internet search engines** is free of charge.

• **Software necessary to automate submission must be provided free of charge**. This will nullify publishers' objections that tracking IP rights-holders is "onerous and expensive".

• **The National Cultural Archive must be financially self-supporting** via levies made on the commercial use of known work facilitated by The National Cultural Archive, in a similar way to Google profiting from **Google AdSense**. **Transactional links** are a well established, widely used and practical mechanism for achieving this. There are probably others.

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To be clear, **all submissions and views of any intellectual property made available via the National Cultural Archive must be free of charge to both the viewer and owner of that intellectual property.** Any payment to the National Cultural Archive or search software provider must be in the form of a levy on the commercial licensing of that intellectual property.

- **Include orphan and known works**

Of course, to act as an economic stimulus **The National Cultural Archive must also include works of known provenance.** This will cause the National Cultural Archive to stimulate economic use of known work to the direct benefit of all sectors, and thereby become **a profit engine for everyone** whilst avoiding the insurmountable problems of the commercial exploitation of so-called orphan works. For example, publishers and broadcasters, commercial libraries and the cultural sector could include their entire collections of known works alongside their so-called orphan works.

- **Orphan works on loan**

Cultural use is not a transfer of rights or an exception to copyright: our so-called “orphan works” are on loan to the nation for its cultural enrichment. Rights holders retain all of their rights at all times.

- **Code of practice**

Only the National Cultural Archive is to be authorised to display so-called orphan works. All existing so-called orphan works must be submitted to the National Cultural Archive registry by their custodians and categorised as so-called orphan works before any use of any kind can be made of them.

Submissions of so-called orphan works must conform to a Code of Practice that recognises that **not all works are suitable for submission.** For example, works depicting minors, that may be private commissions, or works with obviously commercial subject matter may be problematic. Creators will contribute to the drafting of the Code of Practice.

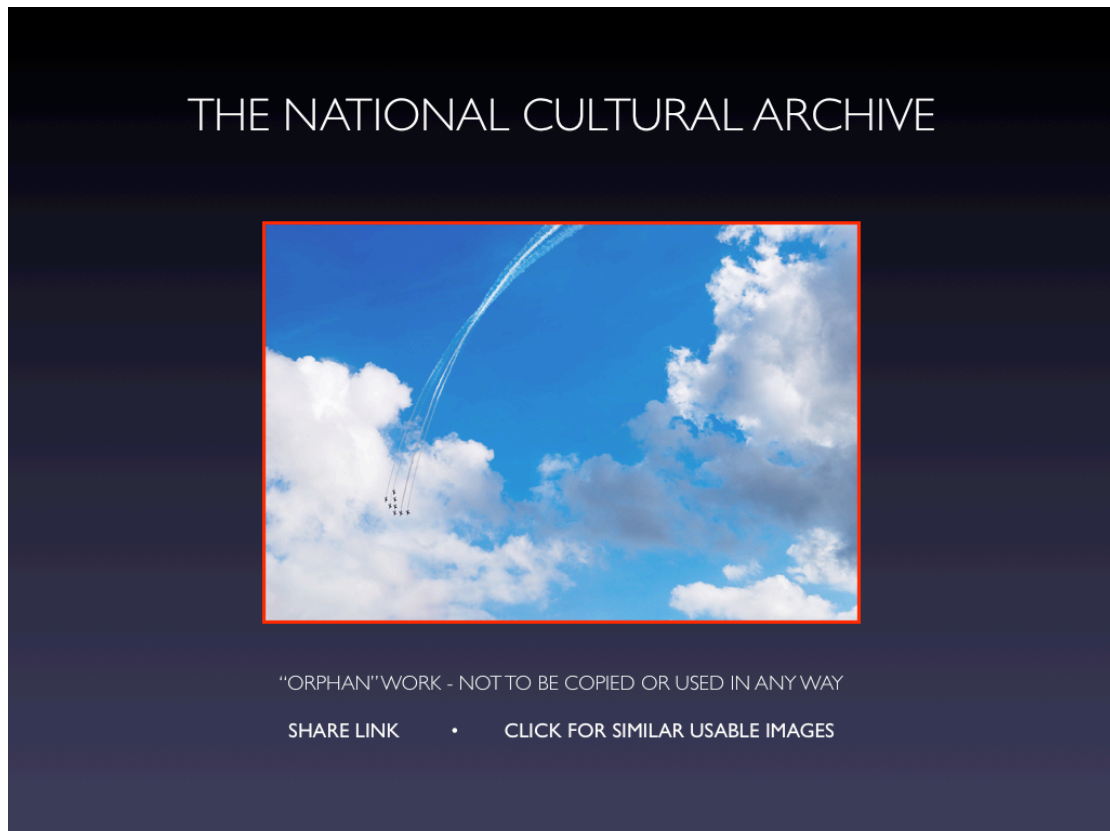
- **Creators’ Requirements**

Our requirements, in detail.

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Example Orphan Image Page

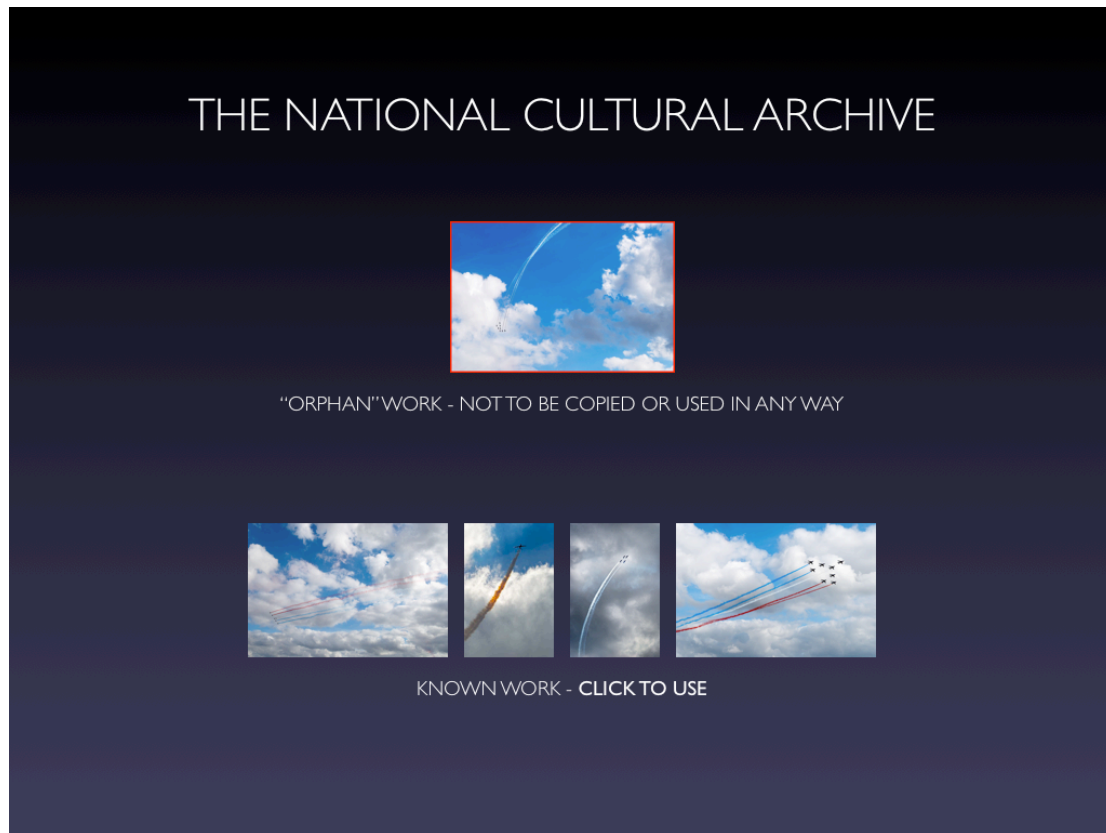


In this example, the image is shown surrounded by a red border to denote its “orphan” status. • **Share Link** is a JavaScript button to make it easy to share this page on social networking sites, etc. To be clear, this button shares that page’s address, NOT the image itself. It does not allow embedding in other pages. • **Click for similar usable images** causes visual such software to create a “lightbox” of visually similar images that are commercially licensable. **In this way, a so-called “orphan” image can be made available to the public for their cultural enrichment and at the same time be used to generate a selection of similar known works that can be properly licensed for further use.**

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Example Orphan Works Page with Alternative Known Works



In this example, the **Click for similar usable images** button on the previous page has generated a “lightbox” of visually similar images. Clicking on the image thumbnail would take the viewer straight to the creator’s or rights-holder’s website for licensing the image. This link could lead to

- the creator’s personal website or e-shop, such as [PhotoShelter](#)
- that image in a commercial picture library such as [Getty Images](#), [Alamy](#) or [Corbis Images](#), or smaller library such as those of many of [BAPLA’s members](#)
- that image in a museum’s or gallery’s picture library, such as [The National Gallery Picture Library](#)
- that image in a newspaper, magazine, broadcaster, book publisher’s or agent’s picture library, such as [The Associated Press Picture Library](#)

In this way, The National Cultural Archive has

- culturally enriched the viewer by allowing him to see an image that otherwise he could not
- informed and educated its users that the pictures they are looking at are not “free”, or free to use

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- provided access to a selection of similar, known images that might serve just as well for any extra-cultural use
- linked potential users with the rights holders of those known images
- and, if a commercial license is agreed between potential user and rights holder, stimulated economic activity to their mutual benefit, and that of society at large.

If this point is reached and a successful transaction concluded, the rights holder should pay a levy to the National Cultural Archive and visual search software provider for having acted as “agents” in this transaction. The levy should be small, probably a percentage of the license fee, and be automated on the “[transactional link](#)” principle. Commercial picture libraries should absorb the levy themselves and not pass it on to the image’s copyright holder.

Stop43 are in the process of building a working demonstration model of this system.

The National Cultural Archive In Detail

Introduction

The fundamental purpose of this proposal is to allow "cultural use" of genuine so-called orphan works, and for this cultural use to switch all other uses and users to works of known provenance, and thereby stimulate economic activity to the benefit of all. To enable this we propose some changes to current copyright law and the establishment of a National Cultural Archive.

Copyright exists not only to protect creators' rights, but also to protect the rights of those depicted in photographs, of beneficiaries of contracts agreed in the course of making those photographs, and the rights of viewers, readers and consumers of creative intellectual property. This proposal is contingent on the establishment in UK law of the inalienable [Moral Rights](#) of the creator as [civil rights](#), as they are in all other EU countries except for Ireland and The Netherlands. They are:

1. Attribution: the right to be identified as the creator of the work
2. Disclosure: the right to decide when and where to publish the work
3. Integrity: the right to preserve the integrity of the work.

In addition, **this proposal is dependent upon passing the [Berne three-step test](#)**. The test is included in [Article 13 of TRIPS](#). It reads:

"Members shall confine limitations and exceptions to exclusive rights to certain special cases

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which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder."

There is some interpretation of the steps in this document.

Step 1: "Exceptions to copyright in "certain special cases" is interpreted as for a specific purpose justified by clear reason of public policy or exceptional circumstances; the exceptions to copyright must be clearly defined and of narrow scope and reach."

Step 2: "An exception to a right rises to the level of a conflict with a normal exploitation of the work if uses, that in principle are covered by the right but exempted by the exception, enter into economic competition with the ways in which right holders normally extract economic value from that right, and thereby deprive them of significant or tangible commercial gains."

It is not immediately clear that *any* use of so-called orphan works passes this test.

However, the "format-shifting" of IP from decaying traditional media to robust digital storage in order to conserve, catalogue and preserve that IP is clearly a "special case" that passes Berne Step 1.

This proposal deals specifically with photographs. Other media have different characteristics and requirements: **they are are put to different uses** by private individuals and organisations, and these different uses must be reflected in definitions of "cultural use" and copyright law. Having said that, the broad principles and some details of this proposal are probably applicable to all creative intellectual property and could be used by visual artists of all kinds, illustrators, writers, composers and musicians, filmmakers and others as a basis for their proposals. We would welcome this.

Only the National Cultural Archive is to be authorised to display so-called orphan works. The National Cultural Archive should also include works of known provenance. Displays of works of known provenance should include "affiliate links" from which these works can be licensed for use in the normal ways, prints and books bought, etc.

Displays of orphan works should include links to selections of similar works of known provenance, which themselves should include **transactional links** from which those works can be licensed for use in the normal way, prints and books bought, etc. This will cause the National Cultural Archive to stimulate economic use of works of known provenance to the direct benefit of all sectors. The National Cultural Archive would thereby become a profit engine for everyone whilst **avoiding the insurmountable problems of the commercial exploitation of so-called orphan works**. For example, publishers and broadcasters, commercial libraries and the cultural sector could include their entire collections of works of

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known provenance alongside their so-called orphan works.

In this proposal, the term "creators" refers primarily to freelance and small-business professional and semi-professional creators. Creative employees of larger organisations that produce creative intellectual property and those larger organisations themselves will also benefit from this proposal. The term "creators" does not refer to the aggregators, marketers and licensors of the intellectual property of others, commonly but misleadingly known as "the creative industries". Their interests are often not coterminous with ours.

When evaluating this proposal, please do not focus on single points out of context. This proposal is a system. Please ensure that you have grasped its systemic nature before evaluating it. Constructive criticism on this basis is welcome; the proposal needs any weaknesses identifying and rectifying.

A Digital Solution to a Digital Problem

- So-called "orphan works" are copyright works for which their owners cannot be found. The so-called "orphan works problem" is almost entirely the result of **the unprecedented ease with which the Internet makes it possible to propagate digital intellectual property** - the vast majority of images on the Internet are so-called "orphan works" or illegal copies of known works.

- Properly developed and implemented, **image recognition software** such as **Picscout ImageIRC (1), (2)** makes it equally easy to propagate creators' and rights holders' information, reunite it with "orphaned" digital files, and thereby **re-establish proper ownership and control** of them. **The Picscout ImageIRC represents an existing, functioning example of the technical basis of this proposal.** There may be others that can also be used as examples.

- **The National Cultural Archive should be a "virtual" entity** consisting not of an institution in the conventional sense but **a specialised search engine composed of a suite of technical specifications, software protocols and administrative obligations** that displays cultural assets in a defined way. This will enable existing digital collections, public, private and commercial, to become part of The National Cultural Archive. Such an approach will very significantly reduce the costs of running The National Cultural Archive and enable the nation to gain access to it very quickly. It will also stimulate economic activity.

- **The National Cultural Archive must have as its basis a registry of works.** This must be visually-searchable and require no special software to access beyond freely-available browser and image-editing software plug-ins and freely-available JavaScript to be added to web pages. There can be multiple registries but they must appear as a coherent whole to

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users. Open protocols must be used to enable search by different search software, promoting competition and thereby feature and efficiency improvements among search software providers.

- **Technical specifications, software protocols and administrative obligations should all be derived from existing, successful network-based models.** There are many examples: commercial picture libraries such as [Getty Images](#), [Alamy](#) and [Corbis Images](#); [Picscout ImageIRC](#); [BBC iPlayer](#); [Apple iTunes Store](#); [Amazon.com](#) and its "suggestions" system; password-protected web galleries requiring account generation and login to access, etc.

The digital problem has a digital solution.

Cultural Use Defined

- **As creators and rights holders, we believe it to be our prerogative to define "cultural use", and particularly what is not "cultural use".**
- Cultural use does not include commercial, educational (in the conventional sense), political, religious or social (charity) use.
- Cultural use is not "private use". It does not include any right to 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 work. "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 creatives depend on such licensing as their primary income.
- **Cultural use is not an exception to copyright. Rights holders retain all of their rights at all times.** This is why we are willing to "loan" our orphan works to the National Cultural Archive.
- **We propose to allow cultural use of so-called "orphan works".** Two well-established and uncontentious examples of "cultural use" are:
 - a. Viewing pictures hanging on the wall of a public art gallery
 - b. Reading illustrated books in a public library.

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Both examples 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.** Digital networking will bring 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.

- A digital equivalent might be the requirement to put any picture of unknown provenance into a password-protected web gallery that requires the creation of an account to log in. Usual weblogs must be kept. All images in the gallery must be "fingerprinted" by [Picscout](#), [ImageIRC](#), [TinEye](#) or similar, and contain full metadata, with "orphan" metadata entered in the unknowable fields. Copying and embedding are not to be permitted. Each asset in the gallery is to have a "Share Link" button that allows sharing of its address, so that others can create accounts, log in and view the asset. The buttons should be freely shareable.
- **No advertising, political, religious, charitable or sponsorship images or links are to be permitted**, but links to other similar 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 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.
- This 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. It also gives creators the moral high ground - we are visibly giving something back to society.
- Although not entirely damage-free, this scheme would cause minimal 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-orphan problem.

A Stimulus to Economic Activity

- **The main purposes of the Archive are to encourage cultural enrichment and stimulate economic activity** by enabling the "cultural use" of genuine so-called orphan works to switch all other uses and users to works of known provenance, so that they can be properly licensed for use to the economic benefit of all.

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Free To Submit And To Use

- **Submission to and search of The National Cultural Archive must be automated and free of charge**, in exactly the same way that submission to and use of Google and other **Internet search engines** is free of charge. **Software necessary to automate submission must be provided free of charge**. This will nullify publishers' objections that tracking IP rights-holders is "onerous and expensive".
- **The National Cultural Archive must be financially self-supporting** via levies made on the commercial use of known work facilitated by the National Cultural Archive, in a similar way to Google profiting from **Google AdSense**. **Transactional links** are a well established, widely used and practical mechanism for achieving this. There are probably others.
- To be clear, **all submissions and views of any intellectual property made available via the National Cultural Archive must be free of charge to both the viewer and owner of that intellectual property**. Any payment to the National Cultural Archive or search software provider must be in the form of a levy on commercial licences that have been facilitated by The National Cultural Archive.
- We do not want payment made to us for the cultural use of our so-called orphan works by the nation.
- We do not want profit to be made by others as a result of our making available our so-called orphan works for cultural use.
- Profit made by all parties as a result of the switching of extra-cultural uses and users from so-called orphan works to known works is welcome, and we encourage it.

All works, both known and orphan

- Of course, to act as an economic stimulus **The National Cultural Archive must also include works of known provenance**. This will cause the National Cultural Archive to stimulate economic use of known work to the direct benefit of all sectors, and thereby become **a profit engine for everyone whilst avoiding the insurmountable problems of the commercial exploitation of so-called orphan works**. Individual freelance professionals, semi-professionals, publishers and broadcasters, commercial libraries and the cultural sector should all be encouraged to include their entire collections of known works alongside their so-called orphan works.

Cultural use is a loan, not a transfer of rights or exception to copyright

- **Cultural use is not a transfer of rights or an exception to copyright: our so-called "orphan works" are on loan to the nation for its cultural enrichment. Rights holders retain all of their rights at all times.**

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- Creators are willing to "loan" their orphan works to the nation so that the public might culturally enrich itself by viewing them. Cultural enrichment is a result of the public making cultural use of our orphan works.
- When a creator discovers their orphaned work in the National Cultural Archive they must be allowed to remove it, or grant explicit permission for it to remain there for cultural use. They should also be offered help in making it available for economic use, if they so wish.

Code of Practice

Only The National Cultural Archive is to be authorised to display so-called orphan works.

- A Code of Practice defining cultural use, imagery suitable for such use, and imagery unsuitable for such use, must be established and adhered to. **Non-compliance must result in de-authorisation of the infringer by The National Cultural Archive.**
- **The Code of Practice must recognise that not all works are suitable for submission.** For example, works depicting minors, that may be private commissions, or works with obviously commercial subject matter may be problematic. Creators will contribute to the drafting of the Code of Practice.
- Custodians of so-called orphan works approved and regulated by The National Cultural Archive are to be free to digitise all of their IP held on traditional media, for the purposes of conserving, cataloguing and preserving it. These digital copies are to be submitted to The National Cultural Archive Registry as they are created. **This is not to be regarded as an exception to copyright;** rather, it is a form of "format shifting" to move the IP from fragile, decaying traditional media to robust digital storage. The IP itself remains the copyright of the rights holder. **It is to be legally recognised that the "format-shifted" IP in digital form is not itself a new copyright work.**
- **All existing genuine so-called orphan works must be submitted to the registry by their custodians and categorised as so-called orphan works before any use of any kind can be made of them.**
- **All entities that accept submission of IP from the public** (broadcasters, Facebook, Flickr, newspapers and magazines, competitions, etc.) **must register that IP as property of the submitter, based on data captured by the submission.** For professional photographers this will include IPTC data within the image files; for users of Flickr, Facebook and similar the submitter's account details; for IP submitted by mobile devices the IP address, MAC address, phone number or other capturable data. **To allay privacy concerns,**

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submitters must also be offered the choice of anonymous, anonymised submission with no data capture, on the clear understanding that by submitting in this way they are knowingly and deliberately orphaning their IP. **The default must be registered submission.**

- **Displays of so-called orphan works by the National Cultural Archive must not themselves be archived by any other means.** This is to ensure that so-called orphan works that have been readopted by their rights holders, or displayed in breach of the Code of Practice, can be properly and permanently removed from all display.

- Any display of our so-called orphan works in any way except by way of small, full-image-watermarked thumbnails in search engine results, must be entirely free of adverts, ad links and commercial, political, religious or charity sponsorship messages. **Our so-called orphan works must not endorse or generate profit for advertisers or be used in any way to imply endorsement of any commercial, political, religious or charitable philosophy or organisation.**

Creators' Requirements

OUR OFFER:

- Creators are willing to "loan" their orphan works to the nation so that the public might culturally enrich itself by viewing them. Cultural enrichment is a result of the public making "cultural use" of our orphan works.

IN RETURN, WE REQUIRE:

- Proper participation in the drafting of an Intellectual Property Act. We do not accept that the so-called "creative industries" properly represent our views and interests. We must participate ourselves.
- Inalienable Moral Rights, copyright and fair contract law on the German model applied to Intellectual Property.
- Deficiencies identified by us in current copyright law to be reasonably and equably rectified to our satisfaction. These are:
 - the current lack of inalienable Moral Rights, copyright and fair contract law on the German model applied to Intellectual Property;
 - the current lack of an informal, low cost, quick, online method of enforcing rights and obtaining compensation for breaches. To deter infringement it is essential that the penalty for a breach is significantly greater than the lawful cost of a proper licence would have been,

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even if not all of the money charged to an infringer gets paid to the rights owner.

- We require effective measures to re-establish the ownership of current so-called orphan works.
- We require effective measures, both technical and legal, to prevent the generation of future so-called orphan works.
- We require clear recognition at all times that our so-called orphan works remain the property of their rights holders.
- We require clear understanding by all parties that the overwhelming majority of digital so-called orphan works have become separated from their rights holders without their rights holders' knowledge because they are exact copies or derivatives of copies, made without the rights holders' knowledge or authorisation, of files still under the rights holders' control.

CULTURAL USE

- As the rights holders, it is our prerogative to define "cultural use", and particularly what is not "cultural use".
- "Cultural use" does not include commercial, educational (in the conventional sense), political, religious or social (charity) use.
- "Cultural use" is not "private use". It does not include any right to 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 work. "Educational use", while including elements of "cultural use", also contains elements of "commercial use". 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 creatives depend on such licensing as their primary income.
- "Cultural use" is not an exception to copyright. Rights holders retain all of their rights at all times. This is why we are willing to "loan" our orphan works to the National Cultural Archive.

CODE OF PRACTICE

- We require a Code of Practice defining "cultural use", imagery suitable for such use, and imagery unsuitable for such use, must be established and adhered to. Non-compliance must

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result in de-authorisation of the infringer by the National Cultural Archive.

- As a consequence of their subject matter, not all so-called orphan works will be suitable for "cultural use".
- Displays of so-called orphan works by the National Cultural Archive must not themselves be archived by any other means. This is to ensure that so-called orphan works that have been readopted by their rights holders, or displayed in breach of the Code of Practice, can be properly and permanently removed from all display.
- Any display of our so-called orphan works in any way except by way of small, full-image-watermarked thumbnails in search engine results, must be entirely free of adverts, ad links and commercial, political, religious or charity sponsorship messages. Our so-called orphan works must not endorse or generate profit for advertisers or be used in any way to imply endorsement of any commercial, political, religious or charitable philosophy or organisation.
- Access for viewing our so-called orphan works in The National Cultural Archive should be limited to UK-based IP addresses in the same way that access is limited to BBC iPlayer. Access to known works should be global. Worldwide access must be provided for image recognition software so that foreign rights holders can find their IP in the The National Cultural Archive and readopt it.
- When a creator discovers their orphan work in The National Cultural Archive they must be allowed to remove it, or grant explicit permission for it to remain there for cultural use. They should also be offered help in making it available for commercial use, if they so wish.

FINANCIAL

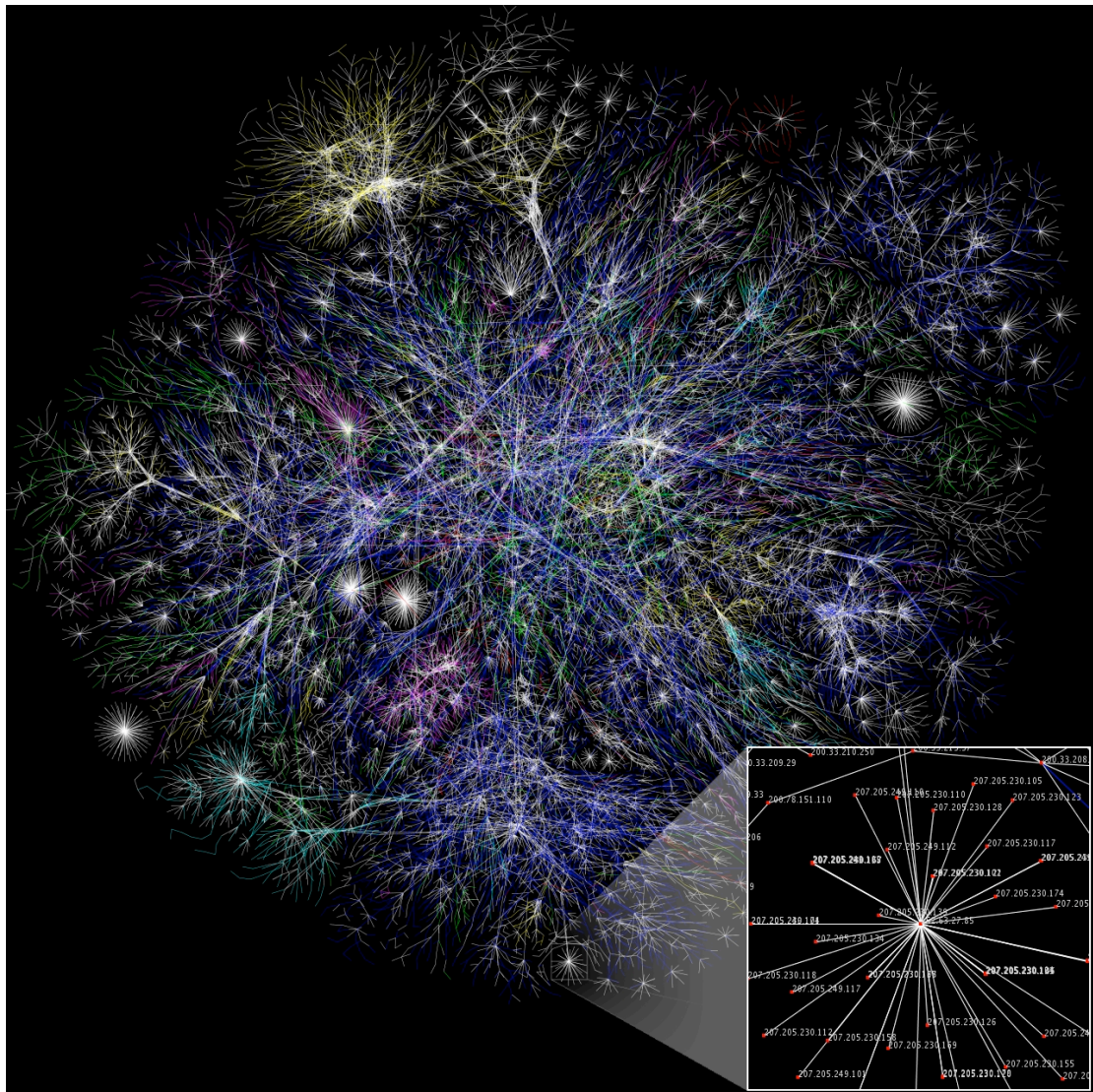
- All costs of the cultural use of our so-called orphan works by the nation must be borne by the nation.
- Our careers, businesses and ability to create new work are not to be materially damaged by the "cultural use" of our so-called orphan works by the nation.
- We do not want payment made to us for the cultural use of our so-called orphan works by the nation.
- We do not want profit to be made by others as a result of our making available our so-called orphan works for cultural use.

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- Profit made by all parties as a result of the switching of extra-cultural uses and users from so-called orphan works to works of known provenance is welcome, and we encourage it.

The Characteristics of Digital Media & Networking



A map of the Internet, from *Wikipedia*

The primary characteristics of **digital media** and **networking** have been widely known, well understood and straightforward to describe for nearly thirty years. They are:

1. **Digital data can be copied exactly.**
2. **Digital data is separate from its storage medium.**
3. **Digital data must be copied and transformed in order to use it.**
4. **A digital network is no more than an extension of a digital device.**

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5. All digital data transmission can be logged.

6. All digital copy-protection and digital rights management mechanisms can be subverted.

Stop43 were struck by how ignorant of these primary characteristics the Digital Economy Bill debate was, and indeed how little regard the entire Bill, now an Act, pays to them. Most discussion concerned itself with treating symptoms rather than understanding causes. Apart from a few knowledgeable Lords and MPs, most Parliamentarians seemed to struggle with the whole concept of the Internet and digital media as they might struggle to programme an ancient VCR.

They had been bamboozled by its switches, buttons, plumbing and jargon and failed to see that they were actually discussing **the primary effect of pervasive digital media, devices and networking: the unprecedented ease with which it is now possible to propagate intellectual property and its consequences for creators, rights holders and users.**

The current spread of Internet and email use, social networking and file sharing is simply a manifestation of the lowering of the barriers to entry to digital networking and the origination, sharing and recombining of digital media afforded by more powerful and smaller computing devices, more capable, easier-to-use software, and pervasive digital networks. There is good reason to believe that this trend will continue.

Until now, the most obvious result of the almost effortless propagation of intellectual property via digital networking has been its large-scale piracy. New software developments now enable the propagation of authors' and rights holders' information with equal ease, to reunite that data with pirated or orphaned copies of their intellectual property.

This will have the effects of informing and educating the public that intellectual property on the Internet is not "free" but is owned by someone, and of making it easy for prospective users of that intellectual property to contact its rights holders to negotiate a License to Use it, if the rights holders so wish. At last, the Internet becomes a proper, functioning intellectual property market rather than merely a conduit to theft.

Stop43 believe that no properly effective and long lasting legislation can be created to regulate digital copyright without a thorough grasp of these characteristics and we recommend you take the time to understand them in detail.

The Characteristics of Digital Media and Networking, In Detail

Statements were made by the previous Government to the effect that regulation of digital copyright is too complex for primary legislation, because too much remains unknown and powers must be granted in advance to regulate unpredictable future developments. This after more than four years of research and "consultation", starting with the Gowers Review in 2006 and continuing with the Lammy Review in 2009.

The primary characteristics of digital data, digital media and digital networking have been widely known, well understood and straightforward to describe for nearly thirty years. The current spread of Internet and email use, social networking and file sharing is simply a manifestation of the lowering of the barriers to entry to digital networking and the origination, sharing and recombining of digital media afforded by more powerful and smaller

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computing devices, more capable, easier-to-use software, and pervasive digital networks. There is good reason to believe that this trend will continue.

1. Digital data can be copied exactly.

This is the first primary characteristic of digital media, and what distinguishes it from conventional "analogue" media. Copies of digital files are exact copies, identical in every way, with no quality loss. This is why software works, why the spreadsheet you send to a colleague still calculates correctly, and why exact backups of your work are possible. Because of this characteristic there is really no such thing as a unique digital master file; there is only either a single copy of the data, or multiple identical copies. Of course it is also possible to derive functionally-similar copies from an original digital file. Resized digital images, images with their metadata stripped, and images saved in different file formats can all be visually identical and functionally similar to an original, but comprise different data structures.

This gives rise to the first point of confusion for consumers and other users of creative intellectual property. Unlike stealing a physical object and thereby depriving its owner of its use, the unauthorised copying of a digital data file leaves the original in place for its owner to continue unsuspectingly to enjoy. Unauthorised copying therefore appears to be a "victimless crime". *It is not.* The original data file's value to its owner is reduced because the unauthorised copy can go on to be freely duplicated and used elsewhere by others who might otherwise have bought an appropriate licence to use it at the proper market rate from its owner, or who might go on to use it in ways that its owner would not sanction. Law recognising this fact in relation to illegal file sharing was enacted in the Digital Economy Act 2010, and yet its antithesis, this false and sloppy "victimless crime" thinking, remained codified in the Digital Economy Bill Clause 43.

2. Digital data is separate from its storage medium.

A digital data file can exist stored on a hard disk, memory stick, CD or DVD, data backup tape, in random access or flash memory or any other physical storage medium and be copied freely between them. When you replace your worn-out old computer you copy your data from it to a new one: the storage medium changes but the data itself remains unchanged.

This gives rise to the second point of confusion for consumers and other users of creative intellectual property: they think that they have "bought" a CD, DVD or data file. In fact they have bought and own a copy of the physical storage medium, but only paid for a licence to use the intellectual property stored upon it; they have not bought its copyright.

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Consumers do not “buy” stories, articles, music or films; no-one need “buy” photographs. In all cases an appropriate licence to use is sufficient.

3. Digital data must be copied and transformed in order to use it.

Unlike viewing a photographic print, painting, drawing or sculpture; listening to live speech or music; or watching a film projection it is not possible to experience digitally-stored data at first hand. A digital data file resident on a physical storage medium must first be loaded by software into a digital device's random-access memory and then transformed into **pixels** on a screen to be viewed, or **streamed** to a **digital-to-analogue converter** and fed to an **amplifier** and **transducer** to be heard. These are transformative copying operations. This both proves the veracity of the first characteristic of digital data and introduces its fourth characteristic.

4. A digital network is no more than an extension of a digital device.

Any digital device consists of functionally-discrete **modules** such as **data input**, **storage**, **processing** and **display**, joined by internal **communications conduits**. A **digital network** is no more or less than the extension of these internal communications conduits beyond that device to other devices. Data travels through these conduits accompanied by **identification** and **routing metadata**. In so travelling its digital format might be transformed to comply with the technical requirements of the conduit, but on arriving at its destination it can be transformed back again to become an exact copy of the data on the originating device. **That really is all there is to it. WiFi, Ethernet, cellular networks, IP addresses, MAC addresses, TCP/IP** and the rest are merely digital plumbing.

5. All digital data transmission can be logged.

Your itemised mobile phone bill is a testament to this fact. Identification and routing metadata can be and is routinely **logged**. Such logging has been **legislated for in the Digital Economy Act**. This is the basis of all digital billing, accounting and auditing systems. **Authorial metadata** is no different from any other digital data and can be similarly logged.

It is significant that UK publishers accept, use and benefit from digital logging as a means of doing business when selling their wares, and yet object to the digital logging of the authorial metadata of their contributors' submissions as "unacceptably onerous and expensive". The same software and computer systems can easily carry out both functions simultaneously, and this is exactly what they do, by law, in Germany. Germany appears to enjoy a thriving publishing industry.

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6. All digital copy-protection and digital rights management mechanisms can be subverted.

In transforming a stored digital file into pixels for viewing or sound waves for listening to, all **encryption** and **Digital Rights Management** mechanisms must be unlocked. Herein lies their weakness: the unlocking process can be **reverse-engineered**. The fact that these mechanisms *can* be subverted does not imply that they *always will be* every time a digital rights managed file is used. **DVD copy protection** was "**cracked**" within weeks of release of the format, but contemporary commercial DVDs remain copy-protected and sales healthy.

The subversion of digital rights management mechanisms can properly be compared to losses suffered by high street retailers as a consequence of **shoplifting.** Most shoppers do not steal; retailers remain profitable despite the activities of shoplifters. Retailers deploy measures to minimise shoplifting but regard the costs of those measures and the stolen stock as costs of doing business. They could reduce their losses by making their shops less consumer-friendly but know that in so doing they would reduce their overall sales and thereby suffer. Their measures limit their losses through shoplifting to a commercially-manageable level. In this regard, Digital Rights Management is no different. Many large, successful digital network businesses such as **Apple iTunes** are built upon **digital rights-managed** data distribution in the full knowledge that a commercially-acceptable proportion of that data will be "cracked" and illegally shared.

Future Legislation

Future digital copyright legislation has only to recognise these six primary characteristics of digital data and networking to be effective no matter what developments the future might hold by way of its proliferation and usage. It is quite wrong to assert that the future is unpredictable in this way. **It is perfectly possible to word concise, comprehensible and effective primary legislation that takes into account the six primary characteristics of digital data and networking. Photographers intend to participate in exactly that.**

The Uses of Creative Intellectual Property in the Networked Era

In concerning itself with trying to cure symptoms rather than diagnosing the causes of problems created by **the unprecedented ease with which it is now possible to propagate intellectual property** and its consequences for creators, rights holders and users, the Digital Economy Bill debate almost entirely ignored the uses to which creative **Intellectual Property (IP)** is put.

They are:

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A PROPOSAL TO RECTIFY DEFICIENCIES IN CURRENT COPYRIGHT LAW AND ENABLE THE USE OF SO-CALLED ORPHAN WORKS FOR DEFINED CULTURAL PURPOSES.

- **End Use:** The final use made of an **instance** of IP;
- **Further Use:** any use made of the IP before its End Use.

Both of these can be subcategorised:

- **Private Use** (*by an individual or household, as defined by typical DVD or CD License to Use statements*);
- **Public Use** (*in which the IP is put on public display or made available for the public to enjoy or share*); and
- **Commercial Use** (*in which the IP is used to generate revenue in some form, and/or to further a political, religious, or social (charity) purpose*).

There is an economic value chain from the originator to end user of IP. End Use is exactly that: the end of the value chain. All other uses can be categorised as **Further Use** in that **subsequent private, public or commercial use can be made of the intellectual property beyond this point.**

An additional usage definition is possible: Cultural Use. In our view, this use can be defined as being similar to Public End Use, but with some restrictions. In other words:

- viewing a picture on a public gallery wall
- reading a book in a public library
- attending a free-to-enter performance of theatre, music, the screening of a film, a poetry recital or book reading, or similar event free of advertising and sponsorship messages and not staged to further a commercial, political, religious or social (charity) purpose.

This is an End Use: no Further Use in any way can be made of the IP. In a digital networked form, it is one possible way in which so-called “orphan works” might be made available for public cultural enrichment.

Stop43 believe that no properly effective and long lasting legislation can be created to regulate digital copyright without a thorough grasp of these uses and **we recommend you take the time to understand them in detail.**

The Uses of Creative Intellectual Property in the Networked Era, In Detail

If appropriate legislation regulating digital copyright is to be drafted, it is first necessary to properly understand how creative intellectual property is used in the era of digital media and digital networking. Different media tend to be put to different uses. This paper, although referring to other media, will concern itself primarily with the uses of

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photographs.

Let us first categorise the uses to which creative **Intellectual Property** (IP) is put:

- **End Use:** The final use made of an **instance** of IP;
- **Further Use:** any use made of the IP before its End Use.

Both of these can be subcategorised:

- **Private Use** (*by an individual or household, as defined by typical DVD or CD License to Use statements*);
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There is an economic value chain from the originator to end user of IP. End Use is exactly that: the end of the value chain. All other uses can be categorised as **Further Use** in that **subsequent private, public or commercial use can be made of the intellectual property beyond this point.**

Before the advent of cheap and ubiquitous **networked digital capture** devices, IP on most traditional media could not be easily put to Further Use because the practicalities and barriers to further use of that IP were difficult to surmount. It is now trivially easy to digitise almost any medium into usable **formats** for Further Use, and the ease of use and propagation of digital IP is such that **with few exceptions there is no longer any real end-user of digital media: it can be endlessly used, re-used and combined or “mashed-up” into new uses.**

It is important to note that **the primary purpose of all copy-protection and Digital Rights Management mechanisms is to limit that instance of the IP to its defined End Use and prevent unauthorised Further Use.**

Here are some examples of the six categories of use:

END USE

usually the end of the economic value-chain for that particular instance of the IP

Private

- a photographic print of a privately commissioned portrait
- a printed wedding album

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- purchase of a limited-edition "art" print
- the enjoyment of books and other printed matter, traditional vinyl records, CDs, videotapes and DVDs bought for private use, as defined in their accompanying Licenses to Use
- before the widespread adoption of domestic tape and video recorders, broadcast radio and television.

Public

- viewing a picture on a public gallery wall
- reading a book in a public library
- attending a free-to-enter exhibition, performance of theatre, music, the screening of a film, a poetry recital or book reading, or similar event *not* staged to further a commercial, political, religious or social (charity) purpose.

Commercial

- listening to music "piped" to shops, restaurants, lifts, and other public spaces
- attending a pay-to-enter exhibition, performance of theatre, music, the screening of a film, a poetry recital or book reading, or similar free-to-enter event staged to further a commercial, political, religious or social (charity) purpose.

FURTHER USE

not usually the end of the economic value chain for that instance of the IP

Private

- any recombination, collaging or "mash-up" of IP originated by others, for that individual's study, practice or amusement

Public

- display on a public gallery wall
- placing a book in a public library
- mounting a free-to-enter performance of theatre, music, the screening of a film, a poetry recital or book reading, or similar event
- Use in any way on the public Internet (including "blogs") for non-commercial purposes (see below), or on "private" web-pages viewable by others, such as Facebook. Note: This is *not* private end use because it is in fact publishing, and makes it trivial for IP displayed there to be re-used by others, without authorisation. Furthermore, Facebook and others assert or have asserted rights to use IP posted to their services over and above those necessary for the provision of their services. Such assertions are known as rights-grabs.
- any recombination, collaging or "mash-up" of IP originated by others, for public display

Commercial

- the publishing, resale or re-licensing of the IP in any form, paid or not

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- use in advertising, or in an advertising context (the advertiser is making money from the use. This includes search engine results pages or “blog” pages that contain **advertising banners** or links)
- use in a commercial, political, religious or social (charity) context; i.e. to further a commercial, political, religious or social (charity) purpose
- any public recombination, collaging or “mash-up” of IP originated by others, to achieve a commercial, political, religious or social (charity) end, such as the infamous “**Ashes to Ashes**” **political posters**
- borrowing a book, CD or DVD from a public library
- use on the Internet, beyond Public use
- **Editorial** uses in “**the media**”
- **Public Relations** uses in “the media”, etc.
- “Corporate” uses such as Annual Reports, in-house magazines, brochures, flyers, etc.
- “Educational” use. **United Kingdom universities generated £59 billion for the UK economy in 2009, more than the pharmaceutical industry or the agricultural sector.**

Education is not unprofitable, and many creatives depend upon licensing their IP for educational uses for their main income stream. We know that many students are encouraged to duplicate photographs found on the Internet for inclusion in their course work, and that their teachers and tutors do exactly the same when preparing tuition materials. This must be considered commercial educational Further Use.

An additional usage definition is possible: Cultural Use. In our view, this use can be defined as being similar to Public End Use, but with some restrictions. In other words:

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The Photography Markets

Most people, including many photographers, labour under the illusion that there is a single “photography market”. In fact there are at least six, all of which have widely differing customs and subcultures. They are:

- **Social** and **weddings** (private commissions)
- **Fine Art**
- **Editorial**

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- **Public Relations** (PR)
- **Corporate**
- **Advertising**

They are discussed in detail here and can be summarised as follows:

- **Social** and **weddings** (private commissions): subjects have **rights of privacy**; no right to commercially exploit images; market functions well.
- **Fine Art**: no or limited right to commercially exploit images; market functions well.
- **Editorial**: market grossly unbalanced; requires copyright law reform to function satisfactorily; **a failed market according to orthodox free-market theory.**
- **Public Relations** (PR): market poorly balanced; requires copyright law reform to function satisfactorily.
- **Corporate**: market poorly balanced; requires copyright law reform to function satisfactorily.
- **Advertising**: market reasonably well balanced and functions reasonably well.

In all markets except for fine art and high-end advertising, client understanding of copyright concepts is poor or non-existent.

The Photography Markets In Detail

It is our concern that if appropriate legislation regulating digital **copyright is to be drafted, it is first necessary to properly understand the varied markets for photography and their characteristic subcultures.**

First, let us list the different **genres (the subject matter or “content”) of photographs and the markets in which they are licensed.**

Genres include:

- Portraits, Weddings & Social
- Landscape
- Wildlife & Nature
- Sports
- News, Documentary & Reportage
- Interiors
- Architecture
- Still Life
- Lifestyle
- Fashion
- Cars, Aviation & Transport

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The difficulty and cost of creating images within and between genres varies widely. For example, anyone attending a public airshow can easily shoot pictures of aircraft from the ground for the price of the entry ticket. Photographing the same aircraft air-to-air from another is a far more demanding and costly affair.

Markets for photographs include:

- **Social** and **weddings** (private commissions)
- **Fine Art**
- **Editorial**
- **Public Relations** (PR)
- **Corporate**
- **Advertising**

"**Stock photography**" is not itself a market, but a means of supplying photography markets with pre-existing images. Similarly, photographic competitions are not a market, but are **increasingly used** by **unscrupulous organisers** imposing **rights-grabbing** entry terms to acquire libraries of stock photographs for commercial re-use at little cost to themselves.

Images with near-identical content are commissioned, created, valued, licensed and used very differently in different markets. With the exception of the **Public Relations** and **Corporate** markets, which overlap somewhat, it is highly misleading to assume that what prevails in one market is also true for others.

Few photographers are professionally active in all genres and markets. Most operate in multiple genres but only a few markets; others specialise in one or two genres but operate in multiple markets; the best-known photographers usually specialise in one or two genres and markets.

Each market for photography has its own distinct subculture based on its combination of the following factors:

- The **Supplier/Client** Ratio
- The **Commissioning** process
- The Creation and **Production** Process
- The **Valuation** Process
- The **Licensing** Process, including the prevalence of unfair contract terms and **rights-grabs**
- Usage, particularly **usage restrictions**, **exclusivity**, **privacy**, and whether the photograph will be subject to **End Use** or **Further Use**
- The proper functioning or **failure of the market** according to orthodox **free-market theory**.

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SOCIAL & WEDDINGS

- **The Supplier/Client Ratio:** all parts of the market are well-balanced with many suppliers servicing many clients. Both sides of the market overwhelmingly comprise individuals or microbusinesses.
- **The Commissioning process:** private commissions. As such, images are private and no other use can legally be made of them without the consent of both the copyright holder (usually the photographer) and the commissioner. One of the great problem areas for any so-called “orphan works licensing” scheme.
- **The Creation and Production Process:** varies from available-light “reportage” to full-blown lit location and studio work at the high end of the market.
- **The Valuation Process:** fees negotiated directly between client and supplier. Many suppliers offer a tariff; the properly competitive nature of the market enables clients and suppliers easily to match quality, style, deliverables and fee to mutual satisfaction.
- **The Licensing Process:** photographers automatically retain copyright. Images are licensed for private use.
- **Usage:** images are used for private purposes. Deliverables tend to be photographic prints or wedding albums. These are traditionally End Uses. There is a recent trend towards the supply of accompanying digital media, which can result in unintended and unauthorised Further Use.
- **This market functions well according to orthodox free-market theory.**

FINE ART

- **The Supplier/Client Ratio:** all parts of the market are well-balanced with many suppliers servicing many clients. Both sides of the market mostly comprise private individuals or microbusinesses; galleries sell prints to the public on behalf of photographers; some large cultural institutions collect photographs.
- **The Commissioning process:** self-commissioned or, less frequently, private commissions. Images are private and no other use can legally be made of them without the consent of both the copyright holder (usually the photographer) and the commissioner. One of the great problem areas for any so-called “orphan works licensing” scheme.
- **The Creation and Production Process:** the entire range of production methods and processes is represented. Prints are usually unique or produced in limited editions. Verifiable documented proof of provenance is of paramount importance.
- **The Valuation Process:** fees negotiated directly between client and supplier. Valuations range from a few tens of pounds to tens of thousands - another of the great problem areas for any so-called “orphan works licensing” scheme.
- **The Licensing Process:** photographers automatically retain copyright. Images are

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licensed for **private use** and public display.

- **Usage:** images are collected and displayed for private, cultural and investment purposes. Deliverables tend to be **photographic prints**. These are traditionally **End Uses**. There is a recent trend towards the supply of accompanying **digital media**, which can result in unintended and unauthorised **Further Use**.
- **This market functions well according to orthodox free-market theory.**

EDITORIAL

- **The Supplier/Client Ratio:** most parts of the market are **oligopolistic**, characterised by high **concentration** and grossly unbalanced with a great many suppliers competing to supply relatively few clients. The supply side of the market overwhelmingly comprises **amateur**, **semi-professional** and **professional** individuals or **microbusinesses**; clients mostly consist of large corporate media combines.
- **The Commissioning process:** members of the public freely supply images for no fee, sometimes in return for a “**byline**” or credit; freelance professionals and microbusinesses supply “on spec”, sometimes at their own rates but usually at rates dictated by the client; clients also directly commission work from photographers or their agents. Clients usually use their **market dominance** to dictate terms. **Picture Agencies** and **Stock Libraries** also supply clients, often via commodity “subscription deals” in which the client is licensed to use a fixed number of images per day, week or month for an inclusive fixed fee.
- **The Creation and Production Process:** the entire range of production methods and processes is represented.
- **The Valuation Process:** clients usually use their market dominance to dictate fee levels, which are usually imposed on suppliers (“day rates”, “shift rates” and newspaper “space rates” are prime examples) although direct negotiation between supplier and client can occur, depending on an image’s perceived exclusivity and commercial value to the client. The **Base Usage Rate** method is sometimes used at the top of the market. Valuations range from free use to tens of thousands of pounds - another of the great problem areas for any so-called “orphan works licensing” scheme.
- **The Licensing Process:** photographers **automatically retain copyright** but there is an increasing trend by clients towards **rights-grabbing**, usually for little or no extra fee beyond that for traditional limited editorial use. Book and magazine publishers are notorious for imposing onerous rights-grabbing contracts on suppliers, often also demanding that the supplier indemnify the publisher against the costs of potential unknown and unpredictable legal action as a result of publication over which the supplier has no control. Clients often insist that Internet use be included for no extra fee, or for a nominal fee increase. Newspaper and magazine publishers routinely publish images without offering payment to their owners, marking the use as “await invoice”, in the clear expectation that many such uses will go unnoticed and unchallenged, and thereby reduce licensing costs. Few other industries systematically defraud their suppliers in this way.

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- **Usage:** images are used in a non-advertising editorial context to illustrate books, magazines and newspapers, on commercial websites, in other media, and in an “educational” context. Licences are usually valid for a limited timespan, although the trend towards clients “wholly-owning” the work (as a consequence of their imposition of rights-grabbing contracts) is rapidly changing this custom. Deliverables are usually **digital media** and represent **Further Use** in that publishers will then use the digital media commercially in a multitude of ways to generate revenue for themselves. Along with social media websites, publishers and broadcasters are the main generators of so-called “orphan” photographs, usually by failing to credit the photographer and employing **website systems that strip identifying IPTC metadata** from the digital image files as they are uploaded. As an example, the BBC alone daily “orphans” hundreds of images in this way. **Their behaviour is quite usual.**
- **Because of this market’s externalities, distortions and gross imbalance of power and competition between suppliers and clients, this is mostly a failed market according to orthodox free-market theory and can only be made to operate satisfactorily for suppliers by rectification of the deficiencies in current UK copyright law, inalienable Moral Rights for photographers and the extension of Fair Contract law to include Intellectual Property.**

PUBLIC RELATIONS

- **The Supplier/Client Ratio:** many suppliers service fewer clients, but the market is not grossly unbalanced. Suppliers overwhelmingly comprise **freelance professionals** or **microbusinesses**; clients range from small **PR agencies** through to large corporations, charities and public bodies.
- **The Commissioning process:** **PR agencies** or corporate PR departments make direct contact with photographers or their **agents** to commission pictures.
- **The Creation and Production Process:** the entire range of production methods and processes is represented, but many news photographers and **photojournalists** also undertake PR work, sometimes using lights and assistants, often unassisted and using **available light** or on-camera flash. PR work is often viewed as **commodity** photography, with little opportunity for the photographer to offer personal **style** and with it, **scarcity value** and higher rates.
- **The Valuation Process:** fees negotiated directly between client and supplier. “Market” hourly, half-daily and day-rates predominate. In the extreme upper end of the market fees are based on the commercial value of the image to the client and the **Base Usage Rate** system is occasionally used.
- **The Licensing Process:** most clients tend to have little grasp of copyright. Photographers **automatically retain copyright** but there is an increasing trend by clients towards **rights-grabbing**, usually for little or no extra fee beyond that for traditional limited PR use. Clients often insist that Internet use be included for no extra fee, or for a nominal fee increase. High-

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end clients tend to have a reasonable grasp of copyright and limited use.

- **Usage:** Images are licensed for further free supply to publishers and others to illustrate articles favourable to the end-user client. Events illustrated range from “grip and grin” to corporate hospitality events and product launches. The PR market tends to confine itself to specific events and PR campaigns. Images are not licensed for advertising use. Licences are usually valid for a limited timespan, although the trend towards clients “wholly-owning” the work (as a consequence of their imposition of rights-grabbing contracts) is rapidly changing this custom. Deliverables are usually **digital media** and represent **Further Use**.
- **This market is not “failed” according to orthodox free-market theory, but photographers do not regard it as functioning well, especially at the lower end. Much of this is due to ignorance of copyright. Inalienable Moral Rights for photographers and Fair Contract law extended to include Intellectual Property are required to make it function properly.**

CORPORATE

- **The Supplier/Client Ratio:** many suppliers service fewer clients, but the market is not grossly unbalanced. Suppliers overwhelmingly comprise **freelance professionals** or **microbusinesses**; clients range from small businesses through to large corporations, charities and public bodies.
- **The Commissioning process:** SME’s, corporate press and marketing departments or design agencies working on their behalf make direct contact with photographers or their **agents** to commission pictures.
- **The Creation and Production Process:** the entire range of production methods and processes is represented, but many news photographers and **photojournalists** also undertake corporate work, often using lights and assistants, occasionally unassisted and using **available light** or on-camera flash.
- **The Valuation Process:** fees negotiated directly between client and supplier. “Market” day-rates predominate, but in the upper end of the market fees are based on the commercial value of the image to the client and the **Base Usage Rate** system is well-established. This is one of the great problem areas for any so-called “orphan works licensing” scheme.
- **The Licensing Process:** at the lower end of the market, clients tend to have little grasp of copyright. Photographers **automatically retain copyright** but there is an increasing trend by clients towards **rights-grabbing**, usually for little or no extra fee beyond that for traditional limited corporate use. Clients often insist that Internet use be included for no extra fee, or for a nominal fee increase. Clients often assume that they “own” the pictures and are free to use them for any “corporate” purpose. High-end clients tend to have a good grasp of copyright and limited use.
- **Usage:** Images are licensed for specified uses to illustrate Annual Reports, in-house magazines, corporate and marketing brochures and flyers, **point-of-sale** and **below-the-line advertising** materials, etc. **The NUJ** defines much of this work as “extended PR”. The

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corporate market can be considered an extension of the PR market, with the work not limited to specific events or campaigns, but not including **above-the-line advertising**. Images are not licensed for such advertising use. Licences are usually valid for a limited timespan, although the trend towards clients “wholly-owning” the work (as a consequence of their imposition of rights-grabbing contracts) is rapidly changing this custom. Deliverables are usually **digital media** and represent **Further Use**.

• **This market is not “failed” according to orthodox free-market theory, but photographers do not regard it as functioning well, especially at the lower end. Much of this is due to ignorance of copyright. Inalienable Moral Rights for photographers and Fair Contract law extended to include Intellectual Property are required to make it function properly.**

ADVERTISING

- **The Supplier/Client Ratio:** many suppliers service fewer clients, but the market is not badly unbalanced. At the high end, few clients (usually **advertising agencies** working on behalf of the end client) commission work from relatively few highly-skilled specialists, usually via their **agents**. Suppliers overwhelmingly comprise well-established **freelance professionals, microbusinesses or small businesses**; clients range from **SME’s** through to multinational corporations, charities and public bodies.
- **The Commissioning process:** advertising agencies and corporate marketing departments make direct contact with photographers (or more usually their agents) to commission pictures.
- **The Creation and Production Process:** the entire range of production methods and processes is represented, but usually a pictorial concept will have been developed by creative staff at the advertising agency. The shoot will be directed by the advertising agency’s **Art Director** and usually feature **professional models, stylists, property managers** and others, all of whom work under contract, usually to the photographer or his **producer**. **Model-** and **property-releases** are essential and used as standard. The production process tends to have high **production values** and as a consequence be costly. The imagery will be for the exclusive use of the end client.
- **The Valuation Process:** fees negotiated directly between client and supplier. Fees are based on the commercial value of the image to the end client. “Market” day-rates are often used, but in the upper end of the market the **Base Usage Rate** system is prevalent and well-understood.
- **The Licensing Process:** most clients have a good grasp of copyright. Photographers **automatically retain copyright**. Images are licensed for specific uses, in specific geographic territories, for a specific length of time. Extra uses are costed as additional percentages or multiples of the agreed Base Usage Rate for that image. This is one of the great problem areas for any so-called “orphan works licensing” scheme.
- **Usage:** Images are exclusively used to illustrate **above-the-line advertising** in newspapers

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and magazines, on posters, billboards, hoardings and in other media. Deliverables are usually **digital media** and represent **Further Use**.

- **This market functions reasonably well according to orthodox **free-market theory**.**

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