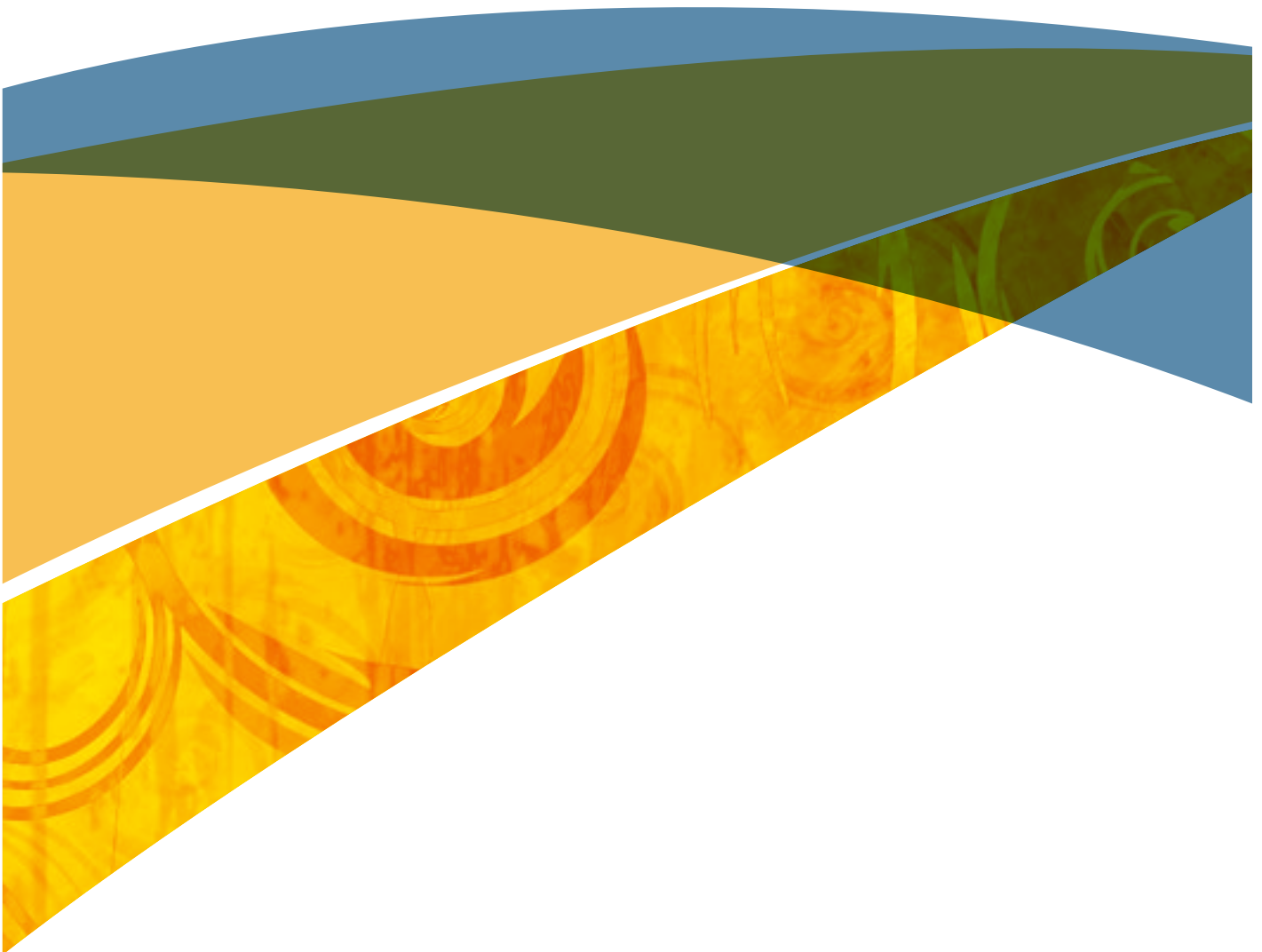




Intellectual
Property
Office

A consultation on changes to Section 72 of the Copyright, Designs and Patents Act 1988 (which permits the free public showing or playing of a film contained in a broadcast)





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Ministerial Foreword



The UK is home to a strong and thriving creative sector, worth more than £76.9 billion.¹ The Government's support for the sector delivers both cultural and economic benefits. For example, support for the film industry has resulted in a number of great British films and encouraged international investment in the industry.

One of the ways we can help to support investment in creativity is by providing a robust and effective copyright framework. By enabling creators to control and be paid for the use of their works, copyright plays a crucial role in supporting creativity and encouraging investment in new content and services.

Copyright law seeks to strike a balance between the interests of copyright owners and users of copyright material in a way which promotes creativity and innovation, economic growth, and wider benefits to society. To help achieve this balance, the law provides a number of permitted acts which do not infringe any copyright in the work and therefore do not need permission from the right holder.

This consultation focuses on one such permitted act, provided by Section 72 of the Copyright, Designs and Patents Act 1988 (CDPA), which allows organisations that do not charge for admission to show television programmes to the public without permission from the owners of film and broadcast copyright in those programmes.

Recent court cases have highlighted both legal and policy issues in relation to this provision. First, that it could be more closely aligned to the overall European legal framework, and secondly that some commercial premises seek to rely on this provision to show subscription television broadcasts without paying for commercial licences, thus reducing the potential revenues of firms which invest in, and create, audiovisual content.

This consultation sets out the Government's proposed changes to Section 72, which seek to address these issues. We hope to provide the right balance between right holders' entitlement to protect and be rewarded for use of their works, and the public's access to and enjoyment of television broadcasts, whilst also ensuring that UK legislation effectively implements European legislation.

The consultation is your opportunity to comment on the changes the Government intends to make to Section 72. I look forward to hearing your views.

Baroness Neville-Rolfe, DBE, CMG
Minister for Intellectual Property

¹ Creative Industries Economic Estimates - January 2015 <https://www.gov.uk/government/statistics/creative-industries-economic-estimates-january-2015>



Consultation Aims

The Government's aim is to amend Section 72 in a way which is consistent with European Union (EU) law and which strikes an appropriate balance between the interests of copyright owners and users of copyright works. The purpose of this consultation exercise is:

- to seek views on proposals to amend Section 72; and
- to seek views on the potential impact of these proposals on different groups of copyright owners and users of copyright works.

An Impact Assessment has been prepared in relation to the proposals set out in this consultation, as well as additional options that the Government has considered (Annex A).

How to respond

The Government is seeking evidence that is open and transparent in its approach and methodology. Unsupported responses (e.g. “yes” or “no” answers) are unlikely to assist in forming a view. However, Government is aware that some individuals and small businesses and organisations face particular challenges in assembling evidence. Those contributions will be assessed accordingly. The Intellectual Property Office has published a guide to evidence for policy² which lays out the Government’s aspiration that evidence used to inform public policy is clear, verifiable and able to be peer-reviewed.

When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents (providing a link to a webpage that has the information would be ideal) and, where applicable, how the views of members were assembled. Similarly, if you as an individual have been encouraged to respond by an organisation, it would be useful to know which one. It would also be useful to know if you currently rely on the Section 72 exception or if this exception currently has an impact on your copyright works.

Please make your responses as concise as possible, clearly marking the response with the question number.

You do not have to answer all of the questions, but we would welcome views on those issues of most interest or relevance to you. We are particularly interested in receiving evidence, including financial information where necessary, in support of your comments as this will support the further development of the impact assessment.

The consultation response form is included at Annex B. The form can be accessed from the link available on the main Section 72 Consultation web page and can be submitted electronically by email or by letter to:

Section 72 CDPA Consultation 2015
Copyright and Enforcement Directorate
Intellectual Property Office
Room 1Y05 Concept House
Cardiff Road
Newport
NP10 8QQ

E-mail: Section72CDPA@ipo.gov.uk

Please let us have your comments by 8 October 2015.

The contact details above may also be used to ask questions about policy issues raised in the document, or to obtain a copy of the consultation in another format.

This consultation document has been prepared by officials at the Intellectual Property Office. No decisions have yet been made by the Government on the proposed option and as such the document does not constitute official Government policy.

2 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388238/consult-2011-copyright-evidence.pdf

Confidentiality & Data Protection

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to us, to be treated as confidential, please be aware that, under the FOIA, there is a statutory code of practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, in itself, be binding on the Department.

What happens next?

The Intellectual Property Office intends to publish individual responses and a summary of the responses to the consultation. It may be necessary to amend the Impact Assessment in light of the responses. The Intellectual Property Office intends to undertake a technical review on any draft legislation.

Comments or complaints on the conduct of this consultation

This consultation has been drawn up in line with the Government's Consultation Principles³. If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Angela Rabess
Better Regulation Unit
1 Victoria Street
London SW1H 0ET
Telephone: 020 7215 1661

E-mail to: Angela.Rabess@bis.gsi.gov.uk

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60937/Consultation-Principles.pdf

Introduction

What does Section 72 allow?

1. The Copyright, Designs and Patents Act 1988 (CDPA) provides copyright owners with a range of rights allowing them to control the use of their works and to seek payment for this use – for instance through grant of a licence in exchange for a fee or royalty. Among these rights are rights to control the showing, playing and other communication of works to the public. This includes the showing of a film or broadcast to a public audience.
2. Section 72(1) sets out an exception to these rights. It allows organisations which do not charge for admission to show television broadcasts without needing permission from some (but not all) of the owners of copyright in those broadcasts. In particular, it means such organisations do not need permission from owners of “film” copyright. A “film”, as defined in copyright law⁴ is any recording from which a moving image may be produced. This definition includes all audiovisual recordings, not only films made to be shown in cinemas.
3. If an organisation wishes to show broadcasts that contain other copyright elements, for example any original literary, artistic, musical or dramatic works, as well as most commercially produced sound recordings, it will still need the permission of the relevant owners of those works.

72 Free public showing or playing of broadcast

(1) The showing or playing in public of a broadcast to an audience who have not paid for admission to the place where the broadcast is to be seen or heard does not infringe any copyright in:

- (a) the broadcast;
- (b) any sound recording (except so far as it is an excepted sound recording) included in it; or
- (c) any film included in it.

(the full text of Section 72 can be found at: <http://www.legislation.gov.uk/ukpga/1988/48/section/72>)


Why was the Section 72 exception introduced?

4. An exception of this type was first introduced by the Copyright Act 1956. It was intended to enable those who show or play a television or radio in publicly accessible places to which entry is free, such as public houses, to do so without the need to seek multiple licences for all the rights in the broadcast, in order to reduce the licensing burden on these premises⁵.
5. Section 72 of the CDPA maintained a similar exception to that provided by the Copyright Act 1956, which was justified by the Government on similar policy grounds, namely a desire to relieve businesses from an excessive licensing burden⁶.

⁴ Section 5B CDPA.

⁵ Parliament debated the question of the “Scarborough landlady”, who ran a small seaside boarding house or pub with a television room, where her customers could view television programmes. HL Deb 06 December 1955 vol 194 cc1097-174.

⁶ See comments by Lord Beaverbrook, Hansard HL Debate 23.2.1988, Vol 493 Cols 1191-1192.

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6. Section 72 has been amended on two previous occasions to ensure consistency with EU law. Together, these changes limited the exception to remove commercial sound recordings from its scope. They meant that shops, hairdressers and other premises were required to hold licences from PPL (the body which represents owners of sound recording and performance copyrights) in addition to licences from PRS (which represents owners of music copyright) in order to play music tracks or songs featured on the radio or television.
 7. As a result of these changes, Section 72 is narrower than originally enacted and does not apply to most works contained in television broadcasts, but continues to apply to films.

Why is the Government consulting?

8. A legal action brought by the Football Association Premier League (FAPL) highlighted a question as to the scope of Section 72. FAPL's case was against pubs which were using unauthorised satellite decoder cards to show live Premier League football matches, and firms supplying these satellite decoder cards. The action gave rise to a series of judgments, including a reference to the Court of Justice of the European Union (CJEU)⁷.
9. The main issues of relevance in the CJEU case were:
 - a. Whether British pubs could use satellite decoder cards intended for use in another EU Member State to screen football matches in the UK; and
 - b. Whether satellite decoder cards licensed only for private home use could be used to screen football matches in pubs and other public places.
10. The CJEU considered these questions and ruled that:
 - a. The granting of exclusive territorial licences obliging the broadcaster not to supply decoding devices outside the territory covered by the licence was an unjustified restriction on trade in the EU; and
 - b. Showing a broadcast of a football match in commercial premises such as a pub constitutes a communication to the public under EU copyright law, and where the broadcast contains original creative works (such as graphics, music, and cinematographic works), copyright owners' authorisation is required (for example, via a commercial subscription). This means that pubs (and similar commercial premises) are not permitted to show television programmes containing creative works without the appropriate commercial subscription.
11. When the case was returned to the national courts, it was found that, notwithstanding that it constituted a communication to the public, the showing of certain audiovisual content, including the match footage itself, was permitted as it was protected only by film copyright, which fell within the exception provided by Section 72(1) CDPA.⁸
12. Sports right holders such as FAPL therefore rely on enforcement of the copyright in their graphics and musical works when seeking to prevent the showing of football matches without a commercial licence. They cannot rely on their film copyright, which falls within the scope of Section 72.

⁷ C-403/08 Football Association Premier League Limited and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08).

⁸ Football Association Premier League Ltd v QC Leisure & Ors [2012] EWHC 108, [2012] EWCA Civ 1708 (20 December 2012).

13. The national courts found that the Section 72 exception applied to all types of film content, whether creative or non-creative, whereas EU law does not permit exceptions of this type in relation to creative works (including cinematographic works). Because of this, the Court of Appeal concluded that the scope of the exception in Section 72 was incompatible with the EU Copyright Directive.⁹
14. This court ruling has highlighted the need to clarify Section 72 to ensure its consistency with EU law. In addition, audiovisual right holders suggest that unauthorised use of satellite decoder cards continues to cause problems for them, and the current scope of Section 72 means that they are unable to obtain adequate remuneration for use of their works.

The Government's proposals

Summary of proposals

15. The Government intends to address these issues by:
 - a. Clarifying that the exception in Section 72(1) applies only to producers' rights in film fixations, and not to creative (or "cinematographic") aspects of film; and
 - b. Narrowing the scope of Section 72 so that it cannot be relied on by commercial premises seeking to show exclusive subscription broadcasts in public without an appropriate commercial viewing licence.
16. In the following sections, we explain the reasons why the Government believes these amendments are necessary and explore their potential impact. You are invited to respond to the questions which appear at the end of each section.

Consequential amendments and technical review

17. Alongside these changes, the Government intends to make certain consequential amendments, including amendments to ensure that Section 72 continues to apply for the purposes of demonstration and repair of broadcast equipment.
18. We recognise that this is a complex area and would welcome views on whether wider amendments to the CDPA would be needed as a result of these proposals.
19. The drafting of these amendments will be considered following the consultation period, and the Intellectual Property Office (IPO) also intends to undertake a technical review. A technical review will allow for comments on the terms and definitions to be used in any legislation.

⁹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

Detail of the Proposals

Part A - Clarifying that the exception in Section 72(1) applies only to producers' rights in film fixations, and not to creative (or "cinematographic") aspects of film

Film protection in EU copyright law

20. EU law recognises two different types of copyright in film. The first is known as "cinematographic" copyright, and applies to the original creative content of a film. It is first owned by the creator of an audiovisual work – for example, the director of a cinematic film.
21. The second type of copyright is known as the "fixation" right, and applies to audiovisual recordings. It applies irrespective of whether the content of the recording is creative, so applies equally to recordings of news and sport, as well as drama. The first owner of the fixation right is the film's producer.
22. This distinction is important, as EU law does not permit an exception of the type provided by Section 72 in relation to cinematographic works, whereas film fixations are not subject to the same restrictions.

Film protection in UK copyright law

23. UK copyright law does not precisely mirror the language of EU law with respect to film protection, and different views exist as to how UK law protects film fixations and cinematographic works.
24. The CDPA provides protection for "film", which is defined in Section 5B as a "recording on any medium from which a moving image may by any means be produced". There are different views as to the exact scope of this definition, but it is clear that it covers at least film fixations.
25. Cinematographic works are not referred to expressly in the CDPA. However, protection is given to "dramatic works" and cinematographic works have been held by the Court of Appeal to be a type of dramatic work.¹⁰
26. In its judgment in the FAPL case, the High Court ruled that the CDPA does not draw a clear distinction between the two different types of film rights as recognised by EU law. Instead, in Section 5B, the two types of rights are "combined into one" – i.e. Section 5B "film" protection does not merely cover film fixations, but also extends to cinematographic works.

The Government's proposal

27. The Court's interpretation of Section 5B is important because an exception of the type provided by Section 72(1) is not permitted by EU law in relation to cinematographic works.
28. Because of this, the Government's proposal is to amend the CDPA to clarify that Section 72 applies only to rights in film fixations, and not to original creative (cinematographic) aspects of film, in line with the EU copyright framework.

¹⁰ Norowzian v Arks [1999] EWCA Civ 3014.

Impact of this proposal

29. It is unclear how widely rights in dramatic works and other authorial rights in films are licensed at present or how many more authorial right holders may choose to license their rights in the future. Therefore, the costs and benefits of this change are not currently clear. Further detail can be found in the Impact Assessment in Annex A.

Questions for Part A:

1. What would be the impact of the proposal on your organisation, business or industry?
2. What evidence is there for this? Please explain the impact and provide evidence on the costs and benefits.
3. Do you agree that this proposal appropriately reflects the requirements of the relevant EU Directives and EU and UK court judgments?
4. Are there any alternative approaches that could be taken to clarify this area of legislation?

Part B - Narrowing the scope of Section 72(1) so that it cannot be relied on by commercial premises seeking to show exclusive subscription broadcasts in public without an appropriate commercial viewing licence

30. The CJEU has stated that sporting events cannot be regarded as intellectual creations, and therefore they cannot be classified as cinematographic works. Because of this, sports footage is protected only by copyright in the fixation of the film; all audiovisual recordings will generate copyright in the fixation, irrespective of whether they contain any original creative content.
31. In practice, most sport broadcasts will be accompanied by graphics and music, which benefit from their own separate copyright protection (as artistic and musical works). As these types of copyright work do not fall within the scope of Section 72, sports right holders are able to rely on their copyright in graphics and music to prevent pubs and other premises from showing sports programmes to their customers unless the premises has an appropriate commercial subscription. FAPL has successfully claimed copyright infringement in a number of court cases against pubs which were showing football matches without a commercial subscription on this basis.
32. However, it remains possible to show a broadcast of a football match without communicating some or all creative works contained within it. For example, if the sound is muted, copyright in the musical performance may not be infringed. Some commercial premises place cards over on-screen logos and there has been an increase in the use of masking technology which hides logos. In these circumstances it may be difficult for right holders to take legal action against such activity.¹¹

¹¹ There have been a number of cases raised by the Premier League in relation to unlicensed use of its copyright material. For example: Case [2014] EWHC 726 (CH) The Football Association Premier League Limited v Anthony Berry, Barclays Bank plc <http://www.bailii.org/ew/cases/EWHC/Ch/2014/726.html>



The Government's proposal

33. The Government proposes to narrow the scope of Section 72 so that it no longer applies to commercial subscription broadcasts shown in commercial premises. This means that right holders in commercial subscription or pay for access broadcasts will be able to enforce their copyright in film fixations, as well as other copyright in graphics, music etc., when broadcasts containing their material are shown in pubs and other commercial premises without their permission.

Impact of this proposal

34. We expect that the proposed changes will make it more difficult for parties to avoid buying commercial subscriptions by obscuring graphical works in broadcasts, and easier for right holders to enforce the use of commercial subscriptions, as they will be able to enforce their copyright in fixations of broadcast films. This will mean that the proposal will benefit film right holders, who will be able to obtain greater remuneration for the public showing of their works in television broadcasts.
35. As non-commercial subscriptions (i.e. those intended for domestic use) are available at a lower price than commercial subscriptions, commercial premises using commercial subscriptions to show sports channels are currently at a competitive disadvantage compared to those using non-commercial subscriptions.
36. Therefore, we expect that this proposal will also benefit commercial premises such as pubs that currently buy commercial subscriptions (which we understand to be the majority) as they will no longer be at a financial disadvantage compared to those premises using cheaper non-commercial subscriptions.
37. As well as impacting the sports rights and hospitality sectors, the proposed change may also affect the showing of a wide range of other subscription or pay for access broadcast content, including music videos.
38. For example, Video Performance Limited (VPL) collects royalties on behalf of record companies (producers) and music performers. It does not currently license the use of music videos contained in broadcasts. This proposal could lead VPL or other right holders and licensors to seek additional payment from commercial premises in order to show music videos to the public, where they are shown via subscription music channels.
39. Equally, the impacts of this change may not be confined to pubs and similar establishments. There may also be an impact on a range of premises and organisations which show subscription or pay for access broadcasts to the public. This could include but is not limited to offices, care homes and restaurants.
40. As the Government is keen to ensure the impacts of this proposal are proportionate, it will be maintaining the Section 72 exception in two key areas.
41. First, the exception will continue to apply in relation to film fixation rights in both subscription and free-to-air broadcasts in non-commercial premises, such as prisons and hospitals. Such premises will therefore be unaffected by this aspect of the proposals.
42. Secondly, the exception will continue to apply in relation to film fixation rights in free to air broadcasts in commercial premises. So if pubs or other premises wish to continue to benefit from the exception, they will be able to do so as long as they only show film fixations contained in free-to-air broadcasts.

43. The Government is of the view that restricting the exception in this way, and so increasing the opportunities for right holders to receive remuneration for the use of their works, will strike a more appropriate balance between the interests of producers of content, and commercial premises which derive financial benefit from showing television broadcasts to the public.

Questions for Part B:

General Questions

5. What would be the impact of the proposal on your organisation, business or industry?
6. What evidence is there for this? Please explain the impact and provide evidence on the costs and benefits.
7. Do you agree that this proposal strikes an appropriate balance between the needs of right holders and users of copyright works?

Copyright Users

8. Will the proposal affect whether you show broadcasts, either on free-to-air channels or via subscription?

Right Holders and Licensors (including Collecting Societies)

9. Will you change the way you license your works as a result of this proposal? Please provide details of possible licensing structures including estimates for licence fees.
10. Will you change the way you enforce against such public communication of your works as a result of this proposal? Please provide details of the ways in which you would seek to protect your film content. Would this have an impact on the judicial system?

Part C: Other options which were considered

44. Two other options were considered by the Government when preparing to consult in this area. Further details on these proposals can be found in the Impact Assessment at Annex A.
45. A first option was to remove the reference to film completely from the Section 72 exception. This option would be simpler to implement as fewer changes would be needed to the CDPA. However, it would have a greater impact on a wide range of commercial and non-commercial bodies which show television broadcasts in public, and as such the Government did not consider this proposal to be proportionate or that it struck the appropriate balance.
46. A second option was to clarify that Section 72 only applies to the film fixation right, as outlined in Part A of this paper, without the additional amendments to the scope of the exception as outlined in Part B. Although this option would help to clarify the law, the Government again did not feel that this would strike the balance it wanted to achieve between the needs of right holders and copyright users.
47. As this is a legally complex area, we remain open at consultation stage to considering other approaches to achieving the appropriate balance between the needs of right holders and copyright users. It is important to the Government that those who invest in content creation are properly remunerated for use of their works, without disproportionate impact on users of copyright content.

Question for Part C:

11. The Government has chosen to consult only on the proposals outlined in Parts A and B of this document. However, we would welcome views on the costs and/or benefits of any other options which you may feel the Government should consider. These could include any wider amendments that you feel may be necessary.

ANNEXES

ANNEX A Consultation Stage Impact Assessment

Title: Section 72 of the Copyright, Designs and Patents Act (CDPA) – exception for the public showing or playing of a film contained in a broadcast IA No: BISIPO004 Lead department or agency: Intellectual Property Office (IPO) Other departments or agencies:	Impact Assessment (IA)		
	Date: 15/01/2015		
	Stage: Consultation		
	Source of intervention: EU		
	Type of measure: Secondary		
Contact for enquiries: Section72CDPA@ipo.gov.uk			
Summary: Intervention and Options		RPC Opinion: Green	

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as Two-Out?
£0m	£0m	£0m	No Zero net cost
What is the problem under consideration? Why is government intervention necessary? Currently, Section 72 of the Copyright, Designs and Patents Act (CDPA) 1988 sets out an exception to copyright infringement allowing the free showing or playing of a broadcast and certain copyright elements within the broadcast in a place to which the public has free access. The exception covers the rights in the broadcast itself, certain sound recordings in the broadcast and films included in the broadcast. Following a court ruling, it appears that the current wording relating to film in the exception may not be consistent with EU requirements. To ensure clarity and consistency, it is proposed to amend this Section. Any amendment would be re-implementing EU law and therefore the European Communities Act can be used.			

What are the policy objectives and the intended effects?
 The aim is to amend Section 72 in a way which is consistent with EU law, and which strikes an appropriate balance between the interests of copyright owners and users of copyright works.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)
Option 0: Do nothing. Following the court ruling it appears necessary to review this aspect of copyright law, so the do-nothing approach would not address the issues which prompted the legal cases.
Option 1: Clarify that the exception in s72(1)(c) applies only to film fixations and not to the authorial film right and remove the application of s72 in relation to films contained in subscription broadcasts shown by commercial entities.
Option 2: Clarify that the exception in s72(1)(c) applies only to film fixations and not to the authorial film right.
Option 3: Delete film entirely from the exception in s72.

 Under all of the above options we would maintain the current exception in relation to the use of broadcasts for the purpose of the demonstration or repair of televisions. Consequential amendments would be required to achieve this.

Option 1 is the preferred option and the option to be consulted on because it ensures the minimum consequences for law-abiding businesses/charities whilst aligning UK law more closely with EU law.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: April 2019					
Does implementation go beyond minimum EU requirements?					
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)	Traded: N/A		Non-traded: N/A		

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY: Date:

Summary: Analysis & Evidence

Policy Option 1

Description: Clarify that the exception in s72(1)(c) applies only to film fixations and not to authorial rights in film and, remove the application of s72 in relation to films contained in subscription broadcasts shown by commercial entities.

FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 0	High: 0	Best Estimate: 0

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0	0	0
High	0	0	0
Best Estimate	0	0	0

Description and scale of key monetised costs by 'main affected groups'

At present, the IPO has not been able to monetise costs and benefits for the option but hopes to do so following consultation.

Other key non-monetised costs by 'main affected groups'

- i) Commercial entities which show subscription broadcast television in public using a non-commercial licence will be required to purchase commercial licences and face legal action if they do not.
- ii) Other businesses, charities, voluntary and not-for-profit organisations which show television broadcasts to the public (whether free-to-air or subscription) may be required to purchase additional licences by rights holders in authorial rights but this will only have an impact to the extent that these rights are not already licensed. This could affect the showing of films with creative content such as dramas and music videos but would not affect the showing of non-creative free-to-air content such as sport or news.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	0	0
High	0	0	0
Best Estimate	0	0	0

Description and scale of key monetised benefits by 'main affected groups'

At present, the IPO has not been able to monetise costs and benefits for the options but hopes to do so following consultation.

Other key non-monetised benefits by 'main affected groups'

- i) Businesses that sell rights to televise live action such as sport and the broadcasters of such action themselves will be able to ensure that commercial entities showing subscription broadcast television are only able to do so if they have acquired a commercial licence.
- ii) Other rights holders with authorial rights in films will be able to license these rights in content being shown by commercial and non-commercial entities but this will only have an impact to the extent that they do not already license these rights.

Key assumptions/sensitivities/risks

Discount rate (%) 3.5

- i) In the absence of any action to amend Section 72, the reported level of infringement is likely to continue to grow as it has done over the previous few years.
- ii) The change may act as a disincentive to those that sell unauthorised equipment and to commercial entities that are inclined to purchase non-commercial decoder cards.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs: 0	Benefits: 0	Net: 0	No	NA

Summary: Analysis & Evidence

Policy Option 2

Description: Clarify that the exception in s72(1)(c) applies only to film fixations and not to authorial rights in film

FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 0	High: 0	Best Estimate: 0

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0	0	0
High	0	0	0
Best Estimate	0	0	0

Description and scale of key monetised costs by 'main affected groups'

At present, the IPO has not been able to monetise costs and benefits for the option but hopes to do so following consultation.

Other key non-monetised costs by 'main affected groups'

- i) Businesses, charities, voluntary and not-for-profit organisations which show television broadcasts to the public (whether free-to-air or subscription) may be required to purchase additional licences by holders of authorial rights in film, but this will only have an impact to the extent that these rights are not already licensed. This could affect the showing of films with creative content such as dramas and music videos but would not affect the showing of non-creative content such as sport or news.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	0	0
High	0	0	0
Best Estimate	0	0	0

Description and scale of key monetised benefits by 'main affected groups'

At present, the IPO has not been able to monetise costs and benefits for the options but hopes to do so following consultation.

Other key non-monetised benefits by 'main affected groups'

- i) Right holders with an authorial right in films will be able to license their rights in film content being shown by commercial and non-commercial entities but this will only have an impact to the extent that they do not already license these rights.

Key assumptions/sensitivities/risks

Discount rate (%) 3.5

- i) In the absence of any action to amend Section 72, the reported level of infringement is likely to continue to grow as it has done over the previous few years.

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs: 0	Benefits: 0	Net: 0	No	NA

Summary: Analysis & Evidence

Policy Option 3

Description: Delete film entirely from the exception in s72.

FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 0	High: 0	Best Estimate: 0

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0	0	0
High	0	0	0
Best Estimate	0	0	0

Description and scale of key monetised costs by 'main affected groups'

At present, the IPO has not been able to monetise costs and benefits for the option but hopes to do so following consultation.

Other key non-monetised costs by 'main affected groups'

- i) Commercial entities which show broadcast television of any kind in public using a non-commercial licence will be required to purchase commercial licences and face legal action if they do not.
- ii) Non-commercial entities (e.g. charities, voluntary and not-for-profit organisations) which show television broadcasts of any kind to the public may also be required to purchase additional licences in order to show television broadcasts to the public (this includes free-to-air broadcasts as well as subscription ones).

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	0	0
High	0	0	0
Best Estimate	0	0	0

Description and scale of key monetised benefits by 'main affected groups'

At present, the IPO has not been able to monetise costs and benefits for the options but hopes to do so following consultation.

Other key non-monetised benefits by 'main affected groups'

- i) Businesses which sell rights to televise live action such as sport and the broadcasters of such action themselves will be able to ensure that commercial entities showing subscription broadcast films only do so if they have a commercial licence.
- ii) Right holders in television broadcasts (eg. sports right holders, music video right holders) will be able to issue licences for a use which they currently cannot license (ie. the showing of certain broadcast content in places which do not charge for admission).

Key assumptions/sensitivities/risks

Discount rate (%) 3.5

- i) In the absence of any action to Section 72, the reported level of misuse is likely to continue to grow as it has done over the previous few years.
- ii) The removal of 'film' from Section 72 will allow rights holders to license additional uses of their works.

BUSINESS ASSESSMENT (Option 3)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs: 0	Benefits: 0	Net: 0	yes	Zero net cost IN

Evidence Base

Problem Under Consideration

Following a court ruling it appears necessary to review the reference to film in Section 72(1)(c) of the Copyright, Designs and Patents Act (CDPA).

Section 72 of the Copyright, Designs and Patents Act 1988 (as amended) sets out an exception to copyright infringement for the free public showing or playing of a broadcast and certain elements within it. This Section of the Act was initially designed to enable those who use a television or radio in a publicly accessible location to which entry is free, to do so without the need to seek licences for all the rights in the broadcast. There are two parts to the exception:

1. Section 72 (1) provides an exception to copyright infringement for the playing or showing of a broadcast, certain sound recordings included in it, and any film included in it. Generally, any accompanying music, graphics or other creative content within a broadcast such as logos, are not covered by the exception and require a licence to be shown in public.
2. Section 72 (1B) provides an exception to copyright infringement for the playing or showing of a broadcast, and any films and sound recordings included in it, where the use is necessary for the demonstration or repair of radios, televisions and similar equipment.

A legal dispute arose between the Premier League and sellers and users of satellite decoder cards over whether:

- a) individuals or businesses in the UK were able legally to buy and use satellite subscriptions intended for use in another EU Member State and;
- b) whether or not satellite subscriptions provided for home use could also be used to show television broadcasts to the public.

Section 72 was relevant to the second question, as it allows commercial entities to show certain types of broadcast content, including “film”, without an additional licence, as long as they do not charge for admission to their premises.

The Court of Appeal judgment highlights that the scope of Section 72 is unclear when considered in light of European law, and therefore clarification is necessary.

Rationale for Intervention

The Government seeks to ensure that copyright strikes an appropriate balance between the interests of both copyright owners and users of copyright works, whilst also ensuring that UK legislation effectively implements European legislation.

Section 72 is a longstanding exception in UK law, which has been amended from time to time in order to comply with changes in the overarching EU legislative framework. The proposed intervention is necessary in order to clarify the law in light of the ruling by the Court of Appeal and in the context of wider European copyright legislation, while ensuring an appropriate balance is struck between copyright owners and users of copyright works.

Policy Objective

The main policy objective is to address the underlying issues behind the legal case and clarify UK copyright law, in the context of the overarching EU framework, while providing an appropriate balance between the interests of copyright owners in obtaining remuneration, thus supporting provision of new content to the public, and the interests of businesses, the public and third sectors in being able to use copyright works on reasonable terms.

Description of Options Considered

Following the court ruling it appears necessary to review the relevant law. Therefore the ‘do-nothing’ approach would not address the issues behind the legal case, nor clarify the law, so has been ruled out.

The following three options have been considered:

Option 1 – the preferred option, will clarify that the exception for film in section 72(1) applies only to producers’ rights in film fixations, and not to authors’ rights in film. It will also narrow the scope of the exception so that it cannot be relied on by commercial entities seeking to show exclusive subscription broadcasts in public without a commercial licence. The exception will continue to apply to non-commercial use, and to free-to-air broadcasts.

Option 2 – will also clarify that the exception for film only applies to producers’ rights in film fixations and not to authors’ rights. Other than this, the scope of the exception, and the types of organisation which can use it, will remain unchanged.

Option 3 – removes film entirely from the exception in s72(1). This would mean businesses, charities and other organisations showing broadcasts to the public (whether free-to-air or subscription) would need to obtain additional permissions (whether by licence or otherwise) to show broadcasts to the public.

Parties Affected

This measure is relevant to those who sell rights to televise events such as sport action, those who broadcast such events, rights holders in other types of film such as drama, news, documentaries and music videos, and to businesses, charities, voluntary and not-for-profit organisations which show broadcasts in public. The IPO anticipates that parties affected by the implementation of this policy may include:

- Hospitality Sector (such as pubs, bars, hotels, restaurants)
 - Premises purchasing legal commercial subscriptions
 - Premises purchasing subscriptions which are not licensed for commercial use
- Other Commercial Premises (such as sports clubs, gyms, fitness centres, offices, care homes, shops, hairdressers)
 - Premises purchasing legal commercial subscriptions
 - Premises purchasing subscriptions which are not licensed for commercial use
- Non-commercial public premises (such as hospitals, prisons, village halls used by voluntary groups, charities, amateur sports clubs)
- Consumers who view broadcasts in commercial or non-commercial public premises
- Suppliers of unauthorised decoder cards
- Sports event organisers, such as the Football Association Premier League
- Broadcasters
- Other rights holders in broadcast films (such as record companies and performers represented by PPL/VPL)
- Her Majesty’s Court and Tribunal Service (HMCTS) who are affected by changes in the numbers of legal cases.

Cost and Benefits of Options Considered

Option 0 – Do Nothing

If no action is taken to change the existing situation, film would remain within the scope of the Section 72(1)(c) exception, and costs and benefits of this option would be zero. Following a court judgment, the Government considers that the ‘do-nothing’ approach is not available as it would not address the underlying legal issues.

Option 1: Clarify that the exception in s72(1)(c) applies only to producers' rights in film fixations and not to authorial film rights; and narrow the scope of the exception so that it cannot be relied on by commercial entities seeking to show exclusive subscription broadcasts in public without a commercial licence

Under EU law, there are two types of right in film. The first is an "authorial" or "cinematographic" copyright. This applies to the film as a creative work, to the extent that the work is original, and is first owned by the creator (e.g. the director) of that work. The second is a "fixation" right which applies to the recording of a film, which may or may not be creative (i.e. including news and sport as well as drama). The first owner of the fixation right is the film producer. The Court of Appeal has noted that UK law currently does not draw a clear distinction between the two rights, and as a result it is unclear whether or not Section 72 applies to one or both rights.

Under option 1 we would clarify the law to make it clear that Section 72 applies only to the fixation right, and not to the authorial right in film, making it clear that UK law is consistent with EU law.

Narrowing the scope of the exception, so that it cannot be relied upon by commercial entities showing subscription broadcasts, would allow owners of film rights, such as organisers of televised sport, to take legal action against commercial entities, such as pubs, shops, offices, etc, if they show broadcasts containing their films to the public without an appropriate commercial subscription.

Costs to commercial entities in the hospitality sector (such as pubs, bars, hotels, restaurants) which show subscription broadcast television

Many pubs choose to show live sporting events in order to attract more customers. To show subscription sports events, such as Premier League matches, pubs should have a commercial subscription from a satellite broadcaster.¹ The British Beer and Pub Association estimates that there were 50,395 pubs in the UK in 2011.² Of those pubs that wish to show live sport, the majority purchase a commercial subscription. However, evidence provided by broadcasters and the Premier League indicates that a number of pubs broadcast live matches using decoder cards which are not licensed for commercial use.

Showing live football matches in a commercial premise via a TV screen constitutes a "communication to the public" in copyright law. Where the broadcast contains copyright works such as the Premier League logo and theme tune, the copyright owner's authorisation is required. In practice this means having a commercial subscription (commercial subscriptions cost £1000s while non-commercial subscriptions intended for use in an individual's home cost £100s p.a).

However, Section 72 means that any "film" content in the broadcast can be shown by commercial premises without permission from the copyright owner, as long as they do not charge for admission. This has led some pubs to attempt to avoid paying for commercial subscriptions (which are significantly more expensive than subscriptions for home use) by removing protected content when the show is broadcasted – e.g. by switching off the sound, placing cards over logos, or using masking technology which obscures logos. This can make it difficult for copyright owners to take legal action to enforce the use of commercial subscriptions.

Removing the application of Section 72 in relation to commercial entities showing subscription broadcast television to the public would mean that pubs would no longer be able to show subscription television to the public using non-commercial subscriptions without infringing copyright. As rights holders' permission is already required to show graphic and musical works to the public, it is, in most cases, already an infringement of copyright to show television broadcasts to the public without a commercial subscription, and as a result most pubs that show satellite television already hold commercial subscriptions (putting them at a relative financial disadvantage to those which do not). The amendment proposed under Option 1 would however make it easier for copyright owners such as sports right holders to take action against the minority of pubs which show satellite television without a commercial licence.

¹ A commercial subscription differs from a private/non-commercial licence, as a pub will show sport in order to attract more people with the intention to increase revenue it collects from drinks and food. Consequently, commercial subscriptions for satellite broadcasters are more expensive than the packages sold to households.

² British Beer and Pub Association Statistics - <http://www.beerandpub.com/statistics>

Estimating the Number of Commercial Premises using Unauthorised Decoders

The IPO has held discussions with broadcasters, sports rights holders and representatives from the hospitality sector to clarify the number of pubs using unauthorised decoders. It was agreed by all parties that establishing a figure of any certainty is extremely difficult but the evidence provided below from industry and other stakeholders gives an indication.

Evidence gathered by the broadcasting industry suggests that there are approximately 3,200 to 5,000 premises in the UK showing exclusive content through misuse of subscriptions such as using a cheaper non-commercial subscription in place of a commercial subscription. Broadcasters report receiving complaints regularly from pubs which purchase commercial subscriptions and feel they are not able to compete on a level playing field with pubs that avoid doing so, by using subscriptions intended for home use, at a significantly lower price.

The Premier League undertakes a comprehensive programme of visits to commercial premises to monitor various forms of intellectual property infringement. During the 2009/10 Premier League season they reported approximately 2,000 infringing premises. By the end of the 2012/13 season this figure had increased to approximately 5,500³.

Note: The IPO has held discussions with representatives from the hospitality sector, and will look to establish more information on the impact to the hospitality sector in consultation.

The Impact on Pubs

- 1) **Premises that show live sport and purchase legal commercial subscriptions:** As non-commercial subscriptions are available at a lower price than commercial subscriptions, pubs using commercial subscriptions are currently at a competitive disadvantage against those which use subscriptions intended for home use. Assuming pubs are deterred from using such subscriptions under Option 1, pubs which already hold commercial subscriptions would benefit from being put on a level playing field with other pubs which had been using cheaper subscriptions intended for home use.
- 2) **Premises that show live sport without legal commercial subscriptions:** Option 1 would mean that pubs using non-commercial subscriptions to show audiovisual content would no longer be able to do so without the authorisation of copyright owners, even if they took steps to block music and logos. It is therefore anticipated that these pubs would be deterred from using such decoder cards due to an increased risk of legal action. These premises could respond in one of three ways:
 - a) They could continue to use non-commercial decoder cards at the risk of legal action by rights holders.
 - b) They could be deterred from showing subscription television completely. This could reduce the number of customers, and possibly their revenue. These pubs could continue to rely on Section 72 to show free-to-air television without authorisation from the owners of copyright in film fixations (though licences will still be required in relation to other copyright content, such as music).
 - c) They could choose to purchase commercial subscriptions and continue to show live sport. They would face an additional financial cost by doing so.

Financial Cost to Pubs

We have assumed that there will be no direct costs to the hospitality sector from this option,⁴ as pubs continue to have the option of whether to show sports broadcasts only available via subscription or not, and do not have to do so. The change to Section 72 could potentially add additional financial burden to pubs switching to commercial subscriptions, or if customers are deterred from visiting premises due to the lack of live sport. However, those pubs that currently use non-commercial subscriptions instead of

³ Premier League submission

⁴ See Annex 1 for further detail on Direct and Indirect Impacts

commercial subscriptions are likely to be already breaking the law (to the extent that they communicate unauthorised authorial copyright content, such as artistic or musical works). We do not monetise costs to those performing unauthorised activities.

The IPO will seek further information on the impact to the hospitality sector at consultation.

Costs to other commercial premises showing subscription broadcast films

Many other types of commercial premises other than pubs may also take advantage of Section 72 in order to use non-commercial subscriptions to show broadcast television. These premises could include: sports centres, hotels, offices, shops, restaurants, etc. The impacts are likely to be similar to those affecting pubs. It is however extremely difficult to estimate the number of premises affected and discussion with stakeholders has not yet yielded any evidence on the prevalence of unauthorised systems outside the pub sector.

The IPO will seek further information on the impact to other commercial premises in consultation.

Estimating the Number of Other Commercial Premises Infringing Rights Holders' Content

Discussions with various stakeholders provided little insight into the number of other commercial premises showing subscription broadcasts, in particular sport broadcasts, using non-commercial subscriptions. One broadcaster stated that premises other than pubs are less likely to specifically want to screen sports, and are typically interested in a broader range of programming including non-sports content such as news. Where misuse of non-commercial subscriptions is seen, it is typically in the office and retail sectors. All recorded incidents have been resolved by informing the customer of the need for a commercial licence. The impact on other premises is therefore expected to be small, but we will seek further evidence during consultation.

Costs to non-commercial public premises

Non-commercial public premises (such as hospitals, prisons, village halls used by voluntary groups, charities, amateur sports clubs) would be unaffected by this option, unless owners of authorial copyright (copyright in creative works such as television drama) took steps to enforce their copyright. Authorial copyright owners are able to do so under the existing law, however, so any such action would not be a direct result of this policy. We are unaware of any authorial copyright owners other than music copyright owners and the Premier League (in relation to their logos and anthem) who choose to enforce their copyright in such circumstances at present.

Costs to consumers who view subscription broadcasts in commercial premises

Less Choice

Consumers would no longer benefit from the ability to watch subscription sport and other film content in commercial premises which only have a non-commercial licence and currently rely on Section 72. Should some premises choose to no longer show subscription television as a result, there could be a cost to consumers who would face a narrower choice of premises in which they could view sport etc.

Costs to suppliers of unauthorised decoder cards

If the change to Section 72 makes it more difficult for pubs and other commercial premises to use non-commercial subscriptions, thus reducing demand for them, it is likely that suppliers of technology which currently enable this use - such as suppliers of unauthorised satellite decoders and masking technology - would see a reduction in income.

Costs and benefits to sports event organisers, such as the Football Association Premier League

Ability to Enforce

The Premier League argues that the Section 72 defence makes it difficult for them to take legal action against commercial premises which show subscription broadcasts of football matches without a

commercial licence. Enforcement against such premises is currently reliant on sound and graphics within the broadcast which can be circumvented by pubs through various measures, including switching off the sound, placing cards over logos, and using masking technology which covers logos.

Evidence provided by the Premier League suggests a significant increase in the use, and sophistication, of masking technologies to obscure or eliminate logos from their broadcasts.⁵

The Premier League has implemented a national monitoring programme. Over the last three seasons, the costs of this were over £1.7 million. The Premier League has also spent in excess of £2 million in legal fees in an attempt to clarify and enforce its intellectual property rights. Despite this significant investment, according to the Premier League, the number of premises using unauthorised decoders continues to rise. This has meant that they have felt compelled to double the size of the monitoring programme for the current season.

The removal of application of Section 72 from subscription broadcasts is expected to improve the ability of rights holders to enforce against premises using unauthorised decoder cards to show matches. The extent to which legal proceedings may increase is unknown, but media articles⁶ indicate that the Premier League intended to carry out 100 prosecutions across England and Wales in the season from January 2014. Though the Premier League will initially incur legal costs, a few major successful legal challenges could act as a deterrent effect against further use of unauthorised decoder cards. Given the uncertainty, the extent of legal proceedings has not been calculated in this Impact Assessment.

Financial Impact - UK Market

The Premier League grants UK broadcast licensees exclusive rights over both commercial and non-commercial subscriptions. Broadcasters gain these rights through a regulated open competitive tender process where the price of Premier League rights is determined by the amount broadcasters are willing to pay for them. The process prohibits contingent bidding and prevents a single buyer from acquiring all the live rights.

If a deterrent effect leads to an increase in authorised subscriptions, this could lead to a more valuable Premier League product for future broadcasting auctions. However, it is difficult to determine what this might be given that the majority of commercial premises already purchase commercial subscriptions.

Other sports

Although this IA follows a specific case on the showing of Premier League matches, Option 1 would also affect subscription broadcasting of other sporting events.

The IPO will seek further evidence of the impacts of this policy on sports right holders at consultation.

Costs and benefits to subscription broadcasters

The use of unauthorised decoder cards has a negative impact on broadcasters who make significant investments in broadcast content.

Current Cost of Monitoring

Evidence from the broadcasting industry states that a high value is placed on the broadcast of live Premier League matches within the UK. As a result, UK broadcasters have invested considerable resources in a compliance programme consisting of monitoring and enforcement, with an internal compliance team which dedicates time to monitoring activities. Commercial premises are actively monitored to verify commercial subscriptions. Broadcasters currently spend millions of pounds on investigations, external legal and compliance advisors to enforce rights against commercial premises that show their copyright in sports programming without authorisation.

⁵ Over the first 2 weekend fixtures of the 2013/14 Premier League season, 14.5% of the pubs found to be showing live unauthorised broadcasts were using some form of masking technology, according to the Premier League. Over the next 4 weekend fixture programmes that percentage rose to 35.25%.

⁶ <http://www.bbc.co.uk/news/uk-wales-25849670>

Proceedings Against Infringers

Where there is no creative content (i.e. not authorial copyright) in a broadcast film, both broadcasters and FAPL may currently be unable to pursue legal action against premises which show a broadcast of that film. Option 1 would effectively outlaw the showing of subscription broadcast television, including certain sport events which are broadcasts via subscription services, in places which are open to the public, unless the premises holds an appropriate commercial subscription.

As a result, right holders such as the Premier League and broadcasters such as BT and Sky would find it easier to take legal action against premises which show subscription television content using home, rather than commercial, subscriptions. This may be to the advantage of broadcasters who may see an increase in demand for their commercial subscriptions. Given the lack of evidence, the impact has not been estimated in this impact assessment but we will seek further information at consultation.

Estimating the Increase in Revenue to Broadcasters

The IPO has held discussions with broadcasters, sports rights holders and representatives from the hospitality sector to try to clarify the extent of unauthorised showings. Based on the approximations provided, the IPO has attempted to estimate the number of pubs using home or infringing decoders that are expected to switch to lawful commercial subscriptions, and of the additional revenue to UK broadcasters as pubs switch to their services.

The following evidence is represented in accordance with broadcaster requests to remain anonymous.

Evidence provided by broadcasters states that there could be 3,200 and or 5,000 premises showing television without an appropriate commercial licence. The mean cost of a commercial broadcaster subscription in the UK is approximately £4,410 per year and the mean cost of a home broadcaster subscription in the UK is approximately £354 per year. Assuming 50% of premises switch to commercial UK broadcaster services:

Low estimate of increase in revenue:

The number of premises is assumed to be the lower of the broadcaster estimates, 3,200 premises, and it is assumed that there is complete overlap of premises accounted for by the overall broadcaster estimates.

For this estimate, we will also assume that all of the premises who will switch to commercial UK broadcaster services are currently subscribing to the home broadcaster services of the broadcaster in question.

Number of premises switching to commercial UK broadcaster services:

- 50% of 3,200 premises = 1,600 premises

Current revenue from home broadcaster subscriptions (which will be lost when premises switch to commercial subscriptions):

- 1,600 x £354 = £566,400

Revenue from commercial broadcaster subscriptions taken up by premises:

- 1,600 x £4,410 = £7,056,000

Increase in revenue for UK broadcasters:

- £7,056,000 - £566,400 = £6,489,600

High estimate of increase in revenue:

The number of premises is the total of the broadcaster estimates (3,200 + 5,000), 8,200 premises.

For this estimate, we will assume that all of the premises who will switch to commercial UK broadcaster services are not currently subscribing to home broadcaster services, resulting in the largest possible increase in revenue for the broadcaster.

Number of premises switching to commercial UK broadcaster services:

- 50% of 8,200 premises = 4,100 premises

Revenue from commercial broadcaster subscriptions taken up by premises:

- $4,100 \times \text{£}4,410 = \text{£}18,081,000$

Increase in revenue for UK broadcasters:

- $\text{£}18,081,000$

Central estimate of increase in revenue:

The number of premises is the mean of the high and low estimates, $(3,200 + 8,200) / 2 = 5,700$ premises.

For this estimate, we will assume that half of the premises who will switch to commercial UK broadcaster services are currently subscribing to the domestic broadcaster services.

Number of premises switching to commercial UK broadcaster services:

- 50% of 5,700 premises = 2,850 premises

Current revenue from home broadcaster subscriptions (which will be lost when premises switch to commercial subscriptions):

- 50% of 2,850 premises $\times \text{£}354 = \text{£}504,450$

Revenue from commercial broadcaster subscriptions taken up by premises:

- $2,850 \times \text{£}4,410 = \text{£}12,568,500$

Increase in revenue for UK broadcasters:

- $\text{£}12,568,500 - \text{£}504,450 = \text{£}12,064,050$

These calculations assume that:

- The broadcaster estimates refer to separate premises.
- The removal of application of Section 72 from subscription broadcasts will deter premises from using decoders which are not authorised for commercial use.
- Broadcaster estimates on the number of infringing premises are accurate.
- Given there is no evidence on the likely proportion of premises that will switch to licensed commercial subscriptions 50% is used.
- Given there is no evidence on the proportion of premises likely to switch to licensed commercial subscriptions which currently purchase home subscriptions, a high number was used for the low estimate, 50% was used for the central estimate and it was assumed that none of the premises likely to switch to licences commercial subscriptions were current home subscribers in the high estimate.

However, a number of factors mean these are uncertain estimates. For example, we do not know if (as the Premier League suggest) the number of infringing premises is increasing and will continue to do so; we do not know what proportion of pubs will seek to buy commercial subscriptions from a provider based in another EEA country, rather than the UK; we do not know how prices of services will vary in the future; etc. We intend to seek further data on these impacts during our consultation.

Proceedings Against Infringers

Evidence provided by the broadcasting industry anticipates that a change in the law is likely to lead to an increased number of successful court proceedings against pubs and other commercial premises showing subscription television without the appropriate commercial licence.

Legal action has been issued in proceedings for copyright infringement against pubs for the misuse of non-commercial viewing cards in UK commercial premises. These claims have been initiated through the

Intellectual Property Enterprise Court where to-date the legal costs on the four actions amount to hundreds of thousands of pounds.

One broadcaster anticipates that the change to Section 72 would not lead to an increase in the total number of actions being taken by the company as it already takes action against premises found to be infringing its copyright. However, the broadcaster anticipates that a change in law would enable broadcasters and rights holders to conclude actions more quickly and more cost effectively. The quicker resolution of actions is expected to act as a deterrent to those considering breaking the law.

Another broadcaster anticipates that a change in the law would safeguard the investments made at various stages of the value chain. They argue that this will underpin greater investment in content and broadcast which will have longer term benefits for end consumers.

Pricing of Subscriptions

It might be assumed that, if a greater number of commercial premises are encouraged to buy commercial subscriptions, then the overall price of a subscription could fall, without broadcasters and other right holders losing income. However, based on discussions with right holders and broadcasters it is clear that pricing decisions can be influenced by a number of market factors such as competition and the overall economy. Although the proposed change to Section 72 may make it easier for broadcasters to enforce the use of commercial subscriptions, it is unlikely to impact on the price of subscriptions.

Costs and benefits to other rights holders in subscription broadcast films (such as record companies and performers represented by PPL/VPL)

PPL/VPL Licences

Video Performance Limited (VPL) collects royalties on behalf of record companies (producers) and music performers.

VPL licenses approximately 1,000 premises for public performance of music videos – the majority of which are fitness centres, in addition to a small number of bars, restaurants and shops. Such premises play music videos from DVDs, VCRs, hard-drive systems or video jukeboxes (which do not fall within the scope of Section 72). They do not license music videos in broadcasts currently.

Types of current VPL licences

There are licences to cover the use of short-form music videos for “background” and “foreground” purposes.

- Background purposes

VPL’s 2014 public performance tariff for “background purposes only” is £275.29 (plus VAT) per annum⁷, covering premises with up to 5 separate screens, with a maximum screen size of 41 inches.

- Foreground purposes

There are a number of tariffs for the showing of short-form music videos for “foreground purposes”. These tariffs are based on the number and size of plasma screens in the venue⁸:

⁷ VPL - Background Fees 01-Jan-14 to 31-Dec-14

⁸ VPL - Foreground Fees 01-Jan-14 to 31-Dec-14. More screen or monitors than stated in Band D would require individual negotiation with VPL.

Band	Screens	Cost (plus VAT)
A	1 Plasma screen or between 6 and 9 TV monitors	£428.48
B	2 plasma screens or between 10 and 13 TV monitors	£856.92
C	3 plasma screens or between 14 and 17 TV monitors	£1285.41
D	4 plasma screens or between 18 and 21 TV screens	£1713.86

There are also a number of other VPL licences⁹ including for concert and stage events, airlines, spectator sports venues, and a "background" music video tariff for gyms, leisure and fitness centres and health clubs.

Changing Section 72

It is envisaged that the removal of the application of Section 72 in relation to subscription broadcast television may have some effect on other (non-sport) rights holders in broadcast film such as VPL, to the extent that music videos are delivered by subscription television services. This would apply particularly with respect to gyms and locations such as reception areas and waiting rooms for commercial premises where television sets are tuned to music television channels for most, if not all, of the working day.

Section 72 applies to establishments which do not charge admission, including organisations such as gyms which charge a membership fee but where showing television is only incidental to its main purpose. Therefore Section 72 is likely to apply to gyms which operate on a membership basis, allowing them to continue to show free-to-air broadcasts. A calculation of the possible revenues to VPL if they choose to start licensing music videos in both free-to-air and subscription broadcasts is undertaken in Option 3.

Costs and Benefits to Her Majesty's Court and Tribunal Service (HMCTS) who are affected by changes in the numbers of legal cases.

If, as anticipated, the removal of application of Section 72 to subscription broadcasts improves the ability for rights holders to enforce their rights in relation to subscription broadcast film content, there could be an increase in costs to the court. As illustrated in the Premier League evidence, there remains significant uncertainty surrounding the number of proceedings that are likely to take place. As a result, the costs to HMCTS have not been calculated in this Impact Assessment.

The IPO will seek further evidence on this at consultation.

Additional options

The additional options that have been considered are analysed below.

Option 2 – Clarify that the exception in s72(1)(c) applies to film fixations only and not to the authorial film right

This option is similar to the preferred Option 1 as it would clarify the law in respect of the two film rights. As under Option 1, copyright owners would still be able to prohibit the showing of creative ("authorial") copyright works in television broadcasts without their permission. However, under Option 2, commercial and non-commercial premises which do not charge for admission would remain able to show "film fixations" (i.e. recordings of films) contained in television broadcasts without permission from their owners – whether the television broadcast is delivered via subscription or free-to-air.

As for Option 1, it is unclear how widely authorial rights in films are licensed at present or how many more authorial rights holders would choose to license their rights in the future. However, any change in licensing practice in relation to authorial rights will not be a direct consequence of any amendment to Section 72 as authorial rights already fall outside its scope (and this will remain so). So we do not expect any direct impacts on authorial right owners or users as a result of this option.

⁹ <http://www.ppluk.com/Dynamic-Library/Main-Content-Modules---Secondary/FAQs/All-PPL-and-VPL-tariffs/>

As far as film fixation copyright is concerned, Option 2 would clarify that film fixations fall within the scope of the exception, so pubs and other premises could continue to attempt to rely on Section 72 by avoiding communication of music, logos etc. (with the attendant risk of copyright infringement), as they can at present. Because the scope of the exception remains essentially unchanged as a result of this option we have not estimated any extra costs or benefits to businesses and charities as a result of the clarification of the law under this option.

Option 3: Delete film entirely from the exception, thus prohibiting the playing in public (without a relevant licence) of any film contained in a broadcast whether free-to-air or subscription, regardless of the commercial or non-commercial nature of the establishment.

This option could affect any establishment (including businesses, charities, voluntary and not-for-profit organisations) which show broadcast films (whether free-to-air or subscription) to the public. This could include pubs, bars, hotels, restaurants, shops, offices, care homes, hospitals, prisons, village halls etc.

In order to continue to show broadcasts lawfully, these organisations would need permission from the owners of the film copyright (both fixation rights and authorial rights) contained within them (as well as the owners of any other authorial copyright – e.g. music etc.). Permission from film copyright owners could be obtained via an additional licence or via a subscription which includes permission to show this content. This would be additional to any other licences they may hold for playing broadcast or recorded music for example.

This option would also affect a range of organisations which hold rights in broadcast films, including sports event organisers, subscription and free-to-air broadcasters, television and film production companies, music video production companies/record companies and performers etc. These groups would be able to charge via licences or increased subscriptions for display of their films via television screens in places which do not charge for admission (which is currently not possible because of Section 72).

It is unclear at this stage which rights holder organisations will take advantage of the ability to charge for this activity (some may choose not to enforce their rights), and how they would go about this, and which organisations that currently show broadcasts would be prepared to pay to continue to show film content.

Unlike Options 1 and 2, film (both the fixation and authorial rights) would be removed from the section 72 exception with respect to free-to-air as well as subscription television. So Section 72 would no longer apply to television such as news and sport shown on free-to-air channels, as well as subscription channels.

Costs to commercial entities which show broadcast films

The impact on commercial entities showing broadcast films would be **as set out in Option 1 in relation to subscription broadcast television but would be greater as free-to-air television is also included within its scope**. Unlike under Option 1, premises such as pubs would not be able to continue to rely on the exception by choosing to show free-to-air rather than subscription television. The overall impact on commercial entities is unclear as the extent to which right holders in free-to-air films would choose to license their rights is unknown.

Costs to non-commercial public premises

Option 3 would affect non-commercial public premises such as hospitals, prisons, village halls used by voluntary groups, charities, amateur sports clubs if they show broadcasts in public. Whether the broadcasts were subscription or free-to-air, their film content would be licensable and therefore right holders may choose to charge for this right, increasing costs to these non-commercial organisations.

Example - gyms and fitness centres – including both commercial & non-commercial premises

Many gyms and fitness centres show music video channels, whether this be via Freeview or through a subscription service (e.g. MTV). The use of music videos in a gym or fitness facility may attract customers and lead to an increase in revenue. It is unclear the extent to which VPL licenses these types of premises already and the extent to which the law allows them to do so.

There has been an interim tariff in place for the commercial fitness industry for the showing of music videos as collected by VPL/PPL¹⁰. Each premises pays £432.73 (plus VAT) with a discount for UK Active members¹¹.

These tariffs have been in place for a number of years, subject only to RPI adjustments. VPL states that some PPL public performance tariffs include a 50% concessionary rate for the smallest premises if they are playing sound recordings solely by means of traditional broadcast delivery. PPL has indicated that some form of discount on the current VPL background purposes tariff might be appropriate if they start to license premises that are playing music videos solely via broadcast delivery.

According to the 2013 'Sport England, Active Places Report' there are 6,724 commercial and non-commercial fitness facilities in England¹². Of these facilities, it is assumed that a high proportion will show music videos. Assuming that 75% of fitness facilities show music videos, this would represent 5,043 facilities.

Direct impacts

The IPO anticipates that, should the exception be amended as proposed under Option 3, a high number of commercial facilities may want to continue to show music videos, so may choose to pay an additional licence to VPL members rather than stop showing them. The rate per premises for the public use of music videos in commercial gyms, leisure and fitness centres, and health clubs, is £432.73 per premises (and £333.32 for UK Active members).

Assuming that 70% of these facilities continue to show music videos and are commercial facilities and pay the additional licence, VPL would be able to collect the following additional income:

70% of 5,043 facilities = 3,530
 3,530 x £432.73 = £1,527,536

NB: This assumes a large proportion of the facilities to be commercial. If this is not the case the amount of this income will be less.

The additional income collected would also represent the additional cost to gyms and fitness centres of the removal of 'film' from Section 72. Both sides would also face additional administrative costs relating to administering licences.

Wider Impacts

The change to Section 72 as proposed under Option 3 could mean that some premises would have to pay an additional fee. This could lead to other possible impacts:

- a) An increase in membership fees
- b) A decrease in customers who enjoy having the option to watch music TV while using the gym's facilities (if a gym chooses not to show TV).

¹⁰ Interim VPL Background Music Video Public Performance Tariff for Gyms, Leisure and Fitness Centres and Health Clubs 01-Jan-14 to 31-Dec-14

¹¹ £333.32 (plus VAT)

¹² Sport England (2013) Active Places Report: Health & Fitness Facilities in England

Costs to consumers who view broadcasts in commercial or non-commercial public premises

The impact on consumers would be of a similar nature as that for Option 1 but additional impacts would occur for consumers watching free-to-air broadcasts and it would not matter whether they were in a commercial or non-commercial public premises. Therefore, the potential costs to consumers would be greater under Option 3 than under Options 1 or 2.

Costs to suppliers of unlicensed decoder cards

The nature of the costs to these firms would be similar to those described under Option 1, but they would be more significant due to the greater number of organisations (i.e. including non-commercial entities) affected by the change (leading to a smaller market for unlicensed decoder cards).

Costs and benefits to sports event organisers, particularly the Football Association Premier League

The impacts for individual sports event organisers would depend upon whether their events were shown on subscription or free-to-air television. Otherwise, the nature of the impacts would be as for Option 1, and overall the benefits to sport event right holders would be increased, as Option 3 would allow licensing of free-to-air broadcasts as well as subscription ones and would apply to non-commercial entities showing broadcast television in public as well as commercial ones.

Costs and benefits to broadcasters

As for Option 1 in relation to subscription broadcast films, but broadcasters would also be able to charge for licences to show free-to-air broadcast films, and to charge non-commercial users as well as commercial ones. The extent to which broadcasters of free-to-air television would choose to license their rights is unknown, but should they choose to do so it would represent an increase in income to them.

Costs and Benefits to Other rights holders in broadcast films (such as record companies and performers represented by PPL/VPL)

As for Option 1, film right holders other than sport right holders may also choose to charge for licences to show their films contained in free-to-air television broadcasts, and to charge non-commercial users as well as commercial ones.

The extent to which right holders in free-to-air films would choose to license their rights is unknown. We note that most broadcast content already contains copyright protected content which is not covered by the Section 72 exception (such as graphic and dramatic works) and, despite this content being licensable by the rights holders, at present, outside specific areas (such as Premier League Football), little effort appears to be made to license the public communication of this material, or to enforce against such public communication. In contrast, music content is usually licensed through collective licensing, requiring licence fees through PRS for Music for composers, lyricists and music publishers and through PPL for performers and record companies.

Costs and benefits to Her Majesty's Court and Tribunal Service (HMCTS) who are affected by changes in the numbers of legal cases.

As for Option 1 but the number of legal cases could be magnified because the removal of the exception completely would additionally make showing in public of subscription and free-to-air broadcast films for non-commercial use illegal, as well as showing of free-to-air broadcasts in commercial premises illegal. As illustrated in the Premier League evidence, there remains significant uncertainty surrounding the number of proceedings that are likely to take place. As a result, the costs to HMCTS have not been calculated in this Impact Assessment.

Risks and Assumptions

- This impact assessment assumes that, following the judgment of the Court of Appeal, Section 72 requires clarification by way of amendment to the Copyright, Designs and Patents Act, and the "do nothing" option is unavailable. Views will be sought on the legal implications of the Court of Appeal's ruling during consultation.
- This impact assessment acknowledges that interpretation of the law may vary and can only be determined by the courts. This may affect the classification of what is considered to be unauthorised currently and what is not, as well as the meaning of definitions such as "commercial" and "non-commercial". As such, there are uncertainties around the scope of any provision and risks that its impact may be greater or more limited than predicted. The IPO will seek feedback on these risks and uncertainties during consultation.

One-In Two-Out

Under the "One In, Two Out" rule, a measure that has a net cost to business must have a measure or measures of equivalent cost removed in order to be implemented. At present, the IPO has not been able to monetise costs and benefits for the options but hopes to do so following consultation. At this stage, the preferred option (Option 1) is considered not in scope of "One In, Two Out" because it does not go beyond the minimum requirements necessary to comply with EU law.

A summary of the impacts follows:

Option 1 – the preferred option

Stakeholder	
Commercial entities which show subscription broadcast television in public	Commercial entities that choose to show subscription broadcast television in public will require the authorisation of the author and producer.
Non-commercial entities which show subscription broadcast television in public	There is a possibility that authors may start to license their rights in authorial film content.
Consumers who view subscription broadcast television in commercial premises	If commercial entities decide no longer to show subscription broadcast television there could be less choice for consumers.
Suppliers of Unauthorised Decoder Cards	Demand may fall for unauthorised decoder cards.
Sports event organisers, such as the Football Association Premier League	The change should allow the Premier League to prevent the use of unauthorised satellite decoder cards more effectively.
UK Broadcasters	With the threat of legal proceedings for premises using unauthorised services, demand for UK broadcaster services could increase.
Other rights holders in subscription broadcast television	The change may benefit other rights holders in broadcasts to the extent they are delivered by subscription broadcast services.
HMCTS	If rights holders can more effectively enforce their intellectual property rights in subscription services it could lead to an increase in the volume of litigation at HMCTS. More effective enforcement may also act as a deterrent and reduce litigation in the longer term.

Option 2

Stakeholder	Impact
Commercial entities which show broadcast films in public	Required to gain authorisation from the rights holder to show authorial film content.
Non-commercial entities which show subscription broadcast films in public	Required to gain authorisation from the rights holder to show authorial film content.
Suppliers of Unauthorised Decoder Cards	Demand may fall for unauthorised decoder cards.
Sports event organisers, particularly the Football Association Premier League	The change would clarify the law. Free to air sporting events would not be affected. There would be no change to the current infringement proceedings for FAPL (i.e. they would still only be able to rely on copyright in graphics and music).
UK Broadcasters	As above
Other rights holders in broadcast films	The change may benefit other rights holders in broadcast films to the extent that they start to license their authorial works.

Option 3

Commercial entities which show subscription or free-to-air broadcast films in public	As for Option 1 but additional costs in relation to free-to-air broadcast films.
Non-commercial entities which show subscription or free-to-air broadcast films in public	Additional costs in relation to free-to-air broadcast films.
Consumers who view subscription or free-to-air broadcast films in commercial or non-commercial public premises	If commercial or non-commercial entities decide no longer to show subscription or free-to-air broadcast films there could be less choice for consumers.
Suppliers of Unauthorised Decoder Cards	As for Option 1.
Sports event organisers, particularly the Football Association Premier League	As for Option 1 but there may also be benefits from the newly enforceable right in film fixations.
UK Broadcasters	As for Option 1 and there will also be benefits from the newly enforceable right in film fixations
Other rights holders in subscription and free-to-air broadcast films	As for Option 1 but there may also be benefits from the newly enforceable right in film fixations.
HMCTS	As for Option 1 but with additional case possible as a result of creating the new enforceable right in film fixations.

ANNEX B Consultation Response Form

Consultation on changes to Section 72 of the Copyright, Designs and Patents Act 1988 (which permits the free public showing or playing of a film contained in a broadcast)

Using this form, please provide your responses to the questions outlined in this document. You do not have to complete the whole form – please answer the questions which are most relevant to you.

Please Note: This consultation forms part of a publication exercise. As such, your response may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). We plan to post responses on the Gov.uk website when they are received, and they may be the subject of online discussion. If you do not want part or whole of your response or name to be made public please state this clearly in the response, explaining why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system cannot be regarded as a formal request for confidentiality.

About you and your organisation	
Name	
Job Title	
Organisation and main services	
E-mail address	
Postal address	
Telephone Number	
Confidential response? Please give reasons why this should be treated as confidential.	

Part A: Clarifying that the exception in Section 72(1) applies only to producers' rights in film fixations, and not to creative (or "cinematographic") aspects of film

Consultation Questions 1 - 4

1. What would be the impact of the proposal on your organisation, business or industry?

2. What evidence is there for this? Please explain the impact and provide evidence on the costs and benefits.

3. Do you agree that this proposal appropriately reflects the requirements of the relevant EU Directives and EU and UK court judgments?

4. Are there any alternative approaches that could be taken to clarify this area of legislation?

Part B: Narrowing the scope of Section 72(1) so that it cannot be relied on by commercial premises seeking to show exclusive subscription broadcasts in public without an appropriate commercial viewing licence

Consultation Questions 5 - 10

5. What would be the impact of the proposal on your organisation, business or industry?

6. What evidence is there for this? Please explain the impact and provide evidence on the costs and benefits.

7. Do you agree that this proposal strikes an appropriate balance between the needs of right holders and users of copyright works?

Copyright Users

8. Will the proposal affect whether you show broadcasts, either on free-to-air channels or via subscription?

Right Holders and Licensors (including Collecting Societies)

9. Will you change the way you license your works as a result of this proposal? Please provide details of possible licensing structures including estimates for licence fees.

10. Will you change the way you enforce against such public communication of your works as a result of this proposal? Please provide details of the ways in which you would seek to protect your film content. Would this have an impact on the judicial system?

Part C: Views on other options.**Consultation Question 11**

11. Do you have any views on the costs and/or benefits of any other options which you feel the Government should consider?

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