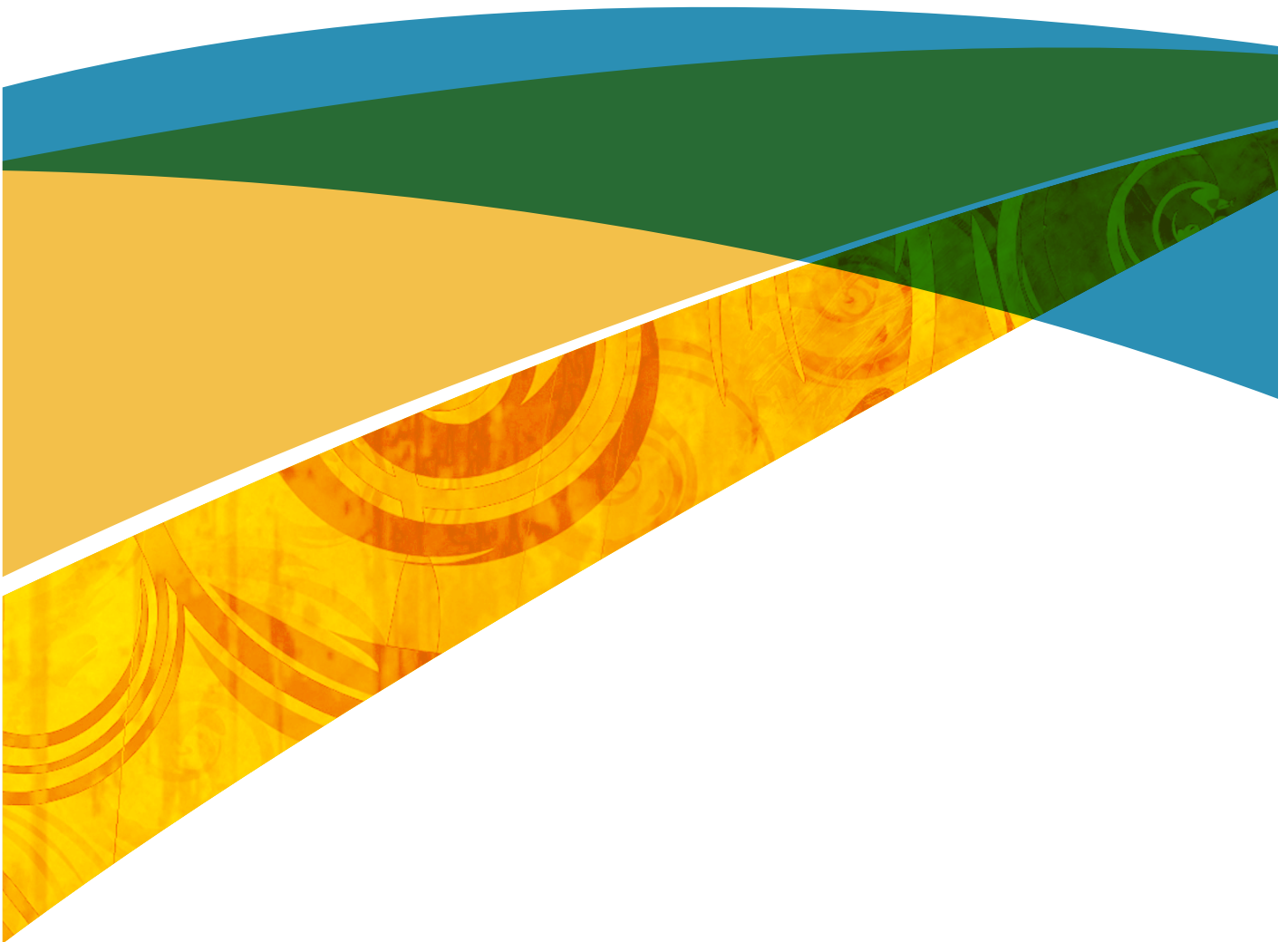




Intellectual  
Property  
Office

# Technical consultation on transitional arrangements following the repeal of Section 73 of the Copyright, Designs and Patents Act 1988 (reception and re-transmission of wireless broadcast by cable)







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# Introduction

In March 2015, the Department for Culture, Media and Sport (DCMS) published a consultation on the Balance of Payments between Television Platforms and Public Service Broadcasters (PSBs):

<https://www.gov.uk/government/consultations/the-balance-of-payments-between-television-platforms-and-public-service-broadcasters-consultation-paper>

This had two central themes: supporting investment and growth in the creative industries sector; and supporting reach and discoverability of PSB content for viewers.

It focused on three particular issues:

- whether the case has been made for Section 73 of the Copyright, Designs and Patent Act 1988 (CDPA) to be repealed;
- whether the current 'Must Offer/ Must Carry' regime should be amended or removed to create freer negotiations between PSBs and platforms, and whether Ofcom should have an additional role of adjudicating any potential future commercial disputes where there is consumer harm; and
- whether the current Electronic Programme Guide (EPG) regime is fit-for-purpose (particularly, whether to amend the existing framework to be technology neutral; and whether to include video-on-demand and High Definition services).

DCMS has since published the [Government Response](#) to the consultation and an [Impact Assessment](#) on the repeal of Section 73. This has been validated by the Regulatory Policy Committee.

This technical consultation concerns only the elements of the Government response that recommend repealing Section 73 of the Copyright, Designs, and Patents Act 1988. Section 73 currently states that the copyright in a broadcast is not infringed where that broadcast is retransmitted via cable. More specifically, this technical consultation considers the practical impacts of the repeal of Section 73, and any necessary transitional arrangements. We have produced an Impact Assessment (Annex A) to sit alongside this consultation document. This will not be scrutinised by RPC at this stage but provides further detail of the options considered as part of this technical consultation.

As part of the Balance of Payments consultation process, Government reached the conclusion that the overall regulatory regime is functioning well and that the commercial PSBs are adequately compensated for their core PSB channels via the existing PSB 'compact' (EPG prominence and spectrum in return for PSB obligations), an agreement which is underpinned in their PSB licences.

However, following the consultation, the Government has decided that Section 73 can and should be repealed. This is owing to its underlying policy intent no longer being relevant, and in order to address the harm to PSBs of lost revenue through internet-based companies exploiting PSB content without paying a copyright fee.

The Government's clear policy intent is for Section 73 to be removed without payment to PSBs and at zero net fees to both PSBs and cable providers. However, there could be an impact on rights that have previously been exempt from remuneration in the underlying copyright content in cable retransmissions (scriptwriters, performers, musicians, etc).

## About this technical consultation

This technical consultation considers the transitional arrangements that may be necessary to adapt to this new rights market, and will run for four weeks until 21 November 2016. It is an opportunity for interested parties to comment on the practical implications of repealing this section of the CDPA.

The Government invites comments on:

- The likely extent of the rights market following the repeal of Section 73
- Impact on performers' rights (Schedule 2, para 19)
- The need for a transitional period or rights clearance mechanism

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, the 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 policy<sup>1</sup> which sets out the Government's aspiration that evidence used to inform public policy is clear, verifiable and able to be peer-reviewed.

## Responding to this technical consultation

When responding, please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled. Responses can be submitted by email or post to the details below:

Section 73 CDPA Technical Consultation 2016  
Copyright and Enforcement Directorate  
Intellectual Property Office  
Room 1Y05 Concept House  
Cardiff Road  
Newport  
NP10 8QQ

Email: [Section73CDPA@ipo.gov.uk](mailto:Section73CDPA@ipo.gov.uk)

Please let us have your comments by Monday, 21 November 2016.

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

<sup>1</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/388238/consult-2011-copyright-evidence.pdf](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 technical 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 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 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 will not, of itself, be regarded as binding on the Department.

## Summary

### What does Section 73 currently allow?

Section 73 of the CDPA provides that the retransmission of the PSB core channels (all BBC Channels, ITV1, and Channel 4 and 5's core channels) via cable is exempt from copyright fees.

#### Section 73 Reception and re-transmission of wireless broadcast by cable

1. This section applies where a wireless broadcast made from a place in the United Kingdom is received and immediately re-transmitted by cable.
2. The copyright in the broadcast is not infringed—
  - a. if the re-transmission by cable is in pursuance of the relevant requirement, or
  - b. if and to the extent that the broadcast is made for reception in the area in which it is re-transmitted by cable and forms part of the qualifying service.

\*A 'qualifying service' means:

- (a) a regional or national Channel 3 service,
- (b) Channel 4, Channel 5 and S4C,
- (c) the public teletext service,
- (d) S4C Digital, and
- (e) the television broadcasting services and teletext service of the British Broadcasting Corporation

(the full text of Section 73 can be found at:

<http://www.legislation.gov.uk/ukpga/1988/48/section/73>)

The purpose of the legislation which preceded Section 73 was to facilitate the retransmission of public service (analogue) broadcasts by cables in areas where aerial reception was poor. By the time Section 73 was enacted the purpose was to encourage cable operators and others to invest further in the infrastructure of cable networks and to ensure that public service broadcasts were equally available to all parts of the population including in remote areas.

### Rationale for the repeal of Section 73

Today, there are a wide variety of platforms by which public service broadcasts can be received. Digital television services are now universally available through a combination of digital terrestrial television and satellite, as well as cable. The cable market has now moved from a myriad of local providers in the 1980's to one big provider and very few local platforms, and from 130,000 subscribers to over 4 million now.



As explored in the response to the Balance of Payments consultation, the Government is satisfied that the objective of ensuring that PSB services (as well as other TV services) are available throughout the UK has been met and therefore that Section 73 is no longer required to achieve that objective.

The repeal of Section 73 will also have the benefit of closing the loophole used by online service providers to stream PSB content. Such providers claim that the copyright exemption in Section 73 applies to retransmission via the internet. The Government rejects this claim and considers that such online services should not be able to transmit PSB content via the internet without any benefit flowing to the PSBs.

## The 2015 Balance of Payments Consultation

On 26 March 2015, the Department for Culture, Media and Sport (DCMS) published a consultation on the wider broadcasting landscape, the Balance of Payments consultation. The consultation proposed the repeal of Section 73 of the CDPA and set out two questions in relation to this specific area:

Q5. What do you think the impacts of removing Section 73 (CDPA 1988) will be?

Q6. What transitional arrangements, if any, would be needed to accompany removing Section 73, what form might these take and how long would they be needed for to allow the cable platforms and commercial PSBs to reorder their commercial relationships?

The majority of responses supported the repeal of the Section 73 exception. However, there were a number of concerns raised that warrant further consultation.

## Technical consultation questions

In light of the concerns expressed in the responses received to the 2015 Consultation, the Government is seeking views on three areas:

1. The scale and impact of the rights market that will result from the repeal of Section 73;
2. The mirrored Performers Rights in cable retransmission in Schedule 19 (2) CDPA 1988; and
3. The need for, and length of, any transition period or rights clearances mechanism.



## 1. Rights Market

The Government's overarching policy objective in repealing Section 73 is to do so at zero-net fees to PSBs and cable providers. This will be achieved in the context of the 'must offer/ must carry' regime found in Section 272 of the Communications Act 2003, which ensures that PSB content is universally available, and which requires PSBs to offer their core channels to cable and satellite providers, and that in return those same providers must carry them. Mutual benefits flow to PSBs and cable and satellite providers as a result of these arrangements.

However, the Government recognises that the repeal of Section 73 will mean that rights holders will be entitled to seek to monetise the value of underlying rights in cable retransmissions, something the exception has previously prevented from happening.

We therefore recognise that the repeal of this area of legislation could create a risk of dispute between PSBs, cable platforms and rightsholders as to the monetary value of the underlying rights in cable retransmissions. As it is assumed that no 'new' flow of funds will occur between PSBs and cable providers as a result of a change, there may be disputes as to the real world value of these underlying rights.

Conversely, evidence suggests that because broadcasters already buy rights in content comprehensively, any potential increase in revenues to rights holders will form part of normal commercial negotiations, which could minimise any risk of dispute.

Given these factors, we would like to hear from interested stakeholders on these issues.

### Questions for right holders and licensors (including collecting societies):

#### Question 1

Will you change the way you license your works as a result of this proposal? What do you expect the financial impacts to be? Please provide details of possible licensing structures including estimates for licence fees.

### Questions for PSBs and cable platform operators

#### Question 2

Will you change the way you acquire the licences for use of copyright works as a result of this proposal? What financial and other impacts do you expect this to have? Please provide details of any potential contractual difficulties.

## 2. Performers' Rights – Schedule 2 (19) CDPA 1988

A number of respondents to the earlier consultation queried whether the Government would also propose changes to Schedule 2 (19). This sets out performers' rights in any cable retransmission and mirrors the wording in Section 73. If Section 73 was removed, the concern was that this would create an unwelcomed inconsistency in the statutory regime for cable retransmissions as Section 73 only refers to copyright in broadcasts and any underlying work, it does not cover performers' rights in any performance. The Government therefore intends to remove Schedule 2 (19) at the same time as Section 73.

### Question 3

Do you see any particular issues in relation to performers' rights and the removal of the Schedule 2 (19) exception?

## 3. Transitional arrangements

Some respondents to the Balance of Payments consultation felt that removing Section 73 completely could lead to a risk of dispute between the cable platform and the underlying rightsholders when trying to agree terms. They felt that there was uncertainty around the scale and financial impact of the change, and that a transitional period may be of value in allowing businesses to adapt to the new rights market.

Additionally there have been suggestions that a rights clearance mechanism – a mechanism that ensures that rights are cleared prior to onward transmission – could be of value in ensuring that there are clear lines of negotiation for the parties involved. One option is to place an obligation on broadcasters to clear all the rights in a broadcast. This would force negotiations to take place at distinct points in the retransmission chain.

### Next steps

Following the conclusion of this technical consultation, the Government will analyse the responses received. We will then publish a summary of responses and, if this exercise finds new information that could affect the overall impact set out in the DCMS Impact Assessment, we will include this in an enactment stage Impact Assessment.

**Question 4**

What do you think the impact will be, in terms of the costs and benefits, of implementing a transitional period for the repeal of Section 73?

**Question 5**

How long should any transitional period for the repeal of Section 73 be?

The Government has suggested three options in the Impact Assessment:

- Six months
- 12 months
- 24 months

**Question 6**

Can you explain or evidence your preferred transitional period, considering why this duration might have greater benefit than any other suggested duration?

**Question 7**

What do you think the impact will be, in terms of the costs and benefits, of adopting a rights clearance mechanism?

**Question 8**

Should a compulsory structure for licensing be introduced under which broadcasters would be required to comprehensively buy all the underlying rights in their broadcasts?

**Question 9**

What do you think the impact will be, in terms of the costs and benefits, of this? Are there any alternative options as to how the rights clearance process could be made easier?

## Annex A: Consultation Stage Impact Assessment

<p><b>Title:</b> Technical Consultation on the potential change to the rights market following the repeal of Section 73 of the Copyright, Designs, and Patents Act 1998 - retransmission by cable</p> <p><b>IA No:</b></p> <p><b>RPC Reference No:</b> BISIPO015</p> <p><b>Lead department or agency:</b> Intellectual Property Office</p> <p><b>Other departments or agencies:</b> Department for Culture, Media and Sport</p>	<b>Impact Assessment (IA)</b>			
	<b>Date:</b> 28/07/2016			
	<b>Stage:</b> Consultation			
	<b>Source of intervention:</b> Domestic			
	<b>Type of measure:</b> Other			
<b>Contact for enquiries:</b> Section73CDPA@ipo.gov.uk				

**Summary: Intervention and Options** **RPC Opinion:** RPC Opinion Status

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANDCB in 2014 prices)	One-In, Three-Out	Business Impact Target Status
£0m	£0m	£0m	Not in scope	Qualifying provision

**What is the problem under consideration? Why is government intervention necessary?**

Following the Balance of Payments consultation carried out by the Department of Culture, Media and Sport in 2015, the Government decided to repeal Section 73 of the Copyright, Designs and Patents Act 1998 (CDPA). The repeal of Section 73 activates rights that have previously been exempt from remuneration when used for those who hold copyright in the underlying content in cable retransmissions (scriptwriters, performers, musicians, etc). Copyright is an exclusive right that allows the copyright holder to authorise how their work is communicated to the public, and to seek remuneration. Given uncertainty about how these rights will alter the relationships between rights holders and other stakeholders in the market, government intervention can ensure there is time for full and fair negotiations to take place and for licensing agreements to be put in place.

**What are the policy objectives and the intended effects?**

This IA considers the rights market that will emerge as a result of removing Section 73 and how copyright owners may choose to enforce these new rights in this new marketplace. The objective is to ensure that the new marketplace operates fairly and effectively so that negotiations between rights holders and broadcasters do not end in dispute at a cost for consumers, and to ensure the smooth functioning of any new market for rights.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

Following the decision to repeal Section 73 (as set out in the Balance of Payments consultation outcome ([here](#))), the following options have been considered:

Option 0 – Repeal Section 73 without transitional arrangements.

Option 1 - Repeal Section 73 and place an obligation on broadcasters to clear the underlying rights in their broadcasts.

Option 2 - Repeal Section 73 and put in place arrangements to smooth the transition to any new rights market that emerges:

- (i) Transitional period of six months
- (ii) Transitional period of 12 months
- (iii) Transitional period of 24 months

**Will the policy be reviewed?** It will be reviewed. **If applicable, set review date:** August 2023

Does implementation go beyond minimum EU requirements?	No			
Are any of these organisations in scope?	<b>Micro</b> Yes	<b>Small</b> Yes	<b>Medium</b> Yes	<b>Large</b> Yes
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)	<b>Traded:</b> N/A		<b>Non-traded:</b> 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: Repeal Section 73 and place an obligation on PSBs to clear the underlying rights in their broadcasts.

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	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'

This option would put emphasis on Public Service Broadcasters (PSBs) to ensure that all rights contained in underlying content are bought comprehensively, including retransmission by cable. This could lead to a cost to PSBs if these rights are not already bought comprehensively and are deemed to have value. It has not been possible to monetise these costs due to lack of available data. Evidence will be gathered at consultation stage to try and provide further information on the scale of potential costs, if any.

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

Where rights are not already bought comprehensively, new negotiations will need to take place between rightsholders and PSBs. This could lead to disputes when trying to agree the value and terms of licensing to include retransmission by cable. New relationships may emerge between PSBs and online service providers and/or right holders and online service providers depending on how the rights are agreed, if at all.

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'

A new market will emerge for use of rightsholders' underlying content used on cable platforms. PSBs or right holders may benefit from seeking retransmission fees from online service providers currently relying on the Section 73 exception to retransmit PSB content, but there is not sufficient clarity as to the value of these rights, if any. We have not been able to monetise these potential benefits due to lack of available data. Evidence will be gathered at consultation stage to try and provide further information on the scale of potential benefits.

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

This option may reduce administrative burdens as channels of negotiation are made clear.

Key assumptions/sensitivities/risks

Discount rate

3.5

This option forces the market place to operate in a particular way by compelling broadcasters to negotiate the value of underlying rights with rightsholders prior to retransmission via cable.

## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs: 0	Benefits: 0	Net: 0	
			0

# Summary: Analysis & Evidence

# Policy Option 2

Description: Repeal Section 73 and put in place transitional arrangements

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	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'

The removal of Section 73 will cause underlying rights to emerge from the broadcast content being retransmitted by cable. If these new enforceable rights lead rights holders (or PSBs who have purchased these rights) to renegotiate with cable providers, cable providers may face the costs of remuneration for these retransmission rights (dependent on any value). New negotiations may also occur between PSBs and online service providers and/or right holders and online service providers depending on **whether or not the use of retransmissions for online services is agreed**. It has not been possible to monetise the costs due to lack of available data as to the value, if any, of the newly enforceable rights. Evidence will be gathered at consultation stage to try and provide further information on the scale of potential costs.

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

The repeal of Section 73 creates the need for new negotiations to take place, between rights holders and PSBs, as well as potentially rights holders and cable providers where rights are not comprehensively purchased by PSBs. This could lead to disputes between all potential parties when trying to agree the value and terms of licensing for the newly created rights. New negotiations may be created between PSBs and online service providers and/or right holders and online service providers depending on whether or not the use of retransmissions for online services is agreed.

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'

Repealing Section 73 will mean that online service providers will no longer be able to rely on the exception to show PSB content (and profit by selling advertising around the service) without the express permission of, and any benefit flowing to, the PSBs or rightsholders. Similarly, if there are negotiations with cable providers, PSBs or rightsholders may benefit from seeking retransmission fees from these providers. It has not been possible to monetise the benefits due to lack of available data on the value of rights. Evidence will be gathered at consultation stage to try and provide further information on the scale of potential benefits.

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

This Option would provide a transitional period to enable new arrangements to be agreed, minimising adjustment costs to businesses from having to adapt quickly.

Key assumptions/sensitivities/risks (%)	Discount rate	3.5
Providing a transitional period would allow time for new arrangements to be made for cable retransmission.		

## BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs: 0	Benefits: 0	Net: 0	
			0

## **Overview**

The Government published an Impact Assessment (29<sup>th</sup> June 2016) relating to the decision to repeal Section 73 as a result of the DCMS-led Balance of Payments consultation. This examined the relationship between platforms and public service broadcasters. That Impact Assessment published ([here](#)) assumes that the underlying must offer/must carry regulatory framework will mean no new value is created and that a zero net fee outcome will remain after Section 73 is repealed. However, the Government also recognises that a new rights market will emerge as a result of the repeal of Section 73, hence the IPO's technical consultation on transition options, and this impact assessment. If this technical consultation finds robust evidence that the repeal of Section 73 will have impacts in the rights market which will affect broadcasters then the Impact Assessment on the repeal of Section 73 currently going through parliament as part of the Digital Economy Bill will be revisited at enactment stage to take this new information into account.

## **Background to Section 73**

The Government published ([here](#)) a consultation on the Balance of Payments between Television Platforms and Public Service Broadcasters (PSBs) in 2015. This considered, amongst other matters, whether the case had been made for Section 73 of the Copyright, Designs and Patents Act 1988 to be repealed.

Section 73 provides an exception for cable providers from having to pay copyright fees for the retransmission of core PSB broadcasts and any works in such broadcasts on their platform. This, along with the 'must offer/must carry' provisions in the Communications Act 2003, means that PSBs are not able to charge cable operators for the retransmission of their PSB services.

The purpose of Section 73 was to encourage cable operators and others to invest further in the infrastructure of cable networks and to ensure that public services broadcasts were equally available to all parts of the population, including in remote areas. There had previously been legislation in place to facilitate the retransmission of public service (analogue) broadcasts by cables in areas where aerial reception was poor.

The broadcasting landscape has changed considerably with the development of multi-channel and digital TV on satellite, terrestrial and increasingly on internet protocol (IP) platforms. Cable networks have also seen a huge increase in capacity. Furthermore, online service providers have emerged which rely on the provisions of Section 73 to permit the streaming of PSB content over the internet without seeking permission from (or paying any licence fees to) the copyright owners in the broadcast (and the underlying copyright owners in the content carried within the broadcast itself). This development means that PSBs cannot readily share in the revenue streams flowing from the popularity of this market segment. Therefore, following the consultation, the Government made the decision to repeal Section 73 ([here](#)).

## **Problem under consideration**

The repeal of Section 73 enables rights holders to seek remuneration for the use of their rights in the content retransmitted by cable. This creates a new rights market. This will create new opportunities for licensing arrangements and alter the relationships between rights holders, PSBs, cable providers and online service providers. How these arrangements will form and which parties will interact is at this stage unknown, creating an uncertainty of the impact of this repeal on the underlying rights market. This Impact Assessment considers any transitional arrangements that may be required to smooth the operation of this new market.

*To note: the vast majority of evidence to inform this Impact Assessment is commercially sensitive and may not be available even after the consultation exercise.*

## **Rationale for intervention**

The repeal of Section 73 activates rights that have previously been exempt from remuneration when used for those who hold copyright in the underlying content in cable retransmissions (scriptwriters, performers, musicians etc). Given these are newly licensable rights, a new rights market will be created allowing copyright owners to enforce these additional rights. The market will need to adapt new licensing structures, and the relationships between PSBs and cable providers and rights holders will be



altered. Given the uncertainty about how these new rights will alter the relationships between rights holders and other stakeholders in the market, there is a risk that negotiations may fail and lead to dispute. It will also impose a cost on businesses, who will have to adapt to these changes straight away. The Government seeks to minimise the transaction costs associated with the new rights environment being formed. Government intervention can ensure that there is time for full and fair negotiations to take place and for licensing agreements to be put in place. Intervention can ensure stakeholders address these underlying rights at a fixed point in the retransmission chain.

### **Policy objective**

This IA considers the new rights market that will emerge as a result of repealing Section 73 and how copyright owners may choose to enforce these new rights in this new marketplace. While the financial relationships between Public Service Broadcasters (PSBs) and cable providers are governed by Section 272 of the Communications Act 2003 ('must offer/must carry' provisions), right holders in the underlying content in any cable transmissions (music, performance, etc) will independently have the right to seek remuneration for the use of their works in retransmissions as a result of the repeal of Section 73. The policy objective is to ensure that the 'new' marketplace operates fairly and effectively and that negotiations do not end in dispute at a cost to consumers, as well as to minimise the transactions costs and burdens that may be associated with the shift to the new rights environment.

### **Description of options considered**

**Option 0 – repeal Section 73 with no transitional arrangements.** The removal of Section 73 brings into play rights for holders in underlying copyright in the broadcast content being retransmitted by cable that were previously exempt from remuneration. The market is left to adapt to, and negotiate the terms of, new arrangements.

**Option 1 – repeal Section 73 and place an obligation on broadcasters to clear the underlying rights in their broadcasts.** This option would force broadcasters to clear all underlying rights before any content is retransmitted via cable, ensuring that negotiations on the value of rights was considered only at distinct points in the retransmission chain.

**Option 2 – repeal Section 73 with transitional arrangements.** This option would address the likely uncertainty during the initial period of negotiation while licensing fees for cable retransmission were established, by introducing a transitional time period.

### **Costs and benefits of options considered**

#### **Option 0 – repeal Section 73 with no transitional arrangements**

Option 0 leaves the market to agree negotiations and licensing arrangements without additional regulatory intervention.

The market would need to negotiate and license new arrangements for use of content in cable retransmissions, and might need to take account of the potential increased value of those rights. These would be commercial negotiations to which the Government would not be party. Importantly, negotiations between PSBs and cable providers would occur in the context of the must offer/must carry regime. Any increased value is therefore considered uncertain, as these obligations would continue to ensure that neither party would unilaterally be able to exit negotiations and withdraw/remove PSB services. While the question of the relationship between must offer/must carry and the Government's stated policy aim of zero-net fees is not considered in this impact assessment, in this context, the newly licensable rights may not attract a substantive value, or any value at all.

For online service providers that have relied on the Section 73 exception to retransmit PSB content, it will mean that they will no longer be able to rely on the exception to profit from PSB content (by selling advertising around the service) without any benefit flowing to the PSBs or underlying rightsholders. If there are negotiations to license content, PSBs or rightsholders may benefit from seeking retransmission fees from these providers, or alternatively PSBs may simply refuse to allow these businesses to continue to retransmit their content. Online service providers are not subject to the must offer/must carry regime.

The way in which rights are acquired will impact upon the market. Evidence suggests that PSBs currently buy rights comprehensively so that when they are retransmitted on other platforms (for example, DTT, satellite etc) there is no need for further licensing arrangements for those reusing the content. These arrangements have developed slowly over time, and though there are some inconsistencies in the way licensing works in relation to certain technologies, are generally believed to be working well. For example, non-core PSB channels are already subject to such licensing agreements. However, no such arrangements exist in relation to cable retransmission due to the Section 73 exception and, therefore, such rights cannot be contractually acquired until the repeal comes into effect.

Rightsholders' responses to the Balance of Payments consultation indicated that the repeal of Section 73 would remove a barrier which has prevented them from maximising the full value of their rights. Responses also indicated that they may seek to monetise these rights. Which party to a retransmission rightsholders will choose to approach for licensing purposes and the potential impact this may have on the flow of payments between PSBs and cable providers following the repeal of Section 73 is, at this stage, unknown. *We intend to seek further evidence on the potential licensing structures that may emerge at consultation.*

One scenario is that rightsholders may choose to seek licences directly from the cable providers. This could lead to a situation where cable providers could choose to seek remuneration from the broadcaster or set out a requirement for the broadcaster to comprehensively acquire underlying rights in content at the outset. In turn, PSBs may then expect a payment to recognise the increased value of the content being provided to cable providers.

Given the difficulty in predicting the response from PSBs and rightsholders, the respective costs and benefits of not introducing transitional arrangements following the repeal of Section 73 are difficult to determine.

#### Benefits

This option would enable the market to establish how best to adapt to the new rights environment, without further regulatory intervention.

#### Costs

This option will mean a period of uncertainty where licensing arrangements are renegotiated, as well as the potential cost to cable providers and PSBs of new licensing arrangements. If these newly enforceable rights lead rightsholders (or PSBs who have purchased these rights) to renegotiate with cable providers (or PSBs), the costs of remuneration for these retransmission rights would flow through negotiations between all parties.

The lack of transitional arrangements may not give the market place sufficient time to consider and establish new structures for negotiating the licensing of underlying rights for cable retransmission. In the absence of any transitional provisions, businesses would have an additional burden in terms of having to adapt straight away to the new requirements. These might include for example, developing negotiating strategies and where appropriate, using these to support new business models (online service providers), and the added cost of implementing any new agreements.

*We have no evidence as to the likely scale or extent of the market, and such information is likely to be subject to commercial confidentiality – however, IPO will seek further evidence of the impacts of this policy option as part of the technical consultation process.*

## **Option 1 – repeal Section 73 and place an obligation on broadcasters to clear all the rights in a broadcast**

This option would set out a compulsory structure for the licensing of underlying rights. In negotiating rights, broadcasters would be required to comprehensively buy all the underlying rights in the content of their broadcasts.

This option would ensure that all negotiations on the value of rights takes place in a linear fashion. By ensuring that PSBs purchased and sold rights comprehensively, we could seek to ensure that negotiations on the value of retransmission rights occur between the party in the 'chain' with most relevant business relationship: rightsholders would negotiate with PSBs; PSBs would then in turn negotiate with cable providers. To an extent, we believe that these kind of arrangements would emerge naturally over time, as business adapted to the new rights environment. However, a rights 'bundling' mechanism may help to accelerate acclimatisation to these arrangements, and provide certainty for business – particularly cable providers who, until the repeal of Section 73, have not been required to establish and maintain relationships with rightsholders.

This option could be accompanied by a short transition period if necessary.

### **Benefits**

Simplicity in agreement. This option would force broadcasters to clear all underlying rights before any content is retransmitted via cable, ensuring that negotiations on the value of rights was considered only at distinct points in the retransmission chain. This option would remove the risk of failed negotiations, as PSBs are required by law to clear all rights.

It would also enable negotiations to take place between PSBs and/or rightsholders (depending on the arrangements made between PSBs and rightsholders) and online service providers for the retransmission of PSB content.

Administrative burdens may be lessened, as channels of negotiation are made clear.

It has not been possible to monetise these benefits due to lack of available data on what proportion of rights, if any, are not brought comprehensively. Evidence will be gathered at consultation stage to try and provide further information on the existing relationships between rights holders and PSBs to establish the scale of potential benefits.

### **Costs**

This option would restrict the way in which the market could operate and may prevent the natural occurrence of negotiations between different stakeholders in the new rights market.

This option may impose a burden on PSBs who are obliged to clear all rights in a broadcast. Given that must offer/must carry provisions exist with cable providers there is a possibility they will face bearing the entire cost of licensing the new rights. Even if the rights themselves are obtained at zero cost, the burden of clearing the rights and ensuring rights are correctly acquired pre-broadcast could represent a transaction cost on PSBs.

It has not been possible to monetise these costs due to lack of available data on what proportion of rights, if any, are not brought comprehensively. Evidence will be gathered at consultation stage to try and provide further information on the existing relationships between rights holders and PSBs to establish the scale of potential costs.

## **Option 2 – repeal Section 73 with transitional arrangements**

This option would introduce transitional periods (ranging from 6 - 24 months) before the repeal of Section 73 comes into effect. As arrangements for licensing of underlying rights do not currently exist for cable retransmissions, it is possible that disputes may arise between the cable provider, PSBs and/or underlying rightsholders when negotiating new terms.

A key point raised in response to the DCMS consultation was that once any legislative change comes into force there should be adequate time to enable PSBs and cable operators to negotiate new commercial arrangements.

Under this option the Government proposes three transition periods:

- i) Six months - Evidence received from right holders as part of the Balance of Payments consultation supports a short transition period as such licensing structures are already in place and well established (music is a good example of this in relation to PRS and PPL licensing regimes). In fact, the majority of respondents felt that only minimal transitional arrangements would be needed as it was felt that the business model for cable providers would not change significantly.
- ii) 12 months – a small number of respondents to the Balance of Payments consultation felt there was a real need for transitional arrangements, and these should be in place for a sufficient period to allow for the negotiations of relevant licences between the PSBs and cable providers and rightsholders, and;
- iii) 24 months - A small number of respondents felt there was a real need for longer transitional arrangements. These arrangements would need to be in place for a sufficient period to allow for the negotiations of relevant licences between the PSBs and platforms, and also between the platforms and any underlying right holders. It was highlighted that in certain cases it can take up to two years to agree terms.

Transitional arrangements could also be coupled with the rights 'bundling' mechanism considered in Option 1, if it was felt that both mechanisms were necessary for the smooth functioning of the market.

### Benefits

This option would allow the market to determine the new relationships and licensing agreements but it reduces the risk of failed negotiations or dispute by providing time for these new arrangements to be agreed.

Administrative burdens might also be lessened, given the longer time frame for reaching agreement would provide time for businesses to adjust to any changes in licensing agreements.

It has not been possible to monetise these benefits due to lack of available data on what proportion of rights, if any, are not brought comprehensively. Evidence will be gathered at consultation stage to try and provide further information on the existing relationships between rights holders and PSBs to establish the scale of potential benefits.

### Costs

This option will delay rights holders from receiving remuneration for content that is retransmitted over cable. It would also extend the current practices of online service providers, whereby content is used without benefit flowing back to PSBs and rightsholders.

This option also does not entirely remove the risk of failed negotiations – while extending the time available for negotiations should minimise this risk it is still a possibility if rightsholders and other market stakeholders cannot agree a licensing structure.

It has not been possible to monetise these costs due to lack of available data on what proportion of rights, if any, are not brought comprehensively. Evidence will be gathered at consultation stage to try and provide further information on the existing relationships between rights holders and PSBs to establish the scale of potential costs.

### **Summary and preferred options with description of implementation plan**

At this stage, how the rights market will react following the repeal of Section 73 is uncertain. This consultation seeks further information on how the relationships between rights holders, PSBs, cable providers (*and online service providers*) could be altered. It also seeks views on whether there are any other options available which could make the rights clearance process more manageable.

### **Risks and assumptions**

This Impact Assessment has relied upon basic evidence provided as part of the Balance of Payments consultation in providing possible costs, benefits and time required to adapt to the change in law. For those online service providers that have so far relied on Section 73 to retransmit PSB content without any benefit flowing to PSBs and/or underlying rightsholders, it has been assumed that either new

negotiations may arise (depending on how the rights are agreed) or permission for use of content would not be granted.

This Impact Assessment also assumes that rights are not currently comprehensively purchased by PSBs. This is because those rights are currently dormant, and therefore cannot be contractually acquired.

### **Direct Costs and Benefits to Business Calculations (following OITO methodology)**

It has not been possible to quantify the costs and benefits in this Impact Assessment at this stage and it is not known, given current available evidence, what the net costs to business will be. Evidence will be sought at consultation stage to try and provide further information on potential costs, benefits and the rights clearance process following repeal of Section 73. Evidence on potential net costs to business as well as whether the preferred option will be a temporary measure will be used to determine whether this Impact Assessment is in scope of One-In Three-Out at the final stage.

### **Wider impacts**

The main groups that are directly affected are underlying rights holders, PSBs and cable operators who may be required to renegotiate retransmission rights. The Government is of the view that online service providers will also be affected as new negotiations may be required with PSBs and/or underlying rights holders. Alternatively, online business models may no longer be able to operate as they will require the permission of relevant rightsholders. Evidence will be gathered at consultation stage to try and provide further information on potential costs, benefits and the rights clearance process following repeal of Section 73.

### **Small and Micro Businesses**

It would not be possible to exclude small and micro businesses from this policy. The Government understands that any affected small and micro businesses may not have the resources (either personnel or financial) to adapt to the change as quickly as larger businesses in terms of setting up possible negotiations. However, there could be a range of smaller/independent organisations producing content which could benefit from the change in law by being able to seek remuneration for their content via cable retransmissions. This strengthens the argument that small and micro businesses should not be excluded.

### **Evaluation**

Any review of the options set out in this Impact Assessment will take place as part of the wider review of the repeal of Section 73 which is a DCMS lead. The review will take place 5 years after the change in law has commenced.

The assumption made as part of the Balance of Payments consultation is that whilst it is not possible to guarantee that no disputes will emerge between broadcasters and cable platforms following the repeal of Section 73, there is already an enforcement mechanisms system in place (managed by OFCOM) that would be capable of dealing with any such disputes. If the repeal of Section 73 does not achieve an outcome in line with the policy intent, the Government has the option of legislating in this area at a later stage.





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