

## Consultation on changes to Schedule 1 of the copyright, Designs and Patents Act 1988 and the Duration of Copyright and Rights in Performances Regulations 1995

**pact.**

## Introduction

- 1 Pact is the trade association that represents the commercial interests of the independent production sector. Pact works on behalf of independent film, television, children's, animation and new media producers to ensure the best legal, regulatory and economic environment for growth in this sector.
- 2 The UK copyright framework is considered one of the best in the world. It has been effective in enabling competition and growth in the television production sector due to the effective legislative framework set out in the Communications Act 2003 and the associated Terms of Trade allowing independent producers to exploit their rights in the marketplace. **Figure 1** illustrates the economic growth of the sector following this regulatory intervention. In addition to this, the current copyright model has served the broadcasting sector well because production companies exploit their rights in the secondary market more than ever before and share all proceeds with the commissioning broadcaster. So broadcasters not only recoup their original investment but also see a return which can be used to commission further programmes. This system allows the UK industry to thrive and contribute to economic growth and job creation.
- 3 The UK independent television sector is one of the biggest in the world, with revenues of around £3 billion in 2015.<sup>1</sup> The sector is also a huge employer employing more than half of employees in the TV production sector<sup>2</sup>.
- 4 The 2014 BFI statistical yearbook notes that the total filmed entertainment market in the UK in 2013 was valued at an estimated £4 billion. The third largest film market in the world after USA and Japan, gross revenues for UK film were an estimated £900 million in 2013. It is forecast that the UK will overtake Japan by 2018 to become the second largest market for filmed entertainment. UK films earned 11% of the global gross box office revenues in 2013 amounting to \$4.1billion, while the UK film industry generated a valuable trade surplus for the British economy of £789 million.<sup>3</sup> The UK film production sector employs 66,000 people in 2013 with a total gross value added to the UK economy of more than £2.9 billion.<sup>4</sup>
- 5 Audiences in the UK and across the globe have had access to high-quality, thought provoking and entertaining content in a range of different genres. An effective copyright regime is vital to securing future growth in the sector. Any disruption to the ecology of this complex market would have a significant impact on UK original content production. **Figure 2** illustrates the value chain in the television production sector. This is a cyclical process whereby ideas are pitched to potential buyers and if successful, the programme is made and broadcast. The producer retains the IP rights for the completed works and is able to exploit the secondary rights to their content in order to generate a maximum return on their investment. Profits can then be re-invested into developing new content ideas, where the cycle begins again. Any disruption to this cycle will have a detrimental impact on the value chain.

<sup>1</sup> Pact Census Independent Production Sector Financial Census and Survey 2015, by Oliver & Ohlbaum Associates Limited, August 2015

<sup>2</sup> Ofcom Communications Market report 2016

<sup>3</sup> BFI Statistical Yearbook 2014 <http://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-statistical-yearbook-2014.pdf>

<sup>4</sup> Ibid

- 6 The key areas of this consultation response that Pact would like to draw to the IPO's attention include:
- Following the proposed harmonisation of industrially exploited artistic work's duration producers will need guidance to ensure relevant rightsholders are remunerated for use of such works within programmes and films and indeed to ensure producers seek remuneration for any use of their own affected works.
  - Pact is concerned there may be a gap in the protection of broadcast rights. Only ITV and BBC are entitled to broadcast rights under the Copyright Act 1956 and Schedule 1 of the current Copyright Designs and Patents Act 1988 (CDPA) does not protect all other broadcasts. This is potentially contrary to the First Term Directive and if harmonised could benefit Channel 4 in the UK and Member State broadcasters who will be able to exploit their fixation, or broadcast rights for the period and be properly remunerated. This remuneration would then likely benefit producers because 1) it will be shared with producers who retained the programmes' IP in the cinematographic rights; and/or 2) any income broadcasters receive could increase the commissioning spend which will lead to more commissions of higher value.
  - The transitional provisions for the removal of compulsory licensing of revived rights potentially allow misuse. It is practical to allow people to use the revived rights following repeal of the Regulations provided they have paid for the use. However, it may help to limit such use to a certain period after the implementation date of the repeal where no contractual arrangement has been agreed to help prevent people paying for rights they have no intention of using or circumventing the requirement to obtain consent for use. This matter would benefit from further consideration and detailed guidance.
- 7 For further information please contact Pact's Head of Legal and Business Affairs on [REDACTED] or Pact's Business Affairs Executive on [REDACTED]

Figure 1.

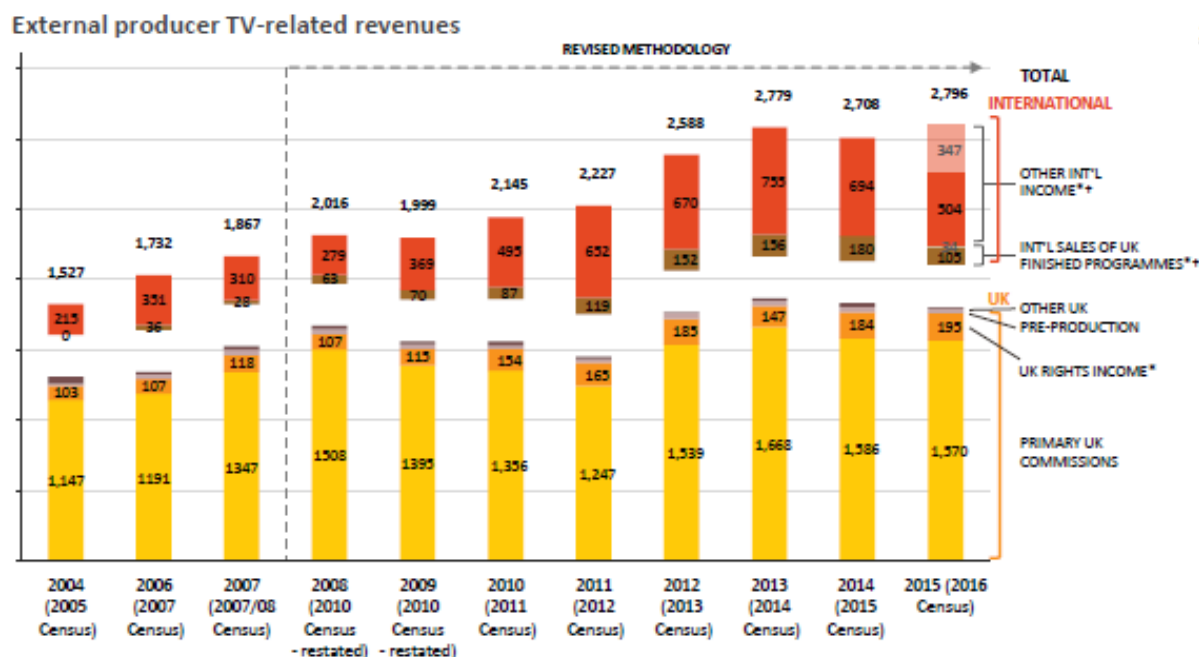
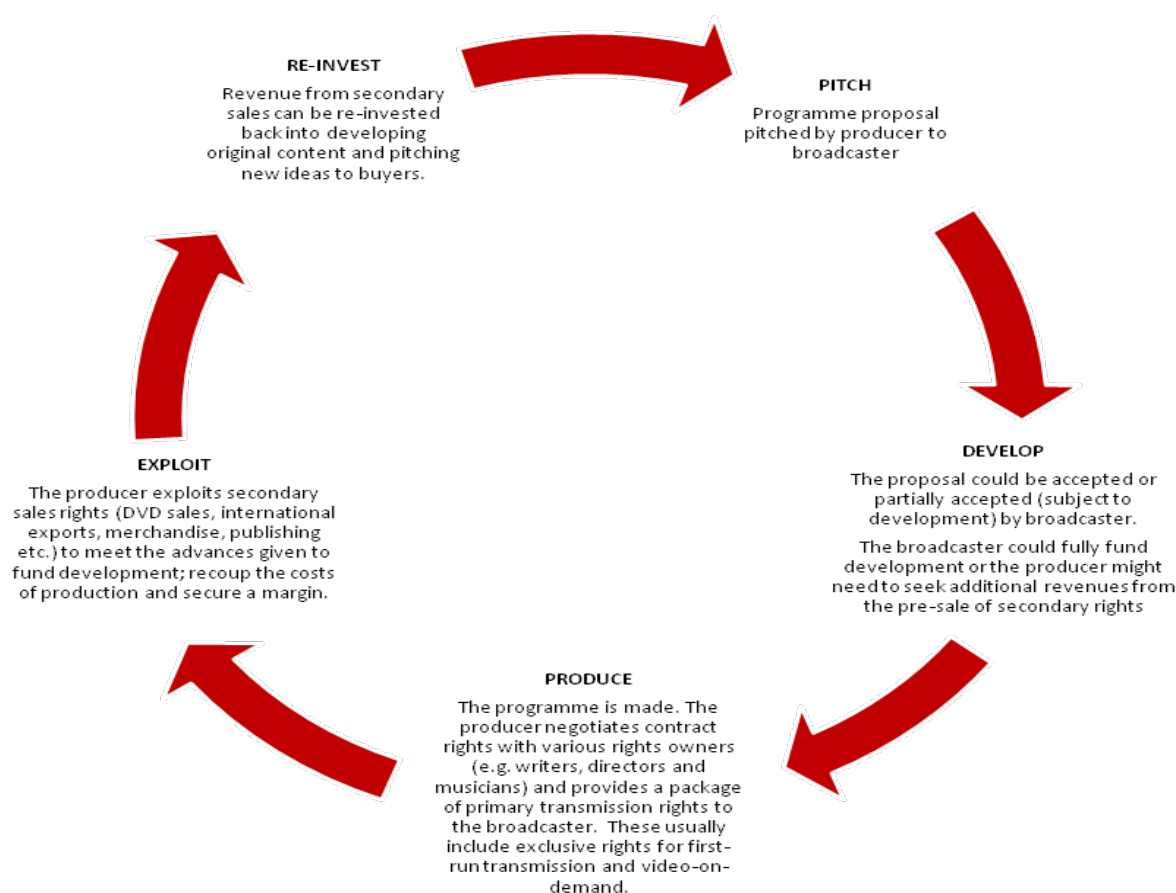


Figure 2.



## Provision of copyright protection for works made before 1 June 1957

### 1. Do the proposed amendments to Schedule 1 and Regulation 16 equalise copyright protection for works created before and after 1 June 1957?

#### 1.1 Schedule 1

- a) The proposed amendments certainly harmonise industrially exploited artistic works with the majority of other works created or occurring before and after 1 June 1957, but Pact is concerned fixation of televisual broadcasts, referred hereafter as 'broadcast works' may have been unintentionally discounted.
- b) Pact understands the Government's intention to limit copyright protection to that which is already currently eligible as to do otherwise without careful scrutiny would lead to uncertainty and potentially damage the delicate system we uphold in the UK where creative, and therefore commercial, rights are protected whilst prospective authors are free to create unencumbered.
- c) Following *Sony Music v Falcon Neue*<sup>5</sup> it is clear that works benefitting from copyright protection in another Member State before 1 July 1995 should also be protected in the UK. Importantly this also applies to works that were not, nor have ever been protected in the UK but were afforded protection under the First Term Directive as per Article 10(2) set out below.

*The terms of protection provided for in this Directive shall apply to all works and subject matter which were protected in at least one Member State on the date referred to in paragraph 1, pursuant to national provisions on copyright or related rights, or which meet the criteria for protection under [Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property]<sup>6</sup>*

- d) All works listed in The First Term Directive<sup>7</sup> are covered under Schedule 1 of the CDPA. However, there is seemingly a discrepancy with regards to the treatment of broadcast works. The First Term Directive states that *"the rights of broadcasting organisations shall expire 50 years after the first transmission of a broadcast, whether this broadcast is transmitted by wire or over the air, including by cable or satellite."*<sup>8</sup>. Yet, Schedule 1 does not acknowledge all broadcasts occurring or made before commencement of Part 1 of the CDPA as protectable.

<sup>5</sup> *Sony Music Entertainment (Germany) GmbH v Falcon Neue Medien Vertrieb GmbH*: C-240/07 [2009] All ER

<sup>6</sup> Article 10(2) of The First Term Directive

<sup>7</sup> Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version)

<sup>8</sup> Article 3(4) of The First Term Directive

*9. No copyright subsists in—*

- (a) a wireless broadcast made before 1st June 1957, or*
  - (b) a broadcast by cable made before 1st January 1985;*
- and any such broadcast shall be disregarded for the purposes of section 14(5) (duration of copyright in repeats).*

- e) At first glance this does not seem to be a problem because para 5 of Schedule 1 states that copyright subsists in an existing work after commencement of the CDPA if copyright already subsisted in the work by virtue of the previous legislation. However, section 14 of the previous Act, Copyright Act 1956, only protects BBC and Independent Television Authority (ITV) broadcasts. It seems no other wireless or cable broadcasts, either in the UK or in other Member States are protected before June 1957/January 1985 in any other legislation. This is potentially at odds with the ethos provided in the First Term Directive that protection is to be afforded to all works protected in other Member States.
- f) As it stands unless a broadcast was made by the BBC or the Independent Television Authority (ITV), copyright does not subsist in a wireless broadcast made before 1957 or a cable broadcast made before 1<sup>st</sup> January 1985 according to Schedule 1. Within the UK this is potentially a problem for Channel 4 that launched in 1982. Outside the UK this is a problem for all broadcasters in the Member States as they are not listed as entitled bodies in section 14 of the Copyright Act 1956 and therefore their broadcasts may not benefit from the protection to which they are entitled under article 3(4) The First Term Directive. This is of particular interest to Pact because any rights that broadcasters own can be exploited and any subsequent remuneration from such exploitation can be used to enhance the commissioning spend for television programmes. This will not only improve the viewer experience but also result in higher value productions attracting better secondary sales figures which inevitably will improve the industry's contribution to the UK economy.

## **1.2 Regulation 16**

- a) The proposed amendments to Regulation 16 of the Duration of Copyright and Rights in Performances Regulations 1995 clarifies that industrially exploited artistic works are also subject to the extended duration dictated by Article 1(2) of The First Term Directive. To ensure a smooth transition, guidance on this change would be useful.
- b) If indeed there is a discrepancy in the treatment of broadcasts as potentially identified above, the matter would require further attention and clarification in Regulation 16 to show that the new provisions also apply to broadcasts pre-dating 1957/1985.

## **2 Do the amendments confer copyright protection to any matter not currently eligible for copyright protection in the UK?**

- a) Copyright protection has not been conferred onto 'works' not currently eligible. Nor would this occur if the treatment of broadcast did require clarification as explained

above because wireless or cable broadcasts occurring before June 1957/January 1985 are not currently eligible for protection under Schedule 1 however the fixation itself is eligible for protection under Part 1 of the CDPA (section 14) so even if protection of broadcasts were equalised in Schedule 1 this still would not provide protection to a work not currently eligible.

### Compulsory licensing

## 3 Do these amendments achieve our aim of complying with Article 2 of the InfoSoc Directive?

### 3.1 Regulations 24 and 34

- a) The proposed amendments comply with Article 2 of the InfoSoc Directive. The transitional provisions are important to ensure practical implementation but they may provide more flexibility than is necessary as there is no limit on the time in which the rights may be used following the implementation date of the amended Regulations. There will be instances where payment would have been made ahead of the repeal in accordance with a contract that will detail arrangements for the intended use. Where there is no such contract in place the proposed transitional provisions could lead to persons paying for the use of rights in bad faith 1) without any real intention of using them; or 2) with the intention of using the rights years after the implementation date; or 3) as a means to circumvent obtaining consent from the authors. A longstop date as provided below in red would help prevent misuse of the transitional provisions.

Despite the revocation of regulation 24 of the Duration of Copyright and Rights in Performances Regulations 1995 by these Regulations that regulation continues to apply to acts done by a person after [the date these regulations come into force] which are treated as licensed by the copyright owner under regulation 24(1) where—

- a) a royalty or remuneration is paid under regulation 24(1) before [the date on which these Regulations come into force]; and  
b) that royalty or remuneration relates to a period of no longer than that agreed in a contractual arrangement or [insert reasonable period such as 1 year, 2 year etc which can relate to a number of factors possibly set out in guidance] during which that person intends to do the act which is after [the date on which these Regulations come into force]

- b) It is also essential the Government provides clear and accessible guidance for rightsholders and users alike to explain the transitional provisions and the affect the proposed amendments may have.

### 3.2 Regulations 25 and 35

If the above longstop is considered a necessary measure to prevent misuse of Regulations 24 and 34, the proposed amendments to Regulations 25 and 35 will require a similar update.

**4 Are there any other regulations we need to repeal or amend in light of these issues?**

Pact is not in a position to comment.