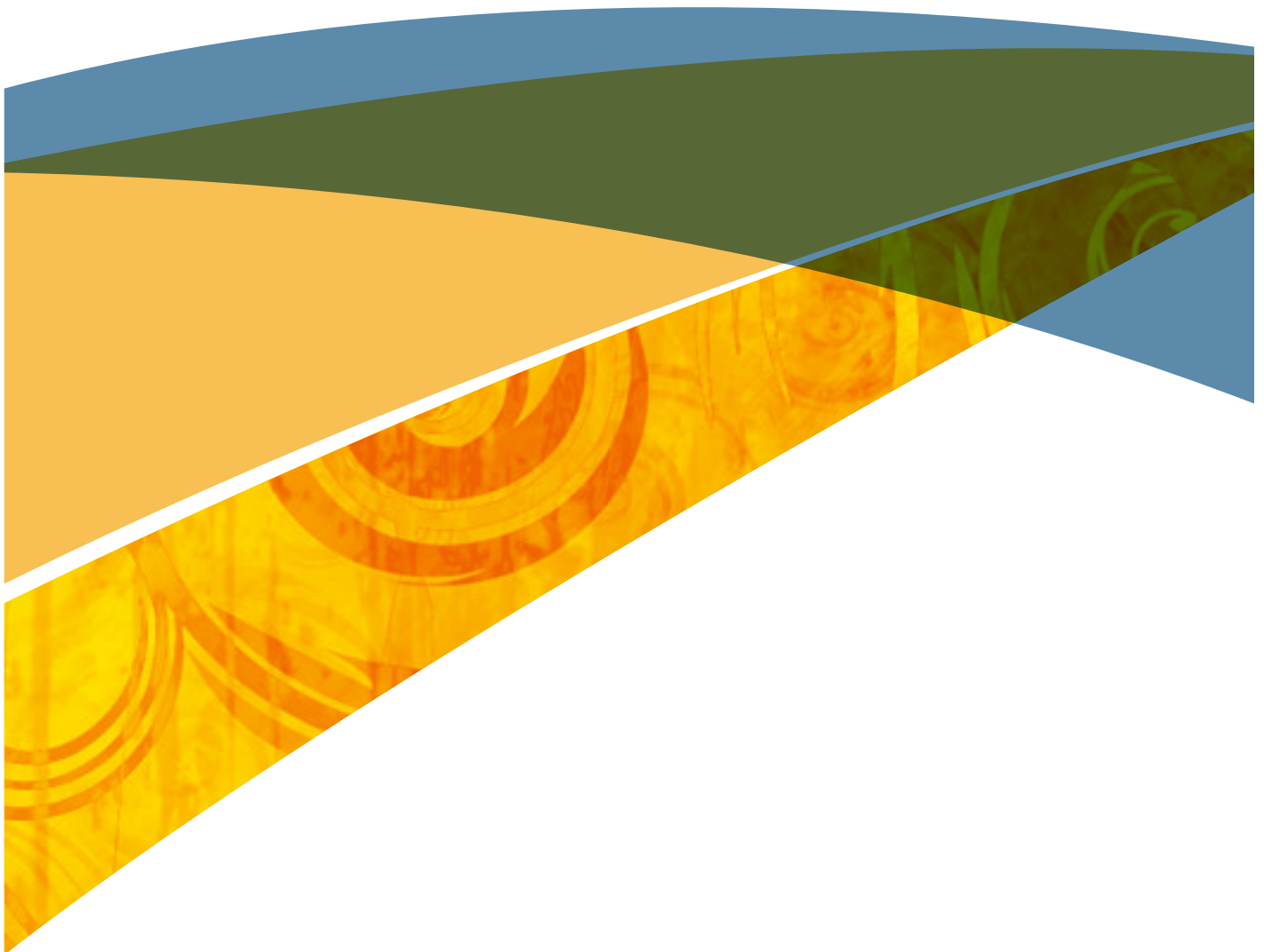




Intellectual
Property
Office

**Government Response to the further consultation
and technical review 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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Executive Summary

This paper is the Government's Response to the further consultation and technical review on changes to Section 72 of the Copyright, Designs and Patents Act 1988 (CDPA).

Responses were received from 10 organisations (see Annex A).

All responses support the Government's policy of removing 'film' from Section 72. The changes will:

- Bring greater clarity to the law;
- Avoid the need for complex changes to the rest of the Copyright, Designs and Patents Act;
- Enable rightsholders to bring enforcement action more easily;
- Lead to a more level playing field for those pubs and other organisations that take out legitimate television subscriptions.

Some respondents highlighted that the subsection in the draft Regulations dealing with 'communication to the public' ran the risk of unintended consequences. The inclusion of this was merely intended as a clarification that the exception applies in respect of a broadcast, where that broadcast is communicated to the public for free, as held by the Courts in the FAPL litigation. The Government agrees that the clarification is not required in order to give effect to the interpretation of the Courts in the FAPL litigation. The position of Section 72 in respect of Sections 19 and 20 of the CDPA will remain as interpreted by the Courts.

The Government would like to thank all those that responded to this further consultation and technical review.

Next Steps

The Government intends to proceed to lay Regulations in Parliament, to remove film from Section 72 (see Annex B).

The extension of Section 72 to acts of "communication to the public" in general, will be dropped from the implementing Regulations.



Background

Section 72 currently permits those who play broadcasts (e.g. television or radio broadcasts) in a publicly accessible location to which entry is free (e.g. a public house) to do so without the need to seek licences for some, but not all, rights in the broadcast. Changes to Section 72 of the Copyright, Designs and Patents Act (1988) are required following a series of decisions in a case brought by the Football Association Premier League Limited¹ (FAPL), which found that UK law is incompatible with the requirements of the Directive of the European Parliament and of the Council (2001/29/EC) of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the InfoSoc Directive).

In 2015, a consultation on changes to Section 72 revealed problems with an approach which would have seen the scope of the exception to copyright provided by Section 72 narrowed:

- To apply only to producer's rights in film fixations and not to creative (or "cinematographic") aspects of film;
- So that it cannot be relied on by commercial premises seeking to show exclusive subscription broadcasts in public without an appropriate commercial viewing licence.

The majority of respondents to the 2015 consultation highlighted that this approach was complicated, with several practical drawbacks (e.g. the difficulty in practice of distinguishing between film fixations and cinematographic film). The majority of consultation respondents advocated that 'film' be removed from the exception completely. The Government decided to support such an approach, subject to further consultation – see: <https://www.gov.uk/government/consultations/technical-review-section-72-copyright-designs-and-patents-act-1988-cdpa>

The Government consulted specifically on the impact of removing 'film' from Section 72 and on draft Regulations which also proposed the addition of the words 'communication to the public'. This paper is the Government's Response to that further consultation and technical review.

Government response by theme

Removal of film

The responses to the consultation were overwhelmingly supportive of the removal of film from the exception, with no dissenting opinions.

Specifically, respondents welcomed the simplification that would be achieved. Several respondents felt that removing film had the advantage over previous options in that it would avoid practical difficulties, and the need to recognise "a new class of copyright work linked to 'film' which would need reconciliation across all the other provisions within the CDPA".

¹ Case C-403/08, (2012) EWHC 108, (2012) EWCA Civ 1709

In practical terms some respondents felt it would clarify the situation for small businesses and consumers, and encourage them to take out legitimate subscriptions rather than seek unauthorised means of access.

Response: This confirms **Government's view** that it would be appropriate to remove “film” from Section 72, as set out in the draft Regulations (excepting the change outlined under “communication to the public”, below), as it will:

- Bring greater clarity to the law;
- Avoid the need for complex changes to the rest of the Copyright, Designs and Patents Act;
- Enable rightsholders to bring enforcement action more easily; and
- Lead to a more level playing field for those pubs and other organisations that take out legitimate television subscriptions.

Compatibility with EU Directives & communication to the public

Respondents unanimously considered that the exception would bring consistency with EU law and caselaw, and was a simpler, clearer solution than that put forward in the 2015 consultation; save in relation to the inclusion of the phrase “communication to the public”.

Several responses expressed concern with the proposal to amend Section 72(1) to refer to “communication to the public”. The Government had proposed this to clarify that the exception applies in respect of a broadcast where that broadcast is communicated to the public for free. However, some respondents expressed concerns that there would be unintended consequences of doing so. In particular:

- It would be unclear whether or not the exception applies only to linear broadcasting, or also to on-demand broadcasts.
- On-demand broadcasts were not the subject of consultation;
- Such a change is not required by the Court judgment which led to the current review of Section 72.

Response: The Government agrees that the inclusion of a subsection dealing with “communication to the public” is not necessary for the purposes of compliance with EU law. The inclusion was initially proposed in order to clarify that the “showing or playing in public” of a broadcast will also constitute an act of “communication to the public”, and so Section 72 should be understood to apply to both, in line with the FAPL rulings. It was not intended to effect any substantive change.

In light of respondents' concerns, the Government has decided to remove the subsection dealing with communication to the public in the amended draft regulations (see Annex B). The Courts have interpreted "communication to the public of the work" in Section 20 as including the "showing or playing in public of a broadcast" within Section 72(1). The inclusion of the phrase "communication to the public" in Section 72(1) was not intended to have any substantive effect in relation to the interpretation given by the Courts and was only included by way of clarification. The Government agrees that the clarification is not required in order to give effect to the interpretation of the Courts in the FAPL litigation, and without it the position of Section 72 in respect of Sections 19 and 20 of the CDPA will remain as interpreted by the Courts.

Changes to licensing

Not all respondents commented on this. Of those that did, some said that it would not change their licensing of rights.

Response: The Government has not received any evidence that the changes to Section 72 will result in a new licensing burden and consequently is confident that the policy of removing "film" from the Section 72 exception is the right one.

Enforcement

Rightsholders responding to the consultation claimed that it would not lead to a change in their enforcement activity, but would improve the chances of reducing infringement by pubs using unauthorised systems to show subscription broadcasts.

In practical terms, rightsholders estimate that the change could initially result in a small number of test cases, using the change in law as an additional ground of argument, but that the simplification and clarification of the law would ultimately reduce the demand on the judicial system.

Response: The expected impact on enforcement fits with that given in the Impact Assessment, and does not give reason to the Government to doubt the policy in relation to Section 72, or the amended Regulations.

Performers' Rights

Some respondents highlighted, as in the 2015 Consultation, a continuing need to amend Schedule 2, paragraph 18 of the Copyright, Designs and Patents Act, to bring "consistency" with Section 72 as amended by the Regulations, or failing that should have it as an area for future review.

Response: The Government is keen to confine legislative intervention in this instance to Section 72, as per the court judgments referred to above.

Annex A: List of respondents

Alliance for Intellectual Property

BT

BPI (British Recorded Music Industry)

British Copyright Council (BCC)

British Equity Collecting Society (BECS)

Football Association Premier League (FAPL)

ITV

Motion Picture Association (MPA)

Sky

Video Performance Limited (VPL)

2016 No.

COPYRIGHT

**The Copyright (Free Public Showing or Playing) (Amendment)
Regulations 2016**

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	***

The Secretary of State is a Minister designated for the purposes of section 2(2) of the European Communities Act 1972(a) in relation to matters relating to copyright(b).

The Secretary of State, in exercise of the powers conferred by section 2(2) of that Act, makes the following Regulations:

Citation and Commencement

1. These Regulations may be cited as the Copyright (Free Public Showing or Playing) (Amendment) Regulations 2016 and come into force on [***] 2016.

Amendments to the Copyright, Designs and Patents Act 1988

2. The Copyright, Designs and Patents Act 1988(c) is amended as follows.

3. In section 72(d)—

- (a) at the end of subsection (1)(a) insert “or”;
- (b) in subsection (1)(b), omit “; or”;
- (c) omit subsection (1)(c); and
- (d) in subsection (1B), insert “film or” before “excepted sound recording”.

(a) 1972 c.68; section 2(2) was amended by the Legislative and Regulatory Reform Act 2006 (c.51), section 27(1) and the European Union (Amendment) Act 2008 (c.7), section 3(3) and Part 1 of the Schedule.
(b) S.I. 1992/707 and S.I. 1993/595.
(c) 1988 c.48.
(d) Section 72 was amended by S.I. 2003/2498 regulation 2(2) and regulation 3 and regulation 21(1) and Schedule 2, and S.I. 2010/2694 regulation 4(1).

Concept House
Cardiff Road
Newport
NP10 8QQ

Tel: 0300 300 2000
Fax: 01633 817 777
Email: information@ipo.gov.uk

www.gov.uk/ipo

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