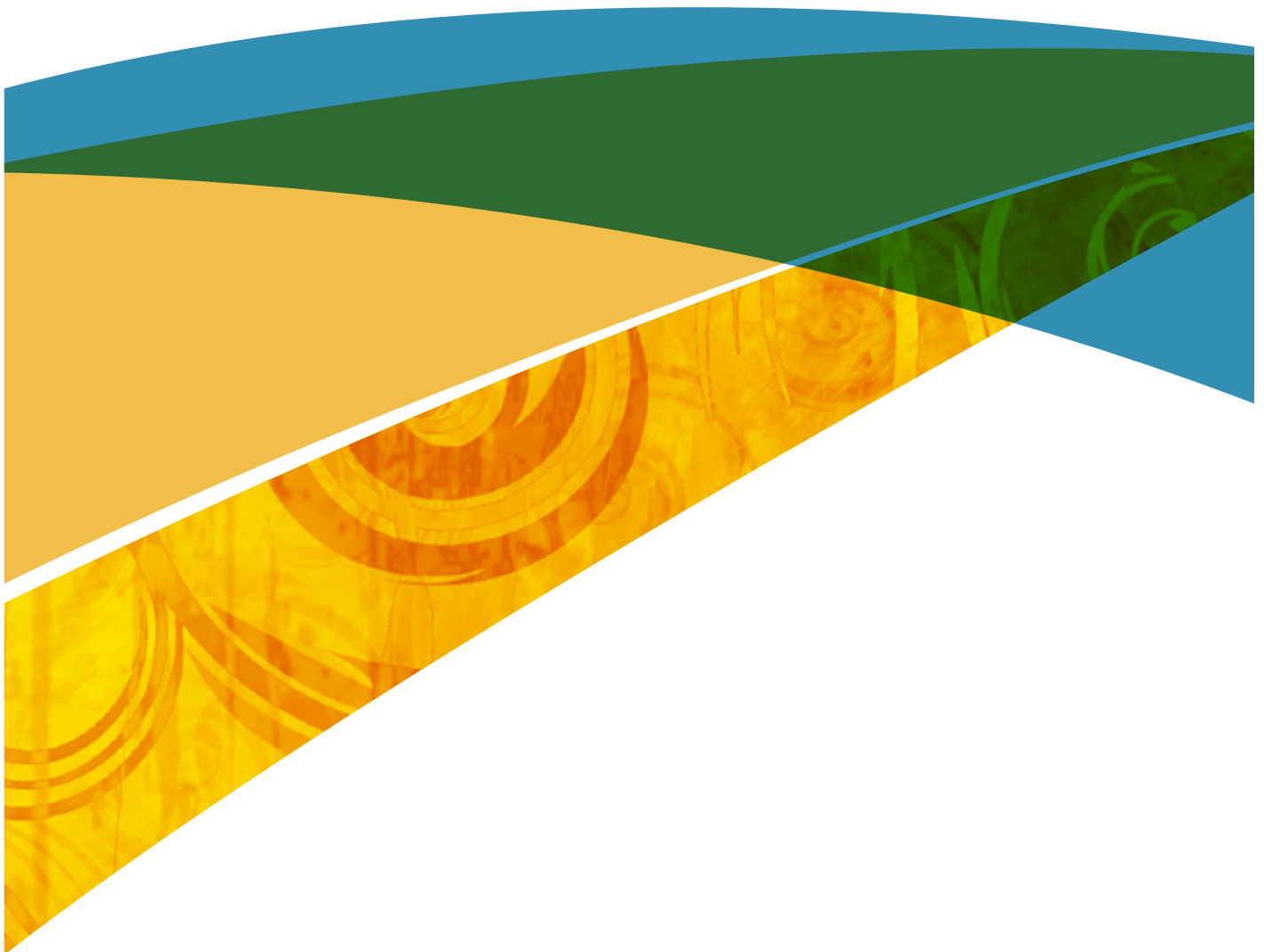




Intellectual  
Property  
Office

# 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)







# Contents

<b>Ministerial Foreword</b> .....	<b>1</b>
<b>Introduction</b> .....	<b>2</b>
<b>About this document</b> .....	<b>2</b>
Responding to this review .....	3
Confidentiality & Data Protection .....	3
<b>Summary</b> .....	<b>4</b>
What does Section 72 allow? .....	4
Why has the Government consulted on Section 72? .....	5
<b>The 2015 Consultation</b> .....	<b>5</b>
Results of 2015 Consultation .....	6
<b>Government Proposal</b> .....	<b>6</b>
Questions .....	7
<b>The Draft Regulations</b> .....	<b>8</b>
Questions on the regulations.....	9
<b>Next steps</b> .....	<b>9</b>
<b>Annexes</b> .....	<b>10</b>
Annex A.....	10
Annex B.....	12
Annex C.....	34
Annex D.....	42



## Ministerial Foreword



The UK is home to a strong and thriving creative sector, worth £84.1 billion<sup>1</sup>. The Government supports investment in this sector by providing a robust and effective copyright framework. 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.

Last year the Government consulted on proposed changes to Section 72 of the Copyright, Designs and Patents Act 1988 (CDPA). Section 72 currently permits 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.

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.

The Government's aim has always been 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 previous consultation set out a preferred option, however, responses to the consultation revealed several complexities. Therefore, based on the feedback to the consultation, the Government has set out a different preferred option which we believe will be more straightforward and more effective at delivering the intended policy change.

The preferred policy option is simpler than the previous proposal, and will bring greater clarity to the law, create a level playing field for legitimate users of copyright works, and provide a clearer basis for right holders to bring enforcement action.

This further consultation is your opportunity to comment on the changes the Government intends to make to Section 72. It also invites views on the draft regulations for implementing these changes. I look forward to hearing your views.

A handwritten signature in black ink that reads "Lucy Neville-Rolfe". The signature is written in a cursive style.

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

<sup>1</sup> Creative Industries Economic Estimates – January 2016 - <https://www.gov.uk/government/statistics/creative-industries-economic-estimates-january-2016>



## Introduction

In 2015, the Government consulted on making an amendment to Section 72 of the Copyright, Designs and Patents Act (CDPA) 1988.

Section 72 currently enables organisations that do not charge for admission to show television programmes to the public without seeking permission from the owners of film and broadcast copyright in those programmes. Recent court cases have highlighted questions as to the scope of the Section 72 provision.

Because of this, the Government proposed to amend Section 72 to clarify that it is consistent with European Union (EU) law, and ensure an appropriate balance between the interests of copyright owners and legitimate users of copyright works.

The 2015 consultation and Impact Assessment can be accessed here:

<https://www.gov.uk/government/consultations/section-72-copyright-designs-and-patents-act-1988-cdpa>

## About this document

Following an analysis of the responses to the 2015 consultation, the Government has changed its preferred policy option. This consultation and technical review sets out the Government's position and provides a further opportunity to comment on the Government's newly preferred policy option. This document also gives interested parties the chance to comment on the practical and legal aspects of draft regulations which will implement this change to the law.

This consultation and technical review will run until 20 April 2016. As the changes implement European law, they will be introduced via secondary legislation, using the powers granted by the European Communities Act.

While the Government is predisposed towards a particular policy option, and implementing regulations, it approaches this consultation and technical review with an open mind.

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>2</sup> which sets out the Government's aspiration that evidence used to inform public policy is clear, verifiable and able to be peer-reviewed.

The Government invites comments on the draft regulations for amending Section 72 (**Annex A**).

---

<sup>2</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)

A Final Stage Impact Assessment has been prepared following the consultation (**Annex B**).

A Summary of Responses to the 2015 consultation is provided at **Annex C**.

## Responding to this review

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 addresses below:

Section 72 CDPA Review 2016  
Copyright and Enforcement Directorate  
Intellectual Property Office  
Room 1Y05 Concept House  
Cardiff Road  
Newport  
NP10 8QQ

Email: [Section72CDPA@ipo.gov.uk](mailto:Section72CDPA@ipo.gov.uk)

Please let us have your comments by 20 April 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 review in another format.

## Confidentiality & Data Protection

Information provided in response to this consultation and review, 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 72 allow?

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.

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 law<sup>3</sup> 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. Furthermore, EU law recognises two different types of copyright in film:

- (a) The original creative aspects of a film (a “cinematographic” work – e.g. the direction and composition of scenes within a TV drama). These rights are first owned by the creator of the work (e.g. the director).
- (b) The recording of the film (a “fixation” – e.g. the mere recording of a football match). These rights are first owned by the producer or the broadcaster who makes the investment to enable the film to be made.

If an organisation wishes to show broadcasts that contain other copyright elements, such as 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 has the Government consulted on Section 72?

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 systems to show live Premier League football matches, and firms supplying these satellite decoder systems. The action gave rise to a series of judgments, including a reference to the Court of Justice of the European Union (CJEU)<sup>4</sup>.

The result was a Court of Appeal ruling highlighting that Section 72 does not clearly distinguish between the two types of film copyright set out at EU level. EU law affords a higher level of protection to cinematographic aspects of film, versus fixation aspects, insofar as it restricts the types of copyright exception EU Member States can apply in relation to use of cinematographic works, but it is more permissive in the case of fixations. Therefore, the Court of Appeal questioned the compatibility of Section 72 (1) with EU law.

Further details on the policy background to Section 72 and the legal issues relating to it can be found in the Government's consultation document.

## The 2015 Consultation

On 16 July 2015, the Government published a consultation on changing Section 72 CDPA to address these issues. The consultation ran for 12 weeks and closed on 8 October 2015.

In the consultation, the Government proposed:

**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; and

**Part 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.

Two further options were considered:

1. removing the reference to film completely from the Section 72 exception; and
2. 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 – this is Part A above without narrowing the scope of the exception.

Although the Government set out a preferred option, it welcomed views on the two other options, and any wider amendments that may be necessary. The other options were also included in the consultation stage Impact Assessment (**Annex D**).

---

<sup>4</sup> 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).

## Results of 2015 Consultation

The 2015 Consultation received 19 responses from representative bodies, the legal profession and right holders. A Summary of Responses can be found at **Annex C**.

The majority of respondents indicated that clarification on the scope of the Section 72 exception is needed, but many considered the Government's proposed option as overly complicated and said that it would continue to cause confusion.

A key concern was that the preferred option would lead to greater legal uncertainty in relation to the licensing of works. A number of respondents commented that having to distinguish between which parts of a broadcast only contain film fixations and which parts contain cinematographic elements would be impossible in practice<sup>5</sup>, and therefore this approach would not benefit users who rely on Section 72. Therefore, the majority of respondents supported removal of film completely from the exception, regarding it as the most straightforward option available to the Government, ensuring compliance with the relevant EU Directives.

One respondent also viewed the removal of film as being consistent with the historic approach in the UK of not distinguishing between the two aspects of film copyright and would provide the greatest level of clarity in the law.

Organisations which show broadcasts in public raised a concern that removing film completely could lead to additional costs to small businesses, as it could mean that those showing music video channels (for example) could require additional licences. However, the 2015 consultation highlighted that the impact on small businesses was likely to be less than previously thought, as the vast majority of copyright works contained in broadcasts can already be licensed by copyright owners, and the only impact attributable as a result of removing film completely would be a possible change in licensing practice by owners of film fixation copyright. The consultation did not uncover sufficient evidence to allow any resulting cost to small businesses to be monetised.

## Government Proposal

In light of the concerns expressed in the responses received to the 2015 Consultation, the Government now proposes to address the issue by removing the reference to film completely from the Section 72 exception.

This proposal is simpler to implement than that proposed in the 2015 Consultation, in that fewer changes are needed to the CDPA, and it offers improved clarity for both right holders and those showing/playing broadcasts.

The Government considers that this proposal would create a level playing field for those premises which are authorised subscribers to commercial broadcasting services, by clearly establishing that right holders could take enforcement action for infringement of copyright against the minority of premises which use unauthorised systems to show subscription broadcasts.

<sup>5</sup> All audiovisual recordings (films) will be considered fixations, regardless of their content, but only original creative aspects (those which are the author's or director's "own intellectual creation") will benefit from protection as a cinematographic work. Ultimately, only the courts can decide whether a work is original, and determining whether an aspect of film is merely a fixation, or qualifies for protection as a cinematographic work may be difficult.

The Government would maintain the current exception in relation to the use of film contained in broadcasts for the purpose of demonstration or repair of equipment for the reception of broadcast.

Although the Government has asked general questions on this approach, it is inviting further comment on it now that it is the preferred option for implementing this policy.

## Questions

The Government welcomes views on:

### General Questions:

**Question 1:**

What would be the impact of removing “film” from the Section 72 exception?

**Question 2:**

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

**Question 3:**

Do you agree that removing film from the exception appropriately reflects the requirements of the relevant EU Directives and EU and UK court judgments?

**Question 4:**

Do you agree that removing film strikes an appropriate balance between the needs of right holders and legitimate users of copyright works?

### Questions for copyright users:

**Question 5:**

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

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

**Question 6:**

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.

**Question 7:**

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?

## The Draft Regulations

The following section provides an opportunity to comment on the draft regulations for implementing this amendment. This would involve the deletion of Section 72(1)(c), under which films are brought within the scope of the exception for the free public showing or playing of a broadcast. It would also involve amending Section 72(1) by including “communication to the public”. This will clarify that the exception applies where a broadcast is communicated to the public free of charge. These changes reflect the Court of Appeal judgment.

In addition, the draft regulations include an amendment to Section 72(1B) to retain film within the scope of the exception for playing or showing a broadcast in public where it is necessary for repairing/demonstrating equipment. This would also be extended to the communication to the public of a broadcast where necessary for repair/demonstration, in line with the proposed changes to Section 72(1). This would mean that showing, playing or communicating a film to the public would be permissible where necessary for repairing/demonstrating equipment in limited circumstances, where Section 72(1) is satisfied.

We propose that Section 72 is amended as follows (*amended sections only shown below*):

S72 (1) The showing or playing in public **or the communication to the 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; **or**
- (b) any sound recording (except in so far as it is an excepted sound recording) included in it. **Or**
- (c) ~~any film included in it.~~<sup>2</sup>

S72 (1B) Where by virtue of subsection (1) the copyright in a broadcast shown or played in public is not infringed, copyright in any **film or** excepted sound recording included in it is not infringed if the playing or showing of that broadcast in public **or the communication of that broadcast to the public is necessary for the purposes of—**

- (a) repairing equipment for the reception of broadcasts;
- (b) demonstrating that a repair to such equipment has been carried out; or
- (c) demonstrating such equipment which is being sold or let for hire or offered or exposed for sale or hire.

## Questions on the regulations

**Question 8:**

Is this the most appropriate way to achieve the desired objective?

**Question 9:**

Do you agree that the approach taken in the draft regulations is consistent with the Government's approach?

**Question 10:**

Are there any additional consequences of this change that the Government should consider / be aware of?

## Next steps

Following the conclusion of this further consultation and technical review, the Government will analyse the responses received. We will then publish the Regulations alongside the final Impact Assessment, and a summary of responses to the technical review. At this stage the Government's approach to implementation remains provisional – the final policy position will be reflected in the implementing Regulations.

# Annex A

## Draft Regulations

---

### STATUTORY INSTRUMENTS

---

**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<sup>(6)</sup> in relation to matters relating to copyright<sup>(7)</sup>.

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

#### **Citation and Commencement**

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**

The Copyright, Designs and Patents Act 1988<sup>(8)</sup> is amended as follows.

In section 72<sup>(9)</sup>—

in section (1), after “showing or playing in public” insert “, or the communication to the public,”;

at the end of subsection (1)(a) insert “or”;

in subsection (1)(b), omit “; or”;

omit subsection (1)(c); and

for subsection (1B) substitute—

---

<sup>(6)</sup> 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.

<sup>(7)</sup> S.I. 1992/707 and S.I. 1993/595.

<sup>(8)</sup> 1988 c.48.

<sup>(9)</sup> 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).

“(1B) Where by virtue of subsection (1) the copyright in a broadcast shown or played in public, or communicated to the public, is not infringed, copyright in any film or excepted sound recording included in it is not infringed if the playing or showing of that broadcast in public, or the communication of that broadcast to the public, is necessary for the purposes of—

- (a) repairing equipment for the reception of broadcasts;
- (b) demonstrating that a repair to such equipment has been carried out; or
- (c) demonstrating such equipment is being sold or let for hire or offered or exposed for sale or hire.”.

# Annex B

## Final Stage Impact Assessment

OFFICIAL

<b>Title:</b> Section 72 of the Copyright, Designs and Patents Act (CDPA) – exception for the public showing or playing of a film contained in a broadcast		<b>Impact Assessment (IA)</b> <b>Date:</b> 26/01/2016 <b>Stage:</b> Final Stage <b>Source of intervention:</b> EU <b>Type of measure:</b> Secondary <b>Contact for enquiries:</b>  <a href="mailto:Section72CDPA@ipo.gov.uk">Section72CDPA@ipo.gov.uk</a>	
<b>IA No:</b> BISIPO004			
<b>Lead department or agency:</b> Intellectual Property Office			
<b>Other departments or agencies:</b>			
<b>Summary: Intervention and Options</b>		<b>RPC Opinion:</b> FIT FOR PURPOSE	
<b>Cost of Preferred (or more likely) Option</b>			
<b>Total Net Present Value</b> £0m	<b>Business Net Present Value</b> £0m	<b>Net cost to business per year</b> (EANCB on 2009 prices) £0m	<b>In scope of One-In, Two-Out?</b> No
<b>Measure qualifies as Zero net cost</b>			
<b>What is the problem under consideration? Why is government intervention necessary?</b> 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.			
<b>What are the policy objectives and the intended effects?</b> The aim is to amend Section 72 to clarify it is consistent with EU law, and ensures an appropriate balance between the interests of copyright owners and legitimate users of copyright works.			
<b>What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)</b> <b>Option 0:</b> 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. <b>Option 1:</b> Clarify that the exception in s72(1)(c) applies only to producers' rights in film fixations and not to creative (or "cinematographic") aspects of film. <b>Option 2: Part A:</b> Clarify that the exception in s72(1)(c) applies only to producers' rights in film fixations and not to creative (or "cinematographic") aspects of film; <b>Part B:</b> Narrow 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. <b>Option 3:</b> Delete film entirely from the s72 exception.  <i>Under all of the options we would maintain the current exception in relation to the use of broadcasts for the purpose of demonstration or repair. Consequential amendments would be required to achieve this.</i>  At consultation stage, <b>Option 2</b> was preferred; however, the majority of consultation respondents considered that this option would perpetuate, or increase, legal uncertainty around the functioning of the exception, and the licensing of copyright works in broadcasts. Many respondents commented that distinguishing between which parts of a broadcast contain film fixations and which contain cinematographic aspects would be impossible in practice, therefore this approach would not benefit users who rely on Section 72. <b>Option 3</b> is now the preferred option, as it would bring the greatest degree of clarification.			
<b>Will the policy be reviewed?</b> It will be reviewed. <b>If applicable, set review date:</b> 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.	<b>Micro</b> Yes	<b>&lt; 20</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: \_\_\_\_\_



## OFFICIAL

**Summary: Analysis & Evidence****Policy Option 1**

**Description:** Clarify that the exception in s72(1)(c) applies only to film fixations and not to creative (or “cinematographic”) aspects of film.

**FULL ECONOMIC ASSESSMENT**

Price Base Year 2015	PV Base Year 2015	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)			
			Low: 0	High: 0	Best Estimate: 0	
<b>COSTS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Cost (Present Value)</b>	
Low	0		0		0	
High	0		0		0	
Best Estimate	0		0		0	
<b>Description and scale of key monetised costs by ‘main affected groups’</b>						
The IPO has not been able to monetise costs for this option. Consultation did not uncover any meaningful data allowing us to estimate either the size of the affected groups or the costs to them.						
<b>Other key non-monetised costs by ‘main affected groups’</b>						
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 creative 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.						
<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Benefit (Present Value)</b>	
Low	0		0		0	
High	0		0		0	
Best Estimate	0		0		0	
<b>Description and scale of key monetised benefits by ‘main affected groups’</b>						
The IPO has not been able to monetise benefits for this option. Consultation did not uncover any meaningful data allowing us to estimate the number of businesses who would benefit from this change.						
<b>Other key non-monetised benefits by ‘main affected groups’</b>						
i) Right holders with a cinematographic right in films will be able to license their rights in film content being shown by commercial and non-commercial premises but this will only have an impact to the extent that they do not already license these rights.						
Key assumptions/sensitivities/risks					<b>Discount rate (%)</b>	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 1)**

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

## OFFICIAL

**Summary: Analysis & Evidence****Policy Option 2**

Description: Part A: Clarify that the exception in s72(1)(c) applies only to film fixations and not to creative (or "cinematographic") aspects of film; Part B: Narrow 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.

**FULL ECONOMIC ASSESSMENT**

Price Base Year 2015	PV Base Year 2015	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)			
			Low: 0	High: 0	Best Estimate: 0	
<b>COSTS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Cost (Present Value)</b>	
<b>Low</b>	0		0		<b>0</b>	
<b>High</b>	0		0		<b>0</b>	
<b>Best Estimate</b>	0		0		<b>0</b>	
<b>Description and scale of key monetised costs by 'main affected groups'</b>						
The IPO has not been able to monetise costs for this option. Consultation did not uncover any meaningful data allowing us to estimate either the size of the affected groups or the costs to them. We are unable to estimate the costs to pubs and other commercial entities currently performing unauthorised activities, from being dissuaded to do so.						
<b>Other key non-monetised costs by 'main affected groups'</b>						
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.						
<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Benefit (Present Value)</b>	
<b>Low</b>	0		0		<b>0</b>	
<b>High</b>	0		0		<b>0</b>	
<b>Best Estimate</b>	0		0		<b>0</b>	
<b>Description and scale of key monetised benefits by 'main affected groups'</b>						
The IPO has not been able to monetise benefits for this option. Consultation did not uncover any meaningful data allowing us to estimate the number of businesses who would benefit from this change.						
<b>Other key non-monetised benefits by 'main affected groups'</b>						
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 do so if they have acquired a commercial licence.						
ii) Other right holders with cinematographic rights in films will be able to license these rights in content being shown by commercial and non-commercial premises but this will only have an impact to the extent that they do not already license these rights.						
Key assumptions/sensitivities/risks					<b>Discount rate (%)</b>	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 systems and to commercial premises that are inclined to purchase such to avoid paying for the required commercial subscriptions.						

**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

## OFFICIAL

**Summary: Analysis & Evidence****Policy Option 3****Description:** Delete film entirely from the exception in s72.**FULL ECONOMIC ASSESSMENT**

Price Base Year 2015	PV Base Year 2015	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 0	High: 0	Best Estimate: 0

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

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

The IPO has not been able to monetise costs for this option. Consultation did not uncover any meaningful data allowing us to estimate either the size of the affected groups or the costs to them. We are unable to estimate the costs to pubs currently performing unauthorised activities, from being dissuaded to do so.

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

- i) Commercial premises (e.g. pubs, restaurants, gyms, etc) 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 organisations (e.g. charities, voluntary and not-for-profit organisations, etc) which show television broadcasts of any kind to the public may also be required to purchase additional licences.

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

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

The IPO has not been able to monetise benefits for this option. Consultation did not uncover any meaningful data allowing us to estimate the number of businesses who would benefit from this change.

**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 premises showing subscription broadcast films only do so if they have a commercial licence.
- ii) Right holders in television broadcasts (e.g. sports right holders, music video right holders) will be able to issue licences for a use which they currently cannot license (i.e. 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 infringement 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 right holders to license additional uses of their works.

**BUSINESS ASSESSMENT (Option 1)**

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

## OFFICIAL

**Evidence Base****Problem Under Consideration**

Section 72 of the Copyright, Designs and Patents Act 1988 (CDPA) sets out an exception to copyright infringement for the free public showing or playing of a broadcast and certain elements within it. It is necessary to review the applicability of Section 72 to the showing of 'films', following a Court of Appeal ruling<sup>1</sup>, which highlighted that this provision was unclear when considered in light of EU Law<sup>2</sup>.

EU law recognises two different types of copyright in film:

- a) The original creative aspects of a film (a "cinematographic" work – e.g. the direction and composition of scenes within a TV drama). These rights are first owned by the creator of the work (e.g. the director).
- b) The recording of the film (a "fixation" – e.g. the mere recording of a football match). These rights are first owned by the producer or the broadcaster who makes the investment to enable the film to be made.

All audiovisual recordings (films) will be considered fixations, regardless of their content, but only original creative aspects (those which are the author's or director's "own intellectual creation") will benefit from protection as a cinematographic work. Ultimately, only the courts can decide whether a work is original, and determining whether an aspect of film is merely a fixation, or qualifies for protection as a cinematographic work may be difficult.

Example: in television sports broadcasts, the music and logos shown in the broadcast of a football match are protected as creative works, whereas a mere recording of the match itself may only be protected as a fixation.

EU law affords a higher level of protection to cinematographic aspects of film, versus fixation aspects, insofar as it restricts the types of copyright exception EU Member States can apply in relation to use of cinematographic works, but it is more permissive in the case of fixations.

**The current situation**

The exception provided by Section 72 of the CDPA enables those who play a television or radio in a publicly accessible location to which entry is free (e.g. a public house, a television showroom, etc), to do so without the need to seek licences for some, but not all, rights in the broadcast. While Section 72 provides an exception to copyright infringement for the showing of "film" contained in a broadcast this can only apply to the fixation aspects and not the cinematographic aspects (though the Court of Appeal has ruled this distinction unclear – see below).

**Why was the Section 72 exception introduced?**

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 premises<sup>3</sup>.

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 burden<sup>4</sup>. However, it was recognised at the time that this exception did not extend to creative copyright in a broadcast, and licences from PRS would be required in relation to the playing of musical works, for example.<sup>5</sup>

<sup>1</sup> Case C-403/08, (2012) EWHC 108, (2012) EWCA Civ 1708

<sup>2</sup> See Case EWCA Civ 1708, para 62.

<sup>3</sup> 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.

<sup>4</sup> See comments by Lord Beaverbrook, Hansard HL Debate 23.2.1988, Vol 493 Cols 1191-1192.

<sup>5</sup> See comments by Lord Beaverbrook, Hansard HL Debate 23.2.1988, Vol 493 Cols 1191-1192.

## OFFICIAL

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. These changes 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.

Currently, following its amendment, Section 72 is narrower than originally enacted and does not apply to most works contained in television broadcasts – including literary, artistic, musical and dramatic works, as well as most sound recordings. However, it continues to apply to broadcasts *per se*<sup>6</sup>, certain sound recordings, and ‘films’ (as described above). Under the preferred policy option (see Option 3, below), Section 72 will no longer provide a defence to the showing/playing of films.

Many pubs choose to show television sports broadcasts in order to attract more customers. Television sports broadcasts include film containing both cinematographic works (e.g. the direction and composition of scenes within a TV drama, or any other type of creative content), and fixations (this may include a mere recording of the match itself). Therefore, even though the match footage may fall within the Section 72 exception, exclusive subscription sports events, such as Premier League matches, include cinematographic works and other creative content, which are not covered by the exception, and showing them requires authorisation from right holders (including taking a commercial subscription from a satellite broadcaster<sup>7</sup>).

**Authorisation & copyright:** copyright provides authors with the exclusive rights to prevent their works being communicated to the public, or being performed, shown or played, in public. These rights apply to literary, dramatic, musical and artistic works, as well as sound recordings, films and broadcasts.

Consequently there will be many rights in a television broadcast, including: rights in the broadcast itself; rights in the film (both in any cinematographic works, and in any fixations); rights in any sound recording; and potentially in any further underlying rights. The extent to which, and terms on which, right holders choose to license (authorise) these rights both to broadcasters and, in respect of any remaining rights, to premises wishing to show/play broadcasts, is unclear.

**Example:** After licensing (gaining authorisation) from right holders, a broadcaster may offer a commercial subscription which authorises premises to play/show sports broadcasts in public. However, the broadcaster may not have gained the necessary licences to permit it to authorise the playing/showing of any sound recording contained in a broadcast. To play a sound recording, premises would need to seek a licence from the publisher of the sound recording, as well as the composer of the musical composition and lyrics (collective licensing bodies offer such licences).

Some commercial premises attempt to avoid paying for the required commercial subscriptions through the use of unauthorised decoders/misuse of subscriptions (e.g. using non-commercial subscriptions which are significantly cheaper), often attempting to remove the creative aspects of sports broadcasts (e.g. by switching off the sound, placing cards over logos, or using masking technology which obscures logos), and relying on Section 72 in respect of film fixations. This can make it difficult, but not impossible, for copyright owners to take legal action to enforce the use of commercial subscriptions, distorting the market between pubs which pay for commercial subscriptions, and those that use comparatively cheaper unauthorised systems (for the purpose of this Impact Assessment “unauthorised systems” includes misuse of subscriptions (i.e. commercial premises using subscriptions intended for private home-use only), set top boxes, unauthorised satellite decoder cards, use of masking technology).

A legal dispute between the Premier League and sellers and users of unauthorised satellite decoders led to a Court of Appeal ruling highlighting that Section 72 does not clearly distinguish between the two types of film copyright, and questioning the compatibility of Section 72 (1) with EU law.

<sup>6</sup> The Copyright, Designs and Patents Act 1988 protects both broadcasts (see Section 6) and films (see Section 5B) separately.

<sup>7</sup> 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.

## OFFICIAL

**Legal challenge**

The Premier League action led to a series of judgments and a reference to the Court of Justice of the European Union (CJEU)<sup>8</sup>.

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.

The CJEU considered these questions and ruled that:

- a) Granting territorial exclusivity of broadcasting licences in relation to live football matches is in breach of the Treaty on the Functioning of the European Union (TFEU) as territorial exclusivity constitutes a prohibited restriction on competition. This means that satellite decoder cards sold in one EU Member State (such as Greece) can lawfully be imported and used in another Member State (such as the UK). However, while a territorial restriction in a licence does not itself preclude the use in the UK of a satellite decoder card sold in another Member State, it will depend on the nature of the licence. If the licence has been authorized for domestic use only, it won't be lawful to use it for commercial purposes in the UK.
- 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, or cinematographic works), the copyright owners' authorisation is required (for example, via a commercial subscription, /or separate licence).). This means that pubs (and similar commercial premises) are not permitted to show television programmes containing creative works without the appropriate licences, and copyright owners can take action against pubs and other commercial premises which use non-commercial decoders to show television programmes to their customers.

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 films was permitted due to the exception provided by Section 72(1) CDPA.<sup>9</sup> However, the High Court also ruled that the CDPA does not draw the necessary distinction between the two different types of film rights as recognised by EU law, and suggested that the CDPA did not properly implement the Copyright Directive<sup>10</sup>.

It is therefore necessary to amend Section 72(1) to ensure that it is consistent with EU law. While doing so, the Government intends to provide a firmer legal basis on which enforcement action against use of unauthorised systems may be taken.

It should be noted that there are two parts to the Section 72 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.
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.

The proposed changes apply only to Section 72(1). Section 72(1B), which provides an exception for the demonstration or repair of radios and televisions, is unaffected.

<sup>8</sup> 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)

<sup>9</sup> Football Association Premier League Ltd v QC Leisure & Ors [2012] EWHC 108, [2012] EWCA Civ 1708 (20 December 2012).

<sup>10</sup> 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

## OFFICIAL

### Rationale for Intervention

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

Section 72 is a longstanding exception in UK law, which has been periodically amended 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 legitimate users of copyright works.

### Policy Objective

To clarify UK copyright law and ensure consistency with the EU legal framework, while providing an appropriate balance between the interests of copyright owners in being remunerated for developing new content, and the interests of businesses and the public sector in being able to use copyright works on reasonable terms.

### Description of Options Considered

**Option 0** - Following the Court of Appeal ruling it is necessary to review the relevant law. The 'do-nothing' approach would not address the issues behind the legal case, nor clarify the law, so has been ruled out.

**Option 1** – Clarify that the Section 72(1) exception only applies to film fixations, and not to cinematographic aspects of film. The scope of the exception, and the types of organisation which can use it, remain unchanged.

**Option 2** – (Nb. This was the preferred “Option 1” in the consultation of October 2015). Clarify that the Section 72(1) exception applies only to film fixations, and not to cinematographic aspects of film. It will also narrow the scope of the exception so that it cannot be relied on by commercial premises seeking to show exclusive subscription broadcasts in public without a commercial licence. The exception for film fixations will continue to apply to non-commercial use, and to free-to-air broadcasts.

**Option 3** – (This is now the preferred option). Remove film entirely from the Section 72(1) exception. Businesses, charities and other organisations showing broadcasts to the public (whether free-to-air or subscription), will not be able to rely on Section 72 as a defence against copyright infringement, and may need to obtain additional permissions (whether by licence or otherwise) to show broadcast films to the public.

**Nb.** Under all of the above options we would maintain the Section 72(1B) exception in relation to the use of broadcasts for the purpose of the demonstration or repair of televisions and other broadcast equipment.

### Parties Affected

Changes to Section 72 are relevant to those who sell rights to televise events such as sport, 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, retail, care homes, shops, hairdressers)

## OFFICIAL

- Premises purchasing legal commercial subscriptions
- Premises purchasing subscriptions which are not licensed for commercial use
- Non-commercial public premises (such as public 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 systems
- Suppliers of authorised systems (provided by broadcasters)
- 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.
- The Scottish Courts and Tribunals Service (SCTS)

### 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) exception in its current form. Following the Court of Appeal 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) applies to film fixations only and not cinematographic works**

Under Option 1 the law would be clarified to highlight that Section 72 applies only to film fixations, and not to cinematographic aspects of film. This would address the concerns raised by the Court of Appeal, by making it clear that UK law is consistent with EU law.

Premises which do not charge for admission would remain able to show film fixations (i.e. mere recordings such as live sport) contained in television broadcasts without permission from their owners. However, copyright owners would still be able to prohibit the showing of cinematographic works in television broadcasts without their permission, irrespective of whether the television broadcast is delivered via subscription or free-to-air.

As far as film fixation copyright is concerned, Option 1 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. As 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.

#### **Additional licensing**

As indicated under the section on Authorisation and Copyright, above, even commercial subscriptions may not include permission from all the right holders in a broadcast allowing premises to show/play a broadcast in public. Consequently, for some rights, premises need to seek separate permission from right holders, other than the broadcaster. This is currently the case in relation to music for which premises must hold licences from the 'PRS for Music' and Phonographic Performance Limited (PPL) collecting societies. It may also in future be true in relation to other rights, should right holders choose to license their rights in this way. For example, it is unclear how widely cinematographic rights in films are licensed at present or how many more cinematographic rights holders would choose to license their rights in the future, following any clarification of the law. However, any change in licensing practice in relation to cinematographic (or other) rights will not be a direct consequence of any amendment to Section 72 as cinematographic rights already fall outside its scope (and this will remain so). So we do not expect any direct impacts as a result of this option. Nevertheless, as a result of clarifying the law (regardless of whether Option 1, 2 or 3), some right holders have indicated that they may choose to license their rights differently (see example under Option 2 below)



## OFFICIAL

As the extent to which, and terms on which, right holders choose to license broadcasters to authorise public showing/playing of a broadcast is unknown, it has not been possible to estimate costs and benefits.

### Feedback on Option 1 following consultation

There was little support for this option in the consultation responses as right holders would still face legal uncertainty in bringing enforcement action against pubs and other commercial premises that show broadcasts without the required commercial subscription.

### **Option 2:**

**Part A: Clarify that the exception in s72(1)(c) applies only to film fixations and not to cinematographic (or creative) aspects of film;**  
**Part B: Narrow 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.**

Part A of Option 2 is as per Option 1 above: the law would be clarified to highlight that Section 72 applies only to rights in film fixations, and not to rights in cinematographic aspects of film. This would address the concerns raised by the Court of Appeal, by making it clear that UK law is consistent with EU law.

Part B of Option 2 would narrow the scope of the exception, so that it cannot be relied upon by commercial premises (e.g. pubs, shops, offices, etc) showing subscription broadcasts without a commercial subscription. Owners of film rights, such as organisers of televised sport, would be able to take legal action against commercial premises showing broadcasts containing films to the public without an appropriate commercial subscription.

### **Costs to pubs**

A number of court cases, including the particular case which highlighted the need to clarify Section 72(1), have involved pubs using satellite decoder cards authorised only for home use in order to show live Premier League football matches to the public. As discussed below, there is a considerable difference in price between the cost of an authorised commercial subscription, and the cost of a home subscription unauthorised for commercial use. Despite these court cases, some pubs (and likely other commercial premises) continue to do this, and seek to rely on Section 72 to avoid infringement in the showing of film fixations, and on other methods to attempt to avoid infringement in other aspects (e.g. by switching off the sound, placing cards over logos, or using masking technology which obscures logos). However, even pubs using masking technologies have been successfully prosecuted by right holders.

### **Enforcement Action**

Broadcasters and other rightsholders already take successful action against the use of unauthorised systems to show exclusive subscription content. For example, the Federation of Copyright Theft (FACT) regularly carries out successful convictions on behalf of its members against pubs that use unauthorised systems to show sports broadcasts. Rightsholders have been successful on a number of grounds, including:

- The subscriptions in question are for non-commercial use, rather than commercial use;
- The use of masking technology has not prevented the screening of creative works;
- Playing theme tunes;
- Showing logos and graphics;
- The offence of fraudulently receiving television programmes (Section 297 CDPA).

Although some pubs make use of masking technology in an attempt to remove logos and graphics from broadcasts (and thus rely on Section 72 on the basis that only "film" content is present), it appears that this has not been a successful defence to infringement. Moreover, despite the potential complexities under the current law, following a few test cases prosecutions for showing Premier League content

## OFFICIAL

without commercial licences appear to have become routine. This can be seen from regular news reports such as those published by the Publicans' Morning Advertiser, e.g:

- <http://www.morningadvertiser.co.uk/Running-your-pub/Sport/Illegal-Premier-League-football-12-pubs-prosecuted-and-supplier-hit-with-big-fine>;
- <http://www.morningadvertiser.co.uk/Running-your-pub/Sport/Named-and-shamed-Pubs-rack-up-100k-costs-for-illegal-football>

In view of the above, although Section 72 remains a possible defence in such cases, it seems that pubs are in practice unable to rely on it to escape infringement proceedings, as they will always be found liable on other grounds – such as infringement of graphics and logos.

Some examples of successful cases:

- <http://www.bbc.co.uk/news/uk-wales-south-west-wales-25968200>
- <http://www.sunderlandecho.com/what-s-on/cinema-tv/sunderland-pub-s-14-000-bill-for-screening-premier-league-football-illegally-1-7497725>
- <http://www.sunderlandecho.com/news/local/all-news/wearside-pubs-pay-the-penalty-for-screening-unauthorised-premier-league-matches-1-7561701>
- <http://www.mirror.co.uk/sport/football/news/three-manchester-pubs-fined-thousands-6805678>

As such, we expect that any pubs in future found to be infringing film rights as a result of their removal from Section 72, would anyway have been found to be infringing copyright had the present law stayed in place. However, the change to Section 72 may well be used as additional grounds of legal argument in future prosecutions.

In addition, as such cases have now become routine, the benefits to rightholders of removing film from Section 72, though still present, are likely to be less than if the section had been amended shortly following the ruling in *FAPL v Murphy*.

The amendment proposed under Option 2 would 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 subscription.

#### Impacts on pubs

- 1) **Pubs that show exclusive subscription live sport and currently purchase legal commercial subscriptions:** Pubs using commercial subscriptions are currently at a competitive disadvantage against those that use unauthorised systems.

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, at a significantly lower price. Pubs that currently use unauthorised systems instead of the required commercial subscriptions are likely to be already breaking the law, as despite masking technologies, it would seem inevitable that copyright works other than film fixations would be shown/played without right holder authorisation.

In May 2015, Ipsos Mori conducted an independent study of 300 Sky customers<sup>11</sup>. This survey showed that “82% of publicans believe unauthorised screening of live sport impacted other pubs with 53% stating that as a result of illegal screenings they lose customers to other pubs”.

Assuming pubs are deterred from using unauthorised systems under Option 2, pubs which already hold commercial subscriptions would benefit from being put on a level playing field with other pubs which had previously been using unauthorised systems. It has not been possible to estimate the impact of this benefit.

<sup>11</sup> Survey conducted by Ipsos MORI between 30<sup>th</sup> April and 15<sup>th</sup> May 2015 with a representative sample of 300 Sky customers. Received as part of Sky's submission to the consultation.

## OFFICIAL

- 2) **Pubs that show live sport using unauthorised systems:** Option 2 would mean that pubs using unauthorised systems to show subscription broadcasts would no longer be able to do so without the copyright owners permission, even if they took steps to block music and logos. It is therefore anticipated that these pubs would be deterred from using unauthorised systems due to an increased risk of legal action. These pubs could respond in one of three ways:
- a) They could continue to use unauthorised systems at the risk of legal action by right 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 however continue to rely on Section 72 to show free-to-air television without authorisation from the owners of copyright in film fixations (though licences may 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.

Estimating the Number of Pubs using Unauthorised Decoders

Evidence provided by the broadcasting industry in 2014 for the consultation-stage Impact Assessment suggested that there are up to 5,000 pubs, in the UK showing exclusive content through unauthorised decoders and misuse of subscriptions in place of a commercial subscription.

The Premier League undertakes a comprehensive programme of visits to commercial premises to monitor screenings of Premier League matches. 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 5,500<sup>12</sup>.

The difference between the above figures (5,000 vs 5,500) is a result of Broadcasters and the Premier League viewing 'infringing pubs differently: UK broadcasters are unable to take action against those premises using foreign feeds as it is not the UK signal/broadcast that is being infringed, whereas the Premier League consider any premise showing any unauthorised broadcasts of Premier League football to be infringing their rights.

No more recent figures were provided following consultation.

Financial Cost to Pubs

We have assumed that there will be no direct costs to pubs from this option,<sup>13</sup> as pubs continue to have the option of whether to show sports broadcasts only available via subscription or not. 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 unauthorised systems instead of the required commercial subscriptions are likely to be already breaking the law (to the extent that they communicate unauthorised authorial copyright content, such as cinematographic film, or any artistic or musical works which would seem an inevitability).

We sought additional data at consultation stage which would help to assess the costs and benefits of this option to pubs; however, little concrete data was forthcoming. We have not been able to estimate the benefits of providing a level playing field to those pubs who already take out legal, commercial subscription. While broadcasters provided estimates of the number of pubs using unauthorised systems, we are unable to monetise the costs to those establishments should the clarification of the law dissuade them from performing unauthorised, infringing activities.

---

<sup>12</sup> Premier League submission

<sup>13</sup> See Annex 1 for further detail on Direct and Indirect Impacts

## OFFICIAL

As right 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). By providing greater certainty in the law, this amendment would make it easier for copyright owners such as sport right holders to take action against the minority of pubs which show satellite television without a commercial licence.

The number of additional cases as a result of this option is difficult to predict. Right holders have litigation budgets, but they do not disclose all of the cases they bring per year. There are only two reported (on Westlaw and BAILLI) cases relating to infringement of copyright, by pubs showing graphics and logos, and relying on unauthorised foreign-feed decoder systems. There are various reports of pubs being prosecuted for showing football without the required UK licence (subscription to Sky and / or BT Sport). We expect a change of law under this option to be used as additional grounds of legal argument, and would expect it to be disputed in at least the first few cases, but given that it is an additional ground we do not think it would necessarily lead to additional cases on top of those which right holders would already bring.

### **Costs to other commercial premises showing subscription broadcast films**

It is likely that types of commercial premises other than pubs also take advantage of Section 72, and use unauthorised systems to show broadcast television. These premises could include: sports clubs, gyms and fitness centres, hotels, offices and retail spaces, 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.

Evidence provided by the hospitality industry suggests that any form of new licensing will be a considerable burden, both financial and administrative, especially as this is something which is only secondary to their main activity. However, cinematographic and other copyright owners are able to license their work under the existing law, so any decision by them to introduce new licences would not be a direct result of this policy. Moreover, as described above in relation to pubs, commercial premises will retain the option of whether or not to show subscription broadcasts. As a result we do not expect any direct costs to be incurred by commercial premises as a result of this policy.

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

Discussions with various stakeholders, and submissions to the consultation, provided little insight into the number of other commercial premises showing subscription broadcasts, in particular sport broadcasts, using unauthorised systems. 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. Unauthorised systems have been used in the office and retail sectors, though all recorded incidents have been resolved by informing the customer of the need for a commercial subscription. The impact on other premises is therefore expected to be small. As with costs to pubs (see above), we cannot monetise costs to those performing unauthorised activities.

For the above reasons it has not been possible to calculate the costs or benefits to other commercial premises.

### **Costs to non-commercial public premises**

Non-commercial public premises (such as public hospitals, prisons, village halls used by voluntary groups, charities, amateur sports clubs) could be affected by this option, but only to the extent that right holders in film fixations in subscription broadcasts choose to license their rights differently. Cinematographic works, and any other underlying rights, are already licensable under the existing law, but many rights holders choose not to do this. Music copyright owners and the Premier League (in relation to their logos and anthem) do, however, currently enforce their copyright, and require licences

## OFFICIAL

(e.g. through collective management organisation, such as PRS Music and PPL (see above), or through commercial subscriptions).

Consultation did not uncover any meaningful evidence which might allow an estimate of how licensing of film fixation rights in subscription broadcasts might be done differently, and it was therefore not possible to monetise the additional burden attributable to this.

### **Costs to consumers who view subscription broadcasts in commercial premises**

Should premises currently using Section 72 and unauthorised systems to show subscription broadcasts, be deterred from showing subscription television completely, consumers could face a narrower choice of premises in which they could view subscription sport, etc. It has not been possible to predict the size of this cost.

### **Costs to suppliers of unauthorised systems / benefits to suppliers of authorised systems**

If the change to Section 72 prohibits pubs and other commercial premises from using unauthorised systems, the demand for them would be reduced. Suppliers of unauthorised systems, including unauthorised satellite decoders, subscriptions, masking technology, etc, would see a reduction in income. Likewise, to the extent that current users of unauthorised subscriptions shift to authorised subscriptions (rather than choosing not to show subscription television at all), there will be a benefit to suppliers of authorised decoder cards. It has not been possible to predict the size of these costs and benefits.

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

The Premier League was the only sports event organiser to respond to the consultation. Costs and benefits to the Premier League in terms of ability to enforce, and the UK market in sports events television rights are discussed below, but the logic would seem applicable to other sports events organisers.

#### 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 using unauthorised systems. Action against such premises is currently reliant on enforcing cinematographic and other creative copyrights within the broadcast. Enforcement is hindered by pubs taking various measures, to prevent the communication to the public of these works. Such measures include switching off the sound, placing cards over logos, and using masking technology which covers logos. Conversely, a number of pubs have been successfully prosecuted by right holders, on a variety of grounds (see 'Enforcement Action' box, above), and we expect a change of law under this option to be used as additional grounds of legal argument, and not necessarily lead to new cases on top of those that right holders already bring.

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.<sup>14</sup>

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 systems continues to rise. There were approximately 2,000 premises using unauthorised systems to show subscription broadcasts during the 2009–2010 season, and approximately 5,500 by the end of the 2012–2013 season. The Premier League claims they have had to double the size of the monitoring programme.

<sup>14</sup> 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%.

## OFFICIAL

Narrowing the scope of the Section 72 exception so it no longer applies to subscription broadcasts is expected to improve the ability of rights holders to enforce against premises using unauthorised systems to show matches. The extent to which legal proceedings may increase is unknown, but media articles<sup>15</sup> showed that the Premier League intended to carry out 100 prosecutions across England and Wales during the last 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 systems. Given the uncertainty, the extent of legal proceedings has not been calculated in this Impact Assessment.

### Financial Impact - UK Market in sports events television rights

The Premier League grants UK broadcasters 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 an increase in the value of the television rights the Premier League puts out to tender at future broadcasting auctions. However, it is difficult to determine whether or not there will be an increase in the value of television rights, as it is not known how many pubs currently using unauthorised systems would take a commercial subscription as a result of the change in the law, or the extent to which any change in behaviour by pubs will impact on the wider broadcasting market.

### **Costs and benefits to subscription broadcasters**

The use of unauthorised systems has a negative impact on broadcasters who make significant investments in broadcast content. The amount paid by UK broadcasters to televise the next three Premier League seasons (2016 to 2019) was £5.136 billion, an increase of 70% from the current three year deal (£3 billion)<sup>16</sup>.

### 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 using unauthorised systems.

### Proceedings Against Infringers

Both broadcasters and the Premier League are currently unable to pursue legal action against premises which show only the film fixations in subscription broadcasts. Option 2 would effectively outlaw the showing of subscription broadcast television in commercial premises which are open to the public, unless the premises hold an appropriate commercial subscription, regardless of whether the showing is limited to film fixations.

As a result, sports events organisers, such as the Premier League, and broadcasters, would find it easier to take legal action against premises which show subscription television content using unauthorised systems. This may lead to an increase in demand for authorised commercial subscriptions.

### Estimating the Increase in Revenue to Broadcasters

We consider that there will be an increase in revenues to broadcasters, due to a take-up of subscriptions by pubs, and other commercial establishments, switching from unauthorised systems. However, we have

<sup>15</sup> <http://www.bbc.co.uk/news/uk-wales-25849670>

<sup>16</sup> <http://www.bbc.co.uk/sport/0/football/31357409>

## OFFICIAL

been unable to estimate the increase in revenue to broadcasters on a sector wide basis, as the only evidence provided was commercially sensitive.

### 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, using unauthorised systems.

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 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, as the law would be clearer. 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 should 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).**

As with Option 1, even a commercial subscription may not include permission from all the right holders in a broadcast allowing premises to show/play a broadcast in public. Consequently, for some rights premises will need to seek separate permission from rights holders, other than the broadcaster. Under Option 2, film fixations in subscription broadcasts would no longer be covered by an exception, and would be newly licensable.

#### Example

Video Performance Limited (VPL), which represents companies owning film copyright (both fixation and cinematographic aspects) in music videos, has indicated that it may begin to license the showing of broadcast music videos once the law is changed (VPL do not currently license the public showing of music videos contained in broadcasts). This could mean that for subscription music channels, premises would require a VPL licence. This would be alongside a PPL licence (to cover performers and record companies for the use of their recorded music), and a PRS licence (to cover songwriters, composers and music publishers for the use of their musical compositions and lyrics). 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. VPL state that the appropriate level of tariff for newly-licensable sites would need to be determined following “fair, reasonable and proportionate consultation with the relevant trade sectors, including appropriately representative trade bodies”.

## OFFICIAL

It has not been possible to quantify the number of premises that may be affected by this. The potential increase in licensing revenue is difficult to value.

### Example

Following the October 2015 consultation, VPL indicated that its members were likely to hold film fixation rights in music videos; however, VPL does not currently license these in broadcasts, and has not been able to provide estimates as to the size of the market. VPL has commented that seeking to research the position would be a considerable task in terms of time, cost and resource which, given the current lack of clarity in the law, it has not been proportionate for VPL to undertake this. VPL state that the appropriate level of tariff for newly-licensable sites would need to be determined following "fair, reasonable and proportionate consultation with the relevant trade sectors, including appropriately representative trade bodies".

### **Costs and Benefits to Her Majesty's Court and Tribunal Service (HMCTS) and The Scottish Courts and Tribunals Service (SCTS) who are affected by changes in the numbers of legal cases.**

If, as anticipated, the narrowing of the Section 72 exception so it no longer applies 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 Courts. On the other hand, if the legal situation is made clearer than at present, court proceedings could be less time-consuming, and over time fewer court actions would need to be pursued. 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, actual costs to HMCTS and SCTS have not been calculated in this Impact Assessment.

### Feedback on Option 2 following consultation

Although this was the preferred option in the October 2015 consultation, many respondents considered it to be overly complicated and would miss the Government's objective of clarifying the law in this area.

A number of respondents raised concerns that while a distinction between film fixations and cinematographic works in films might be drawn in theory, in practice it would be difficult to differentiate between them. Consequently, those seeking to rely on Section 72 as a defence against infringement of film fixations would find scant legal solace, as it would be almost inevitable that cinematographic works in film would be shown, despite attempts to block or mask them (as noted in the 'Problem Under Consideration' section above, the difference between a cinematographic work and a film fixation lies in its originality, which may require a Court to ultimately decide). As a result, this approach would not bring practical benefits to users, and would maintain a lack of clarity in the law, thus not delivering the intended benefits to right holders.

Therefore, following the October 2015 consultation, the Government has decided not to pursue 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.**

Unlike Options 1 and 2, Option 3 would see the exception to showing film (including both film fixation and cinematographic aspects) removed from Section 72, entirely, irrespective of whether the film is contained in a subscription, or free-to-air broadcast.

In the October 2015 consultation, the Government recognised that this option would be simpler to implement as it requires fewer changes to be made to the CDPA, but also considered it could impact to a greater extent on a broader range of bodies showing television broadcasts in public, when compared to Options 1 and 2. However, following the October 2015 consultation, it was found that the majority of respondents support Option 3. Several respondents observed that it was in practice impossible to distinguish between the different types of film copyright (fixation vs cinematographic) in a broadcast, and consequently those seeking to rely on Section 72, by only showing film fixations, would inevitably end up



## OFFICIAL

showing cinematographic aspects, and would therefore be infringing. Consequently, users were unlikely to receive the intended benefits of Option 2, while the complexity of Option 2 meant that it would perpetuate a lack of clarity in the law.

### **Costs and benefits to pubs and other commercial premises which show broadcast films**

The impact on pubs and other commercial premises showing broadcast films would be as set out in Option 2 in relation to subscription broadcast television, but would be greater as free-to-air television is also included within its scope.

- Pubs and other premises showing subscription broadcasts using an authorised subscription, could benefit from competing on a level playing field, if those using unauthorised systems are dissuaded from doing so.
- Pubs and other premises showing subscription broadcasts using unauthorised systems, would no longer be able to rely on a combination of Section 72, and measures to block the showing of cinematographic aspects of film, and would be infringing. However, as discussed under Option 2, above, such an approach has not always proved successful, and prosecutions have been successfully brought even where masking technology is used. Consequently, we do not expect a substantial increase in new cases being brought, but, rather, the absence of any defence under Section 72 for the showing of films, to be used as an additional grounds of prosecution.
- Pubs and other premises showing free-to-air broadcasts may need to ascertain that they are permitted to show the film fixation elements of the broadcast; however, they are already required to seek permission to show cinematographic works, and any underlying works (e.g. music).
- Right holders, such as VPL, would be able to choose to license works more widely than in Option 2, as free to air would be included.

However, following consultation, the costs to pubs and other commercial premises appears less than initially thought. In terms of cinematographic works and underlying rights, much of these works can already be licensed under the existing law but many right holders choose not to do this. The additional burden attributable to this change would only be in relation to any additional licensing of film fixations.. There is a lack of data on the extent to which right holders would choose to license the showing of film fixations, and the overall impact on pubs is unknown, and it is not possible to monetise the additional burden attributable to this.

### **Costs to non-commercial public premises**

As for Option 2, non-commercial public premises (such as public hospitals, prisons, village halls used by voluntary groups, charities, amateur sports clubs) could be affected by this option, but only to the extent that right holders in film fixations in broadcasts choose to license their rights differently. Cinematographic works, and any other underlying rights, are already licensable under the existing law, but many rights holders choose not to do this. Music copyright owners and the Premier League (in relation to their logos and anthem) do, however, currently enforce their copyright, and require licences (e.g. through collective management organisation, such as PRS Music and PPL (see above), or through commercial subscriptions).

Consultation did not uncover any meaningful evidence which might allow an estimate of how licensing of film fixation rights in broadcasts might be done differently, and it was therefore not possible to monetise the additional burden attributable to this.

### **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 2. Additional impacts could occur as Option 3 removes film completely from the Section 72 exception for both subscription and free-to-air broadcasts. However, following consultation, costs may be less than previously thought. Many rights in this area can already be licensed by right holders, but are not, and that situation is unlikely to change significantly as a result of this intervention. The additional burden attributable to this change would only be in relation to any additional licensing of film fixations, and, as above, there is a lack of data on this point, and it has not been possible to monetise any additional burden attributable. In addition, Option 3 has the advantage of providing the greatest level of clarity to the law which benefits both users and right holders.

## OFFICIAL

### **Costs to suppliers of unauthorised systems / benefits to suppliers of authorised systems**

The nature of the costs to these firms would be similar to those described under Option 2, but they would be more significant due to the greater number of organisations (i.e. including non-commercial premises) affected by the change (leading to a smaller market for unlicensed decoder cards). This Option strengthens any enforcement action.

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

The nature of the impacts would be as for Option 2, 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 premises showing broadcast television in public as well as commercial ones.

### **Costs and benefits to broadcasters**

As for Option 2 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. As above, there is a lack of data on the extent to which broadcasters of free-to-air television would choose to license their rights in film fixations, 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 2, 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 'underlying' 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) and the Scottish Courts and Tribunals Service (SCTS) who are affected by changes in the numbers of legal cases.**

As for Option 2 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 unlawful, as well as showing of free-to-air broadcasts in commercial premises unlawful without relevant authorisation. However, as above, right holders already successfully bring prosecutions against pubs using unauthorised systems to show subscription television. Clarifying the legal situation under this option would not necessarily result in additional cases beyond those already brought, but it could offer an additional ground of prosecution. It is possible that clarification of the law under this option would result in court proceedings being less time-consuming, and over time fewer court actions would need to be pursued.

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.

### **Feedback on Option 3 following consultation**

The majority of respondents supported removal of film from the exception in its entirety. This was regarded as the most straightforward option available to the Government, and is considered to meet the Government's key objective of ensuring clarity in the law. It also creates a level playing field for those premises who take out a legitimate commercial subscription to show subscription broadcasts to the public.

## OFFICIAL

### Risks and Assumptions

- This impact assessment assumes that, following the judgment of the Court of Appeal, Section 72(1) requires clarification by way of amendment to the Copyright, Designs and Patents Act 1988, and the "do nothing" option is unavailable.
- 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.
- We assume that the current enforcement regime and licensing market for rights which are already exploitable will broadly speaking continue as is. We assume that licensing practices continue and the rights markets do not suddenly increase in their scope, we therefore assume that the status quo will continue as is. There was no evidence provided at consultation stage which can help us to predict what might happen in the future in this market.
- Overall, it has been very difficult to estimate the size of the various groups who will be affected by this change, as it is not clear at the moment who in the market is relying on section 72 as a defence unless they have been the subject of an infringement procedure. Even doing research seeking to estimate the levels of potentially infringing premises would be difficult to complete, as even during anonymised research the incentives for premises owners would make them unlikely to give a full picture, given the penalties for some types of infringement. It has also been difficult to estimate the number of commercial entities and non-commercial entities who are showing film (including both film fixation and cinematographic aspects) and how much they benefit from being able to do so.

### 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. The IPO has not been able to monetise costs and benefits for the options, for the reasons outlined above. Additionally, it is at the discretion of businesses as to whether they choose to take out a commercial subscription to show broadcast television, and thus any costs which might exist are not being imposed. At this stage, the preferred option (Option 3) is considered not in scope of "One In, Two Out" because it is a reimplementations of EU law, and does not go beyond the minimum requirements necessary to comply with EU law.

## OFFICIAL

**ANNEX 1:** Summary of direct and indirect impacts**Option 1**

<b>Stakeholder</b>	<b>Impact</b>
Commercial premises which show broadcast films in public	Required to gain authorisation from the rights holder to show cinematographic film content.
Non-commercial organisations which show subscription broadcast films in public	Required to gain authorisation from the rights holder to show cinematographic film content.
Suppliers of unauthorised systems	Demand may fall for unauthorised systems
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 cinematographic works.

**Option 2**

<b>Stakeholder</b>	
Commercial premises which show subscription broadcast television in public	Commercial premises that choose to show subscription broadcast television in public will require the authorisation of the author and producer.
Non-commercial premises which show subscription broadcast television in public	There is a possibility that authors may start to license their rights in cinematographic film content.
Consumers who view subscription broadcast television in commercial premises	If commercial premises decide no longer to show subscription broadcast television there could be less choice for consumers.
Suppliers of unauthorised systems	Demand may fall for unauthorised systems.
Sports event organisers, such as the Football Association Premier League	The change should allow the Premier League to prevent the use of unauthorised systems more effectively.
UK Broadcasters	With the threat of legal proceedings for premises using unauthorised systems, 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.

## OFFICIAL

HMCTS and SCTS	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 and SCTS. More effective enforcement may also act as a deterrent and reduce litigation in the longer term.
----------------	---

**Option 3 – the preferred option following initial consultation**

Commercial premises which show subscription or free-to-air broadcast films in public	As for Option 2 but additional costs in relation to free-to-air broadcast films.
Non-commercial premises 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 systems	As for Option 2.
Sports event organisers, particularly the Football Association Premier League	As for Option 2 but there may also be benefits from the newly enforceable right in film fixations.
UK Broadcasters	As for Option 2 and there will also be benefits from the newly enforceable right in film fixations
Other right holders in subscription and free-to-air broadcast films	As for Option 2 but there may also be benefits from the newly enforceable right in film fixations.
HMCTS and SCTS	As for Option 2 but with additional cases possible as a result of creating the new enforceable right in film fixations.

# Annex C

## Summary of Responses to the 2015 consultation

The 2015 consultation received 19 responses from representative bodies, the legal profession and right holders.

Although many respondents agreed with the need for change in this area, concerns were raised in relation to the proposals and possible impact these could have on the wider licensing framework.

This annex provides a summary of what respondents to the consultation have said to the proposals.

The Government would like to thank all those who took the time to contribute to this consultation.

### 1. Proposals

The proposals in the 2015 Consultation were divided into Part A and Part B.

**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**  
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.

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.

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.

### Responses

Overall, the majority of respondents indicated that clarification on the scope of the Section 72 exception is needed. It was felt that this would ensure that both right holders and users of copyright works are clear about what is and what is not covered by the exception.

**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?

## Views in support of the proposal

### Licensing framework

Respondents representing the film sector thought that the approach proposed in Part A would help to promote effective licensing for this type of use, resulting in additional income streams. This would benefit the UK audiovisual economy. Allowing authors and right holders to clearly license their rights would generate essential income to reinvest in new content. It was felt that broadcasters did not always fully fund the cost of production which leaves producers to finance the shortfall. Income generated from the licensing of cinematographic rights for non-commercial use could help close this gap in funding.

One respondent believed that Part A of the proposal would have minimal effect on their organisation as they were not currently seeing any issues with mis-use of creative film works in public premises. Part A of the proposal would, however, make it absolutely clear that such works require authorisation from the author before they can be communicated to the public.

Video Performance Limited (VPL)<sup>10</sup> said that music videos have both film fixation and cinematographic rights, and if the two categories of rights were distinguished, their members would likely hold both rights (by virtue of what has been agreed contractually as part of the music video commissioning process). This would enable VPL to license the use of videos irrespective of the distinction being made.

### Concerns raised

Whilst a number of respondents supported the need for clarification in this area of legislation, a number of concerns were raised.

Many respondents viewed the Government's preferred option as overly complicated and that it would cause greater confusion and difficulties in the licensing context.

The key concern was that this approach would lead to greater legal uncertainty in relation to the licensing of works. A number of respondents commented that having to

---

<sup>10</sup> Video Performance Limited (VPL) collects royalties on behalf of record companies (producers) and music performers.

distinguish between which parts of a broadcast only contain film fixations and which parts contain cinematographic elements would be impossible and therefore this approach would not benefit users who rely on Section 72. Many of these respondents felt that it would be preferable to remove film from the exception altogether.

From a right holder perspective, it was felt that this would cause difficulty in setting out tariffs for use of works, and raise further legal uncertainty as to the scope of what could be effectively licensed. A couple of respondents thought that exempting some audiovisual works would restrict the proper licensing and monetisation of uses. Some respondents noted that films are generally subject to rights clearances and transactions upstream of their inclusion in a broadcast schedule, and these are based on agreements governing the permission of and assignment of rights between creative right holders, including performers.

Some respondents felt that simply distinguishing between 'film fixations' and 'cinematographic works' would not take into account the way underlying rights in creative content are closely integrated within the film production process. Many respondents felt that all licensed broadcast television services will include films that are cinematographic works.

### Performers' Rights

A further concern was raised in relation to the impact this proposal may have on performers' rights. Some respondents suggested that there would need to be parallel changes made to paragraph 18(1) in Schedule 2 to the CDPA, to ensure that performers' rights were taken into account. If the changes were only made to Section 72, these respondents felt that this approach would reduce the negotiating power of performers when agreeing terms and conditions with producers without justification.

### Owner provisions

One respondent referred to the first owner provisions in relation to fixation rights and cinematographic rights for the purposes of Section 72. The respondent felt that the proposal did not make it clear how this would work in practice, especially when compared to how ownership of film copyright is dealt with elsewhere in the CDPA.

### Impact on organisations that show broadcasts

Respondents representing organisations that show broadcasts in public agreed that clarity in the law is required. It was felt that the judgment in the FAPL case had complicated matters and it was not clear what organisations were / were not permitted to do.

However, concerns were raised in relation to potential unintended consequences for pubs and other commercial hospitality businesses. It was noted that the proposal could lead to greater uncertainty and increased costs to the industry as it would, in practice, be impossible to tell which parts of a broadcast contain fixations only and which parts have creative or cinematographic elements.

It was also felt that clarifying the law in this area could result in a situation where copyright holders seek remuneration from commercial premises for the use of material in third-party broadcasts. It would therefore be important for broadcasters and other providers to gain the appropriate permissions for broadcasts.



Overall, this approach would create a negative impact if copyright holders were able to claim additional licensing fees over those that are already charged.

**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**

This part of the consultation asked for views from right holders and licensors, and copyright users.

The proposal to narrow the scope of Section 72(1) means that right holders in commercial subscription or pay to 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.

## Responses

The majority of responses indicated that clarifying that Section 72(1) does not apply to subscription broadcasts being shown in commercial premises would be beneficial.

### 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?

### **Rights Holders and Licensors (including Collecting Societies)**

Right holders thought Part B of the proposal was a positive step. As raised in the consultation document, sports right holders can only currently rely on their copyright in graphics and music to prevent pubs and other premises from showing sports programmes without an appropriate commercial subscription. Although FAPL has to date successfully claimed copyright infringement in a number of court cases against pubs, it remains difficult for right holders to take legal action on this basis. The use of masking technology to hide graphics and replays (original creative works) is increasing, and copyright in a musical performance may not be infringed if the sound is muted.

Sports right holders and broadcasters thought that narrowing the exception so that it does not apply when subscription broadcasts are shown in commercial premises would improve enforcement action. Cases would be more straightforward and cost effective. It would also enable right holders to invest in other areas of enforcement such as internet piracy which is an increasing issue.

Responses from the film sector also indicated support for this approach. Free-to-air television and pay television are considered separate uses and are subject to different contractual arrangements and pricing. Narrowing the scope of the exception would help to ensure legal clarity and lead to revenues for public performance in a commercial premise to be claimed.

Collecting Societies in the audiovisual sector did not think that this proposal would be fully compliant with EU law. They thought that the exclusive rights of audiovisual producers should be recognised whether they are exercised through a public performance of a subscription broadcast or through free-to-air means.

### **Copyright Users**

In general, copyright users in this area supported this part of the proposal. They thought that it would benefit those licensed premises that pay full commercial rates for subscription broadcasts by creating a level playing field.

Copyright users felt that in relation to free-to-air broadcasts, users may choose to show only subscription channels rather than risk infringement (assuming they understood the distinction between film fixations and cinematographic elements).

## **2. Requirements of the EU Directives and court judgments**

Part A, question 3 of the consultation specifically asked whether the Government's proposal reflects the requirements of the EU Directives and EU and UK court judgments.

The majority of respondents took the view that the Government's proposal would meet the requirements of the EU Directives and appropriately reflect the outcome of the court judgments. Part A of the proposal was viewed as being the absolute minimum that is necessary to ensure that Section 72 is compliant with EU requirements.

However, some respondents thought that this would make it more difficult to determine the boundaries between the fixation and creative components of film.

A number of respondents thought that this approach may not be fully compliant with the CJEU decision in the FAPL judgment as Part A and Part B would not allow right holders to exercise their communication to the public right, and their right to derive compensation for the use of their works in broadcasts communicated to the public.

Some respondents felt that excluding a significant number of audiovisual works from being under licence would not conform to Directive 2001/29/EC.

Representatives of the music industry felt that covering music videos in an amended exception would continue to be in contravention of the EU Directives and wider international copyright framework. Furthermore, they thought that the proposal would not meet the requirements of the “3-step test” as they would allow for blanket exceptions rather than use in ‘certain special cases’. It was also viewed as impeding effective exploitation of publicly performed audiovisual works, affecting the legitimate interest of right holders to the benefit of other businesses’ commercial interests.

There was also a view that the Government’s proposals did not reflect the full underlying legal issues in this area. In particular, that the UK has not correctly implemented the Rental and Lending<sup>11</sup>, Term<sup>12</sup>, and InfoSoc<sup>13</sup> Directives. It was felt that these particular Directives make reference to film as a first fixation and that copyright in this sense only protects the signal. The content (or cinematographic elements) is protected as a dramatic work. Wider amendments should therefore be made to the CDPA to clearly differentiate between the rights granted to producers in respect of first fixations and the rights granted to authors in respect of cinematographic works.

### 3. Other possible options for consideration

Part C of the consultation provided a brief overview of other options that the Government has considered.

#### 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 Government should consider. This could include any wider amendments that you feel may be necessary.

#### Remove the reference to film completely from the Section 72 exception

The Government recognised that this option would be simpler to implement as fewer changes to the CDPA would be needed.

The majority of respondents supported removal of film from the exception in its entirety. This was regarded as the most straightforward option available to the Government, and ensures compliance with the relevant EU Copyright Directives. One

11 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental and lending right and on certain rights related to copyright in the field of intellectual property.

12 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.

13 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.

respondent viewed the removal of film as being consistent with the historic approach in the UK of not distinguishing between the two aspects of film copyright and would provide the greatest level of clarity in the law.

Some respondents also thought that this option would lead to more effective enforcement action against commercial premises.

One respondent did not agree with the Government's view that removing film would have a greater impact on those premises that show television broadcasts in public.

Copyright users raised a concern that removing film completely could lead to additional costs to small businesses. It could mean that rolling news channels and music video channels could require additional licences that would impact on marginal businesses that only offer free-to-air.

**Clarify that Section 72 only applies to the film fixation right (as set out in Part A)**

The Government thought that this option would help to provide clarity in the law; however, because of the issues raised by the court judgments, this would not achieve the required balance between right holders and users.

Although, as noted above, one respondent favoured wider changes to the CDPA to distinguish clearly between cinematographic content in films (as dramatic works) and fixations of films, there was no clear support for the option of clarifying that Section 72 only applies to film fixations. Sports right holders and broadcasters felt that this did not address the difficulty of taking legal action based on use of logos and music only, and it was necessary to also narrow the scope of the exception.

## 4. Comments on Part A and Part B

Copyright users supported the Government's overall approach but indicated that the Government must be confident that this doesn't lead to further complexities around the use of third-party copyright material used by broadcasters in free-to-air transmission.

Free-to-air broadcasts were viewed as being extremely important to the hospitality sector and small businesses. Respondents in these sectors agreed that the exception should remain for free-to-air broadcasts.

They also thought that the Government should take a light touch to legislation in this particular area, especially in relation to small businesses. The hospitality sector highlighted the fact that a number of pubs are going out of business as a result of copyright infringements which has a direct impact on local communities and employees.

Respondents from this area also suggested an alternative approach to legislation. They indicated that the Government (and right holders) could work with businesses to provide best practice guidance on how to legitimately use copyright material.

Furthermore, they suggested that the Government should consider providing a framework within which any copyright elements included in free-to-air broadcasts could be licensed without the burden of multiple licences.

A couple of respondents pointed towards the public service broadcasting licensing regime as a possible vehicle to protect premises that use free-to-air broadcasts.

### List of Respondents to the consultation

Association de Gestion Internationale Collective des Oeuvres Audiovisuelles (AGICOA)  
(Association of International Collective Management of Audiovisual Works)

Alliance for Intellectual Property

Association of Licensed Multiple Retailers (ALMR)

British Beer and Pub Association (BPPA)

British Copyright Council (BCC)

British Equity Collecting Society (BECS)

British Film Institute (BFI)

British Hospitality Association (BHA)

British Phonographic Industry (BPI)

BT

Educational Recording Agency Limited (ERA)

Federation of Commercial Audiovisual Libraries (FOCAL)

Football Association Premier League (FAPL)

Independent Film and Television Alliance (IFTA)

Musicians' Union (MU)

PACT

Sky

Video Performance Limited (VPL)

A legal professional also responded

# Annex D

## Consultation stage Impact Assessment

## OFFICIAL

<b>Title:</b> Section 72 of the Copyright, Designs and Patents Act (CDPA) – exception for the public showing or playing of a film contained in a broadcast		<b>Impact Assessment (IA)</b> <b>Date:</b> 15/01/2015 <b>Stage:</b> Consultation <b>Source of intervention:</b> EU <b>Type of measure:</b> Secondary <b>Contact for enquiries:</b>  <a href="mailto:Section72CDPA@ipo.gov.uk">Section72CDPA@ipo.gov.uk</a>				
<b>IA No:</b> BISIPO004						
<b>Lead department or agency:</b> Intellectual Property Office						
<b>Other departments or agencies:</b>						
<b>Summary: Intervention and Options</b>						
		<b>RPC Opinion:</b> <b>FIT FOR PURPOSE</b>				
<b>Cost of Preferred (or more likely) Option</b>						
<b>Total Net Present Value</b> £0m	<b>Business Net Present Value</b> £0m	<b>Net cost to business per year</b> (EANCB on 2009 prices) £0m	<b>In scope of One-In, Two-Out?</b> No	<b>Measure qualifies as Zero net cost</b>		
<b>What is the problem under consideration? Why is government intervention necessary?</b> 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.						
<b>What are the policy objectives and the intended effects?</b> 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.						
<b>What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)</b> <b>Option 0:</b> 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. <b>Option 1:</b> 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. <b>Option 2:</b> Clarify that the exception in s72(1)(c) applies only to film fixations and not to the authorial film right. <b>Option 3:</b> 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.  <b>Option 1</b> 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.						
<b>Will the policy be reviewed?</b> It will be reviewed. <b>If applicable, set review date:</b> 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.		<b>Micro</b> Yes	<b>&lt; 20</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: .....

## OFFICIAL

**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	
<b>COSTS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Cost (Present Value)</b>	
Low	0		0		0	
High	0		0		0	
Best Estimate	0		0		0	
<b>Description and scale of key monetised costs by 'main affected groups'</b>						
At present, the IPO has not been able to monetise costs and benefits for the option but hopes to do so following consultation.						
<b>Other key non-monetised costs by 'main affected groups'</b>						
<ul style="list-style-type: none"> <li>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.</li> <li>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.</li> </ul>						
<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Benefit (Present Value)</b>	
Low	0		0		0	
High	0		0		0	
Best Estimate	0		0		0	
<b>Description and scale of key monetised benefits by 'main affected groups'</b>						
At present, the IPO has not been able to monetise costs and benefits for the options but hopes to do so following consultation.						
<b>Other key non-monetised benefits by 'main affected groups'</b>						
<ul style="list-style-type: none"> <li>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 do so if they have acquired a commercial licence.</li> <li>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.</li> </ul>						
Key assumptions/sensitivities/risks					<b>Discount rate (%)</b>	3.5
<ul style="list-style-type: none"> <li>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.</li> <li>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.</li> </ul>						

**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

## OFFICIAL

**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

<b>COSTS (£m)</b>	<b>Total Transition (Constant Price)</b>	<b>Years</b>	<b>Average Annual (excl. Transition) (Constant Price)</b>	<b>Total Cost (Present Value)</b>
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.

<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price)</b>	<b>Years</b>	<b>Average Annual (excl. Transition) (Constant Price)</b>	<b>Total Benefit (Present Value)</b>
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**

- 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.

**Discount rate (%)** 3.5**BUSINESS ASSESSMENT (Option 2)**

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



## OFFICIAL

**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

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

**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).

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

**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
<b>Costs:</b> 0	<b>Benefits:</b> 0	<b>Net:</b> 0	yes	Zero net cost IN

## OFFICIAL

## 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 and the public sector in being able to use copyright works on reasonable terms.

## OFFICIAL

### 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 consultation proposes three options:

**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.

## OFFICIAL

**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.<sup>1</sup> The British Beer and Pub Association estimates that there were 50,395 pubs in the UK in 2011.<sup>2</sup> 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 broadcast – 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.

<sup>1</sup> 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.

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

## OFFICIAL

### 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 5,500<sup>3</sup>.

*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,<sup>4</sup> 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

<sup>3</sup> Premier League submission

<sup>4</sup> See Annex 1 for further detail on Direct and Indirect Impacts

## OFFICIAL

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 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

## OFFICIAL

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.<sup>5</sup>

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 articles<sup>6</sup> 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.

<sup>5</sup> 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%.

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

## OFFICIAL

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.



## OFFICIAL

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 x £4,410 = £18,081,000

Increase in revenue for UK broadcasters:

- £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 x £354 = £504,450

Revenue from commercial broadcaster subscriptions taken up by premises:

- 2,850 x £4,410 = £12,568,500

Increase in revenue for UK broadcasters:

- £12,568,500 - £504,450 = £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.

## OFFICIAL

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 annum<sup>7</sup>, 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 venue<sup>8</sup>:

<sup>7</sup> VPL - Background Fees 01-Jan-14 to 31-Dec-14

<sup>8</sup> 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.

## OFFICIAL

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 licences<sup>9</sup> 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.

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

## OFFICIAL

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.

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, 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.

## OFFICIAL

### **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/PPL<sup>10</sup>. Each premises pays £432.73 (plus VAT) with a discount for UK Active members<sup>11</sup>.

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 the England<sup>12</sup>. 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

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

<sup>11</sup> £333.32 (plus VAT)

<sup>12</sup> Sport England (2013) Active Places Report: Health & Fitness Facilities in England

## OFFICIAL

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).

### **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.

## OFFICIAL

**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**

<b>Stakeholder</b>	
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.

## OFFICIAL

**Option 2**

<b>Stakeholder</b>	<b>Impact</b>
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.









Intellectual Property Office  
Concept House  
Cardiff Road  
Newport  
NP10 8QQ

Tel: 0300 300 2000

**[www.gov.uk/ipo](http://www.gov.uk/ipo)**

For copies in alternative formats please  
contact our Information Centre.

**When you no longer need this booklet,  
please recycle it.**

You may re-use this information (excluding logos) free of charge in any  
format or medium, under the terms of the Open Government Licence. Visit  
[www.nationalarchives.gov.uk/doc/open-government-licence](http://www.nationalarchives.gov.uk/doc/open-government-licence), write to the  
Information Policy Team, The National Archives, Kew, London TW9 4DU, or  
e-mail [psi@nationalarchives.gsi.gov.uk](mailto:psi@nationalarchives.gsi.gov.uk).

If you have any enquiries regarding this document, please e-mail  
[Section72CDPA@ipo.gov.uk](mailto:Section72CDPA@ipo.gov.uk) or write to:

Section 72 CDPA Review 2016  
Copyright and Enforcement Directorate  
Intellectual Property Office  
Room 1Y05  
Concept House  
Cardiff Road  
Newport  
NP10 8QQ

© Crown copyright, 2016

DPS-003501



INVESTORS  
IN PEOPLE

