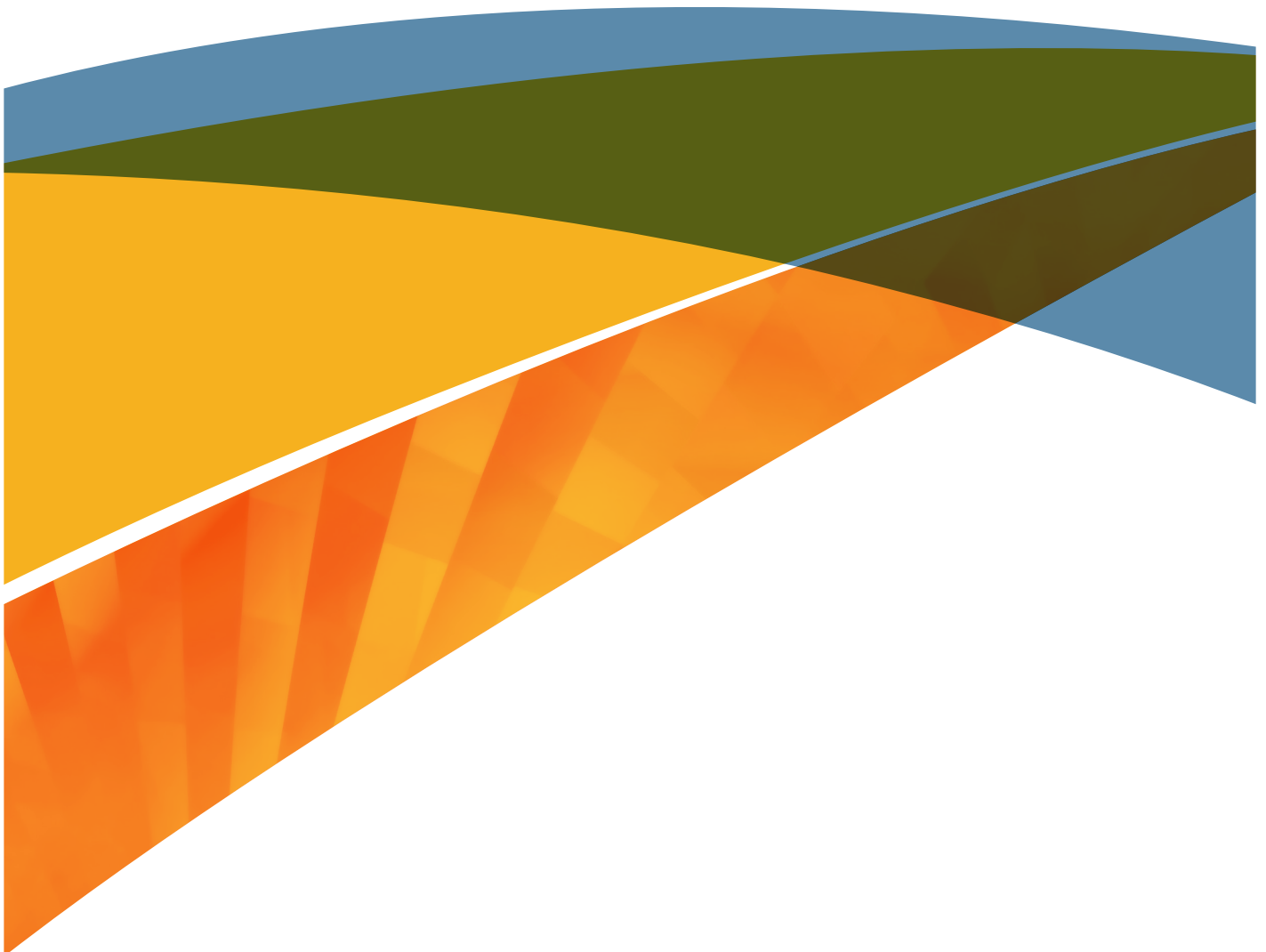




Intellectual
Property
Office

Government Response to a technical consultation on transitional arrangements following the repeal of Section 73 of the Copyright, Designs and Patents Act 1988 (reception and re-transmission of wireless broadcast by cable)





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Executive Summary

This is the Government's Response to the [technical consultation on transitional arrangements](#) following the repeal of Section 73 of the Copyright, Designs and Patents Act 1988 (CDPA).

The technical consultation followed the [Balance of Payments consultation](#) conducted by the Department for Culture, Media and Sport (DCMS) in 2015, after which the decision was made to repeal Section 73 of the CDPA. The technical consultation considered the practical impacts of repealing Section 73:

- The likely extent of the rights market following the repeal;
- The impact on performers' rights (Schedule 2 (19));
- The need for, and length of, any transition period or a rights clearance mechanism

A total of 17 responses were received (see [Annex A](#) for a list of respondents).

In summary, the responses the Government received in relation to the rights market and the licensing of underlying rights did not provide a clear consensus. In their responses, rights holders stated that the repeal of Section 73 would create new rights and therefore new values to negotiate when their works are included in cable retransmissions. Broadcasters, however, stated that they already buy the rights comprehensively for all broadcasting platforms including cable, so there would be no change to negotiations once Section 73 was repealed. Furthermore, the majority of responses highlighted that negotiations already take place on these matters, and that there was no need for a rights clearance mechanism or transition period to facilitate this process once Section 73 is repealed.

The majority of responses supported either no transition period or a very short (up to 6 months) transition period, and there was a lack of support for introducing a rights clearance mechanism. In relation to Performers' Rights set out in Schedule 2 (19) CDPA 1988, there did not appear to be any issue with removing this in order to ensure consistency in the legislation.

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

Next Steps

The information gathered as part of this technical consultation will be used to update the Impact Assessment completed by DCMS as part of the Digital Economy Bill.

Background

Section 73 and the Balance of Payments Consultation

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

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

As part of the [Balance of Payments consultation](#) carried out by DCMS in 2015, the Government concluded that the overall regulatory regime is functioning well and that the commercial PSBs are adequately compensated for their core PSB channels via the existing PSB 'compact' (Electronic Programme Guide (EPG) prominence and spectrum in return for PSB obligations), an agreement which is underpinned by their PSB licences.

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

IPO technical consultation

The purpose of the [IPO technical consultation](#) was to help inform DCMS' implementation of the recommendation of the Balance of Payments consultation to repeal Section 73. The technical consultation considered three main areas:

- a. whether the licensing of underlying rights could change following the repeal of Section 73;
- b. whether the repeal of Section 73 could impact on Performers' Rights set out in Schedule 2 (19) of the CDPA; and
- c. whether transitional arrangements were required including whether a rights clearance mechanism should be introduced.

Government Response by Theme

Rights Market

As set out in the [technical consultation document](#), the Government recognised that the repeal of Section 73 means that right holders will be entitled to monetise the value of underlying rights in cable retransmissions, something the Section 73 exception had previously prevented from happening.

An assumption was made that the Section 73 repeal could have an impact on the way negotiations take place in the market as it could lead to a risk of disputes between PSBs, cable providers and right holders as to the monetary value of the underlying rights.

This section was split into two questions:

Question 1: this question was aimed at right holders and licensors (including Collective Management Organisations) and considered whether there would be a change to the way copyright works were licensed once Section 73 was repealed.

Summary of responses

The majority of respondents stated that the repeal of Section 73 would create new rights and therefore new values for the use of their works. The view was that changes to commercial negotiations were likely to occur in order to appropriately recognise the cable retransmission rights.

A number of respondents explained that recognition by broadcasters and cable service providers of certain clearances of cable retransmissions within the UK might fall within the remit of collective management organisations. It was suggested that this could be a driver for change in the way clearances were secured in future.

Some right holders also considered that the repeal of Section 73 could create a risk of dispute between the cable service provider and/or PSBs with underlying right holders. Some respondents suggested that underlying right holders might choose to license the rights to broadcasters or directly to cable service providers. A point was also raised that underlying right holders might seek an additional fee for the use of their works from a producer and this, in turn, would lead the producer to seek payment from the PSBs.

Question 2: this question asked PSBs and cable platform operators whether the repeal of Section 73 would lead to a change in the way copyright licences were acquired.

Summary of responses

All the respondents to this question considered that the repeal of Section 73 would not lead to a change to the way they acquired licences. They said that the main reason for this was that they already bought the rights to use copyright works comprehensively for all broadcasting platforms including cable, and that there would be no need to change how rights were negotiated as a result of the repeal. Respondents explained that specific fees were not attributed to specific platforms and never, within a specific platform, would there be any differentiation between those rights that may be covered by the Section 73 exception and those that are not.

Respondents felt that the repeal would not lead to any significant contractual difficulties. The underlying right holder was already remunerated and the view was that no additional licence fees would be justified as a result of the Section 73 repeal.

Response: There is a clear disparity between the views of right holders and licensors, and the views of PSBs and cable providers. The Government believes that this indicates negotiations will need to take place between these parties to understand the potential value of underlying rights. This is not to predetermine the outcome of such negotiations, or any fluctuations in the value of the rights following the abolition of Section 73. The Government merely recognises the difference in view is indicative of the need for discussion and negotiation between those affected.

Performers' Rights – Schedule 2 (19) CDPA 1988

A number of respondents to the [Balance of Payments consultation](#) queried whether the Government would also propose changes to Schedule 2 (19) in line with the repeal of Section 73. Schedule 2 (19) sets out performers' rights in any cable retransmission and mirrors the wording of Section 73. The concern was in relation to creating inconsistency in the statutory regime for cable retransmissions as Section 73 only refers to copyright in broadcasts and any underlying work, and does not cover performers' rights in any performance.

Summary of responses

Eleven respondents provided a view on this section and stated that there would be no issue with removing Schedule 2 (19) as this would eradicate any inconsistency in the overall statutory framework.

The majority of respondents felt that the relevant performance rights in agreements with performers will have already been cleared on an individual basis or through collective licensing agreements.

Some respondents felt that authorisation of a communication to the public under the cable retransmission right should take into account performers' rights (as related rights) and this needed to be treated separately to an individual broadcast for which limited specific consents have been obtained. As with the above conclusion on underlying rights, the value of any related rights in performance should be determined through the course of normal commercial negotiations.

Response: As no issues were raised, Schedule 2 (19) will also be repealed alongside the Section 73 repeal.

Transitional Arrangements

Some respondents to the [Balance of Payments consultation](#) raised a concern that the removal of the Section 73 exception would lead to a risk of dispute between cable service providers and underlying rights holders when trying to agree terms. The main reason for this was the uncertainty about the potential financial impact of the change. It was suggested that a transition period may be of value in allowing businesses to adapt to any changes in the rights market.

As well as considering removing Section 73 with no transition period, the technical consultation also set out three possible transition periods:

1. Six months
2. 12 months
3. 24 months

Summary of responses

The majority of responses supported either no transition period or a very short transition period (up to six months). These respondents felt that a longer transition period would not be necessary given their view that the overall licensing structure would not change as a result of Section 73 being repealed and therefore no adjustments would need to be made in existing and future negotiations.

Some respondents highlighted the ongoing issue of online service providers continuing to rely on the Section 73 exception to permit the streaming of PSB content over the internet without seeking permission from or paying any licence fees to the copyright owners in the broadcast or the underlying copyright owners in the content carried within the broadcast itself. These respondents opposed any form of transition period due to the financial and reputational harm placed on PSBs as a result of the unregulated advertisements used around PSB content by such online service providers. They felt it was important to end this practice as soon as possible.

A small number of responses also referred to the legal uncertainty posed by ongoing court cases.

One respondent supported the option of having, at the very least, a 24-month transition period. They considered that removing Section 73 posed a high risk of failed negotiations leading to a negative impact on consumers. The respondent stated that negotiations can currently take many months and the repeal of an established and relied upon statutory provision would increase complexity in the market.

A second respondent felt that it would be difficult to set a timeframe. They felt that the repeal of Section 73 would create the risk of dispute with underlying right holders, and a more appropriate approach would be to have a flexible transition period (one example provided was to include extensions that could be activated if necessary). However, they did note that if this was not considered a practical approach, a transition period of 24 months would be the preferred option.

Response: On the basis of the responses to this consultation the Government has decided to repeal Section 73 without a transition period. The responses to the technical consultation did not present significant new evidence to suggest that repealing Section 73 without a transition period would impose undue cost burdens or uncertainty in regards to the acquisition of rights.

The Government feels that the wider question of the relationship between PSBs and cable providers is best addressed through the current regulatory framework, within the context of the 'must offer/must carry' provisions of the Communications Act 2003, and does not necessitate transitional arrangements. The broad power taken in the Digital Economy Bill will mean that the repeal of Section 73 will not come into effect until a date appointed by regulations, likely to be in mid-2017 (subject to prompt passage and approval of the Bill by Parliament).

Rights clearance mechanism

It was also suggested that a rights clearance mechanism - a mechanism that ensures that rights are cleared prior to onward transmission - may be needed to support Section 73 repeal. The technical consultation considered whether this could take the form of placing an obligation on broadcasters to clear all the rights in a broadcast prior to retransmission thereby forcing negotiations to take place at distinct points in the retransmission chain.

Summary of responses

The majority of respondents made it clear that they did not see a role for government to intervene and they were not supportive of this idea. They believed that the current licensing structures and business practices worked well and that the market could adapt to the removal of Section 73 without further regulation. A small number of respondents stated that they would seek retransmission fees directly from cable providers as well as PSBs, suggesting that the market might need to establish at which points in the rights acquisition process liabilities arose. However, there was no suggestion that the market was incapable of dealing with any such changes in the acquisition of rights.

Response: Based on these responses, the Government considers that no compulsory structure for licensing needs to be introduced. The licensing structure already works well and will be able to adapt once Section 73 is repealed.

ANNEX A

List of respondents

AGICOA (Association for the International Collective Management of Audiovisual Works)

ALCS (Authors' Licensing and Collecting Society Limited), Directors UK and BECS (British Equity Collecting Society Limited)

ArenaPal (A small specialist performing arts picture agency)

BAPLA (British Association of Picture Libraries & Agencies)

BBC

BCC (British Copyright Council)

Channel 4

COBA (Commercial Broadcasters Association)

Compact Media

Equity

IFTA (Independent Film and Television Alliance)

ITV

PACT

PRS

STV (Commercial public service broadcaster for Scotland and Affiliate of ITV plc)

VIACOM

Virgin Media

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Fax: 01633 817 777

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