

Consultation 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)**Response from the British Copyright Council**

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Organisation and main services:	<p>British Copyright Council</p> <p>The British Copyright Council represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights.</p> <p>Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers. These right holders include many individual freelancers, sole traders and SMEs as well as larger corporations within the creative and cultural industries. While many of these create works and performances professionally and make decisions relating to both commercial and non-commercial use of those works and performances, they also use and access works in an individual private capacity. Some of our member organisations also represent amateur creators and performers. Our members also include collective rights management organisations which represent right holders and which enable access to works of creativity.</p> <p>A list of BCC members and more about our services to our members can be found at http://www.britishcopyright.org/bcc-members/member-list.</p>
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Confidential response:	This response is not confidential.

Introductory comments

The BCC does not represent producers of films, so cannot respond for, or on behalf of, these interests. The BCC does represent other authors of films and underlying contributors to films (particularly performers and directors and also script and screenwriters, composers of music for films and creators of artistic works included in films) and our comments are made on their behalf. The BCC also has a wider and more technical interest in the importance of proper recognition of copyright and related rights in films.

The BCC has, therefore, used this opportunity to concentrate on questions which arise in relation to these matters and the impact of this proposal on the creative aspects of a film.

Impact Assessment - Preferred Option

With reference to the Impact Assessment attached to this consultation, the BCC's preferred option is **Option 3**, that is, to delete "film" entirely from the exception in Section 72 (1) (c). Such deletion would remove all films from the S.72 exception and require the repeal of the parallel exception for performers currently covered by Paragraph 18 of Schedule 2 CDPA.

The BCC disagrees with Government's preference for Option 1. We do not think this option is helpful to copyright and related rights law.

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.

Questions 1 to 4

1. What would be the impact of the proposal on your organisation, business or industry?

The BCC believes that the Government's proposal to "clarify" the current exception in s 72(1) CPDA by addressing only "producers" rights in film fixations fails to address the practical aspects of:-

- (a) the way in which underlying creative elements and rights are closely integrated within film productions processes; and
- (b) how all licensed broadcast television services will include films that are cinematographic works.

The proposal to try and distinguish between "film fixations" and "cinematographic works" in the context of revising the scope of the s 72(1) exception would:-

- (i) fail to provide any practical benefit to those who might currently rely upon the scope of the exception for film under s 72(1) because it would in practice be impossible for anyone to distinguish the parts of a broadcast service which might fall within a narrower "fixation" exception;
- (ii) contractual and CMO licensing can apply to cover recognition of the rights that are relevant to the removal of "film" from s 72 (1) in ways that would not prove disruptive to the marketplace.

For these reasons any clarification of the exception in Section 72(1) must address the creative (or “cinematographic”) aspects of a film.

Performers Rights

Particular questions are raised for the members of the BCC which represent the interests of performers. In this context, the BCC believes that a number of important questions do not appear to have been addressed within the Consultation Paper or the linked Impact Assessment.

These questions include:-

- Where do performers, whose performances are fixed in a film, sit in terms of application of any amended exception? Their rights and interests must be considered.
- Where will the lines be drawn in terms of “qualifying performances” for those who “deliver” scripts or other literary works in the context of “film fixations” and which the Government is arguing do not involve “creative aspects”? For example – the presenter of a football match who reads a script in between the presentation of commentary and cross references to facts and directions given by the director of a film (particularly in the context of multi-camera recordings at events)?
- Is it really possible, or indeed, practical to argue that film fixations that involve the role of a “principal” director do not have at least some “creative element”?
- If not, is it reasonable to seek to leave any “films” as relevant to a revised s 72(1) exception?
- Should “commercial” films (and the performances in them) fall outside any CDPA S.72 exception in the same way that excepted sound recordings have already been excluded?
- Furthermore, the opportunities recognised in Article 11(1) of the WIPO Beijing Treaty on Audio-visual Performances are important¹.

It is recognised that any changes to the scope of s 72 must in any event make it clear that the s 72(1) provisions do not apply to the cinematographic aspects of film. In this context it must be noted that parallel changes are needed to ensure that

- a) the scope of the exception currently set out in paragraph 18(1) Schedule 2 CDPA should be reduced insofar as it currently applies to performances included in a “film”. This currently provides:-

“Schedule 2

18. (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 right conferred by [this Chapter] in relation to a performance or recording included in

(a) the broadcast.....,or

¹ “Performers shall enjoy the exclusive right of authorising the broadcasting and communication to the public of their performances in audio-visual fixations.”

(b) any sound recording [(except so far as it is an excepted sound recording)] or film which is shown in public by reception of the broadcast..."

The impact assessment makes no specific references to the equivalent exceptions in paragraph 18 Schedule 2. However, when S.I. 2010 No. 2694² was implemented on 1 January 2011, the repeal of s 72 (1B) (a) of the CDPA was put in place at the same time as removal of the equivalent exception in relation to performers' rights (repealing what was formerly sub-paragraph (1A) (a) of paragraph 18 of Schedule 2). See http://www.legislation.gov.uk/ukSI/2010/2694/pdfs/ukSI_20102694_en.pdf.

BCC Members representing performer interests would hope to comment further on this as part of any technical review linked to proposed legislative change proposed following this Consultation.

It is important that both primary changes and any transitional changes linked to provisions currently in place under Schedule 2 CPDA are co-ordinated and applied transparently for the purposes of negotiations for the engagement of performers in new films and other audio-visual productions.

In this context, the way in which contractual collective bargaining terms and statutory rights preserved under quit clauses enable the collection of secondary rights revenue for the benefit of performers, will be important against the background of any changes to the current scope of the exception provisions in paragraph 18 of Schedule 2 CDPA.

Without the parallel recognition of performers' rights referred to above, the rights of performers would be reduced without justification.

The Rome Convention defines performers as "actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works". The WIPO Performances and Phonograms Treaty – Article 2(a) provides that "performers" are actors, singers, musicians, dancers, and other persons who sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore".

The rights of performers recognised within the CDPA would be disadvantaged and the negotiating power of performers when agreeing terms with producers unjustly reduced.

The contractually agreed qualifications that performers are entitled to attach to any assignment or licence of their property rights are vital to ensuring that performers continue to benefit from the use and commercial exploitation of cinematographic works including fixations of performances.

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

The BCCs concern and interest is with this technical approach to this consultation on clarification and it leaves it to those of its members representing performers and directors to provide the evidence requested.

² S.I. 2010 No. 2694 The Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2010.

3. Do you agree that this proposal appropriately reflects the requirements of the relevant EU Directives and EU and UK court judgments?

Not in any practical way. EU law does not permit exceptions of the type currently applied under s 72 (1) in relation to creative works. Therefore trying to carve out a description of films which do not have any creative elements in the context of an exception that might otherwise apply to the public reception of television broadcast services is not going to provide any clarity for users or rights owners.

4. Are there any alternative approaches that could be taken to clarify this area of legislation?

See our response above. We support the removal of all films from the S.72(1) exception.

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 publication without an appropriate commercial viewing licence

Questions 5-10

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 rights holders and users of copyright works?

Please see our response to Question 1 above.

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

Not applicable.

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 licensing fees.

Information on licensing practice and the contractual infrastructure which supports it can be obtained from those CMO members of the BCC which already have such structures in place.

10. Will you change the way you enforce against public communication of your works as a result of this proposal? Please provide details of the way in which you would seek to protect your film content. Would this have an impact on the judicial system?

Not applicable

11. Do you have any views on the costs and/or benefits of any other options which you feel the Government should consider?

In this context, the BCC notes the PPL case study (included in the consultation response from VPL) and referencing the equivalent 2011 repeal.

British Copyright Council
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