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Technical consultation on transitional arrangements following repeal of Section 73 of the Copyright Designs and Patents Act 1988

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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.

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.

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>.

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Confidential response

This response is not confidential.

Introductory comments

The BCC welcomes this further technical consultation by IPO on changes to s 73 CDPA.

The BCC does not represent producers of films, nor does it directly represent the interests of broadcasters, 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 the proposed changes for such contributors.

The BCC has previously welcomed the proposed repeal of s73 CDPA and has raised concerns that any repeal should also properly address repeal of the parallel exception linked to rights of performers (as currently provided in paragraph 19 Schedule 2 CDPA).

The changes proposed are potentially of real significance for the Collective Management Organisations who are members of the BCC.

These CMOs manage copyright and rights related to copyright, including performances, on behalf of more than one right holder, for the collective benefit of those right holders.

As such, it is the purpose of such CMOs to ensure that members represented by them are adequately compensated for exercise of rights within their mandates.

They are potentially **licensing bodies** linked to application of the “cable re-transmission right” recognised by Directive 93/83 ECC and the provisions of s 144A paragraph 19 of Schedule 2 CDPA¹.

As such the role of these licensing bodies should be addressed in considering the impact on rights that have previously been exempt from remuneration in underlying copyright and related rights content in cable re-transmissions.

Whilst the Government’s stated policy intent is for Section 73 to be removed without payment to PSBs and at zero net fees to both PSBs and cable providers, **this does not obviate the need to assess the value of exercise of the recognised act of cable re-transmission as far as underlying right holders are concerned.**

For this, a number of questions must be answered:-

1. How should right holders be remunerated for cable re-transmission and to what extent should the role of licensing bodies be recognised when ensuring the appropriate payments for retransmissions of broadcasts from other Member States that can only be exercised through a collecting society?
2. By what process should such payments be determined?
3. How will underlying rights holders be remunerated where online service providers seek to stream PSB content in the future?²

It is submitted that such agreements should not be the exclusive prerogative of PSBs. Appropriate contractual or collective licensing agreements should be in place to secure clearances and provide for appropriate payments to be made to underlying rights holders and performers whose performances are fixed in the re-transmitted

¹ Article 9

Exercise of the cable retransmission right

1. Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.

2. Where a right holder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the right holder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights.

A right holder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the right holders who have mandated that collecting society and he shall be able to claim those rights within a period, to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter.

3. A Member State may provide that, when a right-holder authorizes the initial transmission within its territory of a work or other protected subject matter, he shall be deemed to have agreed not to exercise his cable retransmission rights on an individual basis but to exercise them in accordance with the provisions of this Directive.

² Page 5 of Technical Consultation “The repeal of Section 73 will also have the benefit of closing a loophole used by online service providers to stream PSB content. Such providers claim that the copyright exemption in Section 73 applies to retransmission via the internet. The Government rejects this claim and considers that such online services should not be able to transmit PSB content via the internet without and benefit flowing to the PSBs.

programming, but we believe that such agreements are for many right holders better established between the cable operators or online platforms themselves and the relevant CMOs representing right holders.

Question 1

1. Will you change the way you license your works as a result of this proposal?

As “licensing bodies”, CMOs already hold mandates to represent members for exercise of the “cable re-transmission right” to the extent that such rights fall to be licensed on a collective basis through a collecting society.

These mandates will be important for underlying contributors to secure remuneration for exercise of any re-transmission rights when the terms of the contracts under which a contributor was engaged to contribute to a new programme of work do not properly provide for remuneration to be paid for identified retransmissions which are otherwise authorised between a broadcaster and the service provider responsible for the re-transmission.

The Consultation suggests that “because broadcasters already buy rights in content comprehensively, any potential increase in revenues to right holders will form part of normal commercial negotiations, which could minimise the risk of dispute”.

We believe that changes may occur in the way that such commercial negotiations take place in order to properly recognise the cable re-transmission rights which fall to be exercised through relevant collecting societies.

Recognition by broadcasters and service providers that certain clearances for future cable re-transmissions within the UK (amounting to new communications to the public distinct from an original broadcast) may fall within the remit of collecting societies could be a driver for change in the way that clearances are secured in the future. These rights may be recognised by the quit clauses included and recognised in a range of collective bargaining agreements which otherwise apply or govern interpretation of individual contributor contracts linked to the creation of new radio or television or other forms of audio or audio visual material.

Question 2

This question relates only to PSBs and cable platform operators.

Question 3**Performers' Rights – Schedule 2 (19) CDPA 1988****Do you see any particular issues in relation to performers' right and the removal of the Schedule 2 (19) exception?**

The original consultation on proposed repeal of s 73 CDPA raised particular questions for the BCC's performer members in relation to the way in which s 73 applied an exception to the works in which performances were fixed.

The BCC believes that this technical point is important and must be recognised when the relevance of performers' rights as related rights is taken into account for the purposes of recognition of the cable retransmission rights to the extent that they involve authorisation of a communication to the public which is additional to, and distinct from a broadcast for which limited specific consents have been obtained.

Whilst some existing contractual arrangements may mean that contractual rights are secured from performers to support the cable transmission of performances in broadcasts or performances fixed in sound recordings or films, this is not, and may not be in the future, exclusively the case.

Indeed this is the recognised justification for the collective administration of cable retransmission rights recognised within the Satellite and Cable Directive.

Arguments from broadcasters that they clear all rights to cover both broadcasts and any cable relay across their licensed regions is simplistic and ignores:-

- (a) the nuances within collective bargaining agreements that provide for additional payments to be negotiated or paid, for rights that were not in place or contemplated at the time a collective bargaining agreement was concluded;
- (b) the existence of Quit Clauses within many collective bargaining agreements linked to the commissioning of both films and television programmes for UK broadcast;
- (c) the arrangements that some collective management organisations already put in place with broadcasters on the one hand and cable operators on the other linked to the cable retransmission rights under s 144A CDPA and links to UK implementation of the EC Satellite and Cable Directive.
- (d) the general role that CMOs might play in the administration of cable retransmission rights (absent the current s 73(3) exception).
- (e) the fact that some licences from right holders to public service broadcasters may not include cable retransmission rights.

Question 4.**What do you think the impact will be, in terms of the costs and benefits, of implementing a transitional period for the repeal of s 73?**

As previously suggested, we hope that the repeal will address both s 73 and the parallel and linked provisions currently provided under paragraph 19 Schedule 2 CDPA.

The BCC is aware that a number of its members will be responding to the current technical consultation including figures upon how the value of the cable re-transmission markets within other EU member states provides for payments to be made to programme contributors, including through the application of collective licensing.

Question 5**How long should any transitional period for the repeal of Section 73 be? The Government has suggested three options in the Impact Assessment 6 months – 12 months or 24 months?**

The BCC would refer to the earlier submissions from its members PPL and PRS which show how the licensing structures to be applied through CMOs are either already in place, or to the submissions from other CMO members which support the fact that they

have the ability to put licensing structures in place to compliment other clearances, without long transitional periods being required.

Whilst some previous respondents to questions raised concerning the repeal of section 73 recognise that new negotiations do sometimes take up to two years, it is important that the repeal of the current s 73 and linked provisions within paragraph 19 Schedule 2 should be the trigger for a proper assessment of any new cable-retransmission clearances that are required for the re-transmissions which were previously covered by the exception. Existing commercial negotiations and the supporting roles that can be played by CMOs should provide for sufficient flexibility to obviate the need for a potentially unhelpful cut off point for any new arrangements that might be of advantage to all interests, in the longer term.

This will not be a question of existing clearances “disappearing”, but rather for new licences being supported by collective arrangements in circumstances when there are no current arrangements in place.

Question 6

Can you explain or evidence your preferred transitional period, considering why this duration might have a greater benefit than any other suggested duration?

Please see our response to question 5 above.

Question 7

What do you think the impact will be, in terms of the costs and benefits, of adopting a rights clearance mechanism?

There is clear evidence in other European countries, that CMOs have a potentially important role to play in the effective licensing of rights by cable operators.

The repeal of s. 73, linked to a significant part of the UK market for the cable re-transmission of broadcasts within the UK, may result in

(a) a change in approach to the way that broadcasters seek to clear rights covering both their original broadcast and any simultaneous retransmissions by platforms within the UK; and/or

(b) increased incentives for cable operators and similar secondary platforms involved in the “retransmission of broadcasts” to establish new types of blanket clearance arrangements directly with representative CMOs. This will be particularly true when broadcasts emanating from outside the UK are also retransmitted.

This provides benefits for both right-holders and service providers in supporting choice, whilst avoiding the need for service providers to have to start from a blank page to secure individual rights clearance whenever they wish to pick up and relay a broadcast service within the EU Satellite and Cable Directive framework.

It is right that the repeal of s 73 and linked provisions from within current paragraph 19 Schedule 2 CDPA should open doors for this flexibility for the benefit of all in the future.

We are not aware of any other option that has been proven to give rise to greater benefits or reduced costs overall.

Question 8

Should a compulsory structure for licensing be introduced under which broadcasters would be required to comprehensively buy out all the underlying rights in their broadcasts?

No. The BCC believes that flexibility and choice outlined by our earlier responses means that this approach would be restrictive and fail to recognise that an ability to monitor and understand the economic value of re-transmissions and re-uses within the world of electronic digital delivery service of the future, will be an important element for effective operation of future value chains.

The impact assessment refers to a possible risk of ‘failed negotiations’. However, in the event that terms could not be agreed, it is possible to resolve an impasse through the

Copyright Tribunal.

Question 9

What do you think the impact will be, in terms of the costs and benefits of this? Are there any alternative options as to how the rights clearance process could be made easier?

We are not aware of any other option that has been proven to give rise to greater benefits or reduced costs overall than the flexible systems based upon those described in our responses to the earlier questions.