



## ANNEX B Section 72 Consultation Response Form

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)

Using this form, please provide your responses to the questions outlined in this document. You do not have to complete the whole form – please answer the questions which are most relevant to you.

**Please Note:** This consultation forms part of a publication exercise. As such, your response may be subject to publication or 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). We plan to post responses on the Gov.uk website when they are received, and they may be the subject of online discussion. If you do not want part or whole of your response or name to be made public please state this clearly in the response, explaining 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 cannot be regarded as a formal request for confidentiality.

About you and your organisation	
Name	Martin Couchman
Job Title	Deputy Chief Executive
Organisation and main services	British Hospitality Association.  The British Hospitality Association is a representative body for the UK hospitality industry, speaking on behalf of 40,000 hospitality and tourism establishments including hotels, restaurants, catering and facilities management companies, attractions and apart-hotels in the UK.
E-mail address	martin.couchman@bha.org.uk
Postal address	Augustine House, 6a Austin Friars, London, EC2N2HA
Telephone Number	442074047744

Confidential response? Please give reasons why this should be treated as confidential.	We are content for this response to be made publicly available.
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**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**

**Consultation Questions 1 - 4**

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

The impact of the proposal, to clarify that the exception in section 72(1) applies only to producers' right in film fixations and not to creative aspects of film, on those hotels and restaurants who are members of BHA will include the following:

1. It would be unwelcome as it would in all probability lead to both uncertainty and increased costs and expense.
2. The uncertainties would arise because there would be difficulty in practice in BHA members distinguishing between a fixation and a film since almost all films have some copyright elements contained within them. These might include scripting, graphics or the director's copyright. Whilst the distinction between fixation and film may be appropriate for a certain limited category of television output, such as sports and news programmes, which are arguably free of copyright, it would not apply to other television output. In practice, however, it would be difficult to monitor the switching on and switching off of television in, for example, a hotel lobby, in order to avoid infringing copyright elements contained within the next programme in the schedule.
3. Further uncertainty would arise because the hospitality industry as a whole would have no practical method of locating the owners of such copyright material or of acquiring the necessary licences from them. They would at best be obliged to seek undertakings from the relevant broadcasters that the rights no longer protected by section 72(1) had been obtained.
4. Even if the owners of such rights could be located, there would then be an increased cost of the kind identified by Lord Beaverbrook when he said in a 1998 Lords debate on the Premier League case:

"The Berne Convention requires us to give composers a right in respect of the public performance of broadcasts of recordings containing their work but convention requirements do not oblige us to extend this to makers of sound recordings provided they receive "equitable remuneration" in respect of the broadcast itself. Nor, in our view, does the convention require a right to be given to film-makers in respect of public showings of broadcasts containing their works. That can be justified as a minor reservation recognised by the parties to the Berne Convention as a legitimate departure from its literal wording.

We have always taken the view, unwelcome though it may be to the record industry, that it is not reasonable to impose a requirement for multiple copyright licences on shops, pubs, restaurants, cafes and the like, where a radio or TV set is played or shown. The public exposure of films and sound recordings in that way is a relatively minor form of exploitation.

The owners of the rights concerned are not going unremunerated since they have a right to control whether or not their works are broadcast in the first place. The burden on the retail sector, both administrative and financial, of having to obtain additional copyright licences would be considerable, linked as it would be to something that was only secondary to their main activity."

What the above considerations indicate is that for all practical purposes the benefit of the section 72(1) exception will be lost, as its new limited ambit will be of little practical benefit to hoteliers and restaurateurs.

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

There is no empirical evidence currently available but Lord Beaverbrook's observations, referred to above, plainly demonstrate that there will be costs inherent in removing, for all practical purposes, the protection which has thus far been available by reason of the section 72(1) regime.

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

Yes.

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

It ought to be possible to mitigate the impact of the de facto removal of the section 72(1) protection by making provision for those rights which were previously covered by section 72(1) to be available from a central body of one kind or another. That is to say that the legislative change necessary to make UK law compliant with Article 3 ought if possible to be accompanied by appropriate administrative arrangements, which we assume are outside the ambit of this consultation exercise.

## 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

### Consultation Questions 5 - 10

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

Within the hospitality industry virtually all venues which show subscription broadcasts in public have commercial licences in place so impact should be negligible.

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

If this were not the case, there would be more legal actions by copyright holders against hospitality businesses. We are not aware of any of our members ever being subject to legal action for not having the necessary subscription channel licence.

7. Do you agree that this proposal strikes an appropriate balance between the needs of right holders and users of copyright works?

Yes.

## Copyright Users

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

In circumstances where consents are not readily available from copyright owners for free to air showings of films, users may, if they understand the distinction between fixations and films, choose to show only subscription channels, rather than risk infringement.

## 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.

N/A.

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?

N/A.

### Part C: Views on other options.

#### Consultation Question 11

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

The Government should consider the need to provide a framework within which copyright elements included in free-to-air channels' programming can be licensed without the burden of multiple licensing arrangements, with broadcasters , copyright owners and collection societies, for those showing the broadcasts. There is also a need to avoid costs for these users, since no direct revenue is derived from free showings of broadcasts in public places.