

Title: Repeal of section 73 of the Copyright, Design and Patents Act (1988) IA No: RPC Reference No: Lead department or agency: DCMS Other departments or agencies:	Impact Assessment (IA)			
	Date: 29/06/2016			
	Stage: Final			
	Source of intervention: Domestic			
	Type of measure: Primary legislation			
Contact for enquiries: Anoushka Kenley anoushka.kenley@culture.gov.uk				
Summary: Intervention and Options				RPC Opinion: Awaiting Scrutiny

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANDCB in 2014 prices)	One-In, Three-Out	Business Impact Target Status
£0m	£0m	£0m	In scope	Qualifying provision

What is the problem under consideration? Why is government intervention necessary?
 Section 73 (s73) Copyright, Designs and Patents Act 1988 means that the copyright of PSB programmes re-transmitted via cable is not infringed. This legislation was introduced to support the roll-out of cable infrastructure and the availability of public service broadcast television. That policy rationale for this intervention has now passed and the Government proposes to repeal this provision.

What are the policy objectives and the intended effects?
 The purpose of s73 was to support the development of analogue cable infrastructure in the 1980s and 1990s and the availability of public service broadcast television. Much has changed now with the development of multi-channel and digital TV on satellite, terrestrial and increasingly on internet protocol (IP) platforms and the massive increase in capacity supported by the cable networks. The policy rationale for this intervention has now passed and the Government proposes to repeal this provision.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)
 Option 1. Do nothing
 This option makes no change to the regulatory framework: s.73 would continue to apply.

 Option 2: Remove s.73 (while maintaining 'must offer must carry') (preferred)
 The option would remove s.73 of the Copyright, Design and Patents Act (1988). This would ensure an effective copyright regime underpins negotiations between cable TV providers (Virgin) and PSBs. Must offer and must carry provisions are maintained.

Will the policy be reviewed? It will not be reviewed. If applicable, set review date: Month/Year					
Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope?		Micro Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible **Dat**
SELECT SIGNATORY : **e:**

Summary: Analysis & Evidence

Policy Option 1

Description: Repeal of s.73

FULL ECONOMIC ASSESSMENT

Price Base Year 2014	PV Base Year 2016	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: 0

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

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

No costs have been monetised

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

We do not estimate any impact on firms or individuals of repealing s.73.

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

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

No benefits have been monetised

Other key non-monetised benefits by 'main affected groups'

We do not estimate any impact on firms or individuals of repealing s.73.

Key assumptions/sensitivities/risks	Discount rate (%)	3.5
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Our best understanding is that continuing must offer must carry obligations will negate any change to negotiating position between platform providers and PSBs caused by the repeal of s.73.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs: 0	Benefits: 0	Net: 0	
			0

Evidence Base

1. Background

Broadcasters and TV platforms co-exist interdependently as part of the value chain that delivers a mix of content, packaged in a range of business models, across various distribution technologies and devices. A regulatory framework, which requires that core PSB channels be available for viewers to watch on all TV platforms, governs these complex commercial arrangements.

The Regulatory Framework

Section 73, Copyright, Design and Patents Act (1988): This section provides that in certain circumstances the retransmission on cable of certain broadcasts by public sector broadcasters (“PSBs”) is not an infringement of the copyright in the broadcast itself nor is it an infringement of the underlying copyright in any work included within the broadcast. In other words, cable operators do not have to pay copyright fees to PSBs for core PSB content retransmitted via cable.

Must offer: These obligations require relevant broadcasters to make their PSB channels available to every appropriate network and satellite services. The scope does not extend to PSBs’ video-on-demand (VoD) or portfolio services. Sections 272 and 273 of the Communications Act 2003 enable Ofcom to impose conditions on relevant broadcasters to ensure that their PSB channels are offered as available to every appropriate network and satellite television service.

- Section 272 relates to all networks that are used by a significant number of end-users as their principal means of receiving television programmes.
- Section 273 specifically relates to satellite television services and applies insofar as its objectives are not secured by conditions imposed under section 272.

These sections were brought into force in 2010, following which “must-offer” conditions were included in the broadcasting licences for the commercial PSBs. The BBC is not subject to these provisions but has a similar set of obligations with the effect that the BBC must do all that is reasonably practicable to make its services widely available to its users; in practice this means that the BBC must offer its services to all significant platforms.

Must carry: Section 64 of the Communications Act 2003 implements Article 31 of the Universal Service Directive, which allows Member States to impose must-carry obligations. This provision enables Ofcom to set general conditions to secure the broadcast or transmission of the PSB channels on an electronic communications network.

Consultation on the Balance of Payments between Television Platforms and Public Service Broadcasters

In March 2015, the previous government issued a consultation: *Balance of Payments between Television Platforms and Public Service Broadcasters*. As part of this, the consultation sought views on:

- * repeal of section 73 of the Copyright, Designs and Patent Act 1988;
- * whether the current ‘Must Offer/ Must Carry’ regime should be amended or removed to create freer negotiations between PSBs and platforms, and whether Ofcom should have additional role of adjudicating any potential future commercial disputes where there is consumer harm.

Government consulted on these issues for 13 weeks. Further detail, including full summary of consultation responses, are available in the government's response to the consultation.

In particular, it is worth noting that the Impact Assessment which accompanied the consultation assessed the impact of repealing s73 while at the same time deregulating must offer/must carry and that consultation responses broadly focused on a similar package of deregulation. The measure now proposed is the repeal of s73, while must offer/must carry regulation is retained. As a result, the impact of repealing s73 is materially different to that assessed in the original consultation Impact Assessment because of the broader regulatory framework.

Consultation Responses

The government consultation received responses from a wide variety of interested parties. These responses are explained and examined in the government response to the consultation.

In their response to the consultation, Virgin disagreed with the assumption in the consultation impact assessment that the repeal of s.73 would have a 'negligible impact'. However, they did not provide a quantified assessment of the impact. Similarly, ITV did not offer an estimate of the impact of repealing s.73, although they were in favour of the policy in general.

2. Problem under consideration and rationale for intervention.

Section 73 provides that the copyright in a broadcast of PSB services (and any work in the broadcast) retransmitted by cable is not infringed where the broadcast is receivable in the area in which it is retransmitted. In effect, currently cable platforms are not required to provide copyright/retransmission fees in relation to the core PSB channels.

The rationale for intervention was to support the availability of public service broadcast television and development of cable infrastructure.

Today, there are a wide variety of platforms, which ensure that virtually everyone in the UK is able to receive public service broadcasts. Digital television services are now available for 99.9% of consumers through a combination of digital terrestrial television, digital satellite and digital cable platforms. The cable market has now moved from a large number of local providers in the 1980s to one big and a few very small local platforms, and from 130,000 subscribers to over 4.5 million to date. Moreover, the capacity required to carry PSB services on the full digital cable network is negligible compared to the constraints of earlier analogue networks. The government is satisfied that the objective of ensuring that PSB services (as well as other TV services) are available throughout the UK has been met, and therefore section 73 is no longer required to achieve that objective.

3. Policy Options Considered

Option 1. Do nothing

This option makes no change to the regulatory framework: s.73 would continue to apply.

Option 2: Remove s.73 (while maintaining 'must offer must carry') (preferred)

The option would remove s.73 of the Copyright, Design and Patents Act (1988). Must offer and must carry provisions are maintained.

We estimate that there would be no change to the current balance of payments between cable TV providers and PSBs because the must offer and must carry provisions, which require PSBs offer their core PSB channels for

carriage to all major platforms and that Electronic Communications Networks (ECNs) must carry them, are retained. The removal of s.73 is a deregulatory measure.

4. Analysis of Costs and Benefits

Option 1. Do Nothing.

This option makes no change to the regulatory framework and therefore has zero costs or benefits. This represents the counterfactual.

Option 2: Removal of Section 73

Scope

Section 73 applies to the commercial PSBs, ITV, Channel 4, and Channel 5, and cable platform providers, of which Virgin Media is the only one. These are the firms within scope of the regulation.

Consultation Stage Impact Assessment

An impact assessment accompanied the government consultation document.¹ The impact assessment analysed the impact of removing the must offer must carry provisions, with a central estimate of a flow of c. £40m from TV platforms to the PSBs (with a net impact on business of zero). Alongside this, the impact assessment modelled the impact of repealing section 73 as an extension of the impact of removing the must offer must carry regime. This impact was estimated to be a c. £2m shift from platforms to PSBs, in addition to the c. £40m shift from platforms to PSBs that results from the removal of must offer must carry.

Given that this assessment of the impact of repealing s.73 was made in the context of also removing the must offer must carry regime, then this analysis cannot be used to estimate the impact of repealing s. 73 in isolation.

Direct Impact on PSBs and Virgin

If the must offer must carry arrangement did not exist, then the repeal of section 73 could conceivably lead to a transfer of wealth from Virgin to the PSBs, as the PSBs would be entitled to retransmission copyright fees from Virgin. The contractual arrangements between PSBs and platforms are commercially sensitive and the details are not known by government. However, it is understood that such contracts cover multiple other services (for example, PSB portfolio channels which are not covered by the same regulations) and do not single out copyright fees. The policy would then be likely to have a material impact on contract negotiations, as one side would have additional leverage - this was the conclusion of the consultation stage impact assessment. It is worth noting that if any impact were to materialise, then it would always net to zero in terms of total impact on business, as any transfer of wealth would only be between firms, so the losses to one firm are offset by the gains of another.

However, due to the must offer must carry arrangement, the PSBs are obliged to offer platforms, including Virgin, their content and the platforms, in turn, are obliged to carry core PSB channels. Therefore any greater leverage for PSBs in negotiations is immediately negated, as the greater leverage only covers the core channel for which it also has must offer obligations. PSBs would not be able to credibly threaten to withdraw their channel as a negotiating tactic, as they would still be required to provide it. As a result we expect the impact of repealing s.73 on negotiations between PSBs and platforms to be zero.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417797/Balance_of_Payments_Consultation_Impact_Assessment_finalfinal.docx

Wider and indirect impacts on underlying rights market

The repeal of s. 73 could have an impact on firms outside of the direct scope of the regulation (the PSBs and Virgin). S. 73 means that cable platform operators do not have to pay copyright fees to commercial PSBs for their main channels. In this context, the underlying rights holders (i.e. those who own the copyright for the content itself, such as artists, production companies, etc.) can make no copyright claim to the PSBs for content that is shown on cable platforms.

Although negotiations between PSBs and platforms take into account the copyright payments owed to the PSBs by the platforms when their content is shown, the PSBs themselves do not always own all of the copyright - this is owned by the underlying rights holders (actors, musicians, etc.). The PSBs negotiate with the platforms over copyright payments, and the underlying rights holders then receive payment from the PSBs. The underlying rights holders could decide to seek an increase in payments as a result of repealing s.73 - in their consultation responses, some stakeholder groups representing underlying rights holders suggested that they would seek increased remuneration for their rights.

The repeal of s.73 would effectively create a new market between the underlying rights holders and the PSBs, as the rights holders could make copyright claims for content shown via cable platforms. In this way, there is potentially a negative impact on the PSBs (or the platforms, if underlying rights holders attempt to bargain directly with them), who are newly liable to pay copyright to underlying rights holders for transmission over cable.

However, in practice, PSBs 'purchase comprehensively' the rights from the underlying holders, i.e. they will buy the right to show that content via any medium throughout the UK (as opposed to, say, buying the rights to show content on each channel or platform individually). Government expects that the PSBs will, in time, clear these rights (compensate the rights holders as required) as part of their usual and ongoing negotiations with the rights holders, in line with similar processes e.g. as relate to transmission of content over Digital Terrestrial Television.

Government expects that the current agreements between the PSBs and rights holders (where PSBs 'bulk buy' rights and already effectively buy the right to cable retransmission), which is governed by existing copyright law, should extend to this potential new market.

Furthermore, since our view is that no new financial value will be generated for the PSBs by the removal of s.73 as a result of must offer/must carry regulations, there will be no additional value to pass on to underlying rights holder, limiting what they could negotiate for.

Therefore, our current estimate is that the removal of s.73 should not materially impact payments between the PSBs and underlying rights holders.

Furthermore, an accurate assessment of the impact on flows, if one were to materialise, would depend on disaggregating this impact from the overall negotiations between PSBs and rights holders, which are complex and constantly under review. It is again worth noting that any impact on business as a whole would always net to zero as the rights holders are generally firms themselves, and that the impacts would be indirect through the creation of a new market further up the supply chain (not a direct consequence of removing s.73).

IPO consultation

Although the government's best understanding is that removing s.73 would not impact the transfer of wealth between PSBs and underlying rights holders, government believes that further work is required to understand how the terms of this market might materialise and identify any transitional arrangements necessary. This is because, although in practical terms we believe there will be no commercial impact because of the constraints of must offer must carry regulation, a new market for copyright of content carried on cable will be created by the repeal of s.73 because, as for other platforms, copyright for retransmission over cable will no longer be regulated by s.73.

Furthermore, government will, if necessary, establish transitional arrangements for repealing s. 73, and would like to understand more about whether such arrangements may be necessary. To this end, the Intellectual Property

Office (IPO) will be running a separate, technical, consultation on the potential transitional arrangements to adoption of the new rights market. If this consultation in any way brings information to light that impacts on our cost benefit analysis in this document, then government will produce a further, enactment stage impact assessment that takes account of the new information.

6. EANDCB and BIT

Government believes that there will be no impact of the repeal of s.73 beyond removing an outdated and unnecessary piece of legislation. **The NPV, EANDCB, and BIT are all zero.**

7. Indicative Policy Timetable

The policy is intended to form part of the Digital Economy Bill, which will be laid before parliament in July 2016, and is expected to receive royal assent in the summer of 2017.