

HOUSE OF LORDS

Select Committee on the Constitution

6th Report of Session 2009–10

Clause 17 of the Digital Economy Bill

Report

Ordered to be printed 20 January 2010 and published 22 January 2010

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 40

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Clause 17 of the Digital Economy Bill

1. The Digital Economy Bill, introduced in the House of Lords in November 2009, contains provisions concerning a wide range of issues emanating from the *Digital Britain Final Report*.¹ In its scrutiny of the Bill the Committee noted one important matter of constitutional concern: the extent of the powers which the Bill confers on the Secretary of State.
2. We decided to raise this matter in correspondence with the Secretary of State (Lord Mandelson). We raised concerns, in particular, about clauses 17 and 42. We are grateful to the Secretary of State for his reply, which is reprinted in the annex to this report. While we accept his explanation of and justification for clause 42, **we are not persuaded by what the Secretary of State had to say in his letter about clause 17.**
3. The House will recall that while the Delegated Powers and Regulatory Reform Committee examines Henry VIII clauses, where such clauses raise broader constitutional concerns this Committee has also reported on them. **The Henry VIII power in clause 17 of this Bill is astonishing in its potential breadth.** This provision inserts a new section, s. 302A, into the Copyright, Designs and Patents Act 1988. It allows the Secretary of State to amend very substantial proportions of the United Kingdom's statutory law of copyright. There is a purposive limitation to the Secretary of State's power. As originally introduced in the House, the Bill provided that the Secretary of State may exercise the power only "where appropriate to do so having regard to technological developments that have occurred or are likely to occur". The Committee was concerned that this was a limitation that would not lend itself to effective judicial supervision, on the basis that it would be difficult for a court to rule that a technological development is unlikely to occur. The clause makes it clear that the power does not include the power to create or modify a criminal offence, but it expressly includes the power "to confer a power or right or impose a duty on any person" and "to require a person to pay fees". Exercise of the power is subject to affirmative resolution procedure, and must be preceded by consultation.
4. We asked the Secretary of State to provide examples of the sorts of provisions of statute law which he thought might need to be amended under this power. He provided only one example. **The Committee was not persuaded that such a broadly worded Henry VIII power is required in these circumstances.** The Committee notes that the Secretary of State's justification for the power was that that "we need to be able to respond effectively" if threats arise. But it does not follow from this that a Henry VIII power as broad as that conferred by clause 17 is necessary. No explanation has been given, for example, as to why fast-track legislation could not be used instead of relying on ministerial powers to alter the statute book.² [In the recent example of the Video Recordings Bill Parliament has shown that

¹ Cm 7650, June 2009.

² See our Report on *Fast-track Legislation*, 15th Report for 2008–09, HL 116.

time can be made available for fast-track legislation that is shown to be necessary.³]

5. The Committee is aware that the Secretary of State has subsequently tabled amendments to clause 17 (amendments 211A and 211B). Amendment 211B provides for the use of the super-affirmative procedure. Amendment 211A amends the purposive limitation with regard to the power. The reference to “technological developments” has been removed and replaced with a new purpose concerning an online copyright infringement having a “serious adverse effect”. This may *extend* the scope of the power. Further, if this is the purpose of the power, the Secretary of State’s justification for the power (namely, that it is needed in order to enable the Government to respond quickly to technological developments) no longer applies.
6. **Even with these amendments the Committee remains of the view that clause 17 is constitutionally inappropriate and should be omitted.**

³ See our Report on the *Video Recordings Bill*, 5th Report for 2009–10, HL 36.

APPENDIX: CORRESPONDENCE ON THE DIGITAL ECONOMY BILL

Letter from the Chairman to the Rt Hon Lord Mandelson, 2 December 2009

The House of Lords Select Committee on the Constitution is carrying out scrutiny of the Digital Economy Bill. The Committee would like clarification of two aspects of this bill.

Clause 17

While the House of Lords Delegated Powers and Regulatory Reform Committee is likely to examine the ‘Henry VIII clauses’ in this Bill, where such clauses have raised broader constitutional concerns the Constitution Committee has also taken a keen interest in them. Clause 17 will insert a new section, s. 302A, into the Copyright, Designs and Patents Act 1988. It will allow you as the Secretary of State to amend very substantial proportions of the United Kingdom’s statutory law of copyright. There is a purposive limitation to the power, in that the Secretary of State may exercise the power only “where appropriate to do so having regard to technological developments that have occurred or are likely to occur”. However, whether this is a limitation that will lend itself to effective judicial supervision must, with great respect, be doubted, on the basis that it is likely to be difficult for a court to rule that a technological development is unlikely to occur. The clause makes it clear that the power does not include the power to create or modify a criminal offence, but it expressly includes the power “to confer a power or right or impose a duty on any person” and “to require a person to pay fees”.

Exercise of the power is subject to affirmative resolution procedure, and must be preceded by consultation. Notwithstanding these procedural safeguards (which the Committee welcomes), we are concerned about the very considerable breadth and scope of this power. In this respect it contrasts sharply with other Henry VIII powers contained in the Bill, such as those in clauses 36 and 40. The former allows you as Secretary of State to amend s. 58 of the Broadcasting Act 1996 (concerning the renewal of radio multiplex licences); the latter allows you as Secretary of State to amend ss. 2A and 3 of the Video Recordings Act 1984 (concerning the classification of video games). Both powers are limited, therefore, to amending very particular provisions of the statute book. This is not the case with regard to clause 17.

The Committee would like to know why you are of the view that the power in clause 17 is required to be drawn so widely? It would be helpful to the Committee, for example, if you could give an indication of the sorts of provisions in Parts 1 and 7 of the Copyright, Designs and Patents Act 1988 which you envisage may need to be amended under the clause 17 power. In our Report on the Legislative and Regulatory Reform Bill, we noted that even though Henry VIII clauses have become an established feature of the law-making process, this does nothing to diminish the “constitutional oddity of allowing the executive branch of government to set aside or amend primary legislation”.⁴ In that Report, we concluded that where such powers are included in legislation, they must be “*clearly limited* powers, to be exercised for specific purposes”. We are concerned that this test is not satisfied by clause 17.

⁴ Constitution Committee, 11th Report (2005–06), HL 194, para 34.

Clause 42

Additional powers are conferred on you as Secretary of State by clause 42 of the Bill, which inserts four new sections, ss. 116A-D, into the Copyright, Designs and Patents Act 1988. Section 116A(1) is in the following terms: “The Secretary of State may by regulations provide for authorising a licensing body or other person to do, or to grant licences to do, acts in relation to an orphan work which would otherwise require the consent of the copyright owner.” An orphan work, we understand, is a work in relation to which no copyright owner can readily be identified. The Bill does not define this term: rather, the legal definition of the term is to be determined by regulations made by you as Secretary of State (s. 116A(6)). The Committee’s view is that this is inappropriate, and that “orphan work” should be defined in the Bill. Likewise the following matters are left for you as Secretary of State and are not settled in the Bill: the treatment of royalties, the deduction of administrative costs, the period for which sums must be held for the copyright owner, and the subsequent treatment of those sums. The Committee notes that regulations made under this section are subject only to negative resolution procedure; and that the provisions contain no express duty on you as Secretary of State to consult appropriate stakeholders.

As with clause 17 it would greatly assist the Committee if you could explain why you consider it to be constitutionally appropriate for what appear to be such wide-ranging and open-ended rule-making powers to be conferred on you as Secretary of State.

I look forward to a speedy response to this letter so that the Committee can finish its scrutiny of this bill.

Response from the Rt Hon Lord Mandelson, 17 December 2009

Thank you for your letter of 2 December 2009, regarding measures included in the Digital Economy Bill. Let me deal with the two main areas you raise in turn.

Clause 17

Clause 17 of the Digital Economy Bill provides a restricted capability to amend parts of the Copyright Designs and Patents Act 1988 (“CDPA”) to deal with civil infringement of copyright online. It is not a power to redefine what constitutes copyright infringement for the purposes of Part 1 of the CDPA, as some have suggested, as this would not be possible due to the wording of the Clause. Technology in this area moves fast and this Clause will enable Government to move quickly and flexibly if we are persuaded that the existing legislation is not able to provide adequate forms of redress for civil infringement of copyright that takes place online.

First, you note the purposive limitation to the power. The wording of the clause requires that the power may only be used:-

- to prevent or reduce copyright infringement on line if appropriate to do so having regard to technological developments that have occurred or are likely to occur;
- to amend the CDPA in ways that do not create or amend any criminal offences;
- following consultation; and
- by means of affirmative resolution procedure in both Houses.

In addition to these limitations in the statute, the power may only be used in a way that is consistent with Convention Rights; with European Directives on subjects such as copyright protection, Internet Service Provider liability and privacy, and in a way that is consistent with principles of administrative law. This means, for example, that despite what some commentators have suggested, this power must be exercised consistently with the limitations imposed on general or specific monitoring of internet traffic in EU law.

The power will not create or modify a criminal offence, meaning that the power may not be used to redefine what constitutes an infringement of copyright for the purposes of section 107 of the CPDA.

You express concern that the Clause includes powers to, “confer a right or impose a duty on any person,” and, “to require a person to pay fees”. These powers could be used, for example, to impose a duty on OFCOM to carry out educational functions in relation to how copyright is infringed. The aim of such a programme would be to reduce copyright infringement. The power to sub-delegate functions which you have highlighted would be necessary for its introduction. The power to charge fees would enable a body to whom such functions were delegated to charge fees as required to cover its costs. Costs set above cost recovery limits in Treasury guidance are likely to be a tax and so will not be *intra vires*. Any exercise of these powers must also be subject to the safeguards detailed above.

You ask specifically which provisions of the CDPA may need to be amended by use of this power. We can envisage today some potential areas where this power could be required, for example to clarify or otherwise streamline the injunctive procedure available under section 97A (this section may offer rights holders a course of action, for example, against website hosted services being used for copyright infringement, but has never to our knowledge been used). However, the purpose of this Clause is to allow me to respond quickly to threats which arise, or are shown to be likely to arise in the future. Whilst we do not know for certain what those threats are today, we need to be in a position to respond effectively if they arise. That is why this power is drafted in general terms, with appropriate safeguards, so that it remains useful as technology and behaviours develop.

Clause 42

You ask why the term ‘orphan works’ is not defined on the face of the Bill. The key factor in determining whether a copyright work is orphan is the level of searching and publicity used before it can be so classified. We recognise there is a danger that use of the term “orphan work” in the Bill without further clarification could lead to uncertainty, with a resulting lack of understanding of what works could be licensed under the provisions applying to orphan works. This is not in the interests of copyright owners who may find their works wrongly classified as orphan and may prejudice those licensing such works. The process of diligent searching will be defined in secondary regulations, by reference to guidance which has been developed in Europe and elsewhere. Much of what defines an orphan work will, therefore, depend on the search criteria and standards of due diligence that apply when seeking out the owner of the work. Both of which may change over time as new databases and searching methods are developed and European or international standards are put in place. As a result, any attempt to fix a definition of ‘orphan work’ in primary legislation runs a risk of creating a class of works that are orphan according to the Act, but not according to the search process commonly used by those dealing with such works, or vice versa.

The Intellectual Property Office (IPO) has carried out a preliminary consultation on licensing of orphan works with the British Copyright Council. Details are available via the IPO website <http://www.ipo.gov.uk/pro-types/pro-copy/c-policy/c-policy-orphanworks.htm>. In line with BIS guidance on consultation the IPO will conduct a full consultation prior to exercising any of its powers in relation to orphan works. Any such consultation will extend to the licensing of orphan works, including the definition and the appropriate search criteria. We have publicly committed on the same IPO website, and in discussions with interested parties, to finalising these details in the regulations based on feedback with our stakeholders.

Likewise, issues such as the treatment of royalties, the deduction of administration fees and related matters would be the subject of a full consultation which would inform how these matters are dealt with in the regulations. It would not be appropriate to include this level of detail on the face of the Bill as discussions with stakeholders have indicated that an orphan works solution may involve different schemes for different types of orphan works or orphan rights. For example, a library authorised to licence the use of orphan works in its archives, may be authorised to set administration costs differently from say a collecting society, operating an orphan works scheme where the works are exploited commercially. It is therefore more appropriate for such technical details to be included in regulations rather than on the face of a Bill.

I have already mentioned the consultation we intend to undertake on orphan works. The full public consultation, which will be widely publicised, will follow discussions with stakeholders over the last few years. Although this is not expressly stated on the face of the Bill, the IPO has publicly undertaken to consult, as stated above.

Finally, on the question of a negative resolution procedure, we consider that this is appropriate given the commitment to consult fully with all interested parties before making the secondary legislation.

