



HOUSE OF LORDS

Select Committee on the Constitution

6th Report of Session 2009–10

Clause 17 of the Digital Economy Bill

Report

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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.

