

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

41st Report of Session 2013–14

**Draft Copyright and Rights in Performances
(Personal Copies for Private Use)
Regulations 2014**

**Draft Copyright and Rights in Performances
(Research, Education, Libraries and
Archives) Regulations 2014**

**Draft Copyright and Rights in Performances
(Quotation and Parody) Regulations 2014**

**Draft Copyright and Rights in Performances
(Disability) Regulations 2014**

**Draft Copyright (Public Administration)
Regulations 2014**

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Secondary Legislation Scrutiny Committee (formerly Merits of Statutory Instruments Committee)

Historical Note

In January 2000, the Royal Commission on the Reform of the House of Lords said that there was a good case for enhanced Parliamentary scrutiny of secondary legislation and recommended establishing a “sifting” mechanism to identify those statutory instruments which merited further debate or consideration. The Merits of Statutory Instruments Committee was set up on 17 December 2003. At the start of the 2012–3 Session the Committee was renamed to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

The Committee has the following terms of reference:

- (1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), scrutinise—
 - (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
 - (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (2).
- (2) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—
 - (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
 - (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
 - (c) that it may inappropriately implement European Union legislation;
 - (d) that it may imperfectly achieve its policy objectives.
- (3) The exceptions are—
 - (a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
 - (b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;
 - (c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.
- (4) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.
- (5) The Committee shall also consider such other general matters relating to the effective scrutiny of secondary legislation and arising from the performance of its functions under paragraphs (1) to (4) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Lord Bichard	Baroness Hamwee	Rt Hon. Lord Scott of Foscote
Lord Blackwell	Rt Hon. Baroness Morris of Yardley	Lord Woolmer of Leeds
Lord Eames	Lord Norton of Louth	
Rt Hon. Lord Goodlad (<i>Chairman</i>)	Lord Plant of Highfield	

Registered interests

Information about interests of Committee Members can be found in Appendix 1.

Publications

The Committee’s Reports are published on the internet at www.parliament.uk/seclegpublications

Information and Contacts

If you have a query about the Committee’s work, or opinions on any new item of secondary legislation, please contact the Clerk of the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW; telephone 020–7219 8821; fax 020–7219 2571; email seclegscrutiny@parliament.uk.

Statutory instruments

The National Archives publishes statutory instruments on the internet at <http://www.legislation.gov.uk/>, together with a plain English explanatory memorandum.

Forty First Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the following instruments and has determined that the special attention of the House should be drawn to them on the grounds specified.

- A. **Draft Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014**
Draft Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014
Draft Copyright and Rights in Performances (Quotation and Parody) Regulations 2014
Draft Copyright and Rights in Performances (Disability) Regulations 2014
Draft Copyright (Public Administration) Regulations 2014

Date laid: 27 March

Parliamentary Procedure: affirmative

Summary: These draft Regulations update the framework of exceptions to copyright and rights in performances, expanding the freedoms in copyright law that allow third parties to use copyright works (such as text, film or music) for a variety of economically and socially valuable purposes, without permission from copyright owners. The Government consider that the changes contain safeguards to ensure that a reasonable balance is maintained between the interests of creators, owners, performers, consumers and users of copyright works.

There is considerable interest in the proposed changes, both inside the House, as manifested in a Grand Committee debate on 5 December 2013, and among external groups, as shown by written submissions to this Committee. We took evidence from Viscount Younger of Leckie, Parliamentary Under-Secretary of State in the Department for Business, Innovation and Skills (BIS), on 6 May.

We asked Viscount Younger about the use of secondary legislation to make these changes, and about the timetable being followed for laying and bringing the legislation into force. We have been struck by the strength of concern expressed by some interested parties about the issues of compensation and of “contract override”, and we explored these matters as well. While the Government have presented their justification for the approach being taken on these issues, as set out in Viscount Younger’s evidence to us, we flag up the possibility that the changes will have a greater economic impact on producers and creators than the Government have so far envisaged.

We see the changes proposed in the Regulations as undoubtedly significant, for example in their positive potential for the research sector, and in their negative potential, conversely, for rights-holders in the music sector and elsewhere. BIS states in the Explanatory Memorandum that the instruments are to be reviewed by the Intellectual Property Office no later than April 2019. We would urge the Government to monitor the impact of the changes from the point of implementation,

and in particular to respond effectively if it becomes clear that any negative potential is being realised.

We draw these instruments to the special attention of the House on the ground that they are politically or legally important or give rise to issues of public policy likely to be of interest to the House.

1. The Department for Business, Innovation and Skills (BIS), through its Intellectual Property Office (IPO), has laid these five sets of draft Regulations, with a shared Explanatory Memorandum (EM) and Transposition Note, and separate impact assessments. BIS has also provided an additional memorandum of assistance to the Joint Committee on Statutory Instruments. In amending the Copyright, Designs and Patents Act 1988 (“the 1998 Act”), the instruments provide for the incorporation into UK law of exceptions and limitations to copyright and performers’ rights which Member States may introduce into their law under the relevant European legislation (“the Infosoc Directive”).¹ The instruments update the framework of exceptions to copyright and rights in performances, expanding the freedoms in copyright law that allow third parties to use copyright works (such as text, film or music) for a variety of economically and socially valuable purposes, without permission from copyright owners. BIS states that the changes contain safeguards to ensure that a reasonable balance is maintained between the interests of creators, owners, performers, consumers and users of copyright works. Viscount Younger of Leckie, Parliamentary Under-Secretary of State at BIS, has written to this Committee to reinforce the information provided in the EM, and has given oral evidence to us (see below).²

Draft Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014

2. These draft Regulations introduce a new exception to copyright, allowing limited personal copying by individual consumers. It allows individuals to copy media that they own, such as CDs or eBooks, from one medium or device to another, for their own private use. While the exception does not prevent copyright owners from using technology measures to restrict copying (such as the copy protection found on DVDs and Blu Ray discs), consumers will be able to appeal to the Secretary of State, who may take steps to give them access to the copy if a technological measure is unreasonable. (Further details are given at section 7.7 of the EM.)

Draft Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014

3. This draft instrument extends the scope of existing exceptions for research and private study to include all copyright works, including sound recordings, films and broadcasts, including copies provided to users by libraries. As at present, these exceptions are to be limited by a requirement for fair dealing by an individual, and to copying of a reasonable proportion of a work by a

¹ Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

² A transcript of the evidence can be seen on the Committee’s website:

<http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/publications/>.

librarian supplying a copy to an individual. These limitations prevent researchers from copying and obtaining entire works which they would ordinarily have to buy. (Section 7.8 of the EM).

4. BIS states that, while an exception to copyright already exists allowing libraries and archives to make copies of books in order to preserve them, without infringing copyright, the current law does not apply to artistic works, sound recordings or films and does not apply to museums or galleries. The draft instrument extends the exception to apply to all types of media and to apply as well to museums and galleries, while retaining the existing requirement that the exception only applies when it is not reasonably practicable to purchase a replacement copy. (Section 7.9 of the EM).
5. BIS explains that automated analytical techniques, such as text and data mining, work by bulk-copying of electronic information, which is analysed for patterns, trends and other useful information; and that copying in this way without the permission of the rights-holders risks infringing copyright. A new copyright exception provided by the draft instrument would permit UK researchers carrying out non-commercial research to use text and data mining technologies without risking copyright infringement. However, researchers or their institutions will still have to buy access to content if that is the rights holder's model. (Section 7.10 of the EM).
6. The draft instrument also updates copyright exceptions for education. BIS explains that British copyright law has long included such exceptions, in recognition of the fact that copying is often a necessary part of teaching. The changes now proposed bring these exceptions up-to-date, to reflect advances in digital technology. They allow teachers and lecturers to use copyright works with modern teaching equipment without risk of copyright infringement, and remove administrative burdens from schools and universities. (Section 7.11 of the EM).

Draft Copyright and Rights in Performances (Quotation and Parody) Regulations 2014

7. The draft Regulations broaden existing provisions so as to permit quotation from a work not only for the purpose of criticism or review, but for any purpose, as long as it is a "fair dealing". This will allow other minor uses of quotations, such as academic citation and use in examination papers, which do not undermine the commercial exploitation of copyright works. Like the existing exception, the exception for quotation applies to all types of copyright work including film, broadcasts, sound recordings, and photographs as well as traditional text quotation. (Section 7.12 of the EM).
8. The instrument proposes a new exception to permit fair dealing for the purposes of caricature, parody or pastiche. BIS explains that, to date, creators in the UK have been liable for copyright infringement if even a small amount of copying takes place when making a parody work, for example. Permission of right holders may be granted in some cases, but is often refused or involves significant costs. BIS states that the new exception creates a limited basis on which caricature, parody and pastiche may be practised, without disproportionate costs, uncertainty and legal risk. (Section 7.13 of the EM).

Draft Copyright and Rights in Performances (Disability) Regulations 2014

9. These draft Regulations extend existing provisions, which allow individuals and charities to make books in accessible formats for blind and visually-impaired people, so that it will be possible to copy any type of copyright work for the benefit of people with any impairment, if that impairment prevents them from accessing a copyright work. Individual disabled people will be able to make a copy of a work for personal use, and charities and educational establishments may make accessible-format copies and issue them to disabled people more widely. As at present, these exceptions are to apply only when accessible copies are not commercially available. (Section 7.14 of the EM).

Draft Copyright (Public Administration) Regulations 2014

10. The existing copyright exception relating to public administration is being updated, to enable public bodies to make relevant copyright material that they hold available to the public online. BIS explains that some material held by public bodies³ will have been submitted, for example, by businesses or members of the public, and that existing copyright law permits such third party material to be issued to the public in paper format or to be viewed on the premises of public bodies, but prevents such material being published online. The change only applies to material that is already available for public inspection through some statutory mechanism or material that is unpublished, but not to material which the copyright owner has made available on a commercial basis. (Section 7.15 of the EM).

Consultation

11. At section 8 of the EM, BIS provides information about the processes of discussion and consultation that have taken place since the publication in May 2011 of the Hargreaves Review report, “Digital Opportunity: an Independent Review of IP and Growth”.⁴ These have included formal consultation in the light of the Government’s response to that review, between December 2011 and March 2012: a summary of the responses to the consultation was published in June 2012.⁵ The Government published a policy response in December 2012.⁶
12. In June 2013, the Government published an early draft of the Regulations, to enable interested parties to provide comments as to whether the text achieved the policy objectives set out in the December 2012 policy response. A summary of responses was published in March 2014.⁷ At paragraph 8.5 of the EM, BIS itemises several issues raised by respondents: and at paragraph 8.6, it offers examples of changes made to the draft Regulations in the light of responses.

³ BIS offers as examples material that is open to public inspection pursuant to a statutory requirement (such as planning applications) and previously unpublished material which has been communicated to the Crown in the course of public business.

⁴ See: <http://www.ipo.gov.uk/ipreview.htm>.

⁵ See: <http://www.ipo.gov.uk/copyright-summaryofresponses-pdf>.

⁶ “Modernising Copyright” – see: <http://www.ipo.gov.uk/response-2011-copyright-final.pdf>.

⁷ See: <http://www.ipo.gov.uk/response-copyright-techreview.pdf>.

Consideration in Lords Grand Committee – 5 December 2013

13. On 5 December 2013, a motion by Baroness Buscombe, on Government plans to modernise copyright exceptions, was debated in Grand Committee.⁸ The debate was informed by knowledge of the early drafts of the Regulations, as published in June 2013. Members who spoke in the debate raised a number of important issues, including the legal context for the changes and the decision to do so through secondary, rather than primary, legislation; concerns about “fair dealing” and “contract override”; the proposed handling of the exception for text and data mining; the clarity of certain definitions; and the impact of the changes on sheet music. As well as responding in his remarks in Grand Committee, Viscount Younger also wrote on 17 December 2013 to Members who had spoken in the debate, and placed a copy of his letter and the enclosed note in the Library of the House.⁹
14. Lord Clement-Jones has reiterated his concerns about the legal basis for the Regulations, in material sent to the Joint Committee on Statutory Instruments (JCSI) and copied to us. The additional memorandum of assistance which BIS has provided addresses aspects of this issue, which will be considered by the JCSI in its scrutiny of the Regulations.

Submissions by external organisations

15. Since the draft Regulations were laid at the end of March, we have received a number of submissions from external organisations both supportive of, and opposed to, several of the exceptions proposed in the draft Regulations. Comments supportive of the exceptions have been submitted by the British Library; the Libraries and Archives Copyright Alliance; the National Museum Directors’ Council; the Open Rights Group; Tech UK; Which?; and the Wellcome Trust. Submissions critical of, or opposed to, certain exceptions have been sent to us by the Alliance for Intellectual Property; the British Copyright Council; British Pathé; the Creators’ Rights Alliance; the Motion Picture Association; the Publishers Association; and UK Music.
16. We are publishing copies of those submissions specifically addressed to the Committee, and of responses to certain of them provided by BIS, on our website.¹⁰ We refer to them as appropriate below.

Evidence session with Viscount Younger of Leckie

17. On 6 May, we took evidence from Viscount Younger, and two officials from BIS/IPO, in order to explore in more depth issues relating to the proposals which it was evident to us were still of particular concern to external organisations. We pressed the Minister on his statement to us in an earlier letter that the changes proposed were “relatively minor”: we are not persuaded that this is an accurate assessment of their impact.

⁸ HL Deb, 5 December 2013: cols GC62–GC79.

⁹ See: [DEP2014–0208](#).

¹⁰ See: <http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/publications/>.

Personal copying for private use

18. We had in mind in particular concerns expressed by organisations representative of the creative industries, notably submissions from UK Music which relate to the new exception allowing personal copying for private use. UK Music does not accept the Government's view that this new exception may cause only minimal harm to rights-holders; in a letter of 30 April 2014, Jo Dipple, Chief Executive Officer of UK Music, reported on the findings of a consumer survey and stated in particular that "by requiring that all CDs are sold with the right to make unlimited copies, [this exception] will cause a loss of potential revenue to the music industry by approximately £58 million per year". UK Music has criticised the Government's decision not to provide for fair compensation to be paid to rights-holders suffering any such loss, a point also made by the British Copyright Council. We put the point to Viscount Younger that the proposed change could fairly be seen to benefit the consumer at the expense of the producer, and that the prospect of such an outcome surely reinforced the case for considering compensation.¹¹
19. In a written response to UK Music's letter of 30 April, BIS states that the proposed exception "does not permit unlimited copying, it is a narrow exception allowing personal copying for private use only". The Department also states that, rather than assuming that making personal copies is currently restricted and does not take place, it is more realistic to assume that, as is the case in practice, personal copying is unrestricted and does take place. In his evidence to us, Viscount Younger re-affirmed that the exception proposed by the Government was narrower than elsewhere in the EU, where mechanisms exist to provide compensation to rights-holders;¹² and that the Government did not see the change proposed in the UK "as being significant at all for the rights-holders".¹³ Mr Stout said that the EU's Infosoc Directive did not make it mandatory on Member States to provide for exceptions, and that the UK was using the discretion allowed under the Directive to frame the exception for personal copying on a narrow basis.¹⁴

Clarification of legal position

20. Viscount Younger also said that "at the moment the law is extremely unclear and people do not have clarity"; the Government wished to clarify the law so that, while it will be legal to make personal copies, it will be illegal to make and distribute additional copies. He added that, through the IPO, the Government had launched an educational programme to communicate this position to consumers.¹⁵ We note in this context that, in its submission, Which? emphasises that "format shifting¹⁶ for private use is currently unlawful yet this is unclear to UK consumers". Which? has urged the Government to implement to the proposed exception for personal copying for private use (which covers format-shifting) at the earliest opportunity.

¹¹ Q 8.

¹² Q 2.

¹³ Q 8.

¹⁴ Q 7.

¹⁵ Q 2.

¹⁶ Format-shifting means copying an item bought in one technological format to another, for example, copying a CD on to a computer.

Contract override

21. The draft Regulations contain provisions which seek to ensure that users can rely on copyright exceptions despite contract terms to the contrary. Several of the submissions to the Committee, for example those from the Alliance for Intellectual Property, the British Copyright Council, and the Motion Picture Association, voiced concerns about the acceptability and workability of the contract override provisions.
22. We discussed these concerns in our evidence session, and pressed for an explanation of the justification which the Government saw for such generic provisions which would cut across the normal operation of contractual agreements between producers and users. Viscount Younger and Ms Heyes told us that the effect of the provisions would not be retrospective, but would apply only to new contracts; and that the provisions were precedented, inasmuch as an existing exception allowing material to be photocopied in schools could not be overridden by contractual terms.¹⁷
23. We note in this regard that the submissions sent to us by the British Library and the Wellcome Trust both support the contract override provisions. The British Library has commented that “without this protection, every user of a digital resource in a library is expected to read...what each contract allows or disallows.”

Views of stakeholders

24. We put it to Viscount Younger that, even though his Department had consulted extensively in its implementation of the Hargreaves Review since 2011, it was clear that reactions to the draft Regulations were still divided between users of copyright material, who favoured the proposals, and producers, who opposed them: was this not a matter of concern to the Government? Viscount Younger told us that the position was not so black-and-white; that the proposals were in fact supported by some rights-holders; and that there was recognition on all sides that the Government had carried out extensive consultation. He added that his focus was on implementation of the Hargreaves Review: “copyright exceptions are part of the 10 key elements of Hargreaves, and I am determined to roll that out in the fairest, most transparent way”.¹⁸

Parliamentary handling and timetable

25. A concern voiced by some opponents of the proposed changes, for example, British Pathé, is that they should not be made by secondary legislation. We put this point to Viscount Younger, and asked as well why the Government had not been able to lay the draft Regulations in February, as was indicated at the time of the Grand Committee debate in December 2013; and also why the Government specified 1 June 2014 on the face of the Regulations as the date when they would come into force. Viscount Younger said that 50 copyright exceptions already in place had themselves been provided through secondary legislation;¹⁹ that the delay in bringing the Regulations forward had resulted from continuing discussions with interested parties; and that his

¹⁷ Q 12.

¹⁸ Q 7.

¹⁹ Q 1.

Department had specified 1 June to bring the Regulations into force “on the basis that we had had such a long consultation and that certain stakeholders were really pushing us to get on with it”.²⁰

Conclusions

26. We noted above that Viscount Younger has described the proposed changes as “relatively minor”. In our evidence session, however, he told us of the Government’s estimate that the changes made by the Regulations could bring a benefit of some £500 million to the UK economy over 10 years. Set alongside the points made both for and against the proposals by external organisations, the scale of this potential benefit suggests to us that the changes add up to a more significant package than might be inferred from the Minister’s description.
27. In our scrutiny of secondary legislation, we always pay close attention to the approach taken by the relevant Department to the process of consultation preparatory to finalising and laying statutory instruments before Parliament. In the case of these Regulations, the process described above indicates that BIS has made sustained efforts to allow interested parties to contribute to the secondary legislation that has now come forward. It is right, however, to acknowledge that concerns remain among some organisations, at the same time as others are keen to see the changes made.
28. **We were struck, in particular, by the strength of concern expressed by some interested parties about the issues of compensation and of “contract override”. While the Government have presented their justification for the approach being taken on these issues, as set out in Viscount Younger’s evidence to us, we flag up the possibility that the changes will have a greater economic impact on producers and creators than the Government have so far envisaged.**
29. **We see the changes proposed in these Regulations as undoubtedly significant, for example in their positive potential for the research sector, and in their negative potential, conversely, for rights holders in the music sector and elsewhere. BIS states in the EM that the instruments are to be reviewed by the Intellectual Property Office no later than April 2019. We would urge the Government to monitor the impact of the changes from the point of implementation, and in particular to respond effectively if it becomes clear that any negative potential is being realised.**

²⁰ Q 4.

APPENDIX 1: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 6 May 2014 Members declared the following interests:

Draft Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014

Draft Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014

Draft Copyright and Rights in Performances (Quotation and Parody) Regulations 2014

Draft Copyright and Rights in Performances (Disability) Regulations 2014

Draft Copyright (Public Administration) Regulations 2014

Baroness Morris of Yardley

Non-executive Director, Performing Rights Society

Lord Norton of Louth

Author

Editor, Journal of Legislative Studies

Professor of Government and Director of Centre for Legislative Studies,

University of Hull

Attendance:

The meeting was attended by Lord Goodlad, Baroness Morris of Yardley, Lord Norton of Louth, Lord Scott of Foscote and Lord Woolmer of Leeds.