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Inquiry on

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Witnesses: Viscount Younger of Leckie, Charlotte Heyes and Robin Stout

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Members present

Lord Goodlad (The Chairman)
Baroness Morris of Yardley
Lord Norton of Louth
Lord Scott of Foscote
Lord Woolmer of Leeds

Examination of Witnesses

Viscount Younger of Leckie, Parliamentary Under-Secretary of State for Intellectual Property, Department for Business, Innovation and Skills, **Charlotte Heyes**, Deputy Director, Hargreaves Review Implementation Programme, Intellectual Property Office, and **Robin Stout**, Deputy Director, Copyright Policy, Intellectual Property Office

Q1 The Chairman: Minister, welcome to the Committee. Thank you very much indeed for coming. This is, as you know, a formal evidence-taking session. It is on the record and is being webcast live. A verbatim note is being taken, which will be put on the public record in printed form and on the parliamentary website. The clerk will of course send a copy of the transcript of our proceedings for any amendments of errors. Would it be convenient if, for the record, you identified the colleagues you have brought with you?

Viscount Younger of Leckie: Yes, I am very happy to do that. On my left we have Charlotte Heyes, who is deputy director of the Hargreaves Review Implementation Programme and a colleague at the IPO—the Intellectual Property Office. On my right is Robin Stout, who is deputy director of copyright policy and is also from the Intellectual Property Office.

The Chairman: Thank you very much indeed. Minister, you have laid five sets of regulations to make changes to the provisions of the Copyright, Designs and Patents Act 1988—a wide range of changes, which are explained in detail in over 40 paragraphs in the

Explanatory Memorandum. Could you please tell the Committee why the Government thought it appropriate to make these changes through statutory instruments rather than using primary legislation?

Viscount Younger of Leckie: It makes sense to us to use secondary legislation for this, because this is what has been done before. There are 50 exceptions to copyright already in place. These were taken through on a secondary basis, and they are, in my view, relatively minor, so it seemed to me to be reasonable that they should go through on secondary legislation rather than primary.

Q2 Lord Scott of Foscote: Minister, I will just ask you a few questions arising out of that. Would you regard it as minor to make an amendment to the copyright provisions in the 1988 Act, which introduces new exceptions that allow copying without compensation? Is that minor?

Viscount Younger of Leckie: I would argue that it is minor and it is a particularly narrow exception. If we look at the experience in Europe, where there are certainly different experiences between countries in Europe, we are proposing a much narrower system whereby, on that particular subject, if an individual buys a CD or a DVD, they are allowed to make copies purely for themselves, which of course right now they are not allowed to do. Making copies for anybody else, including members of their family, would be illegal, so we regard this as being minor.

Lord Scott of Foscote: Once the individuals—the members of the family you have mentioned, and some people have very wide, extensive families—come into possession of copies thus made, they can presumably make copies of those, and so on and so forth.

Viscount Younger of Leckie: As I say, at the moment the law is extremely unclear and people do not have clarity, so what we want to do is to bring in clarity, as some countries have done already. For example, Canada and Australia are ahead of us on this, and we want

to make it quite clear that it is legal to make personal copies but that it is illegal thereafter. To that extent, we already have a strong educational programme under way with the IPO looking at all aspects of society, so even looking at the younger age groups, the 14 to 16 year-olds, we have various apps with cartoons—

Lord Scott of Foscote: The proposition is that the individual who purchases the first copy from the copyright holder can then make further copies for himself and members of his family. Is that defined? Does "family" include second cousins once removed?

Viscount Younger of Leckie: "Family" does. You are not allowed to do that. It is purely for you, and it is very narrow to that extent.

Lord Scott of Foscote: But it is for your family as well, is it not?

Viscount Younger of Leckie: No, it is for you.

Lord Scott of Foscote: Once he has them, can he not give them to his family?

Viscount Younger of Leckie: No, he cannot.

Lord Scott of Foscote: As a Christmas present or otherwise.

Viscount Younger of Leckie: If it is a gift, that is slightly different, but the point is that the law is going to be clear that if you buy a CD or a DVD you can only make copies for yourself. You can only format-shift for yourself as well, so if you want to copy it you can, on to your iPod or your MP3 player, but it is illegal to pass it on. If you want to do that, you would have to pay for it, which is fine. It does not stop people doing it, but you would have to pay for it.

Lord Scott of Foscote: What is the justification for allowing the individual to make copies for himself, which are then, inevitably, going to be used and enjoyed by his family? I have children and grandchildren, and they read all my books.

Viscount Younger of Leckie: We think this is fair, because we are thinking of the rights holders too. At the end of the day, the education side and the enforcement are very

important to back this up, and that has already started. What we see is not going to happen instantly, but through a period of time it will become apparent to people young and old that if they buy a DVD or a CD these are the restrictions.

Lord Scott of Foscote: How do you describe it as fair to the copyright holder that copies then come into circulation in respect of which the copyright holder has received nothing?

Viscount Younger of Leckie: If the copy goes beyond the individual, they should receive something. I should say that there are measures that the industry can take and is, indeed, already taking. There are technical protection measures that they can take. For example, with a DVD you can put on to it a process whereby copies can be made once or twice and then they go blank. This is very much an industry process, but the main focus for us is the education system that we are introducing.

Lord Scott of Foscote: Schools can make copies of copyright material without having to pay for it. Is that right?

Viscount Younger of Leckie: No. When it comes to schools they would need a licence, as normal, to purchase—

Lord Scott of Foscote: Parents of home-educated children would not have to bother with that.

Viscount Younger of Leckie: That is right, exactly.

Q3 Lord Scott of Foscote: Overall, why should the copyright holder, who is the originator of the work in question, not receive fair compensation for the number of volumes of his or her work that are put in circulation by the purchaser of the original volume or work?

Viscount Younger of Leckie: We believe that there is lack of clarity at the moment, and in Europe, as you probably know, there is a levy system, which we feel we should not go down. That is where there is uncertainty as to whether the copyright owners receive anything.

The levy that is imposed upon gadgets such as MP3 players in some countries in Europe is supposed to be used to fully recompense the rights holders. That does not work. We are not convinced at all by the evidence on that, and that is why we think it is right to make it legal for people to make copies but to make it very narrow so that the monetisation starts beyond the owner and within the family.

Lord Scott of Foscote: Just for the purpose of clarity, when you speak of making copies are you simply speaking of making copies by the new technologies that have arisen over the last few years, rather than simply printing more books using the master that has been purchased as the basis for the printing?

Viscount Younger of Leckie: I might, at this stage, if I may, pass to—who would like to take up the technical aspects of this?

Robin Stout: Shall I take this? On the subject of compensation, I think we are covering several different areas now perhaps, but as the Minister has said the main way by which rights holders will be compensated is by selling their works, and when we look at the exception for personal copying, as the Minister has said, you would only be able to copy something that you have bought or that someone else has bought and given to you. You will not be able to distribute or circulate those copies, so our view is that you have been compensated when it was sold and the extra compensation does not come into play.

When it comes to educational use, as the Minister has said, there are licensing schemes that cover that and that provide some extra compensation.

Lord Scott of Foscote: Therefore, a school would have to pay for each volume that it purchased for distribution among its pupils.

Robin Stout: Yes. The school would pay at the beginning to buy the copies of the books—they might these days be electronic copies perhaps—and then, if they wanted to photocopy those they would, as now, have to get a licence from the relevant agency.

Lord Scott of Foscote: The families—and I think there are quite a few such families nowadays—who go in for home education would not have to do that then.

Robin Stout: The special provisions for educational establishments only apply to those establishments, so if you do not count as one then you cannot rely on those provisions. Therefore, either that will still be a copyright infringement, so the law will be more restrictive, or there are other exceptions, many of which already exist, allowing extracts of works to be taken for certain minor uses, such as research and study. Therefore, you would be able to rely on some exceptions but, as I said, there are specific arrangements for educational establishments.

Lord Scott of Foscote: Establishments, but not families.

Robin Stout: There is an exception for use by way of illustration in teaching, which is a fair dealing exception, which can be used if you are not an educational establishment. That could be used, I suppose, for home teaching, but that is very narrow and really just for if you are giving an example of something. It may be an extract used in a presentation, perhaps, whereas what we are looking at with the wider exceptions that apply to educational establishments relates to schemes where you can photocopy large amounts of textbooks, which I think everyone would agree could compete with the sales of those books. The exception works only in conjunction with a licensing scheme and then the licensing scheme provides an extra payment back to the rights holders.

Lord Scott of Foscote: Is the distinction that the reproduction for commercial purposes would not be acceptable but the reproduction for educational purposes, even if it were for educational purposes that were being carried on commercially, would not?

Viscount Younger of Leckie: Yes, I suppose that provides some further clarity to it, which is that if there is any hint of any commercial aspect to it, that would not be right. However, as Robin has been saying, the purposes for instructional use are definitely permitted, and that

would seem to be reasonable and fair, so that if a teacher, particularly bearing in mind the digital age, was to use a whiteboard, they could do so without infringing copyright.

Lord Scott of Foscote: However, a state school could not copy the books for their pupils.

Viscount Younger of Leckie: They would need a licence to do that.

Lord Scott of Foscote: If they did it without a licence, it would be a breach of copyright.

Viscount Younger of Leckie: Yes, exactly right. They would need to have a general licence. If there were any specific exceptions that had not been written down, my understanding—and I am sure I will be corrected on this—is that the school could approach the Secretary of State directly to ask for a particular exception for some particular reason. However, we are aiming to clarify the law in respect of schools to that extent.

Q4 The Chairman: Before we move on, perhaps I could just ask about the parliamentary handling of this. In the Grand Committee debate last December, Minister, you said that the Government aimed to lay the regulations in February and bring them into force in April. Then, in your letter of 27 March to the Committee, you said that this was not possible and that the new target date to bring them into force was 1 June this year. Why was the laying of the regulations delayed by two months, and given the uncertainty over the timing of Parliamentary approval, why did you specify the date of 1 June on the face of the regulations?

Viscount Younger of Leckie: It is a fair question, and it might be helpful if we could take a step back and if I explained, if I may, the timetable of this, because this has been quite a long process. These regulations are a culmination of a very long consultation process, which arguably began under the last Government. Many of you will know about the Gowers review in 2006, when there was much talk about the exceptions and then, for whatever reason, it did not go ahead. You will also know that when this Government came in, Ian Hargreaves was asked to conduct the Hargreaves review, and that ran from November 2010 through to May 2011. We then published our proposals in December 2012.

In fact, the Secretary of State Vince Cable announced these then, which was just before I came into office, after a full three months' consultation.

Now, it may be helpful for you to know, which you will know, that we then took the additional step of publishing the regulations for technical review in the summer of 2013. You will also know, and I will say, that these regulations have been subject to much interest from stakeholders and we felt it was important to take the time to engage with them and to give the SIs proper consideration.

That led, which you alluded to earlier, to the five bundles. To answer your question, it did, it is fair to say, take longer for the process to look at the five bundles in the latter stages. That led to us not being able to meet the April deadline. We then decided to go for 1 June, and that is purely on the basis that we had had such a long consultation and that certain stakeholders were really pushing us to get on with it, if I may put it that way. We thought we should do that and go for 1 June rather than delay further, until October, which would be the next window.

That is rather a long-winded response, but I hope that helps to explain the thinking on the timetable.

Q5 Lord Norton of Louth: Going back to your point earlier when you said that the changes are relatively minor and that that is the justification for using secondary legislation, would you like to say a bit more about that, because some of the evidence that has been put to us, which focused particularly on consequences, suggests that there may be significant harm, at least in their contention? That is based on the claim that the Government have consulted but that they do not really have a strong evidence base and have not undertaken significant analysis in order to justify it. This is really to invite you to respond to that. Before you do, I should perhaps declare an interest, which is well balanced, because on the

one hand as an author I am a holder of copyright, but as an academic I am the user of copyright, so I think it more or less balances out.

Viscount Younger of Leckie: Thank you for that. The first thing to say is that we believe that the evidence is important—you mentioned the word "evidence"—and we believe that we have strong evidence for a number of reasons. Just very briefly, for the Hargreaves review, which was the review between 2010 and 2011 to be precise, we had 288 responses. On the copyright consultation, between December 2011 and March 2012 we had 471 responses. We scrutinised these responses very closely and several things came out. One is that we were very clear that the statutory instruments needed to go ahead and the benefits were definitely there.

In terms of the higher-level benefit—and this has been ratified by the RPL—the benefits are due to be £500 million to the UK economy over 10 years. That is the headline. However, if we look at the consumer or user end—there is a balance, of course, between protecting, very importantly, the rights holders and creators, at the user end, for example, UK researchers have been unable to use the benefits of text and data-mining. That is just one example. If we look at libraries that wish to make copies of whatever they have for preservation purposes, the admin costs are as much as £25 million per annum. Those are just two examples as to why we think the evidence is there for making the changes.

It is probably a good thing to say now that I knew when I came into this role in January 2013 that this area of copyright was a pretty emotive area. We are at the tail end of the Hargreaves implementations. I am very pleased that it has gone, I hope you agree, very well up to now and I intend that to continue. However, they are emotive and that is simply because there is such a spread along the spectrum between those who are very strongly minded, understandably so, at the rights holders' end and those at the user end who want to see some openness, but not too much so.

Lord Norton of Louth: Do you want to say a bit more? You have stressed the benefit to the economy as a whole and to users. What about the producers—those who are generating the material?

Viscount Younger of Leckie: The first thing to say is that we recognise particularly the huge strength of the creative industries. I am always talking about that and I am busy focusing on that, so here I am saying that we must support our creative industries. To that extent, from their point of view that would mean 100% monetisation for everything they do. However, one of the challenges that Hargreaves recognised was that with the influence of the digital age there are huge new challenges, which we have taken a grip of and we are harnessing. These copyright exceptions are designed to create this necessary balance between both ends of the spectrum, so we believe that we really have listened very carefully to the rights holders and the creators who you allude to. To that extent, I have mentioned the long consultation, but since just before I came into office, admittedly—in November or December 2012—we have had over 250 stakeholder meetings. It is very much my style to engage with people personally, so we have often had multiple meetings with the same stakeholders, impressing upon them again and again what we are trying to do.

Finally, my main aim, frankly, is to support UK plc. At the end of the day, it is growth that we want to support, and to support our UK creative industries, creators, musicians, artists, or indeed photographers—the whole spectrum.

Lord Norton of Louth: We are probably coming back to the compensation point, but just picking up on the UK internationally, do you want to say more about how we compare with others?

Viscount Younger of Leckie: Yes. We have talked about private copying and the much narrower focus that we are giving, which is designed to protect creators. We have also looked at where we are compared to our international partners, and the European

countries, as I think I mentioned earlier, are very different. Germany, Denmark, Poland and the Netherlands all have very different ways in which they deal with this. In France, for instance, a typical example of how they have a levy, in my understanding, is that 50% of the levy that is raised on an MP3 player will go directly to young artists. That is very much a French cultural way forward, which I think is admirable. However, we have to remember that that is still a tax and, having consulted widely and gone through this process, we do not believe that this would be right for the UK and that it would be very much a Treasury matter if a levy or tax was introduced.

Q6 Lord Woolmer of Leeds: I have just one follow-up in this area, and that is the use of saving things to the cloud. What issues do you see when technology keeps changing? It will change in the next few years, but, as things stand at the moment, what issues do you see arising from people saving items of various kinds to the cloud, which is designed very much to give wide access and is widely used by others and individuals?

Viscount Younger of Leckie: That is an interesting question. In my understanding of the use of the cloud, I relate it to having your own physical shelf in your room. If you have gone out to HMV and have bought a CD or DVD, you would look at it and say, "That is nice", and you would then put it on your shelf. I would regard the cloud as virtually the same: you would be able to put it into your cloud locker. The way I look at it is that some people have said, "We do not like that and you should pay for it", but we think that is not fair and that it would be difficult to regulate and control, because to that extent you will be asking individuals to pay once for their CD or DVD and then to pay twice for that same piece of music or film. I do not know whether, Charlotte or Robin, you wanted to add to that, but we see this being a fairly clear stand.

Charlotte Heyes: The only thing I would add—and Robin might want to come in—is that in other countries, for example in America, they have basically two types of cloud in the

market. They have a cloud where you can share and stream music as well as storing your own content, and they have things that are sometimes named "dumb lockers", which essentially the Minister referred to as, in his mind, a shelf. I try to think of it as a version of a physical hard drive but with no wire attached. You are the only person who can access your dumb locker, your cloud, and the reason you have it is to store content you have already paid for.

We say that the personal copying exception should allow you to have your own cloud to store your own content on it, because it works in the same way as you would in making your own personal copy of your CD to, say, put on your MP3 player. However, what our exception does not capture is the version of the cloud where you are streaming and sharing content with others, because that would be outside the exception. We think that one of the benefits of our exception will be that it will, hopefully, allow the dumb-locker part of the cloud market to evolve in this country as well as the more, should I say, gold-plated version, with streaming and other facilities. Some consumers will just want the dumb locker and some will want the fancier version, and that gives more choice in the market.

Lord Woolmer of Leeds: So if an individual or institution saved items to the cloud and other people accessed this, in strict legal terms that would not be legal. That is very difficult to police.

Charlotte Heyes: Do you want to say a bit about what we know existing cloud providers are doing in terms of policing? We have some evidence.

Robin Stout: Yes, absolutely. In a way, when something is done on the internet it is slightly easier to police because things can be traced. It is not the same as if you are doing something purely in the privacy of your own home. Someone is providing that service, and if they do something that is frankly illegal, such as helping people to share copies illegally on the internet, there are ways to go after that party. There are various initiatives that the

Government and industry are taking forward to try to clamp down on unauthorised use of copies and copyright piracy over the internet. However, as my colleague Charlotte has said, the real division here is between what our relatively narrow personal copying exception lets you do, which is store copies of your own materials, and a scenario where you might share that via a cloud more widely. From the personal copying exception that would simply fall outside the exception, it would be illegal, and if a service supported anyone in doing that, then not only the individual but the service could be liable for that infringement.

Q7 Baroness Morris of Yardley: I have an interest as a director of the Performing Rights Society and draw the Committee's attention to that.

It really is a complicated business, I can see that, and I do not doubt the amount of consultation. I know that this debate has been going on a long time and there have been lots and lots of meetings at all levels, so I acknowledge that and I think that has been excellent. I want to pick up some of the issues that have already been raised. Despite all those hundreds of meetings, you still arrive at a position now where those for and those against come from two very different groups: the users are for and the content providers are against. Does that not worry you? If I was you, I would feel a bit easier had I managed to persuade some of the content producers that this was a good idea and, to be honest, left some of the people who would access it thinking it was a bad idea. There has been no crossover. After all those hundreds of meetings, why do you think none of the creative producers, as far as I can see from the letters we have had, think this is a good idea?

Viscount Younger of Leckie: I have no doubt that you have received letters and that they will be saying whatever they say.

Baroness Morris of Yardley: They do split into the two camps. That is what drew my attention to it.

Viscount Younger of Leckie: I absolutely hear what you say. I do not quite see it in such a black and white way. There is a spectrum. It is true that there are some rights holders who are broadly in favour, so I would just clarify that it is not that one lot are at one very far end of the spectrum and the other lot are at the other end. It is a spectrum, so it is not quite like that, but I come back to what I was saying. My job, really, is to focus on what I am due to do, which is to implement Hargreaves. 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. To that extent, that is why it has taken some time. That is also why we have gone for the five bundles, and that is really to assuage a number of parties so that we can have fuller debate. Of course these debates will take place. I am not sure that we have a date for them, but they will be coming up before long. It is fair to say that I do get some feedback from all sides to say that the one thing they cannot say is that we, as a Government, have not consulted. We have done a lot of consulting, a lot of listening, and there are some changes too, so to that extent I feel comfortable, rather than uncomfortable, about it.

Baroness Morris of Yardley: There is a difference between consulting and taking people with you, but I take your point and hear what you say. I wanted to explore a couple of issues that have been raised already, just two or three, that are possibly at the core of the lack of success in taking the sector with you. I genuinely struggle to understand them myself, so I would be grateful for some clarification. It is this private copying and the compensation. I have two issues, one that came from reading the correspondence you and the department sent in, which is that because the nature of the exception is different from some other European countries—the breadth of the exception—the same rules do not apply. I am no expert on European legislation, but I would have thought that European legislation did not say that fair compensation is due unless you have made the narrowest of all exceptions compared with other EU countries. Surely the principle in the European legislation is that if

you have made a change to the rights holders' rights, one has to consider whether compensation applies. That is the first question.

Viscount Younger of Leckie: I may refer to my colleagues, but just to say that, as you can imagine, we have done an awful lot of legal work on this and we feel very comfortable with the fact that we have gone ahead with very strong legal backing. The EU regulations say that it is fine to introduce personal copying provided there is no more than minimal harm, and we definitely think we are well within that. I have no real problem with that and the fact that it is a lot narrower than our European counterparts. Perhaps I can refer to Robin further on that particular question.

Robin Stout: The Minister has set it out fairly clearly. None of these exceptions is mandatory under the copyright directive. There is a degree of discretion with all of them. Within certain categories you can have a wide or narrow type of exception, and for exceptions relating to private copying the directive says that if it causes more than minimal harm, compensation should be provided. Across Europe, we see some very wide exceptions that do allow family sharing, for example, and they do provide compensation, usually via a levy. However, the compensation rule is a rule where member states have a degree of discretion and we always bear in mind this minimal-harm criterion. It might be worth noting that there is an exception for time-shifting of broadcasts, where again the UK does not provide exception on the basis that it causes minimal harm. This is where you would record a TV programme to watch later, which would be a copyright infringement were it not for an already existing exception. So the practice of providing compensation where it is needed and not providing it where the harm is minimal is one that is already quite well established.

Q8 Baroness Morris of Yardley: I have two more questions. It really does come down to whether or not there is harm, and that is the next question I wanted to look at. Just to

put on record as well, I think one of the letters we had from the department said that UK Music had not done any survey work on whether there was any harm, and I note that we have that in a later correspondence from it, so that evidence, from the research it has commissioned, now exists. However, there is something, Minister, in the letter that you sent following the debate in the House before Christmas. It says, "It will not harm copyright owners, who will continue to receive appropriate remuneration when their copies are sold". In my mind, what I cannot get quite clear is that there is no point changing the law unless it achieves something and what it is achieving is an extra right for consumers and a lesser right for rights holders, whether that is minimal or not—let us say it is really minimal—otherwise it is pointless changing the law, because we would all be wasting our time. There has to be a shift of rights or a shift of power between those two people, so do you expect the cost of CDs and DVDs to go up and now to say, "This is the compensation, because you are now allowed to copy it onto another platform"? If not, I cannot see where the answer to the question is. Where is their compensation coming from?

Viscount Younger of Leckie: It goes back to the whole narrowness of the private copying exception. Again, I should reiterate that we have a big education programme going out, bearing in mind that the law is unclear at the moment. Individuals will be allowed to buy whatever they buy and then make copies for themselves only. That is very, very narrow.

Baroness Morris of Yardley: It is a shift of power—the control of the reproduction right.

Viscount Younger of Leckie: You could argue that it is a small shift in power, but we do not see that as being significant at all for the rights holders. I should say, of course, that with the impact assessment that was produced we are quite clear that we are okay on that.

Q9 Baroness Morris of Yardley: That leads me to my last question, if I may. I am sorry to ask so many questions. There is this approach in the legislation, which I understand but I think it is a bit risky. I have forgotten what you call it, but it is technology-neutral. I do not

know whether you call it platform-neutral. There is a bizarre analogy about bookcases in your letter to the Committee following the debate. If you go down to a big auctioneer's you will find a bookcase that was made 200 years ago with no books in it, which will cost you an awful lot more than the bookcase cost in value 200 years ago. The only value of these new platforms is the content. They will not make a penny unless they have content. The bookcase can make an awful lot of money whether or not it has content, so I think that was, if I may say, an unwise analogy. It showed a lack of understanding that I know does not exist—I know you understand it—but it almost played down the effect that the whole of this cloud thing can have. If it was the old days—when I was a child it really was about photocopying it once or copying it from a record to a CD—I think the harm might be minimal, but it is not once you allow it to be copied into this technology. The whole of the history of the music industry and the film industry over the last 20 years has been of real difficulty in keeping up with that.

This is my last question, honestly. It ties into the minimal effect, because that is what you are allowing. Surely you are not going to pass a law that you are not going to be able to enforce, so how are you going to ensure that it does not go beyond the person and that they do not use the new technologies to make sure that it is spread far and wide, far beyond the family influence that Lord Scott talked about? I think you have really opened a door here by making private copying permissible with no compensation in the era of cloud locker services and whatever may be invented next year.

Viscount Younger of Leckie: I understand what you are saying, but I would still say that it is so narrow. It is the narrowest of all the countries that I know of.

Baroness Morris of Yardley: How are you going to ensure that it does not go beyond the narrow exception?

Viscount Younger of Leckie: The educational programme that we have is very robust and very broad. As I say, it focuses on all levels of society and ages, and I think that is a very important point to make.

The other thing that might be helpful to answer your question is that we have spoken a lot about levies. The other side of the coin is licences. We have looked very, very carefully at this. You can license everything. Every time you buy something you can license it. However, the issue there—and again there has been much discussion about this, as you can imagine—is that it is a very bureaucratic process and it would be quite stifling. It would have a chilling effect for many businesses if, for example, every time you wanted something you had to get a licence, even if it was very small. Again, it comes down to what we think is very reasonable, which is to go for this very narrow exception.

Q10 The Chairman: Thank you very much indeed. Minister, can I just turn now please to contract override? The regulations contain contract override provisions intended to ensure that users can rely on copyright exceptions despite contract terms to the contrary. Members who spoke in the debate in this House on 5 December last year raised concerns about the potential for legal conflict that this could bring, and your response did not deal with this concern explicitly. Could you please say how you see the impact of the contract override provisions on existing contract law and how you see the risk that conflict between the contract override provisions and existing contract law will result in significant numbers of legal proceedings?

Viscount Younger of Leckie: We have looked at this very carefully and we do not see there being an impact, although there will be an impact on established contract law to the extent that contract override provisions already exist. My point is that any new law that comes in overrides the contract, so that, to me, is very clear. Contract provisions are overridden by the law. In fact, it is fair to say that if any law came in and a contract was to override the

law, that would make a bit of a mockery of the law. The advice that we have received is very clear on that.

The Chairman: So you do not see any legal proceedings emanating from this.

Viscount Younger of Leckie: There may be legal proceedings, but we feel that we are on safe ground on that.

Q11 Lord Scott of Foscote: If a particular copyright holder was willing to allow use of his or her copyright material for a particular sum of money, there is a commercial negotiation going on, so the amount of the reward, of the money, which the copyright holder is hoping to get is going to depend upon the terms that are in the contract between him and the prospective user. As in all contracts, the terms of the contract will indicate the value of it to the person who is providing and the benefit to the person who is acquiring. If one of the terms of the contract is that there is to be no copying for private use, let us say, and on those terms the price is lower than it would otherwise be, or copying on private terms is to be permitted, in which case the price will be higher than in the former example it would be, what is the matter with that from a public interest, public policy point of view? One of the bedrocks of English law is the sanctity of contract and what the contract override provisions are providing is that you cannot make a contract to protect the copyright holder even if the price on which he is willing to allow whatever it is to go to the user is much lower than it would otherwise be.

Viscount Younger of Leckie: I understand what you are saying. That is quite a technical question and, if I may, I will pass to Charlotte to give you an answer.

Charlotte Heyes: Just to clarify, is it a question about retrospectivity around the validity of contracts once they are entered into, or is it about the payment for services under the terms of—

Lord Scott of Foscote: It is about the sanctity of contract. Why should parties not enter into a contract under which the price being charged for the use of the copyright material is lower than it would be were it not for the restriction on the use that can be made of the contract material when the acquirer has it?

Charlotte Heyes: I think it goes back to the principle of the exceptions, which is that there are some uses where the Government are saying you should be able to make use of the copyright work without permission from the rights holder. However, if you had to enter into a contract, that then overrides that exception in law. We do not want contract law to basically undo what we are trying to do in exceptions. However, what the exceptions do not do is prevent people from making contracts under other terms, so it would only be the element of the contract around the exception—

Lord Scott of Foscote: Forgive me, but that sounds to me like a little piece of government arrogance that goes far beyond what is legitimate. If the copyright holder is willing to allow his baby to be used by someone else for a very low price, that is up to him. If he is not prepared to let it be used for that price and wants much more for it, but on terms that allow reproduction by the other party to the contract, that is fine; that is between them. Why should it not be a matter for commercial negotiation between the copyright holder and the user in every case, and the terms that they choose to incorporate into their particular contract? What does that have to do with the Government?

Charlotte Heyes: This is again a matter of principle about why exceptions exist in law, and they have done in international law and in our law for a long time. International treaties and our law have said for some time that there should be some uses for which you do not have to enter into a negotiation with the rights holder to use the work in those specific, narrow exceptions.

Lord Scott of Foscote: You mean that people can insist on using it even if they pay nothing.

Charlotte Heyes: That is what the exceptions are about, yes.

Lord Scott of Foscote: That is a huge step. It is appropriation of the copyright holder's valuable item of property.

Q12 The Chairman: Could I just ask you please to go back to what you said? Did I hear you right in saying that you do not want contract law to interfere with what we are trying to do?

Charlotte Heyes: If contracts override the principle in law about the exceptions, which say that you can use the copyright work in this narrow and targeted way, if a contract goes over the top of it and says that you cannot do it, that is what we are trying to avoid in these regulations, because we want the exceptions to be effective in law and we feel that there are some instances where contracts may override the exceptions and make it hard for people to use them.

Baroness Morris of Yardley: Do you mean retrospective contracts or contracts from now on?

Charlotte Heyes: From now on. It will not be retrospective. We are not allowed to do that under the terms of the European legislation.

Lord Scott of Foscote: Suppose the copyright holder was to say, "I do not want to make a lot of money out of you. I can see that you want to use my invention"—whatever it is, because this could apply to patents just as much as to artistic copyright and so on—"but if you are going to take advantage of the right to reproduce as you may like, I am afraid you are going to have to pay me rather more for it", what is the matter with that from a public interest point of view?

Charlotte Heyes: Do you want me to carry on? You looked like you were going to say something.

Q13 The Chairman: While you are thinking about that, could I just ask the Minister to comment on what has just been said about contract law?

Viscount Younger of Leckie: Only that I feel very comfortable that this has been very strongly covered through the legal advice that we have received and I feel perfectly comfortable about the position that we have taken. I come back to the point that if you bring in a law you cannot, in general, have contracts that override the law. As Charlotte was saying, this is not retrospective. This is looking ahead, so you have the preparation in place so that everyone knows where we are. But surely, I say to myself, that must be the case in so many other areas when it comes to contract law.

Charlotte Heyes: Can I just add that there is a contract override provision already in our law to do with copyright exceptions? For example, the exception for photocopying by schools cannot be overridden by contract, so this is not us taking an unprecedented step. We are continuing along the lines that exist in law already, and it is not undoing all contract law; it is simply saying that where a contract exists going forward it says that you cannot do X, which is then going to be allowed by the copyright exception that we intend to introduce, that part of the contract would be unenforceable going forward. The rest of the contract would remain in force, including any fees that have been agreed as payable as part of the contract.

Lord Scott of Foscote: Would it be also unenforceable to say, "If you do X, you must pay me more"?

Robin Stout: The example I was going to refer to was one of the measures here, which is built on an existing measure, which is about enabling libraries, archives and museums to copy things for preservation purposes. That is an example that we have used when we have

spoken to a lot of libraries and archives that currently rely on this provision, and they have pointed out that this is something where, if you do go to the rights holder, very often they will say, "Yes, you can do this and you can do it for free". It is about preserving something in a collection for future generations. However, to get to that point you need to work out first whether it is in copyright and then work out who the copyright owner is. They might not be traceable and there might also be a contract or licence attached to that work that says something contradictory to the provisions. This is really, in very specifically defined cases, about saying that you do not need to go through all those steps. You can just go ahead and do something, such as preserve a book in a British library, and you do not have to go through all these steps because the law recognises that it is a reasonable thing to do.

The Chairman: Are there any other questions? Minister, thank you very much indeed for coming with your advisers. We will send the transcript in due course. Thank you very much.

Viscount Younger of Leckie: Thank you very much indeed.