

Briefing on the Telecoms Package (Paquet Telecom) - DRAFT

Written by Monica Horten

University of Westminster, Communications and Media Research Institute (CAMRI)

PhD research: The Political Battle for Online Content in the European Union

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The 'Telecoms Package' and the copyright amendments – a European legal framework to stop downloading, and monitor the Internet

Abstract

This paper considers how imminent changes to European telecommunications law will permit the monitoring and blocking of websites and peer-to-peer exchanges by ISPs, in a way that is currently not legally possible. These legal changes will also permit ISPs to sanction users by suspending or terminating Internet access. And they are essential in order for the French 'riposte graduee' or '3 strikes' copyright enforcement measures to be implemented.

The changes are a series of hidden amendments related to copyright, and contained in the so-called 'Telecoms package'. This paper argues that these amendments will effectively erode the ISP's legal status of 'mere conduit', which currently protects individual rights and liberties on the Internet. It argues that the 'mere conduit' status should be preserved, and the copyright amendments rejected.

The proposed copyright amendments will result in the loss of individual freedom and privacy on the Internet – in breach of fundamental principles of human rights law in Europe. Ultimately, they could open the door to wider political or commercial censorship, and this is the real danger of permitting them to get into law. The risk is that this will happen without proper legislative scrutiny or public debate. The European Parliament committees responsible for the Telecoms package vote on July 7th and the Parliament as a whole will vote on September 2nd.

The ‘Telecoms Package’ and the copyright amendments – a European legal framework to monitor the Internet and stop free downloading

Overview

The so-called ‘Telecoms Package’ (Paquet Telecom) is a review of European telecoms law – the law that governs how Internet service providers and telephone companies can operate in Europe. It is currently going through the committee stages of the European Parliament and important votes on it will be taken in July.

Telecoms law should have nothing to do with copyright, but entertainment industry lobbying has resulted in the inclusion of a number of important legal changes that relate to copyright. The changes are intended to bring an end to free downloading and the use of copyrighted material on sites such as MySpace and YouTube. However, the consequence of these legal changes heralds an even more sinister prospect of censorship of the Internet by corporate organisations and/or the State.

The bottom line is that fundamental changes to the telecoms regulations are needed before European governments can bring in "3 strikes" copyright enforcement rules similar to the “riposte graduee” being implemented in France - these changes are hidden in the detail of the Telecoms Package. Among over 200 amendments, is a core group of changes which effectively incorporate copyright enforcement within the rules for European telecoms operators and ISPs, and mandate regulators to oversee that they do it. Copyright enforcement means, in real terms, that ISPs will be asked to monitor, block and censor content to support rights-holders, and without any right of defence for the user or creator.

ISP ‘mere conduit’ status will be lost

ISPs will lose their legal status as ‘mere conduits’ which was enshrined in European law in the E-commerce directive to protect individual freedom. ‘Mere conduit’ means they are only responsible for carrying electronic data from A to B, but not for the content. Thus, they have to date been able to argue successfully against enforcing copyright, and regulators were obliged to protect that legal position.

The copyright amendments to the telecoms package, if passed, will mean that ISPs have a legal obligation to monitor copyrighted content and users’ activity. Monitoring could involve blocking users who are using peer-to-peer (P2P) file-sharing, or it could mean blocking specific websites or web pages. The criteria for blocking would be related to copyright infringements, as presented to the ISP by the rights-holder companies. This represents a key change to the framework law which governs the ISP business. There is no provision for legal oversight to determine what is legal or illegal (i.e. infringing) content, or what happens when a dispute arises. It is private censorship.

Regulation by stealth

There is evidence that the copyright amendments have been lobbied for by the US and French film industries, to support their copyright. They have been calling on the EU to get rid of the ‘mere conduit’ status, on the grounds that that is an obstacle to copyright enforcement. They also make it very clear in their written communications with the Commission, that ‘copyright enforcement’ means they will pursue ‘on a mass scale’¹, Internet users who download content, and they want access to personal data in order to do this.

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The ‘Telecoms package’ copyright amendments will achieve the rights-holders objectives by stealth, without permitting proper Parliamentary scrutiny or public debate on a fundamental change to the Internet. They have been included in the Committee stages of the European Parliamentary process, and although the texts are publicly available, they are long and difficult to wade through and interpret. Many of the changes are so subtle - just a one-word change - that only a legal expert knows what they are intended to mean. But most importantly, because they are buried within a set of laws about telecommunications networks, discussion about copyright enforcement and the Internet becomes a secondary discussion and does not get the attention it needs.

Why we should protect ‘mere conduit’

The political issue here is that the ‘mere conduit’ status of the ISP was put in place to protect individual privacy and freedom. Once this change to telecoms framework law is in place, ‘mere conduit’ is effectively eroded, and this apparently small legal change will give corporations and governments control over the Internet which they have not previously been able to get. If it is legally possible for Internet content to be monitored and blocked to support copyright infringement, what is to stop it being used for other forms of censorship, including political purposes?

Under the current legal framework, we are protected from such censorship by the ‘mere conduit’ status, combined with data protection law. It is therefore vital to retain that ‘mere conduit’ status, in order to protect citizenship rights to communicate freely using the Internet.

And if we are going to make any changes at all to the ISP status, it must be properly and publicly debated and go through the full legislative scrutiny in a transparent manner, so that all stakeholders, including civil society, can input to it.

Why this attempt to change the ISP legal status?

Until now, the ISPs in Europe have been able to ignore content industry requests to chase and sanction their customers who allegedly infringe copyright because they could always point to the E-commerce directive articles 12 and 14. They could argue that they enjoy ‘mere conduit’ status (technical neutrality), and that they have no legal liability for content, and (in the case of hosting companies and user-generated content sites) that they have no actual knowledge of the content. And they could argue that governments could not ask them to monitor content, under Article 15 of the E-commerce directive.

ISPs could also argue that data protection law prevents them from giving out users’ personal data, and similarly under data retention law. They explicitly had, under the law, no responsibility for content. They were conveyors of electronic signals only.

This esoteric legal argument has importantly protected the rights and freedoms of millions of European Internet users. It has meant that the Internet was an environment in which people were free to do what they wanted, try out new things and experiment. The Information Society was able to grow, with consequent growth in jobs and employment, and cultural diversity.

“Mere conduit” can be thought of in the sense of a road system – the ISPs control the roads – manage the signals, signs, traffic flows, speeds, etc – but they don’t care about the vehicles or what’s inside them. People are free to drive cars wherever they wish. The Telecoms Package amendments – which typically take the form of a subtle alteration in the wording of a clause –

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will effectively reverse that status. ISPs will be forced to care what colour cars are on the roads, to stop cars at random and see whether there's any copyrighted content inside.

Nor will they be able to claim 'no actual knowledge' of content. They will be forced to give away personal data, and contractually obliged to tell their customers that content is being restricted.

But the ISPs 'mere conduit' status has annoyed the rights-holders – the entertainment and music industries - who have been campaigning to get rid of it for at least two years. Their campaign has been in the public domain, but strangely gone unnoticed.

If the copyright amendments are passed, the ISPs ability to argue against doing the bidding of the rights-holders, is weakened, and indeed, it is removed. The "neutral" carrier status of the ISPs, legally known as "mere conduit"ⁱⁱ will be effectively over-ridden, and the entire telecoms framework law altered to support copyright enforcement.

Taken together with a weakening of privacy laws, this would result in a legal infrastructure which supports censorship by the rights-holder industries, in direct contraction to European Human Rights Law (ECHRⁱⁱⁱ).

Further, the current legal framework^{iv} prevents governments from asking ISPs to monitor traffic and protects their status as carriers or "mere conduits". This provision in EU law which prevents governments from asking ISPs to monitor traffic, will also effectively be over-ridden. This provision is in the E-commerce directive^v, which is why governments are having to co-erce the content and ISP industries into 'voluntary' agreements. Until and unless, the framework law is altered at European level, they cannot mandate monitoring of the sort that is proposed under the '3 strikes' measures. If the copyright amendments in the Telecom Package are passed, governments will have the legal framework they need to mandate such measures.

This is why the French government had to get ISPs to sign an agreement, and why the UK government's position – asking for a voluntary agreement otherwise they will legislate in spring 2009 - looks rather hollow. The UK government is simply sitting quiet until the European legal mechanisms are in place, whereas the French are pressing ahead.

In other words, the law which has protected the ISPs, has also protected us. The copyright amendments which will alter the legal status of the ISPs will also cause citizens to lose fundamental rights and freedoms to access and distribute data, and to have our privacy protected.

How the copyright amendments shift the emphasis from 'mere conduit'

An important amendment that sets up this shift emphasis are the addition of Point 19, in Annexe 1 of the Authorisation directive, which will create a statutory obligation for ISPs to enforce copyright. Other amendments will create an obligation for regulators to oversee ISP enforcement of copyright and to restrict access to content^{vi}. When put together, it becomes clear how the overall framework of law for telecoms operators and ISPs will shift away from 'mere conduit' and impose a liability for content on ISPs – how can they determine what content meets the rights-holders' criteria for restricting access, and what doesn't, without having a means of knowing what content is travelling across their networks?

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Further copyright amendments serve to restrict the user's freedom to access and distribute Internet content. ISPs will be told to include contract terms which will make it legal for them to terminate services on the basis of allegations of copyright infringement. They will also be told to restrict the scope of service provision, with the implication that content may be monitored or blocked, and permit the right-holder companies to gain access to personal data – and specifically, amend the data retention provisions to permit access by rights-holders – something which was rejected in the Data Retention Directive^{vii}.

In addition, there is an amendment, understood to have come from the Information Society Commissioner Viviane Reding herself, which specifies that ISPs must incorporate into their contract with end-users an undertaking to inform users regularly about copyright infringing material (Article 1 (12) point 6 of the new directive^{viii}).

Why the entertainment industries wanted the copyright amendments

There is evidence that the copyright amendments have been lobbied for by the US and French film industries, to support their copyright. This is validated by their submissions to the Commission's Creative Content Online consultation and in documents sent to MEPs.

Since 2006, the Motion Picture Association and Walt Disney were calling on the European Commission to amend what they called the 'outdated' nature of the telecoms regulatory framework. The MPA asked the EU to "seize the opportunity of the Telecoms Package review for setting the ground rules for stakeholder co-operation to be both encouraged and facilitated at the EU level". Walt Disney complained of the 'impediments to co-operation' that were raised by the ISPs. They also complained that they were limited to going through the courts and were limited in the possibility for civil action. They were concerned with the question of how to enable ISPs 'to address abuses' at the same time as defending Walt Disney's own interests, through 'civil and criminal means'.

The International Federation of Phonographic Industries (IFPI) – representing the music industry, made it clear what they intend by 'addressing abuses through civil means'. Any solution 'which only allows for a limited number of cases to be addressed each month' (ie the courts) 'will not have the necessary impact' they said. They called for the EU to implement measures which will address 'mass-scale piracy' in a way which is 'not overly burdensome'^{ix}.

And the SACD, in a letter to MEPS in March 2008, stated that 'the ISPs hide behind the significant exemptions from liability in the E-commerce directive and the strong protection of personal data in privacy legislation' and this is the reason why "they are abstaining from any action in the fight against piracy on electronic networks". The SACD use this as the rationale for an amendment to the Telecoms Package which would oblige ISPs to co-operate in the protection of copyright.

What is the 'Telecoms Package' ?

The "Telecoms Package" comprises 5 new directives, but for the copyright issue there are two which are important. Amendments to the telecoms framework law are contained in one bundle or dossier, entitled *The Electronic communications: common regulatory framework for networks and services, access, interconnection and authorisation* (Directives 2002/19/EC to 2002/21/EC]). This bundle amends three original directives which together set out the ground rules under which telecoms companies and ISPs may operate. These directives cover the overall framework for telecoms services, the rules for business issues such as access, interconnection and radio spectrum, and the rights and obligations towards society and their customers, of telecoms service providers.

An important point that is stated in the framework text, is that telcos and ISPs are conveyors of electronic signals. Content services are not intended to be covered by these directives. The Framework Directive^x encompasses conveyance of signals, facilities, co-location, rights of way, the regulator's role, rights of appeal against regulatory decisions, mobile masts, spectrum, and the European internal market for these services. Then we have the Access and Interconnection Directive, which sets out how telecoms operators deal with each other and provide access to users; and the Authorisation Directive^{xi} which sets out specific terms under which they may operate, and what regulators may ask of them.

The lead committee dealing with the Framework directive review is the Trade and Industry (ITRE) committee. The rapporteur's report is from Catherine Trautmann. The Culture committee has also produced an Opinion report, by the MEP Ignasi Guardans Cambo (Guardans).

These directives are complemented by the E-commerce directive, which is not amended here. But the concern is that the copyright amendments as outlined above, will fundamentally alter the telecoms framework law, such that they over-ride the protection of 'carrier status' in the Ecommerce directive by default.

Amendments to the law governing user's rights on telecoms services are covered under the new directive called the *Electronic communications: universal service, users' rights relating to networks and services, processing of personal data, protection of privacy, consumer protection cooperation* (Directives 2002/22/EC, 2002/58/EC and Regulation (EC) No 2006/2004). This directive amends two existing directives which set the rules for what users can expect from ISPs and telecoms service providers. The Universal Service directive^{xii} specifies the kinds of services that user's have a right to access, and how those services will be provided to them. The Electronic Privacy directive^{xiii} deals with personal data and how it will be treated on electronic networks.

The lead committee dealing with the directives that concern users' rights is the Internal Market committee (IMCO). The rapporteur's report is written by British MEP Malcolm Harbour. The Culture committee (CULT) has also produced an Opinion report, by the MEP Manolis Mavrommatis.

Liability for determining 'lawful' content

Whilst the Telecoms Package ushers in this significant change to the Internet, and grants the right to determine what we can and can't see to major corporations, it does not provide for any form of oversight on the process of content blocking or censoring. There is no provision for an authority who would establish the rules.

Determining what is 'lawful' and 'unlawful' online content, in the context of the 2001 Copyright Directive, is not a simple process. Thus, if a film studio alleges that you are filesharing copyrighted content, your ISP has to go on their word that you are indeed file sharing and that the content is copyrighted. Or the ISP has to develop its own criteria. And there is nowhere for the user to go, in case of dispute. Thus, the lack of regulatory oversight only serves further to impose a liability for content onto the ISPs, and further erode the mere conduit principle.

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And in this context, there are a number of questions to be answered. Top of the list is 'who decides what content is to be blocked?'. Who decides if to block by type of traffic (protocol), by URL, domain name, or IP address? Who arbitrates the interpretation of the 2001 Copyright Directive to determine what is and is not fair dealing under the exceptions? And in which countries does that interpretation apply (because in spite of harmonisation, it will be different for each member state)? Do we have a single market in content blocking, or do we remain a divided Europe for this purpose?

It is clear that these organisations representing the entertainment and music industries, have lobbied for the removal of the 'mere conduit' status, and along with it, the right to monitor users and get access to personal data.

The copyright amendments and the ISP status – in detail

College of commissioners amendments: Two amendments were incorporated by the College of Commissioners, (and according to an interview with Europolitique, they were put there by the Commissioner, Viviane Reding herself^{xiv}) Annexe 1, point 19 of the Authorisation directive, which sets the ground rules for ISPs to operate in Europe, mandates ISPs to comply with the IPR Enforcement Directive.

This amendment, when connected with two amendments to the Framework Directive is the one which creates the most fundamental change in the ISP status. As above, the Authorisation Directive sets the rules for the ISP and telcoms operator business. Annexe 1 is a list of conditions which regulators may attach – is what Member States may oblige ISPs to do. Point 19 states compliance with the Copyright Directive and the IPR Enforcement Directive. This means that governments may impose a special condition on ISPs to enforce copyright infringement. In practice, we know that enforcing copyright infringement means monitoring of user traffic, and that goes against the E-commerce directive. So either we have two conflicting pieces of legislation, or one over-rides the other. We make the assumption that it is intended to over-ride the E-commerce directive.

The other College of Commissioners amendment is Article 1 (12) point 6 of the new directive^{xv} which specifies that ISPs must incorporate into their contract with end-users an undertaking to inform users regularly about copyright infringing material. This Article is the focus of attention for the ISPs and telecom operators, but their attention seems to be focussed on making it less vague. It can be interpreted in such a way that they have to inform about every infringing item on the web – an impossibility – and leading to endless liability claims against them. However, it should not be there at all. It is a supporting Article, putting in place a key part of the overall framework for copyright censorship.

The Framework amendments: There are two crucial amendments, originally proposed by the Guardans (Culture committee) report on the new Framework directive^{xvi} and now being incorporated into the text for the new directive:

- a requirement on the national regulator to protect copyright. This is a fundamental move, which along with Annexe 1, Point 19, seems to sew up the telecoms framework to enforce copyright – regulators, operators and ISPs (Culture committee - Guardans - Opinion, Amendment 19).

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- reinforces the framework, putting it into law that ISPs and telecom operators should work with content providers, using the euphemism “co-operate”. This amendment was written by the French collecting society, the SACD^{xvii} (Culture committee - Guardans - Opinion Amendment 20).

In practice, “co-operation” means that the ISPs will monitor user traffic, block certain traffic flows and content on behalf of rights-holders, and they are being asked to sanction their own customers on behalf of rights-holders.

And, following further secret discussions in the European Parliament lobbies, it appears that the Guardans amendments (19 and 20) have been added to the Internal Market – report as a new amendment to Article 33 of the Universal Access directive. If the Internal Market committee passes them, they stand to get into law.

The users rights amendments: Crucial amendments which cement the altered legal framework for telecoms operators and ISPs were originally proposed in the Mavrommatis Opinion (Culture committee), and incorporated into the lead committee (Internal Market) report for the 7th July vote. If they are passed in this report, they stand to get into law. However it is understood that back-room negotiations are underway and it is uncertain where they will lead.

Restricting access and blocking content: the service may be restricted to “lawful” services and may be blocked if “unlawful”. By implication, this means that monitoring may be put in place – how else will an ISP distinguish between different types of services? But it also begs the question, who will determine what is “lawful” and what is “unlawful”? There is no provision for regulatory oversight or intermediation in cases where there is a dispute – indeed, there is no provision for users to dispute filtering or blocking of their content or their access. There does also appear to be an implication that ISPs and web host companies will have to have actual knowledge of the content they are carrying or hosting – in direct contraction of the E-commerce directive. (Culture committee - Mavrommatis – opinion, Amendments 1, 10 and 11). *The same language has appeared in a new and secretly negotiated compromise amendment for a recital in the Internal market committee – Harbour - report.)*

Personal data: ISPs may be asked to divulge personal data of their customers to rights-holders. It is a partial implementation of the ECJ judgement in the case of Promusicae vs Telefonica. The interpretation that is intended here is disputed among legal experts. The Promusicae judgement may also be interpreted to mean that ISPs may not be obliged to divulge personal data. (Culture committee - Mavrommatis – opinion, Amendment 4)

Data retention: two amendments have the effect of permitting data retention in support of rights-holders – something that was rejected in the Data Retention directive.^{xviii} Amendment 11 was inserted by the SACD.^{xix} (Culture committee - Mavrommatis – opinion, Amendments 14 and 15)

User contract terms: new terms and conditions that ISPs will be mandated to place in users’ contracts. They stipulate what the ISPs will do in a case where an infringement is committed and that ISPs must inform users of limitations to the service. This may imply that content will be restricted or that the types of protocol the user may employ are restricted, eg Bit Torrent. (Culture committee - Mavrommatis – opinion, Amendments 7 and 8)

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To discuss the issues raised in this paper, please contact the author. Monica Horten is carrying out PhD research in European communications policy at the University of Westminster. Tel: +44 (0) 1628 672155 Website: www.iptegrity.com

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This document has been informed by written communications to the European Commission, Consultation for Content Online 2006, and Consultation for Creative Content Online 2008, including those from the following organisations: Motion Picture Association, IFPI, The Walt Disney Company, SACD, Eurocinema, GESAC, SACEM, FERA, PPL-VPL, MCPS-PRS, EuroSPA, ETNO, BT, France Telecom, AFA, 3Group, Intel, Edima, Yahoo, Google, GSMe, BEUC.

All of the above documents are available on the European Commission website.

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ⁱ IFPI submission to the DG Information Society Consultation for Creative Content Online 2008

ⁱⁱ Directive 2000/31/EC, Article 12

ⁱⁱⁱ European Convention on Human Rights, Article 8 Privacy, Article 10 Right to access and distribute information

^{iv} E-commerce Directive 2000/31/EC Article 12

^v Directive 2000/31/EC, Article 15 . See also Recital 40.

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^{vi} Two amendments (12 and 13) in the report from MEP Guardans which amend the Framework directive and the proposed re-write of these amendments in the IMCO committee report.

^{vii} Directive 2006/24/EC

^{viii} COM (2007) 0698-en

^{ix} MPA, Walt Disney and IFPI submissions to the DG Information Society Consultation for Content Online 2006, and the Consultation for Creative Content Online 2008.

^x Directive 2002/21/EC

^{xi} Directive 2002/20/EC

^{xii} Directive 2002/22/EC

^{xiii} Directive 2002/58/EC

^{xiv} Europolitique, 14 Novembre 2007, Télécommunications :Le nouveau « paquet télécoms » suscite de très vives réactions

^{xv} COM (2007) 0698-en

^{xvi} COM (2007) 0697

^{xvii} SACD, Mars 2008, EXAMEN DE LA REVISION DU « PAQUET TELECOM » PAR LE PARLEMENT EUROPEEN

^{xviii} *ibid* iii

^{xix} *ibid* xi