

## The Telecoms Package and '3 strikes' – voluntary *cooperation* to restrict downloads

### Abstract

How far does the Telecoms Package set out a 3 strikes or graduated response regime? The purpose of this paper is to examine the text that was voted on 7<sup>th</sup> July, in the context of copyright enforcement measures.

The E-commerce directive says that EU governments may not *obligate* ISPs to monitor content on their networks, but they may ask for a *voluntary agreement*. This is the starting point for the Telecoms Package amendments.

There is a request for a voluntary agreement implicit in the text that asks regulators to *promote cooperation*. The request is supported by obligations for end-user contracts and regulatory oversight, making it very difficult for ISPs to slither out of doing it. There is also a limitation on the content that users may access – and arching over the all these changes is a framing clause that ISPs have to comply with the law on copyright and copyright enforcement.

The nature of the voluntary agreement is encoded by the word *cooperation*, which is defined by the rights-holder companies themselves in terms that parallel graduated response. The text says that regulators may oblige ISPs to send users information which '*may include warnings regarding copyright infringement*'. And the regulator will pay for the ISP '*to send information by post*. Strikes one and two, of graduated response.

The word *lawful* is utilised to limit the content users can access. User's contracts are to say that ISPs can send them email warnings, and to limit the ISPs liability for *degradation* and *restriction of service* – the slowing down of peer-to-peer connections and blocking website access.

So it can be argued that we do have a text that obliges ISPs to work with rights-holders for the purposes of enforcing copyright, and we have a text which limits users rights to access and distribute content – a limitation which is defined in terms of its copyright status.

The problem for policy-makers is whether to let it happen. The question to ask is, what is the risk that Europe could end up with a filtered Internet, with government warning messages winging their way through cyberspace to all our inboxes?

*Critical amendments - See IMCO Amendment 9, 11, and 112. ITRE Compromise Amendment 6, Article 1, point 8, point e. (See also: IMCO Amendments: 62 and 67, 75 and 76, and 8, and Annexe 1 Point 19 of the Authorisation Directive).*

## The Telecoms Package and ‘3 strikes’ – voluntary *cooperation* to restrict downloads

### Overview

At the risk of mixing my sporting metaphors, the Telecoms Package does seem to have the telco industry looking up at the EU umpire with McEnroe-like incredulity<sup>i</sup>. “3 strikes - you cannot be serious!” they cry, as they spot the amendments which will impose on them contractual obligations in respect of copyright, overseen by national regulators.

On the other side of the net are the rights-holders, who openly sought legal changes in the Telecoms Package<sup>ii</sup>, and yet now, seem to be crying off – it’s all meaningless. Huh? If it’s meaningless, why put it there in the first place?

In my previous paper *The ‘Telecoms Package’ and the copyright amendments – a European legal framework to stop downloading, and monitor the Internet*, I argued that the ‘mere conduit’ status of the ISPs is in danger of being eroded by a series of amendments hidden in the Telecoms Package. I suggested that the E-commerce directive says that EU governments may not *ask* ISPs to monitor content on their networks. That is, they make it *obligatory*. But they may ask for a *voluntary agreement*<sup>iii</sup>.

The purpose of this paper is to look at the actual text of the Telecoms Package that was voted through on July 7<sup>th</sup> in the IMCO and ITRE committees<sup>iv</sup> and examine the copyright amendments. I am specifically investigating the telecoms package in respect of the ‘3 strikes’ proposals – or graduated response (riposte graduée) to give it the formal name – and I am interested in the use of language to set it up.

The starting point is to consider the *voluntary agreement*. The concept of cooperation in the IMCO report Recital 12c and Article 33 2a, would seem to imply a voluntary agreement, and it is supported by a range of obligations for end-user contracts and regulatory oversight, that make it very difficult to slither out of doing it. It would seem there is also a limitation on the content that users may access implicit in the text ‘lawful’ and ‘unlawful’ – words which make their first appearance here, as far as telecommunications law and content is concerned.

It is arguable that without overtly specifying a graduated response regime, the Telecoms Package sets up the raw framework, including the principle that ISPs should enforce copyright. It also establishes the principle that user’s traffic may be degraded or restricted, paving the way for filtering of Internet traffic:

-ISPs may be obligated by the regulator to enforce copyright (Annexe 1, Point 19 of the Authorisation Directive)

-Regulators are obligated to ‘promote’ ISP ‘co-operation’ with rights-holders (Article 33, 2a), where the definition of ‘promote’ and ‘co-operation’ is left open but the use of the word in the context of online content would imply 3-strikes measures

-ISPs are obligated to pass on public interest messages, where ‘public interest’ is defined as ‘warnings regarding copyright infringement’ (Amendment 9, Recital 12c) and where there may be ‘postal costs’ incurred, reflecting strikes one and two of graduated response

## Briefing on the Telecoms Package and copyright enforcement

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

21 July 2008

-ISPs are obligated to alter their contracts with users in respect of two matters: passing on messages from rights-holders and national regulators (Article 20, 2,2; Article 21 4a; Recital 12c ); and ‘restriction’ and ‘degradation’ of service (Article 20, point 2, 1b, Recital 14). The text on degradation and restriction of service is written in such a way that leaves it open for ISPs to filter traffic and to pass on messages from rights-holders. In other words they can filter, because they will be covered by clauses in their contracts to the effect that users may experience restrictions on their service.

- There are restrictions on the content which users are permitted to access via the Internet - lawful content only, which appears to be a brand new concept in EU telecommunications law .

It is not the final step, but it is a very necessary first step. It forces open the door, allowing for further legislation, perhaps with the Content Online Recommendation or within the context of the Member States’ own legal framework. It begs the question: why is the British government insisting the agreement is ‘voluntary’ ? Why does the French Presidency push so hard to get the Telecoms Package through by November? Interestingly, the following topic was up for discussion at an informal culture council meeting on 21-22 September: *measures suggested by the Commission to protect copyright and related rights, particularly with the aim of making ISPs responsible for informing internet users of rules in this area*<sup>v</sup>.

The tactic of using the European Parliament committee process to get the legislation amended makes it very difficult for policy-makers, who do not have the proper opportunity to scrutinise the measures properly. One thing that became obvious was that the MEPs who had to vote on these amendments were confused, and did not understand what they were voting on. That is hardly surprising – telecommunications law is difficult enough for the uninitiated, let alone when there are a hundred and fifty-two amendments to be voted on<sup>vi</sup>, and some related to a totally different area of law, such as copyright.

The problem for policy-makers is whether to let it happen, opening up the possibility that Europe could very soon have a filtered Internet, with a range of government ‘information messages’ winging their way through cyberspace to all our inboxes.

### **Graduated response**

To determine whether graduated response (riposte graduee) is intended by the amendments in the Telecoms Package, we need first to define what it is. It is a mechanism intended to deal with people who download content on the Internet and who in doing so, allegedly infringe copyright. The first concrete proposals are in France, and the law is in draft form at the time of writing. Users are alleged to have downloaded copyrighted content may be sent warning emails (strike one). If they do not change their behaviour, they will be sent a letter by recorded post (strike 2). If they still do not stop, their Internet access will be terminated for up to one year, and they will be put on a blacklist, so that they cannot sign up with another Internet provider during that time (strike 3).

Many issues have proved to be problematic, including who will pay for it – the ISPs, the French government, the tax payer or the rights-holders. It is not clear how users can appeal against the strikes. As many people use alternative email suppliers, they will hear nothing until strike 2, when they get the letter. There are a range of possible unintended consequences, for example, entire households could be cut off the Internet.

Monica Horten [www.iptegrity.com](http://www.iptegrity.com) 01628 672155

This work is licensed under a Creative Commons Attribution Non-commercial-Share Alike 2.5 UK:England and Wales License. <http://creativecommons.org/licenses/by-nc-sa/2.0/uk/> 3

Some form of monitoring or ‘filtering’ of Internet users’ traffic has also been proposed to sit alongside graduated response. At one level, monitoring is necessary to identify the content that is allegedly infringing. It is also needed to fulfil rights-holders demands for people using peer-to-peer file sharing to be stopped as they are downloading. The only way the ISP can do that, is to monitor individual users’ traffic, and slow down or block users who try to access peer-to-peer systems.

### **Copyright hooks**

Insiders have confirmed that the content industries lobbied the Commission to get copyright enforcement measures into the Telecoms Package. The responsible services within DG Information Society did not include it. But, as I discussed in my previous paper, the College of Commissioners placed two copyright amendments into the package - these are dubbed the ‘*copyright hooks*’. Annexe 1, Point 19 of the Authorisation Directive, may be interpreted either as a political signal that authors’ rights are to be protected online, or as a framing clause permitting regulators to ask ISPs to enforce copyright. Either way, it was never amended, and so it has been overlooked – and remains in the law.

Article 20, point 6 which mandated ISPs to include notices on copyright infringement in their contracts, has been amended, and been incorporated elsewhere in Article 20.

### **Cooperation and graduated response**

“*Co-operation*” (see IMCO report, Amendments 9 and 112, Recital 12c and Article 33 (2a)) has acquired a meaning in the context of copyright enforcement which is almost the opposite of its usual meaning. The Motion Picture Association, representing Hollywood studios, wrote to the European Commission, defining ‘*cooperation*’ as “*proportionate and effective means of redress*” and that includes encouragement of “*the take-up of technological tools discouraging and/or preventing illegal activities*”<sup>vii</sup>.

The European Film Companies Alliance (EFCA) says the French MoU ‘*is an example how cooperation between right owners and ISPs can be achieved. The deal foresees the implementation of a “graduated response” to illegal file-sharing activities: Internet users downloading illegal music or film files risk losing web access should they not answer positively to initial warnings. Finally, filtering measures are another way to prevent online copyright infringement...*’<sup>viii</sup>

IFPI’s written communications to the European Commission have been unequivocal in their definition: “*IFPI has been asking for the cooperation of Internet Service Providers ...to help control the unauthorised offer and dissemination of protected content online*”. It continues: “*(ISPs) are usually best placed to act promptly and effectively against infringements over their networks or services. Yet, in Europe, access providers have been unwilling so far to provide any meaningful cooperation*” ... “*One of the most effective steps an ISP could take is to warn infringing subscribers and thereafter to suspend and, eventually, terminate services to subscribers who are repeatedly abusing the service to infringe copyright. Such termination is feasible and not technically burdensome*”.<sup>ix</sup>

In this text, we have the words *warn*, *suspend* and *terminate* – the three strikes of graduated response. Proposed as an option which the EU should consider, by the organisation which represents the recorded music industry.

A similar definition has previously been proposed to the Parliament, and was rejected. This was an amendment to the Bono report<sup>x</sup>, which defined **cooperation** as : “ *the use of filtering technologies to prevent their networks being used to infringe intellectual property, the removal from the networks or the blocking of content that infringes intellectual property, and the enforcement of their contractual terms and conditions, which permit them to suspend or terminate their contracts with those subscribers who repeatedly or on a wide scale infringe intellectual property*”<sup>xi</sup> This text was rejected, and an amendment to the Bono report opposing these concepts, was passed. One must therefore question why MEPs want to now pass it into law.

The text of the revised Telecoms Package states “national regulatory authorities ... shall ... promote *cooperation* between undertakings providing electronic communications networks ...and the sectors interested in the protection and promotion of lawful content ...” (IMCO, Article 33 2a) And IMCO Recital 12c mentions a *cooperation procedure*.

It is entirely plausible that MEPs felt that they were voting for something entirely reasonable, when seen out of context. However, when seen in the context of the available written material on copyright enforcement, we must ask how should we then consider the Telecoms Package which mandates national regulators to promote this “co-operation”? Does it, or does it not mean graduated response measures supported by filtering and blocking of internet content? <sup>xii</sup>

### **Lawful vs unlawful**

The current Framework directive <sup>xiii</sup> does not contain this word *lawful*. Nor does *lawful* occur in the Universal Access directive<sup>xiv</sup>. In the e-Privacy directive<sup>xv</sup> it occurs in the context of ‘lawful business practice’ and ‘lawful interception’, and the ‘period in which a bill may be lawfully challenged’, but not in the context of content. The word ‘lawful’ in the context of content and EU telecommunications law, first appears in the text drafted by the European Commission of the amended Universal Access and e-privacy directives (Telecoms package) . <sup>xvi</sup> In other words, in the law governing all telecommunications network and the carriage of electronic data, we have an important new concept. It is interesting that this wording was never questioned.

As discussed in my previous paper, there is a gap in definition for the word “lawful” in this context. The text says that users will be restricted to lawful content, and in the context of the wording "lawful" could be interpreted as meaning copyrighted and licenced, and possibly to the exclusion of all other content. for example, the text links the word “unlawful” linked to “copyright infringement” in one sentence. (IMCO Amendment 76, Article 21) ‘*to engage in unlawful activities or to disseminate harmful content, particularly where it may prejudice respect for the rights and freedoms of others, including infringement of copyright..*’ This raises a concern, because there is plenty of other lawful content on the Internet, other than content put out by rights-holders. The question arises whether the intent is to restrict user’s access to content.



### **Cooperation supported by contract - the linked amendments**

The pivotal clause is IMCO Amendment 112, Article 33 2a, which states that national regulatory authorities shall ‘promote’ co-operation. *Promote* is used because, as per the E-commerce directive, the EU cannot mandate any filtering or monitoring of users – it has to be a voluntary agreement. This clause is linked into the Framework directive via Article 8, paragraph 4, point g (compromise amendment 6), establishing such co-operation within the overall telecommunications regulatory framework and user service obligations.

Article 33 (2a) is linked to the requirements for information on copyright infringement to go into end-user contracts, via IMCO Amendment 67, Article 20, 2,2<sup>xvii</sup> and to an obligation to send end-users messages in IMCO Amendment 75, Article 21, where it is specified that users must be told they may be sent warning messages about copyright infringement. These two Articles are supported by Amendment 9 Recital 12c<sup>xviii</sup>. It says that *warnings regarding copyright infringement* could be sent out either *as a preventative measure* or *in response to particular problems*, without defining what the particular problems are. It looks remarkably close to strike one of graduated response. Recital 12c also states that ISPs will only receive *significant costs* - where *significant* is defined as *sending a letter by post*. The recorded delivery letter, sent by post, is strike two of graduated response.

Thus, it can be argued that we do have a text that obliges ISPs to work with rights-holders for the purposes of enforcing copyright, in a way that resembles graduated response. ISPs are obligated to distribute information about copyright<sup>xix</sup> and to put restrictions in their contracts. And we have a text which limits users rights of access and distribution, to content which is defined in terms of its copyright status. "Lawful" could be interpreted as meaning copyrighted and licenced, and possibly to the exclusion of all other content.

### **Degradation and restriction of service**

'Degradation of service' and 'restriction of service' are difficult terms in a policy context because they can have positive and negative meanings in the context of copyright enforcement. They have been deliberately inserted into the contractual terms required of ISPs, and one has to ask why? The reason appears to be that under EU law, there is a problem with ISPs filtering content under a voluntary agreement, unless they have contractual clauses to limit their liability, in the event that they will be filtering. Let's understand more about what they mean.

*Degradation of service* refers to the slowing down of an Internet connection. It happens when an ISP takes measures to reduce the speed at which the data travels to the user's computer, and typically is used to for peer-to-peer (P2P) traffic. Technically, the ISP intercepts the P2P download, and has a way to tell the computer to take the data at a slower rate. The user will notice that the movie or music file they are downloading arrives much more slowly than they expected. The technique is known as 'throttling'<sup>xx</sup>.

ISPs use 'throttling' as a way to manage traffic when the network gets congested or when there is a security threat such as a denial of service attack. That is the positive meaning where we see the term 'degradation of service' in the context of the 'Telecoms Package' (Recital 14b).

However, in the context of copyright enforcement and ‘riposte graduee’, the same ‘throttling’ techniques can be used to punish users. There is a risk that the ISP is placing a restriction on legitimate activity. For example, the ‘throttled’ traffic could be a legitimate software download for business purposes, and nothing to do with copyrighted content.

*Restriction of service* is the next step up from degradation. It uses the same technology to prevent traffic flows on the network – in other words, it’s like a road-block – it can identify individual types of peer-to-peer traffic, for example, bit torrents and shut them down.

The positive meaning is that it can be used for market segmentation. For example, users who want to use bit torrent software, have to pay more for their Internet access; users who don’t want it, pay less. Rather like first class and economy travel.

However, the Telecoms Package concerns copyrighted content. In the context of copyright enforcement policy, there is a negative meaning of restriction of service. The technology can be used to police the restrictions which have been set in place by the State, or by the rights-holders. The ability to shut down peer-to-peer traffic can be used to prevent users from accessing websites and Internet facilities.

In other words, a block on peer-to-peer would be implemented for the purposes of policing restrictions on copyrighted content. Rights holder interests have advocated to policy-makers that blocking of peer-to-peer, and blocking access to websites is an appropriate element of ‘cooperation’<sup>xxi</sup>.

However, some peer-to-peer websites, content and facilities are not related to copyrighted content. For example, students of film production might use them to communicate their own work which may not be yet at a commercial level. Similarly, for musicians and software developers. A unilateral block on peer-to-peer traffic risks blocking non-commercial cultural and other content, and stifling innovation in the process. And it involves widescale monitoring of user traffic across the ISP networks.

### **Restriction of service amendments**

IMCO Article 22(3), and Recital 14 discuss restriction and degradation of service. Article 20, (2, b) obligates ISPs to include information on restrictions in the user contract, and Article 21 (4 c) asks regulators to make ISPs do so. All of these texts hook into the Framework Directive in Article 8 – 4 – g, which contains the same limitation on user’s rights to lawful content.

The curious thing about Article 22(3) is that it asks the regulators to take action to prevent degradation of service (noting our definition above, this would mean preventing ISPs from throttling traffic). But, it immediately contradicts itself: regulators are also asked “to ensure that the ability of users to access or distribute lawful content or to run lawful applications and services of their choice is not unreasonably restricted.” One interpretation of this second element is that the converse is also true – that users ability to distribute unlawful content, may be reasonably restricted. This leaves the door open for restricting access to content – given our definition above, that would mean that technology on the network could be used to block their access to copyright infringing content.

## Briefing on the Telecoms Package and copyright enforcement

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

21 July 2008

The point appears to be to reduce liability for ISPs, if they restrict users access to content. Recital 14c, says that users should be ‘fully informed of any restrictions’ ...’either the type of content, application or service concerned’ which may be an indication of the intent of the drafter. It is also intriguing that Recital 14b specifically absolves liability for restrictions that are carried out for network management purposes. If users must be told what content is to be restricted – and it isn’t about network management - then there is an implication that access to content will be restricted. Meaning bandwidth is throttled and websites are blocked. On what basis, we can only assume from the rest of the text, for there has been no public discussion.

*You are free to use the information in this paper, provided you attribute it to the author.*

*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](http://www.iptegrity.com)*

---

<sup>i</sup> John McEnroe ‘You can not be serious!’ on You Tube

[http://www.youtube.com/watch?v=ekQ\\_Ja02gTY&feature=related](http://www.youtube.com/watch?v=ekQ_Ja02gTY&feature=related)

<sup>ii</sup> Gesac question in the high Level Conference on Counterfeiting and Piracy 13 May 2008 ; MPA, IFPI submissions to European Commission, Consultation for Content Online 2006 and 2008

<sup>iii</sup> E-commerce directive 2000/31/EC Recital 40

<sup>iv</sup> A6-0318/2008 REPORT on the proposal for a directive of the European Parliament and of the Council amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on consumer protection cooperation Committee on the Internal Market and Consumer Protection. Rapporteur: Malcolm Harbour. AND PE398.542v02, Draft report, Rapporteur Catherine Trautmann

<sup>v</sup> Available on French Presidency website: [http://ue2008.fr/PFUE/lang/en/accueil/PFUE-07\\_2008/PFUE-21.07.2008/Informelle\\_culture\\_et\\_questions\\_audiovisuelles](http://ue2008.fr/PFUE/lang/en/accueil/PFUE-07_2008/PFUE-21.07.2008/Informelle_culture_et_questions_audiovisuelles)

<sup>vi</sup> The 152 amendments were reduced from over 600 on the IMCO report.

<sup>vii</sup> Public Consultation on Creative Content Online in the Single Market – Submission of the “Motion Picture Association” (MPA) in response to the Questionnaire of the European Commission regarding Policy/Regulatory issues, 2008 , p9

<sup>viii</sup> EFCA submission to ContentOnline Consultation 2008

<sup>ix</sup> Creative Content Online, IFPI response to the Commission Consultation , 2008

<sup>x</sup> Report on the Cultural Industries in Europe. Committee on Culture and Education. Rapporteur: Guy Bono. A6-0063/2008

<sup>xi</sup> PE 398.378, Amendment 80, Heaton-Harris

<sup>xii</sup> IMCO Amendment 112, Article 33 (2a), consultation with interested parties. Linked to ITRE Compromise Amendment 6, Article 1, point 8, e

<sup>xiii</sup> Directive 2002/21/EC . My point is easily established by running a search on the document.

<sup>xiv</sup> 2002/22/EC

<sup>xv</sup> 2002/58/EC , lawful business practice: Recital 23, Article 5 (2); lawful interception: Recital 11; lawful challenge to a bill: Article 6(2)

<sup>xvi</sup> COM (2007) 0698

<sup>xvii</sup> Although the amendment text does not specify copyright infringement, the justification does do so.

<sup>xviii</sup> IMCO report Amendment 9

<sup>xix</sup> Recent comments from some MEPs have suggested that the messages are not just about copyright, but will encompass a range of public interest messages from governments, such as public health information about buying drugs on the Internet.

<sup>xx</sup> Also known as TCP reset /protocol spoofing.

<sup>xxi</sup> *ibid* IFPI