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Where Copyright Enforcement and Net Neutrality Collide - How the EU Telecoms Package Supports Two Corporate Political Agendas for the Internet

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WHERE COPYRIGHT ENFORCEMENT AND NET NEUTRALITY COLLIDE – HOW THE EU TELECOMS PACKAGE SUPPORTS TWO CORPORATE POLITICAL AGENDAS FOR THE INTERNET

Monica Horten

ABSTRACT

This paper discusses a change to European Union (EU) telecoms law which *de facto* permits operators to impose restrictions on network traffic, and which enables such restrictions to be imposed for the purposes of copyright enforcement—thus it simultaneously facilitates two different policy agendas from the copyright and telecoms industries—‘three-strikes’ as well as ‘traffic management.’ The mechanism is a provision concerning users’ contracts, supported by generic provisions addressed to EU governments and regulators. The change went into law in late 2009, within the so-called ‘Telecoms Package,’ which, together with the E-commerce directive, establishes the EU legal framework for telecoms networks. In terms of the latest initiative on IP Enforcement, ACTA, this is the much-cited EU *aquis communautaire*, with which ACTA must comply. This paper addresses how the change came into being and possible interpretations and implications for copyright enforcement policy.

The research for this paper forms part of the author’s doctoral research.* The Telecoms Package policy process was observed contemporaneously as part of a cross-disciplinary policy study, and the analysis of the legislation in this paper relies on original EU policy and legislative documents.

*The author successfully defended her thesis on 7 September 2010.

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I. INTRODUCTION

How can an apparently small change in European Union telecoms law enable a shift in enforcement of copyright? Telecoms law of course, does not address copyright, or content, and therefore it cannot directly specify any enforcement action in respect of copyright. However, it can be used to give instructions to network operators, on the basis of a policy decision. This paper investigates how this was done in one provision in the EU Telecoms Package. This provision is split between a clause on subscriber contracts and a linked clause on transparency, which were both altered during the legislative process to fulfil the requirements of two groups of industry lobbyists. The rights-holder industries wanted to enable graduated response. The telecommunications industry wanted to enable traffic management. In the policy haggling over the subscriber contracts provision, the two agendas were observed to collide, in the sense that restrictions to Internet access became necessary for both agendas. Using concepts drawn from both copyright and telecoms law, this paper draws on policy documents to establish what the lobby groups wanted and their intended interpretation of the amendments; and using current news sources, it makes some observations on the implementation one year on from the Telecoms Package passing into law. The paper argues that the outcome, which enables restrictions on Internet use, suited both stakeholder groups, and that it ultimately supports the new environment of ‘co-operative efforts’ specified in ACTA.

II. POLICY ISSUES FOR THE TELECOMS PACKAGE

The Telecoms Package¹ was a review of the European Union Telecoms Framework law which provides the common rules governing all electronic communications, including providers of Internet access. It had last been reviewed in 2002 and was based on a principle of open network provision, where national regulators had the power to enforce access, interconnection, and inter-operability between services.² This had the effect of protecting users' ability to obtain a connection to anywhere, irrespective of which network they were on. The purpose of the Telecoms Package review was primarily to address issues related to market-based competition for network operators, specifically in the commercial relationships between operators. In particular, the Package sought to assess any changes that were needed in light of technological developments. Its main objective was to roll back *ex ante* regulation, and increase the application of competition law. In this context, the policy agenda included the functional separation of retail and wholesale telecoms services, and the establishment of a new European regulatory authority. A second objective of the review was to address users' rights, where 'rights' referred to consumer protection and the commercial, contractual relationships between the operators and their subscribers.³ The scope of the review specifically excluded all issues concerning content, and of course, copyright. It was, however, an opportunity to alter the scope of the network operators' terms of service, and it is this possibility that concerns us here.

The Telecoms Package went through the EU legislative process from 2006–2009. During this period the two industry agendas emerged simultaneously, and were presented to European policy-makers with a series of demands. The rights-holder community came up with an enforcement solution to address peer-to-peer file-sharing and the alleged copyright infringements taking place over peer-to-peer networks. This solution was called graduated response, but in order to implement it, they needed to get a political instruction to the network operators. Graduated response proposed that the network operators could implement sanctions against subscribers who were alleged to have infringed copyright. It can be established from policy documents that the core concept of graduated response comprised a series of warnings sent to Internet subscribers,

¹ Council Directive 2009/136/EC, 2009 O.J. (L337) 11; Council Directive 2009/14/EC, 2009 O.J. (L 337) 37; Council Regulation 1211/2009, 2009 O.J. (L 337) 1 (EC).

² Council Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), art. 5.1, 2002 O.J. (L 108) 7, 12.

³ See European Commission SEC (2007) 1472, Commission Staff Working Document, Impact Assessment, 6-8 (Nov. 13, 2007).

followed by a sanction. The sanction may consist of cutting off the subscriber's access to Internet services, or but it may also entail the slowing of bandwidth or blocking of connections, or restricting access to the Internet using network filtering or traffic management techniques.⁴

In parallel, the network operators were evolving a new technology, known as traffic management, which enabled them to have more control over the data flowing on their networks. This policy agenda is frequently referred to as 'net neutrality' but in the context of the Telecoms Package, it actually concerned the telecommunications industry's demand to be able to run traffic management systems which would enable them to operate the networks in a non-neutral way and, among other things, throttle user transmission speeds, prioritise traffic, and operate discriminatory policies in respect of Internet traffic. The European telecoms industry lobbying documents highlighted prioritisation of services, and they formulated an argument to oppose any policy which would "*mandate non-discriminatory treatment of network traffic.*"⁵ In other words, they wanted to use traffic management systems without any regulatory oversight, and they did not want anything akin to a net neutrality principle.

The first draft of the Telecoms Package appeared on 13 November 2007, when it was unveiled by the European Commission.⁶ Provisions addressing both copyright enforcement and traffic management had been inserted. They were to be found in the Universal Services Directive, Article 20, subscriber contracts, and Article 21, transparency.⁷

III. THE CREATIVE INDUSTRIES' AGENDA FOR GRADUATED RESPONSE

Graduated response is, in essence, a system of warnings followed by a

⁴ Mission Olivennes, Le développement et la protection des oeuvres culturelles sur les nouveaux réseaux. Rapport au ministre de la culture et de la communication report, p. 17, available at www.elysee.fr/download/?mode=press&filename=rappport-missionOlivennes-23novembre2007.pdf [hereinafter Mission Olivennes] ("*Il consiste à ce que les fournisseurs d'accès à internet, saisis par les ayants droit d'actes susceptibles d'être de la contrefaçon, envoient dans un premier temps plusieurs messages d'information et, en cas de récurrence, prennent une sanction, telle que la diminution provisoire de la bande passante, l'interruption de l'abonnement, voire sa résiliation.*")

⁵ Net Confidence Coalition, *Ensuring Network Stability and Consumer Confidence in Competitive Markets 1*, available at http://www.cableuurope.eu/uploads/Publications/documents/4870%20-%20Network%20Management%20Coalition%20Stmt%20_06-10-08_%20FINAL_.pdf.

⁶ The European Commission draft of the Telecoms Package (Nov. 13, 2007) comprises 2 documents: COM (2007) 0697 – Framework, Access and Authorisation directive and COM(2007) 698 final – Universal Services and e-Privacy Directive.

⁷ See COM(2007) 698, art. 20 and 21.

sanction.⁸ The warnings would be transmitted by the network provider to the user, either by email or by post. If further allegations were made against the subscriber, the network provider may be asked to apply a sanction, which may be to cut off their access, or it may be throttle their bandwidth, or prevent them from using specific protocols, requiring the operator to implement traffic management systems. Graduated response targets peer-to-peer file-sharing in particular. Notably, the sanction is applied directly against the Internet access subscriber, which differs from existing enforcement regimes where the sanction is applied against a commercial provider, or against a person who consciously posted material on a web server. Graduated response requires the broadband providers to work ‘co-operatively’ with the rights-holders, and—depending on the national legal requirements and the individual State implementation—there is not necessarily a public authority or a court intermediating. The mechanism for making it work is the subscriber’s contract, as is outlined by the International Federation of Phonographic Industries (IFPI) representing the recorded music industry, in their response to a European Commission Consultation in 2008:

[A]n effective warning and sanctions system based on the sending of a warning by the ISPs to their subscribers, followed by the suspension and, eventually, the termination of the contract if the subscriber insists on continuing to infringe. This system formally applies the contractual conditions that most ISPs already have in their contracts but which they have until now refused to enforce.⁹

The first legislative proposal for graduated response was the Creation and Internet law of 12 June 2009, in France¹⁰ in which two warnings were proposed, and the third allegation of infringement would incur the sanction. Hence it is colloquially known as ‘three strikes and you’re out.’ The UK followed with the Digital Economy Act, passed by the Parliament on 6 April 2010.¹¹ The law proposed a form of graduated response, as confirmed

⁸ See *id.* 4; see also Mission Olivennes, *supra* note 4.

⁹ Creative Content Online, IFPI Response to the Commission Consultation 13 (Feb. 29 2008), available at http://ec.europa.eu/avpolicy/docs/other_actions/col_2008/ngo/ifpi_en.pdf

¹⁰ Creation and Internet law: Loi n 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet, 12 Juin 2009, available at: http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=01E95EE37B316AB4B19955279DCADC77.tpdjo02v_2?cidTexte=JORFTEXT000020735432&categorieLien=id#.

¹¹ Digital Economy Act 2010, Sections 3-18, available at http://www.opsi.gov.uk/acts/acts2010/ukpga_20100024_en_1.

by Lord Young of Norwood Green, the government Minister who led it through the House of Lords¹²: “*our process might well be described as taking a graduated approach.*”

The creative industries had been putting pressure on the EU and the Member State governments regarding graduated response for several years. The first political achievement of the creative industry lobbyists was the Cannes Declaration which stated that “*the Ministers and the European Commissioner continue to support the exchange of best practices in the fight against piracy and in this respect the ‘graduated response . . . is a major step forward.’*”¹³ In particular, the lobbyists targeted the Telecoms Package. The Motion Picture Association (MPA) representing the Hollywood studios, called on the European Commission “*to seize the opportunity of the ongoing legislative review of the so-called “Telecoms Package... for setting the ground rules for stakeholder co-operation to be both encouraged and facilitated at the EU level.”*”¹⁴

What were these ground rules that MPA wanted in the Telecoms Package? Exactly as the IFPI had stated in their lobbying document (see above), the copyright enforcement agenda demanded a provision which mandated a term in the subscribers’ contract such that their access could be terminated or restricted in some way as a sanction. Such a provision would support graduated response measures by mandating the network operators to alter their terms of business to assist the rights-holders. It was arguably a way to shift liability without altering the E-commerce directive and the ‘mere conduit’ status of Internet service providers.¹⁵

The European Commission obliged, and its draft of the Telecoms Package dated 13 November 2007¹⁶ contained two provisions related to copyright enforcement. Only one of them will be discussed here, and it is the one that concerned the subscriber contracts provision. At this stage the provision was known as Article 20.6 of the Universal Services directive. This provision said that subscribers had to be informed about copyright infringements *and their legal consequences*. These legal consequences

¹² Hansard, House of Lords, Column 1307, Lord Young of Norwood Green (Jan. 26, 2010), <http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/100126-0003.htm>.

¹³ Cannes 2005 Declaration – Europe Day at the Cannes Film Festival (May 17, 2005), http://ec.europa.eu/avpolicy/docs/other_actions/cannes_decl_2005_en.pdf.

¹⁴ Motion Picture Association, Brussels, 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 2 (Feb. 29, 2008), *available at* http://ec.europa.eu/avpolicy/docs/other_actions/col_2008/comp/mpa_en.pdf.

¹⁵ Directive 2000/31/EC, art. 12 (exonerating ISPs from liability for content).

¹⁶ *Id.* 6 COM (2007) 698, art. 20.6.

were undefined in the directive, but it is arguable that the intended *legal consequences* were graduated response and the sanction of having Internet access cut off:

Member States shall ensure that where contracts are concluded between subscribers and undertakings providing electronic communications services and/or networks, subscribers are clearly informed in advance of the conclusion of the contract and regularly thereafter of their obligations to respect copyright and related rights. Without prejudice to Directive 2000/31/EC on electronic commerce, this includes the obligation to inform subscribers of the most common acts of infringements and their legal consequences.¹⁷

What's interesting here, is not only how Article 20.6 matched the rights-holder demands,¹⁸ but how the rights-holders saw it as creating a form of legal liability for the Internet service providers (ISP), even though, under the EU legal framework, ISPs are 'mere conduits'. See for example, this comment in a lobbying document from the European film producers group known as Eurocinema: "The Commission's initiative is remarkable in the sense that it fully recognises that apart from their role as network operators in the infrastructure sectors, the network operators are involved in the means of distribution and access to content, among which is content protected by droit d'auteur."¹⁹

The Article 20.6 Contracts provision neatly side-stepped mere conduit, because the network providers were neither expected to monitor nor to take responsibility for the actions of their subscribers, merely to prevent them from indulging in any further infringing activity.

The matter of copyright enforcement became the subject of a raft of amendments in the Telecoms Package. Article 20.6 was deleted, but its content was re-structured and re-drafted in two "compromise" amendments. Labelled "Compromises" 2 and 3, they split the provision between Article

¹⁷ Electronic communications: common regulatory framework for networks and services, access, interconnection and authorisation ['Telecoms Package' (amend. Directives 2002/19/EC, 2002/20/EC and 2002/21/EC)].

¹⁸ Eurocinema, Révision du Paquet telecoms 1 (Apr. 28, 2008), available at http://www.eurocinema.eu/docs/Telecoms_Position_EUROCINEMA_FR_avril08.pdf ("Selon la Commission, les opérateurs de télécoms étant également des fournisseurs et distributeurs de contenu, ils doivent informer leurs clients des modalités relatives au respect de la propriété intellectuelle.").

¹⁹ *Id.* ("L'initiative de la Commission est remarquable en ce sens qu'elle reconnaît pleinement qu'en dehors du rôle déterminant des opérateurs de télécoms dans le secteur des infrastructures, ces derniers sont impliqués dans les moyens de distribution et d'accès aux contenus et, parmi ceux-ci, aux contenus légalement protégés par le droit d'auteur.").

20 – Contracts and Article 21 – Transparency, but essentially they can be interpreted as having the same meaning. These two “compromises” are set out by Eurocinema in a lobbying document (see Figure 1 below). If compared against the text of Article 20.6, it can be seen that they say virtually the same thing but they split the provision into two. Article 20, the Contracts clause, requires that the subscriber’s contract states any restrictions on access to content, applications and services, but the explicit reference to copyright is gone. Instead, it says the contract must include ‘*information referred to in Article 21.4a.*’ When we look at Article 21.4a, which forms part of the Transparency clause, it specifies the inclusion of ‘*infringement of copyright and related rights, and their consequences.*’ It is notable that the re-draft incorporates the language of restrictions on access to content, services and applications (*See Figure 1*). Eurocinema’s accompanying comment reflects the general rights-holder approval: “The Internal Market and Consumer Protection committee has adopted provisions which modify them slightly but which conserve the overall coherence. We therefore support these provisions introduced in the Compromises 2 and 3 in respect of Articles 20 and 21 of the Universal Services Directive (See Annexe 1).”²⁰

²⁰ Eurocinema, *Lettre_depute_juillet08_final*, Bruxelles 1 (Jul. 30, 2008), available at http://www.eurocinema.eu/docs/Lettre_depute_juillet08_final.pdf (“*La commission du marché intérieur et de la protection des consommateurs a adopté ces dispositions en les modifiant quelque peu mais en conservant la cohérence d’ensemble. Nous soutenons donc les dispositions introduites par les compromis 2 et 3 visant les articles 20 et 21 de la directive service universel (voir annexe 1).*”). Note that the Internal Market committee of the European Parliament was the responsible committee for Directive 2009/140/EC.

ANNEXE 1

Amendement de compromis 2 à l'article 20 de la directive service universel (2002/22/CE)

Article 20**End-user interests and rights**

2. Member States shall ensure that, where subscribing to services providing connection to a public communications network and/or **electronic communications services, consumers, and other end-users so requesting**, have a right to a contract with an undertaking or undertakings providing such services and/or connection. The contract shall specify **in a clear, comprehensive and easily accessible form** at least:

(b) services provided, **including in particular:**

- **information on any restrictions imposed by the provider regarding a subscriber's ability to access, use or distribute lawful content or run lawful applications and services,**

The contract shall also include any information provided by the relevant public authorities on the use of electronic communications networks and services to carry out unlawful activities or to disseminate harmful content, and the means of protection against risks to personal security, privacy and personal data, as referred to in Article 21(4a) and relevant to the service provided.

Amendement de compromis 3 à l'article 21 de la directive service universel (2002/22/CE)

Article 21**Transparency and publication of information**

4. Member States shall ensure that national regulatory authorities are able to oblige undertakings providing **connection to a public electronic communications network and/or** electronic communications services, to **inter alia**:

(c) **inform subscribers of any change to any restrictions imposed by the undertaking on their ability to access, use or distribute lawful content or run lawful applications and services of their choice;**

4a. Member States shall ensure that national regulatory authorities oblige the undertakings referred to in paragraph 4 to distribute public interest information to existing and new subscribers when appropriate. Such information shall be produced by the relevant public authorities in a standardised format and shall inter alia cover the following topics:

(a) **the most common uses of electronic communications services to carry out unlawful activities or to disseminate harmful content, particularly where it may prejudice respect for the rights and freedoms of others, including infringement of copyright and related rights, and their consequences.**

ANNEXE 2**Nouveau considérant (30bis) en français**

« (30bis) Lors de la mise en œuvre des mesures de transposition de la directive 2002/58/CE, il incombe aux autorités et notamment aux juridictions des États membres non seulement d'interpréter leur droit national d'une manière conforme à la directive, mais également de veiller à ne pas se fonder sur une interprétation de celle-ci qui entrerait en conflit avec des droits fondamentaux ou principes généraux du droit communautaire, tels que le principe de proportionnalité. »

4

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Figure 1: Compromise 2 and Compromise 3, as published by Eurocinema.

Eurocinema lobbied for graduated response, and its assertion that Compromises 2 and 3 “*conserve the coherence*” of the Commission’s copyright amendment, implies that the above interpretation is correct, and that it is the one intended by the drafters. In other words, the “compromises” together have the same meaning as the original Article 20.6, and therefore the Telecoms Package provides for broadband providers to

insert a term in their contract to support graduated response measures for copyright enforcement. The provision remains in this form in the final version of the Universal Services Directive²¹—Article 20.1 combined with Article 21.4(a)—the main difference being that it is optional and not mandatory (it was changed from ‘shall’ to ‘may’) and ‘*conditions limiting*’ has been substituted for ‘*restrictions*’ (see below). It is interesting to read the equivalent provision from the French Creation and Internet law, which implements graduated response. It reflects the same language as this Telecoms Package “compromise,” notably Article L. 331-35 says that broadband providers must state in their contracts with subscribers, in a clear and readable way, the sanctions which could be incurred through violations of copyright.²²

IV. THE TELECOMS AGENDA: TRAFFIC MANAGEMENT

Having examined how the rights-holder industries targeted the Contracts provision and altered it to meet their requirements for copyright enforcement, further analysis reveals how the telecommunications industry targeted the same provision for the traffic management agenda. In fact, the language concerning restrictions to Internet services was there precisely because of the traffic management agenda and the lobbying by the telecoms industry.

What happened was that the telecoms industry managed to obtain the deletion of a set of provisions that had been carefully drafted by the European Commission and that sought to incorporate a policy of net neutrality (in the sense of not permitting discriminatory behaviour) into the Telecoms Package. This can be seen in the Commission’s first draft of the Package dated 13 November 2007. The Impact Assessment for the Telecoms Package,²³ discussed the Madison River case, along with the U.S. Federal Communications Commission (FCC) ‘net freedoms,’ and concluded that there was a need to ensure that European operators did not unfairly discriminate against certain types of Internet traffic. To address this possibility²⁴ the European Commission had introduced a new

²¹ Directive 2009/140/EC.

²² *Id.*; Creation and Internet law, art. 5, § 3, Sous-sect. 3, Art.L. 331-35 (“*Les personnes dont l’activité est d’offrir un accès à des services de communication au public en ligne font figurer, dans les contrats conclus avec leurs abonnés, la mention claire et lisible des dispositions de l’article L. 336-3...Elles font également figurer, dans les contrats conclus avec leurs abonnés, les sanctions pénales et civiles encourues en cas de violation des droits d’auteur et des droits voisins.*”).

²³ *Id.* 3 European Commission SEC (2007) 1472, 90-92.

²⁴ See Christopher Marsden, *Net Neutrality*, Bloomsbury Academic, London 141 (2010).

mandate that contracts with subscribers had to specify any ‘limitations’ applicable to the service provision, as did any publicly available service details (transparency).

Member States shall ensure that where contracts are concluded between subscribers and undertakings providing electronic communications services and/or networks, subscribers are clearly informed in advance of the conclusion of a contract and regularly thereafter of *any limitations imposed by the provider on their ability to access or distribute lawful content or run any lawful applications and services of their choice.*²⁵

This clause was backed up by a minimum quality of service²⁶ provision. Importantly, the national regulators would have overseen ‘transparency’ in respect of traffic management and the Commission itself would have had additional powers to intervene.²⁷ These ‘net neutrality’ provisions would have been supported by a principle in the Framework directive²⁸ that regulators must protect users’ rights to have open access to content, services and applications.²⁹

The European Commission’s assumption was that informed subscribers could choose whether to stay with an operator or switch and that non-neutral practices could be put down to anti-competitive practices. It stressed that the regulator also had overarching powers to use competition law as a remedy.³⁰ The combination of these provisions would have arguably created a policy where operators could have been accountable to the regulators who would have overseen ‘transparency’ in the public interest. However, the telecommunications industry itself pointed out the flaw in this thinking, namely that competition law “*could only address network access for electronic communications operators*” and does “*not directly address access to and for content and applications by end-users.*”³¹

²⁵ 6 COM (2007) 0698 Universal Service Directive (USD), arts. 20.5, 21.5.

²⁶ *Id.* art. 22.3.

²⁷ *Id.* arts. 21.6, 22.3. For example, in Article 21.6, *technical implementing measures* means that the European Commission the power to intervene, usually to ensure harmonization across different implementation in Member States. Guidance was provided by Recitals 14 and 16.

²⁸ 6 COM (2007) 0697 Framework Directive Art. 8.4g.

²⁹ The inclusion of the words ‘lawful content’ appears to have been drawn from the US, and was intended to address malicious content such as viruses, but unfortunately it clouded the meaning of this provision, and acted as a signpost to the inclusion of copyright enforcement in the Package.

³⁰ 3 European Commission SEC (2007) 1472, 92 n.209.

³¹ Liberty Global, Proposal Amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks; *see* Justification to Recital 14.

On this basis, competition law was a weak power for addressing any discriminatory behaviour.

The telecom operators' requirement for traffic management meant they were opposed to the Commission's net neutrality principle, and they lobbied against it, leading to a series of amendments when the Package passed through the European Parliament. The industry had a more limited interpretation of a transparency requirement: "[Consumers] will receive adequate information about the products / services they purchase in order to make the choice most appropriate to them (including, for example, such elements as relevant rates, terms and conditions, or any limitations that apply)."³² The outcome of their lobbying was that the Commission's net neutrality provisions were deleted and replaced with language which suited the operators:

2. Member States shall ensure that, where subscribing to services providing connection to a public communications network and/or electronic communications services, consumers and other end-users so requesting have a right to a contract with an undertaking or undertakings providing such services and/or connection. The contract shall specify in a clear, comprehensive and easily accessible form at least:

{...}

- information on any *restrictions imposed by the provider regarding a subscriber's ability to access, use or distribute lawful content or run lawful applications and services*[.]³³

The provision was split in the same way as the copyright enforcement provision, between the Contracts and Transparency clauses, and the wording was sufficiently vague that it was not clear what kind of '*restrictions*' were intended. However, the meaning was clarified in a further set of amendments where the word '*restrictions*' was replaced by '*traffic management policies*'³⁴ and incontrovertibly revealed that this provision was about restricting Internet services via the use of traffic

³² 5 Net Confidence Coalition, *supra* note 5, 1

³³ European Parliament, COD(2007)0248 P6_TA(2008)0452, Texts Adopted By Parliament Wednesday, 24 September 2008—Brussels Provisional edition Electronic communications networks and services, protection of privacy and consumer protection, Amendments 61 and 62 (Sept 24, 2008).

³⁴ Council of the European Union 16497/08, Common position adopted by the Council with a view to the adoption of 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 33 pt. 13, art. 20.1(b) (Feb. 9 2009) (Information on the provider's traffic management policies).

management systems. However, the telecommunications industry did not like this change and policy-makers were subjected to heavy lobbying to amend the text back to ‘restrictions.’

Lobbying documents reveal who these stakeholders were. AT&T, Liberty Global and ETNO (European Telecommunications Network Operators) were notably aggressive in lobbying.³⁵ Their preferred text was “*restrictions imposed by the understanding on their ability to access content or run applications and services of their choice.*”³⁶ The UK authorities also intervened, proposing amendments that, according to their preamble, were intended to enable network operators to offer prioritised services or service bundles: “There is nothing in the Framework or elsewhere in the European law preventing a service provider from providing subscribers with access to pre-defined and differentiated set of services or applications.”³⁷

The European Parliament acceded to these lobbying demands, and it replaced ‘*traffic management policies,*’ but instead of ‘*restrictions*’ it used ‘*conditions limiting*’: ‘information on any other *conditions limiting access to and/or use of services and applications,* where such conditions are permitted under national law in accordance with Community law.’³⁸ This language had the effect of obscuring the meaning again and enabled policy-makers to brush it aside—as was evident from the fact that the Parliament carried the directive with almost no opposition. Simultaneously, the Parliament’s amendments weakened the regulatory powers by, for example, removing the Commission’s powers to address non-transparent or restrictive behaviour.³⁹ This change has proved to be pivotal. It had the effect of altering the meaning to the effect that operators had to tell subscribers about restrictions to the service, but they risked little in the form of regulatory intervention.

V. COLLISION COURSE

The above analysis has illustrated how two political lobby groups pursued their own agendas in respect of the Telecoms Package and how

³⁵ Kevin J. O’Brien, *US lobbyists angle for influence in Europe’s net neutrality debate*, INT’L HERALD TRIB. (Mar. 8, 2009).

³⁶ See Liberty Global, *supra* note 31, handwritten amendments to Article 21.

³⁷ See UK Proposed Amendments (Feb. 25, 2009). This document is understood to have originated from the UK regulator, Ofcom. 1 Rationale, and 2 Amendment to Article 20, available at http://www.laquadrature.net/files/UK_PROPOSED_AMENDMENTS_on_net_neutrality_DRAFT_20090223_print.pdf.

³⁸ Directive 2009/136/EC, Article 20.1 (b) second bullet point.

³⁹ COM(2007) 698 Article 21.6 was deleted, and the regulatory powers in Article 22.3 weakened.

they targeted the same clause. It is arguable that it suited them both to have the compromise with a split provision and obscured wording to cover Internet restrictions. The connection between the two agendas becomes more obvious in the final version of the Telecoms Package. A provision was inserted which makes it explicit that operators are not forbidden from imposing restrictions on Internet subscribers and are therefore permitted to do so, provided they tell them: “This Directive neither mandates nor prohibits conditions, imposed by providers of publicly available electronic communications and services, limiting users' access to and/or use of services and applications...but lays down an obligation to provide information regarding such conditions.”⁴⁰

The second sentence of this provision addresses the right of EU Member State governments to impose measures using such restrictions: “National measures regarding end-users' access to or use of services and applications through electronic communications networks...”⁴¹ Thus it makes a direct link between the operator’s right to restrict subscribers, as in the Contracts provision, and measures that could be imposed by the governments of EU Member States. It does not define ‘national measures,’ but one way to understand it is to consider the UK Digital Economy Act 2010. This Act includes national measures for copyright enforcement, where Internet subscribers alleged to infringe copyright will be sanctioned by ordering the ISPs to impose ‘technical measures’:

a technical measure is a measure that limits the speed or other capacity of the service provided to a subscriber; prevents a subscriber from using the service to gain access to particular material, or limits such use; suspends the service provided to a subscriber; or limits the service provided to a subscriber in another way.⁴²

‘Limiting the speed’ or ‘limiting the use’ of the subscriber’s connection implies the use of traffic management systems. Thus, in the Digital Economy Act there is a direct connection between graduated response and traffic management, where graduated response requires a restriction on Internet access as a sanction and where traffic management will be used to apply the restriction. It is arguable that the language and the split structure the Contracts provision of the Telecoms Package suited the drafters of the

⁴⁰ Directive 2009/136/EC, Universal Services and Users Rights Directive, Article 1.3.

⁴¹ *Id.*

⁴² Digital Economy Act, Section 9, 124G Obligations to limit internet access: assessment and preparation, cl. 3; *see also* Marsden, *supra* note 24, 177-178.

Digital Economy Act. The Act must comply with EU law, and since it amends the UK Communications Act 2003, it must specifically comply with the Telecoms Package.

It is clear from policy documents that the European legislators understood that the “*national measures*” referred to “*restrictions on a user's internet access*”⁴³ and related directly to graduated response. This is why, in the final agreement of 4 November 2009, they drafted a provision which could act as a barrier to graduated response. The final agreement is a provision in the Framework directive which imposes an obligation on all Member States.⁴⁴ It repeats the same language, referring again to measures which restrict subscribers Internet access “*measures regarding end-users' access to, or use of, services and applications through electronic communications network.*” and it adds the qualification “*liable to restrict fundamental rights or freedoms*”—this is an intentional reference to graduated response. The barrier which they incorporated was the ‘*prior, fair and impartial hearing*’ which was intended to remind European national governments of the legal requirement for due process⁴⁵ when individuals are sanctioned, and to act as an instruction that States should not permit graduated response measures which bypass due process.⁴⁶

VI. HOW THE CONTRACTS PROVISION SUPPORTS BOTH AGENDAS

During the passage of the Telecoms Package through the European legislature, it was observable that the telecommunications industry opposed graduated response. For example, the European Telecommunications Network Operators (ETNO) even issued public statements in support of the European Parliament's stance on this issue.⁴⁷ However, in reality they put

⁴³ See European Parliament, PE 430.561 v 01-00, Report on the joint text approved by the Conciliation Committee for a directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services 7 (Nov 9, 2009).

⁴⁴ Directive 2009/140/EC, Framework directive, art. 1.3a.

⁴⁵ European Convention on Human Rights, art. 6.

⁴⁶ The UK's Digital Economy Act and France's Creation and Internet law have found different ways to address this provision, and their compliance is arguable, but this is outside the scope of this paper.

⁴⁷ ETNO, Review of EU Telecoms Rules: Improved rules on investment risk must swiftly translate into more flexible regulation for NGA, *available at* <http://www.etno.be/Default.aspx?tabid=2146> (“*ETNO welcomes the strong EP support to the principle that e-communications providers should not be asked to take any measure against a consumer outside of a Court order. ETNO calls on the EU institutions to find a compromise based on this essential principle in full respect of citizens' fundamental rights.*”).

up a weak fight. It was not clear from observing the process whether the telecommunications operators understood the implications and colluded, or whether they were too keen to get traffic management provisions and failed to realise how their requirements connected with copyright enforcement. In the year since the Telecoms Package passed into law, their attitude has become more open, and the connection between the traffic management agenda and the copyright enforcement agenda has strengthened.

France is a particularly interesting case in point. The broadband provider SFR began selling the iPad, minus connectivity to Voice over IP (Voip) services, peer-to-peer file-sharing, or bulletin boards.⁴⁸ Whilst blocking Voip would appear to be an anti-competitive move in relation to voice services, blocking specific peer-to-peer file-sharing protocols and access to bulletin board services relates directly to copyright enforcement. Another French ISP, called 'Free' has also been reported blocking peer-to-peer protocols.⁴⁹ All French mobile operators block peer-to-peer.⁵⁰ Such blocking is voluntary, and there is a competitive market in France. Under the European Commission's logic outlined above, subscribers would be free to switch if they were not happy with these restrictions. However, the French situation illustrates the flawed logic in this thinking. A cartel-like collusion means that choice on this matter is removed. If all mobile operators offer an 'unlimited' tariff, but block peer-to-peer, where does the peer-to-peer user go for service?

What is also emerging in France in the final months of 2010 is how the graduated response—and 'co-operation' with its requirements—may be bartered for other favours from the government. The capitulation of the French broadband providers with the Creation and Internet law requirements has been linked to a deal at government level. At the time of writing, the existence of the deal had been confirmed by the Culture Minister Frédéric Mitterand, but the substance had not. It was believed that

⁴⁸ See SFR Advertisement, available at <http://img.telecomix.org/EU/src/127728743242.png>. ("*Ne permet ni usages voix ni SMS, Peer To Peer, Voix sur IP et Newsgroups interdit.*").

⁴⁹ Guillaume Champeau, Free briderait les protocoles SSH, VoIP ou P2P en zone non dégroupée, in *Numerama*, <http://www.numerama.com/magazine/15461-free-briderait-les-protocoles-ssh-voip-ou-p2p-en-zone-non-degroupee.html> (Apr. 9, 2010) ("*Free...aurait de nouveau décidé de brider certaines pratiques de ses abonnés'... 'Les bridages bloqueraient tous les ports (et/ou protocoles) considérés comme non-standards, empêchant ainsi de jouer à des jeux en ligne, d'utiliser des applications telles que le SSH, de regarder des vidéos en streaming, d'utiliser des applications de VoIP ou de peer-to-peer, etc.*").

⁵⁰ Marc Rees, Orange autorise la VoIP en 3G, l'Internet illimité enfin moins limité, in *PC Inpact*, <http://www.pcinpact.com/actu/news/56368-iphone-orange-voip-3g-illimite.htm> (Apr. 14, 2010) ("*L'illimité ne l'est cependant toujours pas avec l'impossibilité par exemple d'accéder au P2P sur ces forfaits mobiles.*").

the deal concerned traffic management.⁵¹ The likelihood of collusion of the French ISPs with the government is further substantiated by their reaction to the ISP Free's refusal to transmit the graduated response emails. Free has been accused by other ISPs of breaking up the competitive landscape. They had hoped that if all co-operated, none could suffer competitive disadvantage from accusations of collaboration with a much-disliked law. The Minister has threatened Free with a hefty fine if it continues to refuse to co-operate. Free is also accused of using graduated response to get the government's blessing for its own proprietary—and non-neutral—network services.⁵²

The UK situation is evolving. The two largest broadband providers, BT and TalkTalk are simultaneously challenging the copyright enforcement sections of the Digital Economy Act in the courts,⁵³ and saying that they would be prepared to charge extra for prioritisation of services such as broadcast television.⁵⁴ A number of the broadband providers are throttling traffic. Their tactic, less transparent than the French, is to use bandwidth caps and speed restrictions to make peer-to-peer file-sharing difficult. An example is Virgin Media, as indicated by its terms of service.⁵⁵

In Ireland, a court judgment in respect of the Irish telecoms operator eircom, which was sued by the Irish Recorded Music Industry Association known as IRMA, implements a privately-contracted implementation of

⁵¹ Guillaume Champeau, Hadopi: Mitterrand veut marchander avec les FAI qui sont "tous convaincus," *Numerama*, <http://www.numerama.com/magazine/16839-hadopi-mitterrand-veut-marchander-avec-les-fai-qui-sont-tous-convaincus.html> (Sept. 21, 2010) ("*Certains fournissent un accès à Internet ont fait valoir les frais que le dispositif pouvait occasionner, mais nous avons convaincu tous les FAI de l'utilité de collaborer avec la Hadopi... nous souhaitons inclure ce débat dans un échange plus global avec les FAI.*").

⁵² Guillaume Champeau, Comment Free bloque l'Hadopi et tacle Frank Riester au passage, *Numerama*, <http://www.numerama.com/magazine/16995-comment-free-bloque-l-hadopi-et-tacle-frank-riester-au-passage.html> (Oct. 7, 2010) ("*En refusant d'envoyer les premiers e-mails de l'Hadopi à ses abonnés, Free a fait d'une pierre plusieurs coups. ... En refusant d'envoyer les premiers e-mails de l'Hadopi à ses abonnés, Free a fait d'une pierre plusieurs coups. ... Le ministre de la Culture a annoncé un décret créant des sanctions contre les FAI qui refusent de collaborer à l'envoi des mails.*") ("*Free ne cache plus son ambition de créer via les services de la Freebox... L'Hadopi est donc une monnaie d'échange qu'il garde en poche le plus longtemps possible.*").

⁵³ BT press release (Jul. 8, 2010), <http://www.btplc.com/News/Articles/Showarticle.cfm?ArticleID=98284B3F-B538-4A54-A44F-6B496AF1F11F>.

⁵⁴ David Meyer, Telecoms Business Users Call for Net Neutrality, *ZDNet*, <http://www.zdnet.co.uk/news/regulation/2010/09/28/telecoms-business-users-call-for-net-neutrality-40090319/> (Sept. 28, 2010).

⁵⁵ Chris Williams, Virgin Media introduces P2P throttling Major policy change on traffic management, *The Register*, http://www.theregister.co.uk/2010/09/30/vm_upload/ (Sept. 30, 2010).

graduated response measures.⁵⁶ Two aspects of the agreement are notable in this context. Firstly, that “Eircom has . . . an acceptable usage contract with its customers mandating termination for illegal internet use. Eircom takes its customer contract seriously.”⁵⁷

Secondly, eircom agreed to comply with an application to block The Pirate Bay,⁵⁸ which would arguably count as a restriction. The significance of the contractual terms are discussed in a second Irish judgment of October 2010, where the network operator, UPC is admonished by the judge for failing to enforce the contract with its subscribers in respect of copyright: “The customer use policy of UPC makes it very clear that the internet service of UPC cannot be used to steal copyright material. This is a matter of contract, and for a breach of this obligation by the customer, UPC can terminate the contract.”⁵⁹

It would therefore appear to be a reasonable interpretation that the Contracts provision in the Telecoms Package supports not only graduated response measures, but any other restrictions on Internet access and services, and if carried out for the purpose of copyright enforcement, they will not be opposed by the regulators who are charged with overseeing the implementation of the Package. Indeed, the regulators appear to take the view that restrictions which support copyright enforcement are acceptable. The UK regulator, Ofcom, works on the premise that traffic management will be used, and has indicated in a consultation document that, in its opinion, traffic management could be applied for copyright enforcement measures: “Traffic management per se is neither good nor bad. For example, it is widely accepted that the blocking of illegal content (such as images of child abuse) is necessary and that steps taken to address issues such as online copyright infringement would be viewed as acceptable traffic management.”⁶⁰

Ofcom has seriously considered using deep packet inspection—a function of traffic management systems which opens the packets of data to inspect the internal content—for its own purposes, to monitor file-sharing

⁵⁶ Ireland, 11 October 2010: The High Court Commercial [2009 No. 5472 P] EMI Records (Ireland) Limited, Sony Music Entertainment Ireland Limited, Universal Music Ireland Limited, Warner Music Ireland Limited and WEA International Incorporated v. UPC Communications Ireland Limited 36, ¶74 (“*The parties there contracted for a three stage response to internet piracy.*”)

⁵⁷ *Id.* ¶10.

⁵⁸ *Id.* ¶¶136, 137.

⁵⁹ *Id.* ¶4. Note that despite this, the judge ruled in favour of UPC, but the reasons are outside the scope of this paper.

⁶⁰ Ofcom, Traffic management and ‘net neutrality’: A Discussion Document 6, ¶2.8, <http://stakeholders.ofcom.org.uk/binaries/consultations/net-neutrality/summary/netneutrality.pdf> (Jun. 24, 2010).

on UK networks.⁶¹ Ofcom's French counterpart, the ARCEP, believes that 'non-neutral' controls, put in place for copyright enforcement, do not infringe fundamental rights and reflect a legitimate public interest.⁶² The European Commission, which oversees regulation across the EU, does not name copyright enforcement, but it is implied as an acceptable non-neutral traffic management activity: "In future, traffic may also be managed to ensure that legal obligations are met in some Member States, particularly for example with regard to illegal content."⁶³

Whether or not these regulators are acting in the public interest, is a quite different question. Their position is opposed by citizens' groups in Europe. La Quadrature du Net, for example, opposed the Telecoms Package on the basis that graduated response would infringe the fundamental rights of European citizens, and consistently called for an open, neutral Internet infrastructure to be protected in Europe. The citizens' group suggests that the EU has imported into the Telecoms Package a weak and 'minimalist' regulatory position and has set out a demand that net neutrality should be established as a policy principle in the EU.⁶⁴ Retrospectively, it is asking for the loop-hole in the Telecoms Package to be closed.

Both the ARCEP and the European Commission give some consideration to the citizenship aspects of net neutrality, for example, the Commission asks whether there are issues concerning freedom of expression. However, as evidenced above, the operators have the first-mover advantage and governments are countenancing non-neutral behaviour to enforce copyright.

VII. FINAL THOUGHTS

This paper has argued that amendments to a Contracts provision in the Telecoms Package reveal how European policy-makers were targeted by

⁶¹ ISP Review, Ofcom Moots Deep Packet Inspection Illegal ISP File-Sharers, <http://www.ispreview.co.uk/story/2009/11/19/ofcom-uk-moots-deep-packet-inspection-to-target-illegal-isp-file-sharers.html> (Nov. 19, 2009).

⁶² ARCEP, Neutralité de l'internet et des réseaux : propositions et orientations 56-57 <http://www.arcep.fr> (2010).

⁶³ European Commission, Information Society and Media Directorate, Questionnaire for the public consultation on the open Internet and net neutrality in Europe 6 http://ec.europa.eu/information_society/policy/ecommm/library/public_consult/net_neutrality/index_en.htm.

⁶⁴ La Quadrature du Net, Time for EU-Wide Net Neutrality Regulation Response to the European Commission's questionnaire on Net Neutrality 5-6, <http://www.laquadrature.net/en/la-quadrature-answers-the-eu-questionnaire-on-net-neutrality> (Sept. 30, 2010).

two lobby groups, and how those policy-makers managed to address their demands by contriving a language and structure which suited both agendas. What they concocted was a directive which arguably enables both traffic management and graduated response. The paper has also investigated how this legislation translates into practice, where traffic management implements graduated response, and becomes an alternative form of copyright enforcement. In this context, the Telecoms Package is enabling law and a small change has big implications. It arguably subverts the general purpose telecoms framework to allow network providers control over non-transport functions, specifically, over content.⁶⁵ It does not specify explicitly any change of policy for copyright enforcement. It legally cannot do so since it is, of course, not copyright law. Its function is to set out the rules for network operators in order that their operations may be consistent across the EU—this is what in the past would have been their license. However, it can—and it does—provide general instructions to network operators which are necessary for the implementation of copyright enforcement on electronic network services, and instructions for operators who want to restrict subscribers in any other way.

The copyright enforcement agenda is moving into other policy fora, such as the Anti-Counterfeiting Trade Agreement (ACTA) which calls for ‘*co-operative efforts... to address...copyright infringement.*’ It is certainly arguable that the broadband providers’ good-will is required, not merely to put the copyright enforcement terms in their contract but also to enforce them. It is also arguable that they will find ways to use graduated response as a bargaining chip against various forms of traffic management, and the Telecoms Package Contracts provision facilitates them doing so.

⁶⁵ I paraphrase Susan Crawford’s comments which are made in respect of the U.S. See Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV (2009): 871, 915 (2009), available at http://cgi2.www.law.umich.edu/_FacultyBioPage/facultybiopagenew.asp?ID=373d.