

The Copyright Enforcement Enigma

**Internet Politics and
the 'Telecoms Package'**

Monica Horten



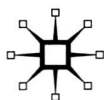
The Copyright Enforcement Enigma

Internet Politics and the 'Telecoms
Package'

Monica Horten



palgrave
macmillan



© Monica Horten 2012

All rights reserved. No reproduction, copy or transmission of this publication may be made without written permission.

No portion of this publication may be reproduced, copied or transmitted save with written permission or in accordance with the provisions of the Copyright, Designs and Patents Act 1988, or under the terms of any licence permitting limited copying issued by the Copyright Licensing Agency, Saffron House, 6–10 Kirby Street, London EC1N 8TS.

Any person who does any unauthorized act in relation to this publication may be liable to criminal prosecution and civil claims for damages.

The author has asserted her right to be identified as the author of this work in accordance with the Copyright, Designs and Patents Act 1988.

First published 2012 by
PALGRAVE MACMILLAN

Palgrave Macmillan in the UK is an imprint of Macmillan Publishers Limited, registered in England, company number 785998, of Houndmills, Basingstoke, Hampshire RG21 6XS.

Palgrave Macmillan in the US is a division of St Martin's Press LLC, 175 Fifth Avenue, New York, NY 10010.

Palgrave Macmillan is the global academic imprint of the above companies and has companies and representatives throughout the world.

Palgrave® and Macmillan® are registered trademarks in the United States, the United Kingdom, Europe and other countries.

ISBN 978–0–230–32171–7

This book is printed on paper suitable for recycling and made from fully managed and sustained forest sources. Logging, pulping and manufacturing processes are expected to conform to the environmental regulations of the country of origin.

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Horten, Monica, 1960–

The copyright enforcement enigma: Internet politics and the "Telecoms Package" / Monica Horten.

p. cm.

Includes bibliographical references and index.

ISBN 978–0–230–32171–7 (alk. paper)

1. Copyright—European Union countries. 2. Internet—Law and legislation—European Union countries. 3. Telecommunication—Law and legislation—European Union countries. 4. European Parliament. Directive 2009/136/EC. 5. European Parliament. Directive 2009/140/EC. 6. European Parliament. Regulation (EC) No 1211/2000. I. Title.

KJE2655.H67 2011

346.2404'86—dc23

2011029574

10 9 8 7 6 5 4 3 2 1
21 20 19 18 17 16 15 14 13 12

Printed and bound in Great Britain by
CPI Antony Rowe, Chippenham and Eastbourne

Acknowledgements

My academic research, which forms the basis of this book, began in February 2007, with an interest in current EU telecommunications policy concerning the Internet and online content. I was interested in how 'human rights' issues could be a new factor in communications policy-making. It seemed that, as communications technology becomes more sophisticated and more intrusive, 'rights' were going to be more relevant to policy-making, but it was unclear how this might be the case, and the 'human rights' aspect/concept was rather loose. The issue of copyright enforcement and the case of the Telecoms Package, which engages the rights to due process and freedom of expression in the context of broadband provider liability, have exceeded my original expectations.

Three years of research were invested in this book, of which approximately 18 months were spent contemporaneously tracking the Telecoms Package, as it passed through the EU legislature. I'd like to thank the Telecoms Package rapporteurs – MEPs Catherine Trautmann, Malcolm Harbour and Alexander Alvaro – and their assistants for their help in fine-tuning the text.

However, this book would not have been possible without the help of very many people, and I would like to acknowledge with thanks all of those who have contributed over the past four years.

My warm thanks go to Jean Seaton, who has been wonderfully supportive and motivating, as well as to Alison Harcourt of the University of Exeter and to Peter Goodwin of the University of Westminster. I would also like to thank the staff at the Communications and Media Institute of the University of Westminster (CAMRI), notably Maria Michalis.

It was Erik Josefsson who first sent me the Telecoms Package – all three bundles, with the 'Reports' and 'Opinions'. I was a bit aghast when I saw the sheer volume of the Package. Erik patiently explained to me the Opinion Committee system and illuminated the more esoteric aspects of the EU policy process. He also put me in touch with many of the people who have been kind enough to contribute.

A special thank-you goes to Christophe Espern and Jeremie Zimmermann and to the citizens' community, notably Philippe Aigrain, Gérald Sédrati-Dinet, Paolo Brini, Patrick Breyer, Andre Rebentisch,

Markus Beckedahl, Benjamin Henrion, Jonas Maebe, Mike Kiely and Eamonn Wallace.

I could not have done this without the Brussels lobbyists who took my calls and met with me – Alexandra Krenzler, Sophie Jacobs, Caroline Persson, Cecile Despringre, Chris Hutchins, Francisco Mingorance, Lodovico Benvenuti, Jean-Jacques Sahel, Ilse Godlovitch, Jeremy Rollison, Melina Violari, Kurt Einziger, Andrea D’Inecco, Alex Blowers, Caroline de Cock, Karina Lott, Thierry Dieu, Carole Tongue and Innocenzo Genna, and especially Joe McNamee and Tilman Kupfer for their historical insights into EU copyright and ecommerce policy.

I’d also like to thank the lawyers who helped me to correlate and understand what I found: Andriani Ferti, Fanny Coudert, Evi Werkers, Joris Van Hoboken, Celia Blanco, Hugo Cox, Nuria Rodriguez, Anne-Catherine Laurent, Loreto Reguera, Chris Marsden, Lilian Edwards and Simon Bradshaw.

Staff at the Council and the Commission were very helpful, especially Nigel Hickson, Marcel Boulogne and Ken Ducatel. In the European Parliament, I am grateful to MEPs Philippe Lamberts and Christian Engström, as well as the Parliamentary staff: Peter Traung, Sofia Asteriadi, Maxime Herrmann, Elisabeth Bauer, Raphaël Delarue, Laurence Van De Walle and Henrik Alexandersson. I’d also like to thank Christofer Fjellner, MEP, for inviting me to speak at his seminar in the European Parliament, which gave me insights that I would otherwise not have had.

Every writer needs someone to discuss ideas with, and for this I have to thank my former editor, Ian Scales, who introduced me to telecoms in what seems like a different era, and my good friends Mireia Fontbernat and Gillian Hunter, my colleague and friend Benedetta Brevini, and Kristin Skoog.

And finally, this book is dedicated to my mother, Irmela Horten. Sadly, she will never read it, but in her life she was an ardent campaigner for human rights causes, and right at the end she was learning to use the Internet. I am sure she would have liked the Telecoms Package story.

Abbreviations

This list details some of the organisations and political groups cited in the text, which are commonly known by their initials, and other technical abbreviations.

ACT	Association of Commercial Television in Europe
AFA	Association des fournisseurs d'accès et de service d'Internet
AK Vorrat	Arbeitskreis Vorratsdatenspeicherung
ALDE	Alliance of Liberals and Democrats for Europe
ARP	Association des Auteurs-Realisateurs-Producteurs
AT&T	American Telephone and Telegraph Corporation
BEUC	Bureau Européen des Unions de Consommateurs
BT	British Telecom
CEPI	European Coordination of Independent Producers
CMBA	Creative and Media Business Alliance
EFADs	European Film Agency Directors
EFCA	European Film Companies Alliance
EPP	European People's Party
ETNO	European Telecommunications Network Operators Association
EU XXL	EU XXL Forum – European Federation of Cinematographers
EuroISPA	European Internet Services Providers Association
FERA	Federation of European Film Directors
FIAPF	International Federation of Film Producers Associations
FNDF	French National Federation of Film Distributors
GESAC	European Grouping of Societies of Authors and Composers
GSMc	GSM Europe
GUE/NGL	European United Left/Nordic Green Left

HADOPI	High Authority for the Distribution of Works and the Protection of Rights on the Internet
IFPI	International Federation of Phonographic Industries
IND/DEM	Independence/ Democracy group
IP	Internet Protocol
ISP	Internet Service Provider
IVF	International Video Federation (IVF)
MCPS-PRS	Mechanical Copyright Protection Society-Performing Rights Society
MPA	Motion Picture Association
PPL	Phonographic Performance Limited
PSE	Party of European Socialists
SACD	Société des auteurs et compositeurs dramatiques
SACEM	Société des auteurs, compositeurs et éditeurs de musique
SGAE	Sociedad General de Autores y Editores
SNEP	Syndicat National de l'Édition Phonographique
TCP	Transmission control protocol
UEN	Union for Europe of the Nations
WIPO	World Intellectual Property Organization

Contents

<i>Acknowledgements</i>	vii
<i>List of Abbreviations</i>	ix
1 Introduction – Establishing Links between Copyright and Telecoms Policies	1
Part I Historical Context	
Copyright Enforcement from Henry VIII to the Internet	
2 A Short History of Copyright Enforcement	13
3 Copyright Enforcement and the Internet	28
4 Policy Perspectives for Online Copyright Enforcement	41
Part II Political Context	
The Law, the Lobbyists and New Enforcement Proposals for Europe	
5 EU Copyright and Telecoms Policies – An Inherent Conflict	55
6 Rights-Holder and Telecoms Lobbying: Disproportionate Influences	70
7 Graduated Response – Shifting Liability for Enforcement	80
Part III The Telecoms Package	
The Attempt to Commandeer Telecoms Law for Copyright	
8 Why the Telecoms Package Became the Policy Instrument	103
9 The Attempt to Put Copyright in the Telecoms Package	121
10 How Internet Users’ Rights Challenged Copyright	153
11 How Copyright Set the Parliament against the Member States	165

12	Conciliation and the Right to a Fair Trial	190
13	Copyright and Telecoms: The Enigma Unpacked	205
	<i>Notes</i>	216
	<i>Bibliography</i>	246
	<i>Index</i>	272

1

Introduction – Establishing Links between Copyright and Telecoms Policies

The case of the Telecoms Package was a puzzle to many people. It concerned a calculated attempt to enable copyright enforcement on the Internet by amending telecoms law. The attempt did not quite work out as planned, and it generated an especially curious outcome – a provision that sought to protect the right to a fair trial. Even more baffling was the fact that the case was prompted by French government measures for content on the Internet and was instigated by a group of apparently non-powerful collecting societies.

The case matters because the attack on telecoms law, if it had succeeded, implied a fundamental change in the way the Internet operates and in the legal principles that govern it in Europe. At the core of it was a demand to make broadband providers liable – not for the content itself, but for applying sanctions to their customers, who were accused of infringing copyright – by giving them a legal obligation, enforceable by a fine or even by the loss of the right to trade.

The case is difficult because it involves a double *non sequitur*. Firstly, there was the simple fact that the policy agenda was copyright, but telecoms law was being amended. Secondly, the right to a fair trial implies a consideration of fundamental rights, and yet it is not obvious at all why such a consideration should be necessary in the context of telecoms policy. The book unpacks this double *non sequitur* in order to explain the rationale behind the attempt to change telecoms law, and why it presented an issue for fundamental rights. In particular, the book explains how European Union (EU) politics shaped the strange outcome.

The place to begin is copyright and the notion of enforcement. ‘Copyright enforcement’ refers to the imposition of a sanction – a punishment – for the unauthorised copying, distribution or use of

copyrighted creative works. Various means of enforcement have been employed ever since the days of the first printing presses, although in the modern context it is usually discharged via litigation in the courts. In the era of the Internet, copyright enforcement concerns the prevention of unauthorised copying and distribution of creative works such as films, music and books, or the so-called ‘fight against Internet piracy’. The advent of a technology known as ‘peer-to-peer file-sharing’, which enabled millions of people to swap content, has prompted lobbying of policy-makers by copyrights holders, such as recorded music labels and Hollywood film studios, for alternative forms of enforcement. This is the policy issue that is addressed by the book.

The policy solution demanded by the rights-holders was to make the broadband providers responsible for dealing with copyright enforcement. Incorporated in their demands were measures known as ‘graduated response’ (also called ‘3-strikes’) – a system of warnings followed by suspension of the Internet account. Suspension was often referred to colloquially as ‘cutting people off the Internet’. Graduated response implied an obligation imposed on the broadband providers to impose sanctions directly onto their customers, the Internet users. Unsurprisingly, the telecoms industry was opposed to any such obligation. The first member state to draft a law for graduated response was France, followed by Britain. What happened in the Telecoms Package case was an attempt to embed such an obligation in European law, and policy-makers in Brussels had to balance the needs of the two industries, which argued bitterly and could not come to any agreement.

Graduated response was predicated on avoiding the need for litigation and was evolved as a form of punishment which by-passed the courts. What happened in the Telecoms Package case was that this factor became a policy issue and was given a high profile, thanks to a counter-campaign by citizen lobbyists. European policy-makers had a second balancing act between copyright and users’ rights, and specifically between copyright and the right to a fair trial. This balancing act created an inter-institutional conflict between the European Parliament, which supported the right to a fair trial, and the member states in the Council of Ministers, where two governments – France and Britain – saw their graduated response laws being threatened.

Therefore the core policy issue of Internet copyright enforcement created fall-out in two apparently separate policy areas: broadband provider liability (telecoms) and fundamental rights. In particular, it required a change to telecoms law in order to establish that liability shift. The

book examines the Telecoms Package case in order to expose how and why this might have happened and to reveal some general messages for Internet copyright enforcement policy. A core message of the book is how telecoms law may be used to enforce copyright on the Internet, and that amendments to telecoms law may indeed be essential to implementing this kind of policy. But there are some strong caveats, especially the necessity to protect citizens' fundamental rights – which means that any decision to pursue online copyright enforcement measures must be taken at a political level. And, when that happens, policy-makers will find themselves in the uncomfortable position of mediating between two powerful warring industries fighting to protect their own fundamental structures.

The story of the Telecoms Package is positioned within a historical and political context for copyright enforcement. The historical context, dating back to the sixteenth century, suggests that copyright is, and always has been, an economic right for the distribution of creative content, and that rights-holders have a pattern of lobbying and litigating in order to protect their distribution rights. In other words, copyright enforcement is the driver of rights-holder lobbying, as was seen in the Telecoms Package case. The political context informs us who the modern-day rights-holders are and how the European policy framework shaped their thinking. There are three themes, which consistently recur and are unfolded in the story of the Telecoms Package.

The first theme is the *court ruling* and the role of the courts in enforcing copyright, because graduated response is about avoiding the courts. Attempts by rights-holders to by-pass legal procedures can be traced right back to the early printing industry of the sixteenth century. In the twenty-first century automated technologies emerged, which could operate extra-judicial sanctions on a mass-market scale. Whether or not the courts should be involved was the crux of the political argument that emerged in the Telecoms Package as a result of the attempt to insert copyright enforcement provisions. This political argument came to a head in the Third Reading, which is examined in detail.

The second theme is the *liability* of the broadband network providers for enforcing copyright. The contextual chapters outline how liability for copyright infringement has its roots in the early days of the print industry, when the person who 'suffered their press to be used by someone else to infringe' could be punished. In the contemporary context, who is that person, if not the broadband provider? An examination of

the literature of copyright in the digital age illustrates how notions of liability are evolving towards asking the Internet companies to manage their customer behaviour. In the Telecoms Package, the rights-holders attempted to insert provisions that sought to create an obligation for broadband providers to enforce copyright, under the threat that they could lose their right to trade if they failed to do so. The proposed mechanism for imposing such liability was the user's contract with the broadband provider. The specific measures were graduated response, modelled on the French Olivennes measures (now better known as 'the Hadopi law').

The third theme is a recurrent one in the history of copyright, namely how policy-makers can *balance* copyright against other rights. In the Telecoms Package case, those 'other' rights were the rights of Internet users, with specific reference to fundamental rights under the European Convention of Human Rights. The particular right that concerns the Telecoms Package is the right to due process – a fair trial – which is a logical consequence of the debate about court involvement, and which ended up at the heart of the final political agreement.

Telling the story of the Telecoms Package

The book provides the background to copyright enforcement and graduated response in a number of contextual chapters. The aim is to arm the readers with a good level of understanding in order to enable them to approach the Telecoms Package story with ease. The essential groundwork is covered, and key notions such as indirect liability are introduced.

Part I reviews the historical context, from the sixteenth century and the first printing presses, through to the digital era and the Internet. It explains technological concepts such as peer-to-peer file-sharing, and why this was perceived to be a problem for the creative industries. The key themes of the book are established – specifically, the notion of indirect liability and the traditional balancing act between copyright and other fundamental rights, such as privacy and freedom of expression.

Part II sets up a discussion of the policy issues concerning Internet copyright enforcement. It explains the EU legacy policies for both copyright and telecoms policies, highlighting their inherent conflict. Drawing on data from the European Commission's Content Online Consultations, it sketches out the rights-holder and telecoms industry interest groups and how they were organised to lobby the European

Union institutions. It sets out their demands for the broadband providers to 'co-operate' with them, and it introduces the French 'graduated response' proposals for online copyright enforcement measures, which sought to by-pass the courts and to sanction users by suspending Internet access – or, in colloquial language, by cutting people off the Internet.

Part III tells the Telecoms Package story. It is told chronologically, beginning with the European Commission drafting the law and moving through the First Reading in the European Parliament, the reaction from the French government, the Council Common position and the Second and Third Readings in the Parliament.

The story begins by examining the rights-holder submissions to the Commission for changes to the Telecoms Package and their rationale, specifically their two key demands – a general obligation on the telecommunications industry to enforce copyright, and a condition related to copyright in the broadband subscribers' contracts. Making the link between telecoms and copyright policies, the book suggests an explanation as to why the Telecoms Package became the policy vehicle for online copyright enforcement and explains how the rights-holders were able to gain political support inside the EU institutions. The Telecoms Package story moves on, with an analysis of the attempt to insert 'copyright' amendments – an attempt that did not entirely succeed. It then tells how policy-makers were thrown into confusion by the counter-insertion of Amendment 138, which demanded a judicial ruling before users could be cut off the Internet and struck at the heart of graduated response.

Amendment 138 brought on the wrath of the French government, which saw its graduated response measures threatened; and it seemed that French politics were dominating the process in Brussels. However, the book reveals that both French and British governments may have sought to influence the outcome via the Council of Ministers, which led to an unexpected stand-off between the Council and the European Parliament. The book reveals how the stand-off was resolved in a Third Reading, through agreement to a provision that sought to protect the fundamental rights of EU citizens in respect of the right to a fair trial, although the effectiveness of this provision will have to be tested in the courts.

The final chapter pulls together the different policy themes with a discussion of the online enforcement policy problem in respect of provider liability and balancing rights. It concludes with a reflection on the policy outcome of the Telecoms Package.

Analysing the Telecoms Package

The research on the Telecoms Package process, which is the foundation stone of this book, entailed a detailed analysis of the *travaux préparatoire*, incorporating 10 discreet stages of documentation for the draft directives, starting in April 2008, through to May 2009.¹ The process was observed contemporaneously, and so it was possible to observe the policy formulation in a way that would be missed in a retrospective analysis. The difficulty was how to ascribe meaning to the individual amendments, which were opaquely written and frequently interlinked. This was a complex process, because a subtle change to the text could make a significant difference in meaning. Changes could be direct substitutions of words, for example the change from 'shall' to 'may', or the use of 'limitations' for 'restrictions'; or re-positioning of text in order to hide meaning. An analytical technique was to match up an understanding of the graduated response measures obtained from studying the Creation and Internet Law, with the proposed provisions. Further documentary sources were obtained to substantiate the political debate, and over 200 documents have been referenced. These documents include European Parliament, Council and Commission internal documents and emails.

It was a deliberate choice to concentrate on the documentary analysis. This choice was made on the grounds that in the documents one can see exactly what was done, rather than rely on the perception of an individual policy actor who may have a political reason for framing an action or an output in a particular way. In many cases the EU documents provide information that tells us what the intention was at the time of drafting – for example the justifications to amendments. Moreover, a close examination of the documents allows us to piece together the policy story with a higher degree of accuracy than when relying on the memories of policy-makers and lobbyists. This analysis was subsequently, and retrospectively, cross-checked through personal interviews with the key policy actors in January to March 2011. I am grateful to the rapporteurs, Catherine Trautmann and Malcolm Harbour, for their feedback, and also to Members of the European Parliament (MEPs) Alexander Alvaro, Philippe Lamberts and Christian Engström.

There are interesting issues other than copyright enforcement raised by the Telecoms Package, for example, net neutrality and traffic management; or the introduction of the Body of European Regulators for Electronic Communications (BEREC). However, the need to maintain a focus has precluded following them up.

Addressing the polarity of the lobbying

Any work dealing with the topic of peer-to-peer file-sharing, which is such a politically polarised issue, inevitably faces the problem of how to handle this polarity. The analytical approach, concentrating on documentary research, which encompassed a study of material from all stakeholder groups – rights-holders, telecoms operators and citizens – was one way to address this issue. Indeed, a significant volume of rights-holder material was used, to ensure that this viewpoint was understood, as should be visible from the quotes in the text. Careful consideration has been given to the appropriate language. The policy issue is frequently referred to by any of the following terms: the fight against piracy, Internet piracy, copyright piracy, illegal downloading or anti-file-sharing crack-down. All have normative implications, namely that the activity is breaking the law. Furthermore, for technical purists, some of these terms do not describe the activity correctly, because they are too specific to a technology or a technique. A term was required that was technology and industry neutral and did not make any normative assumptions regarding the legality of the activity; therefore the legal terminology of ‘copyright enforcement’ is used.

The book describes the views and opinions of policy actors and allows the different groups to speak for themselves, taking quotes from their own documents. Importantly, the book does not seek to come up with any normative judgements about the issue of peer-to-peer file-sharing, nor does it draw any conclusion regarding the economic issues concerning file-sharing. This is outside the scope of the book, although the book does incorporate a relative positioning of the industries from a political economy perspective as contextual information.

The intersection of telecoms and copyright policy studies

The real challenge of the Telecoms Package story was to pull together the threads from the previously separate disciplines of telecommunications and copyright policy. It meant doing extensive research horizontally, across a range of topics, and arguably it does mean that there wasn’t scope or space to address some of the many interesting angles. The historical perspective brings out the notions of copyright enforcement and indirect liability, without the complexities introduced by Internet technology. The specific context of the Internet environment is explained using the work of telecoms scholars such as Goldsmith and Wu (2006) and Zittrain (2004, 2008), who discuss how the network may be controlled, and Balkin (2008), who analyses why freedom of

expression may be at risk from certain policy choices in respect of network architecture. This book owes an invaluable debt to the work of Lawrence Lessig in digital copyright, in particular to his notion of 'code is law', as he expressed it in *Code Version 2.0* (Lessig, 2006), and also to Siva Vaidhyanathan (2003), who explains the link between such controls on the network and their use for copyright enforcement purposes. The book takes these ideas, which have been (largely) developed to fit the American policy environment, and considers them in the European context.

The story of the Telecoms Package takes a slice through the global policy issue and explores it in the EU context. The background to the EU Telecoms Framework review is detailed in Michalis (2007), and further background on the 'convergence' policy of the 1990s is found in Harcourt (2005). Historical aspects of EU communications policy, which also form the backdrop to the Telecoms Package, have been documented by Levy (2001), Humphreys and Simpson (2005), and Christou and Simpson (2007). However, European policy scholars have tended to base their research around the EU agenda, and this has meant that studies tend to be dictated by the prevailing EU policy silos and some issues simply fall in between the silos and are missed out. It is arguable that online copyright is one of those.

This book aims to shed light on the implications of the choices now facing policy-makers to address online copyright enforcement. Rather than accepting the official EU policy positioning, it began with the policy issue and examined the agenda as the stakeholder interests expressed it, before considering how the EU institutional structures, processes, rules and norms had served to shape this puzzling outcome.²

This approach, which crosses over the conventional policy structures within the EU, has arguably enabled a wider exploration of how the proposed measures to enforce online copyright have implications for the fundamental rights of EU citizens. The matter of fundamental rights under the European Convention is a new area for study in EU communications policy,³ which will be increasingly important in coming years, since policy initiatives in respect of online copyright enforcement are ongoing. On the other hand, this broad horizontal approach, aimed at finding links between policy areas, did preclude a deeper exploration of some issues, such as telecoms provider liability.

Finally, I am frequently asked about my personal position on this issue. For the record, I have been writing on telecommunications issues for many years, and I run a website on Internet policy. The issue which concerns me most is not free file-sharing, but the possible 'lock-up' of