



Book Title: **The Copyright Enforcement Enigma**

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BOOK REVIEW: THE COPYRIGHT ENFORCEMENT ENIGMA

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Until recently, copyright law and telecommunications law were considered as quite separate domains. Copyright law, dating back to the 19th Century and being a part of intellectual property law general, mainly belongs to the area of private law (*e.g.* civil law, commercial law, unfair competition law). Telecommunications law, a relatively recent legal area aiming at regulating electronic communications, consists of a conglomerate of sector specific regulation of a both private and public law character (*e.g.* administrative law, competition law, criminal law).

However, as society became more complex due to various economic and societal developments, formerly separated domains of law have become functionally interconnected. This legal interconnection is evidenced for instance by regulation of new forms of doing business (for example, franchising and licensing) and innovative technical inventions (for example, television and computer software) or upcoming antagonism between different societal groups such as the entertainment industries and user's interests groups. The indicated developments are accompanied by actions of institutionalised and non-institutionalised pressure groups, striving for strengthening their respective positions.

The legal response to the recent clash between the creative industries and the telecommunications industries in the European Union (EU) is a good illustration of what has been said so far. At issue is the advent of a technology known as *peer-to-peer-file-sharing*, which enabled customers to swap content on the Internet without respecting the related copyrights. In reaction, organisations of copyright holders made a calculated attempt by amending telecommunications law to make broadband providers responsible for dealing with copyright enforcement on the Internet. For, according to the creative industries, the then existing EU legal framework (*e.g.* the Information Society Directive, the Copyright Enforcement Directives, the E-Commerce Directive, the E-Privacy Directive) together with the Council of Europe's safeguarding of fundamental rights (*e.g.* the rights of freedom of expression and fair trial), did not serve well enough their needs for protection.

The indicated state of affairs instigated organisations of copyright holders (particularly those in the entertainment industries, such as recorded music labels and film studios) to start lobbying policy-makers for alternative forms of enforcement. As a consequence, the previously separate disciplines of copyright law and

Telecommunications law became part of one and the same policy-agenda. The legal solution that figures at the end of all these politics and that has become known as the EU's Telecoms Package regulation (TP) is by its very nature a form of functional law.

The TP, aiming at updating the EU Telecoms Rules of 2002 and unifying the EU's telecommunications market for all 27 EU Member States, passed into law in 2009, leaving the Member States an 18 months period to implement its provisions in national law.¹ For present purposes, it suffices to indicate that the TP allows Member States to disconnect Internet users for illegally downloading copyrighted material, but only if there has been a prior, fair and impartial procedure and an effective and timely judicial review. In spite of the expressed preference of the European Parliament (EP), a preceding decision by a judge is no longer required for measures that limit the access to Internet. A procedure governed by administrative law, answering to the rules of due process, may suffice. Such as -following from the so-called Amendment 138 - codified in Article 1 (3a) TP: *Any of these measures regarding end-users' access to, or use of, services and applications through electronic communication networks liable to restrict those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of Community law, including effective judicial protection and due process. Accordingly, these measures may only be taken with due respect for the principle of the presumption of innocence and the right to privacy. A prior, fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned, subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to effective and timely judicial review shall be guaranteed.*

The cited article gives evidence of the apparent compromise that had to be reached between the European Council (EC) and the EP, the former adopting the argument put forward by the creative industries that illegal down loaders should be cut off from the Internet after multiple attempts to file-share, the latter supporting the view held by the telecommunications industries and consumers that access to the Internet, being a human right to freedom of expression, should not be restricted. The EC and the EP disagreed to such an extent that the various drafts of the TP regulation entered the EU's conciliation procedure. The final compromise text holds that the user's Internet access can be restricted but only as is expressed in the final text of Article 1 (3a) – and by appropriate, proportionate and necessary measures.

The core issue of the book is about how telecommunications law may be used to enforce copyright on the Internet, and that amendments to telecommunications law may indeed be essential to that aim. The inherent conflict which lies herein is especially sharp with regard to the liability issue: making broadband providers liable for enforcement of copyright infringement by Internet users would conflict with the principle of mere conduit, established in the E-Commerce Directive.

The centrepiece of the book, Part III: The Telecoms Package – The Attempt to Commandeer Telecoms Law for Copyright, reports how the creative industries tried to change this situation by lobbying to open the door for graduated response measures in the EU telecoms framework. Their aim was to have two provisions - the copyright hooks - to be embodied in the TP: first, a legally enforceable obligation on the broadband providers to work with copyright holders so as to enforce copyright; second, a requirement that Internet users' contracts should include a condition to respect copyright and should indicate the legal consequences if not doing so. Although the creative industries were able to exert a disproportionate amount of influence compared to that of the large and economically powerful telecommunications industries, the intended provisions were not adopted by the EP.

¹ COM (2007)697 (http://ec.europa.eu/prelex/detail_real.cfm?CL=en&DosId=196418,COD/2007/0247) ; (<http://www.europarl.europa.eu/oeuil/FindByProcnum.do?lang=en&procnum=COD/2007/0247>). The bill was presented to the European Parliament on 13 November 2007 and after several amendments passed into law on 24 November 2009.

This had the effect of unleashing a political battle over introducing a remedy which was called *graduated response*. Graduated response entails three stages: two warnings (strike 1 and strike 2) followed by a penalty, consisting in termination of access to Internet (strike 3). According to the copyright industries this remedy, obviously by-passing regular legal proceedings, was a fairer way of dealing with infringers than taking them to court.² However, it needed co-operation from the side of the telecommunications industries which refused to do so because of the indirect ISP liability that it would establish.

The standstill in drafting the TP that followed was finally overcome by a stand-off in the form of the already mentioned Amendment 138, not explicitly prohibiting graduated response, as long as member states comply with the overall EU legal framework that includes the Charter on Fundamental Rights. In the words of Horten, this compromise can be summarised as follows: *But it has made it clear that, for the moment anyway, an EU-wide liability of Internet providers for applying sanctions is not acceptable.*³ (...) *The overall outcome is that the European Union has shifted the burden and thrown the thorny matter of enforcing copyright online back to the individual member state governments, under the subsidiarity principle.*⁴

Monica Horten's study provides an accurate and absorbing account of the story of the Telecoms Package, positioned within a historical and political context of balancing open connectivity as valued by telecommunications ideology against restricted exclusivity as promoted by copyright enforcement doctrine. The historical part being somewhat superfluous, this is certainly not the case with the political one, illuminating how the EC and the EP under the influence of different groups of lobbyists were striving to harmonise the related opposing interests. Although it is a well known fact of life that most if not all legal regulation is the outcome of political dealing and wheeling, one seldom finds a suchlike clear and succinct reconstruction of important decisive events as Horten's study offers with regard to the TP.

There is only one puzzling aspect of the book: the use of the word *enigma* in its title and the way it is explained in Chapter 13. *The story began*, Horten writes, *with copyright and ended a discussion on the right to a fair trial. Yet the centrepiece is a study of telecoms regulation, which on the surface should have no connection with the other two issues. This is the non sequitur of the online enigma. The policy agenda that connects all three is graduated response, which drags the broadband providers into the copyright dispute between creative industries and file-sharers and at the same time seeks to by-pass existing legal procedure.*⁵ In my reading this quotation gives an excellent summing up of the whole book, underlining the not at all enigmatic course of things of the political process which stands at the begin and the end of the TP.

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² This remedy was copied from a similar sanction in the French Creation and Internet Law 2008. See also the British Digital Economy Act 2010.

³ Horten, p. 214.

⁴ Horten, p. 213-214.

⁵ Horten, p. 205.