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The Telecoms Package - a licence to chill

Abstract

With a few simple words, "*conditions limiting access to and/or use of services and applications*" the Telecoms Package reverses the users' right to freely communicate in cyberspace, and turns it into an operator's right to impose restrictions.

The Telecoms Package establishes the rules for network operators in the EU. Those "*conditions*" mean that the operators may, at their own discretion, block the use of applications and services, which could include Skype, peer-to-peer file-sharing, and any other website, service or protocol.

Such restrictions on Internet use are already applied by some operators. The choice is being made for commercial purposes, or because the operator is subject to litigation by third parties. It is independent of requirements to manage the network, and is carried out without consulting the users as to their needs.

Moreover, the Telecoms Package contains provisions which establish the legal foundation at EU level for government measures restricting the Internet for political purposes. Those purposes may include enforcement of copyright. However, the true extent of the intentions for blocking is unknown.

The restrictions on users' communications will be automated, using relatively new concepts in network technology known as "traffic management systems" and deep packet inspection (sometimes referred to as 'technical measures'). These systems work surreptitiously. The users will not know that the restrictions are in place.

The network operators will be able to implement restrictions with a minimal obligation to a regulator or supervisory body. It is called 'light-touch' regulation, the same as applied to the banks.

Such restrictions will reduce the opportunities for innovation, as entrepreneurs will struggle to get funding if there is a risk that their service will be blocked.

The Internet is a communications network. It is two-way, end-to-end, any-to-any and it provides the essential infrastructure to support democratic values, such as freedom of expression. Attempts by governments to use technical measures to control communications for political purposes of whatever nature, arguably interfere with that right.

Amendment 138 helps to counter these restrictions and protect the fundamental right to freedom of expression. The European Parliament has twice voted in favour of Amendment 138. It has also voted "*to ensure that freedom of expression is not subject to arbitrary restrictions from the public and/or private sphere and to avoid all legislative or administrative measures that could have a "chilling effect" on all aspects of freedom of speech*"[i]

The question for policy-makers is: how far does the Telecoms Package represent a 'licence to chill'?

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"Why should I not use BitTorrent to run my application? It's an open market, isn't it?" That was the question posed recently by a former stock-market trader turned innovator in London's fashionable Chelsea. Exactly the kind of person the EU would wish to encourage with its innovation policy, concerned at how EU telecoms policy would restrict her options.

Who gives broadband providers the right to block certain Internet applications? At the heart of problem with the Telecoms Package, is such a very simple question. The Telecoms Package revises the rules for network operators, including those who run the Internet. With a few simple words, "conditions limiting access to and/or use of applications and services" the Telecoms Package reverses the users' right to freely communicate in cyberspace, into an operator's right to restrict their communications.

When operators, and not users, choose which websites, services and applications users may access, and seek to prevent them from distributing information, there is likely to be a chilling effect on communication. The policy issue for Europe, is whether such an operator's right is appropriate in a democratic society.

What is the problem with the Telecoms Package that Internet users don't like?

The Telecoms Package legalises the selective blocking of Internet services by network providers. And it provides for EU governments to order such blocking for a political purpose, such as enforcement of copyright. In a democracy, we have to ask what right do network operators or government have to restrict the choice of a private business or an end-user in their use of the public communications network infrastructure.

This is the policy question that we must consider with the Telecoms Package. Should the European Union legitimise blocking behaviour on the part of the operators, just because industry asks for it? Or, should it put in place a framework which protects users interests too?

The issue for the Telecoms Package and users rights is much wider than just copyright, where the users first entered the debate. It does include copyright, since protection of copyright could be one reason for the blocking behaviour –placing restrictions on users' communications to protect the rights of content owners. But it won't be the only reason.

In fact, we are unlikely to know the reason, because the broadband providers are not going to be asked to explain the restrictions, and the regulator will not have the proper powers to deal with them.

The example of the innovator wanting to use BitTorrent is an interesting one because her application[ii], like many others[iii], has nothing to do with copyrighted content. The Telecoms Package does not say that BitTorrent will be blocked, but we know from news reports that broadband providers are already blocking users of BitTorrent software and that this practice will be made legitimate under the Telecoms Package. However, BitTorrent is a technology that enables the fast transmission of data files. It is not illegal and the operator's practice of blocking it is arguably an infringement on the users rights to communicate. Arguably too, constraining the options of software developers in this way will stifle innovation. A developer cannot be certain whether their application will be favoured by the broadband providers or whether it will be affected

by national government restrictions, and the consequences will be difficulties in raising funding and attracting customers. For an industry such as the online gaming industry, which is currently raising venture capital, such consequences could have a serious impact.

The upshot is that the network operators become the gatekeepers to the whole Internet. They can choose what we may or may not look at, who we may talk to, and who and when we can get things. They open and shut the gate for the news media, for entertainment and for business. The entertainment industries – some sectors – have decided that it suits them, because they have a problem with copyright protection on the Internet.

For the mass of Internet and e-commerce trade, it could spell financial disaster. They have set up business on the Internet on the basis that they get access to a global market. Under this scenario, they are dependent on the opening and shutting of the electronic gates. And for millions of non-commercial websites, blogs, social networking sites and the democratic media, there is another word – it is called censorship.

Moreover, an additional provision inserted in the Package shortly before the May 6 Second Reading vote in the European Parliament, provides the necessary go-ahead for member state governments to introduce '***national measures'*** to restrict the Internet.

What should we understand by the term '***national measures'***? The perceived intent at the moment is that ***national measures*** will be to support copyright enforcement, and will impose liability for content onto broadband providers. That is, governments will mandate broadband providers to enforce copyright. There are two examples already public.

The UK government has proposed that the Secretary of State for Business can directly order Internet restrictions. The restrictions will be placed to enforce copyright, and will be at the request of the rights-holders. The restrictions could take the form of blocking websites, or blocking individual users communications to prevent them from using BitTorrent and similar technologies – a block which will inherently be arbitrary. The restrictions could also take the form of a temporary or permanent suspension of a user's Internet access. There does not currently appear to be a provision for due process. The UK government has openly admitted that these proposals are in response to stakeholder pressure[iv].

The French government's graduated response proposals have been widely publicised. Internet users accused of copyright infringement by the rights-holders will be given two warnings before their ISP will be asked to suspend their contract to Internet access for up to a year. A public authority known as the HADOPI was to oversee these warnings and sanctions[v]. The highest court in France, the Conseil Constitutionel has declared that the graduated response proposals are against the French Constitution, because only judge can deprive a user of his or her civil liberties. The French government's response was to alter the measures to meet the Conseil Constitutionel's requirement for the involvement of a judge. Fundamentally, from the users' perspective, it will not be much different[vi].

It is becoming clear from the reactions of both the UK and French governments that what is at issue here is the imposition of restrictions for political purposes – the pursuit of copyright enforcement having been arguably escalated to a political level by the rights-holder pressure on those governments.

The issue for users, however, is how much further such mandates could go? Some member states, such as Germany, are actively pursuing Internet censorship for 'protection of children'. The

question is whether the law should also include provisions to stop such powers being used for political purposes, or imposing a disproportionate censorship of content onto all users and all usage.

What is in the Telecoms Package that creates that problem?

The Telecoms Package reverses two key assumptions in EU telecoms law - two principles which have served to protect users against discriminatory behaviour by operators. Firstly, it reverses the assumption in the existing Telecoms Framework, that users have a right to end-to-end connectivity. It does so by permitting restrictions on access to some services, where restrictions may mean that users are blocked or stopped in mid-connection.

Secondly, it reverses the provision in the E-commerce directive that operators of Internet services – commonly known as ISPs – are "mere conduits' – that is, they carry our data, but they do not know or care about the content; they do not know why we go there or what we do when we get there. If ISPs block access to specific services that run on the network, they can no longer be mere conduits.

It does this with the following words:

"***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, where allowed under national law and in conformity with Community law, but does provide for information regarding such conditions***."

This is in the new Article 1.3 in the Universal Services and Users rights directive (USD), drafted by the Council and copied into the law by the European Parliament's IMCO committee. It grants operators the right to restrict access to Internet services.

What does "***conditions limiting access***" mean? The rapporteur, Malcolm Harbour, provided the explanation when speaking at an EU conference hosted by the Czech Presidency on April 16th 2009[vii]. He spoke of "*service limitations ..could certainly include restrictions on access to services like voice over IP*" (Skype is implied here). He also said that "*some customers may wish to buy a package with service limitations if it was cheaper*" – indicating there are corporate interests who may want to package up the Internet.

The legal interpretation[viii] is that acts are which are not prohibited, are by implication, permitted. In other words, if it doesn't say you can't do it, then it's ok, you can. Hence, the meaning is evident: "***neither mandates nor prohibits ... conditions limiting access***'' means that if it is not forbidden to restrict access to the Internet, or block websites and services, therefore operators may do it. "*…but does provide for information regarding such conditions*" means that they have to tell users. Elsewhere in the directive (Article 20 and 21), it states that this information must be in the user's contract and must be published somewhere. Thus, the only barrier to the operator imposing such restrictions on Internet services and applications, is to put it in the small print somewhere in the user's contract. This is a minimal requirement and is unlikely to be of great help to users[ix].

From the users point of view, the problem is obvious. No-one would want a telephone service if the operator could choose which numbers they were permitted to dial, and which ones they couldn't call. Likewise, they do not want an Internet service where the operators choose which websites, services and applications they can use.

The second sentence in USD Article 1.3 gives governments the right to impose measures using such restrictions for specific purposes: "***National measures regarding end-users' access to or use of services and applications through electronic communications networks…"***

Although Article 1.3 does say that such 'national measures' must respect users fundamental rights, it only specifies the right to privacy – as an acknowledgement of data protection laws - and not the right to freedom of expression. The obvious question to ask is why the directive needs to refer to 'national measures regarding end-users access' to services and applications on the Internet? Why would governments want to impose 'measures' to restrict access to the Internet?

The purpose and meaning of Article 1.3 can be understood by considering the recent UK government proposals in the *Digital Britain* report and P2P Consultation, which proposes to give UK regulator Ofcom a duty to reduce file-sharing, and to impose '*technical measures'* such as blocking of particular websites or protocols (peer-to peer protocols such as BitTorrent will be targetted).

Article 1.3 was a replacement for a previous amendment - Article 32(a), also known as Amendment 166 which sought to protect users' rights to open access on the Internet. Article 1.3 reverses the intent of Article 32(a) from a users' right into an operators and government right.

Article 1.3 is supported by similar text inserted in all of the 'right' places in the Package: user contracts, transparency, interconnection, authorisation, and their associated recitals.

And so, with those few words, "***conditions limiting access to and/or use of applications and services***" the Telecoms Package reverses the legal position from a users right to end-to-end connectivity, into an operator's right to impose blocks on users communications and a government right to impose such blocks for political purposes. If operators may block, then the end-to-end principle is gone. Networks which block lose their "mere conduit" status. If governments may block, then Europe is on the slippery slope to Chinese-style Internet censorship.

Why are restrictions such a problem?

Restrictions on Internet services will be applied by network operators using sophisticated new technologies, which are known as 'traffic management systems' and are also euphemistically called 'technical measures'.

Traffic management[x] refers to new systems which telecoms operators are buying. These systems employ sophisticated technology to keep the flow of traffic moving on the network and deal with problems such as congestion. However, traffic management systems also have powerful capabilities to enable the operator to prioritise and to discriminate.

Traffic management systems enable the network operators to decide which traffic will be allowed on their networks, and which will not. They can pick and choose what goes first, and what goes last, what goes fast and what goes slow. They can offer preferred content, and make sure that their own content is available faster and more conveniently than other content. They are also able to block traffic electronically, at different levels on the network. – at the entrance to websites, traffic in transit, and at the point where the user accesses the network. These actions do not necessarily relate to the need to keep the traffic flowing.

Moreover, using deep packet inspection technology, traffic management systems can look into our data. They are capable of electronic surveillance, and everything is done covertly, by automation. The UK's Phorm technology for covert monitoring to support advertising, is one example. They will be able to do things that are not immediately detectable. Some deep packet inspection systems claim they can check users' data for copyright compliance and block it if it is deemed to be infringing.

Technically, peer-to-peer file-sharing is easy for network operators to identify[xi]. The individual peer-to-peer protocols can be seen on the network provider's monitoring screen, as can individual computer games played online. On watching a network being monitored, it was possible to identify for example, games such as World of Warcraft and Lord of the Rings[xii]. There is already evidence of blocking behaviour by operators. Skype is already being blocked by an unrepentant T-Mobile[xiii], some UK operators block access to peer-to-peer sites. BT is blocking video at certain times of day[xiv], and blocking peer-to-peer services [xv].

At the 16th April Czech Presidency conference[xvi], T-Mobile said that the bulk of traffic in 2010 will be managed by such systems. Simon Hampton, of Google, warned that managed traffic will become the model, not the exception. The message is clear. We are entering an era when network operators will have the ability to control how, what and when we communicate.

Most people will have no idea this is happening. Even if it is in the contract, as the Telecoms Package provides for, most people will not know that the network operators have this kind of equipment, or how it would work. Deciphering a problem with a network connection can be a minefield, because the answer could lie in a thousand different network points. Is it the router (which router?), the users' pc, the server, the line, the exchange … ? The ordinary users will not know whether the operator is blocking their connection or whether they do indeed have a problem with their computer. It will be easy for the network operators to avoid liability to the user.

Moreover, in this environment, the development of new Internet applications and services will be dampened. Whilst politicians race to jump on the Twitter bandwagon, they should consider carefully how the next Twitter – or Google, or Facebook, or Wikipedia - will evolve?

But won't competition law deal with it?

The Telecoms Package provides for competition law to deal with such blocking situations, but competition law has a number of weaknesses where Internet restrictions are concerned.

Market-based competition is used in policy initiatives to encourage the availability of a variety of goods and services at affordable prices. In terms of telecoms services, the principle of competition should mean that people can choose which provider they will go with, and they can switch if they are not happy. But for many people, such a concept of choice is not realistic. Changing your broadband supplier is like moving house. You have to tell everyone and make changes to your computer. For small businesses, there are direct costs involved.

Competition law does not deal with government measures. It deals with situations where a company either dominates the market, or indulges in behaviour such as price-fixing. There is some evidence that competition law may be used to address a situation where a network operator is giving preferential treatment to its own commercial content services, and treating competitor services less well[xvii].

However, in respect of blocking by Internet providers, competition lawyers advise that this is inadequate to deal with such situations. It refers to Articles 81 and 82 of the EU Treaty, dealing with dominant market power and cartels. In some cases, it may be relevant, but in many cases, where a user finds their right to access something is blocked, competition law may not apply.

The Telecoms Package "compromise" proposals in the European Parliament's Second Reading have stripped away most of the powers from the regulators to deal with such situations. For example, the weakened powers for the Commission in Universal Services and Users Rights directive Article 22.3. Aside from a small power for regulators to impose 'minimum quality standards,' there is little that they can do. The new BEREC will not be empowered to address such situations.

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The only barrier to operators blocking access to anything they choose on the Internet, is that they tell the user in small print of the contract. This means that we can expect blocking to become the norm, and the only choice that users will have, is a choice of different types of blockages.

This is called 'light touch' regulation. The banks also had 'light touch' regulation. The banks are an example of what happens when large industries with complex technical systems are left to regulate themselves.

Where does copyright come in to it?

The creative industries have been pressuring for over 10 years to get the Internet industry made liable for enforcing copyright[xviii]. They want network operators to check their traffic for copyrighted content, and prevent users from getting it, using 'technical measures'. Alternatively, they want users sanctioned, as for example, in the French graduated response measures.

The creative industries have lobbied the European Commission in 2006[xix] and again in 2008[xx] They have litigated, bringing numerous test cases, such as IRMA v eircom in Ireland, Sabam v Scarlet in Belgium, Promusicae v Telefonica in Spain, Tele2 in Denmark, and the well-known Pirate Bay case in Sweden. They frequently pick on small and financially weak companies, as is evident with Karoo[xxi] in the UK, which succumbed to pressure from legal threats before a court case could be brought.

The ISPs have been able to argue that they are '***mere conduits'***[xxii] and therefore not liable[xxiii]. Now the creative industries have understood how deep packet inspection works, they are lobbying governments for 'technical measures'. The key question is whether they will get a test case, or government support, as they are pressing for in the UK.

A provision for ISPs to be mandated to work with the creative industries has been built into the Telecoms Package via the ***cooperation with the sectors interested in the promotion of lawful content***[xxiv] (*USD: Article 33.3).* This Article has had little opposition because it was not well understood what it meant. Co-operation sounded harmless. This demand for co-operation[xxv] should be seen in light of the list of litigation against ISPs to force them to censor websites and sanction users, and the eircom-style private agreements to sanction users with no due process, handled via call centres.

At the same time, anyone wishing to obtain an EU-wide licence for music cannot do so[xxvi], and new music ventures such as Spotify could simply be incorporated under the control of the four recorded music companies which dominate the music market worldwide[xxvii].

Moreover, the reference to ***'national measures'*** opens the door for European governments to introduce measures which sanction Internet users or prevent them from accessing copyrighted content by slowing down or intercepting data transmission. The specific measure which is provided for in the Telecoms Package is the ***'mechanism for the purpose of enabling appropriate cooperation on issues relating to the promotion of lawful content'***, (*USD: Recital 39*)

How does the Telecoms Package infringe on freedom of expression?

There is an issue for public policy in respect of how such measures affect the rights of European citizens. In particular, the right to freedom of expression, which is essential for democratic society. In the European Union, freedom of expression is a right granted to citizens by the Treaty[xxviii], which references the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) . This says that people have the right to *receive* and *impart* information without interference from a public authority.

The right to freedom of expression is about the opportunity to have access to any and all of the available information and users of the network. In the digital era, or the Information Society, people exercise this right using the Internet, as has recently been stated clearly by the French Conseil Constitutionel[xxix], and by the Council of Europe political declaration of 28-29 May 2009.[xxx] The use of services and applications to access and distribute is an important element to facilitating this right.

The right to freedom of expression can therefore only be guaranteed if Internet users have access to all websites, services and applications, and if they have the right to upload information as well as download it. Under EU law, if governments wish to place restrictions on those rights, those restrictions must be only for limited and specific reasons, and genuinely meet public interest objectives. They must be within the boundaries prescribed by national law, and they should be proportionate to any alleged offence.

The Telecoms Package 'limitations' clauses are about restricting access to services which users currently have access to. Arguably, they are arbitrary, for a privately defined purpose, and broadly applied. In a democratic society, one would expect that such matters are decided at a societal level, and not determined by individual commercial operators.

How does Amendment 138 protect free speech?

Amendment 138 was intended to protect Internet users rights to free speech. In particular, it has acted as a counter-weight against measures such as the French government's graduated response. It did this by putting a reminder into the law that users rights to freedom of expression may not be restricted without a prior judicial ruling. Its ultimate meaning turns on the interpretation of 'restriction of fundamental' rights' and on the importance of having a 'prior judicial ruling'.

'Restriction of fundamental rights' has been interpreted as 'cutting off Internet access' where access is the provision of the service down the wire to the home or office. However, assuming that the right to freedom of expression is interpreted as the right to use all applications and services, then 'restriction' also means blocking access to Internet services and applications.

Moreover, the right to freedom of expression is guaranteed under the EU Treaty *without interference* from the State. Arguably, the use of traffic management systems with deep packet inspection (technical measures) would constitute 'interference'.

The words 'prior judicial ruling' is also arguably a reminder that citizens may only be deprived of fundamental rights by a court, and thus Amendment 138 maintains the separation of political and judicial functions which is essential for the functioning of a democratic society. It protects society against governments who wish to slide judicial functions into private hands via 'self-regulatory measures' or 'voluntary agreements' or even 'public authorities'.

On the other hand, this is the reason why governments are opposed to it – because it 'constrains their policy options'[xxxi] where their 'policy options' are imposing automated restrictions on the Internet to support copyright or other political purposes.

It is also worth noting that the so-called "compromise" Amendment 138 which the Council pressured onto the Parliament takes a lead from the Universal Services Directive Article 1.3 (*see above*) and seals in the provision for governments to put in "***national measures***" for the control of specific aspects of Internet content.

The so-called "compromise" is very cleverly written so that the difference is subtle. It is written from the perspective of the body taking the measures, whereas Amendment 138 is written from the user's perspective. " ***Measures taken regarding end-users access ... shall respect fundamental rights ... in relation to privacy....*** " means that a measure can be taken indirectly, such as the blocking of a web service, in which case the right to a judgement could be a judgement by appeal after the penalty has been applied. This is not the same as "***no restriction shall be placed on the fundamental rights without a prior judicial ruling***" which is a reminder of current EU law, that everyone has a right to due process *before* the punishment is applied and, importantly, that the functions of the judiciary and commercial regulation are kept separate.

The European Parliament has twice voted in favour of Amendment 138, in the full understanding that it was preserving the right to freedom of expression: on September 24 2008, and again on 6 May 2009. Amendment 138 therefore plays a very important role in supporting freedom of speech on the European Internet.

Why a licence to chill?

The Internet today is much more than a vast encyclopedia or entertainment system. It is woven into the very fabric of life for many people. Entrepreneurship to develop the 'digital economy' has been encouraged by a variety of policy decisions in the past 15 years to do more online[xxxii], and European citizens have embraced these new communications possibilities .

People regard it as theirs. It is the shop, the bank, the office, the leisure centre – and it is the news-sheet, the pamphlet, and the cafe or bar-room chat.

And there is perhaps a dichotomy between the policy makers and the users. The policy-makers think that the users' rights are in the commercial contract for access to the system. The users believe their rights lie in what they do when they are connected. The Internet is a communications system, which is intended to connect end-to-end, anyone or any computer to any other, in two directions.

Amendment 138 holds in the balance users rights to access and distribute information as well as the economic rights of innovative web services.

By authorising blocking practices, and by giving governments the right to authorise them for political purposes, the Telecoms Package puts Europe on a path to a series of restricted networks, instead of one inter-connected communications system. Such a scenario puts at risk innovation, as well as any policy goals to encourage cross-border trade. And, by permitting the technical interference with users' communications, it stands to chill democratic speech. Under the Telecoms Package, a network operator only needs to tell the users cannot access certain sites. When a government or a network operator disfavours a political view, who will stop it putting the blocks on?

In March 2009, the European Parliament voted for the Lambrinidis report which stated : *"to ensure that freedom of expression is not subject to arbitrary restrictions from the public and/or private sphere and to avoid all legislative or administrative measures that could have a "chilling effect" on all aspects of freedom of speech"*[xxxiii]. The Telecoms Package challenges the European Parliament to adhere to its principles.

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References

[i] *Lambrinidis Report*, 25 March 2009, point (v):

[ii] I have paraphrased the situation, but the conversation was a real one.

[iii] Business using BitTorrent to distribute material include Asus (the Taiwan-based manufacturer of the NVIDIA graphics card) to distribute software; and Amazon S3 web storage service; new-style TV distributor Vuze; the music platofrm Jamendo; and video distributor Brightcove.

[iv] *Government statement on the proposed p2p file-sharing legislation* page 3, Available at: http://www.berr.gov.uk/files/file52658.pdf

[v] La loi favorisant la diffusion et la protection de la création sur Internet.

[vi] Project de loi relatif à la protection pénale de la propriété littéraire et artistique sur internet.

[vii] Future Europe: Modern Communications for Everyone, High-Level Seminar on e-Communications http://www.mpo.cz/kalendar/download/71542/priloha007.pdf and http://www.mpo.cz/dokument57660.html

[viii] Interpretation under English law. As this text was drafted by the UK delegation, it is likely that this interpretation was intended.

[ix] For a longer discussion on the issues related to disclosure and 'transparency' see Susan Crawford, *Transporting Communications*, In Boston University Law Review 89, no. 3 (2009): 871-937, available at: http://cgi2.www.law.umich.edu/_FacultyBioPage/facultybiopagenew.asp?ID=373

[x] Monica Horten and Benedetta Brevini, *Net neutrality vs traffic management policies A briefing paper on the Telecoms Package Second Reading*, 16 March 2009, Available at: http://www.iptegrity.com/index.php?option=com_content&task=view&id=278&Itemid=9

[xi] Peer-to-peer Taste Test http://www.internetevolution.com/document.asp?doc_id=178633&

[xii] Demonstation by Procera Networks, showing a Swedish network being monitored, at Broadband World Forum 2008

[xiii] Statement from the VON coalition Available at: http://www.voneurope.eu/leading-providers-of-voice-solutions-over-the-internet-protest-against-blocking-or-degrading-of-voip-applications-over-mobile-networks-after-t-mobile-announcement

[xiv] New York Times http://bits.blogs.nytimes.com/2009/06/12/bts-battle-against-the-bbcs-internet-video/

[xv] There are many articles about BT throttling P2P and other Internet traffic. Here are two: http://news.bbc.co.uk/1/hi/technology/8077839.stm and http://www.afterdawn.com/news/archive/15040.cfm

[xvi] Ibid Future Europe: Modern Communications for Everyone, High-Level Seminar on e-Communications

[xvii] France Telecom was criticised by the French competition authorities for offering exclusive access to certain sports content, however, the decision was not legally binding. http://www.ft.com/cms/s/0/493e839a-6b1e-11de-861d-00144feabdc0.html

[xviii] Paul Goldstein, Copyright's Highway, From Gutenberg to the Celestial Jukebox, Stanford University Press, 2003, p 171. A US proposal in 1996 to make ISPs liable for content was rejected following opposition from technology industries and consumer groups.

[xix] CMBA contribution to the Telecoms Review Consultation in 2006: "The European Union therefore urgently needs to take the opportunity offered by the review of the Telecom Package to put in place the right conditions for effective joint efforts by public authorities and stakeholders to tackle law enforcement needs ranging from "identity theft" to "infringement of intellectual property rights"..." CMBA members include Bertelsmann, EMI, Time Warner, Canal+, Universal, IFPI, MPA, Disney, Sony. http://ec.europa.eu/information_society/policy/ecomm/doc/library/public_consult/review_2/comments/cmba.pdf

[xx] Motion Picture Association (MPA) Contribution to Creative Content Online consultation 2008 called on the 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, .."

[xxi] http://www.guardian.co.uk/music/2009/jul/24/hull-isp-pulls-plug-filesharers

[xxii] E-commerce directive, Article 12

[xxiii] For further information on the issues concerning intermediary liability, copyright and freedom of expression, see Jack M Balkin, *The Future of Free Expression in a Digital Age*, in Pepperdine Law Review, Vol 36:N, 2008; also see *ibid* Susan Crawford.

[xxiv] SACD letter to the European Parliament www.laquadrature.net/files/note-sacd-paquet-telecom.doc

[xxv] ibid MPA: "The notion that stakeholder cooperation – notably between Internet service providers/telecoms operators and rights holders – can go a long way to improve respect for copyright in the online environment"

[xxvi] Policy discussion concerns multi-territory rights for music and audio-visual works. See Recommendation on Music Online 2005; Cisac decision 2008; Consultation for Content Online 2008.

[xxvii] Wired magazine *Ka-shing! Spotify Investors Include Chinese Billionaire* 21 August 2009. The article says that bands will have to sign with music majors to benefit from Spotify royalties, meaning the music companies retain control and remain the gatekeepers for music. http://www.wired.com/epicenter/2009/08/ka-shing-spotify-investors-include-chinese-billionaire/

[xxviii] Article 6 of the European Union consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community. Official Journal of the European Union 29.12.2006

[xxix] Conseil Constitutionel, 10 Juin 2009, Communique de presse, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/2009/decisions-par-date/2009/2009-580-dc/communique-de-presse.42667.html

[xxx] The Council of Europe is a different institution from the Council of Ministers. The document is *1st Council of Europe conference of Ministers responsible for Media and New Communications Services. A new notion of media?, 28-29 May 2009, Reykjavik, Iceland*

[xxxi] Lords Hansard Text 17 June 2009 EU: Telecoms Council Statement by The Minister for Communications, Technology and Broadcasting (Lord Carter of Barnes). "*The UK noted that the amendment was unacceptable both in legal and policy terms, noting how it could constrain future decisions of the Government*."

[xxxii] Information Society initiatives since 1993, including the i2010 initiative which includes the 'Broadband for all' policy. E-commerce directive; Framework programme – R&D, innovation; consumer policy - cross-border consumer rights. http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/702&format=HTML&aged=0&language=EN&guiLanguage=en The latest thinking is that the digital economy can drive Europe's economic recovery - the European Commission is consultating on the Digital Economy: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1112&format=HTML&aged=0&language=EN&guiLanguage=en

[xxxiii] *Ibid* Lambrinidis report, point (v):