# Analysis of reports
# Mavrommatis (PE 404.747) et Guardans (PE 404.775)

By « La Quadrature du Net »
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**Subject of the document**

La Quadrature du Net (Squaring the Net) is concerned about amendments which threaten the right to privacy, tabled by the rapporteurs of the Culture Committee of the European Parliament in respect of the two framework-directive proposals known as the "Telecom Package".

These amendments aim to get the concept of « *graduated response* » (alternatively known as '*three strikes and you're out*') included into this legislation. This note aims to inform the MEPs in details about these amendments, their origins and the threats they pose to the rights and freedoms of citizens.

Several have been literally copied from amendments proposed by the French copyright collective society SACD. They aim to lower the level of protection of privacy and personal data in Europe. They go against a recent ruling by the European Court of Justice. Other amendments are designed to allow ISPs to sanction Internet users without going through the courts.

The note also studies other amendments by the draftsmen of the CULT Committee to to institutionalize the influence of the cultural industries, legalize cultural industry spyware, or to enable them to determine which wireless technologies will be used by the public. The final amendment studied, denies the existence of a public's right to redistribute in the public domain or free licensed works.

**About la Quadrature du net / Squaring the Net**

La Quadrature du Net / Squaring the Net is a citizen group monitoring law and regulation related to the Internet, and the way in which they impact on civil liberties, as well as economic and social development in the digital age.

La Quadrature du Net / Squaring the Net is supported by more than fifteen french, european and international NGOs including the Electronic Frontier Foundation, the Open Society Institute and Privacy International.

# SUMMARY


**Three-strikes riders**[1]

**1) Piracy of the E-privacy directive : Mavrommatis : 2, 3, 4, 10, 11**

Rider to lower the level of protection of personal data and privacy by extending the authorization for wiretaping, interception and surveillance of electronic communications, as well as processing of personal data without the user's consent, in order to support "intellectual property". Aims to void a ruling by the European Court of Justice.[2]

**2) Weakening of judicial authority : Mavrommatis : 6, 7, 8, 9 ; Guardans : 12, 13**

Rider to authorize national regulatory authorities (in France : ARCEP, CSA, HADOPI) to create rules which would compel technical intermediaries to co-operate in the fight against unlawful content outside the domain of the courts, and to include these rules in their contracts with end-users.

**Others legislative riders**

**3) Attempt to legalizing of cultural industries spyware : Mavrommatis : 5**

Rider to allow Trojans to fight against unauthorized copying (called Sony rootkit rider)

**4) Harm to technological neutrality : Guardans : 6, 14, 15, 16, 18, 22**

Rider to extend the concept of cultural exception to limit the opening of the spectrum and undermining the principle of technological neutrality

**5) Creating a privilege in terms of influence: Guardans : 2**

Rider to institutionalize the influence of cultural industries and media at the expense of other parties

**6) Negation of the public's freedom of communication : Guardans : 12**

Rider to deny the public's right to impart content on electronic networks .


1 Amendments are grouped according to their objectives and each group's name begin with "rider" to make reference to the concept of "legislative rider", corresponding to an off-board amendment, but also to make reference to the concept of troyan horse, as the motives of the amendements mask the actual objectives of their authors.

2 http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher$docrequire=alldocs&numaff=C-275/06

# 1) PIRACY OF THE E-PRIVACY DIRECTIVE

***Rider to lower the level of protection of personal data and privacy, by extending the authorization for wiretapping, interception and surveillance of electronic communications, as well as processing of personal data without the user's consent, in order to support "intellectual property". Aims at voiding a ruling by the European Court of Justice.***

**Mavrommatis Amendments : 2, 3, 4, 10, 11**

**Amendment 2** removes the part of recital 28 of the draft Framework Directive which states that « *it is necessary to ensure that the fundamental rights of individuals, in particular the right to privacy and data protection, are safeguarded* », so that information and communication technology, such as RFID, can be accepted and thus contribute to economic and social development of the European Union.

In altering the focus of the original recital away from privacy and personal data, in accordance with the objectives of the Framework Directive, the amendment proposes a reference to all the fundamental rights of the European Charter of Fundamental Rights. It is therefore seeks to put all fundamental rights at the same level for the interpretation of the articles of the directive, including the protection of "intellectual property" (mentioned in the Charter).

Such an objective is inconsistent with the preamble for the Framework Directive which aims at enforcing protection of privacy and personal data. It is also inconsistent with the very title of the directive modified by the following amendments (Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector - Directive on privacy and electronic communications) .

This amendment seeks to divert the framework directive away from its purpose, and to justify the subsequent amendments lowering the level of protection of privacy and personal data on behalf of the protection of "intellectual property".

**Amendment 3** adds a new recital 30 a) to the Framework Directive. This recital is an excerpt from a decision by the European Court of Justice (Case Promusicae vs Telefonica) that recalls, out of its original context, that Member States must respect the principle of proportionality.

This decision, however, takes its full meaning when one reads the entirety of the decision: The Court reminds us that one can not always act on the basis of copyright alone. .

It thus indicates that EU directives dealing with copyright « *do not require the Member States to lay down, in a situation such as that in the main proceedings, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. However, Community law requires that, when transposing*

*those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality. »*

The General Counsel, which has been followed by the Court, had stressed in its conclusions that *« the State's duties of protection are not so far-reaching that unlimited means should be made available to the rightholder for the purpose of detecting infringements of rights. Rather, it is not objectionable for certain rights of detection to remain reserved for State authorities or not to be available at all. »*

**Amendment 4** changes recital 31 of the Framework Directive. It limits the pursuit of an appropriate level of protection of privacy and personal data on electronic networks only to « *lawful* » uses of these networks, whereas the principle of proportionality, which is at issue here, applies to all users, irrespective of whether they are suspects, guilty or not guilty. In case of alleged or proven misuse, this principle will always apply, although its application can vary under the control of the courts or judicial authority. That is the whole meaning of the pre-cited ECJ decision. This amendment therefore attacks the very foundation of the Court's decision.

**Amendment 10** rewrites Article 5 (1) of Directive 2002/58/EC to allow wiretapping, interception of communications and any other type of monitoring of communications, in order to protect "Intellectual property", since it adds a reference to the Charter of Fundamental Rights (where protection of intellectual property is mentioned).

**Amendment 11** complements the previous one. It amends Article 15.1 of the Directive 2002/58CE (Privacy and electronic communications) referred to in section 5 (1) of this directive (as amended by Amendment 10).

Article 15.1 states that Member States may adopt measures, such as those provided for in Article 5 (1), « *when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system , as referred to in Article 13(1) of Directive 95/46/EC.*».

The change is the addition of the sentence « *or protection of rights and freedoms of others* » after «*communication system* ». It aims to allow the interception of electronic communications, access to connection data and cross-referencing with personal data, in

the interest of protecting "intellectual property" - for example, in the fight against non-profit copying made without authorisation via Internet.

Until now, activities of this kind, which pose a challenge to fundamental rights could only be authorized by a judicial authority, who would utilise these powers, in accordance with the principle of proportionality, and only for serious criminal offences - prevention and fight against terrorism, organized crime, computer fraud.

It must be noted that in its opinion the General Counsel of EJC stated :

« *Consequently, the protection of the rights and freedoms of others under Article 13(1)(g) of Directive 95/46 cannot justify the communication of personal traffic data.* »

In other terms, the exact opposite of the aim of this amendment.

***Nota bene* :** amendments 3 and 11 are literal copies of amendments of the SACD, the french pro-graduated response cinema lobby, as evidenced by a note that La Quadrature du Net obtained.

The justification for these amendments in this note is explicit :

« *IIt is essential that this re-alignment takes place within the 2002 directive because, as pointed out by the ECJ in its ruling Promusicae c / Telefonica of 29 January 2008, Member States shall ensure, particularly where the information society is concerned, the effective protection of intellectual property, especially copyright. It follows guidelines to ensure compliance with intellectual property right ( "Information Society" Respect Human Rights "and" electronic commerce ") that such protection [of intellectual property] can not affect the requirements of the protection of personal data.*

*It is about two amendments [3 and 11], which can take better account of the fundamental rights of intellectual property and effective judicial protection against those of privacy and protection of personal data.*»

This note of March 2008 was followed on May 5 by a letter signed by Pascal Rogard, executive director of the SACD. The letter was addressed to some members of the CULT Committee asking them to support his amendments adopted by the rapporteur.

Surprisingly, the reasons presented by the rapporteur state that is to reinforce the Court's decision, while the Director General of the SACD refers to « *take fully into account the judgement of the ECJ of 29 January 2008 Promusicae c / Telefonica*. ».

Yet, as has been demonstrated - and is embodied by the SACD itself in its note, lowering the protection of privacy and personal data currently in force in Europe, is clearly contrary to theTelefonica vs Promusicae judgement. .

## 2) WEAKENING OF JUDICIAL AUTHORITY

***Rider to authorize national regulatory authority (in France : ARCEP, CSA, HADOPI) to create ruleswhich would compel technical intermediaries to cooperate in the fight against unlawful content outside the domain of the courts, and to include such rules in their contracts with end-users.***

**Mavrommatis amendments : 6, 7, 8, 9**

**Amendment 6** amends Article 20, paragraph 2 h of Directive 2002/22 EC,which requires service providers to inform consumers of actions they can take in case of « *security or integrity incidents or threats and vulnerability* » (ie: the interruption of service).

This amendment alters this article to include an obligation to include in contracts the measures they can take in case of « *unlawful* » activities.

But the fact that a provider can implement the decisions of the court need not be reported in a contract. It is indeed the court's role to determine what is lawful or unlawful in light of the facts, and order the necessary, appropriate and proportionate measures to deal with infringements, to put a stop to damaging activity or to punish.

This provision has no place in this paragraph, which deals with consumer information on measures operators can take, unilaterally or at the request of a national regulatory authority to ensure the safety and integrity of electronic communications infrastructures. It does not deal with matters that should be dealt with by a court of law or a judicial authority.

**Amendment 7** amends Article 20, paragraph 5 of the Directive 2002/22 EC, which requires the ISP to inform the user about the restrictions on their ability to access, and distribute, legal content or on their use of lawful applications and services of their choice.

This amendment deletes the two occurrences of « *lawful* », in order to permit information to be given on what measures can be taken in case of unlawful activities.

If the removal is a good thing, the motive is irrelevant.

- The original provision aims to ensure that the consumer is informed in relation to benefits provided in the context of normal use of the service, not to inform on measures that the provider could take at the request of the courts or a judicial authority (ie: filtering of illegal content)
- The fact that a provider can implement the decisions of the judiciary relating to illegal content or services need not be reported in a contract.

Moreover as noted by MEP Rubig *« the reference to the content being 'lawful' implies that service providers monitor and check the content of communications and would be able to categorise them, which is generally not the case. This is misleading, because it is forbidden by law. To avoid misinterpretation, the adjective should be removed.* [3]

3 http://www.europarl.europa.eu/meetdocs/2004_2009/documents/am/718/718824/718824en.pdf

**Amendment 8** amends Article 28, paragraph 1 of a Directive 2002/22 EC, which makes the regulatory authorities to ensure that users can get access to, and use, services offered in the EC, especially information society services.

The amendment adds the word « *lawful* » after « *services* » which is unnecessary since the national regulatory authorities are not intended to verify that a service provided in the Community is lawful - it is presumed to be lawful unless there is a decision of a court or judicial authority to the contrary.

**Amendment 9** amends Article 28, paragraph 1, paragraph 2 of Directive 2002/22 EC. This article allows national regulators to order the blocking of content (filtering) or access (cut) in the event of fraud or abuse

The amendment extends this repressive intervention scope to any « *illegal and harmful* » activity or *« abuse situation »*.

This amendment is the logical continuation of the previous ones: it gives the power to the national regulatory authorities to order filtering measures or access cut if they guess an unlawful activity or to stop a harm. These include transferring to the national regulatory authorities, the powers of the judicial authority which would enable them to limit the freedom of communication for electronic network end-users.

**<u>Guardans Amendment : 13</u>**

**Amendment 13** completes previously studied amendments. It adds a point h to article 8, paragraph 4 of the Directive 2002/21CE. This point h stipulates that national regulatory authorities must ensure that service providers are working together « *towards the protection and the promotion of lawful content*. »

The objective is that national regulatory authorities will be able to set up conditions such that service providers can get involved in the implementation of the graduated response, ie the fight against copyright infringements.

In particular, they would be able to write boilerplate clauses that ISPs could introduce into their contracts, to exclude liability for themselves in cases of surveillance and access termination (amendment Mavrommatis 6). or filtering (amendment Mavrommatis 7) authorized by the regulatory authority (amendment Mavrommatis 9), (and therefore without control of a judicial authority).

## 3) ATTEMPT OF LEGALIZING OF CULTURAL INDUSTRIES SPYWARE

***Rider to allow Trojans to fight against unauthorized copying (called Sony rootkit rider)***

**Mavrommatis amendment : 5**

This amendment proposes to limit the definition of spyware in recital 34 of the Framework Directive to software that secretely records the « *lawfu*l » user actions and / or corrupt the operation of the terminal equipment for the benefit of third party. This means that software which recorded illegal actions or corrupted user's hardware would not constitute a serious threat to privacy.

On the one hand, this is a delegation to software of powers granted to the courts or judicial authority to judge what is lawful or not,. which means that a computer can replace a judge. On the other hand, it trivializes the handling of personal data of the user without his knowledge, out of control of a judicial authority, which is currently prohibited by law.

This amendment can be linked to the case of the Sony rootkit, a system which monitored actions of users listening to Sony CD on their personal computer. Once discovered, the company argued that it was to fight against illicit copying. It has been demonstrated in this case that any spyware presents a threat to the privacy of users - millions of machines had been corrupted by the Sony root-kit which was then used by others for fraudulent purposes.

As the Electronic Frontier Foundation reports, «*by including a flawed and overreaching computer program in millions of music CDs sold to the public, Sony BMG has created serious security, privacy and consumer protection problems that have damaged music lovers everywhere. (...) The security issue involves a file folder installed on users' computers by the MediaMax software that could allow malicious third parties who have localized, lower-privilege access to gain control over a consumer's computer running the Windows operating system. The software also transmits data about users to SunnComm through an Internet connection whenever purchasers listen to CDs, allowing the company to track listening habits -- even though the EULA states that the software will not be used to collect personal information and SunnComm's website says "no information is ever collected about you our your computer*. »[4]

This is obviously an amendment that has no place in a directive on the protection of personal data and privacy, especially since it amends an important recital aiming to ensure a high level of protection for users in the digital environment, including against spyware of cultural industries.

4 http://www.eff.org/cases/sony-bmg-litigation-info

## 4) HARM TO TECHNOLOGICAL NEUTRALITY

***Rider to extend the concept of cultural exception to limit the opening of the spectrum and undermining the principle of technological neutrality***

**Guardans amendments : 6, 14, 15, 16, 18, 22**

This series of amendments is designed to extend the list of restrictions to the principle of technological neutrality that can be taken by Member States.

The definition of the concept of cultural exception is thus extended through the amendment 6 such that it is no longer limited to « t*he promotion of cultural and linguistic diversity and pluralism in the media* », but encompasses all restrictions implied by « *cultural and media policy objectives* » such as cultural and linguistic diversity and pluralism of the media".

This expression « *cultural and media policy objectives* », followed by a non-exclusive list of objectives, is then reused in the other amendments which incorporate this rider.

*Details of two other particularly explicit amendments*

**Guardans amendments : 16**

*5a. Member States shall have the competence to define the scope, nature and duration of restrictions intended for the promotion of cultural and media policy objectives such as cultural and linguistic diversity and media pluralism in accordance with their own national law.*

Coupled with the amendment 15, the amendment aims to allow Member States to take measures derogating from a fundamental principle laid down by the Framework Directive « *all types of electronic communication services may be provided in the radio frequency band open to electronic communication services* », if these measure form part of the objectives pursued through a « *cultural and media policy* ».

**Guardans amendment : 18**

*(d) create an exception to the principle of services or technology neutrality, as well as to harmonise the scope and nature of any exceptions to these principles in accordance with Article 9(3) and (4) other than those aimed at ensuring the promotion of cultural and media policy objectives such as cultural and linguistic diversity and media pluralism.*

This amendment 18 seeks to prohibit the Commission from harmonizing national laws when exceptions to the principle of technological neutrality have been taken by a Member State within the framework of the objectives pursued by its cultural policy and media.

The goal of these amendments is therefore to allow Member States to prohibit certain technologies including wi-fi, from using open frequency bands, and to limit the ability of users to access content with the tool of their choice. This goal has no public interest criteria, rather it means that, the Member States will be able to implement policies for the benefit of cultural industries to the detriment of the principle of technological neutrality.

On behalf of a « *cultural and media policy* », Member States could therefore constrain the freedom of communication and free market competition, as well as curb the development of interoperability within the internal market, and the Commission would not have the power to intervene.

**5) CREATING A PRIVILEGE IN TERMS OF INFLUENCE**

***Rider to institutionalize the influence of cultural industries and media at the expense of other parties***

**Guardans amendment : 2**

Recital 3 (a) (new)

*3 (a) The views of national regulatory authorities, industry stakeholders and audiovisual media services providers should be taken into account by the Commission when making decisions under this Directive through the use of effective consultation to ensure transparency and proportionality. The Commission should issue detailed consultation documents, explaining the different courses of action being considered, and interested stakeholders should be given a reasonable time in which to respond. Having considered the responses, the Commission should give reasons for the resulting decision in a statement following the consultation, including a description of how the views of those responding have been taken into account.*

Holders of industrial interests and providers of audiovisual services are only a few of the actors involved in the Framework Directive. They should not see their contributions privileged compared to other holders of interests (users, free software community, consumer associations, ...)

**Proposal :** replace « *industry stakeholders and audiovisual media services providers* » with « *and of all parties concerned, including consumers and user groups* »

## 6) NEGATION OF THE PUBLIC'S FREEDOM OF COMMUNICATION

### *Rider to deny the existence of freely redistributable content*

**Guardans Amendment : 12**

Directive 2002/21/EC

Article 8 – paragraph 4 – point g (new)

*g) applying the principle that end-users should be able to access -- and distribute -- any lawful content and use -- any lawful applications and / or services of their choice ]*

This amendment deletes the words "*and distribute*". This ignores the fact that users can distribute their own works and redistribute the works of others, either because these works were created in the public domain, or because the authors have decided to give permission at all to do so through specific licences, such as licensing used by the authors of free software or Creative Commons licenses.

This deletion is therefore not only a negation of the existence of free content, but also and mostly inconsistent with the Charter of Fundamental Rights and the Universal Declaration of Human Rights :

> Charter, art. 11.1: *« 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and IMPART information and ideas without interference by public authority and regardless of frontiers.*. »
>
> UDHR art. 19 : *Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and IMPART information and ideas through any media and regardless of frontiers*.

The Parliament should therefore reject the amendment but also to delete the word "*lawful*" for the reasons indicated in the study of the amendment Mavrommatis 7.

***Nota bene*** : the text of the amended article in English does not correspond to the text of the Framework Directive on the site of the European Parliament and the error propagates on the amended article. The rapporteur's report lacks a part of the sentence: « *(g) applying the principle that end-users should be able to access and distribute -- any lawful content and use -- any lawful applications and / or services of their choice .* »