[Editorial IIC]

Codes of Conduct and Copyright: Pragmatism v. Principle.

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Codes of conduct are the latest fashion. All over the world, right holders are sitting down with Internet service providers (ISP's) to come up with self-regulatory codes that seek to provide pragmatic solutions to, inter alia, the massive problem of peer-to-peer (P2P) copyright infringement. Such codes (or 'best practices') might include obligations to warn infringing subscribers, preserve traffic data, reveal subscribers' identities or terminate their accounts. Some codes go even further, and call for filtering and monitoring.

National governments and the European Commission tend to encourage such self-regulatory solutions, and one can easily understand why. Having the stakeholders sort out these problems by themselves saves law makers precious legislative energy and time, especially at the European level, where legislation is increasingly difficult and deregulation (or 'better regulation') the name of the game.

Already in 2000 the E-Commerce Directive encouraged trade, professional and consumer organizations to draw up of codes of conduct at Community level. The Enforcement Directive of 2004 also promotes the development of codes of conduct to facilitate IP enforcement, particularly regarding the labeling of optical discs.

The enthusiasm among governments for self-regulatory codes becomes even easier to understand when one considers the ground rules of the E-Commerce Directive. The Directive immunizes ISP from liability for providing access, and rules out an obligation to monitor. This limits the discretion of national legislatures to come up with legislative solutions.

Moreover, such codes are likely to lessen the need for judicial enforcement, both civil and criminal. Courts are often overworked, while public prosecutors usually have more important things to do than to go after copyright infringers. Codes of conduct are attractive for other reasons as well. Since they are developed in a dialogue between stakeholders, they can easily be changed to accommodate a highly dynamic environment, such as the Internet. And codes of conduct might provide for rapid and expedient content removal or subscription termination procedures – remedies much quicker than a right holder would have in civil court, even in summary proceedings. Such remedies could also serve as deterrents to would-be infringers, more effective perhaps than the prospect of a protracted civil court case.

So, one might conclude, let's embrace these codes of conduct, and be happy. Well, not so fast. Codes of this kind come with serious drawbacks. Putting copyright enforcement into the hands of ISP's – and that's what these codes are really about – presupposes that these providers are capable of acting as judges of what constitutes copyright infringement, and what not. Of course, in most cases this is not difficult. But sometimes it is. As various experiments reveal, most ISP's will immediately shut down an allegedly infringing website even if the claim of the purported right holder is completely bogus. What these experiments reveal is that ISP's

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are not competent to act as judges, and have no incentive to develop the copyright expertise required to do so. Rather, to keep costs down, they will simply obey the orders of the alleged right holders. In other words, these codes will lead to risk-avoiding behavior on the part of the ISP's, and thereby limit freedom of expression and information – a fundamental freedom that applies not only vis-à-vis the state, but also horizontally between citizens.

Another human right that is at stake here, is the right to privacy, which is likely to be compromised by codes obliging ISP's to inform right holders of the identities of subscribers suspected of infringement. As the ECJ has warned in the recent *Promusicae* case (Case C-275/06**),** this right needs to be taken fully into account when applying, for instance, the right holders' information right mentioned in the Enforcement Directive. In essence, the ECJ calls for proportionality. Will the codes of conduct reflect a balance between the commercial interests of the right holders and the fundamental freedoms of the subscribers? Maybe they will, but most likely they will not.

Another serious drawback of these emerging codes is their lack of democratic legitimacy. Codes of conduct are usually agreed upon between the 'stakeholders' most directly concerned: right holders and ISP's. These stakeholders are likely to protect only their own interests. Right holders want effective enforcement. ISP's don't want to be taken to court on a regular basis, and prefer to keep the content industry (their bread and butter) happy. But the interests of the general public – the millions of citizens that are connected to the Internet – are not represented in these negotiations. This democratic deficit is particularly worrisome because these codes affect the fundamental rights and freedoms of citizens. To infuse these codes with at least a measure of legitimacy, stakeholders might give heed to the E-Commerce Directive (art. 16.2), which encourages the involvement of consumer organizations in developing codes of conduct.

All this is not to say that codes of conduct have no role to play here. Codes might, for instance, implement certain information duties, as contemplated by the E-Commerce Directive, or standardize terms of use, and thus increase transparency. But when human rights are at stake, what we really need, like elsewhere in the law, are duly codified rules and procedures that protect the interests of right holders to effectively enforce their rights, while protecting the citizens' rights to due process, to free speech and to privacy. This calls for proportional and balanced *legislative* solutions, or at the very least for forms of 'co-regulation' whereby stakeholders create codes within the confines of a normative framework set by the legislature, subject to validation by a public authority.

At the EU level this would imply a revisiting of the rules on ISP liability enshrined in the E-Commerce Directive. The Directive has left a gaping void. While it immunizes access providers from liability for damages, it does not rule out injunctive relief, as is confirmed by the Information Society Directive (art. 8.3). As recent court decisions in various Member States reveal, such relief might come in the form of court orders to terminate Internet accounts, to reveal subscriber data or to install filtering software. Avoiding such court orders is an important incentive for ISP's to agree to the self-regulatory procedures proposed by right holders. But unlike the US *Digital Millennium Copyright Act* that inspired its liability rules, the E-Commerce Directive lacks procedural rules aimed at protecting the rights of the Internet subscribers. It is high time to start thinking about these now.