

## ETHICS, CODES OF CONDUCT AND P2P

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### **I. Introduction**

Ethics is not a term which is particularly linked to copyright. And the reason for this is that ethics usually apply to those areas of law which are either obscure or under formation (such as, for example, cultural property law). In these areas the interests of the parties (which are strong) are directly opposite and therefore solutions can only be reached on the basis of the parties' goodwill and consensual practices. We can hardly argue that copyright law is under formation; not because the interests involved are not strong and in cases directly opposite, but because those interests have in most cases been reconciled by the existing law in the area. Yet, there are areas in copyright law, which are obscure. That means that a definite solution to a matter is not provided expressly in the law by reason of the fact that such solution has not ripen yet so as to be adopted or because there is the conviction that self regulation can be more effective and less intrusive or simply because the political will is not there to provide for such solution. A characteristic example in this respect is copyright protection and the file exchanging systems on the Internet known as peer-to-peer (P2P).

This issue has been highly interesting in copyright law for various reasons. Just to name a few, P2P is a practice, which is relatively new and inextricably linked to technological developments. That means that file sharing during recent years has known different forms and shapes essentially depending on the software used. In addition to it, P2P is a tremendously popular practice in the sense that it is easy and cheap to share files of protected material on the Internet and in most cases the quality of the shared content is comparable if not the same with the original work. On top of it, it involves a considerably high number of people having access to the Internet irrespective of age, profession and so on and knows no territorial boundaries. On top of everything, it has also to do with immaterial property (i.e. copyright) which is traditionally faced with difficulties with regard to sensitizing people as to its significance as a property right.

It is clear of course that P2P practices involve Internet Service Providers (ISPs).

ISPs are the intermediaries which technically provide the means to access the Internet,<sup>1</sup> through the assignment of IP addresses. In fact the connection and communication of private computers on the Internet is based on IP addresses. IP addresses are numerical address formats, comparable to a telephone number, which enable networked devices, such as web servers, e-mail servers or private computers, to communicate with one another on the Internet. IP addresses can either be static or dynamic. Static IP addresses are assigned in order to connect private users to the Internet in the same way they are connected to a telephone network. However, this is not always the case, since the Internet is at present still organised in such a way that each access provider has only a limited number of addresses available to it. For this reason subscribers are assigned dynamic addresses. Dynamic IP addresses are assigned to subscribers on an *ad hoc* basis from the limited number of addresses the ISP has. Thus, these addresses change each time a subscriber dials up.<sup>2</sup>

On the part of copyright law it is clear that the exchange of files on the Internet does not fall within an exception to the exclusive and absolute rights of authors and rightholders of related rights. Even if it is argued that file sharing may come under the private copy exception it would however fail under the three step test in the sense that it would conflict with the normal exploitation of a work and would unreasonably prejudice the legitimate interests of the rightholders.<sup>3</sup> That translates into the fact that when one downloads songs or films from the Internet this very person won't buy them on the market to watch or listen to them since his needs have already been covered. That means that this practice conflicts with the normal exploitation of the work and unreasonably prejudices the legitimate interests of the rightholder.

It should be noted at this point that ethics in this area take more the form of good practices and ethical conduct (set of rules outlining the responsibilities of or proper practices for an ISP)<sup>4</sup> rather than ethics *stricto sensu*<sup>5</sup> or even more precisely

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<sup>1</sup> According to the EDPS Opinion, "The different on-line intermediaries can be defined according to their functional roles. However, in the real world intermediaries usually take on several of these functions. On-line intermediaries include: (a) *access providers*: users connect to the network by connecting to an access provider's server; (b) *network providers*: they provide the routers, *i.e.*, the needed technical facilities for the transmission of data; (c) *host providers*: they rent space on their server, upon which users or content providers can upload content. Users may upload and download material to an online service, such as a bulletin or a P2P networks", EDPS/10/3 Brussels, Monday 22 February 2010.  
[http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2010/10-02-22\\_ACTA\\_EN.pdf](http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2010/10-02-22_ACTA_EN.pdf), p. 4, fn 10.

<sup>2</sup> Opinion of Advocate General Kokott in *Promusicae v. Telefonica* (C-275/06), [2008] ECR 271, as this Opinion was delivered on 18 July 2007, paras 30 seq.

<sup>3</sup> Silke von Lewinski, "Certain legal problems related to the making available of literary and artistic works and other protected subject matter through digital networks", (1.1.2005) prepared at the request of the UNESCO Secretariat for the 13th Session of the Intergovernmental Copyright Committee, 2005, <[http://portal.unesco.org/culture/en/ev.php-URL\\_ID=27931&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=27931&URL_DO=DO_TOPIC&URL_SECTION=201.html)>.

<sup>4</sup> A useful definition is provided in the 2007 International Good Practice Guidance, *Defining and Developing an Effective Code of Conduct for Organizations*, the International Federation of Accountants: "Principles, values, standards, or rules of behavior that guide the decisions, procedures

applied ethics that provide how moral outcomes can be achieved in specific situations. If we are now to see the relation between ethics, codes of conduct and copyright protection we could schematically argue that ethics form the principle, codes form the vehicle and copyright protection forms the ultimate target.

The aim of this paper is to a) discuss the emergence of codes of conduct in the area of copyright law and in particular in P2P, b) discuss some examples of such codes, and c) examine whether self regulation and the voluntary adoption of codes of conduct can form and transform ethics and provide a viable alternative to law.

## II. The Role of Codes of Conduct

### A. Provision in Law

Self regulation, as well as voluntary codes of conduct, are concepts whose sperms are found in antiquity. One example is the Hippocratic oath taken by doctors. However, a proliferation of such codes in different sectors has coincided with increased emphasis on particular problems in the sector itself. For example, the 1990s saw a proliferation of corporate codes of conduct and an increased emphasis on corporate responsibility. These emerged in the aftermath of a period that saw a major shift in the economic role of the state, and in policies towards transnational corporations (TNCs) and foreign direct investment.<sup>6</sup> Codes of conduct in the copyright area emerged during the 90's and form the trend of the last decades.

In Greek Copyright Law (Law 2121/1993) they are provided for in **article 66D** bearing the title "Codes of Ethics and Information Exchange".<sup>7</sup> According to it, codes of conduct may be prepared by business or professional associations concerned, as well as collecting societies or collective protection organizations, with respect to issues of copyright enforcement. This article also makes a direct reference to the use of codes in optical discs with the purpose to identify the origin of their manufacture; this, however, was inserted in the law in compliance with the article 17 of the E.C. Enforcement Directive. The same article provides that the codes of ethics and any evaluation of their implementation shall be forwarded to the European Commission, whilst the Hellenic Copyright Organization is provided for as the national correspondent for such issues.

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and systems of an organization in a way that (a) contributes to the welfare of its key stakeholders, and (b) respects the rights of all constituents affected by its operations".

<sup>5</sup> In the sense of a branch of philosophy which seeks to address questions about morality (i.e. what is good and bad, right and wrong, and so on).

<sup>6</sup> Rhys Jenkins, "Corporate Codes of Conduct: Self Regulation in a Global Economy", <http://www.unrisd.org/unrisd/website/document.nsf/0/E3B3E78BAB9A886F80256B5E00344278?OpenDocument>.

<sup>7</sup> Article 66D: "(1) The business or professional associations concerned, as well as collecting societies or collective protection organizations, shall prepare codes of ethics with the purpose of contributing, at national, Community or global level, to the enforcement of the rights under this law and shall recommend the use of codes in optical discs in order to identify the origin of their manufacture. The codes of ethics and any evaluation of their implementation shall be forwarded to the European Commission. (2) The national correspondent for the rights under this law shall be the Hellenic Copyright Organization". This article was introduced by article 2 para 7 of Law 3524/2007 (FEK A' 15/26.1.2007).

On a European Union level, two Directives make direct reference to codes of conduct. The E-Commerce Directive in **article 16** (entitled ‘Codes of Conduct’)<sup>8</sup> provides that

*“1. Member States and the Commission shall encourage:*

*(a) the drawing up of codes of conduct at Community level, by trade, professional and consumer associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15;*<sup>9</sup>

*(b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission;*

*(c) the accessibility of these codes of conduct in the Community languages by electronic means;*

*(d) the communication to the Member States and the Commission, by trade, professional and consumer associations or organisations, of their assessment of the application of their codes of conduct and their impact upon practices, habits or customs relating to electronic commerce;*

*(e) the drawing up of codes of conduct regarding the protection of minors and human dignity.*

*2. Member States and the Commission shall encourage the involvement of associations or organisations representing consumers in the drafting and implementation of codes of conduct affecting their interests and drawn up in accordance with paragraph 1(a). Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted.”*

The Enforcement Directive also contains provisions on codes of conduct.<sup>10</sup> In particular, **article 17** entitled ‘Codes of Conduct’ provides that *“Member States shall encourage: (a) the development by trade or professional associations or organisations of codes of conduct at Community level aimed at contributing towards the enforcement of the intellectual property rights, particularly by recommending the use on optical discs of a code enabling the identification of the origin of their manufacture; (b) the submission to the Commission of draft codes of conduct at national and Community level and of any evaluations of the application of these codes of conduct”*. Also in its **Preamble in Recital 29** it provides that: *“Industry should take an active part in the fight against piracy and counterfeiting. The development of codes of conduct in the circles directly affected is a supplementary means of bolstering the regulatory framework. The Member States, in collaboration with the Commission, should encourage the development of codes of conduct in general.[...]”*

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<sup>8</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) OJ L 178, 17.7.2000, p. 1–16.

<sup>9</sup> Articles 5 – 15 are the main provisions of the Directive, i.e. almost all Chapter II (except of article 4) entitled ‘Principles’.

<sup>10</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157/45, 30 April 2004 [Enforcement Directive].

“Creative Content Online in Europe's Single Market” Communication also makes reference to codes of conduct.<sup>11</sup> In this Communication the Commission identifies four main, horizontal challenges which merit further action at EU-level, amongst which ‘legal offers and piracy’ are included. According to a press release the Commission intends to instigate co-operation procedures (“codes of conduct”) between access/service providers, right holders and consumers to ensure not only the widespread offer of attractive content online, but also adequate protection of copyrighted works, and close cooperation on the fight against piracy and unauthorised file-sharing.

## **B. Current Practice**

Since the interests concerning the Internet have developed and strengthened requiring a lot of time and energy on the part of the European Union to legislate, recourse to self regulation solves many problems and takes the burden (political or other) away.

Codes of conduct dealing with copyright infringement on the Internet take different stances on the matter varying from notice and takedown procedures or graduated response models, termination of accounts or filtering and monitoring of traffic and communication data to mere warnings and procedures which allow ISPs to reveal subscribers’ identities or introduce exceptions to the secrecy of communications to the same end.

Some examples of such codes are the following:

- Code of Practice and Code of Practices and Ethics that were adopted by the Internet Service Providers Association of UK<sup>12</sup> and Ireland in 1999 and 2002 respectively.<sup>13</sup> The Code of Conduct of India adopted by the Internet Service Providers Association of India should also be added to them.<sup>14</sup> These codes refer to good practices followed by ISPs on the Internet including decency, honesty, fair trading, data protection, privacy and so on.
- the Dutch Notice-and-Take-Down Code of Conduct, which was published in 2008.<sup>15</sup> The code is a voluntary agreement between Dutch internet service providers and government enforcement agencies and seeks to clarify the responsibilities of the former (hosting providers in particular) when confronted with situations relating to unlawful (under Dutch law) online information.
- A code of conduct for ISPs published in 2005 jointly by the International Federation of Phonographic Industries (IFPI) and the Motion Picture Association (MPA). This code provides for filtering technology to block services or sites that are substantially dedicated to illegal file sharing or download services. It also contains provisions which require subscribers to

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<sup>11</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/5>.

<sup>12</sup> [http://www.ispa.org.uk/about\\_us/page\\_16.html#Scope](http://www.ispa.org.uk/about_us/page_16.html#Scope).

<sup>13</sup> ISPAI Code of Practice and Ethics, available at [www.ispai.ie/docs/cope.pdf](http://www.ispai.ie/docs/cope.pdf).

<sup>14</sup> <http://www.ispai.in/codeOfConduct.php>.

<sup>15</sup> Notice-And-Take-Down Code of Conduct, drafted under the auspices of ISOC.nl, available at <http://isoc.nl/info/nieuws/2008-noticeandtakedown.htm>.

consent in advance to the disclosure of their identity in response to a reasonable complaint of intellectual property infringement by an established right holder defence organisation or by right holder(s) whose intellectual property is being infringed.<sup>16</sup>

- The Principles for User Generated Content Services, which was the outcome of an agreement between a number of major film producers with several large providers of user-generated content services (UGC) in the United States (2007) including MySpace and Dailymotion. This agreement obliged UGC service providers to cooperate with content owners on the use of content identification and filtering technologies.
- The Irish arrangement that was concluded in 2009 between the Irish Recorded Music Association (IRMA) and the telecommunications provider Eircom as a result of litigation concerning copyright infringement on the Internet.
- The YouTube Terms of Use which basically repeat the US provisions on notice-and-take-down found in the Digital Millennium Copyright Act (DMCA).
- The Facebook's Statement of Rights and Responsibilities and the Terms of Service of the Google search engine that govern their relationship with their users and also refer to the US provisions on notice-and-take-down.
- The Code of Conduct of the Canadian Association of Internet Providers (CAIP).
- The Code of Practice in Australia published by the Internet Industry Association on cybersecurity.<sup>17</sup>

Codes of conduct present a number of advantages.

They come within the scope of soft law as a form of self regulation or co-regulation. Self regulation is when the stakeholders regulate for themselves (e.g. ISPs regulate for ISPs or ISPs and rightholders regulate for ISPs). Co-regulation is when the Government is involved in this procedure (usually under the threat of legislating) on its own initiative or under the pressure of the industry. This involvement can take many forms such as for example participation in the process towards the adoption of the rules or in the form of supervising the results of such a process. Codes of conduct (as a result of self regulation or co-regulation) either replace or supplement the law. In this sense governments avoid to enact new laws which would cover the existing legislative gap or clarify ambiguous legal situations. That means that by codes of conduct governments to save time, money and energy by sparing themselves the legislative process. On certain occasions they also save the political debate which comes with it.

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<sup>16</sup> C. Arthur, 'IFPI Drafts 'Code of Conduct' for ISPs', *The Register*, 12 April 2005, <[www.theregister.co.uk/2005/04/12/ifpi\\_drafts\\_code\\_of\\_conduct](http://www.theregister.co.uk/2005/04/12/ifpi_drafts_code_of_conduct)>.

<sup>17</sup> Internet service providers voluntary code of practice for industry self-regulation in the area of cyber security, Internet Industry Association, <http://iia.net.au/images/resources/pdf/icode-v1.pdf>.

Codes can be drafted expediently and respond immediately to the problem at issue.

They are also flexible in the sense that they can be updated and changed easily in order to accommodate technological developments and social needs.

Codes of conduct also set norms in a low profile given the fact that they are voluntary schemes. That means they standardize a particular conduct in the area and open up the way for future legislation.

Given also the fact that the drafters are usually the interested parties (stakeholders) the solutions followed are usually very closely geared to the problem. That means that they can provide for fast and effective remedies (such as content removal or subscription termination), in fact a lot faster compared to what a rightholder could achieve through the courts even in summary proceedings or through an injunction. Such expedient remedies also work as an effective deterrent to would be infringers.

Last but not least, self regulatory enforcement may be less costly compared to courts.

Yet, codes of conduct come with a number of shortcomings, too.

The fact that they are drafted by the stakeholders themselves can work both as an advantage and a disadvantage. The advantage as described above refers to tailor made solutions. However, parties involved in its drafting are not always all parties affected by it, e.g. consumers or the public at large. In this sense one could argue that codes of conduct present a democratic deficit regarding participation and representation and are usually one-sided as they serve the interests of the drafting parties only. To this the lack of transparency could be added. The reality however is that codes of conduct may be more transparent than the law itself. This is so in cases where the law is drafted by the State itself without the involvement of any of the parties concerned even more of any of the parties affected. And in any case a code of conduct can change far easier compared to law.

Also the fact that codes cannot be enforced in the sense a legal provision can, since they do not provide for sanctions in the form law does, presents a serious drawback. A usual sanction is the dismissal of a member from the association which has adopted the code or the presumption that this particular member does not operate on high professional standards or follow good business practices. Dismissal is not a sanction *stricto sensu* but the pressure exercised on the dismissed member may in some cases equal a proper sanction. Also the fact that sanctions are 'softer' compared to proper legal sanctions creates legal uncertainty.

Although codes of conduct are not binding for those who have adopted them they could however end up being binding for those mostly concerned. ISPs for example which are bound by such a code will usually reflect the terms of the code to their contracts with subscribers. In this way the norms of the code will end up as binding contractual provisions for the consumers. On top of it the respect of ISPs of the terms of a code of conduct may play role towards the assessment of their liability in copyright infringement cases. In fact it is very likely that a Court will take into account in assessing whether an ISP has acted with due diligence or took any

reasonable steps to prevent or avoid the doing of the act, whether he has acted within the standards accepted in area as reflected in a code of conduct.

As regards costs one may argue that costs are not always low. If one has to turn to the courts the total costs of litigation on top of the costs of a first round of self regulatory enforcement procedure will usually exceed those of litigation alone.

### **III. Conclusions**

Codes of conduct provide for a less intrusive solution which brings the various stakeholders together and gives them the opportunity to solve themselves the issues at stake. This can be done under the auspices of the State or without the State's involvement. It can also be argued that codes of conduct may -though voluntary schemes- in certain cases form or transform ethics in the area or even operate (indirectly) on the same level as law. It is however both difficult and unrealistic to say whether a code of conduct provides for a good or a bad solution to a problem. Their utility depends on the problem, the solution they are called to offer and the timing. It also depends on whether they replace or supplement the law. The latter seems closer to their purpose and provides better guarantees for proportionality and respect for fundamental freedoms and rights.

As the European Commission sets out in its 2001 White Paper on European Governance, combining formal legislation with non-legislative and self-regulatory solutions supports the clearer definition of EU policy objectives and improves the effectiveness of those policies.

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