Drowning in Codes of Conduct

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In Australia as in many other countries, online services are a lightly-regulated industry, in which codes of conduct rather than laws are relied upon to protect consumers. On World Consumer Rights Day this year, the UNSW Law Faculty Cyberspace Law and Policy Centre released a report: "Drowning in Codes of Conduct: An analysis of codes of conduct applying to online activity in Australia" which suggests this self regulatory approach to online consumer protection, rights and interests online is not necessarily an effective answer for consumers.

We saw a complex, confusing, mostly unenforceable, variably negotiated, and often dysfunctional group of 16 online Codes, lacking coherence and system from a consumer perspective. We have informally speculated that an individual Code may work very well to "make the problem go away" for both governments and industry (especially where industry is divided and would struggle to reconcile competing business interests in a submission to law reform), but often represents a failure to implement adequate real protection of consumer rights, interests and remedies.

An example is in the case of copyright reform. Last month the High Court of Australia affirmed an earlier ruling that an Internet Service Provider is not liable for copyright infringements committed by users on its network. For copyright owners, the answer to this "problem" is a code privately negotiated with Internet Service Providers that would warn or penalise unauthorised downloaders. This maintains an unfortunate history of failure of government, rights holders and IT/Internet industry stakeholders to recognise that consumer interests need to be at the centre of the discussion about copyright and online expectations, having instead often treated them as bystanders rather than central players.

The difficulty is the other stakeholders are very well resourced and have direct business model interests at stake, while consumer interests have in the past not been very well organised on this topic. (The SOPA/PIPA fiasco in the US shows that this need not be the case any more, but there needs to be leadership in pushing for wider participation in the talks, and framing what is at stake from a consumer perspective.) An earlier study we did for Consumers International suggested that if consumers think the rules and market are fair, they are more likely to accept and comply with prices and obligations - they are not all intransigent bludgers - so there is no reason to assume the outcome of full consumer participation would support piracy.

Accordingly, the first priority here should perhaps be to formulate a much more inclusive process from now on that fixes this, rather than jump in immediately with the presumed "answers" on specific questions of concern for inclusion in yet another arbitrarily enforceable Code. If what is at stake, for instance, is:

- potential disenfranchisement of some users from the internet community, in defence of monopolists' refusal to supply at globally fair price, timing and merchantable quality; or
- attempts to lock in certain measures or models aimed at protecting creative endeavour which may harm local creators while de facto implementing a draconian role reversal for ISPs by means of a Code or legislation,
then this warrants a fundamental re-think with all parties at the table, and interests, evidence and arguments out in the open for examination -- not just a nice quick deal to get the heat off ISPs, done more or less behind closed doors again.

Forming and aiding a coalition to support such a broader negotiation is worth considering as the strategic goal. Such a coalition could set out the interests and expectations of consumers more broadly, and:

- frame the problem as, in part, the MPAA's reluctance to come to the party for Australians keen to respond to their global movie marketing temptations; and
- frame the answer to include substantial movement on this front, including: actually offering items for purchase (!), interoperability of data and DRMs, durability (non-expiry) of purchases, global timeliness (non-discrimination against Australians as to launch date), fair global prices, and the like.

(A growing body of opinion thinks fixing these flaws and supply failures could be as significant a factor in reducing 'piracy' and bolstering rights holder revenue streams as the endless attempts to suppress unauthorised downloading by direct enforcement of rules supporting refusal to supply at all or on fair terms; now may be the best chance for a while to put this on the table.)

Rights-holders and government would presumably seek to portray these sorts of matters as totally out of scope, and the Internet industry to portray them as a distraction to a simple "how to deal nicely with infringement complaints" Code.

The question for the rest of us is whether that's the case, and a code is the best we can realistically expect, so we should throw whatever weight we can muster behind that (this could well be the case); or whether this is precisely the moment to point out that "the emperor has no clothes", that the troubles are partly of content-owners' own making, and to demand a better seat at the table, insisting that the remedy this time works for consumers and fair markets as well as for the immediate industry participants.

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