

The Norwegian Internet Ethical Council

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1 Abstract

This article is about the basis scope and work of the Norwegian Internet Ethics Council. It gives an overview of the background of the project. The rules that has served as its basis. It further more discusses the reasons for why such a self-regulatory body is needed and why it nevertheless may cease to exist. This article also discusses some aspects of self-regulations especially in the Internet area.

2 Background

Around 1997 there was some debate in Norway and elsewhere with respect to reasonability for child pornography on the Internet. Issues like who should be responsible this kind of illegal information. At this point the debate was more concerned about child pornography than on infringement of IP right which certainly has been the focus later.

Some politicians advocated that one should have rules that made ISP and network providers responsible for distribution of illegal information like child pornography. Clear proposals, however, never went as far as to the parliament. This led an initiative by the Norwegian Computer Industry Association. Which formed a group with the mandate to draft a Code of Conduct and set up Internet Ethics Council to complaints with respect to breaches of the rules. The idea from the industry point of view was that one would get a better set of rules if one with self-regulation than one would get waiting for the politicians. A point here is that at this point it was unknown to the public what the outcome of the e commerce directive would be.

The group consisted of headed by attorney at law Steingrim Wolland a well-renown free speech lawyer, and consisted further more of mix of professionals from the ITC industry, the press and public institutions.

A set of rules (English translation at the end of this article) was accepted in the fall of 1998. Due to lack of finances the Council was not up and running before September 16th 2001, although only as a test experiment.

So far this is the only initiative so far which can be said to in line with the types of codes of conducts envisaged in the e-commerce directive. The commerce directive encourages the member states to set up out of court settlements and make Codes of Conduct. This is explicitly stated in article 16 and 17.

Article 16: Codes of conduct

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;

(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.

Article 17: Out-of-court dispute settlement

1. Member States shall ensure that, in the event of disagreement between an information society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding information society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.

Since the set of Internet Ethic Rules did not have and has not got any basis in the law, the idea was that especially ISPs would declare themselves bound by the rules. The idea was further more that the ISP would take in tot their subscriber contracts that their customers would have to comply with the Internet ethics rules and respect decisions by the Internet ethics Council.

The major ISPs in the market did declare themselves bound by the Internet Ethic Rules, but did not implement it in their customer contracts. The arrangement covered approximately 60 % of the market. Which is not ideal but was nevertheless considered a good start.

3 The Internet Ethics Council

There was some discussion on how many members the Council should have and their qualification should be. The result was that one decided to have a professional board consisting of professionals with knowledge of law, especially It law, media sciences and computer sciences. The IEC consists of five members, which is normal for out of court settlement bodies.

4 The Internet Ethics Code

Although the code is concentrated around publication on World Wide Web the code does cover all major activities on the Internet. The rules are short open and discretionary rules, with the idea that the rules should be formed by means of practice and divided into 6 chapters. An inspiration was the Norwegian Press Code, the outcome was however very different.

4.1 Chapter 1: Objectives of the rules

A major element in section 1.2 is that there is a reference to article 10 in the European Convention of Human Rights (freedom of expression) and article 8 (respect of privacy). The point here is to emphasise that many of the major disputes that will arise in the Internet world do have a side to freedom of expression and or privacy. For this reason it was found that it should be stated as major objective to serve the principles of the ECHR and take article 8 and 10 into consideration when decisions are made. A point here is of course that the ECHR has is made part of Norwegian Law in the in the Norwegian Human Rights Act, and has become a frequently used legal source in several Supreme Court decisions.¹

4.2 Chapter 2: Decisions

This Chapter will not be discussed in detail in this article. I was however a challenge to find appropriate Norwegian words. As elsewhere in the world many of the words used in daily describing functions and roles in the Internet are English.

4.3 Chapter 3: Area of work

Activates on the Internet is far limited to one sort branch or one area of society, but does in fact cover everything. One did of course see that much Out of Court would of course apply to Internet disputes and conflicts. A major task of the

¹ LOV 1999-05-21 nr 30: Lov om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven).

Council would therefore be to guide complaints to more specialised bodies. In Norway as in the rest of the Nordic Countries we have variety Out Court Settlement bodies, especially in the area of consumer purchases. A dispute concerning financial transactions would be more suitably handled in The Complaints body for financial transactions (Bankklagenemnda). Likewise bodies such as The Norwegian Press Forum may better handle complaints concerning content in Internet editions of Newspapers. It is with respect to this explicitly said in section 5.4, that the Internet Ethics council shall give guidance with regard to other Complaint bodies. In the years the council has operated as a test project it did happen that we referred complaints to other bodies like i.e. The Consumer Ombudsman.

One could of course question the value of a body with limited jurisdiction because of its lack of legal basis. And further more, the general difficulty there its due to Internets international character. There is doubt that these to point limit the value of the Internet Ethic Council. The fact, however, that we had 60 % of the Norwegian market was at least a start, and better than nothing.

4.4 Chapter 4: Rights and obligations

Chapter four of the rules concerns rights and obligations. Its major principle is that most of the responsibility shall be with the publisher. As stated above these rules most directly concern areas like the World Wide Web, this is stated both in section 4,1 and 4,8. Attaching the major responsibility with the one who actually publishes material on the net may seem obvious, but one must at this point take in to account that the rules were produced prior to the ecommerce directive. Section 4,1 also includes the principle the publisher should be identified. This principle is resembles section 428 in the Norwegian Penal Code with respect to printed matters. The rules also follow up the principle of the Norwegian Penal Code excepting technical personnel from responsibility.

Section 4.2 states the principles that any customer may choose information without being subject to any form of prior control. This coincides very well with the principle stated in the ecommerce directive banning any kind monitoring.

This important section in the whole set of rules and the section which also appeared to be the most important is section 4.3 which reads:

The publisher is obliged to monitor material that is made available on his own website and to give due consideration to the interest of the general public and to the rights of others such as protection of reputation, protection of personal data, intellectual property rights, etc.

Almost all complaints handled by the IEC concerned some violation section 4,3. There was much discussion whether one should have more detailed rules, instead of the present section 4,3. One found that the best would be a discretionary rule and make it develop through practice. At this point it important to bear in mind that the objectives of the IER does set a limit for the discretion's made by the IEC, with its reference to article 10 of the ECHR. It has always been a precondition that the practice of the IEC should never be a barrier to free speech other than those that would be allowed within the limits of article 10 of the ECHR.

But as one can see section 4,3 would cover practically all kinds of content issues imaginable. The word “etc.” helps in this context.

With regard to the content rules it was the intent of the group preparing the IER that should to at least some extent be in line with legislation concerning printed matter. Section 4.4 is interesting in this context and reads:

4.4 The publisher is obliged in accordance with good Internet practice to post rebuttals on his website when demanded by the person to whom the information immediately relates and the rebuttal is of a factual nature.

This section is inspired from section 430 of the Norwegian Penal Code, and does indeed show how press rules have been an important source of inspiration. The Council has never experienced that any one ever asked to post a rebuttal. And one can of course ask whether this section at all fits in the world of Internet. It probably makes sense with respect to serious and more journalistic like websites, but other than that it is without practical value.

The rules distinguish between communications and publications. This is clearly pointed out in section 1,1. Sections 4,5,4,6 and 4,7 concerns communication. Section 4,5. uses the term good interett practice. What good Internet practice really is not known and the idea was here too that practice would give the concept meaning. It is, however obvious that the spreading of data viruses, hacking and other forms of malicious behaviour.

Sections 4,6 and 4,7 are of a more data protection character and must be viewed in connection with article 8 of the ECHR. Section 4,6 states that a host, information transporter and access provider shall as a general rule shall observe confidentiality in regard to parties who communicate via the Internet. While 4,7 says that information with regard to the publisher and Internet traffic to the publisher's website to a greater degree than he is obliged to do by law or court ruling. Both of these sections says nothing more than what can be derived from general data protection legislation.

Section 4,9 is more special and reads:

If the publisher's conduct on the Internet involves manifest and gross breaches of the law, the access provider and the host have the right to terminate the service. If possible the publisher shall be notified before termination is effected.

The point here is that gross and manifest breaches of the law necessitate immediate action. This section gives a host the possibility i.e. to shut down a website if such gross breaches seems apparent. Two things are important. First of all this section puts no obligation upon the access provider and the host to act, it only gives the possibility. Secondly it will be up to the access provider and the host to define when breach is a manifest and gross violation of law. An example would websites openly selling child pornography. Another example could be websites obviously distributing music violating copyright laws. (Distributing links could not constitute an open an manifest breach). The point then if a website is shut down in pursuance of 4,9. This must be reported in tot the IEC immediately so the Council can assess the incident in depth.

It, however never happened that case was referred to the council in pursuance of this article.

4.5 Chapter 5: The Tasks of the Council

As we can see from the expression “good internet practice” the Council is given much discretion with respect to actual interpretation, but the term must always be interpreted in line with the

Section 5. 2 of the code regulate the access to complain. We have stated that lathes affected by the situation in question. It goes with out saying that we here accept a wide range of complainers. The only condition is that the person in some way is affected. If a complainant is not affected the council has the ability in pursuance of section 5.3 to generate its own complaints.

4.6 Chapter 6 - The Sanctions of the Internet Ethical Council

Chapter 6 concerns the different kinds of sanctions. As one can see all sanctions are in practice aimed at web publishing. Since the council does not have any basis in law, there are no penal sanctions. Nor has the council the ability to award economical compensations. The drastic form of sanction the Council has would be to order a web page closed or opened. Closing is of course to the place only as a last resort option. If we look at section 6.3 of the code we see that the council can ask publisher to ”make corrections, deletions, and post replies or rebuttals on the website”. Ordering a page closed is of course a vast intervention in freedom of speech, and again one would have to look at section 1,2 of the code in order to see whether such a measure is justified or not.

In most cases an advice to correct would in most cases be enough. During the test period of the council it happened only once that the web page actually was shot down.

5 Administrative Regulation

In addition to the ethical code a set of administrative regulation has been issued regulating matters Council members, duration’s of appointment, how the Council is financed etc. These regulations were meant to be temporary. Since it still is uncertain if the council will prevail no new set of regulations have been issued.

6 Examples of Council Practice in the Test Period

I will in this paragraph give an overview of the most significant kind of cases we handled during the test period. The number of cases mounts to a total of ten out of which six were related to actual complaints. In some cases the IEC chose to

make statements even though the parties involved were not committed to rules. In addition to this some cases were dismissed because they involved parties not committed to the rules or that because cases were pending for the courts.

The first case the IEC handled concerned a case where the plaintiff asked that the ISP would not forward spam (Unsolicited direct emails).² Those responsible for the emails were of course not bound by our code. Further more sending spam in Norway and other Nordic countries is illegal. At the time we handled this complaint there was no ban on UDE. The question was on the one hand that UDE is obviously not in compliance with good **Internet practice**, but on the other hand it seemed obvious that the ISP's have an obligation to forward the spam mails. Not doing that with the consent of the receivers would be a violation to those duties. In addition to this the IEC said that the ISPs should be encouraged to offer filter mechanisms to their customers, but these should not be mandatory.

Borttaget: internet

The second complaint decision concerned the use of Personal Identifications Numbers **when** signing up to the Internet version of the telephone directory (www.telefonkatalogen.no).³ The complainer raised the question whether the use of Personal Identifications number at all was legal. It was informed at on the webpage of the telephone directory that the number only was used with regard to controlling new registered users up against the National Peoples Registry. The routine was that the PIN was deleted after the control was performed. The IEC here warned against an increasing use of Personal Identification Numbers. The IEC here ruled that this kind of use of PIN should be illegal when the license given by the DPA was to run out. In this case we could see that the IEC not fully agreed with the Data Protection Authority DPA, as it thought that lisenca for use of PIN in such cases should not be given.

Borttaget: When

A similar kind of disagreement was found in the case www.glattcella.com.⁴ This case concerned a web page publishing wrongdoing like drunken driving by celebrities. Especially celebrities held in prison for offences like drunken driving etc. A point here was that the DPA had said on their web page that web pages of that kind were not covered the Data Protection Act. It is interesting to note that the DPA has acknowledged recently those web pages like this is covered by the Data Protection Act. This came after the European Court of Justice answered a question by a Swedish Court concerning the posting of personal information on to private web pages. The **answer from the European Court of Justice ECJ with the Opinion of Mr Advocate General Tizzano delivered on 19 September 2002, stated that:**⁵

44 In the light of all the foregoing observations, I therefore propose that the answer to this question should be that, pursuant to the first indent of Article 3(2) of the Directive, processing of personal data which consists of setting up a home

² Statement from the IEC: Unsolicited Direct Email, available in Norwegian only at "<http://www.nettnemnda.no/d20011108.html>".

³ Statement from the IEC: Personal Identification Number, available in Norwegian only at "<http://www.nettnemnda.no/d20020102.html>".

⁴ Statement from the IEC: www.glattcella.com, available in Norwegian only at "<http://www.nettnemnda.no/d20020617.html>".

⁵ *Case C-101/01. European Court reports 2003 Page 00000.*

page of the type at issue without any intention of economic gain, solely as an ancillary activity to voluntary work as a catechist pursued in the parish community and outside the remit of any employment relationship does not fall within the scope of the Directive.

The other questions

45 Having come to the conclusion that processing of personal data of the type at issue does not fall within the scope of the Directive, I do not think there is any need to examine the other questions put by the referring court.

Conclusion

46 In the light of the foregoing, I therefore propose that the following answer be given to the Hovrätten i Götaland: Pursuant to the first indent of Article 3(2) of Directive 95/46/EC, processing of personal data which consists of setting up a home page of the type at issue without any intention of economic gain, solely as an ancillary activity to voluntary work as a catechist pursued in the parish community and outside the remit of any employment relationship does not fall within the scope of the Directive.

If this stands the need for a body like the IEC is obviously more needed.

The Data protection Authority has however up not handled any cases concerning information posted on private web pages like the one mentioned.

Yet another statement handled by the IEC concerned photos of a gay couple engaged in sexual acts on a web page posted without their consent.⁶ The persons involved and complained to the IEC that this was a violation of laws and a violation of privacy laws and further more a violation of section 4,3 of the Internet Ethical Code. What was interesting in this case was that the editor of the homepage involved (“www.gayguide.com”) stated on the web page that he would comply with any decisions by the council although he was not in any way bound by the rules. The IEC ruled in this case that the posting of the pictures were illegal and a violations of 4,3 of the Internet Ethical Code.

A couple of cases concerned private information on private persons. One case concerned a private diary posted on a private web page. This diary had information on several persons. With regard to the person who complained it said that this was a person of who belonged to the gay community of the City Trondheim 25 years ago. And further more that there were rumours that the persons had paedophile preferences. Although these were mere hints, the IEC ruled that this kind of information should not be posted on a web page without prior consent. The IEC noted that this kind of information would be regarded as sensitive in pursuance of the Data Protection Act. With regard to the freedom of expression side to this the IEC ruled that it we be taken sufficiently taken care by anonymising the person involved.

Borttaget: confirmed this in its answer of...

⁶ Statement from the IEC: “www.gayguide.no”, available in Norwegian only at: “http://www.nettnemnda.no/”.

7 The Future of the IEC

In the summer of 2004 the future of the IEC is indeed very questionable. Although much of the Internet industry seems to want the self-regulatory body like the IEC the willingness to actually finance it is not that high. That is one point, another question is of course how great the problem with regard to cases I have mentioned above really is. The advantage of having such a council is of course that it has the ability to render relatively qualified decisions in a short period of time. It is further more seen as a service to the public. The only solution now is to use the regular court system unless the actual case falls under the scope of other out of court settlement bodies.

Taking this into account it would obviously be a disadvantage for the public if the IEC were to disappear completely. On the other hand a severe drawback to **self-regulatory** bodies is that it is dependent on willingness to comply. The IEC covered approximately 60 % of the market, meaning that 40 % is outside the scope of the IEC.

Borttaget: self regulatory

This is a far too big percentage outside the jurisdiction of the council and it seems obvious that the arrangement would not work without some forms of basis with in law or at least some form legal acknowledgement.

In Norway some form of acknowledgement is given in the implementation of the ecommerce directive. With regard to ISP responsibility

Nothing is explicitly said in the act itself. It is however said in the legislative history that ISP can be exempted from liability if they have **gotten a** qualified advice (or decisions) from a body like the IEC.⁷ This does obviously give I.S.P s and other actors in the market the incentive to support the IEC and the Internet Ethical Code.

If this is enough remains to be seen. It would have been better if the act had more explicitly supported the IEC and the Internet Ethics Code. A good idea in this respect would be if the act stated that if a significant part of the market decide with a code of conduct approved by the authorities the code could be binding for even those who have not approved. Such a system would resemble the kind of system one has in for **some** collecting societies with in the area of copyright. If this would work here remains to be seen.

Taking the above in to account the future of the IEC is uncertain. It would however be worth while to get the council up and running **for a longer period of time** in order to see if this is the right way to regulate certain matters in the Internet. **Another thing that might happen is that one look to other similar forms of bodies to see if the in some way could be consolidated or at least coordinated. One such body is the Norwegian Council for Audiotex (NCAE) ethics which is a consumer complaints body for users of premium rate services. This body handles cases that in some ways may resemble those handled by the IEC. An example is that the NCAE has dealt with many complaints concerning "modem-jacking" cases where surfers on the internet experience that their modems with them knowing has switched lines to more expensive ones. This is a typical kind**

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⁷ Ot.prp. nr. 4 (2003-2004) Om lov om endringer i lov om visse sider av elektronisk handel og andre informasjonssamfunnstjenester (ehandelsloven), 9.3.1.4 Rettsvillfarelse.

of question which could be dealt with by the IEC, and further more an example that gives reasons to coordinate or even consolidate the two bodies.

CODE OF ETHICS FOR THE INTERNET

1 PURPOSE

- 1.1 The Internet provides increased opportunities in regard to information, communication and publication.
This involves possibilities for conflict, and the purpose of these rules is to balance the conflicting interests that arise from the distinctive nature of the medium.
- 1.2 Freedom of expression and information are fundamental rights in democratic societies, and these rules shall be interpreted in compliance with the protection afforded by *The European Convention on Human Rights (ECHR), article 10*. Similarly everyone has the right to respect for his private and family life, his home and his correspondence, as expressed in *ECHR, article 8*. For this reason a paramount aim is to ensure that these rights are not subject to constraints other than those required in democratic societies.
- 1.3 A special council shall be established to develop and maintain standards that promote the above considerations. The council shall also provide guidance and make decisions in concrete matters.

2 DEFINITIONS

- 2.1 A *website* is a collection of information, accessible via the Internet, that appears as an entity under the same management.
- 2.2 The *originator* is the person who has produced information on the website.
- 2.3 The *editor* is the person who decides the informational content of the website.
- 2.4 The *publisher* is the party who by agreement (with the host, access provider and/or others) has the right to make information available on the website.
- 2.5 An *access provider* is the party who provides technical access to the Internet.
- 2.6 An *information transporter* is the party who transports data across the Internet.
- 2.7 A *host* is a party responsible for storing all or parts of a website.

3 SCOPE

- 3.1 These rules are applicable to any party who by agreement or other means has declared himself bound by them.

- 3.2 Such declaration may be made by notification to the Council's secretariat.
- 3.3 The present rules are not intended to replace complaint arrangements, standards and rules that regulate conduct *independent* of medium.

4 RIGHTS AND OBLIGATIONS

- 4.1 As a general rule the originator, editor and publisher are responsible for the content of a website. The publisher should be identifiable on the website.
- 4.2 The publisher has the right to make information of his own choosing available on the Internet and without prior control by hosts, access providers or others.
- 4.3 The publisher is obliged to monitor material that is made available on his own website and to give due consideration to the interest of the general public and to the rights of others such as protection of reputation, protection of personal data, intellectual property rights, etc.
- 4.4 The publisher is obliged in accordance with good Internet practice to post rebuttals on his website when demanded by the person to whom the information immediately relates and the rebuttal is of a factual nature.
- 4.5 Communication on the Internet shall take due account of good Internet practice, and material breaches of this obligation may be brought before the Council.
- 4.6 The host, information transporter and access provider shall as a general rule observe confidentiality in regard to parties who communicate via the Internet.
- 4.7 The host, information transporter and access provider shall not divulge information about the publisher and Internet traffic to the publisher's website to a greater degree than he is obliged to do by law or court ruling.
- 4.8 The host is entitled to adequate information about the publisher's identity. If such information is deficient, the host has the right to terminate the service.
- 4.9 If the publisher's conduct on the Internet involves manifest and gross breaches of the law, the access provider and the host have the right to terminate the service. If possible the publisher shall be notified before termination is effected.
- 4.10 Any party who terminates a service with reference to circumstances as mentioned in 4.8 and 4.9 is obliged to notify the Council immediately. The access provider, host and publisher are all entitled to request the Council to assess the question of termination.

5 THE COUNCIL'S FUNCTIONS

- 5.1 The Council handles questions concerning breaches of these rules.
- 5.2 The Council makes decisions in cases after an approach is made by any party who is bound by these rules. The same applies to complaints from other parties who are directly affected by the circumstances that gave rise to the complaint.
- 5.3 The Council can take up cases on its own initiative.
- 5.4 The Council can provide guidance to the public regarding other complaints arrangements as mentioned above in 3.3.

6 THE COUNCIL'S AUTHORITY

- 6.1 The Council's decisions are binding on any party who by agreement or declaration has undertaken to be bound by the present rules.
- 6.2 The Council's decisions may entail giving guidance or recommendations, rendering decisions in regard to breaches of these rules or issuing orders concerning circumstances regulated in chapter 4, including orders to terminate services or websites.
- 6.3 In the event of breaches of these rules the Council may decide that the publisher of the website shall make corrections, deletions, and post replies or rebuttals on the website.

Oslo, 5 August 1998