

## **CSISAC STATEMENT ON OECD COMMUNIQUE ON INTERNET POLICY- MAKING PRINCIPLES**

**28 June 2011**

CSISAC strongly supports OECD multistakeholder policy development processes and sees much value in working at the OECD. It was in this spirit, and in good faith, that we participated in negotiations to find common ground on the text of the draft Communiqué throughout the last two weeks. We found these discussions not only productive, but a strong example of the spirit in which multistakeholder processes should operate.

The OECD Communiqué covers a broad range of Internet-related policy issues, including the protection of the global free flow of information, the open and distributed Internet, investment and competition in high speed networks and services, the cross-border delivery of services, multi-stakeholder co-operation in policy development processes, voluntarily developed codes of conduct, capacities to bring publicly available, reliable data into the policy-making process, transparency, fair process, and accountability, consistency and effectiveness in privacy protection at a global level, individual empowerment, limitations on Internet intermediary liability, Internet security, and appropriate priority to enforcement efforts.

CSISAC agrees with a substantial portion of the Communiqué, and strongly commends its support for an open, interoperable Internet and particularly multi-stakeholder policy development processes. However, upon viewing the completed draft text, CSISAC members felt strongly that elements of the draft Communiqué might be understood in a way which would reduce respect and protection for fundamental rights. CSISAC members were additionally concerned the document would push Internet Intermediaries to police and enforce laws on their networks and services. This is something that civil society is unable to accept and is inconsistent with our understanding of the notion of multistakeholder policy development.

For this reason, CSISAC was not able to reach agreement on endorsing the Communiqué.

CSISAC's specific concerns with the draft Communiqué were as follows:

- CSISAC members were concerned about the text's over-emphasis on protection and enforcement of intellectual property rights, even at the expense of fundamental freedoms, and without adequate discussion of the other factors that have allowed the Internet to flourish and innovation to take place to date.
- CSISAC members were concerned that the text might be seen to elevate cybersecurity<sup>1</sup>, and intellectual property rights to a level of importance that is comparable with internationally recognized individual human rights such as freedom of expression. While CSISAC members respect balanced intellectual property and endorse its proportional protection, we could not give it such unqualified weight.
- CSISAC members were concerned by the various qualifications within the text limiting access guarantees to 'lawful' content. This raised several concerns. First, it is not clear how and by whom 'lawfulness' will be determined,

specifically with respect to content that is not inherently illegal, in that its legality is contingent on the applicability of exceptions. CSISAC members felt strongly that such determinations should be reserved to judicial authorities after a process of judicial review that complies with adequate due process standards. Second, in the context of discussion of access to lawful content in the networked environment, CSISAC members were troubled that the restriction to 'lawful' content could be read as a tacit endorsement for network-level filtering of Internet communications.

- CSISAC members were particularly troubled by text in the Communiqué relating to the roles and responsibilities of Internet intermediaries. This was found in both the “Promote Creativity and Innovation” paragraph and in the “Limit Internet Intermediary Liability” paragraph. CSISAC felt that Internet intermediaries must not be called upon to make determinations about the legality of content passing through their networks and platforms because they are neither competent nor appropriate parties to do so. Requiring them to make determinations on the legality of content or behaviour of users raises issues for transparency, due process and accountability and detrimentally impacts on citizens’ freedom of expression. The role of intermediaries as 'mere conduits', and accompanying liability limitations found in many OECD countries, is integral to the protection of civil liberties online. As all online activity requires intermediation, conduits have potential to exert extreme control and surveillance on online conduct. For this reason, no text should undermine, or condition, existing limitations of liability for such entities upon the satisfaction of positive obligations to take particular actions, such as “lawful steps”. Nor should intermediaries be required to “assist rights holders in ...reduc[ing] illegal content.”
- CSISAC members were concerned by references to private sector voluntary cooperative efforts to protect intellectual property rights, including “lawful steps” to address and deter infringement, which CSISAC members felt would encourage Internet intermediaries to engage in overbroad and disproportionate activities such as filtering of Internet communications, removal or blocking of content, and the potential voluntary adoption of Graduated Response or “Three Strikes” regimes whereby Internet access is terminated for users facing repeated allegations of IP infringement.. CSISAC believes that these measures contradict international and European human rights law.
- CSISAC members expressed concern that, for a document intended to “ensur[e] that the Internet remains open and dynamic”, mention of foundational principles that are integral to this openness, such as Net Neutrality and common carriage are surprisingly absent from the document. While the document endorses technical neutrality and interoperability, this is inadequate as it is not these elements per se that ensure the open nature of the Internet. Rather it is Net Neutrality that prevents Internet Service Providers from harming innovation by denying them the information they would need to discriminate against the traffic that passes through their networks. There were concerns that, far from endorsing this important principle, the Communiqué could be seen as justifying deviations from it.
- When viewed in the international context in which these issues are currently

being debated, references to voluntary cooperative efforts by Internet intermediaries in addressing and deterring intellectual property infringement in a high profile OECD Communiqué on Internet Policy-Making is particularly troubling, at a time when a number of the same issues are being discussed in international fora (such as by the United Nations Special Rapporteur on Freedom of Opinion and Expression, WIPO and the Council of Europe), as well as in ongoing discussions in a number of OECD member countries and in pending cases before the European Court of Justice.

- CSISAC members were concerned about proportionality. Elements of the Communiqué could be construed as endorsing disproportionate protection of intellectual property rights and the use of mechanisms that would lead to prior restraints on free expression or disproportionate individual consequences such as restrictions on access to Internet services.
- CSISAC members were concerned about elements of the Communiqué that appeared to endorse transborder data storage or processing without ensuring adequate levels of privacy protection and in ways that could place unjustifiable restraints on freedom of expression based on local laws. CSISAC members felt that cost effectiveness and efficiency are important considerations, but not so important as to justify outsourcing of data in ways that will impact the ability of individuals to access or generate the content of their choice or that will threaten individual privacy.
- Finally, as a matter of process, CSISAC members were concerned about a number of last-minute changes to various aspects of the text (including subtle changes to text in the paragraph on Limit Internet Intermediary Liability) and the speed with which CSISAC was being asked to review and sign off on a Communiqué which included a number of controversial features that could be regarded as nudging the interpretation of various aspects of current law and Internet policy in the United States and in Europe.

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<sup>1</sup> Note: changed in final version of Communiqué.