ISSUE PAPER ON UNLAWFUL CONTENT AND ACCESS PROTECTION

This paper is a 'draft working paper' reflecting the preliminary findings of the drafting team. It has been subject to review by all WGIG members, but it does not necessarily present a consensus position nor does it contain agreed language accepted by every member. The purpose of this draft is to provide a basis for the ongoing work of the group. It is therefore not to be seen as a chapter of the final WGIG report, but rather as raw material that will be used when drafting the report. This draft working paper has been published on the WGIG website for public comment, so it will evolve, taking into account input from governments and stakeholders.

1. Issue
Please identify an issue listed on the table "Inventory of Public Policy Issues" and describe this issue.

There are two separate but related issues: unlawful content and access protection.

"Unlawful content" refers to content that is deemed illegal. That is, the origination, production, and sometimes even consumption, of the content can result in prosecution and conviction in a court of law.

"Access protection" refers to the partial or complete denial of access on the grounds that the content may be illegal, exploited for criminal ends, or potentially harmful. Such denial may be necessary to protect end-users (such as children), potential victims, or even content intermediaries such as internet service providers.

Access protection was accepted by a committee of the European Parliament in 1996 for
• national security (instructions on bomb-making, illegal drug production, terrorist activities),
• protection of minors (abusive forms of marketing, violence, pornography),
• protection of human dignity (incitement to racial hatred or racial discrimination),
• economic security (fraud, instructions on pirating credit cards),
• information security (malicious hacking),
• protection of privacy (unauthorized communication of personal data, electronic harassment),
• protection of reputation (libel, unlawful comparative advertising), and
• intellectual property (unauthorized distribution of copyrighted works, e.g. software or music).

Even if the above were accepted on principle, in practice, the reasons for and areas of restriction of access varies considerably. For example, the USA bans online gambling; China allows online gambling but disallows some political expression.

Content providers who placed their content online therefore face the potential for criminal charges even though the content may be legal in their country of origin.

With access protection, the issue is that such restriction of access may be too broad and so block access to those who are not the intended targets of the restriction. Access protection requires that content be labeled in some form according to some criteria of unacceptability. Whichever the method of labeling, by the content-provider themselves or by machine code, all systems have been found to be fallible.

Given the broad differences in culture and law, it is extremely difficult to come to an objective judgment on whether some content is acceptable or unlawful. For this reason, content filtering in developed countries usually relies on the voluntary choice by end users of a filter provider they like; unlawful content is only removed after proper legal process. Other countries, however, apply filters to the international traffic, usually based on blacklists of foreign sites, to prevent their citizens from accessing some international resources, often for political or religious reasons.

In some sectors (e.g. intellectual rights or consumer fraud), authors who deem their rights to have been illegally violated have tried to bypass legal process and to use alternative means (direct legal pressure, pressure on ISPs, etc.) to obtain the removal of the content more quickly. While this might be necessary to promptly stop online frauds, it also prevents any independent and objective evaluation of the legality of the

content.

2. Attribution to categories
Please attribute the issue to one or more of the five categories on the table "Inventory of Public Policy Issues and Priorities".

(i) Multilingualism and Content and more content

(ii) Possibly Access for All because if content is legal in some countries but illegal in others, access will not be available to those where the content is illegal.

3. SWOT Analysis
Please assess the strengths and weaknesses of the present system (internal factors). What are its opportunities and threats (external factors)?

Strengths
With the present system, there is minimal disruption to content and access rules for each country.

Weakness
Left to itself, the present system would mean each country applying its laws as it deems appropriate to content. This can be confusing to content providers.

Opportunities
There is probably a need to indicate some kind of best practice as opposed to hard law. Such best practices would crystallize into a form of regulation. It would make it easier for content providers to operate.

Threats
Leaving things as they are creates uncertainty on the part of content providers. It is probably not possible to arrive at full agreement on access protection but some common understanding to minimize the fears of content providers would be helpful.

The lack of effective established processes for global resolution of controversies on the legality of content might lead to the use of extra-judicial,which reduces the legal rights of the accused and might also hamper crime-fighting.

The use of compulsory filters that cannot be disabled by users conflicts with international human rights such as privacy, freedom of speech, freedom of religion and of political opinions.

4. Actors (who, with whom?)
Please identify the main actor (government, private sector, civil society or international organization) dealing with this issue and who else among the relevant stakeholders is involved.

For illegal content, governments are the primary enforcers of the law. However, private bodies, such as hotlines for example, may play a part in alerting governments to the availability of the illegal content.

There are many stakeholders interested in access protection. Governments, commercial organisations, civil society and non-profit groups may play a role. Governments have had a role in partial denial of access by forcing ISPs to install filters. The non-profit group, Internet Content Rating Association (ICRA) was established by the Bertelsmann Foundation (which is a non-profit foundation of the Bertelsmann media conglomerate) to empower parents to filter content to the young. And commercial organizations have been set up to sell software that attempt to do such filtering. Sometimes, these are used as a marketing tool, as in the availability of filtered content is touted as a special service.

5. Forums (where?)
(a) who participates
(b) nature of forum
Please describe where this issue is being discussed or dealt with and at what intervals? Do these meetings make

decisions? What is the nature of possible decisions? Who participates in discussions and decision-making processes? What are the decision-making procedures?

There is no internationally-accepted forum that discusses the above issues. Regulators do meet to exchange notes but on an occasional and incidental basis.

6. Governance mechanisms (how?)
(a) objectives of the rules system
(b) content of principles, norms and rules
Please describe the overarching objectives of the rules system or norms in question. What is the actual content of the principles, norms and rules designed to achieve these objectives?

Illegal content is regulated at the national level. The host country may be alerted by a third party but the regulation is applied locally.

For access protection, the regulation is aimed at balancing the need to minimize the impact of the content and freedom of expression. ICRA is probably the best recognized filtering software tool that balances filtering with free speech interests. It was developed after a year of intensive study with expert inputs from academe, regulators and civil activists. Despite the attempt at striking that balance, civil activists have complained right to the time that the program was rolled out that the filtering tool was not sufficiently respectful of free speech concerns.

7. Adequacy measured against criteria / benchmarks set out in Declaration of Principles:
(a) multilateral
(b) transparent
(c) democratic
(d) capacity to address Internet governance in a coordinated manner
(e) multi-stakeholder approach
(f) other
Please assess whether the mechanisms described above are adequate when measured against the criteria or benchmarks set out in the Declaration of Principles. Are they multilateral, transparent and democratic? Are they addressed in a coordinated manner? Are they based on a multi-stakeholder approach? Are there other principles they respect or should respect?

For illegal content, there is no multilateral agreement. However, there is cooperation among a number of countries in the areas of child pornography and consumer fraud. Cooperation tends to be among the more developed countries.

In other areas concerning potentially harmful content, say, on bomb-making or hate-speech, there is no agreement; however, content providers do not host them in locations where they may be illegal.

On access protection, there is no international agreement on blocking access to sites and the culture of the internet is to resist restrictions on access.

8. Additional comments
Please make any additional comments you may wish to make with regard to this issue.

Generally, there is consensus that filtering or denying access to protect children is not objectionable. Hence there is some tolerance of filtering of content deemed unsuitable for the young. In practice, however, ICRA has failed: there is no critical mass of sites labeling their content and so users would not find the filtering working well.

Illegal content would continue to be ruled illegal by the nation-states.