



## **APC expresses concern over OECD Communique on principles for internet policy-making**

*Public interest must feature prominently as a principle*

JOHANNESBURG, SOUTH AFRICA, July 1 2011 (APC) -- Members of the OECD held a High Level Meeting in Paris this week, releasing a Communique on principles for internet policy-making on June 29. Although we applaud the openness of governments and the OECD secretariat to include non-governmental stakeholder constituencies in the meeting, as a worldwide network promoting the use of the internet for social justice and sustainable development since 1990, the Association for Progressive Communications (APC) is concerned about the overwhelming emphasis the Communique places on enforcement of intellectual property laws.

In particular, we worry that the Communique's approach to intellectual property rights does not fully appreciate the complexities of the online media environment.

The Communique was not endorsed by the Civil Society Information Society Advisory Council<sup>1</sup> --a coalition of more than 80 civil society groups from across the globe that provide input into the development of OECD policies relating to the Internet-- of which APC is a member. We support the CSISAC position.

### **The approach to intellectual property requires more nuance**

Our own research on media piracy in South Africa<sup>2</sup> shows that intellectual property laws can represent a significant barrier to access to information and culture especially in poor communities. However the debate surrounding intellectual property too often reveals an overwhelming bias towards enforcement -- including the extension of criminal penalties, increasing of police powers, streamlining of the judicial process and increasing surveillance of the internet.<sup>3</sup>

As detailed in the research, which was produced for *Media Piracy in Emerging Economies*<sup>4</sup> by the Social Sciences Research Council, we found that a narrow focus on the criminal aspect of the violation of intellectual property to be "increasingly counterproductive for all parties, from developing-country governments, to consumers, to the copyright interests that drive the global enforcement debate."

We believe the approach to intellectual property issues should be more nuanced. Creators of content have rights that need to be protected -- should they so wish. But the enormous potential of the internet to increase the development and sharing of knowledge should not be put at risk through the enacting of overly-stringent laws -- an approach we note is favoured mostly by large corporations rather than individual creators.

APC questions the statement in the Communique that intellectual property protection is a "fundamental tool for the advancement of innovation and creativity on the Internet."<sup>5</sup> In fact, in our estimation much of the internet's success is the result of the open source, collaborative efforts of unpaid volunteers contributing to a global information commons.

1 [http://csisac.org/CSISAC\\_PR\\_06292011.pdf](http://csisac.org/CSISAC_PR_06292011.pdf)

2 <http://www.apc.org/en/node/6237/>

3 <http://piracy.ssrc.org/wp-content/uploads/2011/06/MPEE-PDF-Ch3-South-Africa.pdf>

4 <http://piracy.ssrc.org/the-report/>

5 [http://www.oecd.org/site/0,3407,en\\_21571361\\_47081080\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/site/0,3407,en_21571361_47081080_1_1_1_1_1,00.html)

Anyone involved in the development of the internet over the last twenty years knows that transgression has probably been a far greater driver of innovation than IP protection.

We do not want to imply that illegal use of content is a sustainable alternative. What we believe is that policy makers should focus on keeping the internet open, encouraging its potential for strengthening the information and knowledge commons.

And let those with business interests on the internet apply their resources and creativity to come up with models that thrive on openness rather than on restrictions.

### **Ambivalence towards intermediary liability**

Further, while the Communique frequently refers to the free flow of information and freedom of expression, it fails to give these the primacy that they deserve.

Anriette Esterhuysen, APC executive director, expresses her concern about the Communique's "unmistakable ambivalence towards intermediary liability".

"While we recognise that there is a space for self-regulation in the internet industry, far greater emphasis should be placed on ensuring that intermediaries are not held liable and not vulnerable to enforcement by States to violate users' rights without due process that adheres to international human rights standards," she says.

The Communique states that "Internet intermediaries, like other stakeholders, can and do play an important role by addressing and deterring illegal activity"<sup>6</sup>. APC believes that this is a dangerous idea as intermediaries are neither equipped nor qualified to enact policy, especially around sensitive issues like freedom of expression.

On this subject the June report of the UN Special Rapporteur on Freedom of Expression, Frank La Rue, notes that "[t]he range of services offered by intermediaries has flourished over the past decade, mainly due to the legal protection that they have enjoyed from liability for third-party content"<sup>7</sup>. His report goes on to suggest that "intermediaries, as private entities, are not best placed to make the determination of whether a particular content is illegal, which requires careful balancing of competing interests and consideration of defences."<sup>8</sup> As such, the Special Rapporteur, and APC, believe that the restriction of content should never be delegated to a private entity.

### **Thumbs up for the focus on access and openness**

Despite this, there are many positive signs coming out of the meeting in Paris. The Communique wisely recognises the need for "more ubiquitous access to and use of broadband Internet networks [...] at affordable prices"<sup>9</sup> and that public investment may be necessary to promote the growth of networks, especially in remote areas.

As it stands today, affordable access is not ubiquitous. The internet is still a very uneven playing field. What's more, the importance of openness -- which the document stresses -- is constantly at risk, even though it is so deeply embedded in the internet culture. Therefore emphasising and further exploring net neutrality and what it means in an evolving internet should get far more attention than it does in this Communique.

The reality is that the internet is a public space, even if it is not publicly owned. Therefore it is vital that the public interest is a primary internet policy-making principle. We need to recognise the evolving nature of the internet as a public space that is developed, operated and used by multiple stakeholder groups. Public interest therefore has to feature prominently as a principle in internet policy.

6 [http://www.oecd.org/site/0,3407,en\\_21571361\\_47081080\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/site/0,3407,en_21571361_47081080_1_1_1_1_1,00.html)

7 [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf)

8 [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf)

9 [http://www.oecd.org/site/0,3407,en\\_21571361\\_47081080\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/site/0,3407,en_21571361_47081080_1_1_1_1_1,00.html)