

**Cyber-Rights & Cyber-Liberties (UK)**  
**Response to the**  
**Newsgroups: An Internet Watch Foundation discussion paper**  
**January 2001**

**Sent to newsgroup-consult@iwf.org.uk on 30 January, 2001.**

Cyber-Rights & Cyber-Liberties (UK) (<http://www.cyber-rights.org>), is a non profit organisation established to protect the interests of all honest, law abiding Internet users with the aim of promoting free speech and privacy on the Internet. It was founded in 1997 and has been actively involved with the Internet policy making process of the UK government, the European Union, Council of Europe, OECD, and the United Nations.

Cyber-Rights & Cyber-Liberties (UK) has been monitoring the activities of the IWF since its inception in September 1996. So far, we have produced two critical reports in relation to the activities of the IWF, namely, *Who Watches the Watchmen: Internet Content Rating Systems, and Privatised Censorship*, (November 1997);<sup>1</sup> and *Who Watches the Watchmen: Part II - Accountability & Effective Self-Regulation in the Information Age*, (September 1998).<sup>2</sup> Therefore, we welcome this opportunity to comment on the issue of Usenet newsgroups and the availability of illegal content through the newsgroups over the Internet.

It is important to set the scene before addressing the issues raised within the IWF discussion paper.

The UK's laws do criminalize the creation, possession, and distribution of indecent photographs of children (including child pornography and pseudo-photographs) under the Protection of Children Act 1978, as amended by the Criminal Justice Act 1988 and by the Criminal Justice and Public Order Act 1994. These laws have been successfully used in many cases involving the possession and distribution of child pornography ever since they were amended to take into account the technological developments.

Paragraph 13 of the IWF discussion paper states "it is important that the law is enforced and seen to be enforced" but we note that it is well enforced in the UK. There have been more than 500 prosecutions in the last few years and we believe that where those who possess and distribute child pornography are subject to UK law, they are consistently prosecuted.<sup>3</sup> A recent example of this is the prosecutions that followed Operation Cathedral in January 2001.

Concerns about the availability of child pornography over the Internet and pressures on the Internet Service Providers ("ISPs") were first marked in public in the UK in the summer of 1996. The initial warning to ISPs providing services within the UK came

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<sup>1</sup> See <<http://www.cyber-rights.org/watchmen.htm>>.

<sup>2</sup> This second report is submitted to the Committee as an appendix and is available through <<http://www.cyber-rights.org/watchmen-ii.htm>>.

<sup>3</sup> See generally <<http://www.cyber-rights.org/reports/child.htm>>

from the then Science and Technology Minister, Ian Taylor, in August 1996, following the Metropolitan Police's attempt to ban around 130 Usenet discussion groups allegedly carrying child pornography.<sup>4</sup> At that time both Mr Taylor and the Metropolitan Police made it clear that the police would prosecute ISPs who provided their users with illegal content. Following the Metropolitan Police warning, self-regulation of the Internet industry rather than government regulation was seen as the best way forward. The result was the establishment of the Internet Watch Foundation ("IWF") in September 1996.

We note (as paragraph 21 of the IWF discussion paper) that a University College Cork study claimed that the amount of child pornography accessible through the Internet is considerable, with the situation being fluid and dynamic due to sites frequently changing addresses.<sup>5</sup> The Cork Study (in research carried out in January 1998) further suggested that 0.07% of the 40,000 newsgroups carry "child erotica" or "pornography". Furthermore, according to the IWF discussion paper:

20. The latest programme of monitoring by the IWF - completed in July 2000 - has identified 28 newsgroups as frequently containing child pornographic material. However, research by the IWF in August 1999 indicated that some 77% of the illegal material reported to the organisation had been found in just three groups.

24. Recent experience has shown that the average proportion of potentially illegal content within the groups currently being monitored by IWF is some 10-15%, representing 1,676 items out of 14,836 articles posted and reviewed within a one week period. The average in the three 'worst' groups was nearly 45% which represents some 717 items out of a total of just over 1,800.

According to paragraph 16 of the IWF discussion paper, since the creation of the IWF, over 23,000 items have been removed as a result of its hotline process. The great majority of these items contained child pornography. Though it is not possible to fully assess the real extent of this problem, or the availability of such materials over the Internet, the IWF paper gives little indication of the nature of the problem nor how many new items has appeared during the time period in which the 23,000 items were removed from the newsgroup servers of UK ISPs.

Paragraph 17 of the IWF discussion paper deals with the issue of knowledge and the "notice and takedown" provisions used by the ISPs once they are notified by the IWF. According to this paragraph, "the police currently take the view that ISPs only "know" about specific postings that they are told about - either by the IWF or anyone else" and "provided that the ISP acts promptly to remove these items, they will not be prosecuted for what otherwise could be illegal possession" even though technically they can be

<sup>4</sup> See Uhlig, R., "Minister's warning over Internet porn," *The Daily Telegraph*, 18 August. See also the *DTI Press Release P/96/636* - "Ian Taylor Challenges Internet Service Providers: Develop New Software to Come Clean" 14 August 1996. See further Akdeniz, Y., "The Regulation of Pornography and Child Pornography on the Internet," (1997) *The Journal of Information, Law and Technology* (1) at <[http://elj.warwick.ac.uk/jilt/internet/97\\_1akdz/default.htm](http://elj.warwick.ac.uk/jilt/internet/97_1akdz/default.htm)>.

<sup>5</sup> See a summary of the Cork Study in the Irish Department of Justice, Equality and Law Reform, *Illegal and Harmful Use of the Internet* (Pn.5231, Dublin, 1998) pp.33-35.

prosecuted under section 3 of the 1978 Protection of Children Act.<sup>6</sup> At the time of the setting up of the IWF, it was a political agreement not to prosecute ISPs (unlike in Germany for example) despite the existence of section 3 under the 1978 legislation even though “illegal material could often be found in a given newsgroup” as paragraph 18 of the IWF discussion paper states.

### **WHAT IS THE CASE FOR REMOVING SELECTED NEWSGROUPS?**

**27. First, it is already accepted that there is a legal liability on ISPs not knowingly to host child pornography. Now that it is known which newsgroups regularly, even consistently, contain content that it is illegal to possess, these groups should be dropped by ISPs.**

The 1978 Act (through section 3) may well be applied to prosecute ISPs. However, so far, it has never been the intention of the IWF nor the ISP trade associations to lobby the government for change in the current legal policy for the removal of ISPs from the chain of liability for carrying third party criminal content. This of course does not mean that the Internet industry should not act responsibly and promote self-regulatory mechanisms like the IWF hotline. However, there has been no change within the legal environment before and after the inception of the IWF and its hotline activities.

In a sense paragraph 27 takes us back to the summer of 1996. It hence seems that, after more than four years, we are back to the debate on censorship (removal) of newsgroups. We blame the IWF for not doing anything to improve the legal environment for the ISPs. Paragraph 28 which calls “all UK ISPs should cease hosting those groups known to account for the most frequent instances of child pornography” is no different than the letter from the Metropolitan Police to UK ISPs in August 1996 concerning pornographic material in around 130 Usenet discussion groups which stated that “we are looking to you to monitor your Newsgroups identifying and taking necessary action against those others found to contain such material. As you will be aware the publication of obscene articles is an offence.”<sup>7</sup>

**30. Second, the removal of a few selected newsgroups could - almost literally overnight - reduce significantly the size of the newsgroup problem.**

Removal of a “few selected newsgroups” is not an act of reducing the problem of child pornography over the Internet. It is an act of convenience on the part of the IWF since it will not solve the problem – the problematic newsgroups will continue to appear elsewhere outside the UK and will still be accessible to UK users. While removal of a

<sup>6</sup> Section 3 of the 1978 Act states that “Where a body corporate is guilty of an offence under this Act and it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of, any director, manager, ..... he, as well as the body corporate, shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. See for an interpretation Leong, G., “Computer Child Pornography - The Liability of Distributors?” [1998] *Criminal Law Review* Special Edition: Crime, Criminal Justice, and the Internet, (December), 19-29.

<sup>7</sup> See the letter from the Metropolitan Police to the UK ISPs, August 1996, at <<http://www.cyber-rights.org/documents/themet.htm>>

“few selected newsgroups” might, therefore, reduce the current duties of the IWF, it would not reduce the availability of child pornography in the Usenet newsgroups over the Internet.

There is always the possible scenario of new similar newsgroups being introduced carrying the same illegal content as hinted by paragraph 32.

**33. Third, the absence of such newsgroups on UK servers could substantially reduce the future costs of operation of the IWF and allow more resources to be devoted to education and awareness, which is increasingly recognised as the most effective way to protect children from dangers on the Internet.**

This was already hinted in paragraph 30 and seems to be the only realistic reason behind these proposals from the IWF point of view. Although we agree with the IWF that education and awareness are crucial and very important issues to protect children from possible Internet dangers, we would have liked to see a more honest statement on why the IWF is trying to reduce its hotline function. It seems like the hotline is not effectively fighting the problem of child pornography and its activities are not contributing to the reduction of child pornography over the Internet. We have also not witnessed a visible contribution to law enforcement efforts and prosecutions following the activities of the IWF hotline.

#### **WHAT IS THE CASE AGAINST SUCH REMOVAL OF NEWSGROUPS?**

**37. First, any such removal simply would not work. Indeed it would be counter-productive because it would simply lead to the posters of the offending material migrating to other newsgroups.**

This is true and is a point that needs to be taken seriously. Paragraph 40 states that “if material migrates, it will have to be tracked down and removed from its new 'home'. The target may move, but it can and should be followed.” Worse still, this migration of material would lead to newsgroups that are currently not a problem being ‘polluted’ and hence becoming targets for censorship.

In fact the spread of this sort of material to other newsgroups would be likely to expose many users who are not consciously seeking access to material of this kind. It would hence create unnecessary exposure and have a strongly detrimental impact on the value of these other groups, most of whom are unlikely to welcome the new content. This migration would also make it more difficult to track down the material and those who are posting it.

**41. Second, it is wrong for ISPs to remove newsgroups that have a clear majority of perfectly legal content.**

We strongly agree with this point and it would be wrong for ISPs nor for the IWF to make decisions on content related matters. We would also like to remind that illegality is a matter for the courts rather than for the ISPs to make. Otherwise, it would almost

amount to censorship of Internet content and could further expose ISPs to criminal and possibly civil liability if they start making editorial decisions on what newsgroups to carry.

The IWF paper in paragraph 44 states that “there is a body of public opinion which puts a greater emphasis on combating child pornography than on protecting free expression and removal of the relevant newsgroups would be according more weight to that viewpoint.”

However, it should not be forgotten that child pornography is not an Internet specific problem but rather a wider problem within society as a whole. It should hence be dealt within this wider context and not specifically in relation to the Internet. The Internet is just another convenient tool for paedophiles who wish to traffic in these kind of materials. But in most cases, child pornography is used as an excuse for further general regulation of the Internet or as an excuse to provide law enforcement bodies with new general powers as in the case of the Regulation of Investigatory Powers Act 2000. This over-reaction must be strongly resisted and it should be noted that there was no overall “public support” for the RIP Act. This was despite the fact that the Home Office claimed that the intrusive powers under RIPA were necessary to fight child pornography on the Internet. So far, a considerable number of highly publicised police operations involving child pornography on the Internet has been successful without relying on the RIPA powers. Therefore, the existence of “a body of public opinion” does not necessarily justify censorship of newsgroups on the Internet.

**45. Third, the removal of selected newsgroups would give a false sense of security regarding the scale of the problem and therefore ultimately act to the detriment of efforts to combat child pornography.**

We agree. As already discussed earlier, the problem would continue to exist elsewhere and UK users may still be receiving these newsgroups even though they may not be carried by UK ISPs. We believe the UK law enforcement agencies are, or should be, consulted on this matter since these newsgroups should be monitored by law enforcement agencies to identify those who post child pornography within the UK. Therefore, we agree (as in paragraph 47) that this could “make the task of the police harder”, although we do not agree that this would necessarily mean “more children being abused”. The IWF needs to clarify further its claims in its discussion paper.

**49. Fourth, the success of any measures to remove selected newsgroups from UK servers would leave the material on servers in other countries and people could simply download it from there.**

We have already stated this and it has always been our view ever since we published the “Who Watches the Watchmen” reports in November 1997 and September 1998 which was critical of the IWF activities and among other things questioned the effectiveness of hotlines like the IWF. With the second “Who Watches the Watchmen” report in September 1998, we stated that:



“These figures tell us little as the actual amount of child pornography on the Internet is unknown. It is, therefore, difficult to judge how successful the UK hotline has been. Another downside is that the efforts of the organisation are concentrated on the newsgroups carried by the UK ISPs. This means that while illegal material is removed from the UK ISPs servers, the same material will continue to be available on the Internet carried by the foreign ISPs in their own servers. The expensive monitoring of the Internet at a national level is of limited value as the few problems created by the Internet remain global ones and thus require global solutions.”

At the time, we never received a response from the IWF and the only response we ever received in relation to the *Watchmen* reports was sent to us almost two years later through Mr. Roger Darlington in March 2000 following his appointment as the new chair of the IWF in early 2000. But that response did not address the criticism of the IWF hotline. But now the IWF is admitting that we were right on this issue adding that “if a change of policy in relation to certain newsgroups left the material outside the UK but still accessible from it, the IWF would have done all that it reasonably could to address the problem” in paragraph 52.

**53. Fifth, if certain newsgroups are to be removed from UK servers, there is the difficult question of deciding which groups should be selected.**

The legitimacy of the IWF system depends on limiting its function to advice on the illegality of particular images, because only the holding of images is an offence under the current UK legislation and not the carrying of a specific newsgroup. Advice on whether a newsgroup has in some period carried some percentage of illegal images is wholly irrelevant to whether any particular image is illegal. To offer that sort of advice would turn the IWF from a legitimate expert adviser into a peddler of prejudice, and take it into the realms of censorship.

It is plain from the IWF paper that such a development would offer very little commercial advantage to the IWF and have little effect if any on the availability of illegal images from newsgroups to those who want them.

If the IWF follows this option, it needs to be very clear and transparent in the removal criteria but as paragraph 54 states “any such criteria would be inherently subjective and enormously controversial.” This is not an action that Cyber-Rights & Cyber-Liberties (UK) would support in any case. One should always remember that the IWF is not a public regulatory body nor a government department like the Home Office and we question whether such a decision making capacity should lie with the IWF.

**Conclusion**

We believe fundamental principles should be observed when decisions are taken by government and other quasi-regulatory bodies relating to public matters especially if the IWF scheme will be part of the self-regulatory (or co-regulatory) approach that has been adopted and supported by the UK Government. Therefore, it is important to consider the good governance/regulation principles in relation to regulators and quasi regulators

based upon the Nolan Committee principles on good standards in public life<sup>8</sup> and the Cabinet Office Regulatory Impact Unit's principles of good regulation.<sup>9</sup>

In general principles for a good regulatory action should:

be based on clearly defined policy objectives and should be easy to understand,  
 be the minimum necessary to meet those objectives,  
 further enhance legal certainty in a dynamic market,  
 aim to be technologically neutral,  
 have broad public support,  
 be enforceable, and transparent  
 be balanced and avoid impetuous knee-jerk reaction  
 avoid unintended consequences  
 balance risk, cost and practical benefit  
 reconcile contradictory policy objectives  
 have accountability  
 be relevant

However, we have not witnessed these principles being adequately observed by the Internet Watch Foundation since its inception, even though it remains a "private organisation" with important public duties; namely, (a) acting as a hotline for reporting Internet content deemed to be illegal, and (b) as a policy setting body in relation to the availability of Internet content which may be considered as harmful or offensive but not illegal.<sup>10</sup> Transparency, openness and more importantly "accountability" are important features of a healthy society. Although there has been some improvements in relation to transparency and openness from the part of the IWF since Roger Darlington's appointment, without "accountability", the IWF will never become a transparent policy-making organisation. Therefore, if this is the way forward for the future of "Internet content regulation", then the mechanics of this system should observe the above principles.

If bodies like the IWF are to exist, then they must more clearly be subjected to standards of constitutionality and good government. They must also have greater regard to legal standards, especially those standards which serve to protect liberty.

<sup>8</sup> Nolan Committee, *First Report of the Committee on Standards in Public Life* (Cm 2850, London: HMSO, 1995). See also the Committee on Standards in Public Life web site at <<http://www.open.gov.uk/cspl/csplhome.htm>>.

<sup>9</sup> See the Cabinet Office Regulatory Impact Unit's (formerly known as the Better Regulation Unit) Better Regulation Guide, and the Principles of Good Regulation at <[http://www.cabinet-office.gov.uk/bru/1998/task\\_force/principles.pdf](http://www.cabinet-office.gov.uk/bru/1998/task_force/principles.pdf)>.

<sup>10</sup> A detailed criticism of Internet content regulation is provided in Walker, C., & Akdeniz, Y., "The governance of the Internet in Europe with special reference to illegal and harmful content," [1998] *Criminal Law Review*, December Special Edition: Crime, Criminal Justice and the Internet, pp 5-19. This article has also been provided as an appendix for the review of the House of Lords Select Committee.

Cyber-Rights & Cyber-Liberties (UK) would clearly prefer the existence of an effective anti-child pornography hotline to a newsgroup censorship policy by an unaccountable quasi-regulatory body like the IWF.

In our view, the government should give the UK police the resources (and accountability) they need to track down and prosecute UK citizens involved in publishing illegal content. This is to some extent already happening with recent successful police operations. Furthermore, with the enactment of the Criminal Justice and Court Services Act 2000, offences related to child pornography became arrestable offences giving law enforcement agencies wider powers to fight those who deal with child pornography. This is far preferable to having unaccountable bodies getting involved in censorship. In reality, we need illegal material such as child pornography to be reported to an organisation such as the police who have been given the responsibility for dealing with it like in the case of the Anti-Terrorism Hotline operated by the Metropolitan police.

The industry through the IWF could always lobby for the removal of the ISPs from the chain of liability for carrying illegal content rather than developing complex policies which could amount to censorship.

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