

e-commerce law & policy

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Global initiative to protect net privacy and freedoms launched

Microsoft, Google and Yahoo! launched the Global Network Initiative, on 28 October, to counter growing worldwide government pressure to censor the internet, or to disclose personal information. Miriam D'Jaen, an Associate at Perkins Coie LLP, discusses the principles set out in the Initiative and examines whether it will have any impact in countries that restrict internet use.

On 28 October, Microsoft, Google and Yahoo!, alongside a diverse coalition of human rights organisations, academics, investors and technology companies, launched the Global Network Initiative. The GNI aims to protect and promote online freedom of expression and privacy, and sets forth standards for technology and communications companies operating in internet-restricting countries. These standards, known as the Principles on Freedom of Expression and Privacy, are based on internationally recognised human rights norms and provide companies with a framework for responding to government requests to censor or surveil internet users.

State-sponsored internet censorship and surveillance - and the resulting pressure companies face - have gained widespread attention in recent years. In 2005, human rights advocates, the US Government, the EU and numerous non-governmental organisations blasted Yahoo!, after the company provided Chinese officials with confidential user information that was ultimately used to imprison business journalist, Shi Tao. Months later, Microsoft and Google faced criticism from the same audience for censoring blogs and operating restricted Chinese-version search engines, respectively.

Initially, the companies

contended that they had no choice but to comply with local laws if they were to operate within the Chinese market. However, it soon became apparent that the pressures of internet-restricting regimes were not limited to China. Turkey, Pakistan, Tunisia, Thailand, the United Arab Emirates, Saudi Arabia and even the United States, began to present human rights challenges in an increasingly networked world. Coming to terms with the global scope of this issue, leaders in the industry began to call for concerted action.

The GNI was the result of this call to action and its participants hope that by acting collectively, they can be more effective in resisting government requests for censorship and surveillance, or at least creating a trail of accountability. The principles and their accompanying implementation guidelines establish a framework for doing so and commit companies to take several steps, including:

- Identify circumstances when freedom of expression and privacy may be jeopardised and develop appropriate risk mitigation strategies.
- Establish written procedures that ensure consistent implementation of policies that protect freedom of expression and privacy, and document compliance with these policies.
- Require governments to follow established domestic legal processes when seeking to restrict freedom of expression or access personal information.
- Encourage governments to be specific, transparent and consistent in the demands, laws and regulations that impact online freedom of expression and privacy.
- Maintain a record of government requests and demands to restrict freedom of expression and access personal information.

- Interpret government restrictions and demands narrowly so as to minimise the negative effects on freedom of expression and privacy.

- Clearly disclose to users the generally applicable laws and policies which require the participating company to remove or limit access to content, restrict communications or provide personal information to government authorities.

- Clearly disclose to users when specific content has been removed, blocked or provided to government authorities.

- Communicate the principles to all employees and provide detailed training for those corporate employees who are most likely to face freedom of expression and privacy challenges.

- Provide whistle-blowing mechanisms or other secure channels through which employees and other stakeholders can report violations of the principles.

- Implement the principles wherever the companies have operational control and in the countries where the companies lack operational control, use best efforts to ensure that business partners, investors, suppliers, distributors and other related parties uphold the principles.

The principles are intentionally flexible so as to account for technological innovation, market changes and the variety of companies and products that will be represented by the Initiative. In addition, the principles are backed by a multi-stakeholder governance structure, which will ensure their continued relevance, effectiveness and impact. This governance structure also calls for increased transparency with the public, routine evaluations of company compliance by an independent and credible assessor, continued collaboration and shared learning

among the diverse stakeholders.

By committing companies to a higher level of corporate due diligence and risk management, the principles have been hailed as an agent of change. But this begs the question, what really changes?

The GNI is not an organisation that can rewrite laws around the world and the reality is that companies must continue to obey the laws of jurisdictions in which they operate. In addition, it is unlikely that internet-restricting countries will suddenly stop censoring content or demanding information about their own citizens. Understandably, some human rights groups harbour reservations about the effectiveness of the GNI. Shortly after viewing a final draft of the principles, Amnesty International pulled out of the Initiative, explaining: 'Following careful consideration of these documents, Amnesty International has come to the conclusion that - while they represent a degree of progress in responding to human rights concerns - they are not yet strong enough to allow Amnesty International to endorse them'.

While critics have a valid argument in the short-term, it is important to recognise that the GNI has created something that did not exist before: process. The principles set forth a mechanism for companies to assess and manage human rights risks, a framework for handling government demands and a roadmap for managing emerging challenges. Equally important is the new-found collaboration between diverse stakeholders that enables a more nuanced understanding of the problem while encouraging strategic and proactive approaches to addressing it.

"This is a great first step and the pieces are in place to make this a

The Initiative's success over the next few years will require broad-based global representation

very successful initiative", stated Jonas Kron, Senior Social Research Analyst at Trillium Asset Management Corporation, a socially responsible investment fund that has been involved with the GNI since its inception. "The principles create a venue for process and companies will hopefully be able to use this process to walk China to a more open society, such that there are no more Shi Tao incidents. This is a process victory and the proof will be in what happens from here".

The Initiative's success over the next few years will require broad-based global representation and a meaningful process for evaluating and benchmarking companies' adherence to the principles. In addition, success cannot be measured quantitatively, considering the companies are dealing with a moving target - just think about the rapid pace at which technology evolves, government responses change, business models adapt, and the number of internet users and types of uses expand. For this reason, the effectiveness of the GNI must be measured by asking factual and empirical questions: Does the company have a process for assessing human rights risks? Does the process involve review by senior level staff? Is the company following a consistent protocol when responding to government demands? Are new companies signing on to these practices? Is outreach occurring on a global level?

In the short-term, the participants are working to complete a governance charter, which will create rules for a decision-making entity. At the same time, the GNI is looking to appoint an Executive Director and a Board of Directors. These decisions will be critical to the success of the Initiative.

The GNI also hopes to build upon the geographic variation of its participants as well as expand its reach to include telecommunications companies, internet service providers and start-ups. "Although start-ups do not have the same resources as industry leaders and are unlikely to have built the same processes into their business models, they can benefit from the experiences of companies like Google", said Colin Maclay, Acting Executive Director of the Berkman Center for Internet & Society at Harvard University. "It is important to shift companies away from an *ad hoc* approach by getting them to think ahead and incorporate human rights assessments into product plans and business strategy, further reinforcing the fundamental relationship between privacy and expression and their value proposition". Finally, the participants will continue to leverage collective action. Chuck Cosson, Senior Policy Counsel at Microsoft, explained that the entire group has already committed to meet bi-annually and, in the interim, will focus on more informal means of collaboration, such as using electronic resources and small-group meetings. These dialogues will serve as a forum to develop the GNI's organisational structures, recruit participants worldwide, engage in shared learning, generate research, share best practices and openly discuss new areas of concern. In doing so, the participants aim to preserve the great promises of the internet, including information-sharing, personal expression, innovation and social and economic development.

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