

UNITED STATES DEPARTMENT OF COMMERCE  
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

In the Matter of

Global Free Flow of Information  
On the Internet

Docket No. 100921457-0457-01

COMMENTS OF THE GLOBAL NETWORK INITIATIVE

December 6, 2010

The Global Network Initiative<sup>1</sup> (“GNI”) respectfully submits these comments in response to the Department of Commerce’s (“DOC”) Notice of Inquiry regarding the global free flow of information on the Internet. GNI is a multi-stakeholder initiative that seeks to accomplish a number of goals:

- Provide direction and guidance to the ICT industry and its stakeholders in protecting and advancing the enjoyment of freedom of expression and privacy rights globally.
- Help ICT companies demonstrate credibility for their efforts to protect such rights through a system of (a) transparency with the public (b) independent assessment and evaluation of the implementation of these Principles, and (c) collective learning and multi-stakeholder engagement.
- Promote the rule of law and the adoption of laws, policies, and practices that protect freedom of expression and privacy through collaboration among companies and other stakeholders in the global information and communications technology (“ICT”) community and engagement with governments and international institutions.

GNI was launched in October 2008 by a diverse coalition of leading ICT companies, major human rights organizations, academics, and investors.<sup>2</sup> GNI is built upon Principles on Freedom of Expression and Privacy, specific implementation commitments, and a framework for accountability and learning.<sup>3</sup> Through participation in GNI, ICT companies can credibly assure users, customers, and investors that they are committed to meeting their obligations to respect the rights of users while complying with applicable laws.

Multi-stakeholder collaboration and shared learning are fundamental to the sustainability and impact of the GNI model. Membership centers on trusted interactions among key stakeholders, and the ability of companies to explore challenges—related to implementation of the GNI framework, emerging issues, and other priorities— with human rights groups, academics and investors, and vice versa, often as events are unfolding.

The GNI framework is intended to help member organizations respect and protect the freedom of expression and privacy rights of users when responding to government demands, laws and regulations. The framework is rooted in international human rights standards - the Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”), and the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”).<sup>4</sup>

GNI will be issuing its first annual report in December of 2010. The report will describe GNI’s vision for the future, the steps taken by member companies in the past two years to implement the GNI Principles and emerging threats to free expression and privacy online. We believe the report will provide useful information to the DOC as it continues to study the impact of restrictions on the free flow of information on the Internet, and we encourage the DOC to review the report upon its release.

## I. Types of Restrictions on the Free Flow of Information on the Internet

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<sup>1</sup> GNI’s website is [www.globalnetworkinitiative.org](http://www.globalnetworkinitiative.org).

<sup>2</sup> As of December 2010, GNI members include: Google, Microsoft, Yahoo!, Committee to Protect Journalists, Center for Democracy and Technology, Electronic Frontier Foundation, Human Rights in China, Human Rights First, Human Rights Watch, Internews, World Press Freedom Committee, Boston Common Asset Management, Calvert Group, Domini Social Investments, F&C Asset Management, Trillium Asset Management and The Berkman Center for Internet and Society at Harvard University. The academics Rebecca MacKinnon, Ernest Wilson and Deirdre Mulligan serve in a personal capacity.

<sup>3</sup> See <http://www.globalnetworkinitiative.org/corecommitments/index.php> for GNI’s founding documents and core commitments.

<sup>4</sup> The GNI framework also closely follows the Protect, Respect and Remedy Framework created by Professor John Ruggie as the UN Special Representative of the Secretary General on human rights and transnational corporations and other enterprises. See John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5 (April 7, 2008), <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

Around the globe, government authorities often use legal or technical means to censor information and communication over the Internet. Such censorship restricts the ability of individuals to publish their own work, otherwise express themselves online, and obtain information such as user-generated content or public information held by governments.

Governments around the world are appropriately concerned about the use of communication products and services for illicit purposes, such as those that may endanger national security or that may result in the exploitation of children. The challenge is to find the balance points between these legitimate responsibilities of governments and the protection and advancement of the universal rights of freedom of expression and privacy.

Restrictions on the free flow of information can vary in form. For example, governments might use any of the following types of laws to restrict speech:<sup>5</sup>

- Laws created to directly regulate online speech<sup>6</sup>
- Existing laws that regulate speech and are applied to online content<sup>7</sup>
- Existing broadcast media regulations that are applied to online content<sup>8</sup>
- Laws that mandate tracking of user behavior or that require the installation of tracking software<sup>9</sup>
- Electronic privacy or data protection laws<sup>10</sup>

These laws can create civil or criminal liability for content creators or for Internet intermediaries such as ISPs, search engines, social networks, or blogging or video hosts. A legal environment in which speech regulations have vague or unknown boundaries, or are irregularly applied, can also create a chilling effect as users and intermediaries self-censor in order to avoid contravening the law.

GNI has developed analysis and guidance on at least three specific types of restrictions on the free flow of information:

#### 1) Regulations and demands to online service providers to block or filter information

The GNI Principles and Guidelines recognize that governments will, in some cases, have jurisdiction to require local online service providers to block or filter information.<sup>11</sup> To minimize restrictions on the legitimate free flow of information, the GNI Principles provide that companies take steps to interpret jurisdiction narrowly, interpret specific rules or demands narrowly, require clear communications from

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<sup>5</sup> This taxonomy is based in part on that described in Center for Democracy & Technology, *Liability for Content on the Internet* [Provisional Title], Forthcoming (“CDT, Content Liability”). This list is not exhaustive.

<sup>6</sup> For example, Thailand’s Computer Crimes Act and The Internet Law of Turkey. See e.g., Computer Crimes Act BE 2550 (2007), English translation available at <http://advocacy.globalvoicesonline.org/wp-content/plugins/download-monitor/download.php?id=2>; Turkey’s Regulation of Publications on the Internet and Suppression of Crimes Committed by Means of Such Publication, Law No. 5651, Turkish Official Gazette, No. 26030 (23 May 2007). See also CDT, Content Liability.

<sup>7</sup> See e.g., Yaman Akdeniz & Kerem Altıparmak, *Internet: Restricted Access, A Critical Assessment of Internet Content Regulation and Censorship in Turkey* (2008), [http://privacy.cyber-rights.org.tr/?page\\_id=256](http://privacy.cyber-rights.org.tr/?page_id=256); *UEJF et Licra v. Yahoo! Inc. et Yahoo France*, Tribunal de Grande Instance de Paris (22 May 2000), translation available at <http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm>.

<sup>8</sup> For a discussion of the potential impact of the EU’s Audiovisual Media Services Directive (AVMS) on the Internet, as well as for a discussion of China’s licensing requirements for websites, see CDT, Content Liability.

<sup>9</sup> *GNI Principles Offer Guidance to ICT Manufacturing and Software Sector*, Global Network Initiative (June 11, 2009), [http://www.globalnetworkinitiative.org/issues/Manufacturing\\_and\\_Software.php](http://www.globalnetworkinitiative.org/issues/Manufacturing_and_Software.php) (“GNI, Green Dam”).

<sup>10</sup> For example, under the EU’s Data Protection Directive, anyone who creates, hosts or disseminates works involving the likenesses of others could face liability if found to be “controllers” or “processors” of that data. See Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:NOT>.

<sup>11</sup> See *Principles on Freedom of Expression and Privacy*, Global Network Initiative, <http://www.globalnetworkinitiative.org/principles/index.php> (Last visited Nov. 7, 2010) (“GNI, Principles”); *Implementation Guidelines for the Principles on Freedom of Expression and Privacy*, Global Network Initiative, <http://www.globalnetworkinitiative.org/implementationguidelines/index.php> (Last visited Nov. 7, 2010) (“GNI, Implementation Guidelines”).

governments and evidence of legal authority, and provide notice to users about the types of restrictions that apply and when specific content has been blocked.

### 2) Regulations and demands that can require ICT companies to provide personal data of individuals engaged in protected expression

Some governments may seek to restrict the free flow of information by subjecting speakers to criminal process. Particularly where such enforcement actions target peaceful political expression, international standards on privacy are relevant.<sup>12</sup>

The GNI Principles recommend that companies should assess risks in determining where to store data, and encourage governments to be specific, transparent and consistent in their demands, laws, and regulations

### 3) Regulations or standards mandating the installation of content filtering technology

At least two governments have considered restricting the free flow of information through the mandatory installation of filtering software on personal computers sold in the country.<sup>13</sup> GNI recommends that companies faced with this demand work together to seek clarification or modification from the government and to pursue public education regarding the availability of a user-controlled filtering tools that allow parents and guardians to manage unwanted content for children under their care.<sup>14</sup>

## II. Intermediary Liability

Policies creating liability for carriers on the basis of content sent or created by users threaten to chill innovation and freedom of expression. Such policies incentivize carriers to restrict the use of their services for any content that could be considered controversial. The impact on expression tends to be particularly significant where laws defining content to be policed are vague and overbroad.<sup>15</sup> Where governments have sought to incentivize growth in the expressive and commercial capabilities of these technologies, they have enacted protections from damages claims and limited civil and criminal liability for companies that act as “mere conduits” for content, or simply cache or host content.<sup>16</sup> Policies that impose liability on intermediaries also discourage innovation: ICT companies are left without certainty as to whether they will be held liable for the expression that new products and services enable.

Calls for service providers to police user content and communications, under threat of greater liability, and at times under broad and vague standards of what content is considered illegal, illuminate the value of both multi-stakeholder action on public policy and guidance for responsible business actions. GNI has identified intermediary liability as a policy area that merits further attention from member companies and has established a work stream devoted to advocating policy approaches that further free expression by protecting ICT intermediaries from liability for content they do not create.<sup>17</sup>

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<sup>12</sup>See, e.g., Universal Declaration of Human Rights, Article 12.

<sup>13</sup>The two governments are Hanoi City in Vietnam and China. Installation of the software is required in Vietnam. See e.g., “*Decision by the Hanoi People’s Committee to monitor internet users*, Viet Tan – Vietnam Reform Party (April 6, 2010), <http://www.viettan.org/spip.php?article9859>. After an initial announcement, China’s government later stated that installation of filtering software was not mandatory. See e.g., “*Computers to pre-install Internet filter*,” China Daily (June 9, 2009), [http://www.chinadaily.com.cn/china/2009-06/09/content\\_8265466.htm](http://www.chinadaily.com.cn/china/2009-06/09/content_8265466.htm); “*Anti-porn filter software stirs up disputes in China*,” China Daily (June 11, 2009), [http://www.chinadaily.com.cn/china/2009-06/11/content\\_8272205.htm](http://www.chinadaily.com.cn/china/2009-06/11/content_8272205.htm).

<sup>14</sup>GNI, Green Dam.

<sup>15</sup> See Center for Democracy & Technology, “*Intermediary Liability: Protecting Internet Platforms for Expression and Innovation*” (April 2010), [http://www.cdt.org/files/pdfs/CDT-Intermediary%20Liability\\_\(2010\).pdf](http://www.cdt.org/files/pdfs/CDT-Intermediary%20Liability_(2010).pdf) (“CDT, Intermediary Liability”); CDT, Content Liability.

<sup>16</sup> CDT, Intermediary Liability.

<sup>17</sup> See e.g., *GNI Identifies Intermediary Liability for Carriers and Platforms for User Generated Content as a Key Issue for Business and Public Policy*, Global Network Initiative (Aug 19, 2009), [http://www.globalnetworkinitiative.org/issues/Intermediary\\_Liability.php](http://www.globalnetworkinitiative.org/issues/Intermediary_Liability.php) (“GNI, Intermediary Liability”); Susan Morgan, *Intermediary Liability: Balancing creativity, ICT development, and the free flow of*

It is important to note that, in many cases, other governments look to the United States as a model for what policies to adopt, or as justification for the policies they desire to adopt. The United States, through Section 230 of the Communications Act,<sup>18</sup> has established some of the world's strongest protections for intermediaries, making possible an unprecedented explosion of innovation, economic growth, and opportunities for expression and participation. The European E-Commerce Directive also contains important protections for intermediaries and is considered an important guarantee of the free flow of information.

As the DOC pursues important goals such as minimizing copyright infringement and child exploitation, we urge it to support policies that continue to protect this approach to liability for intermediaries – and the expression and innovation this enables – while also considering proportionate and targeted approaches to preventing the dissemination of illegal online activity. The GNI Principles offer guidance to companies on how to address important societal concerns and respond to government regulations in ways that show respect for the fundamental rights to free expression and access to information.

### III. International Cooperation

- A. Multi-stakeholder input, shared learning processes, and transparency and accountability structures can maximize the effectiveness of multi-stakeholder organizations.

The Notice of Inquiry asks about multi-stakeholder initiatives, noting GNI in this discussion. In particular, the NOI asks for input on the attributes multi-stakeholder organizations or initiatives should possess in order to maximize their efficacy and to make them well suited to develop principles and best practices to guide the private sector in areas related to the free flow of information online.

GNI believes that attributes of successful multi-stakeholder initiatives may vary – there is no one size fits all rule. But there are attributes of GNI that are worth noting. The first is that multi-stakeholder initiatives need input from diverse sources of expertise. GNI was developed through nearly four years of intensive negotiation, collaboration, and public scrutiny and includes some of the most prominent NGOs, academics, socially responsible investors, and ICT companies. Informed by the unique and diverse perspectives of its members, GNI is able to offer credible, operational guidance for companies, guidance that is built on extensive experience, guided by a broad set of perspectives, and rooted in international human rights principles.

GNI believes it is important to articulate both high-level principles and specific forms of best practices that serve as more practical and operational guidance for the private sector. The GNI Principles are intended to have global application and are grounded in international human rights laws and standards; they provide high-level guidance to the ICT industry on how to respect, protect, and advance user rights to freedom of expression and privacy, even when faced with government demands for censorship or disclosure of users' personal information.<sup>19</sup> The Implementation Guidelines provide more detailed guidance to ICT companies on how to put the Principles into practice and also provide the framework for collaboration among companies, NGOs, investors, and academics.<sup>20</sup>

In addition, multi-stakeholder initiatives can add value by creating resources and tools. GNI is in the process of developing a Human Rights Impact Assessment tool that is particularly oriented towards better understanding the human rights risks and opportunities that ICT companies face; the tool is intended to help companies identify circumstances where freedom of expression and privacy may be jeopardized or

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*information with other policy objectives*, OECD Workshop: The Role of Internet Intermediaries in Advancing Public Policy Objectives (June 2010), [www.oecd.org/dataoecd/42/52/45509346.pdf](http://www.oecd.org/dataoecd/42/52/45509346.pdf) ("Morgan, Intermediary Liability").

<sup>18</sup> 47 U.S.C. 230.

<sup>19</sup> GNI, Principles

<sup>20</sup> GNI, Implementation Guidelines.

advanced, and, armed with this insight, develop appropriate risk mitigation strategies.<sup>21</sup> The governance framework allows for the development of the Principles and Implementation Guidelines over time as new issues emerge and as the membership grows.<sup>22</sup>

Another important attribute of GNI is that it creates opportunities for building trust, forging relationships, and engaging in shared learning. Forging trust amongst such a diverse set of members takes time. Over the past two years, GNI has established itself as a trusted forum for frank, confidential discussion and the sharing of expertise. Through GNI, member companies regularly interact with experts, workshop issues, and engage in information sharing; they are able to learn from others' experience, expertise, and insights, and to draw on a large body of collective knowledge. Members regularly flag emerging challenges to free expression and privacy and help member companies gather information and formulate plans for action in the face of these threats.<sup>23</sup> GNI has also instituted more directed shared learning processes through which members and non-members alike can engage on ICT-related issues of policy and practice that implicate human rights.<sup>24</sup> In many instances, this shared learning has led to both individual and collaborative efforts to promote the adoption of laws, policies, and practices that protect, respect, and fulfill freedom of expression and privacy.<sup>25</sup>

Transparency and accountability are critically important components of any multi-stakeholder initiative. GNI member companies commit to implement the GNI Principles and accompanying Implementation Guidelines within their organizations. Member companies commit to regular independent assessments of their implementation of the Principles once they have been members for two years.<sup>26</sup> This time is designed to give companies the opportunity to build capacity and knowledge within their organizations and to put any structures in place that are necessary to meet the Principles and Guidelines.

GNI promotes transparency through its annual report to the public. In the two years since GNI was launched, member companies have been working to implement the Principles within their organizations.<sup>27</sup> Additional information on these activities will be outlined in GNI's inaugural annual report, which will be released in December 2010. The annual report will describe developing human rights challenges for the ICT sector, how member organizations have begun to implement the Principles, and GNI's vision for the

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<sup>21</sup> For a high-level description of how GNI member company Yahoo! has incorporated the Human Rights Impact Assessment requirement into its business practices, see e.g., *Human Rights Impact Assessments*, Yahoo! Business & Human Rights Program, <http://www.yhumanrightsblog.com/blog/our-initiatives/human-rights-impact-assessments> (Last visited Nov. 7, 2010). See also Global Network Initiative, *Anniversary Newsletter: Looking Back; Looking Forward* (Dec. 2009), at 2-3, [http://www.globalnetworkinitiative.org/cms/uploads/1/2009\\_GNI\\_Anniversary\\_Newsletter.pdf](http://www.globalnetworkinitiative.org/cms/uploads/1/2009_GNI_Anniversary_Newsletter.pdf); GNI, Implementation Guidelines.

<sup>22</sup> See *GNI Invites Broad Range of ICT Companies to Implementation Dialogue*, Global Network Initiative (Mar 23, 2010), [http://www.globalnetworkinitiative.org/newsandevents/Implementation\\_Dialogue\\_Invite.php](http://www.globalnetworkinitiative.org/newsandevents/Implementation_Dialogue_Invite.php) (GNI, Implementation Dialogue).

<sup>23</sup> For example, when news of the Chinese Government's directive requiring computer manufacturers to install the Green Dam/Youth Escort content control software on personal computers produced or sold in China emerged in June 2009, GNI swiftly responded. By actively monitoring developments and utilizing its multi-stakeholder framework to engage participants and external experts on the issue, GNI was able to respond to the significant challenges raised for companies in the technology sector. Members shared information, leveraging the expertise of companies, who were on the frontlines of the mandate; human rights organizations, who were able to provide on-the-ground perspective on emerging developments and opportunities for pushback; academic institutions, who led a technical analysis of the software; and many others. GNI published a collective statement on the issue and participants expressed views independently within their specific areas of expertise. See GNI, *Green Dam*.

<sup>24</sup> GNI members and non-members are currently engaged in shared learning work streams on the topics of "Intermediary Liability" and "Account Deactivation and Human Rights Issues." For public statements that have emerged from these work streams see e.g., GNI, *Intermediary Liability*; *GNI Convenes Stakeholders on Account Deactivation and Human Rights Issues*, Global Network Initiative (May 11, 2010), [http://www.globalnetworkinitiative.org/newsandevents/Account\\_Deactivation\\_call.php](http://www.globalnetworkinitiative.org/newsandevents/Account_Deactivation_call.php).

<sup>25</sup> See Morgan, *Intermediary Liability*.

<sup>26</sup> See *Governance, Accountability, and Learning Framework*, Global Network Initiative, <http://www.globalnetworkinitiative.org/governanceframework/index.php> (Last visited Nov. 7, 2010).

<sup>27</sup> See e.g., *Microsoft 2010 Citizenship Report*, Microsoft Corporation (Sep 30, 2010), at 52-53, [www.microsoft.com/citizenshipreport](http://www.microsoft.com/citizenshipreport); *Microsoft on the Topic: Internet Freedom*, [http://download.microsoft.com/download/C/6/9/C69D0366-C3EB-4376-B42B-7820EFE844BB/Microsoft\\_on\\_the\\_Topic\\_Freedom\\_of\\_Expression.doc](http://download.microsoft.com/download/C/6/9/C69D0366-C3EB-4376-B42B-7820EFE844BB/Microsoft_on_the_Topic_Freedom_of_Expression.doc) (Last visited Nov. 7, 2010); *Business & Human Rights at Yahoo!*, Yahoo! Business & Human Rights Program, <http://www.yhumanrightsblog.com/> (Last visited Nov. 7, 2010); Michael Samway, *A Wired – And Safe – Vietnam*, *Yodel Anecdotal* (March 12, 2009), <http://ycorpblog.com/2009/03/12/a-wired-and-safe-vietnam/>; David Drummond, *Greater Transparency Around Government Requests*, *The Official Google Blog* (Apr 20, 2010), <http://googleblog.blogspot.com/2010/04/greater-transparency-around-government.html>.

future.

B. Multi-stakeholder initiatives can accelerate standard development and international government bodies can promote adoption.

In a climate of rapidly changing technologies, standards for companies can only be established when norm-setting entities are able to act rapidly and with flexibility. With a diverse membership that includes academics, non-profits, socially responsible investors, and businesses with staff on the ground around the world, GNI is well equipped to respond rapidly to emerging threats to free speech and privacy and to develop accountability mechanisms.<sup>28</sup>

However, as noted in the GNI Principles, adoption of these norms requires engagement and uptake by international government bodies. These entities can also play a key role by encouraging companies to join and uphold the standards of initiatives like GNI. Most important, responsible company actions alone cannot guarantee that human rights are not violated. Governments themselves have the ultimate responsibility to ensure that human rights are respected, protected, promoted, and fulfilled.

C. Private sector support for multi-stakeholder initiatives is essential.

GNI is in the early stages of its work and we expect that overtime as our membership grows, new issues emerge and we continue to learn through our work, there may be a need to review our Principles and Implementation Guidelines. Our Governance Charter allows for this. We have established an "Implementation Dialogue"<sup>29</sup> to help us understand the issues of companies in the ICT sector who are not yet members.

The DOC, the US government, other governments, and international government bodies can play an important role in encouraging more companies to learn more about GNI and look to the value GNI offers to their business.

#### IV. Conclusion

Thank you for the opportunity to comment. GNI is committed to working with the DOC, ICT companies, and other stakeholders to advance respect and protection for freedom of expression and privacy around the world. We hope that GNI's first annual report, to be released in December 2010, will prove a useful supplement to these comments.

There are many ways in which the US Government can support the free flow of information online, among the most important is leading by example: creating and faithfully implementing laws, policies and practices which embody these values and protect these essential flows. Tensions have always arisen between the Internet and the pressing matters of the day from child safety to terrorism and national security. Navigating the complexity of these issues and finding the balance points, which allow innovation to flourish and rights to be protected is vital.

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<sup>28</sup> Establishing such standards is one of the goals of GNI: "Over time, the aim is for the Principles and Implementation Guidelines to take root as a global standard for the ICT sector and to be adopted by companies worldwide, employed by diverse stakeholders for advancing human rights, and recognized by governments and international bodies." See *Frequently Asked Questions*, Global Network Initiative, <http://www.globalnetworkinitiative.org/faq/index.php> (Last visited Nov. 7, 2010).

<sup>29</sup> GNI, Implementation Dialogue.