



# Senate Judiciary Subcommittee on Human Rights and the Law

“Global Internet Freedom and the Rule of Law, Part II”

March 2<sup>nd</sup> 2010

Business for Social Responsibility (BSR) welcomes the opportunity to discuss issues of technology and human rights with the Senate Judiciary Subcommittee on Human Rights and the Law. Information and Communications Technology (ICT) has been one of the most powerful drivers of change in our global society and will increasingly shape how we protect and advance human rights today. For this reason we are pleased by the increased attention being paid to the interrelationship between ICT and human rights. This is a topic of relevance in all countries around the world, as governments everywhere seek to understand how to maintain legal frameworks and law enforcement efforts that are consistent with the human rights of freedom of expression and privacy.

BSR is a non-profit organization working with its global network of more than 250 member companies to develop sustainable business through advice, research, and cross-sector collaboration. With six offices in Asia, Europe, and North America, we use our expertise in the environment, human rights, economic development, and governance and accountability to guide global companies toward creating a just and sustainable world. BSR works with a diverse range of ICT companies including internet, software, semiconductor, telecommunications, consumer electronics and equipment manufacturing companies on a wide range of corporate responsibility topics, including human rights. In various capacities we have been partnered with the participants in the Global Network Initiative (GNI) on internet freedom issues since late 2005.

## Introduction

This written submission is based upon our broad experience working with companies on human rights issues across a range of industries. The key question for the ICT industry as a whole and its stakeholders is this: “how can we design future ICT networks to minimize risks to human rights at every stage of the ICT value chain, and maximize the human rights potential of new technology?” We emphasize three main points for the Senate Judiciary Committee on Human Rights and the Law to keep in mind during its deliberations:

1. The relationship between ICT and human rights is complex and requires the active engagement of companies across the whole ICT industry, not just internet companies.
2. Integrating human rights considerations into decisions about market entry and market exit will lead to different conclusions in different circumstances.
3. There is a need for the whole ICT industry and its stakeholders to integrate human rights principles into their decision making, with processes tailored to the specific needs of the ICT industry.

### **1. The relationship between ICT and human rights is complex and requires the active engagement of companies across the whole ICT industry, not just internet companies.**

BSR has promoted integration of human rights principles into business decisions by advising companies in multiple industry sectors, and by working on collaborative multi-stakeholder solutions since 1995. Concerted efforts to apply human rights principles in the ICT sector are a more recent phenomenon, and in our view, present various unique features:

- » Compared to other industries where human rights impacts are often location specific, the end user is more significant: ICT products and services bring unique human rights risks and opportunities for billions of end users across multiple jurisdictions.
- » Technology often moves faster than the law: the regulatory process tends to move more slowly than ICT product and service development.
- » ICT functionality is introduced rapidly: new products and services bring new risks and opportunities all the time, often with unpredictable consequences.
- » Technology is complex to understand: there is only a very small community of stakeholders who fully understand the human rights implications of ICT.
- » For a wide range of reasons, governments often take great interest in the interrelation of human rights and ICT.

These factors point to the need for in-depth, constructive and collaborative efforts that bring together companies, governments and stakeholders to understand the unfolding relationship between human rights and ICT, especially as technology, data and online communications become increasingly pervasive. It is particularly important that these efforts delve deeply into the human rights implications of specific ICT products, services and functionalities and remain open to the idea that ICT brings both risks and opportunities.

For example, the common assumption is often that internet and telecommunications companies (such as Yahoo!, Google and Microsoft that participate in the GNI) are in the frontline on human rights in the ICT industry. However, it is our view that human rights risks and opportunities can exist at every stage in the ICT value chain – equipment manufacturers, consumer electronics companies and software firms, for example - and it is only by considering the ICT industry as one whole ecosystem that human rights can be most effectively protected.

For instance, telecommunications equipment and handset manufacturers design the product functionalities that enable law enforcement, including intercept, surveillance and location identification, while software companies build and maintain vast IT infrastructures for the storage, analysis, and processing of data which can be used for good or for ill.

These factors also indicate the need for significant government-to-government dialogue on these issues. In particular, governments around the world need to reach a shared understanding of how to maintain legal frameworks and law enforcement efforts that are consistent with the human rights of freedom of expression and privacy, and put in place approaches that enable ICT companies to more easily operate around the world in a manner consistent with human rights.

## **2. Integrating human rights considerations into decisions about market entry and market exit will lead to different conclusions in different circumstances.**

Google's recent announcement to reconsider its business in China has won considerable praise, but it will be some time before we know whether the company's approach has a positive or negative impact on freedom of expression. However, the company's decision to cite human rights as a reason for potentially leaving China raises much broader ethical questions about the role of human rights in corporate decisions to enter or exit a market.

Is it always right to leave a country on human rights grounds? It is our view that while leaving can sometimes be the right approach, there will also be cases where companies should stay and engage, seeking to make a positive impact on human rights while they are there.

When it comes to determining whether a company's decision to enter or exit a market is good or bad for human rights, there's no one-size-fits-all rule, and the merits of the decision will vary considerably with the context—including the types of products and services the company has on offer, the relationships the company has in the country concerned, and the ability of the company to influence human rights in a positive direction.

As such, “are you in or are you out” may be the wrong question. No company automatically advances human rights by leaving a country, and, likewise, no company automatically improves the situation by staying. In all but the worst cases, it’s *how* business participates in challenging markets that is the ultimate test. Does the company have a clear understanding of how its products, services, and market presence will impact human rights? Has the company identified its most significant human rights risks, and does it understand how to mitigate them? Is it working with sympathetic government partners to advance human rights?

It is also perfectly reasonable to expect that two companies may look at the same set of facts and reach different conclusions about which approach will be most effective in advancing human rights: Just as one company may decide that leaving is the best route to advance human rights, so another may decide that staying and engaging is the more impactful route. Maybe we need both.

Whatever one’s opinion about market entry and exit, the fact that an increasing number of companies are weighing these decisions demonstrates that human rights considerations are reaching senior leaders in business like never before. We believe it is right to applaud companies that seek to integrate human rights into their decision-making, to criticize those that don’t—and to be open to the fact that this could mean praising both companies that seek to make an impact by staying in difficult markets as well as those that decide to leave.

### **3. There is a need for the whole ICT industry and its stakeholders to integrate human rights principles into their decision making, with processes tailored to the specific needs of the ICT industry.**

In this written submission we have communicated two main messages, that the interaction between ICT and human rights is complex, and integration of human rights considerations market entry and market exit decisions may result in different decisions for different companies in different circumstances.

These two beliefs lead us to a third conclusion: that there is a need understand further how to integrate human rights principles into business decision making in a manner that is tailored to the specific questions relevant to the ICT industry.

A number of excellent human rights due diligence tools have been created in recent years, such as those maintained by the Danish Institute of Human Rights and the International Business Leaders Forum, as well as by BSR. However, it is our opinion that the next step is for these and other similar tools to be thoroughly tested, refined and built upon by ICT companies from across the sector by using them in real life situations. This may include, for example, questions about product design, development and functionality, market entry and exit, and a determination of where selling to particular customers create significant risks of human rights violations.

We also believe that in the coming years the ICT industry as a whole will need to understand how the forthcoming business and human rights framework resulting from the work of John Ruggie, the UN Special Representative of the United Nations Secretary-General on business & human rights, can be most effectively applied to the sector.

## **Conclusion**

We live in an age where ICT, data and information are increasingly pervasive, and this trend will only accelerate. This transformation brings with it new risks and opportunities that will require much greater literacy on human rights from those working in business and much greater literacy in ICT by those working outside of the industry. That will only happen when multiple parties come together in the pursuit of shared learning and collaboration for shared goals. We must also remember that the difficult questions being considered by the Committee are by no means unique to any single country. They are relevant in multiple jurisdictions around the world. We hope that the Committee is successful in stimulating the global, industry wide and multi-stakeholder dialogue that is required on these important topics.