

# The Internet, Human Rights, and the Private Sector

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## *An Interview with Michael A. Samway*

**GJIA:** You stated in a November 2008 C-SPAN interview that in addition to heading Yahoo!’s international legal team, your “passion at Yahoo!” was leading the company’s human rights program. What do you feel was the greatest success story in championing human rights at Yahoo! during your tenure?

**Samway:** We’re in the early chapters of the business and human rights story. This is true among Information and Communications Technology (ICT) companies and in the business world more broadly, so I am hesitant to declare any successes. Yahoo! was an industry pioneer in expanding operations to international markets and learned some tough lessons along the way. The challenges and opportunities were not just legal, policy, and business ones, but human ones, and we recognized that we needed to learn from our experiences and continue to build a better company—one where responsible decision-making around human rights continued to be a core part of the business. This helped us meet our global obligations to our users, and we believed it was also essential to our financial success.

In spring 2008, after lots of introspection, engagement

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with internal and external stakeholders, and a renewed commitment to doing the right thing, we launched the Yahoo! Business & Human Rights Program, an initiative built on a number of pillars: executive commitment; a dedicated and cross-functional team; high-level principles and operating guidelines; a human rights inventory and clearinghouse; human rights impact assessments; stakeholder engagement; and an accountability framework. The program is in incredibly capable hands today, and Yahoo! must maintain its commitment to this initiative to protect its users' rights to free expression and privacy.

Companies like Yahoo!, Google, Microsoft, Facebook, LinkedIn, Twitter, and others have to anticipate the most likely scenarios where local law or practice may conflict with international norms, and where companies may be required by host governments to take steps that interfere with citizens' rights to free expression and privacy. These risks merit thoughtful and sustainable responses. If more companies begin to build more integrated and durable systems for anticipating and addressing human rights issues, then we would begin to see more tangible gains for ICT users and be able to declare some small successes for protecting human rights.

**GJIA:** In your experience working for a decade on international legal issues at Yahoo!, which nations were the most challenging in terms of protecting your users' rights to freedom of expression or privacy? What sort of vetting process does Yahoo! undertake before partnering with or acquiring a company in a

challenging market?

**Samway:** The principal challenge for ICT companies arises where the law, or the day-to-day practice of governments, conflicts with internationally recognized human rights enshrined in the Universal Declaration of Human Rights and international accords such as the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights. Companies across sectors encounter this most often in countries where the rule of law is weak: places where the government itself and other organs of society are not always accountable under the law; the laws are not just; rules are not enforced fairly; or the judiciary is not fully independent.

Once companies establish local operations, they are required to follow the law in those places, including laws that regulate online speech and government access to digital records. Failure to follow the laws of a host country might jeopardize the freedom or even the safety of employees, potentially substituting one human rights challenge for another. Criminal penalties, including imprisonment, are real risks for employees who disobey local laws. Companies should make decisions on opening a business in an international market only after conducting thorough due diligence on the implications for both users and local employees.

Human rights impact assessments are particularly useful when entering new markets, launching new products, acquiring companies, or establishing partnerships. The idea is to set out the international normative framework on

human rights, explore the human rights landscape of the prospective market, anticipate the areas where the company's products or services may intersect human rights issues, and then design responsible approaches to mitigate the risks. Ultimately, a human rights risk assessment will inform and guide evolving corporate strategies to protect customers' rights to freedom of expression and privacy.

**GJIA:** Google famously abandoned its China search service to avoid complying with Chinese censorship laws. Conversely, other companies such as

involved in the ICT sector: We believe in the benefits of globalization and in doing right by our global customers, and we believe that digital products and services promote access, openness, learning, and sharing globally. We are inspired by the transformational impact the Internet might have on people's lives around the world. The ICT industry has been less focused, however, on the fact that governments not only use the same technology to limit information or even manipulate it, but are also growing more sophisticated in their pursuit of censorship, propaganda, and surveillance.

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Microsoft decided to remain in China and comply with local laws while continuing to engage in dialogue with the government. If a primary goal of ICT companies is to allow people to access information, including in repressive countries, do you find one approach more ethically sound or more effective than another in the long term?

**Samway:** The question of whether to engage in a market is a threshold decision a company must make based on a number of factors, including the home and host country's laws, international human rights norms, the ability of the company to protect and even promote its users' rights, and the current state of affairs in a particular industry and country. Here is the challenge for those

In authoritarian regimes, there is a technology tools arms race between citizens seeking political opening and authorities trying to preserve a closed political system. Since corporations manufacture the tools in this arms race, companies are often agents for both citizens and the government: sometimes willingly, sometimes unwillingly, and sometimes unwittingly. The Edward Snowden revelations about the National Security Agency (NSA) and U.S. intelligence operations have emphasized this point in regards to American companies, but we should not lose sight of what is happening in other parts of the world.

Governments cloak the motivations for their actions behind national campaigns to restrict online pornography,

or to intercept electronic messages for national security purposes. These, and other crime-fighting functions, are the rightful responsibilities of all governments when content limitation or data demands and surveillance are just and in countries with strong rule of law. The challenge for global ICT companies arises when those pursuits mask politically driven censorship and surveillance.

The global media and public are rightly focused on the NSA, but surveillance is happening in other countries with weak rule of law, and the surveillance targets are often political dissidents and human rights activists. We tell ourselves that this is expected, given the nature of authoritarian governments, but we cannot give those regimes a free pass on surveillance or censorship issues and lose focus on the challenges citizens—and companies—face in those countries.

**GJIA:** The Global Online Freedom Act (GOFA) seeks “to prevent United States businesses from cooperating with repressive governments in transforming the Internet into a tool of censorship and surveillance, to fulfill the responsibility of the United States Government to promote freedom of expression on the Internet,” and “to restore public confidence in the integrity of United States businesses.” Do you see the proposed legislation as an effective tool to shape the behavior of corporations and their business practices in repressive countries?

**Samway:** Legislation can be an effective tool in shaping corporate decision-making; that is true in any industry.

The threat alone of legislation may spur company action. However, any effective ICT regulation, whether on net neutrality or online privacy, must be designed to keep pace with the rapidly evolving technology of the Internet and must be in the best interests of the users of the services. GOFA has undergone many revisions since it was introduced in 2006 by Representative Chris Smith (R-NJ).

The earliest drafts, if passed as legislation, might have put companies in the untenable position of having to choose to violate local laws or violate U.S. law. The net result would have been no engagement at all or even withdrawal by companies from many markets with which the U.S. government has diplomatic relations and where it encourages American companies to trade and invest. My sense from meetings on Capitol Hill over the years is that this was not the drafters’ intent. Congressman Smith’s senior staff worked diligently—meeting with representatives from across the spectrum of civil society, academics, companies, technologists, and other Congressional staffers—and revised the bill significantly over the past few years. The result today is proposed legislation that makes a good bit of sense.

One important addition to GOFA is a safe harbor provision that exempts companies from certain requirements of the proposed law if the company is a participant in the Global Network Initiative (GNI). This provision recognizes the meaningful and significant contributions this multi-stakeholder initiative is making in advancing company decision-making on freedom of expression and privacy, and it gives leg-

islative incentive for other companies to join GNI.

**GJIA:** What is the responsibility of American ICT companies in confronting information requests from the U.S. government as a result of the PATRIOT Act, PRISM, or other programs? Are there ways that the ICT industry can push back on government information gathering programs, either individually or collectively?

**Samway:** If companies disagree with the U.S. government's approach to balancing national security and civil liberties, corporate civil disobedience is not the answer. Companies are required to follow the law of the land. Yet, it is not enough for companies to offer a simple compliance approach to government demands for user data and overbroad secrecy rules. What is required from companies is leadership. Companies must acknowledge the rightful respon-

not been successful or even public. One recently declassified case shows that in 2008, Yahoo! unsuccessfully challenged the constitutionality of certain national security law directives requiring the disclosure of user data. Some companies have more recently filed suit in the Foreign Intelligence Surveillance Court, demanding the right to disclose the number of government requests for user data.

In October 2013, AOL, Apple, Facebook, Google, Microsoft, and Yahoo! wrote an open letter to the U.S. Senate Judiciary Committee calling for measures to allow more company transparency with the public regarding government demands for data involving national security matters. In December 2013, AOL, Facebook, Google, LinkedIn, Microsoft, Twitter, and Yahoo! publicly called on governments around the world to take up surveillance law reform. Many ICT companies are also enhancing encryption in all aspects of

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sibility of the government to protect national security while also expressing their willingness to push back on government overreach or when statutes themselves may prove unconstitutional. Users' trust in the companies hangs in the balance.

Some companies have been pushing back on the U.S. government since well before the recent NSA revelations, but those efforts as a general matter have

their data flows, with some companies expressing outrage publicly at revelations that the NSA accessed user data without company authorization.

**GJIA:** Yahoo! has been a pioneer in fusing business decision-making and concern for human rights issues. Yet, as you noted in your testimony before the Senate Judiciary Subcommittee on Human Rights and the Law, "it is so

difficult for just one company to create systemic change.” How can greater action in this area be incentivized to grow a broader collection of ICT companies? What role, if any, should the government play?

**Samway:** In challenging markets, even the Internet’s most powerful companies—those with the greatest reach, number of users, or brand recognition—can have only so much influence on government policy or practice. However, there is strength in numbers, and collective action by companies partnered with other stakeholders in GNI has meant more leverage, more informed corporate decisions, and more effective results for users. ICT companies must maintain strong relationships with industry peers, human rights groups, academics, lawmakers, and diplomats, among other domestic and international actors and institutions.

An essential role for government, as a general matter around the globe, is to make a country’s laws and practices consistent with international human rights norms. This responsibility, however, is often the root of the problem since many governments do not uphold their duty to protect the free expression and privacy rights of their own citizens. In the United States, the government is facing significant scrutiny regarding the NSA revelations, but that criticism and the public debate about legal reform is only possible in a place with strong rule of law. Sadly, that is not the case in the most challenging markets in which ICT companies operate. In the United States, which is home to today’s largest Internet companies, Congress can also

influence corporate behavior through legislation, and the executive branch can promote the cause of Internet freedom through international trade and diplomacy, including through making Internet freedom a U.S. foreign policy priority.

**GJIA:** To what extent do social movements and civil society inform the business strategy of the corporate sector, specifically the ICT industry, in incorporating socially responsible agendas?

**Samway:** Until the 1990s or so, managing a business within the confines of the law and otherwise remaining active citizens through charitable events, sponsorships, community involvement, and contributions all meant good corporate citizenship. The most progressive companies, often in response to social movements, tried to address social and environmental challenges through sustainable business practices and recognition of international normative standards in their respective industries. Many companies began to formalize commitments to community engagement and sustainable business practices by forming internal corporate social responsibility teams, commonly referred to as CSR programs.

Unfortunately, the traditional CSR approach, now widely adopted across business, has not kept pace with the intersection points of business and human rights in the technology field. Social movements drive technology and technology drives social movements; in either case, the dramatic changes in the role global business plays in the distribution of news and information, as well as in communication, make the touch

points with human rights issues more common, more complicated, and more closely related to the products and services offered directly by ICT businesses. The change brought about by globalization, and the Internet in particular, demands a new model for ensuring that companies do not grow complicit in government activities inconsistent with citizens' internationally recognized rights to freedom of expression and privacy.

**GJIA:** What are potential market advantages that the ICT industry can gain from integrating human rights standards into their business models?

**Samway:** If you could peer inside any ICT company—whether Facebook, Twitter, Dropbox, Snapchat, WhatsApp, or others—you would see user trust at the center. These brands are as strong or weak as their practices and their reputations: trust is what makes the wheels go 'round, whether for their employees, audience, subscribers, or advertisers. These companies know competitors are a click away. Responsible decision-making on freedom of expression and privacy, especially in a company with global reach, is essential to maintaining user trust. In addition to the moral incentives and the growing consensus on global obligations—in particular, as a result of the UN Guiding Principles on Business and Human Rights—companies are recognizing that they can gain a competitive advantage by being thoughtful and committed in their beliefs and actions in this field.

Building internal systems, similar to what Yahoo! has tried to do through its Business & Human Rights Pro-

gram, translates to more sustainable business operations, especially in challenging international markets. Young companies should look to the lessons that companies like Yahoo!, Google, and Microsoft have learned outside the United States. Wise decision-making on human rights in the ICT sector will also help companies limit financial exposure associated with legal fees and settlements, crisis consultants, negative publicity, Congressional hearings and regulation, decreased employee morale, share price vulnerability, and other tangible and intangible costs of becoming embroiled in controversy around human rights issues.

**GJIA:** The GNI, of which Yahoo! is a founding member, emphasizes the responsibility that ICT companies have to not only protect user freedom of expression and privacy, but also work cooperatively with other stakeholders to advance these rights globally. The Congressional Research Service described the GNI as adhering to “a set of guidelines that promotes awareness, due diligence, and transparency the activities of ICT companies and their impacts on human rights, particularly in countries where governments frequently violate the rights of Internet users to freedom of expression and privacy.” Beyond simply raising awareness of critical Internet freedom issues, which types of concrete laws, policies, and practices has the organization supported or is currently working toward achieving in the future?

**Samway:** The first important step in the formation of GNI was getting the parties to sit down at the table and

begin discussions. There was a high level of distrust and misunderstanding, not only between companies and civil society, but also among the companies themselves. This is one of the most competitive and oftentimes secretive industries, and though companies are often in talks about one type of deal or another, the idea of sharing lessons and approaches to international markets was not a natural extension of our previous interactions.

Coordinated discussions began in earnest in 2006, and in 2008 we launched the Global Network Initiative. Today's company members include Evoca, Facebook, Google, Microsoft, Procera, Websense, and Yahoo!, with LinkedIn recently joining in an observer role. The NGOs, socially responsible investors, academics, and individual experts in GNI are among the most experienced and knowledgeable in the world. What has GNI accomplished beyond raising awareness about global free expression and privacy issues? From the intensive engagement and trust-building that has occurred since 2006, there is a willingness among all parties to share, in the safe space provided by GNI, good practices and to develop creative and practical approaches to complex technology, business, and human rights puzzles.

GNI has also led directly to tangible changes and improvements in company policies and practices on freedom of expression and privacy issues for users around the world. This includes the use of human rights impact assessments and clear guidelines on content

removal and information disclosure to law enforcement authorities. These changes also include enhanced company transparency with users. GNI has helped promote, and sometimes craft, collective advocacy efforts on important issues ranging from advice on the Privacy and Civil Liberties Oversight Board in the United States to calls for rethinking licensing requirements for online news providers in Singapore.

Public credibility in companies' commitments to respect human rights will also come from independent assessments, and GNI's accountability framework is built on third-party review of each member company's process and practice. This rigorous review is compatible with a highly competitive industry and assists companies in strengthening their internal systems designed to protect human rights. A thoughtful new project called Ranking Digital Rights will complement GNI by surveying and then ranking GNI participants and, importantly, non-participants on their internal capacity and policies on freedom of expression and privacy.

GNI has quietly forged ahead as a leading multi-stakeholder initiative, increasing awareness of the issues at stake, and promoting meaningful improvements to companies' practices on human rights issues globally. Other ICT companies, both large and small, remain outside GNI at their own—and their users'—peril.

*Interviewed by Warren Ryan, December 2013*