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# BlackBerry's Jam: Research In Motion's Struggle to Protect Smartphone Users' Internet Privacy Highlights Need for Shared Industry Standards

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# BlackBerry's Jam: Research In Motion's Struggle to Protect Smartphone Users' Internet Privacy Highlights Need for Shared Industry Standards

Darren R. Sweetwood\*

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## I. INTRODUCTION

In 2010, Research In Motion, Ltd. (“RIM”), the Canadian developer of the popular BlackBerry smartphone, clashed with India and the United Arab Emirates (“U.A.E.”) over concerns for BlackBerry users’ internet privacy.<sup>1</sup> The two countries threatened to completely ban all BlackBerry services unless RIM granted their intelligence agencies access to encrypted BlackBerry data transmissions.<sup>2</sup> Rooted in concerns for national security,<sup>3</sup> India and the United Arab Emirates demands raise age-old concerns about privacy in the context of a powerful new technology: smartphones.<sup>4</sup>

Across the globe, smartphones are rapidly replacing the original single-function cell phone.<sup>5</sup> Much of the appeal of smartphones comes from their ability to access the Internet, allowing smartphones to send and receive a wide variety of information, much like a computer.<sup>6</sup> Smartphone users can send text, picture, and video messages; access and update their Facebook, MySpace, and Twitter accounts;<sup>7</sup> and transfer money, check account balances, and pay bills.<sup>8</sup> The smartphone’s impact on society is not that it allows people to do something they could never have done before; a smartphone only emulates what a computer with Internet access has been able to do for years. What makes the smartphone so revolutionary is that it substantially expands the geographical area in which users can perform Internet tasks.<sup>9</sup> Tasks only achievable within range of a wireless

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1. Miguel Helft & Vikas Bajaj, *BlackBerry Security Stance Sows Anxiety*, N.Y. TIMES (Aug. 8, 2010), <http://www.nytimes.com/2010/08/09/technology/09rim.html>.

2. *Id.*

3. UAE, *BlackBerry Fight Highlights Global Internet Freedom Risks*, CENTER FOR DEMOCRACY & TECH. (Aug. 4, 2010), <http://www.cdt.org/blogs/cdt/uae-blackberry-fight-highlights-global-internet-freedom-risks> [hereinafter *Internet Freedom Risks*].

4. *Lookout Mobile Security Launches Premium Android Security Product*, UBM TECHWEB (Nov. 4, 2010, 4:28 PM), [http://www.darkreading.com/insidethreat/security/privacy/showArticle.jhtml?articleID=228200243&cid=RSSfeed\\_DR\\_News](http://www.darkreading.com/insidethreat/security/privacy/showArticle.jhtml?articleID=228200243&cid=RSSfeed_DR_News).

5. Richard Martin, *Cell Phones Face Extinction as Smartphones Take Over*, INFORMATIONWEEK (Apr. 1, 2008, 6:00 AM), <http://www.informationweek.com/news/207000858>; see Kirk Parsons, *Analyst Angle: The Smart Phone Impact on Consumer Mobile Usage Habits*, RCR WIRELESS NEWS (July 14, 2010), <http://www.rcrwireless.com/ARTICLE/20100714/OPINION/100719994/analyst-angle-the-smart-phone-impact-on-consumer-mobile-usage-habits>. From 2009 to 2010, global smartphone sales increased ninety-six percent, making one out of every five cell phones sold worldwide in the third quarter of 2010 a smartphone. *Gartner Says Worldwide Mobile Phone Sales Grew 35% in Third Quarter 2010; Smartphone Sales Increased 96 Percent*, GARTNER (Nov. 10, 2010), <http://www.gartner.com/it/page.jsp?id=1466313>.

6. Parsons, *supra* note 5.

7. *Id.*

8. *Chase Mobile Banking*, CHASE, [https://www.chase.com/ccp/index.jsp?pg\\_name=ccpmapp/shared/assets/page/Chase\\_Mobile\\_Banking](https://www.chase.com/ccp/index.jsp?pg_name=ccpmapp/shared/assets/page/Chase_Mobile_Banking) (last visited Nov. 7, 2010).

9. See Steve Litchfield, *Defining the Smartphone—Part 1*, ALL ABOUT SYMBIAN (July 16, 2010, 12:05 PM), [http://www.allaboutsymbian.com/features/item/Defining\\_the\\_Smartphone.php](http://www.allaboutsymbian.com/features/item/Defining_the_Smartphone.php).

Internet connection are now possible as long as there is cell phone service.<sup>10</sup> Smartphone users wield the power of the Internet in their pocket twenty-four hours a day, seven days a week.

RIM's conflicts with India and the United Arab Emirates are unique in that they involve smartphones,<sup>11</sup> but they are only the most recent example of multinational corporations confronting issues of Internet privacy.<sup>12</sup> Internet technology giants Google, Inc., Microsoft, Corp., and Yahoo!, Inc. have been accused by the media and various free speech advocacy groups of privacy and freedom of speech violations as a result of agreements made with the Chinese government that allowed these companies to offer their services in China.<sup>13</sup> Most notably, in 2005, Yahoo! responded to demands by the Chinese government to turn over personal information from Chinese journalist Shi Tao's Yahoo! e-mail account.<sup>14</sup> Based on the information, Tao was subsequently arrested and sentenced to ten years in prison for sending Communist party messages to foreign-based websites.<sup>15</sup>

Highly publicized events such as Shi Tao's incarceration provided palpable gravitas to the increasingly popular corporate social responsibility doctrine, a concept that corporations have a moral obligation to the societies they interact with.<sup>16</sup> This concept laid the foundation for the establishment of the Global Network Initiative ("GNI").<sup>17</sup> Created in 2008 by American companies Google, Microsoft, and Yahoo!,<sup>18</sup> the GNI organized a coalition of information and communication technology ("ICT") companies that aimed to protect consumers' privacy and freedom of expression by creating a set of standards that multinational corporations could apply to their interactions with different countries and their respective privacy laws.<sup>19</sup>

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10. Thomas J. Fitzgerald, *Thrifty Wi-Fi That Travels with You*, N.Y. TIMES, June 3, 2010, at B9, available at <http://www.nytimes.com/2010/06/03/technology/personaltech/03basics.html>.

11. Helft & Bajaj, *supra* note 1; *Internet Freedom Risks*, *supra* note 3.

12. See Yahoo "Helped Jail China Writer", BBC (Sept. 7, 2005, 8:18 AM), <http://news.bbc.co.uk/2/hi/4221538.stm>.

13. Michael Masterson, *Altruistic or Not, Microsoft, Google, Yahoo Pledge Human Rights Efforts*, CRN (Oct. 28, 2008), <http://www.crn.com/blogs-op-ed/the-channel-wire/211601097/altruistic-or-not-microsoft-google-yahoo-pledge-human-rights-efforts.htm>; Ryan Singel, *Google Fights China; Will Yahoo and Microsoft Follow?*, WIRED (Jan. 14, 2010, 10:07 AM), <http://www.wired.com/epicenter/2010/01/yahoo-microsoft-china/>.

14. Yahoo "Helped Jail China Writer", *supra* note 12.

15. *Id.*

16. Andrew Keay, *Stakeholder Theory in Corporate Law: Has It Got What It Takes?*, 9 RICH. J. GLOBAL L. & BUS. 249, 268 (2010).

17. *Internet Freedom of Expression*, AS YOU SOW, <http://www.asyousow.org/csr/expression.shtml> (last visited Sept. 9, 2011).

18. *Anniversary Newsletter: Looking Back; Looking Forward*, GLOBAL NETWORK INITIATIVE, [http://www.globalnetworkinitiative.org/cms/uploads/1/2009\\_GNI\\_Anniversary\\_Newsletter.pdf](http://www.globalnetworkinitiative.org/cms/uploads/1/2009_GNI_Anniversary_Newsletter.pdf) (last visited Nov. 7, 2010).

19. *Principles on Freedom of Expression and Privacy*, GLOBAL NETWORK INITIATIVE 1, [http://www.globalnetworkinitiative.org/cms/uploads/1/GNI\\_-\\_Principles\\_1\\_.pdf](http://www.globalnetworkinitiative.org/cms/uploads/1/GNI_-_Principles_1_.pdf) (last visited Feb. 19, 2011) [hereinafter *Principles*].

This Comment uses the smartphone to represent the perpetually-evolving, internet-capable “latest technology” and RIM’s recent digital privacy battle as an illustration of the legal and ethical decisions multinational ICT companies face in an increasingly Internet-dependent world. As the Internet grows in both popularity and functionality,<sup>20</sup> so, too, does the role and responsibility of ICT companies. The corporate decisions made today by companies like RIM, which serve as the gatekeepers of the powerful mobile Internet, will greatly affect the way in which future ICT companies view privacy as a fundamental human right that they must protect.<sup>21</sup> An urgent sense of responsibility should be shared by all ICT companies and implemented as policy across the entire industry.<sup>22</sup> Instead of individual companies addressing privacy issues with separate governments on a case-by-case basis, ICT companies can more effectively achieve adequate privacy protections through joint action with competitors to establish and adhere to a shared standard.<sup>23</sup> With the establishment of coalitions like the GNI, ICT and smartphone companies alike can unite to create workable standards to address the speed, complexity, and privacy dilemmas that face the ICT sector.<sup>24</sup> Ultimately, RIM’s participation in the GNI will contribute to establishing workable, long-term global privacy standards for all ICT companies by setting a precedent of collaboration in the smartphone industry.<sup>25</sup>

In Part II, this Comment discusses the ascent of the smartphone in modern-day society, and the conflicts RIM has encountered in India and the United Arab Emirates, to demonstrate the issues that arise from increased smartphone use. Part III explores the legal framework, in light of recent decisions on corporate social responsibility, under which a Canadian company like RIM must operate when taking steps to protect customers’ privacy. Part IV rationalizes a hypothetical decision by RIM to further protect customer privacy by establishing privacy as a fundamental human right crucial to the development and preservation of Internet productivity. Part V stresses the importance of ICT companies’ collaboration in the GNI in order to establish long-term guarantees of Internet privacy, and finally advocates for RIM’s participation in the GNI.

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20. The number of Internet users has doubled in the past five years to two billion, and now represents a third of the world population. Jonathan Lynn, *Internet Users to Exceed 2 Billion This Year*, REUTERS (Oct. 19, 2010, 9:21 AM), <http://www.reuters.com/article/idUSTRE69I24720101019>.

21. See Leslie Harris, *The BlackBerry “Butterfly Effect”*, ABC NEWS (Aug. 24, 2010), <http://abcnews.go.com/Technology/blackberry-butterfly-effect/story?id=11461691&page=1>.

22. *Id.*

23. *Id.*

24. *Who We Are. What We Do. Why It Matters.*, GLOBAL NETWORK INITIATIVE, [http://www.globalnetworkinitiative.org/cms/uploads/1/GNI\\_WhoWhatWhere\\_1.pdf](http://www.globalnetworkinitiative.org/cms/uploads/1/GNI_WhoWhatWhere_1.pdf) (last visited Jan. 6, 2011) [hereinafter *Who We Are*].

25. Harris, *supra* note 21.

## II. BACKGROUND

### A. Research In Motion and the Evolution of the Smartphone

RIM is a Canadian corporation specializing in the mobile communications market.<sup>26</sup> Since its incorporation in 1984, RIM has designed, manufactured, and marketed wireless hardware devices and software programs for customers all over the world.<sup>27</sup> While RIM may not be a recognizable household name, its flagship cell phone product line, BlackBerry, certainly is.<sup>28</sup> Although BlackBerry made its debut in 1999 as a two-way pager,<sup>29</sup> RIM became most known for its current line of smartphones.<sup>30</sup> Smartphones combine the basic calling and text messaging functions of a cell phone with features such as internet access, a calendar, a multimedia player, and a camera.<sup>31</sup> For example, the new BlackBerry Torch offers a sophisticated web browser for fast Internet browsing, a five-megapixel camera, eight gigabytes of internal memory to store a music or video library, and applications to access social network sites like Facebook.<sup>32</sup> RIM smartphones have become a global commodity, available to customers in 196 countries.<sup>33</sup>

Since being introduced in 1993,<sup>34</sup> smartphones have thrived in the cell phone market, recording sizeable increases in sales and market share.<sup>35</sup> In 2009, cell phone companies sold 174 million smartphones, which represented 15% of all cell phone sales.<sup>36</sup> These numbers exceeded 2008's 151 million units sold and 12.7% market share.<sup>37</sup> Information technology analysts predict that rising demand for smartphones will drive sales to new highs in the future.<sup>38</sup>

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26. *Profile: Research In Motion Ltd (RIM.TO)*, REUTERS, <http://www.reuters.com/finance/stocks/companyProfile?symbol=RIM.TO> (last visited Oct. 17, 2010).

27. *Id.*

28. *Company*, RIM, <http://www.rim.com/company/index.shtml> (last visited Oct. 17, 2010).

29. Joe Pawlikowski, *The History of the BlackBerry*, BBGEEKS (Apr. 15, 2008), <http://www.bbgeeks.com/blackberry-guides/the-history-of-the-blackberry-88296/>.

30. *See Company*, *supra* note 28.

31. *Definition of: Smartphone*, PC MAG., [http://www.pcmag.com/encyclopedia\\_term/0,2542,t=Smart+phone&i=51537,00.asp#fbid=vi4GGtdsILJ](http://www.pcmag.com/encyclopedia_term/0,2542,t=Smart+phone&i=51537,00.asp#fbid=vi4GGtdsILJ) (last visited Oct. 17, 2010); Keith Evans, *What Is a PDA or Smartphone?*, SALON, <http://techtips.salon.com/pda-smartphone-4955.html> (last visited Nov. 16, 2011).

32. *BlackBerry Torch 9800/9810*, BLACKBERRY, <http://na.blackberry.com/eng/devices/blackberrytorch/> (last visited Oct. 17, 2010).

33. *Networks*, BLACKBERRY, [http://us.blackberry.com/ataglance/networks/#tab\\_world](http://us.blackberry.com/ataglance/networks/#tab_world) (last visited Feb. 19, 2011).

34. Dan Tynan, *The 50 Greatest Gadgets of the Past 50 Years*, PC WORLD (Dec. 24, 2005, 1:00 AM), [http://www.pcworld.com/article/123950/the\\_50\\_greatest\\_gadgets\\_of\\_the\\_past\\_50\\_years.html](http://www.pcworld.com/article/123950/the_50_greatest_gadgets_of_the_past_50_years.html).

35. Matt Hamblen, *Smartphone Sales Score Record*, PC WORLD (Feb. 6, 2010, 1:27 PM), [http://www.pcworld.com/article/188610/smartphone\\_sales\\_score\\_record.html](http://www.pcworld.com/article/188610/smartphone_sales_score_record.html).

36. *Id.*

37. *Id.*

38. *See id.*

As smartphone sales steadily increase,<sup>39</sup> so, too, do the number of smartphone producers.<sup>40</sup> Blackberry now competes with companies such as Nokia, Corp., Apple, Inc., Google, HTC, Corp., Palm, and Samsung.<sup>41</sup> Despite its competition, BlackBerry remains a significant player in the smartphone market.<sup>42</sup> In 2009, BlackBerry sold the second highest number of smartphone units for any company, trailing only Nokia, and represented 20% of all smartphone sales.<sup>43</sup> BlackBerry has continued to thrive in the first half of 2010, selling its 100 millionth device and increasing its output 40% from a year ago.<sup>44</sup>

As BlackBerry manufacturer RIM jockeys for position in the smartphone market, evidence suggests it is increasingly dependent on overseas sales.<sup>45</sup> While overall BlackBerry numbers have increased, market share in the United States has declined.<sup>46</sup> RIM counteracted for this loss by capturing market share in the Latin American, Indian, European, and Asian markets.<sup>47</sup> The increase in international demand and prospects of continued growth suggests that RIM's future lies with its success in foreign countries.<sup>48</sup> Therefore, conflicts affecting RIM's international growth and appeal should demand RIM's attention and expedite the creation of a long term solution.

## B. Conflicts with India and the United Arab Emirates

### 1. Threats of Ban

In July and August of 2010, the governments of India and the United Arab Emirates raised concerns over digital transmissions, such as text messages and e-mails that were sent from BlackBerry phones.<sup>49</sup> India and the United Arab Emirates were concerned with the amount of access, or lack thereof, their

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39. *Id.*

40. See *Getting a Piece of the Smartphone Action*, BARRON'S (Nov. 2, 2010), [http://online.barrons.com/article/SB50001424052970203281504575590472414748164.html?mod=BOL\\_da\\_is](http://online.barrons.com/article/SB50001424052970203281504575590472414748164.html?mod=BOL_da_is).

41. Hamblen, *supra* note 35.

42. Matt Hamblen, *RIM Leads Way as Mobile Phone Shipments Surge 14 Percent*, INFOWORLD (July 30, 2010), <https://www.infoworld.com/d/mobilize/rim-leads-way-mobile-phone-shipments-surge-14-percent-302>.

43. Hamblen, *supra* note 35.

44. Hamblen, *supra* note 42.

45. See Larry Dignan, *RIM Earnings: International Sales to Shine, but Blackberry Losing Grip in U.S.*, ZDNET (June 24, 2010, 3:00 AM), <http://www.zdnet.com/blog/btl/rim-earnings-international-sales-to-shine-but-blackberry-losing-grip-in-us/36210>.

46. *Id.* BlackBerrys are still the most popular smartphone in RIM's home country, Canada, capturing an industry-leading fort-two percent of the market share. Matt Hartley, *RIM Reigns Supreme in Canadian Smartphone Wars*, FIN. POST (June 1, 2011, 3:28 PM), <http://business.financialpost.com/2011/06/01/rim-reigns-supreme-in-canadian-smartphone-wars/>.

47. Dignan, *supra* note 45.

48. *Id.*

49. Helft & Bajaj, *supra* note 1.

respective governments had to data sent from BlackBerry's within their countries.<sup>50</sup> These concerns escalated to actual threats to ban all BlackBerry services in each country if an acceptable solution was not proposed by the governments' deadlines.<sup>51</sup> While the United Arab Emirates has been temporarily mollified by an undisclosed agreement with RIM,<sup>52</sup> India set the beginning of 2011 as a deadline for RIM to provide an acceptable solution.<sup>53</sup> As the deadline passed without a ban or the requested access, RIM's situation in India is still unclear.<sup>54</sup> Based on India's attempts to approach local network operators for the demanded information, it appears that India is still committed to obtaining access to RIM's BlackBerry database.<sup>55</sup> An understanding of why the governments of India and the United Arab Emirates cannot access BlackBerry transmissions requires a brief discussion of how data is transmitted by smartphones in general, compared with the unique method utilized by BlackBerry's software.

## 2. *RIM's Enterprise Software*

RIM's deviation from typical smartphone data transmission is a result of its desire to cater to the needs of corporations.<sup>56</sup> In order to capture the corporate sector of the smartphone market, RIM developed software called Enterprise.<sup>57</sup> Installed on RIM's smartphones, Enterprise allows corporations to effectively manage e-mail, send instant messages, and calendar with other corporate members.<sup>58</sup> With all employees of a corporation conducting business and synchronizing calendars through a single, company-controlled program, productivity is maximized and compatibility problems are eliminated.<sup>59</sup> Enterprise also comes with added security encryptions, which ensure that

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50. See Santosh Kumar & Ketaki Gokhale, *RIM Has Until Year-End to Resolve BlackBerry Access Dispute with India*, BLOOMBERG (Oct. 12, 2010, 1:09 PM), <http://www.bloomberg.com/news/2010-10-12/india-gives-2-more-months-to-rim-to-provide-blackberry-security-solution.html>.

51. *Id.*

52. Paul Mah, *RIM Avoids BlackBerry Ban in UAE*, FIERCEMARKETS (Oct. 12, 2010, 12:09 PM), <http://www.fiercecio.com/techwatch/story/rim-avoids-blackberry-ban-uae/2010-10-12>.

53. C.K. Nayak & Faisal Aziz, *India Demands Full BlackBerry Access*, REUTERS (Jan. 31, 2011, 9:26 AM), <http://www.reuters.com/article/2011/01/31/us-blackberry-india-idUSTRE70U2TO20110131>.

54. See Bill Ray, *India Backs off RIM, Starts on Local Operators*, THE REGISTER (Feb. 18, 2011, 11:56), [http://www.theregister.co.uk/2011/02/18/rim\\_india/](http://www.theregister.co.uk/2011/02/18/rim_india/).

55. This tactic indirectly pressures RIM to grant India access by shifting the burden of obtaining access to the local network operators. The network operators risk losing their licenses if they do not comply with the government and may therefore voluntarily stop supporting BlackBerry devices if they cannot provide the access the government demands. *Id.*

56. See *Business Software*, BLACKBERRY, <http://na.blackberry.com/eng/services/business/> (last visited Oct. 17, 2010).

57. *Id.* See also BlackBerry, *BlackBerry Enterprise Server*, BLACKBERRY, <http://us.blackberry.com/apps-software/business/server/full/> (last visited Nov. 1, 2011).

58. *Business Software*, *supra* note 56; see also *BlackBerry Enterprise Server*, *supra* note 57.

59. *Business Software*, *supra* note 56; *Enterprise*, BLACKBERRY, <http://us.blackberry.com/business/types/enterprise/> (last visited Feb. 25, 2011).



corporate secrets transmitted through the software remain safe from interception.<sup>60</sup> Instead of allowing the transmissions to be routed through the cell phone service provider, like what is typically done with all other smartphone data transmissions, RIM created specific Enterprise dedicated servers in its home country of Canada to handle all data transmitted by Enterprise users.<sup>61</sup> Outgoing data, which is heavily encrypted once it leaves the user's phone, travels to the Enterprise servers in Canada and is then redirected with the heavy encryption to the proper destination.<sup>62</sup> The practical effect of the Enterprise method is that data is never stored on any servers except those in Canada, and thus, the data is less susceptible to interception.<sup>63</sup>

### 3. Security Concerns

India and the United Arab Emirates dislike Enterprise because their intelligence agencies possess no practical method of accessing Enterprise users' data transmissions.<sup>64</sup> For all other smartphone and non-Enterprise Blackberry users, data, whether encrypted or not, has to pass through the servers of the cell phone service provider.<sup>65</sup> These servers are always physically located in the country of the sender or receiver.<sup>66</sup> Governments therefore typically have access to the data by seizing the servers through court order or other equivalent legal methods.<sup>67</sup> However, with Enterprise, data never passes through a server that the governments can access.<sup>68</sup> Essentially, corporate data transferred through Enterprise is so secure that governments cannot access or monitor it for any reason.

India and the United Arab Emirates are concerned about the dangers of potential abuse by Enterprise users and attendant threats to national security.<sup>69</sup> Terrorists could communicate via BlackBerrys connected to Enterprise and remain virtually undetected, severely handicapping the effectiveness of intelligence agencies.<sup>70</sup> Recent terrorist attacks in both India and the United Arab Emirates have made the countries particularly sensitive to security concerns.<sup>71</sup> In

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60. Helft & Bajaj, *supra* note 1.

61. *Id.*; *Internet Freedom Risks*, *supra* note 3.

62. *Internet Freedom Risks*, *supra* note 3.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Helft & Bajaj, *supra* note 1.

2008, terrorist attacks in India left 166 people dead in Mumbai.<sup>72</sup> The United Arab Emirates also suffered a security breach in 2010, when a Palestinian operative was murdered in Dubai, allegedly by the Israeli national intelligence agency, Mossad.<sup>73</sup> Although there have been no allegations or proof that the terrorists communicated via BlackBerry phones connected to Enterprise, India did discover that the terrorists used the Internet on BlackBerry phones to follow the international reaction to the attacks and to monitor police response.<sup>74</sup> Even if terrorists have yet to abuse the national security vulnerability that Enterprise has created, it is not unimaginable that they soon could.

While India and the United Arab Emirates are the only countries thus far to threaten a ban on all BlackBerry services, the concern is quickly spreading to other countries.<sup>75</sup> Indonesia, Saudi Arabia, and Lebanon have all voiced national security concerns over the potential abuse of BlackBerrys and Enterprise by terrorists, and are considering taking actions similar to those of India and the United Arab Emirates.<sup>76</sup> RIM, which offers its BlackBerry services in 195 countries,<sup>77</sup> is now forced to make corporate decisions about its fundamental operations that will have substantial effects on the digital privacy of its customers.

### III. LEGAL FRAMEWORK

#### A. *Corporate Decision Making*

Before advocating for RIM to join the GNI, it is necessary to establish that such a decision is legally feasible. Understanding the framework of Canadian corporations and the standards to which RIM must adhere is thus crucial to making an informed recommendation. The corporation differs from other forms of business in that its creation establishes a separate legal existence.<sup>78</sup> Once incorporated under the appropriate statutory laws, a corporation acts as an

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72. Kumar & Gokhale, *supra* note 50. See generally Somini Sengupta & Keith Bradsher, *Mumbai Terrorist Siege Over, India Says*, N.Y. TIMES (Nov. 28, 2008), <http://www.nytimes.com/2008/11/29/world/asia/29mumbai.html>.

73. Helft & Bajaj, *supra* note 1. See generally Robert F. Worth & Isabel Kershner, *Hamas Official Murdered in Dubai*, N.Y. TIMES (Jan. 29, 2010), <http://www.nytimes.com/2010/01/30/world/middleeast/30dubai.html>.

74. Carlone Waxler, *In Mumbai Terrorist Arsenal: BlackBerrys, Bags of Almonds for Energy*, BUS. INSIDER (Nov. 29, 2008, 10:30 AM), <http://www.businessinsider.com/2008/11/in-mumbai-terrorist-arsenal-blackberrys-bags-of-almonds-for-energy>.

75. *A List of Countries Considering Blackberry Bans*, CBS NEWS (Oct. 8, 2010, 3:09 PM), <http://www.cbsnews.com/stories/2010/10/08/tech/main6939222.shtml>.

76. *Id.*

77. *Networks*, *supra* note 33.

78. ROBERT YALDEN, JANIS SARRA, PAUL D. PATON, MARK GILLEN, RONALD DAVIS & MARY CONDON, *BUSINESS ORGANIZATIONS: PRINCIPLES, POLICIES AND PRACTICE* 133 (2008).

independent person with its own rights and liabilities.<sup>79</sup> However, a corporation has no physical existence and must therefore act through its decision makers: the board of directors and officers.<sup>80</sup> As a result, statutes governing corporations also govern directors and officers, requiring them to adhere to the statutes' provisions.<sup>81</sup> Because RIM is a publicly-held, incorporated entity in Ontario, Canada,<sup>82</sup> decisions made by its directors and officers are subject to the *Ontario Business Corporations Act*.<sup>83</sup>

The statutory framework of Canadian corporate law is substantially similar to that of the United States.<sup>84</sup> Just as in the United States, the structure of a corporation is divided into three distinct classes: (1) board of directors, (2) officers, and (3) shareholders.<sup>85</sup> The board of directors oversees the corporation by managing or supervising the management of the corporation's business affairs.<sup>86</sup> These directors retain a wide variety of powers, including the authority to appoint officers, issue stock, and transact any other business.<sup>87</sup> Once appointed, officers control the daily operations of the corporation.<sup>88</sup> Titles typically associated with officers include president, treasurer, and secretary.<sup>89</sup> Shareholders differ from officers and directors in that they represent the ownership of the corporation.<sup>90</sup> They are the investors who fund the corporation through the purchase of shares in the corporation.<sup>91</sup> These shares give shareholders a percentage interest in the corporation.<sup>92</sup> A unique aspect of corporations is the separation of ownership from control.<sup>93</sup> Shareholders represent the ownership interest of the corporation,<sup>94</sup> yet their control of the corporation's activities is limited to electing the board of directors.<sup>95</sup>

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79. *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.).

80. YALDEN ET AL., *supra* note 78, at 133.

81. Ontario Business Corporations Act § 134(2), R.S.O. 1990, c. B.16 (Can.), available at [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90b16\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90b16_e.htm).

82. RESEARCH IN MOTION LIMITED, NOTES TO THE CONSOLIDATED FINANCIAL STATEMENTS, 2010 ANNUAL REPORT 58 (2010).

83. See generally Ontario Business Corporations Act, R.S.O. 1990, c.B.16 (Can.).

84. See *Incorporation in Canada*, LAWINFO, <http://resources.lawinfo.com/en/Canadian-Legal-FAQs/Business-Corporations/Federal/incorporation-in-canada.html> (last visited Nov. 1, 2011).

85. *Id.*

86. Ontario Business Corporations Act § 115(1), R.S.O. 1990, c. B.16 (Can.).

87. *Id.* § 117(1).

88. *Id.* § 133(a).

89. *Id.* § 1(1).

90. *Incorporation in Canada*, *supra* note 84.

91. CORPS. CAN., GUIDE TO FEDERAL INCORPORATION 30 (7th ed. 2007), available at [http://www.ic.gc.ca/eic/site/cd-dgc.nsf/vwapj/Guide\\_2007\\_Eng.pdf/\\$file/Guide\\_2007\\_Eng.pdf](http://www.ic.gc.ca/eic/site/cd-dgc.nsf/vwapj/Guide_2007_Eng.pdf/$file/Guide_2007_Eng.pdf).

92. *Id.*

93. *Id.*

94. *Id.*

95. Ontario Business Corporations Act § 119(4), R.S.O. 1990, c. B.16 (Can.).

The corporate structure not only limits shareholders' control of corporate affairs, but it also limits the business decisions that are made by the directors and officers.<sup>96</sup> Officers' and directors' control of the corporation is regulated by a legal duty to the shareholders.<sup>97</sup> Canadian law requires that the decisions of officers and directors be made "honestly and in good faith with a view to the best interests of the corporation."<sup>98</sup> This duty has been referred to as the "fiduciary duty" or "duty of loyalty."<sup>99</sup> While directors and officers are granted a tremendous amount of control over a corporation that they do not own,<sup>100</sup> the fiduciary duty ensures that they only use corporate assets to realize the objects of the corporations.<sup>101</sup> Thus, decisions must be devoid of any personal or non-corporate influence<sup>102</sup> and must be achieved with honesty, loyalty, and selflessness.<sup>103</sup> For RIM's directors, this means that, in order to avoid a breach of fiduciary duty, a decision to join the GNI must be made in the best interests of the corporation.

### *B. Corporate Social Responsibility*

The statutory scope of "best interests of the corporation"<sup>104</sup> relies heavily upon the applicability of the doctrine of corporate social responsibility and the interpretation of two recent Canadian cases on the subject. Corporate social responsibility—also variously referred to as corporate citizenship, corporate responsibility, and the triple bottom line<sup>105</sup>—is a broad doctrine that suggests corporations have a legal obligation to act not only for the shareholder's gain, but also for the gain of those socially or environmentally affected by a corporation's actions.<sup>106</sup> The doctrine focuses on the moral, ethical, and philanthropic responsibilities of corporations, instead of the traditional view that pledges sole loyalty to the shareholders.<sup>107</sup> Directors and officers, however, do not possess unlimited discretion to integrate a concept like corporate social responsibility into

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96. CORPS. CAN., *supra* note 91, at 28.

97. *Id.*

98. Ontario Business Corporations Act § 134(1)(a), R.S.O. 1990, c. B.16 (Can.).

99. Peoples Dep't Stores Inc. v. Wise, [2004] 3 S.C.R. 461, para. 32 (Can.).

100. *See* CORPS. CAN., *supra* note 91, at 27-28.

101. Peoples Dep't Stores, 3 S.C.R. 461, para. 35 (Can.).

102. *Id.*

103. *Id.*

104. Ontario Business Corporations Act § 134(1)(a), R.S.O. 1990, c. B.16 (Can.).

105. David Weissbrodt, *Corporate Social Responsibility: A Legal Analysis*, 32 HUM. RTS. Q. 207, 207 (2010) (reviewing MICHAEL KERR, RICHARD JANDA, & CHIP PITTS, *CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS* (2009)).

106. Interested parties may include employees, creditors, business partners, and neighbors, among others. Weissbrodt, *supra* note 105, at 107.

107. Tim Barnett, *Corporate Social Responsibility*, REFERENCE FOR BUS., <http://www.referenceforbusiness.com/management/Comp-De/Corporate-Social-Responsibility.html> (last visited Nov. 1, 2011).

the decision making process.<sup>108</sup> Canadian law places a fiduciary duty on all directors and officers with which they must comply.<sup>109</sup> Therefore, decisions made under the purview of corporate social responsibility must not breach the fiduciary duty to the corporation.<sup>110</sup>

In Canada and the United States, the statutory language of the fiduciary duty states that all corporate decisions must be made in the best interests of the corporation.<sup>111</sup> Nevertheless, there is great debate surrounding the interpretation of the terms “best interest” and “corporation.”<sup>112</sup> The way in which the terms are defined essentially limits a corporation’s legal objectives.<sup>113</sup> Two competing theories that have emerged from the debate are: (1) the shareholder primacy theory and (2) the stakeholder theory.<sup>114</sup>

The shareholder primacy theory, which, until recently, has dominated in Canada and the United States,<sup>115</sup> posits that directors and officers must make corporate decisions that are in the best interest of the shareholders.<sup>116</sup> Because the shareholders are the owners of the corporation, it is the duty of the officers and directors to maximize the financial value of the corporation so that each shareholder’s interest, or share value, is worth more than it was before.<sup>117</sup> In this sense, the scope of the term “corporation” is limited to the shareholders and their best interests defined as financial gain through the increased value of the company.<sup>118</sup>

On the other hand, the stakeholder theory encompasses a much broader set of interests in corporate decision-making.<sup>119</sup> Unlike shareholders, stakeholders are individuals and groups of individuals who may be affected by the corporation’s

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108. *Id.*

109. See Ontario Business Corporations Act § 134(1), R.S.O. 1990, c. B.16 (Can.).

110. *Id.*

111. *Id.*; Florence Shu-Acquaye, *American Corporate Law: Directors' Fiduciary Duties and Liability During Solvency, Insolvency, and Bankruptcy in Public Corporations*, 2 U.P.R. BUS. L.J. 1, 8 (2011).

112. Keay, *supra* note 16, at 249. Compare *Dodge v. Ford Motor Co.*, 204 Mich. 459, 507 (1919) (holding that acting in the best interest of the corporation means best interest of the stockholders), with *Peoples Dep't Stores Inc. v. Wise*, [2004] 3 S.C.R. 461, para. 42 (Can.) (holding that acting in the best interests of the corporation can mean best interest of stockholders, “employees, suppliers, creditors, consumers, governments and the environment”).

113. Keay, *supra* note 16, at 252, 256.

114. Douglas M. Branson, *Corporate Governance “Reform” and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 635-39 (2001); Keay, *supra* note 16, at 249.

115. Keay, *supra* note 16, at 249.

116. ANDREW KITCHING, PARLIAMENTARY INFO. & RESEARCH SERV., DIRECTORS’ LIABILITY UNDER THE CANADA BUSINESS CORPORATIONS ACT 3 (Oct. 16, 2008), available at <http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0825-e.pdf>; Michael R. Siebecker, *A New Discourse Theory of the Firm After Citizens United*, 79 GEO. WASH. L. REV. 161, 183-84 (2010).

117. Marshall M. Magaro, *Two Birds, One Stone: Achieving Corporate Social Responsibility Through the Shareholder-Primacy Norm*, 85 IND. L.J. 1149, 1153-54 (2010).

118. *Id.*

119. *Id.* at 1156.

actions.<sup>120</sup> Under the stakeholder theory, officers and directors should make corporate decisions that maximize the value for all people who can affect or are affected by the actions of the corporation.<sup>121</sup> Justifications for including such a large array of interests rest on the idea that people who have been socially, economically, or politically affected by a corporation helped create value for the corporation.<sup>122</sup> As a result, the corporation should consider these stakeholders' interests and make decisions that provide benefits for both the shareholders and the stakeholders.<sup>123</sup>

The Canadian Supreme Court addressed the issues of corporate social responsibility and stakeholder theory in two recent decisions: *Peoples Department Store Inc. v. Wise* (“Peoples”) and *BCE Inc. v. 1976 Debentureholders* (“BCE”).<sup>124</sup> While the specific legal ramifications of the decisions on Canadian corporate law remain ambiguous, the more recent *BCE* opinion established some basic corporate social responsibility principles on which directors and officers can rely in order to avoid fiduciary duty violations.<sup>125</sup>

Decided in 2004,<sup>126</sup> *Peoples* was the first modern Canadian Supreme Court case to discuss the responsibilities of directors and officers as they pertain to corporate law.<sup>127</sup> In deciding whether the directors had a fiduciary duty to a creditor of the corporation, the court emphasized that a director's fiduciary duty was not to a creditor or any other stakeholder, but to the corporation itself.<sup>128</sup> It further held that a director's statutory duty to make decisions for the “best interests of the corporation” does not necessarily mean “best interests of the shareholders.”<sup>129</sup> While the court recognized that, economically speaking, the “best interest of the corporation” equates to the maximization of the corporation's value, “various other factors may be relevant in determining what directors should consider in soundly managing with a view to the best interests of the corporation.”<sup>130</sup> The factors directors can consider, among others, are, “the

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120. Weissbrodt, *supra* note 105, at 207; Keay, *supra* note 16, at 252.

121. Keay, *supra* note 16, at 256; Siebecker, *supra* note 116, at 183-84.

122. Keay, *supra* note 16, at 256.

123. Magaro, *supra* note 117, at 1156.

124. *Peoples Dep't Stores Inc. v. Wise*, [2004] 3 S.C.R. 461 (Can.); *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560 (Can.).

125. Jeffery Bone, *The Supreme Court Revisiting Corporate Accountability: BCE Inc. in Search of a Legal Construct Known as the “Good Corporate Citizen”*, ALTA. L. REV. ONLINE SUPP. § III (Mar. 3, 2010), [http://ualbertalaw.typepad.com/alr\\_supplement/2010/03/the-supreme-court-revisiting-corporate-accountability-bce-inc-in-search-of-a-legal-construct-known-a.html](http://ualbertalaw.typepad.com/alr_supplement/2010/03/the-supreme-court-revisiting-corporate-accountability-bce-inc-in-search-of-a-legal-construct-known-a.html); Robert E. Milnes, *Acting in the Best Interests of the Corporation: To Whom Is This Duty Owed by Canadian Directors? The Supreme Court of Canada in the BCE Case Clarifies the Duty*, 24 BUS. & FIN. L. REV. 601, 617 (2009).

126. *Peoples*, 3 S.C.R. at 461.

127. Leonard I. Rotman, *Debunking the “End Of History” Thesis for Corporate Law*, 33 B.C. INT'L & COMP. L. REV. 219, 243 (2010).

128. *Peoples*, 3 S.C.R. at para. 43.

129. *Id.* at para. 42.

130. *Id.*

interests of shareholders, employees, suppliers, creditors, consumers, governments, and the environment.”<sup>131</sup> To some, the *Peoples* case represented a clear rejection of the traditional shareholder primacy theory in favor of a stakeholder theory that encompassed a much larger class of stakeholders than considered by even progressive scholars.<sup>132</sup> To others, the broad inclusion of all stakeholder interests in *Peoples* rendered the corporate fiduciary duty void of any content, as a fiduciary duty could not possibly be owed to everyone.<sup>133</sup> Possibly because such broad reform came with little guidance on how to apply it, *Peoples* did not immediately have a substantial effect on the corporate law landscape.<sup>134</sup>

Many eagerly awaited the Canadian Supreme Court decision of *BCE*, handed down in 2008, in hopes that it would distinguish or clarify the reasoning offered in *Peoples*.<sup>135</sup> In its decision, the *BCE* court cited *Peoples* and reaffirmed that the directors owed a fiduciary duty to the corporation itself—not to the shareholders or stakeholders directly.<sup>136</sup> It acknowledged that even if the interests of the corporation, shareholders, and stakeholders align, the director’s duty is to the corporation and the corporation alone, and that this rule will always apply when those interests conflict.<sup>137</sup> Next, the court addressed the corporate social responsibility concept of stakeholders.<sup>138</sup> Speaking in very general terms, it held that directors may consider the interests of stakeholders when making corporate decisions and that the “best interests” of the corporation are those viewed as a “good corporate citizen,” without explaining the nature of good corporate citizenship.<sup>139</sup> The court stated that the fiduciary duty to make decisions in the best interests of the corporation viewed from the perspective of a good corporate citizen was mandatory, but that consideration of groups of stakeholders when making those decisions was not mandatory but only permissible when appropriate.<sup>140</sup> Therefore, the court left a certain degree of latitude and discretion to directors to decide on a case-by-case basis whether stakeholders should be considered, and if so, which ones to consider.<sup>141</sup> Although the holdings in *BCE*

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131. *Id.*

132. Rotman, *supra* note 127, at 249-50.

133. Anita Anand, *Supreme Ambiguity: A Supreme Court Decision Says Corporate Directors Must Serve Many Masters—So Many Their Fiduciary Duties Become Vague and Meaningless*, INVESTOR VOICE (Nov. 18, 2004), <http://www.investorvoice.ca/PI/1421.htm>; see also Mohamed F. Khimji, Comment, *Peoples v. Wise—Conflating Directors’ Duties, Oppression, and Stakeholder Protection*, 39 U.B.C. L. REV. 209, 232 (2006) (arguing that while the *Peoples* decision acknowledges stakeholder interests under corporate law, it does not provide a satisfactory mechanism for protecting these interests).

134. Rotman, *supra* note 127, at 250.

135. *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560 (Can.).

136. *Id.* at para. 37.

137. *Id.*

138. *Id.* at para. 39.

139. *Id.* at para. 66.

140. *Id.* at paras. 39, 66.

141. See *id.*

and *Peoples* leave much to be desired by way of details and standards,<sup>142</sup> they create significant legal leeway for directors at companies like RIM to consider and incorporate social principles into the decision-making process.<sup>143</sup>

### *C. Peoples and BCE's Effect on RIM*

How RIM's directors can resolve the India and U.A.E. privacy dilemmas depends in great part on the interpretations of the *Peoples* and *BCE* holdings. Both of these cases speak to the same issue RIM now faces: the legal significance of stakeholders' interests on corporate decision-making.<sup>144</sup> The stakeholders at issue—RIM's BlackBerry customers in India and the United Arab Emirates—may lose the private nature of their BlackBerry communications if RIM acquiesces to the countries' demands.<sup>145</sup> The courts in *BCE* and *Peoples* identify consumers as a legitimate class of stakeholders.<sup>146</sup> Consumers are of especially great importance to RIM because BlackBerry customers in India and the United Arab Emirates total one million and 500,000 users, respectively,<sup>147</sup> and India is currently the fastest growing cell phone market in the world.<sup>148</sup> Of equally great importance, however, is RIM's self-declared commitment and selling point: to provide the customer with highly secured products.<sup>149</sup> RIM's directors find themselves trapped in the hypothetical proposed in *BCE*, where a decision made in the best interests of the corporation is difficult to decipher when the interests of the shareholders conflict with the interests of a major stakeholder, like BlackBerry customers in India and the United Arab Emirates.<sup>150</sup> Where shareholders may see capitulating to the countries' demands as a necessary step for future profits and company growth, stakeholding customers, relying on RIM's guarantees of secure, private communication,<sup>151</sup> likely view privacy as a non-

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142. See Bone, *supra* note 125, § I(A).

143. *Id.* § III.

144. See generally *BCE*, 3 S.C.R. at 560 (Can.); *Peoples Dep't Stores Inc. v. Wise*, [2004] 3 S.C.R. 461 (Can.).

145. Harris, *supra* note 21.

146. *BCE*, 3 S.C.R. at para. 40; *Peoples*, 3 S.C.R. at para. 42.

147. Cecilia Kang, *UAE Bans BlackBerry Amid Global Scrutiny of Internet Use*, WASH. POST (Aug. 2, 2010, 1:01 PM), [http://voices.washingtonpost.com/posttech/2010/08/uae\\_ban\\_on\\_blackberry\\_attempt.html](http://voices.washingtonpost.com/posttech/2010/08/uae_ban_on_blackberry_attempt.html); Devidutta Tripathy & Sumeet Chatterjee, *India Companies Eye Switch to Rivals as BlackBerry Ban Looms*, REUTERS (Aug. 30, 2010, 3:04 PM), <http://www.reuters.com/article/idUSTRE67T1C420100830>.

148. *Dell Plans Entry into India's Mobile Market*, NDTV PROFIT (July 14, 2010), <http://profit.ndtv.com/news/show/dell-plans-entry-into-indias-mobile-market-82208>.

149. *BlackBerry Enterprise Server Features*, BLACKBERRY, [http://us.blackberry.com/apps-software/business/server/full/features.jsp#tab\\_tab\\_security](http://us.blackberry.com/apps-software/business/server/full/features.jsp#tab_tab_security) (last visited Aug. 28, 2011); Joanne Bladd, *Research In Motion, Maker of the BlackBerry, Hits Back to Reassure Customers on Security*, ITP (Aug. 3, 2010), <http://www.itp.net/581316-blackberrys-response-rim-statement-in-full>; Helft & Bajaj, *supra* note 1.

150. *BCE*, 3 S.C.R. at para. 39.

151. *BlackBerry Enterprise Server Features*, *supra* note 149.



negotiable issue. The answer to RIM's stalemate lies within the *BCE* court's meaning of "good corporate citizen."<sup>152</sup>

Although the Court in *BCE* did not proscribe a method for directors to balance the competing interests of stakeholders and shareholders,<sup>153</sup> it did explain that decisions made in the best interest of the corporation should be those of a good corporate citizen.<sup>154</sup> Unfortunately, the Court did not elaborate on what constitutes a good corporate citizen,<sup>155</sup> and scholars referred to the standard as being one of conspicuous ambiguity.<sup>156</sup> At the very least, the good corporate citizen standard signals that the shareholder primacy theory is no longer reflective of Canadian corporate law.<sup>157</sup> Directors are now able, but are not required, to consider stakeholders' interests when making corporate decisions.<sup>158</sup> Therefore, RIM's directors have a legal basis to consider their stakeholding customers' interests when making business decisions in countries where these interests may be compromised. RIM must now exercise the legal right to consider its customers' interests by taking an active role in ensuring the protection of BlackBerry users' privacy.

#### IV. PRIVACY

##### A. *Privacy as a Fundamental Human Right*

Armed with the legal ammunition to, at a minimum, consider the rights and interests of its stakeholders,<sup>159</sup> RIM's directors should determine whether the stakeholders' rights carry sufficient importance and magnitude to warrant consideration in corporate decision making. A violation of the right to privacy demands RIM's attention. While it is generally agreed upon that privacy is a messy and complex topic with a wide range of concepts and theories,<sup>160</sup> a suitable working definition of privacy is, "the degree to which an individual can determine which personal information is to be shared with whom and for what purpose."<sup>161</sup> The scope of privacy rights varies by culture and context,<sup>162</sup> but usually includes the expectation of anonymity, fairness and control over personal

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152. *BCE* 3 S.C.R. at para. 66.

153. Milnes, *supra* note 125, at 617.

154. *BCE*, 3 S.C.R. at para. 66.

155. *Id.*

156. Bone, *supra* note 125, § I(A).

157. Rotman, *supra* note 127, at 254.

158. *BCE*, 3 S.C.R. at para. 39.

159. *Id.*

160. HELEN NISSENBAUM, *PRIVACY IN CONTEXT* 67 (2010).

161. *Privacy*, ZDNET, <http://www.zdnet.com/topics/privacy> (last visited Jan. 29, 2011).

162. See Jerry Berman & Deirdre Mulligan, *Privacy in the Digital Age: Work in Progress*, 23 NOVA L. REV. 551, 556-57 (1999).

information, and confidentiality.<sup>163</sup> These expectations of privacy guarantee human dignity and prevent illegal or arbitrary interference with the right to privacy.<sup>164</sup> Privacy guarantees not only protect an individual's personal security and identity,<sup>165</sup> but also guard another related human right, freedom of expression.<sup>166</sup> While the respective goals of privacy and freedom of expression appear to conflict,<sup>167</sup> it is generally understood that improving one human right fosters the advancement of others.<sup>168</sup> Promoting privacy in smartphone communications seems to adhere to this rule by also strengthening users' freedom of expression rights. Smartphone users who know that their communications to and from their devices are private may be more willing to candidly express their opinions about politically charged or taboo issues.<sup>169</sup> Without privacy, freedom of expression, which fosters advancement of knowledge, economic opportunity, and human potential, would be chilled.<sup>170</sup> Thus, an invasion of privacy undermines democracy and human development by preventing individuals from holding their governments accountable, generating new ideas, and encouraging creativity and entrepreneurship.<sup>171</sup>

The need for the basic rights of privacy and freedom of expression far predate the creation of the Internet and smartphones. Many international human rights laws recognize privacy and freedom of expression as fundamental human rights.<sup>172</sup> An early, post-World War II United Nations ("U.N.") declaration set the stage for recognizing these human rights.<sup>173</sup> Adopted in 1948, the Universal Declaration of Human Rights ("UDHR") states that the, "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."<sup>174</sup> Article 12 of the UDHR stresses the importance of an individual's privacy,

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163. *Id.* at 557-68.

164. *Principles*, *supra* note 19, at 2.

165. *Id.*

166. *Id.*

167. *Overview—Privacy and Free Speech*, PRIVACY INT'L, <https://www.privacyinternational.org/article/overview-privacy-and-free-speech> (last visited Nov. 1, 2011); *Principles*, *supra* note 19.

168. *Principles*, *supra* note 19, at 1.

169. *See Overview—Privacy and Free Speech*, *supra* note 167.

170. *Chapter Two: Privacy Basics*, CENTER FOR DEMOCRACY & TECH. (Oct. 22, 2009), <http://www.cdt.org/privacy/guide/basic> [hereinafter *Chapter Two: Privacy Basics*]; *Principles*, *supra* note 19, at 2.

171. *Chapter Two: Privacy Basics*, *supra* note 170; Hilary Rodham Clinton, Sec'y of State, U.S. Dep't of State, Remarks on Internet Freedom (Jan. 21, 2010), available at <http://www.state.gov/secretary/rm/2010/01/135519.htm>.

172. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), arts. 17, 19, U.N. Doc. A/RES/2200A(XXI) (Dec. 16, 1966) [hereinafter ICCPR], available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/005/03/IMG/NR000503.pdf>; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, arts. 12, 19, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR], available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf>.

173. UDHR, *supra* note 172, arts. 12, 19.

174. *Id.* at Preamble.

prohibiting, “arbitrary interference with his privacy, family, home or correspondence.”<sup>175</sup> Article 19 establishes the right to freedom of expression, granting the right to, “hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>176</sup>

The principles of the UDHR were later bolstered by the most globally-ratified human rights agreement, the International Covenant on Civil and Political Rights (“ICCPR”).<sup>177</sup> Adopted in 1966 and entered into force in 1976 by the U.N. General Assembly,<sup>178</sup> the ICCPR guarantees both the right of privacy and the right of expression.<sup>179</sup> Regarding privacy, Article 17 declares, “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation,”<sup>180</sup> and that “[e]veryone has the right to the protection of the law against such interference or attacks.”<sup>181</sup> Article 19 grants everyone “the right to hold opinions without interference,”<sup>182</sup> and the right to freedom of expression.<sup>183</sup> Included in freedom of expression is the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”<sup>184</sup> While Article 19 grants broad freedom of expression protection, that right is not absolute.<sup>185</sup> Permissible restrictions of expression include the protection of national security, public order, and public health or morals.<sup>186</sup> However, the Siracusa Principles, drafted by the U.N. Commission on Human Rights, narrow these restrictions.<sup>187</sup> For example, restrictions due to national security can only be justified when taken to “protect the existence of the nation, its territorial integrity or political independence against force or threat of force,”<sup>188</sup> but not to prevent “local or relatively isolated threats to law and order.”<sup>189</sup> Furthermore, the Siracusa

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175. *Id.* at art. 12.

176. *Id.* at art. 19.

177. See Brian R. Israel, “Make Money without Doing Evil?” *Caught Between Authoritarian Regulations in Emerging Markets and a Global Law of Human Rights, U.S. ICTs Face a Twofold Quandary*, 24 BERKELEY TECH. L.J. 617, 622-23 (2009). The ICCPR currently has seventy-two signatories and 167 parties, including Canada. ICCPR, *supra* note 172.

178. ICCPR, *supra* note 172.

179. *Id.*

180. *Id.* at art. 17(1).

181. *Id.* at art. 17(2).

182. *Id.* at art. 19(1).

183. *Id.* at art. 19(2).

184. *Id.*

185. *Id.* at art. 19(3).

186. *Id.* at art. 19(3)(b).

187. U.N. Econ. & Soc. Council, Comm’n on Human Rights, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Annex ¶ (ii), U.N. Doc. E/CN.4/1985/4, (Sept. 28, 1984), available at <http://www.unhcr.org/refworld/docid/4672bc122.html>.

188. *Id.* ¶ 29.

189. *Id.* ¶ 30.

Principles require that, national security limitations “may only be invoked when there exist adequate safeguards and effective remedies against abuse.”<sup>190</sup> In short, the ICCPR, in conjunction with the Siracusa Principles, promulgates privacy and freedom of expression as international human rights that can only be limited in certain narrow and controlled circumstances.<sup>191</sup> These agreements did not contemplate the yet-to-be-invented Internet, but should most certainly apply to this powerful and pervasive new medium.

### *B. Importance of Internet Privacy in the 21st Century and Beyond*

The need for protection of the international human right of privacy and freedom of expression as outlined in the UDHR and ICCPR increases exponentially with the explosion of Internet connectivity. With two billion users worldwide,<sup>192</sup> the Internet is viewed not only as a critical infrastructure, but also an essential element of other critical infrastructures.<sup>193</sup> Consequently, the Internet now supports economic and social activity at a global level.<sup>194</sup> Increased Internet activity through smartphones and other ICTs<sup>195</sup> has also increased the amount and availability of users’ personal information.<sup>196</sup> Unwanted or unintended dissemination of this personal information to third parties threatens to inhibit the Internet’s growth by exposing its users’ greatest concern: privacy.<sup>197</sup> Without adequate privacy protections, Internet commerce will falter and Internet communication and expression will be chilled.<sup>198</sup> If these critical benefits of the Internet are to be preserved and advanced, it is imperative that the fundamental rights of privacy and freedom of expression be extended to the Internet and ICT devices.

The scope of these rights must be international since smartphones allow users to connect to a new communication medium that is quickly becoming a venue for global social organization.<sup>199</sup> The Internet, a conglomerate of information

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190. *Id.* ¶ 31.

191. *Id.*

192. *Number of Internet Users Worldwide Reaches Two Billion*, PHYSORG.COM (Jan. 26, 2011), <http://www.physorg.com/news/2011-01-internet-users-worldwide-billion.html>.

193. Org. for Econ. Co-Operation & Dev. [OECD], *The Economic and Social Role of Internet Intermediaries*, 38 (Apr. 2010) [hereinafter OECD, *Internet Intermediaries*], available at, <http://www.oecd.org/dataoecd/49/4/44949023.pdf>. Critical infrastructure is defined as “a term used by governments to describe assets that are essential for the functioning of a society and economy.” *Critical Infrastructure*, REFERENCE.COM <http://www.reference.com/browse/critical%20infrastructure?o=100074> (last visited Feb. 13, 2011).

194. OECD, *Internet Intermediaries*, *supra* note 193, at 38.

195. *See Number of Internet Users Worldwide Reaches Two Billion*, *supra* note 192.

196. Berman & Mulligan, *supra* note 162, at 569.

197. *Consumer Privacy*, CENTER FOR DEMOCRACY & TECH., <http://www.cdt.org/issue/consumer-privacy> (last visited Feb. 19, 2011). Privacy is also the most prevalent reason non-Internet users avoid the Internet. *Id.*

198. *Chapter Two: Privacy Basics*, *supra* note 170; *see* Berman & Mulligan, *supra* note 162, at 553.

199. Berman & Mulligan, *supra* note 162, at 552.

networks, creates a nervous system of data worldwide.<sup>200</sup> This digital nervous system has the ability to facilitate the free exchange of information and data, contributing to a generation of new ideas and allowing society to become stronger.<sup>201</sup> Through blogs, emails, social networks, and other forums, the Internet has created new ways to exchange ideas.<sup>202</sup> The Internet's capability to organize, create, and exchange ideas provides global benefits to economic, social, and political ventures.<sup>203</sup>

The ICT industry holds the key to the Internet's potential impact on the global economy. Utilization of ICTs has positively affected economic development in emerging countries,<sup>204</sup> and has improved efficiency in established ones.<sup>205</sup> For example, ICTs were a catalyst in Africa's telecommunications sector, causing the sector's percentage of gross domestic product ("GDP") to increase from 2% in 1998 to almost 5% by 2004.<sup>206</sup> In Kenya, farmers' income rose by as much as 30% as a result of mobile banking technology,<sup>207</sup> and in Sub-Saharan Africa, access to the Internet enabled women entrepreneurs to acquire microcredit loans and participate in the global market.<sup>208</sup> Other regions, such as developing Asia, Latin America, and Eastern Europe, have also benefitted from the ICT sector.<sup>209</sup> Most notably, GDP growth due to ICT investment in Latin America increased from 5% during 1989-95 to just under 20% during 1995-2003.<sup>210</sup> For more developed nations, ICTs help companies increase efficiency and productivity.<sup>211</sup> Appropriate incorporation of ICTs into the business model can help companies more efficiently combine labor and capital, reduce transaction costs, and boost innovation.<sup>212</sup> Increased connectivity can also contribute to expanded product ranges, customized services, and decreased response time to demand.<sup>213</sup> For example, in countries with strong growth, like the United States, Canada, and Australia, investment in ICTs showed an increase

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200. Clinton, *supra* note 171.

201. *Id.*

202. *Id.*

203. *See generally id.*

204. *Id.*

205. OECD, ICT AND ECONOMIC GROWTH 11 (2003) [hereinafter OECD, ICT AND ECONOMIC GROWTH], available at [http://www.labs-associados.org/docs/OCDE\\_TIC.PDF](http://www.labs-associados.org/docs/OCDE_TIC.PDF).

206. INT'L TELECOMM. UNION, WORLD TELECOMMUNICATION/ICT DEVELOPMENT REPORT 2006, EXECUTIVE SUMMARY 11 (2006) [hereinafter ITU], available at [http://www.itu.int/dms\\_pub/itu-d/opb/ind/D-IND-WTDR-2006-SUM-PDF-E.pdf](http://www.itu.int/dms_pub/itu-d/opb/ind/D-IND-WTDR-2006-SUM-PDF-E.pdf).

207. Clinton, *supra* note 171.

208. *Id.*

209. *See* ITU, *supra* note 206, at 17.

210. *Id.*

211. OECD, ICT AND ECONOMIC GROWTH, *supra* note 205, at 11.

212. *Id.*

213. *Id.* at 56.

in labor productivity.<sup>214</sup> Similarly, gains in productivity were greatest in sectors that invested heavily in ICTs.<sup>215</sup> Whether introduced to a modernized western nation or an emerging African country, the Internet-driven ICT industry offers global economies growth through increased productivity.<sup>216</sup>

Beyond commercial uses, Internet integration in social service delivery, such as healthcare and education, provides practitioners and teachers with the opportunity to more effectively carry out their services.<sup>217</sup> Healthcare providers are now developing new practices and procedures through the use of “digital appliances, computer terminals, and mobile devices.”<sup>218</sup> In addition to allowing institutions to post medical information online for free, the Internet enables healthcare providers to use multidirectional interactions between patients and personalized information.<sup>219</sup> Physicians in different locations can use webcams to simultaneously look through a microscope and exchange opinions, patients can elicit bids for a surgery through a website, and healthcare administrators can consolidate all medical records into a central database.<sup>220</sup> Thus, the Internet empowers the healthcare industry with the ability to provide localized and interactive attention to its patients.<sup>221</sup>

As the Internet changes the way in which we work and interact with each other, it also redefines the concepts and methods of education.<sup>222</sup> Connectivity spawned the development of the so-called “knowledge economy,”<sup>223</sup> an educational marketplace immersed in electronic networks.<sup>224</sup> In developing countries, the Internet not only increases student creativity through intra-school networking, but it also aides in educating large numbers of geographically dispersed individuals.<sup>225</sup>

Corporations can maximize training by providing an administratively manageable platform in which employees remotely participate in sharing and building knowledge, as well as coaching exercises.<sup>226</sup> Professional practitioners

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214. *Id.* at 47-48.

215. *Id.*

216. OECD, *Internet Intermediaries*, *supra* note 193, at 37.

217. See Betty Collis, *E-Learning and the Transformation of Education for a Knowledge Economy*, in THE NETWORK SOCIETY 216 (Manuel Castells & Gustavo Cardoso eds., 2005); James Katz et al., *Uses of Internet and Mobile Technology in Health Systems: Organizational and Societal Issues in a Comparative Context*, in THE NETWORK SOCIETY, *supra*, at 183.

218. Katz, *supra* note 217, at 183.

219. *Id.* at 186, 192.

220. *Id.* at 192-93, 195.

221. *Id.* at 202.

222. See Collis, *supra* note 217, at 215.

223. The knowledge economy is the “change in society world-wide, particularly globalization, information/knowledge intensity, and networking and connectivity.” *Id.*

224. See *id.* at 215-16.

225. Shirin Madon, *The Internet and Socioeconomic Development: Exploring the Interaction*, 13 INFO. TECH. & PEOPLE 84, 92 (2000), available at <http://eprints.lse.ac.uk/191/1/ITP2000.pdf>.

226. Collis, *supra* note 217, at 217-18.

can engage in life-long learning through networks of online guests, experts, workshops, and discussion forums.<sup>227</sup> In the field of higher education, students can now organize their work into electronic portfolios, allowing for personalized customization and widespread accessibility.<sup>228</sup> Ultimately, the Internet enables educational practices to shift from merely delivering knowledge to facilitating learning through participation in as close to a real world situation as possible.<sup>229</sup>

Arguably the most temporally relevant effect of the Internet is its influence on the political sphere, and more specifically, democracy.<sup>230</sup> The decentralized, open, and interactive nature of the Internet empowers each of its users to become his or her own publisher, forming communities of similar interests that transcend geographic, social, and political barriers.<sup>231</sup> This new communications medium created the “digital democracy,” a method that attempts to practice democracy, through the use of ICTs, without physical limitations such as time and space.<sup>232</sup> Lately, protesters and advocates of democracy are exercising digital democracy by utilizing social networking sites, such as Facebook and Twitter, to document abuses and gather support against authoritarian regimes.<sup>233</sup> After the 2009 Iranian election, in which President Mahmoud Ahmadinejad won the popular vote amid strong domestic and foreign allegations that the results were rigged,<sup>234</sup> Iranian citizens took to the streets to protest in what is now called the “Green Revolution” or “Twitter Revolution.”<sup>235</sup> Instead of the media blackouts typically employed by the Iranian authorities,<sup>236</sup> videos of protestors burning cars and brutal beatings by riot police were uploaded and shared across the world via YouTube and Twitter.<sup>237</sup> While the government was quick to shut down telephone services that protestors used to text each other, they were not as successful in silencing social networks on the Internet.<sup>238</sup> Protestors used Twitter, among other Internet outlets such as email and blogs, to coordinate rallies and share information.<sup>239</sup> Even as the government violently quelled the protests, oppressed

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227. *Id.* at 218-19.

228. *Id.* at 220.

229. *See id.* at 216.

230. *See Madon, supra* note 225, at 94.

231. Berman & Mulligan, *supra* note 162, at 552.

232. ANDREW CHADWICK, INTERNET POLITICS 85 (2006).

233. Donna Trussell, *Mobs and Democracy: The Facebook-Twitter-YouTube Revolution*, POL. DAILY (Feb. 1, 2011), <http://www.politicsdaily.com/2011/02/01/mobs-and-democracy-the-facebook-twitter-youtube-revolution/print/>.

234. Simon Robinson, *Was Ahmadinejad's Win Rigged?*, TIME (June 15, 2009), [http://www.time.com/time/specials/packages/article/0,28804,1904645\\_1904644,00.html](http://www.time.com/time/specials/packages/article/0,28804,1904645_1904644,00.html).

235. Jared Keller, *Evaluating Iran's Twitter Revolution*, THE ATLANTIC (June 18, 2010, 8:00 AM), <http://www.theatlantic.com/technology/archive/2010/06/evaluating-irans-twitter-revolution/58337/>.

236. *Id.*

237. Editorial, *Iran's Twitter Revolution*, WASH. TIMES (June 16, 2009), <http://www.washingtontimes.com/news/2009/jun/16/irans-twitter-revolution/>.

238. *Id.*

239. Keller, *supra* note 235.

Iranians continued to tweet reports of the rising death toll and arrests of opposition leaders.<sup>240</sup> Twitter made the violence in Iran a major geopolitical topic of conversation by enabling protesters to evade their country's repressive regime.<sup>241</sup> The Iranian protests may have failed,<sup>242</sup> but the Green Revolution sparked an international reaction that gained significant international visibility for the protesters' cause.<sup>243</sup> Since the Green Revolution, social networks have played a part in successfully removing authoritarian leaders.<sup>244</sup>

In Tunisia during early 2011, large numbers of young, educated citizens escalated protests against President Zine El-Abidine Ben Ali through the use of Facebook and Twitter, eventually leading to his exile and the end of his twenty-three year corrupt reign.<sup>245</sup> Soon thereafter, protests against Egyptian President Hosni Mubarak started at least in part by Facebook groups that promoted early protests to its hundreds of thousands of members.<sup>246</sup> It was not long before President Mubarak blocked Facebook and Twitter and eventually shut down the Internet completely.<sup>247</sup> Nonetheless, his attempts were futile and his resignation after three weeks of protests marked the end of his thirty-year autocratic rule.<sup>248</sup> In the wake of events in Iran, Tunisia, and Egypt, it is clear that the Internet has proven to be a powerful political tool in promoting worldwide democracy.<sup>249</sup> Its effects also do not appear to be waning; during the writing of this Comment, protests against repressive governments continue in Libya,<sup>250</sup> Bahrain, Yemen, and Algeria.<sup>251</sup>

The multifarious benefits of the Internet already realized by modern society, combined with its potential for future development, highlight the pressing need to preserve this indispensable medium in its most productive form.<sup>252</sup> Creating and

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240. *Iran's Twitter Revolution*, *supra* note 237.

241. Keller, *supra* note 235.

242. Trussell, *supra* note 233.

243. *Id.*

244. Emily Banks, *Egyptian President Steps Down Amidst Groundbreaking Digital Revolution*, CNN (Feb. 11, 2011, 2:35 PM), <http://www.cnn.com/2011/TECH/social.media/02/11/egyptian.president.digital.mashable/>; *Zine El-Abidine Ben Ali*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/people/b/zine\\_elabidine\\_ben\\_ali/index.html](http://topics.nytimes.com/top/reference/timestopics/people/b/zine_elabidine_ben_ali/index.html) (last updated June 20, 2011).

245. *Zine El-Abidine Ben Ali*, *supra* note 244.

246. Banks, *supra* note 244.

247. *Id.*

248. Sami Moubayed, *Welcome Back Egypt*, HUFFINGTON POST (Feb. 11, 2011), [http://www.huffingtonpost.com/sami-moubayed/an-arab-generation-with-n\\_b\\_822035.html](http://www.huffingtonpost.com/sami-moubayed/an-arab-generation-with-n_b_822035.html).

249. *See id.*; Keller, *supra* note 235; *Zine El-Abidine Ben Ali*, *supra* note 244.

250. Libyans have since ousted their ruling government and killed its autocratic ruler, Muammar Gaddafi. *Muammar Gaddafi Killed, Captured in Sirte*, HUFFINGTON POST (Oct. 20, 2011), [http://www.huffingtonpost.com/2011/10/20/muammar-gaddafi-killed\\_n\\_1021462.html](http://www.huffingtonpost.com/2011/10/20/muammar-gaddafi-killed_n_1021462.html).

251. Anthony Shadid, *Cycle of Suppression Rises in Libya and Elsewhere*, N.Y. TIMES (Feb. 19, 2011), <http://www.nytimes.com/2011/02/20/world/middleeast/20mideast-protests.html>.

252. *See generally* Banks, *supra* note 244; Katz et al., *supra* note 217; Keller, *supra* note 235; Moubayed, *supra* note 248; OECD, ICT AND ECONOMIC GROWTH, *supra* note 205; *Zine El-Abidine Ben Ali*, *supra* note 244.



implementing new and more efficient methods that advance economic, social, and political values can only continue if Internet users' privacy is adequately protected.<sup>253</sup> Because privacy is one of the greatest concerns among Internet users,<sup>254</sup> it is likely that its protection will encourage more unfettered and imaginative use of the medium resulting in even greater benefits to society.<sup>255</sup> Similarly, greater privacy guarantees promote freedom of expression, and thus have the potential to facilitate the establishment and maintenance of democracy in repressive societies.<sup>256</sup> None of these outcomes are definite, but the continued protection of privacy in the face of new threats certainly will help the Internet positively influence the future.<sup>257</sup> As a catalyst for increasing Internet accessibility and frequency,<sup>258</sup> the smartphone will likely play a significant role in realizing these potential outcomes. ICT companies like RIM suddenly possess the ability, and possibly the responsibility, to dictate policy that will maximize the Internet's productive potential.<sup>259</sup>

## V. MODEL FOR SUCCESS

### A. ICT Companies in the Best Position to Regulate

Privacy's essential role in Internet development demands an established standard in order to ensure its continued protection in a commercial environment.<sup>260</sup> Through self-regulation, RIM, the smartphone industry, and other ICT companies represent the most effective bodies that can create and maintain this standard.<sup>261</sup> While governments have traditionally regulated forms of communication within their own borders, the ability of the Internet to allow information to flow unimpeded from country to country renders government regulation insufficient.<sup>262</sup> For countries with laws that guard citizens' privacy, their protections extend only as far as their country's borders and, therefore,

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253. See generally *Chapter Two: Privacy Basics*, *supra* note 170.

254. *Consumer Privacy*, *supra* note 197.

255. See generally *Chapter Two: Privacy Basics*, *supra* note 170.

256. *Chapter Two: Privacy Basics*, *supra* note 170; Clinton, *supra* note 171; *Principles*, *supra* note 19, at 2.

257. See generally Banks, *supra* note 244; Katz, *supra* note 217; Keller, *supra* note 235; OECD, ICT AND ECONOMIC GROWTH, *supra* note 205; Zine El-Abidine Ben Ali, *supra* note 244; *Chapter Two: Privacy Basics*, *supra* note 170; Clinton, *supra* note 171; *Principles*, *supra* note 19, at 2.

258. See Lance Whitney, *Nielson: Smartphone Data Usage Soars 89 Percent*, CNET (June 17, 2011), [http://news.cnet.com/8301-1023\\_3-20071941-93/nielsen-smartphone-data-usage-soars-89-percent/](http://news.cnet.com/8301-1023_3-20071941-93/nielsen-smartphone-data-usage-soars-89-percent/).

259. See Dunstan Hope, *Global Network Initiative: An Ethical Compass for Information and Communications Firms in the Internet Age*, 30 GLOBAL BUS. & ORGANIZATIONAL EXCELLENCE 7, 8 (2011). See generally *Internet Freedom Risks*, *supra* note 3.

260. See *Who We Are*, *supra* note 24; see also Hope, *supra* note 259. See generally Berman & Mulligan, *supra* note 162, at 554-55.

261. See *Who We Are*, *supra* note 24; see also Hope, *supra* note 259; *Internet Freedom Risks*, *supra* note 3. See generally Berman & Mulligan, *supra* note 162, at 554-55.

262. Berman & Mulligan, *supra* note 162, at 554-55.

cannot adequately protect users who frequently cross jurisdictional borders while surfing the web.<sup>263</sup> Even when laws are enacted, the lightning-quick evolutionary nature of the Internet and its devices may outpace the legislative process, leading to gaps in protection.<sup>264</sup> As competition drives ICT companies into new markets,<sup>265</sup> some countries' laws work against the preservation of privacy.<sup>266</sup> It is not uncommon for repressive governments to enact laws that restrict political speech or gather personal information in violation of the users' international human rights.<sup>267</sup> Here, ICT companies such as RIM find themselves stuck between invasive local laws and international standards, industry practices, and expectations of stakeholders.<sup>268</sup> Whether inadequate or repressive, country-by-country government regulation of Internet privacy does not present a feasible solution to safeguard privacy globally.<sup>269</sup>

Instead, industry-wide standards of practice to protect privacy should be developed and compliance governed by the ICT companies themselves.<sup>270</sup> Self-regulation ameliorates many of the issues inherent in government regulation.<sup>271</sup> First, a single global standard applicable to all countries in which ICT companies operate eliminates the multi-country jurisdictional problems.<sup>272</sup> Second, ICT companies can be more responsible and nimble in creating privacy standards that keep pace with evolving technologies and their applications.<sup>273</sup> Finally, ICT companies can resist forced compliance of demands from repressive regimes by collectively applying a minimum international human rights standard and requiring adherence by all countries in which they operate.<sup>274</sup> Otherwise, competitors who do not implement privacy protection standards will steal business from complying companies in countries which demand unacceptable access to information.<sup>275</sup> Still, a self-regulatory framework such as this can only

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263. *See id.*

264. *See Who We Are, supra* note 24.

265. Israel, *supra* note 177, at 620.

266. *See, e.g.,* U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS., & LABOR, 2009 HUMAN RIGHTS REPORT: IRAN (2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/nea/136068.htm>; U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS., & LABOR, 2009 HUMAN RIGHTS REPORT: TUNISIA (2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/nea/136081.htm>; U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS., & LABOR, 2009 HUMAN RIGHTS REPORT: UNITED ARAB EMIRATES (2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/nea/136082.htm>.

267. Hope, *supra* note 259, at 7-8.

268. Israel, *supra* note 177, at 620.

269. *See Who We Are, supra* note 24. *See generally* Berman & Mulligan, *supra* note 162, at 554-55.

270. *See generally Who We Are, supra* note 24.

271. *See* DUNSTAN HOPE, BUS. FOR SOC. RESPONSIBILITY, PROTECTING HUMAN RIGHTS IN THE DIGITAL AGE 8 (Feb. 2011) [hereinafter HOPE, DIGITAL RIGHTS], available at [http://www.bsr.org/reports/BSR\\_Protecting\\_Human\\_Rights\\_in\\_the\\_Digital\\_Age.pdf](http://www.bsr.org/reports/BSR_Protecting_Human_Rights_in_the_Digital_Age.pdf).

272. *Id.*

273. *See id.* at 10.

274. *See id.*

275. *See* Hope, *supra* note 259, at 8-9.

succeed if there is uniform adoption by the major players of the ICT industry.<sup>276</sup> RIM, as an industry leader in smartphones,<sup>277</sup> and the first major smartphone company to clash with foreign governments over access to their customers' personal information,<sup>278</sup> has the opportunity—if not the responsibility—to set a precedent of cooperation and coordination for other smartphone companies to follow.<sup>279</sup>

## B. Global Network Initiative

### 1. Created by Necessity

A responsible step RIM should take to guarantee privacy for its customers and encourage privacy in the smartphone industry as a whole is to join the GNI.<sup>280</sup> Founded by leading American ICT juggernauts Google, Microsoft, and Yahoo!, the GNI was established in 2008 because these three companies recognized that a new approach to their international business model was needed after each company was publicly involved in human rights violations in China.<sup>281</sup> Google's incident involved the launch of its Chinese version search engine Google.cn in 2006, which returned incomplete search results on government-deemed sensitive topics such as the Tiananmen Square massacre.<sup>282</sup> Microsoft's controversy revolved around its 2005 removal of outspoken Chinese journalist Zhao Jing's Internet blog, per the Chinese government's request, as well as its decision to censor words like "democracy" and "freedom" from its search engine.<sup>283</sup> For Yahoo!, its defining moment also came in 2005 as a result of Shi Tao's ten-year sentence.<sup>284</sup> Accused of exposing secrets to a pro-democracy website, Shi Tao was convicted after Yahoo! handed over his personal information to the Chinese authorities.<sup>285</sup> Google, Microsoft, and Yahoo! all claimed they were only following the local laws and regulations, but the public, political, and media responses were unsympathetic.<sup>286</sup> At the suggestion of the U.S. Congress, the three ICT companies teamed up with non-governmental organizations (including human rights and press freedom groups), academics, and investors to seek a

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276. See generally *id.* at 12.

277. See Hamblen, *supra* note 42.

278. See *Internet Freedom Risks*, *supra* note 3. See generally Helft & Bajaj, *supra* note 1.

279. See also Hope, *supra* note 259, at 12-14. See generally *Internet Freedom Risks*, *supra* note 3.

280. See generally Hope, *supra* note 259.

281. See *id.* at 7-9.

282. *Id.* at 7; Tom Krazit, *Google to Stop Censoring in China, May Pull Out*, CNET (Jan. 12, 2010, 3:00 PM), [http://news.cnet.com/8301-30684\\_3-10433538-265.html](http://news.cnet.com/8301-30684_3-10433538-265.html).

283. Andrew Donoghue, *Microsoft Censors Chinese Blogger*, CNET (Jan. 4, 2006, 7:33 AM), [http://news.cnet.com/Microsoft-censors-Chinese-blogger/2100-1028\\_3-6017540.html](http://news.cnet.com/Microsoft-censors-Chinese-blogger/2100-1028_3-6017540.html); Hope, *supra* note 259, at 7.

284. Hope, *supra* note 259, at 7.

285. *Id.*

286. *Id.*

solution to Internet repression.<sup>287</sup> The collaborative effort resulted in the formation of the GNI, a coalition of stakeholders determined to ensure that ICT companies “respect and protect the freedom of expression and privacy rights of their users.”<sup>288</sup> By seeking to expand membership with organizations from around the world, the GNI’s goal is to establish its principles on privacy and freedom of expression as a global standard for all ICT companies.<sup>289</sup>

## 2. Structure

The GNI created and relies upon three core documents to describe its objectives and the key commitments of its participants: “Principles on Freedom of Expression and Privacy,” “Implementation Guidelines for the Principles on Freedom of Expression and Privacy,” and “Governance, Accountability & Learning Framework.”<sup>290</sup> The Principles on Freedom of Expression and Privacy (Principles), the first and most relevant of the three documents, describes the GNI’s overarching commitment to advance users’ rights to privacy and freedom of expression through collaboration.<sup>291</sup> Grounded in the previously discussed Universal Declaration of Human Rights and International Covenant on Civil and Political Rights, the Principles establish privacy and freedom of expression as indivisible human rights, which ICT companies must respect.<sup>292</sup> Separate sections for privacy and freedom of expression rights employ similar language, requiring participants to take the necessary steps to protect personal information and avoid or minimize restrictions on communication of ideas and information.<sup>293</sup> Furthermore, when confronted with government demands, laws, and regulations that compromise privacy or freedom of speech, participants must continue to respect and protect these rights if acquiescing would violate international laws and standards.<sup>294</sup> The Principles next address responsible company decision-making, suggesting that proper protection of these rights can be successfully achieved by participants’ integration of the Principles into “company decision making and culture through responsible policies, procedures, and processes.”<sup>295</sup> Turning to the practical aspects critical to achieving the Principles, the document stresses the importance of collaborative, multi-stakeholder problem solving when faced with the global and complex relationship between ICTs and privacy and

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287. Israel, *supra* note 177, at 640; *Who We Are*, *supra* note 24.

288. *Principles*, *supra* note 19, at 1; *Who We Are*, *supra* note 24.

289. *Principles*, *supra* note 19, at 1.

290. *Core Commitments*, GLOBAL NETWORK INITIATIVE, <http://www.globalnetworkinitiative.org/corecommitments/index.php> (last visited Feb. 19, 2011).

291. *Id.*

292. *Principles*, *supra* note 19, at 1; *Core Commitments*, *supra* note 290.

293. *Principles*, *supra* note 19, at 2.

294. *Id.*

295. *Id.* at 3.

freedom of expression violations.<sup>296</sup> Finally, the Principles call for a governance structure that not only supports their purpose, but also ensures long-term success.<sup>297</sup> To achieve this, the Principles rely on a system which utilizes public transparency and independent assessment to hold participants “accountable for their role in the advancement and implementation of these principles.”<sup>298</sup>

The second document, the Implementation Guidelines for the Principles on Freedom of Expression and Privacy (“Guidelines”), provides a more detailed explanation of how participants can put the Principles into action.<sup>299</sup> The thrust of the Guidelines rests on the sections covering responsible corporate decision-making, privacy, and freedom of expression.<sup>300</sup> From a broad decision-making perspective, participating companies’ boards of directors must incorporate the impact of their operations on privacy and freedom of expression when reviewing their businesses.<sup>301</sup> This includes employing human rights impact assessments to identify and mitigate human rights violations, using best efforts to ensure that partners, suppliers, and distributors follow the Principles, and developing internal structures and procedures to promote compliance from all aspects of the business.<sup>302</sup> More specifically, the Guidelines offer procedures for when government demands, laws, and regulations impinge upon privacy and freedom of expression.<sup>303</sup> The procedures encourage governments to be “specific, transparent and consistent”<sup>304</sup> when taking actions that will violate privacy and freedom of expression.<sup>305</sup> This can be done by seeking clarification of overbroad requests, requiring an explanation of the legal basis of requests, and challenging requests in domestic or international courts when they appear to be inconsistent with local or international laws.<sup>306</sup> Transparency must also flow from the participants to their users.<sup>307</sup> Participants should disclose to their users the local laws on restriction and collection as well as their own policies on responding to government demands.<sup>308</sup> While the Guidelines also provide more depth and analysis in other areas that reach beyond the scope of this Comment, the

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296. *Id.*

297. *Id.*

298. *Id.*

299. *Core Commitments*, *supra* note 290; *Implementation Guidelines for the Principles on Freedom of Expression and Privacy*, GLOBAL NETWORK INITIATIVE, [http://www.globalnetworkinitiative.org/cms/uploads/1/GNI\\_-\\_Implementation\\_Guidelines\\_1\\_.pdf](http://www.globalnetworkinitiative.org/cms/uploads/1/GNI_-_Implementation_Guidelines_1_.pdf) (last visited Feb. 19, 2011) [hereinafter *Guidelines*].

300. *Guidelines*, *supra* note 299, at 1-7.

301. *Id.* at 1.

302. *Id.* at 2-4.

303. *Id.* at 4-7.

304. *Id.* at 4, 6.

305. *Id.*

306. *Id.* at 4-6.

307. *Id.* at 5.

308. *Id.* at 5-7.

Guidelines represent a clear, effective, and functional extrapolation of the Principles.

The third and final document of the GNI, the Governance, Accountability, & Learning Framework, establishes the multi-stakeholder organization that will promote the objectives of the GNI.<sup>309</sup> As an administrative body governed by a board of directors and run by a full-time staff, the organization will be charged with, among other duties, recruiting new participants, providing human rights information resources, and creating an accountability system for assessing participants.<sup>310</sup> The Governance, Accountability, & Learning Framework concludes with a three-part plan that details the steps the organization and each participant must achieve to become fully operational in 2012.<sup>311</sup>

### *3. Right for RIM*

Since its founding, the GNI has not added any new ICT company members.<sup>312</sup> In early 2010, U.S. Senator Richard Durbin, Chairman of the Judiciary Subcommittee on Human Rights and the Law, sent letters to RIM and twenty-nine other ICT companies requesting information about their human rights practices in China and urging them to join the GNI.<sup>313</sup> Out of the thirty companies approached, which included industry leaders such as Apple, Cisco, Facebook, Twitter, and IBM,<sup>314</sup> only AT&T, McAfee and Skype committed to merely engage in discussions about joining the GNI.<sup>315</sup> RIM's response, like many others, deflected the request by reiterating the security protections it already had in place.<sup>316</sup>

RIM's refusal to participate in the GNI is perplexing, as the two organizations appear to share similar viewpoints on privacy and would both benefit from RIM's involvement. Joining the GNI makes both strategic and ethical sense for RIM. Strategically, it behooves RIM to involve itself with the

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309. *Governance, Accountability, and Learning Framework*, GLOBAL NETWORK INITIATIVE, [http://www.globalnetworkinitiative.org/cms/uploads/1/GNI\\_-\\_Governance\\_Accountability\\_Learning.pdf](http://www.globalnetworkinitiative.org/cms/uploads/1/GNI_-_Governance_Accountability_Learning.pdf) (last visited Feb. 19, 2011).

310. *Id.*

311. *Id.*

312. *Global Internet Freedom and the Rule of Law, Part II: Hearing Before the Subcomm. on Human Rights and the Law of the Comm. on the Judiciary*, 111th Cong. 35 (2010) [hereinafter *Hearing*] (statement of Rep. Richard Durbin, Chairman, Subcomm. on Human Rights and the Law).

313. *Durbin Sends Letter to Technology Firms Regarding Internet Freedom in China*, U.S. SENATE (Feb. 2, 2010), <http://durbin.senate.gov/public/index.cfm/pressreleases?ID=17305a4c-c7b7-4006-acfe-789ec72007df>.

314. *Id.*

315. *Hearing*, *supra* note 312, at 35.

316. Letter from Robert E. Crow, Vice President, Research in Motion Limited, to Senator Richard Durbin, U.S. Senate (Feb. 19, 2010), available at [http://durbin.senate.gov/public/index.cfm/files/serve?File\\_id=0a54744d-f813-4ceb-83c1-75619e4c2a68](http://durbin.senate.gov/public/index.cfm/files/serve?File_id=0a54744d-f813-4ceb-83c1-75619e4c2a68).

GNI because of RIM's increased dependence on international markets.<sup>317</sup> While sales are steadily growing in Latin America, Europe, India, and Asia, RIM is losing market share in the United States.<sup>318</sup> As a result, the international privacy framework set up by the GNI likely will become more relevant to RIM's business model. Ethically, RIM and the GNI are both committed to privacy.<sup>319</sup> RIM's dedication to privacy is self-evident from its development of the highly encrypted Enterprise software,<sup>320</sup> and resolution refusing to grant, at least publicly, India and the United Arab Emirates access to personal information despite threats of country-wide bans of the use of BlackBerrys in their countries.<sup>321</sup> Similarly, in a statement to its customers following India's demands, RIM dismissed the suggestion that decreased encryption was a viable solution and declared that "this challenge can only be truly overcome if the Information and Communications Technology industry comes together as a whole to work with the Government of India."<sup>322</sup> This proposition does not stray far from the GNI's suggestion in its Principles that "collaboration between the ICT industry . . . and other stakeholders can strengthen efforts to work with governments to advance freedom of expression and privacy globally."<sup>323</sup> Clearly, RIM and the GNI share the general notion that privacy is a fundamental issue which can most effectively be managed through collaboration among ICT companies.

If RIM joined the GNI, it would help further the company's pursuit for user privacy by enhancing the GNI's profile and effectiveness. The GNI provides new avenues of collaboration on privacy issues between ICT companies, human rights groups, academics, and investors during a time of increased policy and regulatory decisions that threaten privacy.<sup>324</sup> Collaboration among ICT and human rights experts through GNI-facilitated avenues creates a reality where ICT companies are much more familiar with human rights, and where human rights organizations better understand the implications of new technology.<sup>325</sup> Shared learning cannot produce results unless there is participation by all sectors of the ICT industry, from telecommunication companies to providers of security software.<sup>326</sup> Only by

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317. See Dignan, *supra* note 45.

318. *Id.*

319. See Principles, *supra* note 19, at 2; BlackBerry Enterprise Server Features, *supra* note 149.

320. BlackBerry Enterprise Server Features, *supra* note 149.

321. Edward Berridge, *RIM Might Have to Walk Away from Corporate India*, THE INQUIRER (Jan. 28, 2011, 11:35), <http://www.theinquirer.net/inquirer/news/1940332/rim-walk-away-corporate-india>; Helft & Bajaj, *supra* note 1.

322. See Press Release, Research In Motion to Indian Government (Aug. 26, 2010), available at [http://us.blackberry.com/ataglance/security/media\\_statement\\_august\\_26\\_2010.jsp](http://us.blackberry.com/ataglance/security/media_statement_august_26_2010.jsp).

323. Principles, *supra* note 19, at 1.

324. Hope, *supra* note 259, at 11.

325. *Id.*

326. *Id.* at 12.

having experts at each stage of the ICT process can the GNI assess human rights risks and provide a workable standard to protect privacy.<sup>327</sup>

RIM's recent altercations with India and the United Arab Emirates should strongly motivate the company to revisit its stance on GNI membership. Since declining to join the GNI in early 2010, these events have received significant media attention and raised public awareness of RIM's current privacy policies.<sup>328</sup> Such attention is reminiscent of what Google, Microsoft, and Yahoo! endured regarding their privacy problems prior to the formation of the GNI.<sup>329</sup> RIM's treatment of demands by India and the United Arab Emirates demonstrates that it has much to gain from GNI participation. For India, in a situation where RIM's fate in the country is still unclear,<sup>330</sup> GNI principles and backing would promote a privacy-friendly outcome by presenting a clear set of standards supported by some of the largest ICT companies in the world.<sup>331</sup> With regards to the United Arab Emirates, the GNI's Implementation Guidelines would have promoted transparency<sup>332</sup> in an otherwise confidential agreement that did not disclose how RIM came within U.A.E. regulations.<sup>333</sup> Promoting Internet privacy is a global dilemma,<sup>334</sup> and as an active member of the GNI, RIM can be part of a global solution.

## VI. CONCLUSION

The Internet has fundamentally transformed our global society.<sup>335</sup> With innovations like the smartphone, people have nearly continual access to the Internet, with its wealth of information and communication networks<sup>336</sup> available every hour of every day. Responding to this powerful new medium, governments across the world are ramping up efforts to monitor these Internet communications.<sup>337</sup> RIM and other ICT companies, which are the portals to this nerve center, are placed in the difficult business and ethical position of deciding whether to grant government demands for personal information or refuse them on the premise that such demands violate international standards of privacy.<sup>338</sup> This

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327. *Id.*

328. *See generally* Helft & Bajaj, *supra* note 1.

329. Hope, *supra* note 259, at 11.

330. *See* Jai Krishna, *Research In Motion: India Assured Firm Won't Be Singled Out for Security Access Needs*, WALL ST. J. (Feb. 18, 2011), <http://online.wsj.com/article/BT-CO-20110218-703438.html>; Helft & Bajaj, *supra* note 1.

331. *Principles*, *supra* note 19.

332. *Id.* at 3.

333. Berridge, *supra* note 321.

334. *Principles*, *supra* note 19, at 1; HOPE, DIGITAL RIGHTS, *supra* note 271, at 4.

335. HOPE, DIGITAL RIGHTS, *supra* note 271, at 4.

336. *Id.*

337. *See* Clinton, *supra* note 171.

338. *Internet Freedom Risks*, *supra* note 3.



Comment's look at the legal and ethical factors RIM must consider is representative of what most ICT companies face today or will face in the near future.

The resolution of complex privacy issues presented by the Internet in a global market cannot, and must not, rest solely on the shoulders of individual ICT companies. The GNI represents a practical framework in which experts on privacy and ICTs converge, forming a brain trust that can understand these issues and implement a set of international standards.<sup>339</sup> In light of RIM's recent struggles with India and the United Arab Emirates, it now has the legal leeway, ethical obligation, and strategic incentive to join the GNI. With its participation, RIM can better protect the privacy of its customers, promote industry-wide smartphone company involvement in the GNI, and contribute to solidifying basic human rights across the entire ICT industry.

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339. *See supra* Part V.B.