



2010

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Recommended Citation

Yutian Ling, *Upholding Free Speech and Privacy Online: A Legal-Based and Market-Based Approach for Internet Companies in China*, 27 SANTA CLARA HIGH TECH. L.J. 175 (2010).

Available at: <http://digitalcommons.law.scu.edu/chtlj/vol27/iss1/5>

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UPHOLDING FREE SPEECH AND PRIVACY ONLINE: A LEGAL-BASED AND MARKET-BASED APPROACH FOR INTERNET COMPANIES IN CHINA

Yutian Ling[†]

Abstract

China is well known for its Internet-monitoring and censorship efforts. As Internet technology and the online culture develop, the Chinese government continues its efforts to control content and communications. It forces both domestic and foreign Internet companies that want to do business in China to censor content and reveal the private information of users upon request. There has been much discussion in the international community on how to prevent non-state actors, such as transnational corporations, from violating human rights. The situation in China is uncommon in that it is government coercion and not simply the will of the corporation that leads to free speech and privacy violations. This paper discusses a two-prong approach to move toward more freedom of expression and privacy rights within China's Internet system. The first prong consists of an international corporate code of conduct, such as the Global Network Initiative, that provides guidelines on how to resist government attempts to violate the rights of users. This code must have a wide range of unified participants and a strong reporting and accountability system. The second prong is a market-based approach that focuses on innovation of technologies to overcome censorship, better consumer relations, and fostering a strong online community. Companies that provide better products and that protect the interest

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and freedom of users will gain market share in China and thus have more influence over industry regulation. Although China has managed to prevent economic freedom from significantly influencing political reform, greater freedom on the Internet will likely lead to incremental changes in civil and political rights. By combining these two prongs, a strong international network of companies backed by an emerging standard of business conduct can protect freedom of speech and privacy while still providing a robust online world for the Chinese people.

1.0 INTRODUCTION

After the death of Mao Zedong, China embarked on a slow march towards economic openness with the outside world. Spurred on by the disastrous results of the Cultural Revolution, Deng Xiaoping introduced four modernizations in 1978 designed to spur economic growth in China: improving economic management, economic cooperation with other countries, adoption of advanced technologies, and improvements in science and education.¹ The result was 30 years of unprecedented growth. GDP increased over 13 times between 1978 and 2006, the per capita income increased dramatically, and over 200 million people were elevated above the poverty line.² Along with increased prosperity came economic freedom: the right to privately invest; the ability to move from place to place, to travel, or to seek employment; and more choices in goods and services.³ In the midst of this economic upheaval, the Chinese government still tightly restricted political and civil rights to maintain single party control.⁴

In 1994, China opened itself up in another way. In that year the first international Internet connection was established in China.⁵ Much of the Western world started using the Internet in the 1980s so China had to play catch-up. And catch up it did. China's adoption of the Internet rapidly increased in the 2000s. By the end of 2009, China had about 384 million Internet users, surpassing the United States

1. Clem Tisdell, *Economic Reform and Openness in China: China's Development Policies in the Last 30 Years*, 39 *ECON. ANALYSIS & POL'Y* 271, 275-76 (2009).

2. *Id.* at 282-83.

3. *Id.* at 283.

4. See, e.g., Mary E. Gallagher, "Reform and Openness" *Why China's Economic Reforms Have Delayed Democracy*, 54 *WORLD POL.* 338 (2002).

5. See, e.g., Martyn Williams, *A Brief History of the Internet in China*, *IDG NEWS SERVICE*, May 17, 2004, http://www.pcworld.idg.com.au/article/128099/china_celebrates_10_years_being_connected_internet/?pp=2&fp=2&fpid=1.

(US) as the country with the most people online.⁶ This rapid growth in Internet usage is attributed to several factors, including China's rapid economic development, a government effort to incorporate technology into the economic and governmental infrastructure, and immense popularity of the technology.⁷ This proliferation of Internet usage did not go unnoticed by the Chinese government. For many years, the Communist Party of China (CPC) controlled and censored political dialogue that it considered a threat to party rule.⁸ Realizing that this new communications medium immensely broadened the reach and power of any speaker, the CPC sought to tame it. The CPC has employed technological, legal, and psychological tools to control online content and discourse.⁹ This vast effort to control the Internet is known as the "Great Firewall of China."¹⁰ Even in the face of continued criticism from much of the international community, China persists in its Internet monitoring efforts.

The Chinese government is not accomplishing all of this by itself. It is also co-opting both domestic and foreign Internet businesses to aid in its censorship efforts.¹¹ The Chinese government requires companies to censor sensitive topics and makes them promise not to disseminate information that spreads superstition or obscenity or jeopardizes state security and social stability.¹² Companies such as Yahoo!, Microsoft, Google, and Skype have all submitted to the CPC's demands in order to do business in China.¹³ The US government was not pleased that US-based companies were kowtowing to Chinese censorship demands, and Congress held

6. CHINA INTERNET NETWORK INFORMATION CENTER, THE 25TH STATISTICAL SURVEY REPORT ON INTERNET DEVELOPMENT IN CHINA 11, (2010), available at <http://www.cnnic.cn/uploadfiles/pdf/2010/3/15/142705.pdf> [hereinafter CINIC].

7. *Id.* at 11-12.

8. See generally Mindy K. Longanecker, *No Room for Dissent: China's Laws Against Disturbing Social Order Undermines Its Commitments to Free Speech and Hamper the Rule of Law*, 18 PAC. RIM L. & POL'Y J. 373 (2009).

9. See Congressional - Executive Commission on China, *Prior Restraints*, <http://www.cecc.gov/pages/virtualAcad/exp/exppriorrestraints.php> (last visited Feb. 5, 2011) [hereinafter CECC, *Prior Restraints*].

10. Miriam D. D'Jaen, *Breaching the Great Firewall of China: Congress Overreaches in Attacking Chinese Internet Censorship*, 31 SEATTLE U. L. REV. 327, 330 (2008).

11. Justine M. Nolan, *The China Dilemma: Internet Censorship and Corporate Responsibility*, 4 ASIAN J. COMP. L. 1, 4 (2009).

12. See e.g., Ben Elgin & Bruce Einhorn, *The Great Firewall of China*, BUSINESS WEEK, Jan. 12, 2006, http://www.businessweek.com/technology/content/jan2006/tc20060112_434051.htm.

13. *Id.*

hearings to interrogate the conduct of those companies.¹⁴ Congress also considered passing the Global Online Freedom Act (GOFA) to regulate US-based Internet companies' conduct abroad.¹⁵ US companies are thus caught in a vice between the demands of the Chinese government and the criticisms of the US government and human rights organizations.

Traditionally, international law dealt with state actors only.¹⁶ All business ventures were seen as extensions of the state.¹⁷ As global commerce has evolved, corporations have become larger, richer, more powerful, and less controlled by the state in which they are based. Such transnational corporations (TNCs) are capable of violating human rights with impunity. How TNCs can be regulated is a conundrum with which the international community continues to struggle. The United Nations (UN) has made several efforts to regulate TNCs, including creating the Global Compact and debating passing norms on the responsibilities of TNCs in regards to human rights.¹⁸ Yet monitoring and enforcement is still a problem.

The case of Chinese Internet censorship is slightly different from other conflicts between TNCs and human rights. While many companies tend to violate labor laws, environmental laws, and other human rights if left to their own devices, Internet companies usually do not censor information on their own accord.¹⁹ This creates an opportunity to enlist Internet companies to help promote freedom of speech and privacy rather than fight them. TNCs have a lot of influence and economic power, which can help spur social and political change. This paper outlines a two-prong approach to

14. See *The Internet in China: A Tool for Freedom or Suppression?* J. Hearing Before the Subcomm. on

Afr. Global Human Rights and International Operations and the Subcomm. on Asia and the Pacific of the Comm. on International Relations, 109th Cong. 109-157 (2006); *Global Internet Freedom: Corporate Responsibility and the Rule of Law: Hearing Before the Subcomm. on Human Rights and the Law*, 110th Cong. J-110-93 (2008), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:45688.pdf.

15. Global Online Freedom Act 2006, H.R. 4780, 109th Cong. (2006) [hereinafter GOFA]; see also Anne Cheung & Rolf H. Weber, *Internet Governance and the Responsibility of Internet Service Providers*, 26 WIS. INT'L L.J. 403, 474-75 (2008).

16. Carlos M. Vasquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 932-933 (2005).

17. *Id.*

18. Surya Deva, *UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?*, 20 ILSA J. INT'L & COMP. L. 493, 494 (2004).

19. Cheung & Weber, *supra* note 15, at 407-08.

protecting free speech and privacy of users which envisions Internet companies as allies instead of enemies to be controlled. The first prong is a legal-based approach consisting of an international code of conduct that outlines the best practices that a company should follow to prevent censorship and violation of user privacy. The second prong is a market-based approach that emphasizes improving customer service, implementing products that innovate around censorship, and fostering a strong online community and culture. Building a strong economic and social presence in China can help push the CPC to make incremental political and civil reforms.

Part 2 of the paper gives a brief history of the Internet in China and the methods that the CPC uses to monitor it. Part 3 of the paper outlines the international human rights standards for freedom of speech and protection of privacy, both traditionally and on the Internet. The conflict between US Internet companies operating in China and Congress will also be discussed. Part 4 of the paper details the two-prong approach described above for enlisting the help of Internet companies to protect the rights of users online. Part 5 of the paper concludes by noting some challenges in moving towards a free Internet and what should be done to achieve that goal.

2.0 BACKGROUND

2.1 A Brief History of the Internet in China

The precursor to the Internet was first used in 1969 by the US government as a means for scientific researchers and the military to communicate and collaborate with each other.²⁰ During the 1970s and 1980s, the system went from being a closed one to an open one that spread across the world.²¹ Beginning in the early 1990s, the Internet became an everyday tool for people to communicate, share, and engage in commerce.²² Although China developed and used digital communications systems in the 1980s, it did not officially connect to the global Internet until 1994 through the China Science and Technology Network.²³ Initially, only about 23,000 people, mostly government officials and academics, were able to access the

20. William J. Cannici, Jr., *The Global Online Freedom Act: A Critique of its Objectives, Methods, and Ultimate Effectiveness Combating American Businesses that Facilitate Internet Censorship in the People's Republic of China*, 32 SETON HALL LEGIS. J. 123, 127 (2007).

21. *Id.*

22. *Id.* at 127-28.

23. See Ronald J. Deibert, *Dark Guests and Great Firewalls: The Internet and Chinese Security Policy*, 58 J. SOC. ISSUES 143, 146 (2002).

Internet.²⁴ Since then, with strong government promotion of the Internet's commercial uses, the number of Chinese users has exploded. The Chinese have developed a very robust Internet culture complete with blogs, bulletin boards, game networks, and rapidly spreading Internet memes. The demographics of the Chinese Internet community skew towards the young (61.5% of users are under 30 years old), urban (72.2% of users lived in cities), and are mostly white collar workers (46.3% of all users) or students (33.2% of all users).²⁵

2.2 China's Great Firewall

This rapid growth of the Internet in China did not catch the CPC by surprise. From the very beginning, the government realized that the Internet could be used to spread anti-government messages and other topics disfavored by the CPC. The government intended to retain as much control as possible over the content and activities of domestic users.²⁶ In 1995, China was already employing filtering technology to block certain websites including those affiliated with the Economist, CNN, the New York Times, human rights groups, dissidents, pro-democracy groups, and the Falun Gong.²⁷ All Internet users were required to submit a lengthy application in which personal information was disclosed and the applicant pledged not to use the Internet in a way contrary to party demands.²⁸ The CPC utilized three main methods to monitor the use of the Internet: (1) legal and regulatory methods, (2) technological methods, and (3) social/psychological methods.

2.2.1 Legal and Regulatory Methods

Theoretically, the Chinese Constitution protects the rights of freedom of speech and privacy. Article 33 of the Chinese Constitution, which outlines state citizenship, was amended in 2004 to include a statement that the "State respects and preserves human rights."²⁹ Article 35 states that Chinese citizens "enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration."³⁰ Article 40 protects the privacy of correspondence

24. *Id.*

25. CINIC, *supra* note 6, at 20-25.

26. Deibert, *supra* note 23, at 147.

27. *Id.*

28. *Id.* at 148.

29. XIAN FA [Constitution] art. 33, § 4 (1982) (P.R.C.), available at <http://www.usconstitution.net/china.html>.

30. *Id.* at art. 35.

of citizens, stating that “[n]o organization or individual may, on any ground, infringe on citizens’ freedom of privacy of correspondence, except in cases where to meet the needs of state security or of criminal investigation, public security or procuratorial organs are permitted to censor correspondence in accordance with procedures prescribed by law.”³¹

In reality, there are a litany of government agencies that cooperate to oversee Internet publications and other online activities. The General Administration of Press and Publication is responsible for licensing all printed or electronic news publication entities and for screening all publication content.³² The State Administration of Radio, Film, and Television plays a similar role for the mediums of radio, television, satellite, and Internet broadcasts.³³ The Ministry for Information Industry regulates telecommunications and software, including the power of licensing and registration of all Internet information services.³⁴ The State Council Information Office also regulates the content of Internet news publications, its goal being to “promote Chinese media to publicize China to the world, including China’s policies, stands, economic development, history and culture.”³⁵ The Central Propaganda Department is CPC’s propaganda wing and is responsible for ensuring that all publication and broadcast content is consistent with the Communist Party’s ideology.³⁶ The actual filtering and monitoring of the Internet is accomplished by the Ministry of Public Security.³⁷ Lastly, the State Secrecy Bureau enforces China’s ambiguous state secrets laws and prosecutes Chinese citizens that disseminate state secrets without permission.³⁸

These agencies enforce China’s laws and promulgate their own regulations to deal with Internet content. The agencies control both who is able to post content on the Internet (via licensing and application requirements) and what content is posted. One of the most powerful prior restraints on free speech is the licensing or registration

31. *Id* at art. 40.

32. Congressional - Executive Commission on China, Agencies Responsible for Censorship in China, <http://www.cecc.gov/pages/virtualAcad/exp/expcensors.php> (last visited Feb. 5, 2011).

33. *Id*.

34. *Id*.

35. *Id*.

36. *Id*.

37. *Id*.

38. CECC, Prior Restraints, *supra* note 9.

scheme. By pre-approving who gets to speak and who does not, governments can engage in content or viewpoint speech discrimination. In China, anyone who provides information to the public through the Internet, publishes works online, posts news articles, distributes audio-visual materials, or operates an Internet bulletin board, message forum, or chat room must first receive a permit from the appropriate government agency.³⁹ Furthermore, any content that someone wants to publish is required to be pre-approved by the government or acquired from government-authorized sources.⁴⁰

In addition to pre-approval procedures, the Chinese government can also require domestic Internet content providers to monitor and remove content and can block content from providers that it cannot directly regulate. Under domestic regulations, Internet services that host publications or bulletin boards must retain records for information posted to their sites, when posted, and the IP address or city name of the posting source for a sixty day period.⁴¹ The government places the burden on Internet information services to monitor the content of posts, to delete illegal information, and to maintain records of their monitoring efforts and submit them to state authorities.⁴² Internet access providers and Internet cafes must maintain records of a customer's identification or account number, IP address, personal information, personal photograph, and online activity for a sixty day period.⁴³ These records must be made available to the police, who use them for monitoring purposes.⁴⁴ There are estimated to be over 30,000 Internet police that monitor the content of online traffic and websites for offensive or illegal content.⁴⁵ Local officials also use police and hired commentators to pose as ordinary citizens and flood Internet chat rooms and blogs with pro-government comments.⁴⁶ The government has even created pop-up cartoon characters, police officers Jing and Cha, which appear on

39. *Id.*

40. *Id.*

41. Congressional - Executive Commission on China, Blocking, Filtering, and Monitoring, <http://www.cecc.gov/pages/virtualAcad/exp/expjamming.php> (last visited Feb. 5, 2011).

42. *Id.*

43. *Id.*

44. *Id.*

45. John Markoff, *Surveillance of Skype Messages Found in China*, N.Y. TIMES, Oct. 2, 2008, <http://www.nytimes.com/2008/10/02/technology/internet/02skype.html>.

46. Michael Wines et al., *China's Censors Tackle and Trip Over the Internet*, N.Y. TIMES, Apr. 7, 2010, <http://www.nytimes.com/2010/04/08/world/asia/08censor.html>.

websites and warn viewers to avoid unapproved websites and to not participate in unapproved conversations.⁴⁷

The national security and state secrets laws in China also chill free speech. Information classified as pertaining to state secrets or national security cannot be disclosed without prior government approval.⁴⁸ However, the laws that classify what information falls under those categories are so vague as to encompass potentially anything.⁴⁹ For example, Article 14 of the Regulations on the Protection of Secrets in News Publishing states that anyone who wants to provide a foreign news service with a report or publication that relates to “the nation’s government, economy, diplomacy, technology or military” must first receive approval from the appropriate state personnel.⁵⁰ This restriction is so open-ended that it ultimately acts as a ban on communication with foreign press. The Chinese courts are usually no help to those prosecuted for breaking the national-security or state-secrets laws. Chinese courts receive funding from local governments and are accountable to both local and national government authorities, compromising their independence.⁵¹ The courts tend to simply restate the law without detailing how the defendant violated the law, do not engage in Constitutional interpretation, defer to the state, and do not inquire as to whether the defendant is actually a threat to national security.⁵² In many cases, like those against human rights activists Shi Tao and Huang Qi, Chinese courts simply assess guilt based on whether a publication’s contents are an affront to the CPC’s political ideology.⁵³ Taken

47. Richard Spencer, *Beijing Police Pop Up to Warn Internet Users*, U.K. TELEGRAPH, Aug. 30, 2007, <http://www.telegraph.co.uk/news/worldnews/1561740/Beijing-police-pop-up-to-warn-internet-users.html>.

48. Congressional - Executive Commission on China, *Silencing Critics by Exploiting National Security and State Secrets Laws*, <http://www.cecc.gov/pages/virtualAcad/exp/expsecurity.php> (last visited Feb. 5, 2011) [hereinafter CECC, *State Secrets*].

49. *Id.*

50. *Id.*

51. RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* 298-316 (2002); see also Clive Ansley, *The Chinese “Judicial System”: A Fairy Tale of Beijing*, 112 THE VERDICT 58 (2007), available at http://www.organharvestinvestigation.net/events/verdict112_mar07.pdf.

52. CECC, *State Secrets*, *supra* note 48.

53. *Id.* (Huang Qi was arrested and jailed twice for violating national security and state secrets laws. In the first case, the evidence presented against him included printed materials and electronic postings on his website that were pro-democracy or critical of the CPC. The court simply accepted that evidence without explaining why or how Huang Qi was a national security threat.); See *Criminal Verdict of Shi Tao*, Changsha Intermediate People’s Court of Hunan Province, Case No. 19-10 (2005), translated in <http://www.globalvoicesonline.org/wp->

together, China's agencies, statutes, regulations, and courts provide a nebulous system designed to ensure that only government-approved content gets published.

2.2.2 Technological Methods

To support its laws, China has implemented a sophisticated technological backbone to control the Internet. In contrast to most other countries, most Internet service providers (ISPs) in China can only access the global web through one of four state-controlled corporations.⁵⁴ This bottleneck provides the opportunity for the government to monitor all incoming and outgoing Internet traffic. US companies such as Sun Microsystems and Cisco Systems have contracted with the Chinese government to provide them with the technology used to build the Great Firewall.⁵⁵ The simplest censorship strategy is IP address blocking. Any websites that the government does not want Chinese users to access are placed on a constantly evolving blacklist and are blocked.⁵⁶ A more advanced method is domain name resolution hijacking wherein the government intercepts the request to view a certain website and redirects the user somewhere else.⁵⁷ The government also intercepts information packets (or transmission control protocol segments) sent through electronic communications and scans the packets for certain keywords.⁵⁸ If the communication is flagged due to content, it can be cut off. Lastly, the Chinese government has long been suspected of engaging in sophisticated hacking and cyber-espionage activities.⁵⁹

One recent attempt by the Chinese government to expand its monitoring system was the "Green Dam Youth Escort" software. The government-controlled web filtering software was intended to block

content/ShiTao_verdict.pdf (In the case of Shi Tao, the court assumed that the contents of the "top secret" government document he passed to a foreign journalist was a state secret without mentioning or analyzing the contents of the document).

54. Deibert, *supra* note 23, at 147.

55. *Id.* at 148.

56. GLOBAL INTERNET FREEDOM CONSORTIUM, DEFEAT INTERNET CENSORSHIP: OVERVIEW OF ADVANCED TECHNOLOGIES AND PRODUCTS (2007), available at http://www.internetfreedom.org/archive/Defeat_Internet_Censorship_White_Paper.pdf [hereinafter GIFC].

57. *Id.*

58. *Id.*

59. See BRYAN KREKEL, CAPABILITY OF THE PEOPLE'S REPUBLIC OF CHINA TO CONDUCT CYBER WARFARE AND COMPUTER NETWORK EXPLOITATION (Northrup Grumman Report, Oct. 9, 2009), available at http://www.uscc.gov/researchpapers/2009/NorthrupGrumman_PRC_Cyber_Paper_FINAL_Approved%20Report_16Oct2009.pdf.

or filter pornographic content so that children could not access it, according to government spokesmen.⁶⁰ Originally it was required to be installed on all computers sold in China, whether made domestically or in a foreign country.⁶¹ The software was instantly criticized by Chinese Internet surfers, the US government, and human rights groups because it could be used to censor political and other sensitive topics.⁶² The Green Dam software contained three times as many politically sensitive keywords as pornographic keywords, which supports the accusations.⁶³ Businesses and trade groups also came out against the software, citing censorship concerns and the short timeframe in which the government required the software installation to be implemented.⁶⁴ The government, responding to the criticisms, delayed the release of the software and then eventually made installation optional for personal computers.⁶⁵ The software was still required to be installed in schools and Internet cafes.⁶⁶

2.2.3 Social and Psychological Methods

The Chinese government's complex system of legal and technological controls for the Internet also has a psychological impact on those living under the system. China's laws regarding freedom of expression are vague and ambiguous, leaving much to the discretion and interpretation of Chinese authorities.⁶⁷ Since it is difficult to determine exactly what type of speech crosses the line, people tend to over-censor themselves to stay on the safe side.⁶⁸ This tendency to self-censor is reinforced by the high-profile arrests of public figures such as journalists.⁶⁹ In fact, a majority of Chinese people are comfortable with some form of Internet control by the government in certain areas. A survey conducted in 2007 by the Chinese Academy of Social Services (CASS) shows that over 80% of respondents thought

60. Jaime FlorCruz & A. Diaz, *China Delays Green Dam Internet Filter*, CNN.COM, July 1, 2009, <http://www.cnn.com/2009/TECH/07/01/china.filtering.software/index.html>.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Lance Whitney, *WSJ: China Not Requiring Green Dam Software*, CNET NEWS, Aug. 13, 2009, http://news.cnet.com/8301-1009_3-10308955-83.html.

66. *Id.*

67. CECC, *Prior Restraints*, *supra* note 9.

68. *Id.*

69. *Id.*; See also Grace Thompson, *An Analysis of Censorship of the Internet in China* 9 (unpublished manuscript, on file with the author).

that the Internet should be managed or controlled.⁷⁰ On the question of who should play the most important role in Internet control, most respondents indicated the government, with Internet companies and parents as the next most important.⁷¹ Regarding what subject matter should be controlled, about 85% of respondents identified pornography and violence.⁷² A sizable minority of respondents also stated that politics (about 45%) and online chatting (about 30%) should be controlled.⁷³ Interestingly, the percentage of respondents who think that political content and online chatting should be controlled has gone dramatically up since a previous survey done in 2005.⁷⁴ The survey also asked about the impact of the Internet on politics. Most respondents (75.1%) agreed that the Internet helps people understand politics, and the majority of people (59%) thought that the Internet would help public officials respect and care about people's input.⁷⁵ Only 47.9% of respondents, however, believed that people would have "more say about what the government does," and only 30.3% believed that the Internet gives people "more political power."⁷⁶ This expectation that the Internet will strengthen the political power of regular citizens has decreased over time, from 62.7% in 2003.⁷⁷ Although these survey results cannot be considered completely representative of Chinese citizens, they show that Chinese attitudes about the Internet and government control are not the same as Western attitudes.

The trend of self-censorship extends beyond individuals and encompasses companies as well. The Internet Society of China (ISC) is a quasi-government organization created to "promote healthy development of [the] Internet in China" by self-regulating, creating good reputations for companies, protecting the legal benefits of its

70. GUO LIANG, CHINESE ACADEMY OF SOCIAL SERVICES, SURVEYING INTERNET USAGE AND ITS IMPACT IN SEVEN CHINESE CITIES 12 (2007), available at <http://www.policyarchive.org/handle/10207/bitstreams/16013.pdf> [hereinafter CASS]. The survey was conducted by telephone interviewing of Internet users and non-users in seven Chinese cities. *Id.* at 5-7. CASS receives some administrative support from the former China State Information Office. *Id.* at 3. How these aspects of the survey may influence the respondents' answers is unknown.

71. *Id.* at 15.

72. *Id.* at 13.

73. *Id.*

74. *Id.* at 14 (The percentage of respondents who think political content should be controlled rose from 7.6% in 2005 to 41.3% in 2007. The percentage of respondents who think online chatting should be controlled rose from 8.2% to 28.2%).

75. *Id.* at 86.

76. LIANG, *supra* note 70, at 86.

77. *Id.* at 87.

members, and playing a role in policy and regulation creation.⁷⁸ Although membership in the ISC is voluntary, the organization's connection to the Chinese government (via the Ministry of Information Industry) places considerable pressure for Internet companies to join.⁷⁹ The ISC has many large Chinese companies as members, including search engines (e.g., Baidu, Sohu), media outlets (e.g., People's Daily, Xinhua, and CCTV), and telecommunications companies (e.g., China Telecom, China Mobile).⁸⁰ The membership list also includes several foreign companies such as Cisco Systems, Microsoft, Yahoo! (via its majority ownership of Alibaba), and Siemens.⁸¹ Companies that join the ISC must agree to the organization's public pledge, which includes the promise to refrain from "producing, posting or disseminating pernicious information that may jeopardize state security and disrupt social stability, contravene laws and regulations and spread superstition and obscenity."⁸² The pledge also states that members should monitor information publicized by users and remove harmful information promptly.⁸³ Yahoo! and Microsoft were criticized by human rights groups for signing the pledge and censoring their services.⁸⁴

3.0 LEGAL RIGHTS OF INTERNET USERS

The myriad of tactics that China uses to monitor the Internet has garnered much criticism from human rights groups and democratic countries throughout the world⁸⁵ In this next section, the international

78. Internet Society of China, Internet Society of China, http://www.isc.org.cn/isc_eIntroduction/index.htm (last visited Feb. 5, 2011).

79. See Nellie L. Viner, *The Global Online Freedom Act: Can U.S. Internet Companies Scale the Great Chinese Firewall at the Gates of the Chinese Century?*, 93 IOWA L. REV. 361, 374-75 (2007).

80. Internet Society of China, ISC Members, http://www.isc.org.cn/isc_e/member.php (last visited Feb. 5, 2011).

81. *Id.*

82. Internet Society of China, Public Pledge of Self-Regulation and Professional Ethics for China Internet Industry, <http://www.isc.org.cn/20020417/ca102762.htm> (last visited Feb. 5, 2011) [hereinafter Public Pledge].

83. *Id.*

84. See, e.g., Amnesty International USA, Censorship in China, <http://www.amnestyusa.org/business-and-human-rights/internet-censorship/implicated-companies/page.do?id=1101584> (last visited Feb. 5, 2011).

85. See, e.g., Human Rights in China, "China's Internet": *Staking Digital Ground*, CRF 2010, NO. 2, <http://www.hrichina.org/public/contents/category?cid=175033> (last visited Feb. 5, 2011); Peter Ford, *Clinton Bluntly Condemns China on Internet Censorship*, CHRISTIAN SCIENCE MONITOR, Jan. 21, 2010, <http://www.csmonitor.com/World/Asia-Pacific/2010/0121/Clinton-bluntly-condemns-China-on-Internet-censorship>.

law and US domestic law regarding free speech and privacy online will be discussed.

3.1 *International Law and the Internet*

The Universal Declaration of Human Rights (UDHR), adopted in 1948 by the newly formed UN General Assembly, provides the basis for most international human rights norms. Article 12 of the UDHR outlines the right of privacy, stating that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence”⁸⁶ The right of free speech is found in Article 19, which states that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁸⁷ The drafters of the UDHR predicted the advent of new forms of communication and wished to protect them as well.

Protection for the rights of free speech and privacy are repeated in the International Covenant on Civil and Political Rights (ICCPR), a covenant adopted by the UN General Assembly on Dec. 16, 1966, which came into force Mar. 23, 1976.⁸⁸ Article 17 of the ICCPR protects the right of privacy, and has almost the same wording as Article 12 of the UDHR.⁸⁹ Article 19 of the ICCPR protects free speech, stating that everyone “shall have the right to hold opinions without interference.”⁹⁰ It expands on this right, providing that the right to free expression includes 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.”⁹¹ The ICCPR includes an exception to the right of free expression in Article 19(3), stating that the exercise of the right carries special duties and responsibilities and may be subject to certain legal restrictions that are necessary to protect the rights or reputations of others, or to protect national security, public order, morals, or public health.⁹² China has signed but has not ratified the

86. Universal Declaration of Human Rights, G.A. Res. 217A, at 58, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

87. *Id.* at art. 19.

88. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, 21 U.N. Doc. A/6316 at 49 (Dec. 16, 1966).

89. *Id.* at art. 17.

90. *Id.* at art. 19.

91. *Id.*

92. *Id.*; see also Nolan, *supra* note 11, at 9 (stating that international law and

ICCPR, which means it is not yet bound by the terms but should be making an effort to ratify it.⁹³ In its 2009-10 Human Rights Action Plan, China offered some general promises to improve freedom of expression and Internet freedom, but only in accordance with domestic law.⁹⁴

China has signed and ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR).⁹⁵ The rights of free speech and privacy are not explicitly protected by the ICESCR. Deprivation of either of these rights, however, can be detrimental to some rights that are included in the ICESCR, like the right to join trade unions (Article 8), the right to education (Article 13), the right to take part of cultural life (Article 15.1(a)), and the right to enjoy the benefits of scientific progress and its applications (Article 15.1(b)).⁹⁶ These three international instruments form the foundational legal base for enforcing free speech and privacy rights throughout the world.

The UN covenants were created decades before the Internet became a common communications medium, yet the same underlying principles carry over into the online world. Governments should not be able to interfere with online communications any more than they can radio and television broadcasts, written documents, or live speeches. In 2005, the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Cooperation in Europe, and the Organization of American States issued a joint declaration concerning rights and freedoms on the Internet.⁹⁷ They clearly recognized that international law regarding freedom of

jurisprudence has established a three-part test for this exception: it must be provided by law, be required to safeguard one of the legitimate interests in Article 19(3), and be necessary to achieve the goal).

93. United Nations Treaty Collection, International Covenant on Civil and Political Rights: Status, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&lang=en (last visited Feb. 5, 2011).

94. INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, NATIONAL HUMAN RIGHTS ACTION PLAN OF CHINA (2009-2010) (April 13, 2009), available at http://www.china.org.cn/archive/2009-04/13/content_17595407.htm.

95. United Nations Treaty Collection, International Covenant on Economic, Social and Cultural Rights: Declarations and Reservations, http://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtmsg_no=IV-3&src=TREATY (last visited Feb. 5, 2011).

96. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 at 49 (Dec. 16, 1966).

97. UN SPECIAL RAPPORTEUR ON FREEDOM OF OPINION AND EXPRESSION ET AL., INTERNATIONAL MECHANISMS FOR PROMOTING FREEDOM OF EXPRESSION (Dec. 21, 2005), available at <https://www.cidh.oas.org/relatoria/showarticle.asp?artID=650&IID=1> (joint declaration between the UN Rapporteur, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression).

expression applies to the Internet and that any government restriction of the Internet must strictly conform to international freedoms and guarantees.⁹⁸ One of the declarations made is that persons desiring to operate an ISP, website, blog, or other information service should not be required to register or obtain permission from a public body.⁹⁹ Also, any regulation of the Internet should be done by bodies “which are protected against government, political and commercial influence”¹⁰⁰ The declaration considered access to the Internet a right and placed an obligation on states to provide adequate resources for universal access.¹⁰¹ The declaration makes clear that any government or commercial filtering that is not end-user controlled is a form of prior restraint and cannot be justified.¹⁰² Liability for Internet content cannot be imposed if the person did not author or adopt the content, unless they refused to obey a court order to remove the content.¹⁰³ Lastly, the declaration urges corporations to respect the online rights of their clients even when dealing with restrictive states, encouraging corporations to “work together, with the support of other stakeholders, to resist official attempts to control or restrict use of the Internet”¹⁰⁴

3.2 Regulation of Free Speech and the Internet in the US and Europe

Western democracies generally follow international law regarding free speech and privacy but there can still be significant differences between jurisdictions. Europeans are particularly sensitive about hate speech and exclude it from free speech protections.¹⁰⁵ For example, in France the hate speech laws go as far as prohibiting the sale or exhibition of Nazi paraphernalia.¹⁰⁶ In Germany, it is unlawful for ISPs to host pornographic, violent, or neo-Nazi content.¹⁰⁷ In a recent Italian case, four Google executives were convicted of

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. International Mechanisms, *supra* note 97 (this does not prohibit governments from shutting down websites with content that is not protected by free speech rights. It only prevents governments from blanket filtering of content without user consent.).

103. *Id.*

104. *Id.*

105. Amy O. Nyberg, *Is All Speech Local? Balancing Conflicting Free Speech Principles on the Internet*, 92 GEO. L.J. 663, 665 (2004).

106. *Id.* at 665-66.

107. *Id.* at 667.

violation of privacy for its delay in deleting a user-posted video of an autistic boy being bullied.¹⁰⁸ For Western European states, the benefits of unfettered speech do not outweigh the possibility of racism, xenophobia, and incitement to violence that can result from unrestricted speech.¹⁰⁹ Contrast this with the US position on free speech, which does protect hate speech, as long as it does not rise to the level of obscenity, imminent incitement of violence, “fighting words,” or defamation.¹¹⁰ Banning hate speech that does not fall under an exception would be tantamount to viewpoint discrimination and would violate the U.S. Constitution.¹¹¹ Thus US law protects a large swath of hateful speech that would be punished if uttered in Europe.

The US, through the Bill of Rights, has very expansive legal protections for freedom of expression. The US relies mainly on self-regulation by the publisher or content provider, coupled with legislative regulation on some specific topics.¹¹² The Communication Decency Act (CDA) of 1996 gave ISPs a safe harbor from civil liability for any online content that the ISP only stored or disseminated, even if the ISP was aware of the content or if it had paid for the content.¹¹³ In addition, a Good Samaritan rule was enacted which shielded ISPs from liability if they voluntarily monitor data for illegal or harmful content.¹¹⁴ Although ISPs are largely responsible for content regulation, government regulation trumps self-regulation in a few instances. ISPs have the affirmative duties of notifying government authorities and removing content if it involves child pornography, terrorism, and protection of copyrighted materials.¹¹⁵

Aside from treaties and participation in international organizations, there are few US domestic tools available for extraterritorial regulation of the Internet. One law that has attempted extraterritorial regulation is the Alien Torts Claims Act (ATCA),

108. Rachel Donadio, *Larger Threat Is Seen in Google Case*, N.Y. TIMES, Feb. 24, 2010, <http://www.nytimes.com/2010/02/25/technology/companies/25google.html>.

109. See Nyberg, *supra* note 105, at 665.

110. *Id.* at 673.

111. Christopher D. Van Blarcum, *Internet Hate Speech: The European Framework and the Emerging American Haven*, 62 WASH. & LEE L. REV. 781, 816 (2005).

112. See B. Frydman et al., *Public Strategies for Internet Co-Regulation in the United States* (Oct. 12, 2008), available at <http://ssrn.com/abstract=1282826>.

113. 47 U.S.C. § 230(c) (1996).

114. *Id.*

115. Frydman, *supra* note 112, at 4.

which provides a private cause of action to aliens for torts committed in violation of the law of nations or a treaty of the US.¹¹⁶ Recently the Supreme Court narrowed the scope of the ATCA to cover only acts which violate specific, universal, and obligatory standards in customary international law.¹¹⁷ That did not stop plaintiffs from suing under the ATCA for Internet-related torts. Wang Xiaoning, a Chinese dissident, was convicted by the Chinese authorities of subversion after Yahoo! gave the authorities Wang's account information.¹¹⁸ Wang's wife sued Yahoo! under the ATCA and the Torture Victim Protection Act, alleging that Yahoo!'s actions led to violations of US-signed treaties, Congressional statutes, international and domestic court decisions, and specific, universal, and obligatory standards of customary international law.¹¹⁹ Under pressure by Congress, Yahoo! settled the lawsuit.¹²⁰ Since the merits of the claims were never reached, it is unknown how a court would have ruled on Yahoo!'s liability under the ATCA.¹²¹

3.3 US Internet Companies Entangled in China

Since the Internet is regulated differently in different countries, difficulties arise when US Internet companies start to do business abroad. In the case of China, companies that want to provide Internet services in that country must subject themselves to the laws and regulations of the Chinese authorities. Many of these regulations are contrary to the US's more liberal approach to Internet regulation and, to a lesser extent, that of Western Europe.¹²² So these Internet

116. 28 U.S.C. § 1350 (1948).

117. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (stating that an example of a specific, universal, and obligatory standard is piracy).

118. Wang Xiaoning et al. v. Yahoo! Inc. et al., No. C07-02151 CW (N.D. Cal., July 30, 2007) (second amended complaint), available at http://www.humanrightsusa.org/index2.php?option=com_docman&task=doc_view&gid=68&Itemid=80.

119. *Id.* at 3.

120. Elinor Mills, *Yahoo Settles Lawsuit with Jailed Chinese Journalists*, CNET NEWS, Nov. 13, 2007, http://news.cnet.com/8301-10784_3-9815950-7.html.

121. For a discussion of the merits of the claims, see Mara D. Bryne, *When in Rome: Aiding and Abetting in Wang Xiaoning v. Yahoo*, 34 BROOK. J. INT'L L. 151 (2008); DeNae Thomas, *Xiaoning v. Yahoo Inc's Invocation of the Alien Tort Statute: An Important Issue but an Improper Vehicle*, 11 VAND. J. ENT. & TECH. L. 211 (2008); 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, 628-36 (2009).

122. See Paul Przybylski, *A Common Tool for Individual Solutions: Why Countries Should Establish an International Organization to Regulate Internet Content*, 9 VAND. J. ENT. & TECH. L. 927, 934-40 (2007).

companies are caught between the proverbial rock and a hard place of trying to appease the Chinese government on one side and Western governments and human rights groups on the other side.

The quintessential examples of companies caught in this vise are the US software giants Google, Microsoft, Yahoo! and, on the hardware side, Cisco Systems. Google, Microsoft, and Yahoo! All censor the results of their Chinese-language search engines to different degrees by removing politically sensitive content from the search results.¹²³ In addition, Microsoft has been accused of censoring content on the blog service it provides.¹²⁴ Yahoo! was widely criticized for giving the Chinese government the e-mail account information of Shi Tao, a Chinese journalist.¹²⁵ Shi Tao was then arrested and jailed for violating state secrets law, all for passing along information from the Central Propaganda Department regarding reporting on the anniversary of Tiananmen Square.¹²⁶ Cisco Systems has been accused of supplying the Chinese government with hardware, some of which has been used to build the Great Firewall.¹²⁷ These four companies have been criticized by human rights groups for bowing to Chinese government pressure to censor and, in 2006, executives from these companies faced interrogation from a US Congressional Subcommittee on their actions.¹²⁸ In their defense, the companies asserted that they must comply with local laws wherever they operate, that access to censored information is better than no access at all, that their presence will aid economic development followed by political change, and that censorship occurs regardless of whether they are involved.¹²⁹

The US Congress responded to these violations of free speech and privacy by proposing the Global Online Freedom Act (GOFA) of 2006, a bill designed to regulate the behavior of US Internet companies extraterritorially. This bill never passed into law, probably because it touched upon sensitive matters of foreign policy. Section

123. See generally NART VILLENEUVE, SEARCH MONITOR PROJECT: TOWARD A MEASURE OF TRANSPARENCY (2008), available at <http://www.nartv.org/mirror/searchmonitor.pdf> (Citizen Lab Occasional Paper #1).

124. AMNESTY INTERNATIONAL, UNDERMINING FREEDOM OF EXPRESSION IN CHINA 20 (2006), available at <http://www.amnesty.org/en/library/asset/POL30/026/2006/en/1ce1ac2d-d41b-11dd-8743-d305bea2b2c7/pol300262006en.pdf> [hereinafter Amnesty FOE].

125. *Id.* at 18.

126. Nolan, *supra* note 11, at 7.

127. Anne Broache, *Senators weigh new laws over China online censorship*, CNET NEWS, May 20, 2008, http://news.cnet.com/8301-10784_3-9948331-7.html.

128. Nolan, *supra* note 1231, at 1.

129. Amnesty FOE, *supra* note 124, at 23-26.

201 of the proposed GOFA required that any US Internet company operating in a designated “Internet-restricting country” may not locate any of their data hardware in that country.¹³⁰ GOFA would have forbidden companies from filtering search engine results and required companies to disclose to the US government requests by foreign governments to filter information.¹³¹ In addition, GOFA prevented companies from filtering US-based or US-supported content and required them to provide the US government with a copy of all content that foreign countries request to be removed from the Internet.¹³² Lastly, GOFA provided for hefty civil and criminal penalties for violations of the Act.¹³³ The four companies at the heart of the controversy preferred that no legislation be passed and some human rights groups agreed, expressing their preference for a voluntary code of conduct.¹³⁴ There were also concerns that GOFA could be politically abused, potentially turning US companies into spies against foreign governments, and acting as a culturally imperialistic piece of legislation that the US would try to impose on the world.¹³⁵

On Jan. 12, 2010, in the latest tussle between China and Western Internet companies, Google publicly announced that it would stop cooperating with Chinese Internet censors and consider removing its entire operation from China.¹³⁶ Google alleged that it, along with some other Western technology companies, was the victim of a sophisticated cyber-attack on its computer systems.¹³⁷ This cyber-attack apparently included intrusions into the Gmail accounts of several human rights activists involved with China.¹³⁸ Although there

130. GOFA, *supra* note 15.

131. *Id.*

132. *Id.*

133. *Id.*

134. Surya Deva, *Corporate Complicity in Internet Censorship in China: Who Cares for the Global Compact or the Global Online Freedom Act?*, 39 GEO. WASH. INT’L L. REV. 255, 314 (2007) [hereinafter Deva, *Complicity*].

135. See *id.* at 315-17; see generally Lindsay Eastwood, “Don’t Be Evil”: Google Faces the Chinese Internet Market and the Global Online Freedom Act of 2007, 9 MINN. J. L. SCI. & TECH. 287 (2008); Jennifer Shyu, Comment, *Speak No Evil: Circumventing Chinese Censorship*, 45 SAN DIEGO L. REV. 211, 231-32 (2008).

136. Andrew Jacobs et al., *Google, Citing Attack, Threatens to Exit China*, N.Y. TIMES, Jan. 13, 2010, <http://www.nytimes.com/2010/01/13/world/asia/13beijing.html>.

137. *Id.*

138. Edward Wong, *Hackers Said to Breach Gmail Accounts in China*, N.Y. TIMES, Jan. 19, 2010, <http://www.nytimes.com/2010/01/19/technology/companies/19google.html> (in some accounts, the settings were changed so that all messages would be forwarded to unfamiliar addresses).

is no conclusive evidence that the Chinese government is behind the attack, experts have examined the malware and strongly suspect it is of Chinese origin.¹³⁹ Sergey Brin, one of Google's founders and a Russian refugee, had always been unsettled by Google's move into China in 2006, and ultimately the cyber-attacks pushed the rest of Google's executives to his side.¹⁴⁰ The US government soon entered the debate, with Secretary of State Hillary Clinton delivering a pointed speech defending Internet freedom, going so far as to name China and stating: "Countries or individuals that engage in cyber-attacks should face consequences and international condemnation."¹⁴¹ China fired back, accusing the US of turning a commercial dispute into political grandstanding and urging the US to "stop using the so-called Internet freedom question to level baseless accusations."¹⁴² Other technology companies were not very supportive of Google's position. Yahoo!, also a victim of the cyber-attacks, publicly supported Google's decision, only to be criticized by its Chinese partner, Alibaba, for making reckless statements.¹⁴³ Bill Gates, whose company Microsoft was not a victim, stated that China's "efforts to censor the Internet have been very limited" and regarded Google's actions as overblown.¹⁴⁴ Gates reiterated that companies in China must obey Chinese law.¹⁴⁵ After over two months of fruitless negotiations, Google decided to shut down Google.cn and redirect users to its Hong Kong search engine.¹⁴⁶ Although Google hopes to retain its other business units in China, it is uncertain whether the Chinese government and Chinese companies will shun Google based on this move.¹⁴⁷

139. John Markoff, *Evidence Found for Chinese Attack on Google*, N.Y. TIMES, Jan. 20, 2010, <http://www.nytimes.com/2010/01/20/technology/20cyber.html>.

140. See Jessica E. Vascellaro, *A Heated Debate at the Top*, WALL ST. J., Jan. 14, 2010, <http://online.wsj.com/article/SB10001424052748704675104575001281662251848.html>.

141. Hillary Rodham Clinton, Sec'y of State, U.S. Dep't of State, Remarks on Internet Freedom at the Newseum (Jan. 23, 2010), available at <http://www.state.gov/secretary/rm/2010/01/135519.htm>.

142. Mark Landler & Edward Wong, *China Rebuffs Clinton on Internet Warning*, N.Y. TIMES, Jan. 23, 2010, <http://www.nytimes.com/2010/01/23/world/asia/23china.html>.

143. Adam Hartley, *Yahoo stayed quiet about Chinese cyber-attacks*, TECHRADAR.COM, Jan. 16, 2010, <http://www.techradar.com/news/internet/yahoo-stayed-quiet-about-chinese-cyber-attacks-664102>.

144. Sky Canaves, *China Ratchets Up Web Privacy Fight*, WALL ST. J., Jan. 28, 2010, <http://online.wsj.com/article/SB10001424052748703410004575028931978304078.html>.

145. *Id.*

146. Miguel Helft & Michael Wines, *Google Faces Fallout as China Reacts to Site Shift*, N.Y. TIMES, Mar. 23, 2010, <http://www.nytimes.com/2010/03/24/technology/24google.html>.

147. *Id.*

The Senate Subcommittee on Human Rights and the Law was also involved in these issues, holding a hearing about Internet freedom on March 2, 2010.¹⁴⁸ Over thirty technology companies were invited to speak including Facebook, Twitter, Hewlett-Packard, and Apple, but only Google attended.¹⁴⁹ The hearing dealt with Google's decision to withdraw their search engine from China and efforts by the executive branch to aid Internet freedom, as well as the Global Network Initiative (GNI), a corporate code of conduct that governs Internet freedom.¹⁵⁰ The senators in attendance expressed frustration that more companies were not taking the problem of Internet restriction seriously.¹⁵¹ Although they said that the GNI held much promise, the senators were concerned that it did not have many participants.¹⁵² Representatives from the State and Commerce Departments outlined how the executive administration was dealing with these issues, from funding anti-censorship technologies to considering export controls on certain technologies capable of censorship.¹⁵³ Google's general counsel acknowledged that they were in a tight bind in China but reiterated that they were doing the best they could under the circumstances and that they believed the GNI could still be an effective tool to promote Internet freedom.¹⁵⁴

4.0 A TWO-PRONGED APPROACH FOR US INTERNET COMPANIES IN CHINA

Simple domestic legislation will probably not solve the conundrum that US Internet companies face in China. GOFA would have forced companies like Google to either violate the law or exit China altogether. This all-or-nothing approach to promoting Internet freedom is unlikely to work and will result in less products and services being offered to the Chinese public. China is a huge market, and saddling US companies with restrictive legislation will diminish their competitiveness with foreign companies. Rather than applying a top-down approach that clamps down on Internet companies, China

148. *Global Internet Freedom and the Rule of Law, Part II: Hearing Before the Subcomm. on Human Rights and the Law of the S. Judiciary Comm.*, 111th Cong. (2010), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4437> [hereinafter Senate Hearing].

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. Senate Hearing, *supra* note 148.

should consider utilizing a bottom-up approach that relies on the voluntary efforts of companies and civil society, which is more likely to succeed. A two-prong approach, with one prong relying on the soft law of a corporate code of conduct and the other prong relying on market forces, may be more effective at freeing the Internet in China.

4.1 The Legal Prong—An International Corporate Code of Conduct

Corporations were traditionally viewed as money-making enterprises with a sole duty to increase value to the shareholders of the company. Corporate social responsibility began to take root at the beginning of the twentieth century.¹⁵⁵ As the size of corporations increased, so did their power. The government tried to control this power through antitrust law.¹⁵⁶ Wealthy businessmen began to believe that they were responsible for those less fortunate and also for society in general, not just their shareholders.¹⁵⁷ This philosophy slowly developed throughout the twentieth century, aided by non-governmental organization (NGO) watchdogs that monitored the activities of corporations.

One of the results of the corporate social responsibility movement was the development of the corporate code of conduct (CCC). A CCC is a voluntary code that can be set up by an individual company, a group of companies, or a mixture of companies, NGOs, and government bodies.¹⁵⁸ The goal of CCCs is to dictate desired behavior in certain business situations, ranging from internal matters like management, human resources, and whistle-blowing to external matters like environmental impact, consumer protection, and human rights. A CCC is not legally binding but rather acts as a set of guidelines to which companies aspire. The codes may also include monitoring or enforcement procedures to ensure that participants adhere to the standards of the code. The benefits of having a code of conduct include fostering a positive public image and preventing negative publicity or liability, and also to set a level playing field for CCCs that span an entire industry.¹⁵⁹

Codes for TNCs are especially useful for harmonizing

155. Ans Kolk et al., *International codes of conduct and corporate social responsibility: can transnational corporations regulate themselves?*, 8 *TRANSNAT'L CORP. J.* 143, 148 (1999).

156. *Id.*

157. *Id.*

158. Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 *COLUM. J. TRANSNAT'L L.* 389, 392 (2005).

159. *Id.* at 402.

worldwide standards. Since the Internet is a global technology, an effective international CCC that requires the cooperation of companies worldwide would be most effective in protecting the rights of Internet users.¹⁶⁰ Jurisdictional and political problems will arise if each state tries to enforce domestic Internet legislation extraterritorially. For example, the Chinese may see GOFA as an indirect attack on their policies rather than simply another piece of US legislation. An international CCC that regulates free speech and privacy would also influence domestic Chinese companies. Even if all foreign companies ceased censoring information, domestic Chinese companies like Baidu would continue to censor because the Chinese government demands it. If an industry-wide standard is adopted, however, it would put pressure on Chinese Internet companies to comply with the standard or risk being shunned by the industry. Having a CCC also creates more accountability between companies and users.

One major advantage of a CCC is that it is soft law and therefore can be modified with relative ease. This is especially important when dealing with the Internet industry since the technology is still quite new and always developing in unexpected ways. Legislation is more cumbersome and cannot adequately keep up with technology. The flexibility of a CCC can also make it easier for companies to join because the standards of the CCC can evolve and strengthen over time from a baseline standard rather than starting as a high initial hurdle. Despite all the advantages of a CCC, it still may not effect real change if participants do not take the CCC seriously and there is no monitoring or enforcement system. The next few sections explore various international voluntary regulatory codes that have already been developed as well as their strengths and weaknesses and also discuss how a CCC relating to the Internet should be structured for maximum impact.

4.1.1 Business Standards Developed by the UN

In 2000, the UN launched the Global Compact (GC), which is described as a “voluntary, international learning network that links companies with” UN agencies and labor and civil organizations.¹⁶¹ The goal of the GC is to create an equitable and sustainable economy

160. See D’Jaen, *supra* note 10, at 347-51.

161. Johanna Brinkmann-Braun & Ingo Pies, *The Global Compact's Contribution to Global Governance Revisited* 1-2 (Martin-Luther-Universität Halle-Wittenberg, Discussion Paper No. 2007-10, 2007), available at <http://ssrn.com/abstract=1001425>.

by establishing a shared set of principles.¹⁶² The GC is not a regulation or code of conduct but rather a set of ten universal principles that companies strive to achieve.¹⁶³ Of these ten principles, two are devoted to human rights: (1) businesses “should support and respect the protection of internationally proclaimed human rights” and (2) businesses should “make sure that they are not complicit in human rights abuses.”¹⁶⁴ There are four principles relating to labor standards, three to the environment, and one to anti-corruption.¹⁶⁵ Currently over 7,700 corporations from over 130 countries have signed on to the GC.¹⁶⁶ A company that wants to participate in the GC must incorporate the GC principles into its strategy and organizational culture, and must submit an annual report detailing its progress.¹⁶⁷ Companies that repeatedly fail to submit reports are considered inactive and are locked out of the GC framework.¹⁶⁸ In addition to corporations, the GC allows labor organizations, civil society organizations, and academic institutes to participate in the network.¹⁶⁹

The uniqueness of the GC stems from its role as a learning forum. The GC is supposed to facilitate discourse and education regarding the ethical responsibilities of business. It does not purport to regulate business nor does it have any meaningful enforcement system to ensure that businesses are following the GC principles. While the promotion of ideal business practices is a noble effort, the GC suffers from several major problems. First, the lack of enforcement or monitoring leads to companies signing up for the GC as a public relations boost without having to institute any real change within the company. Second, the lack of enforcement also means that a high number of companies do not submit reports or case studies, leading to a lack of quality and quantity of information within the learning network.¹⁷⁰ Third, when the GC organizes dialogues, conferences, or panels, there is often a lack of follow-up and delivery

162. *Id.*

163. *Id.*

164. UN Global Compact, The Ten Principles, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

165. *Id.*

166. UN Global Compact, Overview of the UN Global Compact, <http://www.unglobalcompact.org/AboutTheGC/> (Microsoft and Cisco are members, but Yahoo! and Google are not); Deva, *Complicity*, *supra* note 134, at 306.

167. Brinkmann-Braun, *supra* note 161, at 3.

168. *Id.* at 8.

169. *Id.* at 4-5.

170. *See id.* at 8.

of promised goals as to render much of the effort wasted.¹⁷¹ Lastly, GC principles suffer from vagueness, which confuses companies that try to comply and provides cover for companies that have no intention of complying.¹⁷²

In conjunction with the GC, the UN has tried to develop a more detailed standard for businesses and human rights. The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (NRTC) began as a series of working group meetings by a UN sub-committee to investigate the interaction between businesses and human rights standards.¹⁷³ What resulted was a draft set of voluntary norms covering a wide set of rights including equal opportunity treatment, non-discrimination, right of security, rights of workers, national sovereignty, consumer protection, and environmental protection.¹⁷⁴ While the NRTC emphasized that states still have primary responsibility to protect human rights, it placed a lot of affirmative responsibilities on corporations to improve the social situation of people they affect.¹⁷⁵ The NRTC referenced or included rights found in the ICCPR, ICESCR, and many other international treaties and covenants.¹⁷⁶ The NRTC also required businesses to adopt the standards internally, to incorporate the NRTC into contracts with other business enterprises, produce progress reports, and be subject to monitoring by the UN or other international or national organizations, and provide reparation to those harmed by the failure to comply with the NRTC.¹⁷⁷ Therefore, despite the fact that the NRTC was intended as a voluntary international CCC, it resembled compulsory regulation. In fact, many NGOs had hoped that the NRTC would become customary international law over time.¹⁷⁸

171. *See id.*

172. Deva, *Complicity*, *supra* note 134, at 295-98.

173. *See* Larry Cata Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 328-32 (2006).

174. The Sub-Comm. on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, ¶ 2-14, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 13, 2003), available at <http://www1.umn.edu/humanrts/links/norms-Aug2003.html>.

175. *Id.* at ¶ 1.

176. *Id.*

177. *Id.* at ¶ 15-18.

178. SARAH ANDERSON, INTERNATIONAL REGULATION OF TRANSNATIONAL CORPORATIONS 7 (2005), available at http://www.policyinnovations.org/ideas/policy_library/data/01311/_res/id=sa_File1/.

The NRTC did not garner much attention during its development, but when it was unveiled in 2004 for public discussion, business groups and many state governments were not satisfied with it.¹⁷⁹ Businesses highlighted the benefits of voluntary CCCs and argued that any compulsory regulation would only unduly burden businesses.¹⁸⁰ States were wary because the NRTC effectively disempowered them from regulating corporations and instead placed that power on corporations themselves, and on the UN or other NGOs.¹⁸¹ The NRTC was also criticized on grounds that one set of norms would not be adequate to regulate all industries worldwide, the provisions were too vague, it cannot be properly enforced, and some of the norms were outside the traditional definition of human rights.¹⁸² In the end, the NRTC was never adopted rendering the future of the NRTC and other similar proposals unclear.

The discussion of the GC and the NRTC highlights the difficulties associated with global regulation of businesses with regard to human rights. These difficulties stem from three main problems: (1) the allocation of responsibility for the regulation of non-state actors in international law, (2) the lack of effective means to monitor and enforce regulations, and (3) the vagueness that comes with trying to regulate all businesses with a single set of human rights directives. A voluntary CCC avoids the first problem because it is not a law per se and thus is free from the constraints of international law doctrine. The key to an effective CCC lies in how well it handles the second problem. As for the third problem, perhaps a CCC tailored to specific industries would be more effective than a broad one. The next section discusses in detail one such CCC tailored for the information and communications industry.

4.1.2 The Global Network Initiative

The Global Network Initiative was a result of the grilling that Microsoft, Yahoo!, and Google received in front of Congress for their activities in China. They acknowledged that they could do more to protect user rights, and in October 2008 they jointly unveiled the GNI

179. See David Kinley & Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 HUM. RTS. L. REV. 447, 448-449 (2006).

180. *Id.* at 449.

181. Backer, *supra* note 173, at 358-60.

182. For example, the consumer protection obligations in the NRTC (e.g. no deceptive advertising) are not generally considered part of human rights law. Kinley, *supra* note 179, at 464-78.

after two years of negotiations.¹⁸³ The GNI is a voluntary international CCC that is intended to be a “systematic approach for companies, NGOs, investors, academics, and others to work together in resisting efforts by governments that seek to enlist companies in acts of censorship and surveillance that violate international standards.”¹⁸⁴ The GNI consists of three components: the core Principles, the more specific Implementation Guidelines, and the Governance, Accountability, and Learning Framework.¹⁸⁵

The Principles are based on the UDHR, the ICCPR, and the ICESCR.¹⁸⁶ At the centerpiece of the Principles is the protection of the rights of free speech and privacy for Internet users. Participants must respect and protect those rights and avoid or minimize any government efforts to unduly restrict those rights.¹⁸⁷ Top officials within the companies must be informed about decisions that affect free speech or privacy, and participants must incorporate the Principles into their decision-making process.¹⁸⁸

The Implementation Guidelines give some more detail about how to uphold the Principles and provides a way of measuring compliance. A company’s board is specifically given some responsibilities, from receiving and evaluating regular reports on the implementation of the Principles to incorporating the protection of free speech and privacy into their risk management system.¹⁸⁹ The company as a whole must develop a human rights team to oversee the implementation of the GNI and review government demands, set up a remediation process to correct business practices inconsistent with the GNI, provide awareness training for employees, and provide whistleblowing mechanisms for employees to report violations.¹⁹⁰ The Implementation Guidelines also require the creation of human rights impact assessments when entering new markets, deploying new

183. Ryan Singel, *Google Fights China; Will Yahoo and Microsoft Follow?*, WIRED.COM, Jan. 14, 2010, <http://www.wired.com/epicenter/2010/01/yahoo-microsoft-china/>.

184. Global Network Initiative Frequently Asked Questions, <http://www.globalnetworkinitiative.org/faq/index.php> (last visited Feb. 5, 2011).

185. *Id.*

186. Global Network Initiative Principles, <http://www.globalnetworkinitiative.org/principles/index.php> (last visited Feb. 5, 2011).

187. *Id.*

188. *Id.*

189. Global Network Initiative Implementation Guidelines for the Principles on Freedom of Expression and Privacy, <http://www.globalnetworkinitiative.org/implementationguidelines/index.php> (last visited Feb. 5, 2011) [hereinafter Implementation Guidelines].

190. *Id.*

technologies, dealing with business partners, or responding to government demands for user data or content restrictions.¹⁹¹ Participants dealing with partners, suppliers, and distributors that can have a material impact on free speech and privacy must incorporate the Principles into their business contracts and must use “best efforts” to make sure those partners respect the Principles.¹⁹²

When faced with a government request to censor information or attain user data, the Implementation Guidelines require participants to ensure that governments follow established domestic legal processes (by requesting a clear written communication providing the legal basis for the request) and narrowly interpret those processes to minimize any negative impact.¹⁹³ When the government demand seems overbroad, is not required by domestic law, or is inconsistent with international law, the participants must seek clarification or modification from officials.¹⁹⁴ If the demand would still be inconsistent with domestic or international law, participants have the discretion to challenge the government in domestic courts or seek the assistance of relevant government authorities, international human rights bodies, or NGOs.¹⁹⁵ The guidelines also require participants to clearly disclose to users the domestic laws that are applicable, the company’s procedures for handling government demands, notice and reason for acts of censorship, and the type of personal information that is stored and could be disclosed.¹⁹⁶ Participants must not enter or must withdraw from any voluntary agreement to limit the rights of users in a manner inconsistent with the Principles.¹⁹⁷ Lastly, participants must engage in dialogue with governments, other companies, NGOs, industry associations, academic institutes, and other interested organizations with an aim to promote and improve the GNI.¹⁹⁸

191. *Id.*

192. *Id.* (“best efforts” are defined as a good faith action to undertake reasonable steps to achieve the best result in the circumstances and carry the process to its logical conclusion).

193. *Id.*

194. *Id.*

195. The guidelines add a caveat, stating that “it is neither practical nor desirable for participating companies to challenge in all cases. Rather, participating companies may select cases based on a range of criteria such as the potential beneficial impact on freedom of expression, the likelihood of success, the severity of the case, cost, the representativeness of the case and whether the case is part of a larger trend.” Implementation Guidelines, *supra* note 189.

196. *Id.*

197. *Id.* (this provision seemingly targets the Internet Society of China pledge, *see* Public Pledge, *supra* note 82).

198. *Id.*

The GNI will be governed by a board of directors with equal representation from company and non-company participants, and each participant must help fund the GNI.¹⁹⁹ Some of the responsibilities of the GNI administration are to produce annual progress reports, recruit new participants, provide human rights resources, develop an accountability system, and provide a channel for grievances and concerns.²⁰⁰ The accountability system is broken into three phases where the first phase is focused on recruiting participants and then setting up a reliable independent assessment system.²⁰¹ According to the GNI's first Anniversary Newsletter, some of the accomplishments in its first year include developing a human rights impact assessment tool, organizing forums and sharing approaches to protecting rights, responding to current events (such as speaking out against the Green Dam software), and conducting outreach events to potential participants.²⁰² After a year and a half, the GNI has finally selected an executive director and a board of directors.²⁰³

The GNI is currently two years old and there are only twenty-three participants.²⁰⁴ Of those participants, the only Internet technology companies are Google, Microsoft, and Yahoo!, the three companies that co-founded the GNI.²⁰⁵ The rest of the participants are a mixture of academic institutes, socially responsible investing groups, and NGOs.²⁰⁶ Companies like AT&T, McAfee, and Skype have been in negotiations with the GNI, but none have joined.²⁰⁷ Some of the objections raised by non-member companies are that the annual fees (ranging from \$2,000 to \$60,000, depending on annual revenue) and administrative requirements are too burdensome, the GNI principles are not relevant to their specific businesses, and they

199. Global Network Initiative, Governance, Accountability & Learning Framework, <http://www.globalnetworkinitiative.org/governanceframework/index.php> (last visited Feb. 5, 2011).

200. *Id.*

201. *Id.*

202. Global Network Initiative Anniversary Newsletter, <http://www.globalnetworkinitiative.org/newsletter/index.php> (last visited Feb. 5, 2011).

203. Global Network Initiative, Global Network Initiative Announces New Executive Director (Mar. 9, 2010), http://www.globalnetworkinitiative.org/cms/uploads/1/GNI_Executive_Director_Announcement_3.09.10.pdf.

204. Global Network Initiative Participants, <http://www.globalnetworkinitiative.org/participants/index.php> (last visited Feb. 5, 2011).

205. *Id.*

206. *Id.* (the UN Special Representative to the Secretary-General on Business & Human Rights is listed as an observer).

207. Senate Hearing, *supra* note 148.

do not want to be the first movers in their market.²⁰⁸ The skittishness of these companies is a major problem for the GNI. While the GNI must do more to make it easier for potential member companies to integrate with the network, the onus is ultimately on the potential member companies to be brave enough to join and make the hard decisions that the GNI requires.

While some commentators have been optimistic about the potential of the GNI, others have already pointed out concerns about its effectiveness.²⁰⁹ Since the GNI was born out of public criticism of the founding Internet companies, there is a concern that the GNI's mandate is only quelling the criticisms and not working on a more holistic approach.²¹⁰ Indeed, many of the companies invited to speak at the Senate Subcommittee refused on the grounds that the GNI was inapplicable to their businesses.²¹¹ The two years that it took to create the GNI indicate that there was substantial disagreement between the participants, which resulted in some ambiguity in the final provisions.²¹² The GNI provisions were built to give participants a lot of discretion because each company has a slightly different business model, but this may allow participants to continually back down from conflicts.²¹³ Although Microsoft, Google, and Yahoo! are three of the most influential Internet companies in the world, the GNI will not gain much traction if it cannot get any more participants from the industry, especially companies based outside the US. Lastly, there is a lack of unity even among the present participants, as seen from the reactions of Yahoo! and Microsoft to Google's withdrawal from China. The fact that these three companies are competitors undermines the effort of GNI participants in supporting each other. If the current participants cannot present a united front, adding more members will only fracture the GNI even more.

4.1.3 Making a Successful CCC for Internet Companies in China

The criticisms of the GNI demonstrate some of the general weaknesses of CCCs. First, since CCCs are, by definition, voluntary, a company can simply choose not to participate. The CCC can also be

208. *See Id.*

209. For a more optimistic view, *see* Israel, *supra* note 121, at 651-55.

210. Nolan, *supra* note 92, at 26.

211. Senate Hearing, *supra* note 148.

212. Nolan, *supra* note 92, at 27; *see also* Derek E. Bambauer, *Cybersieves*, 59 DUKE L.J. 377, 415-17 (2009).

213. Nolan, *supra* note 92, at 27; Bambauer, *supra* note 212, at 416-17.

written in such a vague or ambiguous way as to provide no real guidance on behavior, thereby leaving it up to the interpretation of each participant. Such criticisms plagued the GC, NRTC, and GNI.²¹⁴ Since CCCs are not legally binding, the disciplinary measures for non-compliance are limited. In a similar manner, monitoring compliance with the code is difficult unless a robust administrative system is set up. If the codes are created solely by the entities that the code is intended to regulate, there is an inherent conflict of interest that may compromise the integrity and effectiveness of the code. In contrast, a multi-stakeholder approach that involves NGOs usually strengthens the terms of the CCC and provides stronger enforcement mechanisms.²¹⁵ Voluntary codes may also hinder corporations that abide by them compared to corporations that do not. Socially responsible behavior may not correlate positively with profits, and therefore companies that follow a CCC may be at a competitive disadvantage against companies that are not socially responsible.²¹⁶

Building a successful enforcement mechanism for a CCC is very important to its effectiveness. Without a stick to accompany the proverbial carrot, the CCC becomes a shield against accusations rather than an actual tool for improvement. Some scholars argue that an effective enforcement system can only come from outside of the corporations being regulated under the code.²¹⁷ For example, NGOs or international organizations can provide third party monitoring and enforcement, or even some sort of international business court system could be created.²¹⁸ Some have proposed that national governments can aid in overseeing and encouraging the development of CCCs.²¹⁹ Introducing the government into the scheme, however, runs the risk of politicizing the CCC. The system for monitoring and enforcement that the GNI envisions involves a group of independent non-government assessors, thus avoiding the politicization problem.²²⁰

Others have suggested that the UN can provide mandatory

214. Deva, *Complicity*, *supra* note 134, at 295; Kinley, *supra* note 179; Nolan, *supra* note 11, at 27.

215. See Kolk et al., *supra* note 155, at 174.

216. See Erin Elizabeth Macek, *Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights*, 11 MINN. J. GLOBAL TRADE 101, 113-118 (2002).

217. Mahmood Monshipouri et al., *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, 25 HUM. RTS. Q. 965, 983 (2003).

218. See *id.* at 985-86.

219. See, e.g., Murphy, *supra* note 158.

220. Global Network Initiative Participants, *supra* note 204.

comprehensive regulation.²²¹ Although this would allow for uniformity and a level playing field, as seen from the discussion of the GC and the NRTC, it is difficult for one regulatory body to govern all corporate activity from the top down. The GNI and other CCCs are different in that they utilize bottom-up regulation being generated by the companies themselves. The companies are more familiar with the human rights issues they face on a day to day basis, and a bottom-up CCC is easier to modify than top-down regulation. This gives companies the flexibility to adjust to new technologies and changes in political or social environments around the world. One of the main weaknesses of the NRTC was that its progress was frozen in debate among all the various interested parties—corporations, social interest groups, developed states, developing states. Each had differing opinions about the composition of the NRTC. Simply by cutting out states and international organizations from any major role in the formation of the code, much of the infighting is removed from the process. While having a voluntary code means that companies can choose not to participate in the code, the flexibility of a CCC allows provisions of the code to be negotiated to bring more participants into the fold.

While CCCs are not international law, some hope that over time a code can harden into customary international law.²²² This may be an attractive end game for human rights groups that want to promote CCCs, but difficulties arise in reaching that goal. There are two traditional requirements for a law or regulation to become customary international law: state practice and *opinio juris*.²²³ Both requirements focus on state action. States must have a uniform widespread practice of following the law and consider the law obligatory.²²⁴ A CCC acts on corporations, not states. Even if an entire industry considers a code obligatory, customary international law would not form unless states also agreed.²²⁵ A significant number of states would have to adopt the CCC's principles as the rule of law. Also problematic is the persistent objector doctrine which allows states to become exempt from customary international laws if they continually object to the law

221. See Macek, *supra* note 216, at 118-24.

222. See, e.g., Backer, *supra* note 173, at 367.

223. Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 641 (2000).

224. *Id.*

225. See Stephan Hobe, *The Era of Globalisation as a Challenge to International Law*, 40 DUQ. L. REV. 655, 662 (2002). The traditional view of customary international law as focusing only on state actors has increasingly been questioned. *Id.*

while it is still in its formation.²²⁶ If China persistently objects to increased free speech and privacy rights on the Internet, even if all other states believe such rights have become customary international law, China will be exempt from it. Despite these difficulties, there are examples that CCCs have formed into hard law or been incorporated into customary international law, such as the hardening of international securities regulations.²²⁷ Thus while the hardening of CCCs into hard law is something to be hoped for, it should not be relied upon as the ultimate goal of CCCs.

The GNI is a promising start in building a robust CCC for the Internet industry, but there are several concerns that it must address. First and foremost, the GNI needs more Internet communications companies as participants. While Microsoft, Yahoo!, and Google collectively hold dominant market share and any actions they take would have significant impact, there is a danger that without wider industry support, the GNI will simply become a tool of those three giants. To become a truly international CCC, participants must range from start-ups to established companies, and there must be participation from non-US companies. Secondly, the GNI must demonstrate a reliable monitoring system as soon as possible. Their independent assessment program should evaluate the three founding companies immediately. The results of the assessments will show if the GNI can adequately critique the practices of the companies rather than gloss over any human rights violations that they are engaged in. The assessments must also provide concrete metrics for improvement. The guidelines and principles must be expanded on and clarified to cover more situations like functionality of products and due diligence. Lastly, the GNI participants must present a united front against China, or else China will easily manipulate the participants, who are also business competitors, against each other.

4.2 The Market Prong—Building User Support

The development of a CCC to protect online rights is only half the battle in protecting free speech and privacy. Companies do not have all the power when it comes to the Internet. An advantageous quality about the Internet is that it gives a lot of power to the users—knowledge, the ability to talk and collaborate, and the ability to

226. Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT'L L. & POL'Y 147, 149 (1996).

227. See, e.g., Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 BROOK. J. INT'L L. 883, 884 (2009); *id.* at 938-39.

manipulate the technology for their own uses. The power of Internet users can be harnessed to push companies and governments not to interfere with their individual rights. Corporate shaming and collective consumer choice is also a powerful tool that forces companies to listen to their costumers and society in general. This section deals with market-based actions that Internet companies can make to reinforce and strengthen the effect of a CCC.

4.2.1 Chinese Opinions of the Internet

The use of the Internet in China has risen dramatically since it was first introduced. Now the Internet and other electronic communications mediums in general have become an integral part of life for many Chinese.²²⁸ Chinese users are increasingly using the Internet as a major source of news and information.²²⁹ It is also a major social-networking tool, with hundreds of millions of people using instant messaging, social-networking sites, and blogs.²³⁰ There has been a rapid increase in the number of Chinese people shopping, trading stock, and engaging in other commercial activities online.²³¹

The CASS survey discussed in Section 2.2.3 revealed that many Chinese users actually preferred that the Internet be managed or controlled and that the government was the most preferred entity to implement the regulation.²³² Overall the Chinese do not believe much online content is reliable and most often trust information found on government websites.²³³ Chinese users most worry about the impact of the Internet on children, especially from pornography, Internet addiction, and the formation of bad friendships.²³⁴ Curiously, a sizable number of Chinese also want online political content to be controlled.²³⁵ One theory to explain why the Chinese prefer tight control of the Internet is that they are under the constant media barrage of stories regarding the negative social effects of the Internet.²³⁶ Stories involving online vigilantism, tabloid journalism,

228. See generally CINIC, *supra* note 6.

229. *Id.* at 38-39.

230. *Id.* at 40-43.

231. *Id.* at 45-48.

232. LIANG, *supra* note 70, at 15.

233. DEBORAH FALLOWS, PEW INTERNET & AMERICAN LIFE PROJECT, MOST CHINESE SAY THEY APPROVE OF GOVERNMENT INTERNET CONTROL (2008), available at http://www.markle.org/sites/default/files/pip_china_internet_2008_0.pdf.

234. *Id.*

235. LIANG, *supra* note 70, at 13.

236. FALLOWS, *supra* note 233.

vicious gossip, and Internet addiction have made people wary, and so the Chinese seek some sort of control over it.²³⁷ Given China's historical and cultural context, the government is the most natural and trusted source of control.²³⁸ At the same time, Internet use is rapidly growing, especially among the young. This leads to an interesting clash of values: the desire for state control versus the desire for increased freedom to explore and express opinions.

It may not make the most sense for foreign governments, corporations, and human rights groups to argue that the Chinese government should have little or no control over Internet content. This argument does not resonate with the majority of Chinese users and has the taint of cultural imperialism. They clearly see the government as a sort of safety net that has a role in protecting citizens from harmful content.²³⁹ Most of the content that Chinese users are wary of involves moral decay e.g. pornography, violence, malicious gossip, and addiction.²⁴⁰ Social and political issues are seen as less potentially damaging to society.²⁴¹ In fact, the Internet has been used by the Chinese to promote social causes and to protest political actions.²⁴² The government is aware of this bifurcation of issues and tries to sell its censorship projects as targeting moral decay while underhandedly targeting social and political material as well. This is exactly what the CPC did with the Green Dam project, alleging that it was intended to block pornography while in reality the software contained many political filters.²⁴³ Internet companies can use a similar tactic but for the opposite purpose. They can build trust with Chinese users by complying with more stringent government regulations for pornography or other material considered morally damaging. At the same time, they should stand up for users' rights in cases where the government tries to clamp down on political or social content. By doing so, companies will censor what Chinese people want censored but will protect the free speech and privacy rights of

237. *See id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *See id.*

242. *See, e.g.,* Jonathan Watts, *Chinese Government Critic Calls for One-Day Internet Protest*, GUARDIAN.CO.UK, June 23, 2009, <http://www.guardian.co.uk/world/2009/jun/23/china-internet-protest-censorship-ai-weiwei>; Malcolm Moore, *Chinese internet vigilantes bring down another official*, TELEGRAPH.CO.UK, Dec. 30, 2008, <http://www.telegraph.co.uk/news/worldnews/asia/china/4026624/Chinese-internet-vigilantes-bring-down-another-official.html>.

243. FlorCruz, *supra* note 60.

users on issues in which they do not want government control. Although ideally the rights of free speech and privacy should be protected regardless of the content of the information, some give and take in the social context of China may be necessary to gain user support and placate the government to some extent.

4.2.2 Improved Services and Innovation

Companies always strive to win more customers, build brand loyalty, and increase market share. The Internet search market is no different. In the US, Google, Yahoo!, and Microsoft account for approximately 93% of all Internet searches as of October 2009.²⁴⁴ In China, however, the US companies are still underdogs. As of September 2008, Chinese search engine Baidu had a 60.9% market share while Sogou, another Chinese search engine, held a 3.1% share.²⁴⁵ Meanwhile Google held a 27% market share in China, and Yahoo! held a 2.4% share.²⁴⁶ Other US Internet companies have not had much luck in China either. eBay misread the Chinese market and was outmaneuvered in China by Chinese company Taobao, which did not charge for listings and had a chat function that allowed buyers and sellers to build up trust before completing transactions.²⁴⁷ MySpace could not oust deeply enrooted domestic social networking sites like Tencent that had much more functionality, including instant messaging software, virtual currency, and games.²⁴⁸ Facebook and Twitter gained followers in China but kept getting blocked by Chinese censors, unlike domestic sites which built cozy relationships with regulators.²⁴⁹ US Internet companies are clearly still having difficulty penetrating an insular Chinese market.

Interestingly enough, when Chinese users were asked to evaluate the quality of the Baidu search engine versus Google's engine, Google was considered superior to Baidu in all categories including search result relevancy, ranking fairness, safety and security,

244. comScore, *comScore Releases October 2009 U.S. Search Engine Rankings*, COMSCORE.COM Nov. 17, 2009, http://www.comscore.com/Press_Events/Press_Releases/2009/11/comScore_Releases_October_2009_U.S._Search_Engine_Rankings.

245. CHINA INTELLICONSULTING CORP., CHINA SEARCH ENGINE SURVEY REPORT 2008 RELEASED (2008), <http://www.iaskchina.cn/en/Report/view/id/13> [hereinafter CIC].

246. *Id.*

247. David Barboza & Brad Stone, *China, Where U.S. Internet Companies Often Fail*, N.Y. TIMES, Jan. 16, 2010, at B1, available at <http://www.nytimes.com/2010/01/16/technology/16failure.html>.

248. *Id.*

249. *Id.*

technology and innovation, and corporate image.²⁵⁰ Yet Baidu still has the larger market share. This may be due partly to national pride in supporting domestic companies and also an unwillingness to be associated with a Western company, and, by implication, Western philosophy and politics. In fact, Chinese newspapers have alleged an intimate relationship between Google and the US government that makes the two seemingly interchangeable.²⁵¹

Google, Yahoo!, and Microsoft all censor their Chinese search results to some extent, but a censorship study shows that Baidu censors more content than the US companies.²⁵² Each search engine, however, censors different keywords and websites, and there is surprisingly very little overlap between them.²⁵³ This means that even though US companies censor content in China, their mere presence increases the accessibility of information by the Chinese people. US companies should continue to make a concerted push into the Chinese market, focusing on the quality of the services they provide and making sure to cater to Chinese needs.²⁵⁴ If US companies can increase their market share, it will make it harder for the government to bully them. Increased market share also leads to more dialogue with the consumers and more influence within the industry. At the same time, the US companies need to engage companies like Baidu and try to bring them into the fold of an Internet CCC like the GNI. This will be difficult since domestic Chinese companies have fewer options than foreign companies for getting around Chinese law. A strong industry standard, however, can put pressure on companies like Baidu to comply at least incrementally with the standard. Although China likes all companies within its borders to play by its rules, people both inside and outside China believe that Google's withdrawal and Beijing's belligerence threatens the continued development of China's technology industry.²⁵⁵

Aside from gaining market share and influencing the industry, companies can aid the protection of user's rights through the

250. See CIC, *supra* note 245.

251. See Ding Yifan, *Google's Exit a Deliberate Plot*, CHINA DAILY, Mar. 25, 2010, http://www.chinadaily.com.cn/opinion/2010-03/25/content_9638825.htm.

252. Villeneuve, *supra* note 123, at 10-12.

253. *Id.* at 14-16.

254. Google's exit from China may have been a principled stand. Unfortunately, it left an open market segment that on which domestic Chinese companies like Baidu quickly capitalized. See Reuters, *Google Exit Appears to Benefit Top China Rival, Baidu*, N.Y. TIMES, Apr. 29, 2010, <http://www.nytimes.com/2010/04/30/technology/30baidu.html>.

255. See, e.g., Michael Wines, *Stance by China to Limit Google is Risk by Beijing*, N.Y. TIMES, Mar. 23, 2010, <http://www.nytimes.com/2010/03/24/world/asia/24china.html>.

provision of more services and the introduction of new technologies that can improve the methods of communication. When Youtube and Twitter were introduced into the Chinese market, they were disruptive technologies that allowed the Chinese to communicate in new and innovative ways, sending government authorities scrambling to find ways to control them. For example, when ethnic riots broke out in Tibet in 2008 and in Xinjiang in 2009, information about the events was leaked to the rest of the world via Youtube and Twitter before the government could block Internet access to those regions.²⁵⁶ By providing new ways of communicating, Internet companies make it harder for any government to censor and lock down information.

Not all the work has to be done by Internet companies. Chinese users, through the use of specially built hardware or software or even the use of Internet memes, can tunnel through China's Great Firewall. Numerous hardware and software workarounds already exist.²⁵⁷ Businesses and other organizations outside China provide censorship circumvention software, such as California-based AnchorFree.²⁵⁸ Although only a small portion of the Chinese public is tech savvy enough to find and use these tools, more people will seek increased freedom and discover these workarounds as Internet usage expands.²⁵⁹ This game of cat and mouse between the CPC and the technology community benefits all by pushing the bounds of innovation and technological freedom. The use of Internet memes is another way of subverting government control. In early 2009, a cartoon animal called the Grass-Mud Horse was introduced into Chinese cyberspace.²⁶⁰ This innocuous-looking children's cartoon was actually anything but—the Chinese pronunciation of Grass-Mud Horse sounds very similar to a vulgar expression.²⁶¹ Since the Chinese characters for Grass-Mud Horse are harmless, the meme went undetected by government censors.²⁶² There are songs and animated cartoons depicting the Grass-Mud Horse's struggle with the

256. Owen Fletcher & Dan Nystedt, *Internet, Twitter Blocked in China City Ar Ethnic Riot*, PCWORLD, July 6, 2009, http://www.pcworld.com/businesscenter/article/167884/internet_twitter_blocked_in_china_city_after_ethnic_riot.html.

257. See, e.g., GIFIC, *supra* note 56, at 6-8; Thompson, *supra* note 69, at 6-8.

258. Brad Stone and David Barboza, *Scaling the Digital Wall in China*, N.Y. TIMES, Jan. 15, 2010, <http://www.nytimes.com/2010/01/16/technology/internet/16evade.html>.

259. See *id.*

260. Michael Wines, *A Dirty Pun Tweaks China's Online Censors*, N.Y. TIMES, Mar. 11, 2009, <http://www.nytimes.com/2009/03/12/world/asia/12beast.html>.

261. *Id.*

262. *Id.*

River Crab, symbolic of China's censorship regime because the pronunciation is similar.²⁶³ Another meme was spawned from a simple 12 character message on a Baidu gaming discussion board telling someone named Jia Junpeng that his mother wanted him to come home and eat.²⁶⁴ Within one day there were 7,000,000 hits and 300,000 comments to that message ranging from the comical to the absurd.²⁶⁵ At around the same time, a blogger named Guo Baofeng was arrested by local police upon accusations that he used his blog to spread rumors about the police.²⁶⁶ Upon hearing of his arrest, another blogger urged people to send the police station postcards with the message "Guo Baofeng, your mother wants you to go home to eat" as a play on the original meme.²⁶⁷ Guo Baofeng was soon released, reasons unspecified.²⁶⁸ There are also more overt ways that Chinese people have stood up to government officials, using online activism to expose corruption, abuse, or social injustice.²⁶⁹ How all of this will interact with Chinese politics in the future is still unknown, but Internet companies would do well to provide means and technology for the Chinese Internet culture to grow organically.

4.2.3 The Connection Between Economic and Political Freedom

Within the past several decades, countries like Taiwan, South Korea, and Chile have experienced a transition from authoritarian regimes to democratic regimes after a period of economic liberalization.²⁷⁰ Many hoped that the opening of China's economy in the 1980s would soon lead to political democratization as well.²⁷¹ Yet,

263. *Id.*

264. Yang Guobin, *The Curious Case of Jia Junpeng, or The Power of Symbolic Appropriation in Chinese Cyberspace*, THE CHINA BEAT, Oct. 20, 2009, <http://www.thechinabeat.org/?p=1010>.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. Tania Branigan, *How China's Internet Generation Broke the Silence*, UK GUARDIAN, Mar. 24, 2010, <http://www.guardian.co.uk/world/2010/mar/24/china-internet-generation-censorship> (The article describes examples, such as how Deng Yujiao was freed after being charged with the murder of a local official who attempted to rape her after Internet users expressed their outrage at her prosecution. In another instance, residents of Panyu district opposed plans for a waste incinerator in their district, which led the local government to assess the environmental impact in more detail.).

270. See Ying Ma, *China's Stubborn Anti-Democracy*, 141 POL'Y REV. (2007), available at <http://www.hoover.org/publications/policy-review/article/5850>.

271. *Id.*

while China has experienced a tremendous growth in economic power, significant political reform has yet to occur. The CPC has managed to limit the political impact of economic reform, and while some legal reforms have been made, the progress is in areas considered politically safe like commercial and administrative law.²⁷² The CPC has managed to streamline their operations and institutionalize themselves even more than before.²⁷³ The CPC tends to demonize Western democracies, resulting in many Chinese believing that the US is trying to contain China's rise to power and destabilize the country.²⁷⁴ A majority of Chinese people are offended by criticisms of their government's human rights abuses and believe that foreigners simply do not understand China's culture.²⁷⁵

So far, the impact of the Internet on China's political landscape is uncertain. The initial hope that the spread of the Internet would quickly lead to political transparency has not come to pass as the CPC developed legal, technological, and social methods of control over the Internet.²⁷⁶ China's suppression of "coordination goods," such as political rights, human rights, press freedom, and accessible higher education, in combination with economic growth, actually leads to a strengthening of the regime and a decrease in the likelihood of democratization.²⁷⁷ In part, this is because the economic benefits placate the Chinese people.²⁷⁸ If people see that their economic power is increasing and that they can afford newer and better things and entertain themselves, the importance of political issues fades. They assume that the current political environment is responsible for their increased living standards and do not wish to change the status quo. Also, it may be that many Chinese still have a limited understanding about the greater political discourse and therefore do not know about issues that should concern them, a situation the CPC perpetuates through censorship.²⁷⁹

If political reform is to come, many think that it will come from the rural areas of China, regions where people have least benefited

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. Ernest J. Wilson III & Adam Segal, *Trends in China's Transition Toward a Knowledge Economy*, 45 *ASIAN SURV.* 886, 899-900 (2005).

277. See Thompson, *supra* note 69, at 7-8.

278. *Id.*

279. *Id.* at 8.

from economic reform.²⁸⁰ The ever-growing gap between the wealthy and the poor is leading to increased social unrest. The number of public order disturbances or protests has increased dramatically within the last decade.²⁸¹ As the connectivity of the Internet slowly spreads to rural areas, there will be more information sharing between the richer coastal people and the poorer inland people.²⁸² If a broad swath of the population is aware of the social problems within the country, it may push China to make real political reforms.²⁸³ One conclusion to draw from all of this is that the Internet is still young, and it will take some time for the Chinese people to utilize its full potential.²⁸⁴ If so, then those pushing for greater Internet freedom must have some patience as China continues to develop.

5.0 CONCLUSION

China considers control of the Internet to be very important to the stability of the country. From the advent of Internet access in China, free speech and privacy rights online were severely curtailed to prevent the spread of dissenting viewpoints. The Chinese government will continue to resist change and create new technologies or appropriate existing technologies for its own monitoring and censoring uses. In a country like China, policies and political views do not shift abruptly. There is hope, however, for a gradual change based on a number of fronts. There must be continuing dialogue with CPC officials about the benefits of a more open Internet and how it will not threaten the stability of the country or the ability of the CPC to govern in its own way. This dialogue must come from all sides including the Internet industry, human rights groups and civil society groups, as well as states and international organizations. While this dialogue is important, the biggest impetus for change will probably not come from political discourse but rather market forces.

Corporations can bring great benefit to society but can also produce much harm. As corporations grow larger and expand their extraterritorial reach, the dangers they pose for human rights are significant. In the struggle for Internet freedom, however, corporations can play a large positive role. In China, foreign Internet

280. *See id.*

281. *Id.*

282. *Id.*

283. *See* Thompson, *supra* note 69, at 7-8.

284. *Id.*

companies have already brought about more freedom to Chinese citizens and can continue to do so. Internet companies can continue to invent new and innovative methods of communication and facilitate the building of a strong Internet community. Foreign companies must understand Chinese society and what the Chinese want from the Internet in order to continue building market share and customer loyalty. Chinese Internet users can then take these technologies and create social movements, push for change, or increase publicity about certain events and topics. This will likely pressure domestic Internet companies to increase their competition and services, leading to an overall more robust and free Internet.

Meanwhile, the creation of a strong international corporate code of conduct with participants from around the world can help regulate the Internet industry in a flexible and quick manner. Hard law cannot change quickly enough with changing technology, and international treaties and conventions are too susceptible to global politics. This ultimate CCC must have a strong monitoring and enforcement system in order for the codes to be taken seriously and allow for widespread adoption throughout the industry. The CCC must also be applicable to various different Internet technologies in order to allow a wide variety of companies to join. Lastly, the CCC must be unified in its approach to China and support its members when they take a stance to protect user rights. Of course, increasing the protection of free speech and privacy online will not happen overnight. The Chinese experience with the Internet is still in its infancy. Those pushing for greater online freedom must have patience as they work with China to open up the Internet. Just as the Great Wall of China has become antiquated, the Great Firewall of China may soon, too.

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