

It's a Mad, Mad Internet: Globalization and the Challenges Presented by Internet Censorship

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"It is very difficult to do business if you have to wake up every day and say 'OK, whose laws do I follow?' . . . We have many countries and many laws and just one Internet." – Heather Killen, former Yahoo! senior vice president of international operations, 2000.¹

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1. JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 2 (2006).

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I. INTRODUCTION

On April 11, 2000, the Tribunal de Grande Instance de Paris summoned Internet content provider (ICP) Yahoo! into French courts for allowing the sale of Nazi memorabilia on its website, Yahoo.com.² Marc Knobel, a French Jew, had previously discovered the offensive material and requested that Yahoo! remove it. Yahoo!, however, refused on the grounds that doing so would violate its constitutionally protected free speech. As a result, the company was summoned into French court. The French court ultimately held that allowing the sale of Nazi merchandise on Yahoo.com violated French criminal laws prohibiting the sale of Nazi goods,³ and, because Yahoo.com was either directly accessible to French citizens (or indirectly through Yahoo.fr, the French portal), the court ordered Yahoo! to block all access through either portal.⁴

Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme was a landmark case. It unearthed the complications that arise when multiple countries seek to regulate a borderless network like the Internet, which has the capacity to transmit instantly information all over the world—

2. *Id.*; see also Evan Scheffel, *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme: Court Refuses to Enforce French Order Attempting to Regulate Speech Occurring Simultaneously in the U.S. and in France*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 549, 549 (2003).

3. Article R645-1 of the French Criminal Code makes it a crime to wear a uniform, insignia, or emblem reminiscent of those worn by either members of an organization declared criminal under Article 9 of Statute of the International Military Tribunal annexed to the London Accord of 8 August 1945 or by a person found guilty by a French or international court of one or more crimes against humanity. CODE PÉNAL [C. PÉN.] art. R645-1 (Fr.), available at <http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006419560&idTexte=LEGITEXT000006070719>.

4. Scheffel, *supra* note 2, at 551–52. The French order required Yahoo! to (1) eliminate French citizens' access to any material on the Yahoo.com auction site that offers for sale any Nazi objects, relics, insignia, emblems, and flags; (2) eliminate French citizens' access to web pages on Yahoo.com displaying text, extracts, or quotations from *Mein Kampf* and *Protocol of the Elders of Zion*; (3) post a warning to French citizens on Yahoo.fr that any search through Yahoo.com may lead to sites containing material prohibited by Section R645-1 of the French Criminal Code, and that such viewing of the prohibited material may result in legal action against the Internet user; (4) remove from all browser directories accessible in the French Republic index headings entitled 'negationists' and from all hypertext links the equation of 'negationists' under the heading 'Holocaust.' The order subjects Yahoo! to a penalty of 100,000 Euros for each day that it fails to comply with the order.

Yahoo!, Inc., v. La Ligue Contra Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1184–85 (N.D. Cal. 2001).

information that can be simultaneously legal in one country and illegal in another.⁵ The crux of the Yahoo! case was determining where to draw the line between two countries seeking to regulate information on the Internet.

Instead of appealing in the French courts, Yahoo! returned to the United States to request relief in federal court. To abide fully by the French order, Yahoo! argued that it could not simply block access by French citizens to the illegal goods, but would have to block everyone's access, including American citizens—"Asking us to filter access to our sites according to the nationality of web surfers is very naïve."⁶ Unlike makers of tangible products (such as motor vehicles), Yahoo! argued that it provides an intangible product that could not easily be individually tailored for different markets, as "it had no power to identify where in the world its 'customers' were from and thus no control over where in the world its digital products go."⁷ Yahoo! contended that it should not be required to censor itself in order to comply with French laws. The company stated, "We hope that a U.S. judge will confirm that a non-U.S. court does not have the authority to tell a U.S. company how to operate."⁸ The district court overturned the French court's ruling on the grounds that, while a U.S. court typically defers to foreign orders, a federal court could not condone a violation of the Constitution or the laws of the United States.⁹

5. Interestingly, the same year that the LICRA trial was taking place, Paul Krugman wrote a *New York Times* article in which he expressed concern over the effects the Internet might have on copyright and tax laws:

[Internet] technology is erasing boundaries—the boundaries that we use to define intellectual property, the boundaries that we use to define tax jurisdictions. And in both cases the loss of effective boundaries, though it brings some direct advantages, threatens something important: the ability of creators to profit from their creations, the ability of governments to collect revenue. . . . *Something serious, and troubling, is happening—and I haven't heard any good ideas about what to do about it.*

Paul Krugman, *Facing the Music: Napster Is Only the Beginning*, N.Y. TIMES (July 30, 2000), available at <http://www.nytimes.com/2000/07/30/opinion/reckonings-facing-the-music.html?src=pm> (emphasis added).

6. GOLDSMITH & WU, *supra* note 1, at 6.

7. *Id.* at 5.

8. *Id.* at 8.

9. The District Court held that

Although France has the sovereign right to regulate what speech is permissible in France, this Court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders. . . . "The protection to free speech and the press embodied in [the First] amendment would be seriously jeopardized by the entry of foreign [] judgments granted pursuant to standards deemed appropriate in [another country] but considered antithetical to the protections afforded the press by the U.S. Constitution."

Yahoo!, Inc., 169 F. Supp. 2d at 1192–93 (quoting *Bachchan v. India Abroad Publ'ns, Inc.*, 585 N.Y.S.2d 661, 665 (Sup. Ct. 1992)); see also Scheffel, *supra* note 2, at 554. In 2001, Yahoo! surprisingly caved in, banning Nazi and Ku Klux Klan goods from *all* of its sites,

LICRA appealed the district court's decision to the Ninth Circuit, which, in 2006, reversed and remanded the case.¹⁰ The Ninth Circuit's decision completely skirted the legal question, reversing purely on procedural grounds,¹¹ an outcome that illustrates the murkiness that still exists in grappling with this complex legal quandary. Interestingly, the court's opinion noted its uncertainty on the extent of Yahoo!'s "First Amendment right to violate French criminal law and to facilitate the violation of French criminal law by others."¹² In other words, the court was unsure of how far one country's laws reach into other countries—unsure of where the line should be drawn between the sovereignty of each when it came to regulating content on the Internet.¹³

The legal dilemma presented in *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme* became even more complicated when the activities of American companies operating in Internet-restricting countries raised more serious questions of domestic and international law. While

saying it will no longer allow items that are "associated with groups that promote or glorify hatred or violence." *Yahoo!, Inc.*, 169 F. Supp. 2d at 1185; see also Jennifer Shyu, *Speak No Evil: Circumventing Chinese Censorship*, 45 SAN DIEGO L. REV. 211, 224 (2008). Its actions, which the company claimed were unrelated to the lawsuit, appeared to be motivated by Yahoo!'s fears that it would lose substantial assets it had in the French market. See GOLDSMITH & WU, *supra* note 1, at 8.

10. *Yahoo!, Inc. v. La Ligue Contra Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1223–24 (9th Cir. 2006).

11. The Ninth Circuit held that the suit lacked ripeness. While the court acknowledged the important First Amendment issue at stake, it primarily took issue with the fact that Yahoo! had already complied with the French order:

There was a live dispute when Yahoo! first filed suit in federal district court, but Yahoo! soon thereafter voluntarily changed its policy to comply, at least in part, with the commands of the French court's interim orders. . . . Until we know whether further restrictions on access by French, and possibly American, users are required, we cannot decide whether or to what degree the First Amendment might be violated by enforcement of the French court's orders, and whether such enforcement would be repugnant to California public policy.

Id. at 1223–24.

12. *Id.* at 1221.

13. The court expressed the situation thus:

What is at issue here is whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation. In a world in which ideas and information transcend borders and the Internet in particular renders the physical distance between speaker and audience virtually meaningless, the implications of this question go far beyond the facts of this case. . . . There is little doubt that Internet users in the United States routinely engage in speech that violates, for example, China's laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom's restrictions on freedom of the press. If the government or another party in one of these sovereign nations were to seek enforcement of such laws against Yahoo! or another U.S.-based Internet service provider, what principles should guide the court's analysis?

Yahoo!, Inc., 169 F. Supp. 2d at 1186–87 (N.D. Cal. 2001).

Yahoo! refused to change its operations to accommodate French law, it has since changed its tune. In fact, over the last decade, Yahoo!, Microsoft, and Google have come under fire for their cooperation with the Chinese government and its strict censorship laws, sometimes even providing vital information leading to the arrest and torture of Chinese citizens.¹⁴ These ICPs have been criticized fiercely by human rights activists, the European Union, the United States government, and many others for being complicit in China's human rights violations of free speech and expression. Yahoo!, Microsoft, and Google, however, argue that they have no choice but to comply with China's censorship laws—otherwise, they risk being pushed out of the market altogether. Given a choice of two evils, these ICPs contend that it is better to remain in the market and provide some access than to leave altogether.¹⁵

Should ICPs do the morally responsible thing and leave the market, or should they stay (or even be allowed to stay) in a market that mandates their complicity in such a rigid system of censorship?

There is no doubt that corporate complicity in Chinese censorship raises significant concerns and, moreover, unearths complicated questions regarding how to tackle the issues that arise from these companies' operations in the Chinese market. While there have been many proposals posited by multiple domestic and international sources in the hopes of addressing the human rights violations and stopping corporate complicity, this Note argues that none are sufficient to address properly the real problem. Furthermore, this Note argues that it would be a mistake to encourage or to force these ICPs to leave the market altogether. No one can deny the significant human rights abuses that occur in China as a result of its censorship laws; however, it is important not to implement quick fixes that fail to target the heart of this complex problem. This Note argues that it is far more beneficial to the ultimate goal of preserving Internet freedoms and stopping censorship in China if ICPs are allowed to maintain their market presence than if they are either forced to leave entirely or penalized for staying.

Part II gives a brief overview of the unique challenges that the Internet presents to the international community, and it provides a general discussion of China's censorship system, including what these ICPs are actually doing in China that is raising so many eyebrows, as well as the domestic and international laws that are being compromised in the process.

14. 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, 618–19 (2009).

15. Shyu, *supra* note 9, at 212; see also *Google Censors Itself for China*, BBC NEWS (Jan. 25, 2006), <http://news.bbc.co.uk/2/hi/technology/4645596.stm>.

Part III discusses the various solutions that have already been put on the table to address concerns over corporate complicity in Internet-censoring nations and argues that the present solutions are inadequate to address the real problem. Part IV posits that the best and most viable solution available, while seemingly not the most appealing, is to allow these companies to continue operating in China. The Note concludes that the tone moving forward should be one of patience and argues that the type of change many would like to see in China is very possible even without taking the drastic step of forcing ICPs like Yahoo!, Microsoft, and Google out of the Chinese market.

II. THE PROBLEM

The ubiquitous nature of the Internet itself sets the stage for the very distinct problems that emerge from American ICPs' operations in China. And while China is not the only country to censor zealously the flow of information on the Internet,¹⁶ it has created what is considered the most complex and highly developed system of censorship in the world¹⁷—a system that has raised many concerns regarding the human rights violations that result from its implementation. This next section will briefly discuss why the Internet presents such a unique problem and then will discuss how China's system of censorship is designed, the ICPs' role in carrying out its policies, and finally, the domestically and internationally protected rights that are compromised as a result.

A. *The Challenge of the Internet*

Due to its unique decentralized nature, the Internet poses distinct challenges for nations in their quest to regulate its content, and likewise, has created an interesting predicament for international relations. Scholars have posited that international trade has a spillover effect on international relations, transforming relationships among nations by promoting interdependence and consequently producing economic stability and peace in a globalizing world.¹⁸ While this is a valuable and fundamental theory on trade and international relations, it does not anticipate the complexities that

16. Reporters Without Borders recently published an updated list of the worst offenders of Internet censorship, which included Saudi Arabia, Burma, North Korea, Cuba, Egypt, Iran, Uzbekistan, Syria, Tunisia, Turkmenistan, and Vietnam. *Web 2.0 Versus Control 2.0*, REPORTERS WITHOUT BORDERS (Mar. 18, 2010), <http://en.rsf.org/web-2-0-versus-control-2-0-18-03-2010,36697>.

17. Jan Bruck, *Reporters Without Borders Warns Against Internet Censorship*, DEUTSCHE WELLE (Dec. 3, 2010), <http://www.dw-world.de/dw/article/0,,5349061,00.html>; *List of the 13 Internet Enemies*, REPORTERS WITHOUT BORDERS (Nov. 7, 2006), <http://en.rsf.org/list-of-the-13-internet-enemies-07-11-2006,19603>.

18. *See, e.g.*, RICHARD ROSECRANCE, *THE RISE OF THE TRADING STATE* 24 (1986).

arise with the Information Age and the advent of the Internet.¹⁹

By the 1990s, there was a general concern that the challenges the Internet presented to governing bodies would ultimately diminish the relevance of the nation-state all together: “The Internet . . . cannot be regulated.”²⁰ These concerns have, if anything, intensified as more issues have been brought to the forefront of international debate. While the Internet has provided a medium for improving communication in an increasingly global and interconnected world, it is by its very nature borderless and can transmit information instantaneously. Likewise, unlike tangible products that are traded on the global market, content on the Internet cannot be tailored for individual markets but instead is globally accessible in an infinite number of locations and is stored in “cyberspace,” effectively “elud[ing] the control of any single business, individual, or country.”²¹ Because information is free-flowing and freely accessible, serious issues arise when multiple nations attempt to regulate such a ubiquitous medium, often resulting in conflict as the laws of different countries collide.²²

While scholars argue that trade between nations has a positive effect on international relations, we are now seeing a clash of interests when nations attempt to trade (and then regulate) a service such as the Internet. In this instance, American ICPs are now providing Internet services in foreign markets, but these foreign countries expect that the ICPs will comply with their laws—laws that potentially conflict with American laws as well as international laws. And, as the Ninth Circuit ruling in *Yahoo!, Inc. v. La*

19. While international trade is certainly a good thing, the effects of international trade are not always positive, as many scholars have noted in their studies of globalization. See, e.g., AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* (1st ed. 2002).

20. GOLDSMITH & WU, *supra* note 1, at 3 (quoting Nicholas Negroponte, cofounder and director of MIT's Media Lab).

21. Shyu, *supra* note 9, at 216.

22. James Rosenau discusses the increasing interconnectedness of the world (specifically with the advent of the Internet) and the complexities that arise from it:

People are unsettled by the realization that deep changes are unfolding in every sphere of life, that events in any part of the world can have consequences for developments in every other part of the world, that the internet and other technologies have collapsed time and distance, that consequently national states and their governments are not as competent as they once were, that their sovereignty and boundaries have become increasingly porous, and that therefore the world has moved into a period of extraordinary complexity.

James N. Rosenau, *Governance in a New Global Order*, in *THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE* 223, 223 (David Held & Anthony McGrew eds., 2003). Ironically, the Internet was initially intended to provide a network free from government restraints, “a new frontier, where people lived in peace, under their own rules, liberated from the constraints of an oppressive society and free from government meddling.” GOLDSMITH & WU, *supra* note 1, at 13–14.

Ligue Contre Le Racisme et L'Antisemitisme illustrates, there is no clear answer in determining whose laws prevail when there is a conflict.

This conflict raises the question, who *does* control the Internet? The uncertainty of this question adds further complexity to an already complicated matter when dealing with corporations operating in Internet-censoring countries like China. Without a central body in place to regulate a borderless medium like the Internet, what results is a complex battle of legal systems with American ICPs seemingly stuck in the middle.

B. *The Great Firewall of China*

The Internet has provided a contemporary vehicle for communication and free speech, but it brings with it great potential for abuse.²³ While all countries censor Internet content to some degree, the Chinese government has a highly developed system of censorship that levies harsh penalties for violators.²⁴ In fact, "China reportedly has the largest recorded number of imprisoned journalists and cyber-dissidents in the world."²⁵

China has the world's most advanced and sophisticated system of censorship, comprised of technological and legislative controls used to regulate the flow of speech and information on the Internet.²⁶ Often referred to as "the Great Firewall of China," China's censorship scheme particularly regulates the flow of information to and from the global Internet.²⁷ Internet censorship is primarily regulated by the Ministry of Information Industry, and the State Counsel Information Office and the Propaganda Department are responsible for determining what content should be censored.²⁸ There are nine licensed Internet access providers (IAP) that provide physical access to the Internet and numerous Internet service providers (ISP) that provide the service connection to the Internet.²⁹ Information flow is filtered at several levels: at the router level; through

23. See Justine M. Nolan, *The China Dilemma: Internet Censorship and Corporate Responsibility*, 4 ASIAN J. COMP. L. art. 3, 1 (2009), <http://www.bepress.com/cgi/viewcontent.cgi?article=1160&context=asjcl>.

24. 18 HUMAN RIGHTS WATCH, "RACE TO THE BOTTOM": CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP 3 (2006), <http://www.hrw.org/sites/default/files/reports/china0806webwcover.pdf>.

25. *Background Information on Freedom of Expression in China*, AMNESTY INT'L, <http://www.amnestyusa.org/individuals-at-risk/priority-cases/background-information-on-shi-tao/page.do?id=1361025> (last visited Apr. 14, 2011); see also Israel, *supra* note 14, at 618.

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

27. HUMAN RIGHTS WATCH, *supra* note 24, at 9.

28. *Id.*

29. *Id.*

ISPs; and, as is the focus of this Note, through ICPs. Companies such as Yahoo!, Google, and Microsoft provide the means through which actual content (words, videos, pictures, sound) is transmitted over the Internet.³⁰ Though there are multiple levels to China's system of censorship, the ICPs play a central role in making the entire operation tick.³¹

Since 1996, China has enacted legislation to tighten control over the Internet—for example, by regulating news sites as well as imposing standards on businesses that offer Internet access.³² Its tight net of censorship has expanded over time and the government is currently censoring numerous sources such as newspapers, text messages, chat rooms, e-mails, blogs, and even video games and films.³³ Furthermore, China's regulations are needlessly vague, seeking to regulate content that “might harm the state's honor, cause ethnic oppression, spread rumors, disrupt social stability, spread pornography, undermine state religious policy, or preach the beliefs of evil cults.”³⁴ Instead of directly regulating ICPs, the Chinese government saves the legwork by requiring all ICPs to be licensed to operate, and then makes the ICPs responsible for preventing the transmission of politically objectionable or illegal information.³⁵ To stay in line with Chinese laws, ICPs individually develop and maintain keywords and phrases that must either be blocked or monitored.³⁶ This system often leads to overcensoring, because China's overly broad guidelines make it unclear as to what is or is not acceptable content.³⁷

30. *Id.* at 12.

31. Kari Huus, *Navigating China's Web of Censors*, MSNBC.COM (Mar. 26, 2010), http://www.msnbc.msn.com/id/36041417/ns/technology_and_science-security/.

32. Interim Provisions Governing the Management of the Computer Information Networks in the People's Republic of China Connecting to the International Network (promulgated by Decree No. 195 of the State Council of the People's Republic of China, Feb. 1, 1996, effective Feb. 1, 1996) P.R.C. Laws, *available at* <http://www.asianlii.org/cn/legis/cen/laws/ipgtmotcinitproccttin1488/> (“strengthening the control on the computer information networks connecting to the international network”); Jill R. Newbold, *Aiding the Enemy: Imposing Liability on U.S. Corporations for Selling China Internet Tools to Restrict Human Rights*, 2003 U. ILL. J.L. TECH. & POL'Y 503, 510 (2003); Administration of Internet News Information Services Provisions (promulgated by the Press Office of the State Council and Ministry of Information Industry, Sep. 25, 2005, effective Sep. 25, 2005), P.R.C. Laws, *available at* <http://tradeinservices.mofcom.gov.cn/en/b/2005-09-25/18571.shtml> (China) (“formulated in order to standardize internet news information services, satisfy the needs of the public for internet news information, safeguard national security and public interests, protect the lawful rights and interests of internet news information service units and promote the healthy and orderly development of internet news information services”).

33. Michael Wines et al., *China's Censors Tackle and Trip over the Internet*, N.Y. TIMES, Apr. 7, 2010, at A1.

34. D'Jaen, *supra* note 26, at 331 (quotations omitted).

35. HUMAN RIGHTS WATCH, *supra* note 24, at 12.

36. *Id.* at 14–15.

37. *Id.* at 14.

Consequently, ICPs are not victims of the Chinese censorship system, but they are in fact direct participants in censoring Chinese citizens, a situation which has left these companies vulnerable to criticism, as well as liability,³⁸ for cooperating with Chinese censorship laws.

C. *Domestic and International Laws on Freedom of Speech*

Freedom of speech is domestically and internationally recognized as a fundamental human right. The United States considers this right to be so paramount that free speech is enumerated in the very first amendment of the Constitution, providing for strong protections against government infringement of speech: “Congress shall make no law . . . abridging the freedom of speech, or of the press....”³⁹ This right is considered so central to American values that Congress proposed the Free Speech Protections Act of 2009 to provide added protection to American citizens’ right to free speech, calling the First Amendment “one of the most basic protections in our Constitution.”⁴⁰ While First Amendment rights to free speech are certainly not limitless, the United States is deemed to have some of the world’s most liberal protections of speech.⁴¹

Freedom of speech is also internationally recognized as a fundamental human right. This international recognition is enshrined in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil Political Rights (ICCPR). Article 19 of the UDHR provides that

Everyone 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.⁴²

The UDHR was adopted in 1948 and participating nations committed themselves to promote freedom of speech as a fundamental universal right. Ironically, China voted for the UDHR, but because it is not a treaty, the UDHR is not legally binding on any nation.⁴³ The UDHR does, however, stand as an emblem of a universally recognized right to freedom of speech.

The ICCPR, on the other hand, is a multilateral treaty adopted in 1966

38. See Israel, *supra* note 14, at 620.

39. U.S. CONST. amend. I.

40. 155 CONG. REC. S2342–43 (daily ed. Feb. 13, 2009) (statement of Sen. Arlen Specter), available at <http://www.fas.org/sgp/congress/2009/s449.html>.

41. Exceptions to First Amendment guarantees include obscenity regulations, copyright protections, and regulations on commercial speech. See generally HENRY COHEN, CONG. RESEARCH SERV., 95-815A, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT (2004).

42. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 19 (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml#a19> (emphasis added).

43. Nolan, *supra* note 23, at 8.

that compels nations to protect, among other rights, freedom of speech.⁴⁴ The ICCPR recognizes free speech as a human right; however, it also prescribes limitations to be placed on the right. These limitations include “respect of the rights or reputations of others,” “the protection of national security or of public order . . . or of public health or morals,” or for prohibiting war propaganda and any national, racial, or religious hatred that can create hostility or a threat of violence.⁴⁵

However, while the ICCPR provides for limitations on free speech in specified circumstances, it requires that any regulations passed that limit free speech must be (1) prescribed by law; (2) implemented in order to protect the rights or reputations of others or to safeguard national security; and (3) necessary to achieve that purpose.⁴⁶ Furthermore, even if a government presents a legitimate interest, the ICCPR requires that the scope of its application be limited strictly to that which is necessary to achieve its purpose, namely, “protecting national security, the right to freedom of expression and information can be restricted *only* in the most serious cases of a direct political or military threat to the entire nation.”⁴⁷

The UDHR and ICCPR provide formal recognition of freedom of speech as a fundamental right, but the actual scope of this right is delineated by each nation, causing variations from country to country. In the case of China, while it has been criticized for egregious human rights violations regarding freedom of speech, China contends that censorship is necessary to promote the nation’s stability and maintain security by avoiding political upheaval.⁴⁸ However, China’s censorship laws are not prescribed by law. In fact, Article 35 of the Constitution of the People’s Republic of China actually provides for freedom of speech.⁴⁹ Likewise, while China’s desire to safeguard national security appears to comport with Article 19(3) of the ICCPR, its censorship laws are extreme and overly broad—resulting in the censoring of hundreds of political names and terms and even benign phrases like “cat abuse” and “mascot”⁵⁰—and its penalties

44. China has signed the treaty, but it has not yet ratified it and thus is not bound by its provisions. *Id.* at 9.

45. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/14668, at art. 19–20 (Dec. 16, 1966), <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> [hereinafter ICCPR].

46. *Id.* at art. 19, ¶ 3; Nolan, *supra* note 23, at 9–10.

47. Nolan, *supra* note 23, at 10 (quoting Special Rapporteur on Human Rights Resolution 1993/45, Reference E/CN.4/1995/32, ¶ 48 (Dec. 14, 1995) (by Abid Hussein)).

48. See D’Jaen, *supra* note 26, at 336.

49. XIANFA art. 35 (1982) (China), available at <http://english.people.com.cn/constitution/constitution.html>.

50. *The Great Firewall of China: Keywords Used to Filter Web Content*, WASH. POST (Feb. 18, 2006), available at <http://www.washingtonpost.com/wp->

for violators are disproportionate to the actual offense.⁵¹ While every country censors to a certain degree in the name of national security, China's censorship laws are on the extreme end of the spectrum, imposing severe penalties for individuals who violate its laws.

While China has been heavily criticized for the multiple human rights violations that result from its system of censorship, its policies are not executed solely by the Chinese government. Instead, China relies on outside entities such as ICPs to promote its censorship goals, adding further complications to the matter.

D. Corporate Complicity

Yahoo!, Microsoft, and Google have come under fire for being complicit, albeit in varying degrees, with Chinese censorship laws. Despite claims that their hands are tied in the matter and that they are helpless against China's demands, by helping China carry out its censorship policies, these ICPs are running afoul of both domestically and internationally recognized protections of free speech. Yahoo! is perhaps the biggest offender; however, all three ICPs have been criticized for their roles in China.

Yahoo! was the first to enter the Chinese market, developing the search engine Yahoo! China in 1999.⁵² Three years later, it signed a Chinese ethics pledge—the only ICP of the three to do so—agreeing to follow Chinese Internet regulations and to censor information that may jeopardize security or stability.⁵³ Google also established a censored version of its Chinese domain, Google China (google.cn), in January of 2006, after years of its google.com portal being “sporadically blocked” by the Chinese government.⁵⁴ By entering China's market, Google escaped the fate of being censored by Chinese filters, but was required to comply with China's laws in filtering keywords or phrases from its searches.⁵⁵ Microsoft

dyn/content/article/2006/02/18/AR2006021800554.html. Roughly fifteen percent of blocked terms are related to sex, while the rest are political terms, including names of political leaders, intellectuals, dissidents, and terms such as “freedom” and “democracy.” *A List of Censored Words in Chinese Cyberspace*, CHINA DIGITAL TIMES, <http://chinadigitaltimes.net/2004/08/the-words-you-never-see-in-chinese-cyberspace/> (last visited Apr. 14, 2011).

51. Such penalties include arrest, long-term detainment, and (reportedly) torture. Nolan, *supra* note 23, at 7.

52. D'Jaen, *supra* note 26, at 332.

53. *Id.*; see also HUMAN RIGHTS WATCH, *supra* note 24, at 12.

54. Kristopher Huynh, *Google Enters the Chinese Market, Practising Enlightened Self-Censorship*, CSR GROUP (Feb. 26, 2006), <http://www.thecsrgroup.com/cblog/index.php?archives/17-Google-enters-the-Chinese-market,-practising-enlightened-self-censorship.html>; *Google Censors Itself for China*, BBC NEWS (Jan. 25, 2006), <http://news.bbc.co.uk/2/hi/technology/4645596.stm>.

55. See *Google Censors Itself for China*, BBC NEWS (Jan. 25, 2006),

entered China's market with its MSN search engine, establishing MSN China in mid-2005.⁵⁶

As a result of their presence in the Chinese market, these ICPs have been linked to the controversial arrests of several Chinese dissidents. Some of these arrests have allegedly resulted in torture, prolonged detainment, and even death.⁵⁷ In 2005, a Chinese journalist, Shi Tao, received ten years in prison for leaking "state secrets" after sending a Communist document to an overseas prodemocracy website through his personal Yahoo! account.⁵⁸ The Chinese government discovered Shi Tao's identity by demanding his personal information from Yahoo!'s Hong Kong office (which readily handed over the information).⁵⁹ In the same year, Microsoft's MSN shut down the popular blog maintained by Chinese journalist Zhao Jing after Chinese authorities requested that it be deleted.⁶⁰ Finally, in 2002, Wang Xiaoning was arrested for publishing prodemocracy material after Yahoo! handed over his information—an arrest which resulted in Wang's wife suing Yahoo! for "corporate irresponsibility."⁶¹ These examples, while far from daily occurrences, serve as an important reminder of the profound consequences of ICP complicity in China's extreme system of censorship.

Though in varying degrees, all three companies have caved to China's demands, and consequently these companies face global criticism for the resulting human rights violations and may face liability for their actions. As a result of their operations in China, these corporations are being haled into American courts by Chinese citizens for violations of U.S. law,⁶² and the problem leaves many questioning what can be done to stop corporate complicity all together.

III. PROPOSALS ADDRESSING CORPORATE COMPLICITY

Numerous avenues have been explored in the effort to hold ICPs responsible for their complicity in human rights violations in China. First,

<http://news.bbc.co.uk/2/hi/technology/4645596.stm>.

56. David Cohn, *MSN Enters Chinese Market*, WIRED NEWS REP. (May 26, 2005), <http://www.wired.com/techbiz/media/news/2005/05/67651>.

57. Israel, *supra* note 14, at 620.

58. *Case Highlight: Shi Tao and Yahoo*, HRIC, <http://www.hrichina.org/public/highlight/> (last visited Apr. 14, 2011).

59. *China: Shi Tao*, PEN AM. CENTER, <http://www.pen.org/viewmedia.php/prmMID/764/prmID/172> (last visited Apr. 14, 2011).

60. D'Jaen, *supra* note 26, at 333. Moreover, Jing's website was located on servers in the United States, not China, creating more concern regarding MSN's actions. 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, 270 (2007).

61. *Wang Xiaoning Multimedia Informaiton*, JOE INVESTOR ONLINE, <http://www.joeminvestoronline.com/library/Wang-Xiaoning.php> (last visited Apr. 14, 2011).

62. *Case Highlight*, *supra* note 58.

foreigners have sued these ICPs in American courts under the Alien Tort Statute (ATS) for aiding and abetting human rights violations in China. Second, the Global Online Freedom Act, the Global Network Initiative, and the Global Compact have been developed to discourage further complicity. However, at least at the present time, none of these options have proven effective in holding these companies liable for their operations in China.

A. *International Law*

Traditionally, violations of international law have been imposed on state actors—but, since the Nuremberg Trials during World War II, liability has been imposed on individual actors as well.⁶³ However, there has been an increasing push to apply international law to corporations like Yahoo!, Google, and Microsoft. Since corporations have grown and entered the global market, their operations began to have more serious ramifications on the global market and the world. As corporations become more powerful, many argue that because these entities look and act more like states than mere companies, they should be treated as such under international law. Consequently, these ICPs have been sued in American courts under the ATS (also known as the Alien Tort Claims Act)⁶⁴ for the human rights violations that have occurred as a result of their operations in China.

The ATS was enacted in 1789 but remained largely unused until 1980⁶⁵ when *Filartiga v. Pena-Irala*⁶⁶ held that the Act provided jurisdiction in federal courts over tort suits brought by aliens (and only by aliens) for violations of “the law of nations” (i.e., customary international law).⁶⁷ However, the language of the ATS does not explicitly address *who* may be held liable for violations of international law—that is, while international law has since recognized that individuals, as well as states, may be held liable for violations under international law, it is not clear whether corporations should be considered “individuals” under the ATS.⁶⁸ Though corporate liability under the ATS is still unsettled, many courts

63. “The singular achievement of international law since the Second World War has come in the area of human rights, where the subjects of customary international law—i.e., those with international rights, duties, and liabilities—now include not merely *states*, but also *individuals*.” *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 118 (2d Cir. 2010).

64. 28 U.S.C. § 1350 (1948) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

65. *Kiobel*, 621 F.3d at 115–16.

66. 630 F.2d 876, 887 (2d Cir. 1980).

67. *Kiobel*, 621 F.3d at 116.

68. *See id.* at 118 n.10; Chimène I. Keitner, *Kiobel v. Royal Dutch Petroleum: Another Round in the Fight over Corporate Liability Under the Alien Tort Statute*, ASIL INSIGHTS, Sept. 2010, at 1, 1–2, available at <http://www.asil.org/insights100930.cfm>.

have assumed that corporations can be held liable under the ATS.⁶⁹ On September 17, 2010, however, the Second Circuit in *Kiobel v. Royal Dutch Petroleum* may have thrown a major wrench in finding corporate liability under the ATS. *Kiobel* dealt with claims by Nigerian residents against Shell Transport and Trading Company PLC for aiding and abetting the Nigerian government in human rights violations during oil exploration.⁷⁰ The Second Circuit (relying on *Sosa v. Alvarez-Machain*⁷¹) held that corporations could not be held liable under the ATS because they are not individuals as understood under customary international law—that while domestic law might recognize corporations as individuals in terms of conferring liability, international law has not done so.⁷²

By conferring subject matter jurisdiction over a limited number of offenses defined by *customary international law*, the ATS requires federal courts to look beyond rules of domestic law—however well-established they may be—to examine the specific and universally accepted rules that the nations of the world treat as binding *in their dealings with one another*.⁷³

In its reasoning, the majority noted, for example, that a proposal at the Rome Conference to grant jurisdiction over corporations in the International Criminal Court was “soundly rejected.”⁷⁴ Likewise, it found that “no corporation has ever been subject to *any* form of liability under the customary international law of human rights”⁷⁵ While *Kiobel* has not

69. See, e.g., *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) (holding that the plaintiff properly stated a claim under the ATS for violations of international law against a corporate defendant); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009) (“In addition to private individual liability, we have also recognized corporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations.”) (citing *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008)); *Doe I v. Unocal Corp.*, 395 F.3d 932, 946 (9th Cir. 2002) (finding that state action was not required to find liability under the ATS); *Kadic v. Karadžić*, 70 F.3d 232, 239 (2d Cir. 1995) (“We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”). *But see* *Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 652 (S.D. Tex. 2010) (“Courts have also divided over whether and under what circumstances a private person or corporation can violate customary international law.”); Mark Hamblett, *2nd Circuit Rejects Corporate Liability in Alien Tort Act Cases*, LAW.COM (Sept. 20, 2010), <http://www.law.com/jsp/article.jsp?id=1202472226419>.

70. The claims included “aiding and abetting (1) extrajudicial killing; (2) crimes against humanity; (3) torture or cruel, inhuman, and degrading treatment; (4) arbitrary arrest and detention; (5) violation of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction.” *Kiobel*, 621 F.3d at 123.

71. 542 U.S. 692, 732 (2004).

72. *Kiobel*, 621 F.3d at 118.

73. *Id.*

74. *Id.* at 119.

75. *Id.* at 121.

yet been granted certiorari by the Supreme Court,⁷⁶ many believe that its holding will not only have a significant impact on ATS cases brought in the Second Circuit, but also that it will have “broad-reaching application” in many other courts.⁷⁷

What does this case mean for ICPs in China? Previously, some Chinese victims of human rights violations have brought suit against Yahoo!, Google, and MSN under the ATS and have met with some success.⁷⁸ After *Kiobel*, however, it appears that (at least for now) this door may very well be closing. Therefore, while there is a great deal of support for imposing international law and human rights obligations on corporations, *Kiobel* may have foreclosed a very viable mechanism through which to find corporations liable under the ATS. For now, it appears that it is up to the governments where corporations are domiciled to deal with the sticky legal situations that their corporations face.

B. *The Global Online Freedom Act*

In response to mounting criticism regarding Yahoo!, Google, and Microsoft’s cooperation with China’s censorship laws, the U.S. House of Representatives held a joint committee hearing in 2006 with executives from Yahoo!, Google, and Microsoft to discuss their business practices in China. As a result of this hearing, Congress proposed the Global Online Freedom Act of 2006 (GOFA) on February 16, 2006.⁷⁹ The Act (later re-introduced in 2007⁸⁰) was intended to create “corporate responsibility of [] companies to protect and uphold human rights”⁸¹ and to provide for civil and criminal penalties for noncompliance.⁸² In other words, GOFA aimed to bring the ICPs’ business practices in line with internationally recognized rights to freedom of speech.⁸³ This Act was an ambitious attempt by the U.S. government to confront issues with corporate business practices in other countries; however, GOFA is not an appropriate means of confronting the problem, for reasons that will be discussed below, and thus likely will not become law. The primary goal of the Act, if implemented,

76. The Second Circuit denied the plaintiff’s motion for rehearing en banc on February 4, 2011. *Kiobel v. Royal Dutch Petroleum Co.*, 2011 WL 338048 (2d Cir. 2011).

77. See, e.g., Hamblett, *supra* note 69 (internal quotation omitted).

78. For example, Yahoo! settled an ATS case brought against it that led to the arrest of Shi Tao. *Families of Shi Tao and Wang Xiaoning (Yahoo! Inc)*, WORLD ORG. FOR HUM. RTS. USA, http://www.humanrightssusa.org/index.php?option=com_content&task=view&id=15&Itemid=35 (last visited Apr. 14, 2011).

79. Global Online Freedom Act of 2006, H.R. 4780, 109th Cong. (2006).

80. See D’Jaen, *supra* note 26, at 329.

81. Global Online Freedom Act of 2006 § 2(15).

82. *Id.* § 207.

83. *Id.* § 2(1).

presents extraterritorial concerns that the United States must take into consideration. The intent of GOFA was “[t]o promote freedom of expression on the Internet [and] to protect United States businesses from coercion to participate in repression by authoritarian foreign governments”⁸⁴ In essence, by passing the Act, the United States would be attempting to regulate business practices that occur outside its borders. While traditionally states have jurisdiction to ensure that nonstate actors are complying with international law within their borders, “extraterritoriality” refers to actions by a state that regulate its citizens beyond its borders.⁸⁵

The United States has long followed a presumption against extraterritoriality.⁸⁶ As the recent district court decision in *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme* illustrates, the United States is very hesitant to extend its laws beyond its borders particularly when it comes to regulating the Internet. The court there stated:

In a world in which ideas and information transcend borders and the Internet in particular renders the physical distance between speaker and audience virtually meaningless, the implications of this question go far beyond the facts of this case. The modern world is home to widely varied cultures with radically divergent value systems. There is little doubt that Internet users in the United States routinely engage in speech that violates, for example, China’s laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom’s restrictions on freedom of the press. If the government or another party in one of these sovereign nations were to seek enforcement of such laws against Yahoo! or another U.S.-based Internet service provider, what principles should guide the court’s analysis?⁸⁷

Likewise, there is still a question of the *extent* to which international law permits a country to apply its laws to corporations when they operate outside of the country’s own borders. While the Human Rights Committee has not explicitly prohibited extraterritorial regulations,⁸⁸ it also has not

84. *Id.* pmbl.

85. D’Jaen, *supra* note 26, at 338; *see also* Nolan, *supra* note 23, at 12.

86. D’Jaen, *supra* note 26, at 338. David Held’s discussion of the classic regime of sovereignty reflects this presumption against extraterritoriality. He stated,

The classic regime of sovereignty highlights the development of a world order in which states are nominally free and equal; enjoy supreme authority over all subjects and objects within a given territory; form separate and discreet political orders with their own interests . . . ; engage in diplomatic initiatives but otherwise in limited measures of cooperation; regard cross-border processes as a ‘private matter’ concerning only those immediately affected

David Held, *The Changing Structure of International Law: Sovereignty Transformed?*, in *THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE* 162, 162–63 (2003).

87. *Yahoo!, Inc., v. La Ligue Contra Le Racisme et L’Antisemitisme*, 169 F. Supp. 2d 1181, 1186–87 (N.D. Cal. 2001).

88. For example, the Human Rights Committee has interpreted Article 2(1) of the

considered this question in the context of extraterritorial corporate actions.⁸⁹ Therefore, if the United States should decide that extraterritorial regulation is necessary in this situation, it is not entirely clear that GOFA's extraterritorial encroachments are justified under international law.

Furthermore, even if the United States decided to impose extraterritorial regulations on its corporations (and its actions were not prohibited under international law), GOFA runs the risk of imposing American views of free speech on the rest of the world. The Act gives the President full power to designate countries as being "Internet-restricting" based on a number of factors including the extent that the country filters content and the number of dissidents prosecuted.⁹⁰ The President is then expected to provide a yearly report of countries that have made the list.⁹¹ GOFA would also provide for an Office of Global Internet Freedom, which would "serve as the focal point for interagency efforts to protect and promote freedom of electronic information abroad"⁹² The aims of the Office would be to (1) create a global strategy to combat state-sponsored censorship; (2) identify and publicize keywords, terms, and phrases censored by each Internet-restricting country; (3) work with companies operating abroad to develop a voluntary code of minimum corporate standards; and (4) advise congressional committees on whether further legislative action is needed to keep the Act relevant.⁹³ While GOFA seeks to bring its companies in line with the human rights recognized in the UDHR, it does so in a manner that risks imposing Americanized notions of free speech on other countries because the Act gives complete discretion to the President and a government agency without any input from other international bodies.

Every country provides varying degrees of protection for speech on the Internet. While China is on the extreme end of the spectrum (having made Reporters Without Borders's 2006 "List of the 13 Internet Enemies"),⁹⁴ the United States is toward the other end, with some of the

ICCPR (regarding a nation-state's duty to ensure individual rights) as conferring jurisdiction on the nation-state to "anyone within the power or effective control of that State party even if not situated within the territory of the State party." U.N. Comm. on Human Rights, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 12, 2004), [http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf); Nolan, *supra* note 23, at 13 (citation omitted).

89. Nolan, *supra* note 23, at 13.

90. Global Online Freedom Act of 2006, H.R. 4780, 109th Cong. §§ 105(a)(1), 103(a) (2006).

91. *Id.* § 105(b)(1).

92. *Id.* § 104(b)(1).

93. *Id.* § 104(2)-(7).

94. *List of the 13 Internet Enemies*, REPORTERS WITHOUT BORDERS (Nov. 7, 2006),

more liberal approaches to Internet censorship.⁹⁵ But even the Internet in the United States is far from unregulated, and, according to OpenNet Initiative, “the United States may be among the most aggressive states in the world in terms of listening to online conversations.”⁹⁶ Furthermore, China is not the only country whose laws clash with the United States’ regarding censoring information on the Internet. As illustrated in the *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, the First Amendment protections in the U.S. Constitution conflicted with French laws prohibiting the sale of Nazi merchandise.⁹⁷ Likewise, Australia has decided to join China in implementing a government-mandated system of censorship where its plans to filter content relating to pornography, bestiality, rape, and child pornography have been highly criticized for being too expansive, potentially resulting in the unwarranted blockage of content with “strong social, political and/or educational value.”⁹⁸

What constitutes “protected speech” is very much reflective of a nation’s culture, politics, and history; even China’s extreme censorship policies are a response to the country’s deep concern with maintaining stability in such a densely populated nation.⁹⁹ Since cultural, political, and historical attributes play into every nation’s concept of protected speech, it should not be up to one country to decide what should or should not constitute protected speech. GOFA requires the President of the United States to determine which countries are “Internet-restricting,” but it does not set out any substantive means of making this determination. It only dictates that “[a] foreign country shall be designated as an Internet-restricting country *if the President determines* that the government of the country is directly or indirectly responsible for a systemic pattern of *substantial restrictions* on Internet freedom”¹⁰⁰ “Substantial restrictions” is not clearly defined, leaving the President to make that judgment. Without any concrete notions of free speech to draw upon,

<http://en.rsf.org/list-of-the-13-internet-enemies-07-11-2006,19603>.

95. OpenNet Initiative lists the United States as lacking “widespread technical Internet filtering at the state level” *Internet Filtering in the United States and Canada in 2006-2007*, OPENNET INITIATIVE, <http://opennet.net/studies/namerica2007> (last visited Apr. 14, 2011).

96. *Id.*

97. *Yahoo!, Inc., v. La Ligue Contra Le Racisme et L’Antisemitisme*, 169 F. Supp. 2d 1181, 1186–87 (N.D. Cal. 2001).

98. Jessica Guynn, *Google, Yahoo Object to Proposed Internet Censorship in Australia*, L.A. TIMES TECH. BLOG (Mar. 23, 2010, 9:58 AM), <http://latimesblogs.latimes.com/technology/2010/03/australia-internet-censorship-google-yahoo.html>.

99. D’Jaen, *supra* note 26, at 336.

100. Global Online Freedom Act of 2006, H.R. 4708, 109th Cong. § 105(a)(2) (2006) (emphasis added).

granting such broad discretion risks unduly imposing American notions of “protected speech” without deeper considerations of the cultural reasoning behind other notions of free speech.

GOFA creates the potential for bad blood between China and the United States at a time when their relationship is already tenuous. One of the considerations for implementing extraterritorial regulations is comity, or legal reciprocity:

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.¹⁰¹

When creating legislation that has extraterritorial effects, it is important to be mindful of the conflicts that can ensue when one nation attempts to extend its laws and regulations beyond its own borders.

The current relationship between China and the United States has been described as “inextricably intertwined, locked in a kind of co-dependency”¹⁰² China holds about \$800 billion of America’s debt,¹⁰³ while the United States is China’s most important market for its goods.¹⁰⁴ Both economies are so completely entangled and dependent on the other that they essentially control each other’s fate—China “can pull the rug out from under [America’s] economy only if they want to pull the rug out from under themselves.”¹⁰⁵ While China does not want to jeopardize its relationship with the United States, the United States also has an interest in maintaining a good relationship with China.

Passing GOFA, however, could strain that relationship. President Obama’s visit to China in November 2009 and his interactions with Chinese officials reflected an unwillingness to put such an important relationship on the line in order to address China’s censorship laws. When asked by a Chinese student whether the United States would “respect” the differences between American and Chinese censorship laws, Obama responded that “it’s very important for the U.S. not to assume what is good

101. *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1985).

102. Keith B. Richburg, *For U.S., China, Uneasiness About Economic Co-Dependency*, WASH. POST (Nov. 16, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/15/AR2009111502435.html>.

103. *Id.* A more recent *Washington Times* article indicates that China may hold closer to \$1.7 trillion in U.S. debt. *China Holds More U.S. Debt Than Indicated*, WASH. TIMES (Mar. 2, 2010), available at <http://www.washingtontimes.com/news/2010/mar/02/chinas-debt-to-us-treasury-more-than-indicated/>.

104. Richburg, *supra* note 102.

105. *Id.* (quoting Kenneth Lieberthal of the Brookings Institution).

for us is good for you.”¹⁰⁶ Likewise, newspaper headlines noted Obama’s “gentle critique” of China’s human rights violations.¹⁰⁷ Obama’s visit to China reflected a general understanding that the United States’ relationship with China is too vital to jeopardize by passing legislation that has the great potential to upset an already strained situation.

GOFA is commendable in its attempts to address the serious issue of American corporations’ complicity in Chinese censorship; however, it is not likely to become law for important reasons. GOFA raises extraterritorial concerns that must be carefully considered. As it is currently written, GOFA lacks an inherent understanding of the cultural, political, and historical motives behind every nation’s concept of protected speech. While the relationship between Internet censorship and human rights is an important topic for the United States GOFA is an inappropriate means to address those issues, and its passage could threaten to disrupt an already tenuous relationship between two of the world’s super powers.

C. *Global Network Initiative*

Since the Global Online Freedom Act was last introduced in 2007, it has not yet been passed into law, and, for reasons already stated, the United States government does not appear to be in the position to address Internet censorship problems at this time. Yet ICPs have still found themselves between a rock and a hard place in trying to maintain market presence internationally while avoiding human rights violations as a result of their business relationships. In October 2008, spurred at least in part by their predicament in China, American ICPs teamed up with nongovernment organizations, investors, and scholars. This two-year collaboration resulted in the development of an industry-wide code of conduct called the Global Network Initiative (GNI).¹⁰⁸ The GNI addresses the “increasing government pressure [companies face] to comply with domestic laws and policies in ways that may conflict with the internationally recognized human rights of freedom of expression and privacy” and is intended to advance a global response toward protecting and advocating freedom of expression and privacy.¹⁰⁹

106. Aileen McCabe, *Obama Gives Human Rights, Internet Censorship Centre Stage in China*, CANADA.COM (Nov. 16, 2009), <http://www.canada.com/news/Obama+gently+chides+China+cyber+censorship/2226819/story.html>.

107. See, e.g., Peter Nicholas, *Obama Chides China on Human Rights*, L.A. TIMES (Nov. 15, 2009), available at <http://www.latimes.com/news/nationworld/world/la-fg-obama-shanghai16-2009nov16,0,6953879.story>.

108. Rebecca MacKinnon, *The Global Network Initiative*, CIRCLEID (Oct. 28, 2008), http://www.circleid.com/posts/20081028_global_network_initiative/.

109. GLOBAL NETWORK INITIATIVE, <http://www.globalnetworkinitiative.org/> (last visited Apr. 14, 2011).

The GNI is guided by three documents that make up its core commitments: the Principles on Freedom of Expression and Privacy; the Implementation Guidelines; and the Governance, Accountability and Learning Framework.¹¹⁰ The Principles detail the broader goals of the GNI in establishing a framework for companies to advance and defend internationally recognized human rights through their business practices.¹¹¹ The Implementation Guidelines expound on the Principles by providing more guidance on *how* companies are to translate these Principles into actual practice. The Governance, Accountability and Learning Framework sets up a multistakeholder organization (governed by a board of directors), which is intended to drive the program forward.¹¹² This organization is empowered to, among other things, recruit new participants, create collaborative forums, establish a means for third parties to express their concerns or questions, and to communicate with participant companies in developing an independent accountability system for assessing company compliance.¹¹³ These documents provide the structure and framework for the entire GNI.

The Governance, Accountability and Learning Framework provides for a three-phase timeline for the GNI to become fully operational. The GNI just finished phase one, which lasted from 2009 to 2010.¹¹⁴ During that time, companies focused on recruiting new participants and implementing the Principles in their business practices.¹¹⁵ At the same time, the organization was required to find and train independent assessors (to be used later on in evaluating participating companies), and also provided information and expertise to the participating companies as they implemented their changes.¹¹⁶ Phase two began in 2011, during which time independent assessors will evaluate and create a written report on each company's implementation of the Principles (also called a process review).¹¹⁷ The third phase begins in 2012 and continues on from there. At that point, assessors will be required to carry out a case review of

110. *Principles*, GLOBAL NETWORK INITIATIVE, <http://www.globalnetworkinitiative.org/principles/index.php> (last visited Apr. 14, 2011); *Implementation Guidelines*, GLOBAL NETWORK INITIATIVE, <http://www.globalnetworkinitiative.org/governanceframework/index.php> (last visited Apr. 14, 2011); *Governance, Accountability & Learning Framework*, GLOBAL NETWORK INITIATIVE, <http://www.globalnetworkinitiative.org/governanceframework/index.php> (last visited Apr. 14, 2011).

111. *Principles*, *supra* note 110.

112. *Governance, Accountability & Learning Framework*, *supra* note 110.

113. *Id.*

114. *See id.*

115. *See id.*

116. *Id.*

117. *Id.*

participating companies by delving deeper into the companies' everyday practices, assessing the effectiveness of each company's policies and their responses to government demands in Internet-restricting countries.¹¹⁸ Throughout the process, the organization and participants are expected to continue to bring in new recruits,¹¹⁹ and, by phase three, the GNI should be in full swing.

On its face, the GNI appears to tackle some of the critical issues inherent in GOFA. The GNI attempts to address on a global scale issues that GOFA sought to address through only the narrow lens of American law. Likewise, the GNI creates a forum for disseminating information on international laws and provides assistance to companies in order to help them minimize their contributions to human rights violations. Most importantly, it places all participating ICPs on a level playing field by creating uniform guidelines for every company and enabling these companies to work together to oppose government demands that potentially compromise human rights.¹²⁰ Therefore, on its face, the GNI appears to be an effective alternative to some of the major shortcomings of GOFA.

However, some inherent problems exist in the GNI's makeup that could hamper its ability to meet its critical goals. Most importantly, while the GNI seeks to be global, it is currently comprised of largely American companies, organizations, and scholars.¹²¹ Further, it has only twenty-five participants,¹²² and it has failed to gain commitments from Internet giants like Twitter, Facebook, Amazon.com, and Skype.¹²³ In fact, the only ICPs that have actually signed on are Yahoo!, Google, and Microsoft. The GNI seeks to create a stronger pushback against Internet-restricting governments, yet these three American ICPs do not hold enough market

118. *Id.*

119. New recruits have two years from the day they join to prepare for their first assessment. If the GNI is already in phase three by the time a new participant joins, their assessment will be comprised of both a process and a case review. *Id.*

120. For example, the GNI requires participating companies to give limited interpretation to government demands that would compromise freedom of expression; to seek clarification on government demands that are overly broad or inconsistent with international law; to obtain written explanations from governments explaining the legal basis for their demands; and to challenge demands in domestic court or seek assistance from international organizations when demands appear to conflict with international or domestic laws. *Implementation Guidelines, supra* note 110.

121. *Participants*, GLOBAL NETWORK INITIATIVE, <http://www.globalnetworkinitiative.org/participants/index.php> (last visited Apr. 14, 2011).

122. *Id.* Interestingly, research began for this Note in mid- to late 2009, and the GNI has only gained one new participant since that time.

123. Evgeny Morozov, *Wiki Rehab: How to Save Julian Assange's Movement from Itself*, NEW REPUBLIC (Jan. 7, 2011), <http://www.tnr.com/article/politics/81017/wikileaks-internet-pirate-party-save>.

power in China to be a sufficient force against government demands.¹²⁴ While it may be too soon to declare the GNI a failure, if it cannot recruit other ICPs, it is unlikely that it will be able to exercise sufficient leverage to accomplish its goals. The GNI also needs more international presence than it currently has, in order to avoid looking merely like GOFA in disguise rather than a global code of conduct for companies.

One of the biggest criticisms of the GNI (and a large reason why several international organizations such as Reporters Without Borders and Amnesty International currently do not back it) is that the GNI lacks sufficient “teeth” to get the job done.¹²⁵ The language in the GNI leaves too much discretion to participating companies in responding to government demands—calling for companies to “*assess the human rights risks . . . where they operate and develop appropriate mitigation strategies to address these risks*” as well as to “[n]arrowly interpret and implement government demands”¹²⁶ While companies are responsible for seeking advice when necessary, the language of the GNI provides loose guidelines for companies, leaving too much to the judgment and discretion of participating companies in responding to government directives.¹²⁷ The organization will publicize companies that are found in noncompliance with the Principles; however, there are no real penalties set out for companies that shirk their obligations.¹²⁸ The GNI also does not outright forbid companies from complying with government demands that violate international laws, leaving many to argue that the GNI does not actually

124. Google’s market share, for example, has dropped to less than nineteen percent in China. Brian Hindley & Hosuk Lee-Makiyama, *Protectionism Online: Internet Censorship and International Trade Law* 5 (ECIPE, Working Paper No. 12, 2009), <http://www.ecipe.org/publications/ecipe-working-papers/protectionism-online-internet-censorship-and-international-trade-law/PDF>.

125. *Why Reporters Without Borders Is Not Endorsing the Global Principles on Freedom of Expression and Privacy for ICT Companies Operating in Internet-Restricting Countries*, REPORTERS WITHOUT BORDERS (Oct. 28, 2008), <http://www.rsf.org/Why-Reporters-Without-Borders-is.html> [hereinafter REPORTERS WITHOUT BORDERS]; Bobbie Johnson, *Amnesty Criticises Global Network Initiative for Online Freedom of Speech*, GUARDIAN (Oct. 30, 2008), <http://www.guardian.co.uk/technology/2008/oct/30/amnesty-global-network-initiative>. It does, however, appear hopeful that Reporters Without Borders has at least acknowledged its support for these ICPs’ efforts in joining the GNI. Doug Caverly, *Reporters Without Borders Names “Internet Enemies,”* WEBPRONews (Mar. 13, 2009), <http://www.webpronews.com/topnews/2009/03/13/reporters-without-borders-names-internet-enemies>.

126. *Implementation Guidelines*, *supra* note 110 (emphasis added).

127. Johnson, *supra* note 125.

128. For example, while the GNI’s own website details what will be assessed in each of its three phases as well as what will be publicly reported (including assessments of each company’s compliance as well as any compliance challenges), it makes no mention of penalties that will be exacted upon companies who are found in noncompliance. *Frequently Asked Questions*, GLOBAL NETWORK INITIATIVE, <http://www.globalnetworkinitiative.org/faq/index.php#42> (last visited Apr. 14, 2011).

eliminate the risk of human rights abuses.¹²⁹ In short, the success of the GNI lies largely in the hands of the member companies to carry out their responsibilities. Thus, while the GNI is a “step in the right direction,”¹³⁰ several international groups are waiting to endorse the plan, remaining cautiously optimistic about its success.¹³¹

While many have not completely written off the success of the GNI, there are plenty of hurdles that the program must overcome before it can prove its value. It is essential that the GNI recruit more members, and it must find well-known, international telecommunications companies that are willing to commit to its Principles.¹³² Further, to assuage the concerns of many international groups that the enforcement provisions of the GNI are too weak to discourage its membership from contributing to human rights abuses, the language of the GNI should either be reformed to address the weaknesses in its framework. Otherwise, the GNI's success will continue to depend on its participants' mere promises to uphold the Principles.

D. *The Global Compact*

The Global Compact is a multistakeholder initiative¹³³ intended to “ensure that markets, commerce, technology and finance advance in ways that benefit economies and societies everywhere.”¹³⁴ Similar to the GNI, it is a global initiative created in order to bring business practices in line with internationally accepted “core values” of good business in the areas of human rights, labor standards, the environment, and anticorruption.¹³⁵ However, while the Compact has some definite strengths not present in the GNI, it shares some of its very fundamental weaknesses, making it a useful mechanism to improve company operations abroad but ultimately missing the mark in offering a sound solution to solving the problems of corporate complicity in China.

While the GNI is struggling to become a truly global initiative, the Compact does not suffer from that same problem. It is a United Nations

129. See MacKinnon, *supra* note 108; Israel, *supra* note 14, at 651–52; REPORTERS WITHOUT BORDERS, *supra* note 125.

130. REPORTERS WITHOUT BORDERS, *supra* note 125.

131. See *id.*; Johnson, *supra* note 125.

132. In late 2008, the *Guardian* reported that the GNI was in discussions with British communication company Vodafone, as well as with French Telecom. Johnson, *supra* note 125.

133. Deva, *supra* note 60, at 291.

134. *Overview of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited Apr. 14, 2011).

135. *The Ten Principles*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Apr. 14, 2011).

initiative and is in fact “the largest voluntary corporate responsibility initiative in the world.”¹³⁶ Since its launch in July 2000, the Compact has attracted a significant number of participants and now consists of about 8,000 members, which include a diverse number of governments, companies, and organizations from all over the world.¹³⁷ It is guided by “The Ten Principles,” which are based on core principles of international law found in the Universal Declaration of Human Rights, the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption. As such, the Principles are truly a global response to reforming corporate business practices in a globalizing market.¹³⁸

While the Compact is made up of an impressive number of participants, it has fielded some heavy criticisms regarding its effectiveness.¹³⁹ The Compact seeks to implement its objectives through leadership, dialogues, learning, and networking,¹⁴⁰ but it does not act as a regulatory body to ensure that its practices are being properly implemented and followed.¹⁴¹ In fact, there is no mechanism in place properly to police participant efforts nor does it penalize those that are not fulfilling their commitment.¹⁴² Furthermore, the Principles are very vague and provide little guidance to companies that wish to follow the Compact’s policies. For example, Principles 1 and 2 provide that “[b]usinesses should support and respect the protection of internationally proclaimed human rights” and “make sure that they are not complicit in human rights abuses.”¹⁴³ Such broad codes of conduct not only create potential problems for companies looking to improve their business practices, but also make it easier for disingenuous corporations to circumvent the code of conduct altogether.¹⁴⁴

136. *Overview of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, *supra* note 134; *UN Global Compact Participants*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last visited Apr. 14, 2011).

137. *UN Global Compact Participants*, UNITED NATIONS GLOBAL COMPACT, *supra* note 136; *Participant Search*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/participants/search> (last visited Apr. 14, 2011).

138. *The Ten Principles*, UNITED NATIONS GLOBAL COMPACT, *supra* note 135.

139. There is, in fact, an entire blog devoted to keeping a watchful and critical eye on the Compact. See GLOBAL COMPACT CRITICS, <http://globalcompactcritics.blogspot.com/> (last visited Apr. 14, 2011).

140. For an example of how the Compact is set up to promote its objectives, see *Analyzing Progress*, UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/COP/analyzing_progress.html (last visited Apr. 14, 2011).

141. Deva, *supra* note 60, at 293.

142. *Id.*

143. *The Ten Principles*, UNITED NATIONS GLOBAL COMPACT, *supra* note 135.

144. Deva, *supra* note 60, at 296.

Despite its large participant base, many have questioned whether the Compact is effective at changing business practices or whether it is simply being utilized by corporations to “polish” or “bluewash” their images.¹⁴⁵ For example, the Compact requires participants to submit annual statements detailing how they are complying with the Ten Principles.¹⁴⁶ If companies do not submit these reports, they can be “delisted” or kicked out of the Compact, and surprisingly, over 1,800 companies have already been ejected for not submitting reports.¹⁴⁷ Then, in March of 2010, the Compact placed a one year moratorium on delisting companies due to concerns that too many companies were being ejected.¹⁴⁸ The moratorium was retroactive (running from January 1, 2010 to December 31, 2010)¹⁴⁹ and was intended to allow the Board to “explore solutions to a systemic lack of disclosure in certain markets.”¹⁵⁰ However, after the moratorium was lifted on December 31, 2010, 200 more companies were de-listed, bring the total number of expelled companies to 2,000.¹⁵¹

Today, the Global Compact is continuing its attempts to increase transparency and to improve effective implementation of its policies by, for example, developing (and publicizing) a grading system in which participating companies are ranked based on their “levels of progress disclosure.”¹⁵² Yet only time will tell whether these changes will ultimately be effective, and many argue that the success of the Compact will remain in question until it can definitively show that its policies are having a real impact on corporate behavior.¹⁵³

E. *Changing Gears in Combating Corporate Complicity*

Ultimately, the Compact, like GOFA, the GNI, and the ATS, fails to address fully the problems that arise from corporate complicity in China.

145. Hugh Williamson, *CSR in Emerging Economies: Style Still Trumps Substance*, FINANCIAL TIMES (June 23, 2010), <http://blogs.ft.com/beyond-brics/2010/06/23/csr-in-emerging-economies-style-still-trumps-substance/>; Kenny Bruno & Joshua Karliner, *Tangled Up in Blue: Corporate Partnerships at the United Nations*, CORPWATCH (Sept. 1, 2000), <http://www.corpwatch.org/article.php?id=996>.

146. Deva, *supra* note 60, at 298; *see also* Williamson, *supra* note 145.

147. Williamson, *supra* note 145.

148. *Global Compact Board Addresses Delistings, Calls for Review of COP Procedures*, UNITED NATIONS GLOBAL COMPACT (Mar. 25, 2010), <http://www.unglobalcompact.org/news/20-03-25-2010>; Williamson, *supra* note 145.

149. *Global Compact Board Addresses Delistings, Calls for Review of COP Procedures*, *supra* note 150.

150. *Number of Expelled Companies Reaches 2,000 As Global Compact Strengthens Disclosure Framework*, UNITED NATIONS GLOBAL COMPACT (Jan. 20, 2011), <http://www.unglobalcompact.org/news/95-01-20-2011>.

151. *Id.*

152. *Id.*

153. *See* Williamson, *supra* note 145.

However, while many raise serious concerns regarding these ICPs' operations, and rightly so, punishing ICPs or removing them altogether is not the appropriate step forward. In fact, American ICPs need not be viewed as the enemies. As will be discussed below, their presence in China provides very tangible benefits. In the end, there are more serious concerns pertaining to the system of censorship in China, and the ultimate focus should not be on the ICPs, but on China itself.

IV. MOVING FORWARD: SCALING THE GREAT FIREWALL OF CHINA

While there have been many alternatives proposed to address corporate complicity with Chinese censorship laws, they focus too much on making quick fixes and have the potential to push the issue in the wrong direction—making matters worse, not better. What is ultimately at issue is not simply ICPs' complicity in China, but the broader issues pertaining to China's system of censorship. If we truly want to address corporate complicity, we must do so in a manner that addresses the human rights violations themselves. And if we want to improve Internet freedoms in China, we must be realistic about what success can look like there—in other words, we need to reconceptualize what it would take to bring change to China.

It is important to keep in mind that, although China has steadily become a super power with a population of approximately 1.33 billion and a GDP of \$4.9 trillion in 2009,¹⁵⁴ it is still very much a developing country.¹⁵⁵ In fact, in 2009, its per capita GDP was only \$3,650 per year,¹⁵⁶ which is significantly lower than the per capita GDP of developed countries¹⁵⁷ (for example, the United States' 2009 per capita sat at about \$46,360¹⁵⁸). China has also experienced exponential economic growth at a

154. *China*, WORLD BANK, <http://data.worldbank.org/country/china> (last visited Apr. 14, 2011). In comparison, the United States' GDP was approximately \$14.33 trillion in 2009. *North America: United States*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Apr. 14, 2011).

155. INT'L MONETARY FUND, RESTORING CONFIDENCE WITHOUT HARMING RECOVERY 2, tbl.1 (July 7, 2010), <http://www.imf.org/external/pubs/ft/weo/2010/update/02/pdf/0710.pdf>; Yu Zhongwen, *China's Developing-Country Identity Remains Unchanged*, ENGLISH.XINHUANET.COM (Aug. 13, 2010), http://news.xinhuanet.com/english2010/indepth/2010-08/13/c_13443881.htm.

156. *China*, *supra* note 154.

157. Jianguo Liu & Peter H. Raven, *China's Environmental Challenges and Implications for the World*, 40 CRITICAL REV. ENVTL. SCI. & TECH. 823, 823 (2010), http://www.csis.msu.edu/Publications/Liu_Raven_2010.pdf.

158. *United States*, WORLD BANK, <http://data.worldbank.org/country/united-states> (last visited Apr. 14, 2011).

much faster pace than developed countries.¹⁵⁹ Consequently, China has become an economic giant but lags behind developed countries in many respects.¹⁶⁰ Its economic growth is expected to create “an unprecedented shift that will create big challenges for every aspect of the urban systems, including health, education, housing, energy, food, and water.”¹⁶¹ China, therefore, is still very much a growing nation that is finding its legs. It has seen considerable change, and it is sure to see more moving into the future; however, it seems unrealistic to hold China to American or Western standards of free speech and democracy and to expect huge changes in short order. Similarly, it is merely conjecture to say that China’s notion of free speech will not look more Western in the future.

The United States itself has seen its own free speech protections evolve significantly over the last two centuries. The First Amendment was adopted in 1791 and its protections have significantly evolved—waxing (and waning) since the 1700s. For example, just eleven years after the Constitution’s adoption, the Sedition Acts of 1798 were enacted to protect the government against seditious attacks of those who opposed it.¹⁶² While short-lived, these Acts were heavily criticized at the time for being a significant abridgment on speech.¹⁶³ In the 1800s, state governments were denying speech protections to minorities,¹⁶⁴ since First Amendment protections were not even applied to the states until 1925 when the Supreme Court held that the Fourteenth Amendment guaranteed free speech protections against state intrusion.¹⁶⁵ Concerns over protecting speech from government encroachment are still very much present today. More recently, the Bush Administration fielded strong criticism for enacting the USA PATRIOT Act. In particular, section 215 of the Act (which gives the government broad powers to obtain personal records of any citizen) has been attacked for the chilling effect it could have on free speech.¹⁶⁶

159. Liu & Raven, *supra* note 157, at 824.

160. *Id.* at 823.

161. *Id.* at 826.

162. Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596 (1798) (expired 1801) (“[I]f any person shall write, print, utter, or publish . . . or shall knowingly and willingly assist or aid in writing, printing, uttering, or publishing any false, scandalous and malicious writing . . . against the government of the United States . . . shall be punished by a fine . . . and by imprisonment not exceeding two years.”).

163. CHARLES C. HAYNES ET AL., *FIRST FREEDOMS: A DOCUMENTARY HISTORY OF FIRST AMENDMENT RIGHTS IN AMERICA* 52 (2006).

164. For example, the California Supreme Court in *People v. Hall*, 4 Cal. 399 (1854), denied the right of Chinese Americans and immigrants to testify at trial due to their inferior race. *Id.* at 84–85.

165. *Id.* at 48.

166. *Id.* at 227; *see also* *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, 18 U.S.C. § 215 (2001).

And the First Amendment continues to evolve every day.¹⁶⁷ In fact, as more acts of “cyber-terrorism” occur—like the publication of classified documents by WikiLeaks—the government has shown more and more distrust and fear of the Internet, making some wonder whether the U.S. government may place increased restrictions on Internet speech in the future.¹⁶⁸ Senator Jay Rockefeller, for example, recently remarked that the Internet is the “‘number one hazard’ to national security” and felt that “it would have been better if ‘we had never invented the Internet.’”¹⁶⁹

On the same token, China, in all actuality, is a maturing nation and has not had as much time as nations such as the United States to develop its laws and policies. As China grows as a country, the potential for change will grow along with it, especially in its stance on speech protections. For now, we must temper our expectations for China and understand that allowing ICPs to maintain a presence in China will be more beneficial than forcing them out.

Since change will likely only come with time, it is of the utmost importance that American ICPs remain in China. Chinese search engines are already dominant in its market (Baidu’s market share is projected to be at seventy-nine percent for 2011),¹⁷⁰ indicating that China could easily maintain its system of censorship without any outside assistance from American ICPs.¹⁷¹ Furthermore, even critics of Chinese censorship laws admit that search engines like Yahoo!, Google, and Microsoft provide search results that are “markedly less censored than rivals like Baidu.”¹⁷² Likewise, since Google produces an error message on its search engine alerting users when their search results have been censored, Google has at least informed the public that they were being censored.¹⁷³ Considering that

167. “[T]hroughout the nation’s history, all Americans struggle to achieve a balance between security and freedom in times of national crisis from the Sedition Act of 1798 to the USA Patriot Act of 2001.” HAYNES ET AL., *supra* note 163, at 12.

168. Teena Clipston, *WikiLeaks: The Day the Internet Died*, SUITE101.COM (Dec. 20, 2010), <http://www.suite101.com/content/wikileaks-is-the-freedom-of-information-killing-the-internet-a323434>.

169. *Id.*

170. Doug Caverly, *Baidu Sets Sights on Market Share of 79 Percent*, WEBPRONEWS (June 8, 2010), <http://www.webpronews.com/topnews/2010/06/08/baidu-sets-sights-on-market-share-of-79-percent>.

171. Fahmida Y. Rashid, *China Brags About Deleting 350 Million Pages in Web Censorship Campaign*, EWEK.COM (Jan 3, 2011), <http://www.eweek.com/c/a/Cloud-Computing/China-Brags-About-Deleting-350-Million-Pages-in-Web-Censorship-Campaign-418388/>.

172. Ryan Singel, *Google Uncensors China Search Engine*, EPICENTER (Mar. 22, 2010, 4:05 PM), <http://www.wired.com/epicenter/2010/03/google-uncensors-china-search-engine/>.

173. In one instance,

[There was a] series of high-profile scandals in China . . . information that had been censored by the government and, by default, search engines including

these ICPs are not essential elements to facilitating China's firewall, removing them from the market altogether would not hinder China's censorship policies. In fact, forcing these companies out will only further insulate the Chinese market. Maintaining a presence in China is crucial to making any progress—and, at the very least, it is a glimmer of hope that change is possible.

Recent developments between Google and China serve as an illustration of how Chinese censorship may evolve. In December 2009, Google was the victim of a “hack attack” in which hackers gained access to the Google accounts of several Chinese human rights activists.¹⁷⁴ The attacks were suspected (and later confirmed) to be linked to the Chinese government,¹⁷⁵ and as a result, Google left China altogether on March 22, 2010.¹⁷⁶ In a bold move, Google removed its Chinese domain, rerouting visitors to its Hong Kong site, which does not filter its search results¹⁷⁷—a move that angered Chinese officials.¹⁷⁸ However, what happened next provides an interesting glimpse into the psyche of the Chinese government. Rather than immediately blocking Google, China waited. About a week later, China had neither permanently blocked Google nor revoked its license.¹⁷⁹ And despite blocking Google China on March 30, 2010, China

Google. . . led some in China to turn to Google.cn, rather than Baidu, because Google would at least tell people when information was being censored—even if the information was missing.

Ryan Singel & David Kravets, *Only Google Could Leave China*, EPICENTER (Jan. 15, 2010, 11:28 AM), <http://www.wired.com/epicenter/2010/01/google-china-engagement/>.

174. Kim Zetter, *Google Hackers Targeted Source Code of More Than 30 Companies*, THREAT LEVEL (Jan. 13, 2010, 2:28 AM), <http://www.wired.com/threatlevel/2010/01/google-hack-attack/>.

175. Dean Takahashi, *WikiLeaks Documents Lay Bare Vast Hacking Attempts by Chinese Leaders*, VENTUREBEAT (Dec. 4, 2010), <http://venturebeat.com/2010/12/04/wikileaks-documents-lay-bare-vast-hacking-attempts-by-chinese-leaders/>.

176. Adam Ostrow, *Google Redirects Chinese Site to Hong Kong*, MASHABLE (Mar. 22, 2010), <http://mashable.com/2010/03/22/google-redirects-chinese-site-to-hong-kong/>; Rebecca Forbes, *Google Pulls Search out of China*, TICKER (Apr. 12, 2010), <http://www.theticker.org/about/2.8220/google-pulls-search-out-of-china-1.2219628>.

177. Cade Metz, *Google Redirects China to Uncensored Hong Kong Servers: Warns Chinese May Block 'Entirely Legal' Move*, REGISTER (Mar. 22, 2010), http://www.theregister.co.uk/2010/03/22/google_redirects_china_to_hong_kong/; Young, *The Difference Between Google Hong Kong & Google China*, FREE NUTS (Mar. 26, 2010), <http://freenuts.com/google-hong-kong-vs-google-china/>.

178. *See Google Angers China by Shifting Service to Hong Kong*, GUARDIAN.CO.UK (Mar. 23, 2010), <http://www.guardian.co.uk/technology/2010/mar/23/google-china-censorship-hong-kong>.

179. *See Sam Gustin, Timeline: Google's Dispute with China*, DAILYFINANCE (Mar. 30, 2010), <http://www.dailyfinance.com/story/timeline-googles-dispute-with-china-came-down-to-principle/19410114/>.

restored access to Google the very next day.¹⁸⁰ This cat and mouse game continued until June 2010, when China threatened to revoke Google's license if it did not stop redirecting users.¹⁸¹ Google complied and China renewed Google's license in early July 2010.¹⁸² While Google China is currently still operational, Google refuses to censor information and, therefore, only delivers results for limited searches such as on products and music.¹⁸³

China may threaten companies who do not comply with its strict censorship laws, but the fact is, China wants Google there¹⁸⁴—it wants these ICPs operating within its markets. China's hesitance to block Google completely is a sign that its fears the effects of doing so would have on the Chinese people. For a government that relies on its citizens for its legitimacy, China does not want to block Google actively. The most avid supporters of Google also happen to be highly educated and outspoken citizens.¹⁸⁵ According to one Beijing consultant, "To block Google entirely is not necessarily a desirable outcome for the government . . . It's going to boil down to whether authorities feel it is acceptable for users to be redirected to that site without having to figure it out themselves."¹⁸⁶ Furthermore, the public's response to Google's announced departure was one of sadness. When Google initially announced its plans to leave China in January, young Chinese citizens left wreaths outside Google's Beijing headquarters to express their dismay.¹⁸⁷ Chinese citizens support these ICPs and they hope that companies like Google will remain active in their country. If its citizens want these companies to remain in the market, it behooves China to keep them there (in whatever capacity possible) because

180. Jessica Guynn & David Pierson, *Google Blames Chinese Censors for Outage*, L.A. TIMES (Mar. 31, 2010), available at <http://articles.latimes.com/2010/mar/31/business/la-fi-china-google31-2010mar31>.

181. Dean Wilson, *Google.cn Changes Landing Page as China Threatens Licence Revoke*, TECHEYE.NET (June 29, 2010), <http://www.techeye.net/internet/google-cn-changes-landing-page-as-china-threatens-license-revoke>.

182. *Google Says China Licence Renewed by Government*, BBC NEWS (July 9, 2010), <http://www.bbc.co.uk/news/10566318>.

183. Matt Rosoff, *Google Admits It Wants to Return to China*, BUSINESS INSIDER (Jan 4, 2011), <http://www.businessinsider.com/google-may-return-to-china-2011-1>.

184. Post March, China seemingly was trying to avoid a Google exit altogether. Saibal Dasgupta, *China Persuades Google to Stay Back*, TIMES OF INDIA (Jan. 16, 2011), <http://timesofindia.indiatimes.com/world/china/China-persuades-Google-to-stay-back/articleshow/5453590.cms>.

185. Miguel Helft & Michael Wines, *Google Faces Fallout As China Reacts to Site Shift*, N.Y. TIMES, Mar. 23, 2010, at B1.

186. *Id.* (quotations omitted).

187. Miguel Helft & David Barboza, *Google Shuts China Site in Dispute over Censorship*, N.Y. TIMES (Mar. 22, 2010), available at <http://www.nytimes.com/2010/03/23/technology/23google.html>.

it is within China's best interests to keep its citizens happy. Blocking Google would be a very aggressive move for China—a move, it is clear, that it does not want to make.

Ultimately, the fact that China is cognizant of the importance of having companies like Google in its markets and, furthermore, that these companies seem to be making an important impact making it that much more essential that they remain in China. But staying in China's market prompts the serious question of how to deal with the violations that occur as a result of these corporations complying with Chinese laws. This question will continue to be difficult; however, even proposals like the Global Network Initiative and the Global Compact can play an important role in helping these companies tighten up their operations in order to avoid contributing to human rights violations. Google has kept (and will continue to keep) its servers outside of China,¹⁸⁸ sheltering it from legal requests for information on dissidents. Yahoo! appears to be following suit—when it launched its new portal in Vietnam, it did not establish its servers there.¹⁸⁹

Furthermore, the Great Firewall is far from impenetrable. VPNs (virtual private networks) and proxy servers are useful in allowing Chinese citizens to have access to information that is otherwise blocked.¹⁹⁰ Likewise, users are misspelling words as well as substituting words that sound similar to banned words as a means of getting around the filters.¹⁹¹ This bottom-up approach used by citizens to usurp the system will only continue since the Chinese people are continuously looking for new ways to get around China's firewall.¹⁹² Interestingly enough, a niche market has developed for software engineers who are constantly creating new technology that enables users to circumvent filtering systems in order to access information on the Internet.¹⁹³

Finally, the World Trade Organization (WTO) may become a viable forum for pressuring the Chinese government to stop heavily censoring its citizens. Since China's censorship practices could be deemed anticompetitive and a restraint on trade, taking up grievances with the

188. Singel & Kravets, *supra* note 172.

189. *Id.*

190. Huus, *supra* note 31.

191. *Id.*

192. *Id.*; see, e.g., Michael C, Comment, *Proxy Server in China?*, YAHOO! ANSWERS (June 6, 2007, 5:55 PM), <http://answers.yahoo.com/question/index?qid=20070610104130AAi6Eh6>.

193. Casey Kazan, *New Tech: Twitter Developing Censorship-Proof Technology*, DAILY GALAXY (Mar. 28, 2010), http://www.dailygalaxy.com/my_weblog/2010/03/new-tech-twitter-developing-censorship-proof-technology-a-weekend-feature.html/; Atari, *Finding New Ways to Get Around China's Censorship . . . For Now*, REASONER (Oct 31, 2005, 3:23 PM), <http://www.reasoner.org/archives/340>.

WTO may be an effective deterrent to continued Chinese censorship.¹⁹⁴ Although some serious doubts have been raised about the effectiveness of using the WTO,¹⁹⁵ the Obama Administration is showing signs that it is willing to use the WTO to influence China's economic decision making.¹⁹⁶ Ultimately, however, it remains to be seen whether the WTO will be an effective venue for challenging China's firewall.

In the end, while it is important to ensure that these ICPs are not adding to the problem, what we really need to be concerned with is achieving change in the long term. It is unclear whether China will liberalize its policies on Internet speech, but the likelihood of such an evolution is much greater with American ICPs in China than if they were mandated to cease their Chinese operations. Though American complicity in Chinese censorship is an unsavory thought, domestic and international law should focus on long-term advancement instead of short-run flaws.

V. CONCLUSION

You are talking about [Internet] technology that everyone acknowledges is critical for liberalization and democratization . . . In our world, taking the position that if it's not 100 percent, you shouldn't go in is just not sensible if what you want at the end of the day is more human rights and [I]nternet freedom.¹⁹⁷

What Google has done in China is somewhat provocative. An American ICP has taken a stand against a major world power, and its actions potentially have created a path toward change. China's reaction is noteworthy, and Google's actions have unearthed a glimmer of hope that China is willing to alter its ways. It will just take time.

At first glance, it seems per se objectionable, even repulsive, to argue that American ICPs should remain in China's market, complicit in its censorship operations and potentially contributing to further human rights abuses. But it is important to step back and understand that China's notions of rights and freedoms are still at the infant stage, but budding signs of progress exist that foreshadow future progress. We cannot expect every country to be the United States.¹⁹⁸ Therefore, we must not view "success"

194. See generally Hindley & Lee-Makiyama, *supra* note 124; Daniel Indiviglio, *Fighting China's Censorship Through the WTO?*, ATLANTIC (June 24, 2009), <http://www.theatlantic.com/business/archive/2009/06/fighting-chinas-censorship-through-the-wto/20070/>.

195. See, e.g., Indiviglio, *supra* note 194.

196. See Keith Bradsher, *Sitting out the China Trade Battles*, N.Y. TIMES (Dec. 23, 2010), available at http://www.nytimes.com/2010/12/24/business/global/24trade.html?_r=1&src=busln.

197. Singel & Kravets, *supra* note 172 (quoting Leslie Harris, the president of the Washington, D.C., advocacy group, Center for Democracy and Technology).

198. Even countries such as France and Australia have differing policies on what is

in China in terms of American standards. We must rejoice in small victories and encourage the Chinese government to increase openness while encouraging American content providers to sustain and grow their presence in the Chinese market. China's response to Google's latest actions shows promise for the future and objective evidence that a watered-down Google is better than no Google at all.

Recent news developments further justify exercising patience with the Chinese government. On October 16, 2010, Li Qiming, the son of a senior police chief, hit two female students while driving under the influence, killing one of them.¹⁹⁹ Initially, Li was remorseless and drove off, believing that he would remain insulated from reprimand because his father served as a local chief of police.²⁰⁰ In the past, Li may very well have escaped any punishment;²⁰¹ however, news of the hit-and-run ignited a public outrage on the Internet, prompting Li to issue a tearful apology on national television.²⁰² Then, in January of 2011, Li was sentenced to six years in prison and ordered to pay nearly \$70,000 in compensation to his victims.²⁰³

Similarly, a Chinese web site called 703804.com recently has been coined by some Chinese citizens as the new Chinese WikiLeaks.²⁰⁴ The web site hosts various discussion forums for music, chat, and social networking, but its most important function is that it facilitates core public speech by providing a forum for local citizens to voice their concerns about local problems, including government corruption.²⁰⁵ While the Chinese government has taken the site down numerous times, it decided to approach the site's creator, Ye Zhe, a few years ago to negotiate.²⁰⁶ In exchange for Zhe's promise to temper political discussions on his forum, the government agreed to allow the site to remain in operation.²⁰⁷ While some argue that 703804.com is a very limited victory for the Chinese people (as the forum is strictly limited to discussions regarding *local* government corruption), many others argue that the government's tolerance of the site is a far cry

acceptable speech, yet they are still considered advanced, rather than backward, countries.

199. *Father and Son Apology for Hit-and-Run Seen as 'Show,'* GLOBAL TIMES, http://www.lifeofguangzhou.com/node_10/node_37/node_82/2010/10/25/128797556981269.shtml (last visited Apr. 14, 2010).

200. *See China Hit-and-Run Driver Sentenced to Six Years in Jail*, BBC.CO.UK (Jan. 30, 2011), <http://www.bbc.co.uk/news/world-asia-pacific-12317756>.

201. *See* Rob Gifford, *Internet Helps to Hold Chinese Accountable*, NAT'L PUB. RADIO (Jan. 26, 2011), <http://www.npr.org/2011/01/26/133233065/Internet-Helps-To-Hold-Chinese-Accountable> (click on "Listen to the Story").

202. *Id.*

203. *China Hit-and-Run Driver Sentenced to Six Years in Jail*, *supra* note 200.

204. Gifford, *supra* note 201.

205. *See id.*

206. *Id.*

207. *Id.*

from even a decade ago and is a “huge step forward in [attaining government] accountability.”²⁰⁸

Ultimately, it is already apparent that conditions in China are ripe for change. But in the mean time, there are no quick or easy answers to this predicament. What is certain, though, is that leaving the market entirely would be counter-productive to the ultimate goal of bringing more freedom to China. If the United States truly wishes to see more Western influence on speech-related issues, it only makes sense that Western corporations should be allowed to continue operating in the Chinese market rather than pulling out and leaving it to operate in isolation. American ICPs are in a perfect position to take advantage of opportunities to increase the flow of information into China. Their presence, therefore, is not only a short-term boon to our tech sector but will continue to present very real opportunities for growth. While it is certainly necessary to avoid further contributions to human rights violations, big changes will not happen overnight. To “fix” China, we must first embrace small victories and understand that a satisfactory long-term solution is possible but that, for now, maintaining an open dialogue can only work to accelerate the ultimate goal of bringing Internet freedom to the Chinese people.

208. *Id.*