

## Note

### **“Don’t Be Evil”: Google Faces the Chinese Internet Market and the Global Online Freedom Act of 2007**

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#### I. INTRODUCTION

Crowds looked on as political, historical and philosophical books burned, sending a tower of smoke high into the air. If watching the legacy of an entire culture going up in flames did not send a clear enough signal to those living under Qin rule, the emperor’s summary conviction and execution of hundreds of scholars certainly did.<sup>1</sup> Intellectuals accused each other to exonerate themselves, and when it was over, 460 people were buried alive.<sup>2</sup> Ironically, the tyrannical emperor, Qin Shi Huangdi, famous in China for burning the books and burying the scholars, is better remembered in the West as the mastermind behind cultural landmarks such as the Terracotta Warriors and the Great Wall.<sup>3</sup> This incident is the earliest record of Chinese governmental censorship, but it is not the last. From the great emperors to Chairman

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<sup>1</sup> Wikipedia, *Burning of Books and Burying of Scholars*, [http://en.wikipedia.org/wiki/Burning\\_of\\_books\\_and\\_burying\\_of\\_scholars](http://en.wikipedia.org/wiki/Burning_of_books_and_burying_of_scholars) (last visited Nov. 1, 2007). Wikipedia is an online encyclopedic source whose material may be altered by readers.

2. *Id.*

3. Wikipedia, *Qin Shi Huang*, [http://en.wikipedia.org/wiki/Qin\\_Shi\\_Huang](http://en.wikipedia.org/wiki/Qin_Shi_Huang) (last visited Nov. 1, 2007).

Mao, the Chinese government has held a tight rein on freedom of expression, recognizing information as a threatening source of social upheaval. With the 1990's, however, came a new challenge for the People's Republic of China. The Internet created a new, difficult-to-police medium, a "world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity."<sup>4</sup>

The Chinese Communist Party (CCP) recognized the threat of the Internet as a means of exposing governmental flaws, and soon implemented legal and physical restrictions on its use.<sup>5</sup> The world's largest Internet companies are based in the United States, however, and for these businesses to enter the Chinese market, they are required to comply with these censorship rules.<sup>6</sup> Though the United States has always officially espoused the benefits of free speech to the liberalization and ultimate progress of a society, large-scale Chinese censorship would have been impossible without the partnership of Western firms.<sup>7</sup>

This Note explores the Congressional attempt to prevent the complicity of American companies in foreign restriction of Internet free speech. A primary driving force behind this legislative endeavor was Google's announcement at the beginning of 2006 that they would cooperate with Chinese authorities in censoring the Internet.<sup>8</sup> As a California-based corporation, this collaboration in perpetrating human rights abuses in the denial of a basic human right runs afoul not only of American social and political ideology, but also of

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4. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, <http://homes.eff.org/~barlow/Declaration-Final.html>, Feb. 8, 1996.

5. See, e.g., Wikipedia, *Internet Censorship in the People's Republic of China*, [http://en.wikipedia.org/wiki/Internet\\_censorship\\_in\\_mainland\\_China](http://en.wikipedia.org/wiki/Internet_censorship_in_mainland_China) (last visited Nov. 12, 2007) (providing an overview of Chinese Internet censorship).

6. See, e.g., Official Google Blog, *Testimony: The Internet in China*, <http://googleblog.blogspot.com/2006/02/testimony-internet-in-china.html> (last visited Nov. 12, 2007) (testimony of Elliot Schrage, Vice President, Global Communications and Public Affairs, Google, Inc., Feb. 15, 2006, presenting Google's perspective on the decision to participate in Chinese censorship).

7. David Lee, *Multinationals Making a Mint from China's Great Firewall*, S. CHINA MORNING POST, Oct. 2, 2002, at 16.

8. Official Google Blog, *supra* note 6.

Google's own infamous mission statement: "Don't be evil."<sup>9</sup> Though U.S. Internet companies such as Yahoo! and Microsoft MSN had previously entered the Chinese market and practiced similar censorship, Google's acquiescence marked a significant shift in restrictive impact in light of the company's considerable market percentage.<sup>10</sup>

Section I will introduce a brief history of Chinese censorship. Following a short historical discussion of governmental regulation of traditional means of disseminating information under dynastic and Communist rule, this section will examine the means the People's Republic has utilized in combating its newest adversary, the Internet. This section will discuss both the specific legal regulations enacted, and the technical means by which the Chinese have regulated activity on the Web. Section II will take a geographic shift to examine the American perspective, discussing the history of interactions between U.S.-based Internet companies and the Chinese market. Major players such as Yahoo! and Microsoft entered the Asian field years earlier than Google, making their respective marks on the evolution of both Chinese and American law. This section will conclude with an examination of U.S. law relating to American corporate activity abroad, as well as accepted international norms in the area of human rights. Section III will explore the political developments that have taken place in the wake of Google's recent entry onto the Chinese Internet landscape. As the most significant American actor yet to enter the Chinese market, Google's decision has spurred the U.S. government to action: Congress can no longer remain passive with regard to regulation of the American industry abroad. Current legislation is ineffective to combat a new and evolving venture that may serve to undermine the very foundations of U.S. and international value systems alike.<sup>11</sup> What steps, if any, can the American government take to

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9. *E.g.*, *Google Spells Censorship in China*, WIRED NEWS, Jan. 24, 2006, <http://www.wired.com/news/technology/0,70081-0.html>.

10. *Baidu, Google Dominate Net Search in China*, CNET NEWS.COM, Aug. 30, 2005, [http://news.com/Baidu,+Google+dominate+Net+search+in+China/2100-1038\\_3-5844468.html](http://news.com/Baidu,+Google+dominate+Net+search+in+China/2100-1038_3-5844468.html).

11. *See generally* Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) (providing a means by which foreign nationals can utilize the U.S. court system to hold American companies accountable for torts committed abroad).

regulate industry in foreign nations? Is the price of conducting business in China too high? Will Google be able to find a gray area in which to operate between closing off an expansive Chinese market and collaborating with a repressive regime in order to reach a billion consumers otherwise kept in the dark? An attempt at change came in February 2006 with the proposition of the Global Online Freedom Act.<sup>12</sup> The bill was approved by the House subcommittee that had jurisdiction over human rights during the 109th Congress, but the session ended before the bill could be brought before the full House for a vote.<sup>13</sup> It was reintroduced in January 2007 under the title Global Online Freedom Act of 2007.<sup>14</sup> Section III begins by examining this legislation with an overview of the Act's key features, followed by the strong criticism it has faced in the short time since its introduction. The section will conclude by examining the fundamental flaws with the legislation as it is drafted today and by proposing changes that must be made for it to survive Congressional scrutiny. Ultimately, however, these changes cannot make the Global Online Freedom Act an effective piece of legislation. Editing the Act to include only provisions making it illegal for American companies to provide personal identifying information to Internet-restricting governments is the best way to create operable law that follows the spirit of the original legislation. This Note concludes by evaluating Google's options for the future. Informing Chinese consumers of the censorship of information may be the first step towards removing those restrictions permanently. A bolder and more effective tactic from the American arena, however, must come from the public realm. This burden cannot be shifted to the private sector. If freedom of expression in China is a right on which the United States wishes to take a stand, then that right must come from a source with the

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12. Global Online Freedom Act, H.R. 4780, 109th Cong. (2006) reintroduced as Global Online Freedom Act of 2007, H.R. 275, 110th Cong. (2007).

13. *Smith Reintroduces the Global Online Freedom Act*, ECLECTIC NEWS, Jan. 8, 2007, <http://eclecticnews.blogspot.com/>.

14. News from Congressman Chris Smith, *Smith Reintroduces the Global Online Freedom Act*, Jan. 8, 2007, [http://www.house.gov/list/press/nj04\\_smith/gofareintro.html](http://www.house.gov/list/press/nj04_smith/gofareintro.html).

power to effect the change sought. Congress can only regulate actions of U.S. companies that take place on U.S. soil. This can only include the surrender of personal information to Internet restricting governments. The President must utilize his role in international negotiation to impose meaningful sanctions on the Chinese government. Otherwise, we must be content to let the natural liberalization of China take its course and ultimately eliminate these restrictions.

## II. THE HISTORY OF CHINESE CENSORSHIP

Censorship is not unique to China, nor is it only a legacy of the past century. China boasts the longest, continuous civilization in the world.<sup>15</sup> Yet, with 4,000 years of philosophy, art and politics has also come a tradition of totalitarian oppression in which the state has resisted any constitutional restraint on its power to dominate and control knowledge.

### A. CHINESE LEGAL AND REGULATORY ATTEMPTS TO CENSOR PUBLIC OPINION

Qin Shi Huangdi's violent destruction of the written and living evidence of seditious thought was not the last episode of its kind. The rule of People's Republic founder, Mao Zedong, has often been compared to that of the Qin emperor.<sup>16</sup> Mao's Cultural Revolution, (1966–1976),<sup>17</sup> officially pronounced as a campaign for a new socialist culture and to “give young people born under the new regime the experience of a revolution,” served rather as a brutal cleansing force to eradicate the opposition, and even some of the weaker proponents.<sup>18</sup> In 1954, Hu Feng, an

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15. See, e.g., VALERIE HANSEN, *THE OPEN EMPIRE: A HISTORY OF CHINA TO 1600*, at 16 (2000) (listing 1766 B.C. as the beginning of the reign of the Shang Kings—the earliest recognized dynasty in China).

16. E.g., *CHINA TODAY: AN ENCYCLOPEDIA OF LIFE IN THE PEOPLE'S REPUBLIC*, at xi (Jing Luo ed., 2005) (comparing Mao Zedong to Qin Shi Huangdi).

17. Wikipedia, *Cultural Revolution*, [http://en.wikipedia.org/wiki/Chinese\\_cultural\\_revolution](http://en.wikipedia.org/wiki/Chinese_cultural_revolution) (last visited Nov. 1, 2007). Mao declared the Cultural Revolution to have ended in 1969, but many consider the period to extend through 1976. See *id.*

18. *CHINESE CIVILIZATION: A SOURCEBOOK* 449 (Patricia Buckley Ebrey ed., 2d ed. 1993).

avowed Marxist and a member of the League of Leftist Writers since the early 1930s, wrote an article criticizing the official requirements that writers write upbeat stories about workers and peasants and deemphasize any signs of backwardness.<sup>19</sup> He advocated more autonomy for writers and more avenues for publication. Hu was tried in secret on charges of being a counterrevolutionary and sentenced to fourteen years of hard labor.<sup>20</sup>

On June 4, 1989, the Chinese military opened fire on a crowd of protesters demonstrating against Communist Party leadership,<sup>21</sup> killing perhaps as many as 7,000 and wounding more than 20,000.<sup>22</sup>

The next day, the Chinese government denied that anyone died in Tiananmen Square, and Chinese students fanned out through the countryside [sic] to tell the truth. In the eastern city of Nanjing, a crowd of 10,000 gathered to listen to students perched in treetops with boom boxes playing accounts of the violence from foreign radio services.<sup>23</sup>

The Tiananmen killings represent perhaps the best-known example of the Chinese government's efforts to suppress information. On the two-year anniversary of the incident, students broke bottles in protest.<sup>24</sup> The strongest protest was at Beijing University where students hung a banner asking all to remember June 4 and distributed antigovernment leaflets.<sup>25</sup> In response, authorities warned that even those who watched protest activity would be considered participants, subject to arrest and possible imprisonment.<sup>26</sup>

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19. *Id.* at 422.

20. Stefan R. Landsberger, *Hu Feng*, <http://www.iisg.nl/~landsberger/hf.html> (last visited Nov. 12, 2007).

21. See, e.g., Wikipedia, *Tiananmen Square Protests of 1989*, [http://en.wikipedia.org/wiki/Tiananmen\\_Square\\_protests\\_of\\_1989](http://en.wikipedia.org/wiki/Tiananmen_Square_protests_of_1989) (last visited Nov. 12, 2007) (discussing the Tiananmen Square incident).

22. James Conachy, *Ten Years Since the Tiananmen Square Massacre: Political Lessons for the Working Class*, WORLD SOCIALIST WEB SITE, June 4, 1999, <http://www.wsws.org/articles/1999/jun1999/tian-j04.shtml>.

23. David Oliver Relin, *The Ripples of Revolution: From Beijing to Bucharest, Student Protesters Are Leading the Effort to Remake the Communist World*, SCHOLASTIC UPDATE, Mar. 9, 1990, at 9.

24. Lena H. Sun, *Students Protest in Beijing on Tiananmen Square Anniversary*, WASH. POST, June 4, 1991, at A15.

25. *Id.*

26. *Id.*

Though Chinese law officially provides for freedom of speech and of the press, the government has not respected these rights in practice.<sup>27</sup> The CCP continues to control print and broadcast media tightly and uses these outlets to propagate government views and Communist ideology. Those who air views disagreeing with the government's position on controversial topics risk punishment in the form of disciplinary action at government work units or police interrogation and detention.<sup>28</sup>

There is a significant difference, however, between regulating literature published in a physical format and that made publicly available through the advent of the Internet. As of July 2006, the China Internet Network Information Center reports 123 million Internet users in China.<sup>29</sup> Any number of these users may anonymously present information on the Internet on a variety of impermissible subjects. One 2006 study reported that the Internet has surpassed television, newspapers, magazines, and the radio as the primary information source for the Chinese population.<sup>30</sup> Given these statistics, the Chinese government has placed an increasing importance on developing methods for controlling the transmission of information through cyberspace.

The CCP launched its first key effort to control the Internet via legal regulation on February 1, 1996, by issuing the "Interim Provisions Governing Management of Computer Information Networks in the People's Republic of China Connecting to the International Network."<sup>31</sup> Then in December of 1997, Computer Information Networks and the

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27. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2005 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (INCLUDES TIBET, HONG KONG, AND MACAU) (2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61605.htm>.

28. *Id.* See source for a list of people charged in 2005, their "crimes," and respective punishments.

29. CHINA INTERNET NETWORK INFO. CTR., 18TH STATISTICAL SURVEY REPORT ON THE INTERNET DEVELOPMENT IN CHINA 3 (2006), available at <http://cnnic.cn/download/2006/18threport-en.pdf> [hereinafter CNNIC, July 2006].

30. *Id.* at 13 (stating that the "[m]ain channel that obtain information" are the Internet (82.6%), television (64.5%), papers (57.9%), magazines (18.8%), books (18.7%), radio (14.4%), and other (6.9%).)

31. Richard Cullen & Pinky D.W. Choy, *The Internet in China*, 13 COLUM. J. ASIAN L. 99, 119 (1999).

Internet Security, Protection and Management Regulations promulgated by the Ministry of Public Security outlined nine specific illegal uses of the Internet, including “inciting to overthrow the government or the socialist system,” “harming national unification,” “destroying the order of society,” and “injuring the reputation of state organs.”<sup>32</sup> This phraseology has been copied almost verbatim in subsequent regulations.<sup>33</sup> The 1998 regulations mandated restricted networks and government approval of Internet Service Providers (ISPs).<sup>34</sup> Under these laws, both individual users and ISPs share liability for illegal content on the Internet. This has led to a great deal of self-regulation on the part of ISPs.<sup>35</sup> In 2000, laws passed requiring that each time a subscriber accesses the Internet, the ISPs must record when the access occurred, the subscriber’s account number, addresses of all Web sites visited, and the telephone number from which the Internet was accessed.<sup>36</sup> ISPs must keep these records for sixty days and supply them to authorities on demand.<sup>37</sup> As part of these regulations, China has formed an Internet police force to track and check Web communication.<sup>38</sup> To operate in China, Western ISPs must conform to these regulations.<sup>39</sup> In December 2002, the U.S.-based search engine AltaVista was temporarily shut down by the Chinese government as punishment for its reluctance to comply with the state in censoring information.<sup>40</sup> The interplay between Western Internet corporations and the Chinese government will be discussed in greater detail in Section II.

Reporting requirements were further tightened in 2002

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32. Changfu Chang, *Internet*, in CHINA TODAY: AN ENCYCLOPEDIA OF LIFE IN THE PEOPLE’S REPUBLIC, *supra* note 16, at 298.

33. *Id.*

34. Jill Newbold, Note, *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, 508.

35. *Id.*

36. *Id.* at 508–09.

37. *Id.* at 509.

38. Chang, *supra* note 32.

39. See, e.g., Official Google Blog, *supra* note 6 (describing Google’s need to comply with Chinese law).

40. Chang, *supra* note 32.

following a devastating fire at a Beijing Internet café.<sup>41</sup> The fire killed twenty-four and injured thirteen.<sup>42</sup> Though the café's failure to be properly licensed likely had little to do with the extent of human damages, the Culture Ministry and Beijing Mayor, Liu Qi, responded by announcing a broad new campaign to probe the operation of cyber-cafes across China and to close those that were not licensed.<sup>43</sup> Effective November 15, 2002, the restrictions imposed heavier content and use regulations, banned minors from the cafés, and required operators to register users, keep records of the information users accessed for up to two months, and provide the records to authorities upon request.<sup>44</sup>

#### B. CHINESE TECHNOLOGICAL BARRIERS TO INTERNET FREE SPEECH

Beyond the implementation of laws and regulations, China utilizes physical barriers to limit information access to the Internet. In 1996, China effectively created a massive Intranet by constructing a nationwide firewall.<sup>45</sup> Filtering programs are used to block prohibited information by restricting certain Web addresses and targeting sensitive keyword searches.<sup>46</sup> Though this software is often quite effective, moderately experienced hackers can still access the prohibited information by using encryption technology and constantly changing computer identification.<sup>47</sup>

The Chinese government responded by updating its software-filtering methods in September 2002.<sup>48</sup> The more sophisticated technology, known as packet filtering, blocks

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41. Michael A. Lev, *Beijing Orders Web Café Inspections*, CHICAGO TRIB., June 17, 2002, at 3.

42. *Id.*

43. *Id.* In June 2002 there were an estimated 2,400 Internet cafes in Beijing, but only 200 operated with a license. *Id.*

44. *Beijing Approves New Measures Restricting Use of Cybercafes*, ASIAN WALL ST. J., Oct. 14, 2002, at A3.

45. Fintan O'Toole, *Internet Now Making 'Great Firewall of China' Very Porous*, IRISH TIMES, Aug. 28, 2006, at 10.

46. *Id.*

47. *The Newshour With Jim Lehrer: Chinese Internet Censorship* (PBS television broadcast, Apr. 18, 2006) (transcript available at [http://www.pbs.org/newshour/bb/asia/jan-june06/china\\_4-18.html](http://www.pbs.org/newshour/bb/asia/jan-june06/china_4-18.html)).

48. Thomas Crampton, *China's "Great Firewall" Limits Internet*, INT'L HERALD TRIB., Oct. 1, 2002, at 1.

selected portions of Web sites and emails by utilizing keyword searches. This allows Chinese Internet users to visit the previously blocked BBC Website, but the users can only access limited information on current events.<sup>49</sup> Packet filtering analyzes each bundle of downloaded and uploaded data to see if it meets programmed criteria. The software selectively blocks emails, creates difficulty accessing foreign sites that use secure connections, and interrupts searches on specific topics. Previously, users were entirely unable to reach Web pages containing prohibited information, but email was without interference. The new technology allows greater access to the Web, but emails can be blocked.<sup>50</sup> China's latest victory in its crackdown on online freedom comes with Google's decision to create a self-censoring search engine, [www.Google.cn](http://www.Google.cn). China is not the only country that would prefer to censor individual access to the Internet, however, and "there is no reason to believe that the Chinese government will refrain from exporting filtering technology to other states, if the opportunity arises."<sup>51</sup> Recognizing the inconsistencies inherent in the practice of U.S. Internet companies censoring users on behalf of the Chinese and other governments, the question arises, how can these activities be challenged in the American system?

### III AMERICA IN THE CENSORSHIP GAME: U.S. INTERNET COMPANIES ENTER CHINA

The use of Internet Content Providers grew in the 1990s, both in the United States and in China.<sup>52</sup> Chinese users initially employed English-language search engines such as Yahoo!, Microsoft MSN, and Google.<sup>53</sup> With censorship technology slowing foreign websites, and at times blocking them altogether, however, the demand for domestic

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49. *Id.*

50. *Id.*

51. John G. Pelfrey, Jr., Hearing on China's State Control Mechanisms and Methods (Apr. 14, 2005), [http://www.fofg.org/news/news\\_story.php?doc\\_id=1017](http://www.fofg.org/news/news_story.php?doc_id=1017).

52. Eric Harwit & Duncan Clark, *Government Policy and Political Control Over China's Internet*, in CHINESE CYBERSPACES: TECHNOLOGICAL CHANGES AND POLITICAL EFFECTS 12, 26 (Jens Damm & Simona Thomas eds., 2006).

53. *Baidu, Google Dominate Net Search in China*, *supra* note 10.

options was clear.<sup>54</sup> In May, 1998, Yahoo! launched a Chinese language site.<sup>55</sup> In 2005, Microsoft launched MSN China in cooperation with a Shanghai corporation.<sup>56</sup> Finally, Google entered the Chinese Internet game with the launch of Google.cn on January 25, 2006.<sup>57</sup> As addressed above, however, the cost of entering the Chinese market is compliance with Internet censorship laws for foreign companies.

In 2005, Yahoo! faced a storm of criticism for cooperating with Chinese officials leading to the imprisonment of cyber-dissident, Shi Tao.<sup>58</sup> Tao was sentenced to ten years for sending foreign-based websites the text of a Communist Party message.<sup>59</sup> The message warned journalists of impending unrest following protests to commemorate the fifteenth anniversary of the Tiananmen Square massacre in June 2004.<sup>60</sup> The information Yahoo! supplied helped link Shi Tao's personal e-mail account and the text of the message to his computer.<sup>61</sup> The freedom of press advocacy group, Reporters Without Borders, reported a similar incident in 2003 in which Yahoo! supplied data to Chinese authorities on Li Zhi.<sup>62</sup> Li was ultimately sentenced to eight years for "inciting subversion"—criticizing the well-known corruption of public officials using online discussion groups and articles.<sup>63</sup> Microsoft was similarly criticized for censoring blog posts.<sup>64</sup> Both companies defended their actions saying, "Like other global

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54. See, e.g., Official Google Blog, *supra* note 6 (citing technical difficulties faced by Chinese users when accessing the main Google site as motivation for launching the Chinese alternative).

55. Eric Harwit & Duncan Clark, *Government Policy and Political Control Over China's Internet*, in CHINESE CYBERSPACES: TECHNOLOGICAL CHANGES AND POLITICAL EFFECTS, *supra* note 52.

56. Microsoft Press Releases, *Microsoft Prepares to Launch MSN China* (May 11, 2005), <http://www.microsoft.com/presspass/press/2005/may05/05-11MSNChinaLaunchPR.msp>.

57. *Here Be Dragons: Google Enters Chinese Market, Practicing Enlightened Self-Censorship*, *ECONOMIST*, Jan. 28, 2006, at 59.

58. 152 CONG. REC. E206 (2006) (statement of Rep. Smith, C.).

59. *Yahoo 'Helped Jail China Writer'*, *BBC NEWS*, Sept. 7, 2005, <http://news.bbc.co.uk/1/hi/world/asia-pacific/4221538.stm>.

60. *Id.*

61. *Id.*

62. 152 CONG. REC. E206 (2006) (statement of Rep. Smith, C.).

63. *Id.*

64. *Yahoo 'Helped Jail China Writer'*, *supra* note 59.

organi[z]ations we must abide by the laws, regulations and norms of each country in which we operate.”<sup>65</sup>

In 1999, the China-based search company, Baidu, was founded, and two years later Baidu.com was launched.<sup>66</sup> Baidu leads the industry in Chinese Internet searches and is currently the fourth most visited website in the world.<sup>67</sup> A year ago, statistics showed that Baidu.com attracted about 52% of search engine users, with Google at 33% and Yahoo! trailing far behind at 3.7%.<sup>68</sup>

#### A. CREATING A CAUSE OF ACTION IN AMERICAN COURTS FOR PEOPLE AFFECTED BY U.S. TORTS ABROAD

U.S. law does not directly address Google’s complicity in Chinese censorship. There are, however, several laws under which a U.S. Internet company aiding censorship may be held accountable. Enacted more than 200 years ago,<sup>69</sup> the Alien Tort Statute (ATS), also known as the Alien Tort Claims Act, confers original jurisdiction on U.S. federal district courts over “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.”<sup>70</sup> The statute lay dormant until the late 20th century, however, when it was revived in a series of cases against U.S. corporations acting with foreign governments to commit human rights violations.<sup>71</sup>

One such case arose in 1996 when villagers from Myanmar (Burma) filed a class action lawsuit in U.S. federal court against, *inter alia*, a U.S. corporation (Unocal) that was involved in a project with the Myanmar government to extract natural gas.<sup>72</sup> The plaintiffs alleged that the defendant was responsible for various human rights violations, including forced labor.<sup>73</sup> The district court found

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65. *Id.* (statement of a Microsoft spokesperson).

66. David Barboza, *The Rise of Baidu (That’s Chinese for Google)*, N.Y. TIMES, Sept. 17, 2006, at C1.

67. *Id.*

68. *Baidu, Google Dominate Net Search in China*, *supra* note 10.

69. Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461, 461 (1989).

70. Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

71. SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 228 (2006).

72. *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

73. *Id.* at 883.

that U.S. corporations are covered by the ATS when they engage in cooperative behavior with governments engaged in human rights violations.<sup>74</sup> Though the claims against Unocal were eventually dismissed, the jurisdiction of U.S. courts to hear such claims against them remains good law.<sup>75</sup>

For a plaintiff “to succeed on an ATS claim, three key elements must exist: (1) the claim must be filed by an alien (not a national of the United States); (2) the claim must be for a tort; and (3) the action in controversy must have violated either a U.S. treaty or a ‘specific, universal, and obligatory’ norm of international law.”<sup>76</sup> By this standard, a Chinese citizen should be able to file a tort claim against a U.S. Internet company, such as Google, for infringing on his or her right to free speech. The difficulty that arises in this regard, of course, is that unlimited free speech is not a right under Chinese law. More importantly, infringement of free speech does not create a tort violation. While Unocal committed tangible abuses against the Burmese workers, the omission of search results is not as clear an infringement on a citizen’s rights. Indeed, in the United States the First Amendment only protects against restrictions on free speech by the government.<sup>77</sup> For these reasons, were the Alien Tort Statute to be cited in a claim regarding an infringement of free speech against an Internet search engine, it seems unlikely that the argument would prevail.

#### B. THE PROTECTION OF FREE SPEECH INTERNATIONALLY AND WITHIN CHINA

Free speech is protected in the international realm by several treaties, including the United Nations’ Universal Declaration of Human Rights.<sup>78</sup> Article 19 of the Universal Declaration states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold

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74. *Id.* at 898.

75. *See Doe I v. Unocal Corp.*, 395 F.3d 978 (9th Cir. 2003) (dismissing the claims against Unocal without denying the underlying merits of the Alien Tort Statute).

76. MURPHY, *supra* note 71 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

77. U.S. CONST. amend. I.

78. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810, (Dec. 12, 1948), *available at* <http://www.un.org/Overview/rights.html>.

opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>79</sup> The Universal Declaration was adopted December 10, 1948.<sup>80</sup> A similar statement is made in the International Covenant on Civil and Political Rights (CCPR), also found in Article 19:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order, or of public health or morals.<sup>81</sup>

The United States ratified the CCPR on September 8, 1992.<sup>82</sup>

Paradoxically, freedom of speech is even protected by the Chinese Constitution, Article 35, which states: “Citizens of the People’s Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.”<sup>83</sup> Therefore, Chinese laws making Internet filtering and censorship mandatory are in direct contravention to the Constitution. Nevertheless, there is little that outside bodies can do to manipulate the internal workings of another nation’s legal system. Short of imposing trade sanctions on offending countries that impose

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79. *Id.* at Art. 19.

80. United Nations, *A United Nations Priority, Universal Declaration of Human Rights*, <http://www.un.org/rights/HRToday/declar.htm> (last visited Nov. 12, 2007).

81. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), (Dec. 16, 1966), *available at* [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm).

82. OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUM. RTS., STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 11 (2004), *available at* <http://www.unhchr.ch/pdf/report.pdf>.

83. CONSTITUTION OF THE PEOPLE’S REPUBLIC OF CHINA, art. 35, *available at* <http://www.usconstitution.net/china.html#Article35>.

limitations on free speech in violation of international customary law, the United States must rely on its ability to exercise jurisdiction on its own natural or legal citizens.<sup>84</sup> The United States lacks the political and economic will to impose sanctions on China, and to do so unilaterally would likely be ineffective.

#### IV. GOOGLE JOINS THE PACK: THE ACQUIESCENCE OF A MAJOR PLAYER CHANGES THE CHINESE INTERNET LANDSCAPE

On February 15, 2006, the Subcommittee on Africa, Global Human Rights and International Operations and the Subcommittee on Asia and the Pacific, of the Committee on International Relations of the U.S. House of Representatives, held a Congressional hearing on the subject of Chinese Internet censorship.<sup>85</sup> Though China has censored the Internet since its inception,<sup>86</sup> and U.S. Internet companies have aided such efforts for years,<sup>87</sup> the introduction of Google.cn on January 25, 2006, marked a substantial step towards such companies' acquiescence to Chinese censorship law.<sup>88</sup> Elliot Schrage, Vice President of Global Communications and Public Affairs for Google, Inc., testified on Google's decision to enter the Chinese market and the methods they were employing to comply with Chinese law.<sup>89</sup>

Though Google acknowledges that the cost of doing business in China includes self-censorship in conflict with their own corporate philosophy, the company launched a Chinese search engine "based on the judgment that Google.cn will make a meaningful—though imperfect—contribution to the overall expansion of access to information in China."<sup>90</sup> Until the start of 2006, Google had no operations or employees in China, but provided the

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84. MURPHY, *supra* note 71. Traditional international law permits states to exercise jurisdiction over its nationals and over their conduct when they are physically outside the state's territory. Companies are persons in the legal sense under American law, as well as under many other national systems.

85. 152 CONG. REC. E206 (2006) (statement of Rep. Smith, C.).

86. *Internet Censorship in the People's Republic of China*, *supra* note 5.

87. *See id.*

88. Official Google Blog, *supra* note 6.

89. *See id.*

90. *Id.*

Chinese search market using a Chinese-language version of Google.com that could be reached by People's Republic users.<sup>91</sup> In 2002, however, Google.com faced sporadic unavailability within China, and in the fall of that year found itself completely blocked.<sup>92</sup> Though service was restored two weeks later, Google, Inc. was nevertheless displeased with the quality of service it was offering in China.<sup>93</sup> Google found that, though they were not engaging in self-censorship, the Chinese government's filtering techniques left Google searches incomplete nonetheless.<sup>94</sup> Measurements indicate that Google.com was unreachable in China about 10% of the time and is often slower than other engines, with certain results stalling out the user's browser altogether.<sup>95</sup> Meanwhile, other American Internet companies were entering China and building local operations, allowing faster, more effective engine services.<sup>96</sup> Google reached the conclusion that Chinese Internet users had less access to information than they would have if the company were to impose its own censors.<sup>97</sup>

Faced with the option of a government-censored Chinese language Google.com or offering a new service that, though subject to self-censorship requirements, would have certain advantages, Google chose the latter, and launched Google.cn at the start of 2006.<sup>98</sup> The new engine would be faster, more reliable, and would provide more and better search results for all but the most politically sensitive subjects.<sup>99</sup> Google noted three elements that distinguish its Chinese service: (1) Google.cn will give notification to Chinese users when search results have been removed, (2) Google will not maintain services, like e-mail or blogging tools, that involve personal or confidential data on Chinese soil, and (3) the company will not terminate the availability of the unfiltered

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91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *See id.*

97. *Id.*

98. *Id.*

99. *Id.*

Chinese-language Google.com service.<sup>100</sup> Schrage's testimony continually emphasized the reasonableness of Google's current plan, reminding Congress that Google will "carefully monitor conditions in China, including new laws and other restrictions" and that if the company determines that they "are unable to achieve the objectives [he] outlined above, [it] will not hesitate to reconsider [its] approach to China."<sup>101</sup>

Perhaps Google's strongest motivation for entering China is the need to stay competitive in the largest emerging Internet market in the world today. Schrage's testimony included statistics on the opportunity available in the People's Republic.<sup>102</sup> Though China boasts over 100 million Internet users,<sup>103</sup> that figure represents only 8% of the population.<sup>104</sup> By 2010, estimates provide that the country will have more than 250 million users.<sup>105</sup> To add to Google's concerns, the Chinese-based engine, Baidu.com, has risen from 2.5% of the search market in 2003 to 46% in 2005, while Google's market share has dropped to below 30% and continues to fall.<sup>106</sup> Worse still, statistics show that college-age users utilize Baidu more and Google less than the older population of China. They attribute this use to improvements in Baidu's services and marketing campaigns, in contrast to the slowness and unreliability of Google.<sup>107</sup> These figures indicate the increasing competition gap in China, which Google is scrambling to overcome.

Recognizing the realities of Internet usage—that the vast majority of Internet searches in China are for local Chinese content such as local news, local businesses, weather, games and entertainment, travel information, blogs, etc.—Google, Inc. determined that the ethical balance

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100. *Id.*

101. *Id.*

102. *Id.*

103. GUO LIANG, SURVEYING INTERNET USAGE AND IMPACT IN FIVE CHINESE CITIES, at iii (2005), available at [http://www.markle.org/downloadable\\_assets/china\\_final\\_11\\_2005.pdf](http://www.markle.org/downloadable_assets/china_final_11_2005.pdf).

104. *Id.* These figures are for July, 2005. By July, 2006, one report found 123 million Internet users in China. CNNIC, July 2006, *supra* note 29, at 3.

105. Official Google Blog, *supra* note 6.

106. *Id.*

107. *Id.*

tipped in favor of the introduction of the new site.<sup>108</sup> Indeed, Schrage testified that Google estimated that fewer than 2% of all queries in China would result in pages from which search results would be unavailable due to filtering.<sup>109</sup>

When a search would yield results subject to censorship by the Chinese government, however, the difference between the traditional Google and its novel Chinese counterpart is clear. A Google image search for “Tiananmen” on Google.com, versus Google.cn, illustrates the stark contrast: “Google uncensored shows a bunch of tanks streaming in there,” said Danny Sullivan, founder and editor of Search Engine Watch. “Google China has smiling, happy people.”<sup>110</sup> An American can observe this difference by comparing the two searches at any time on their web browser. A Chinese person, however, would find their access to Google.com blocked, with only the latter results to draw upon. The procedure used in such circumstances was described by Schrage:

First, when we get a court order or legal notice in a foreign country where we operate, we remove the illegal content only from the relevant national version of the Google search engine (such as Google.fr for France). Second, we provide a clear notice to users on every search results page from which one or more links has been removed. The disclosure allows users to hold their legal systems accountable.<sup>111</sup>

Others insist, however, that this so-called transparency is inadequate. While Google.cn informs users that results have been omitted, there is no way to learn what exactly is absent from the list or why it was removed.<sup>112</sup>

Google’s position on the Chinese censorship issue concludes that it is an issue appropriate for the U.S. government to tackle, rather than private business. Schrage says, “[T]he U.S. Departments of State and Commerce and the office of the U.S. Trade Representative should continue

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108. *Id.*

109. *Id.*

110. Ellen Lee, *How Google Censors its Chinese Portal*, S.F. CHRON., Feb. 2, 2006, at A1.

111. Official Google Blog, *supra* note 6.

112. See Human Rights Watch, “Race to the Bottom” Corporate Complicity in Chinese Internet Censorship, HUM. RTS. WATCH, Aug. 2006, at 53–54, available at <http://www.hrw.org/reports/2006/china0806/china0806webwcover.pdf>.

to make censorship a central element of our bilateral and multilateral agendas.”<sup>113</sup> He goes on to suggest that censorship should be seen as a barrier to trade, and should be brought up in that arena, presumably in the World Trade Organization or similar institutions.<sup>114</sup> Such an approach ultimately would require the U.S. government to act in one of two ways: either negotiating for trade sanctions against the Chinese with other countries that allow free expression, or enacting legislation within the United States that would bind American companies acting overseas.

A. THE FUTURE FOR GOOGLE IN CHINA: FREEDOM OF EXPRESSION, FREEDOM FOR BUSINESS, AND FREEDOM FOR GOVERNMENTAL AUTONOMY—THE GLOBAL ONLINE FREEDOM ACT OF 2007

The day after the Congressional hearing on Internet censorship in China, Representative Christopher Smith of the Fourth District of New Jersey introduced a bill to directly target the role of American companies and the issue of free speech on the Web. The bill was titled the Global Online Freedom Act of 2006 and was reintroduced before the new Congress in January 2007.<sup>115</sup> Though the bill lists at least fifteen states that engage in information blocking, restriction, and monitoring,<sup>116</sup> it is written with a clear focus on the actions of the Chinese government. The Findings section of the bill discusses the attempts by the Chinese government to suppress news of the SARS (Severe Acute Respiratory Syndrome) outbreak in 2004,<sup>117</sup> as well as the general use of censorship in China and its deleterious effects on China’s relationship with the United States and the countries of East Asia.<sup>118</sup>

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113. Official Google Blog, *supra* note 6.

114. *Id.*

115. Global Online Freedom Act, H.R. 4780, 109th Cong. (2006) (reintroduced as Global Online Freedom Act of 2007, H.R. 275, 110th Cong. (2007)).

116. Global Online Freedom Act of 2007, H.R. 275, 110th Cong. § 2(7) (2007). Belarus, Burma, the People’s Republic of China, Cuba, Iran, Libya, the Maldives, Nepal, North Korea, Saudi Arabia, Syria, Tunisia, Turkmenistan, Uzbekistan, and Vietnam block, restrict, and monitor information to their citizens. *Id.*

117. *Id.* § 2(4).

118. *Id.* §§ 2(11)–(13).

To respond to this threat, the Global Online Freedom Act seeks to transform the behavior of both the public and private sectors in America in order to put pressure on the Chinese and other offending regimes. In the governmental sphere, the President is encouraged to utilize international channels such as the Organization of Economic Cooperation and Development (OECD), the World Trade Organization (WTO), the United Nations World Summit on the Information Society (WSIS), and the Internet Governance Forum (IGF) to influence the leadership of other nations to enact similar legislation and to pursue the development of international agreements aimed at the protection of Internet freedom.<sup>119</sup> The President also has the duty of designating Internet-restricting countries for the purposes of the Act,<sup>120</sup> and to issue an annual report identifying the countries that are at that time designated as Internet restricting, along with a description of the efforts of the United States to counter said Internet restriction.<sup>121</sup> The bill further requires the Report Relating to Economic Assistance<sup>122</sup> and the Report Relating to Security Assistance<sup>123</sup> to address the freedom of electronic information in each foreign country.<sup>124</sup>

Finally, the Act establishes the Office of Global Internet Freedom within the Department of State.<sup>125</sup> Apart from acting as a point of commonality for interagency efforts to promote freedom of electronic information and to assist the President in carrying out his responsibilities pursuant to the Act, the primary goal of the Office is to control and oversee the compliance of businesses in accordance with Title II of the Act.<sup>126</sup> The Office would identify key phraseology for purposes of business compliance with section 202, establish

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119. *Id.* § 102(1).

120. *Id.* § 105(a)(1). Countries initially designated by the Act as Internet-restricting were: Burma, the People's Republic of China, Iran, North Korea, Tunisia, Uzbekistan, and Vietnam. *Id.*

121. *Id.* § 105(b)(1).

122. As required by Section 116 of the Foreign Assistance Act of 1961. 22 U.S.C. § 2151n (2000 & Supp. IV 2005).

123. As required by Section 502B of the Foreign Assistance Act of 1961. 22 U.S.C. § 2304 (2000 & Supp. IV 2005).

124. Global Online Freedom Act of 2007, H.R. 275, 110th Cong. § 103(a)-(b) (2007).

125. *Id.* § 104(a).

126. *Id.* § 104(b).

mechanisms for receiving the reports required of businesses in sections 203 and 205 of the Act, and work to develop a basic, voluntary code of corporate standards related to Internet freedom.<sup>127</sup>

Title II of the Global Online Freedom Act sets out the minimum standards for online freedom with which businesses must comply. The Act prohibits the placement of any computer hardware used to “house, store, serve, or maintain files or other data involved in providing search engine or content hosting service” by a U.S. business that “creates, provides, or hosts any Internet search engine or maintains an Internet content hosting service” within a designated Internet-restricting country.<sup>128</sup> This provision would eliminate the jurisdiction of foreign governments over information being stored on their soil; precisely the information invoked in the Yahoo! disclosure cases discussed above.<sup>129</sup> Further, such businesses are prohibited from altering the operation of their search engines with respect to protected filter terms (as designated by the Office of Global Internet Freedom) in a manner that would produce different results for those using the search engine in an Internet-restricting country than would be achieved elsewhere.<sup>130</sup> This bar exists even if a foreign official makes the request.<sup>131</sup>

The bill seeks to ensure business compliance by instituting reporting procedures aimed at creating transparency in search engine filtering,<sup>132</sup> and by imposing penalties and a private right of action against violators.<sup>133</sup>

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127. *Id.* §§ 104(b)(4)–(b)(6).

128. *Id.* § 201.

129. *Yahoo ‘Helped Jail China Writer’*, *supra* note 59.

130. Global Online Freedom Act of 2007, H.R. 275, 110th Cong. § 202(2) (2007).

131. *Id.* § 202(1).

132. *Id.* §§ 203, 205.

133. *Id.* §§ 206(b), 207. Violations of Section 206(a) (User Protection) by a U.S. business or U.S. person would be subject to fines not to exceed \$2,000,000. *Id.* § 207(a)(1). Violations of Sections 201, 202, 203, 204, or 205 shall be subject to a civil penalty not to exceed \$10,000 in an action brought by the Attorney General. *Id.* § 207(a)(2). If a U.S. business willfully violates or attempts to violate Section 206(a) they shall be fined not in excess of \$2,000,000; if a natural person who is an officer, director, employee, or agent of a U.S. business acts, the fine shall not exceed \$100,000 or imprisoned no more than 5 years, or both. *Id.* § 207(b)(1). A willful violation of Sections 201, 202, 203, 204, or 205 for a business is a fine of \$10,000; for a natural person the fine shall not exceed \$10,000 or imprisoned no more than 1 year, or both.

Internet businesses would be required to produce two reports. First, the business must provide a list of “all terms and parameters submitted, entered, or otherwise provided by any foreign official of an Internet-restricting country, that are used to filter, limit, or otherwise affect the results provided by the search engine when used by other users.”<sup>134</sup> Additionally, the business must provide the Office with copies of all data that it has removed from their content hosting service, blocked from availability on the Internet, or blocked from transmission via the Internet to an Internet-restricting country.<sup>135</sup> Likely, in response to incidents such as those involving Shi Tao and Li Zhi, Internet companies would also be prohibited from providing foreign officials with information that could be used to personally identify a particular user except for revelations related to legitimate foreign law enforcement purposes.<sup>136</sup> If a violation of this provision should arise, the bill gives a private right of action to any person aggrieved by such conduct, including the right to bring an action for punitive damages or other appropriate relief.<sup>137</sup> Federal jurisdiction in a district court of the United States is provided without regard to the amount in controversy or to the citizenship of the parties.<sup>138</sup>

#### B. CRITICISMS OF THE GLOBAL ONLINE FREEDOM ACT

Smith’s bill seeks to limit the control of Chinese censorship by simply saying “we won’t play your game.” Major difficulties arise with this form of unilateral action, including the response of affected companies and the likelihood of a material impact on the Chinese population. “It’s unlikely that the Smith bill will be enacted in this form, but it has been an important impetus for the industry to focus on developing its own standard.”<sup>139</sup>

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*Id.* § 207(b)(2).

134. *Id.* § 203.

135. *Id.* § 205.

136. *Id.* § 206(a).

137. *Id.* § 206(b).

138. *Id.*

139. Bill Baue, *Spotlight on China: Sweatshops and Online Freedom are Among the Issues*, CORP. RESP. OFFICER, Fall 2006, at 29, available at <http://www.thecro.com/?q=node/52> (quoting Bennett Freeman, Senior Vice President for social research and policy at the Calvert Group).

The Global Online Freedom Act applies to companies headquartered and incorporated in the United States as well as to companies listed on U.S. stock exchanges, such as the New York Stock Exchange and NASDAQ.<sup>140</sup> This would extend the new legislation to some of China's top Internet companies, including Baidu.com.<sup>141</sup> With penalties ranging from \$10,000 to \$2 million, the proposed legislation could scare off potential listings on U.S. markets, or drive existing companies to Shanghai or Hong Kong exchanges.<sup>142</sup> Anticipating these moves, U.S. exchanges may mount a strong opposition to the proposed legislation.

An unnamed analyst predicted that many Chinese companies already listed in the United States would likely retain their listings and pay penalties as needed.<sup>143</sup> This is increasingly likely if the Act's fines are interpreted to apply once for the general violation of censoring, rather than every time a censored search is generated. For large companies, a single \$10,000 fine, or even the occasional \$2 million, is far less economically detrimental than the potential losses they would face from removal from the U.S. markets.

Dick Wei, a China Internet sector analyst with J. P. Morgan in Hong Kong, expressed little concern for the impact on listed firms: "[m]y impression is that investors may not think of this as a very important issue. I think that the [I]nternet companies in China would essentially operate with business as usual and that investors would just consider this as part of the country risk that an investor has to face."<sup>144</sup> This would mean that the only impact of Smith's proposed legislation would be to drive down the prices of Chinese Internet company stock. Wei added that investors could be more concerned with the potential actions of the Chinese government than that of the United States. "Giving monies to another person (in a punitive damages incident) would likely be a relatively small amount, compared to what would happen if the Chinese government shut down a

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140. Chris Myrick, *Proposed 'Online Freedom Act' May Hurt US and US-Listed China Firms*, FORBES.COM, Feb. 16, 2006, <http://www.forbes.com/business/feeds/afx/2006/02/16/afx2531410.html>.

141. *Id.* Other companies covered by the new Act would include: Hong Kong's Tom Online Inc. and Sohu.com Inc. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

website.”<sup>145</sup>

Worse still, many U.S. Internet companies do not own their Chinese counterparts, but operate through local owners.<sup>146</sup> One of the four main targets of the legislation, Yahoo! Inc., runs its China operations through Alibaba.com, of which it owns only a 40% stake.<sup>147</sup> As a result, Yahoo! could find itself unaffected by the Act and its work in China immune from liability. Google operates its Google.cn business under a license owned by a local company, Ganji.com, but the precise nature of the relationship between the two entities has not been made public.<sup>148</sup>

If the new legislation does in fact pass domestic challenge and American Internet companies feel the desired effects, the end result may still have little or no effect on Chinese users. Chinese companies outside the jurisdiction of the new law, or who remove themselves from its sphere of influence, will continue to conduct themselves under Chinese law, thereby censoring search results and providing the government with information about users. Nothing would change except the name at the top of the Internet search page.

Still others contend that, regardless of the effect on Chinese users or the companies involved, this type of U.S. legislation is an inappropriate endeavor for the American Congress to undertake.<sup>149</sup> The Act has been called an arrogant attempt for the United States to serve as a world

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145. *Id.*

146. *Id.*

147. *Id.*

148. Law and Information, <http://blogs.law.harvard.edu/ugasser/2006/10/25/corporate-social-responsibility-what-is-the-meaning-of-sphere-of-influence/> (Oct. 25, 2006, 3:35 EST).

Yahoo! holds one of the four Alibaba.com board seats, but does not have day-to-day control over Alibaba's Yahoo! China division. Microsoft's China portal is operated by a local entity, Shanghai Alliance Investment Ltd. (SAIL), through a joint venture agreement. SAIL is reportedly operated by the Chinese government, while the servers which deliver Microsoft's Chinese services [reside in the U.S. rather than in China].

*Id.*

149. Posting of Rebecca MacKinnon to RConversation, *China, the Internet & Human Rights—A Long Analysis*, [http://rconversation.blogs.com/rconversation/2006/07/china\\_the\\_inter.html](http://rconversation.blogs.com/rconversation/2006/07/china_the_inter.html) (July 21, 2006, 04:15 EST).

police force.<sup>150</sup> One commentator pointed out that the U.S. government has recently asked Internet and telecommunications companies to compromise user data.<sup>151</sup> “Governments of every stripe—be it dictatorship, autocracy, theocracy, electoral democracy—are leaning on Internet and telecoms companies to compromise citizen’s privacy, freedom of speech, and access to information.”<sup>152</sup> Choosing to ignore U.S. Internet speech violations while enacting legislation that would target similar activities abroad may seem overly hypocritical. From the Chinese perspective, freedom of speech has only improved since the introduction of the Internet.<sup>153</sup> The vast majority of users do not find themselves on the wrong side of the issue and may see this move from the American government as a greater threat to their rights than any of the activities in which the Communist Party engages.<sup>154</sup>

Recognizing the number of countries that engage in some level of censorship, it is difficult to say how the Act’s application will eventually be directed. The law applies only to activities in Internet-restricting countries designated by the president on a yearly basis. This might place an incentive to forego assigning such a designation on certain countries based on other foreign policy issues rather than in accordance with their actual Internet records. By placing ultimate oversight in the hands of the executive, the law may effectuate a mechanism for the exigencies of practical foreign policy to easily override the moral imperative behind the Act.

### C. CHANGES MAY IMPROVE THE VIABILITY OF THE GLOBAL ONLINE FREEDOM ACT, BUT WILL NOT MAKE IT AN EFFECTIVE TOOL IN THE FIGHT AGAINST INTERNATIONAL SUPPRESSION OF FREE SPEECH

The Global Online Freedom Act suffers from several severe problems: the likely objection of American stock markets, the potential abuse of Presidential discretion in

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150. Posting of Seobook to Threadwatch, *Global Online Freedom Act of 2006 = GARBAGE*, <http://www.threadwatch.org/node/5643> (Feb. 15, 2006).

151. MacKinnon, *supra* note 149.

152. *Id.*

153. *Id.*

154. *Id.*

designating internet restricting countries, and the ineffectuality of U.S. legislation on the course of events in China. The first two of these flaws can be corrected with minor changes to the legislation, while the last may require accepting the difference between a law meant to achieve a certain effect and one that looks to make a principled stance.

If Representative Smith's bill were amended to affect only those corporations that are incorporated or headquartered in the United States, rather than those that merely trade shares on U.S. markets, the objections of those markets would be removed. The result would still disadvantage American Internet companies, but would do so regardless of their public offerings choices. The alternative, of course, would be to enforce these prohibitions against all companies traded on U.S. markets, regardless of the resistance. The greater the number of companies affected, the greater the potential for real change abroad.

A more significant barrier to the implementation of the bill's regulations comes from the freedom given to the President to designate the nations against which these actions will be taken. As discussed above, it is the duty of the Executive to determine which states are deemed "Internet-restricting" after the initial period has run. This provision ostensibly allows countries, such as France, that do restrict the Internet to some extent, but not to the degree America would consider detrimental, to escape the Act's effect.<sup>155</sup> This allows the United States hypocritically to sanction the censorship activities of favored nations, thereby turning the Global Online Freedom Act into a political tool (or weapon) rather than a statement of the importance of human rights. To limit this possibility, the Act should articulate specific criteria by which to designate an Internet-restricting country. Targeting certain words or phrases to prevent their suppression could accomplish this goal. For example, the Act could identify "democracy" or "free speech" as words that must not be restricted, while allowing the censorship of hate speech, such as that controlled in France

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155. ELEC. FRONTIERS AUSTRAL., INTERNET CENSORSHIP: LAW AND POLICY AROUND THE WORLD (2002), <http://www.efa.org.au/Issues/Censor/cens3.html#fr>.

and other nations.<sup>156</sup>

The last concern raised by the Act is its inadequacy in combating the actual harms felt by the Chinese population. Whether this new legislation does not apply to foreign companies at all, or is merely more avoidable, it seems clear that its practical effects will only reach U.S. corporations. The result will serve to further disadvantage companies such as Google in the competitive Chinese market, and drive consumers toward those search engines still beholden to the censorship regime. Severely wounding the American Internet industry will not help the Chinese population. This is something no amount of semantic tinkering can avoid.

There are times, however, when laws are enacted not for the effect they will have, but for the principles that drive them. Whether or not there is great potential to change the actions of a person, a company, or a nation, there is something to be said for the effort. To do nothing at all is to sanction the wrong, and even a purely intellectual stance may have an impact. What is more, this legislation works to enhance the influence of the United States on this issue. When the President seeks to utilize the American role in international bodies to bring about genuine change in the People's Republic, he will be coming from a position of moral authority, to lead by example rather than as a hypocrite calling for change. It is from the imposition of these types of sanctions and other tangible penalties that any real change can hope to come.

The area in which the Global Online Freedom Act has real potential for impact is in its prohibition against disclosure of information that personally identifies a particular user except for "legitimate foreign law enforcement purposes" to foreign officials of an "Internet Restricting Country." While mere censorship can be accomplished by Chinese software with or without the consent of American search engines, information housed on U.S. soil cannot be subversively obtained in this manner. The information implicating Li Zhi could not have been obtained by the Chinese government if not for Yahoo!'s complicity in turning over the information. This is the type of activity Congress should be working to prevent.

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156. *Id.*

With the improvements outlined above, the current bill will still only be effective to the extent that it can be enforced against American companies. Search engines based outside the United States will continue to censor and provide user information to Internet-restricting governments. Even if companies such as Baidu.com chose to comply with U.S. law rather than the laws of their home countries, software utilized by the Chinese government will effect widespread censorship nonetheless. Congress need not waste its time debating overly complex legislation that will ultimately do nothing more than take a principled stance. If the bill were parsed down to include only the sections on protection of personally identifiable information, it would be far more likely to pass legislative scrutiny while producing a tangible benefit to citizens of Internet restricting nations.

## V. CONCLUSION

Despite what corporate logos or our own mentality might say, Google, Inc.'s first priority is and always will be generating profit. Watching the newly emerging Chinese Internet market slip away without a fight is not something anyone could have expected of the company. Just as Coca Cola latched on to the Chinese market in 1979 after Deng Xiao Ping opened the country to foreign investors,<sup>157</sup> Google saw an opportunity to serve a billion people or sit idly by while someone else did. With that option, most rational entities would have chosen to enter China, albeit in an imperfect way, with the hope that liberalization would continue to evolve and censorship would eventually fade from the picture.

Left to their devices, the Chinese may indeed overcome current censorship laws and emerge as a liberal, democratic society. In the meantime, Google finds itself subject to Chinese censorship policies. Should a profit-seeking company be expected to limit its overseas commerce in deference to an uncertain ideal that may never materialize? If other companies, or the Chinese filters themselves, will

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157. Drake Weisert, *Coca-Cola in China: Quenching the Thirst of a Billion*, CHINA BUS. REV., July-Aug. 2001, at 52, available at <http://www.chinabusinessreview.com/public/0107/weisert.html>.

ultimately transform the Internet of China to a unique entity little related to that existing in the rest of the world, what can one company do to change the destiny of a nation? For that matter, what can the government of the United States, acting with or without the support of American Internet companies, do?

Domestic U.S. legislation can do nothing but penalize American businesses while the Chinese government maintains censorship for its people. A narrower bill aimed at preventing U.S. companies from turning over the personal information of their clients would not only be more likely to survive bipartisan scrutiny, but would provide a real benefit to the international community. Change beyond this level cannot come from Congress but must originate with the executive branch utilizing its influence in the international arena. Without a commitment to impose meaningful and injurious sanctions on the Chinese government itself, rather than merely targeting those companies recruited to aid its efforts, any U.S. initiative will ultimately fail.

State sovereignty is among the most sensitive of international law issues. Each country must respect the internal practices of another, or choose to take a decisive stand to combat them. In early 2003, the United States declared war on Iraq in the name of protecting the freedom of Iraqi citizens.<sup>158</sup> Given the ambiguous domestic and international reception to that action, the economic and social costs of aggressive international tactics, and the relative atrocities being committed in other nations, it is extremely unlikely that such a campaign would be launched against a nation merely restricting Internet searches. France's ban on access to material advancing racial hate on the Internet will certainly never garner such a response.<sup>159</sup> China's status as a leading trade partner may ultimately afford it the same protection. If this legislation fails to apply to its primary target, then even its remaining minimal value will be lost.

The Global Online Freedom Act cannot and should not be passed in its current form. Congressional legislation

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158. President George W. Bush, President Bush Addresses the Nation, (Mar. 19, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html>.

159. ELEC. FRONTIERS AUSTRAL., *supra* note 155.

should be concerned with regulating domestic activity, and thus should be limited to proscribing activities of American companies on American soil. It certainly should not presume to regulate actions that are legal in the host country and, moreover, are not even contrary to the U.S. Constitution. It is for the President to negotiate the United States' position in the international arena.

The Internet is not defined by national borders, political allegiances, or personal obligations. It may be regulated for a time, but with every barrier imposed, an army of hackers is there to break down the door. "The Declaration of the Independence of Cyberspace," crafted at the dawn of the cyber frontier, asserted:

In China, Germany, France, Russia, Singapore, Italy and the United States, you [governments] are trying to ward off the virus of liberty by erecting guard posts at the frontiers of Cyberspace. These may keep out the contagion for a small time, but they will not work in a world that will soon be blanketed in bit-bearing media.<sup>160</sup>

Governments cannot fix a world they do not control. Ultimately, they will have to face the reality that it will not be legislation or international pressure that changes the Internet, but it will be the users themselves that end their own oppression.

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160. Barlow, *supra* note 4.