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# Internet Content Control in China

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## Internet Content Control in China

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**Abstract:** Can the Internet be controlled? If so, should it? This Article examines the mechanisms and the effects of Internet content control in the People's Republic of China ("China"). In this analysis, the four modalities of control (the law, architecture, social norms and the market), theorized by Lessig will be used. Unlike the initial and popular idea that the Internet was an open and liberal medium with inherent features that made it impossible to control, this paper concludes that the Communist Party of China ("CPC") has achieved its goals and effectively controls the content on the Internet without sacrificing economic interests. Furthermore, this paper attempts to discuss why CPC easily controls the Internet. By analyzing China's distinct culture, history, tradition and society, this article points out that Internet control in China will remain unaltered for a relatively long time unless the inner consciousness for free speech in the mind of Chinese people prevails. From a long-term perspective, however, it is likely that Internet control in China will be gradually weakened.

In September 2002, the Chinese government's control over the Internet became the focus of attention because of its blocking of Google.com<sup>2</sup> and some other similar useful

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\*\*\* All www articles were visited before November 20, 2002.

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The author would like to thank Professor Elizabeth F. Judge and Ms. Jennifer Galeano for their extremely helpful comments.

<sup>2</sup> Considerable news on this issue. i.e. BBC's report on September 2, 2002, *China blocking Google*,

<http://news.bbc.co.uk/1/hi/technology/2231101.stm>.

and well-known search engine websites. The CPC has long made efforts to control the Internet and limit access to most international news websites such as CNN.com, BBC.com and VOA.com. However, this time the CPC went even further, blocking access to websites of general search engines like Google.com. Google.com collects information with web engines through pure technology, not human editors, and is regarded as a technical service and tool, devoid of political involvement. As a result, accompanying this news, the issues surrounding Internet censorship in China has again attracted much international attention, particularly from western nations.

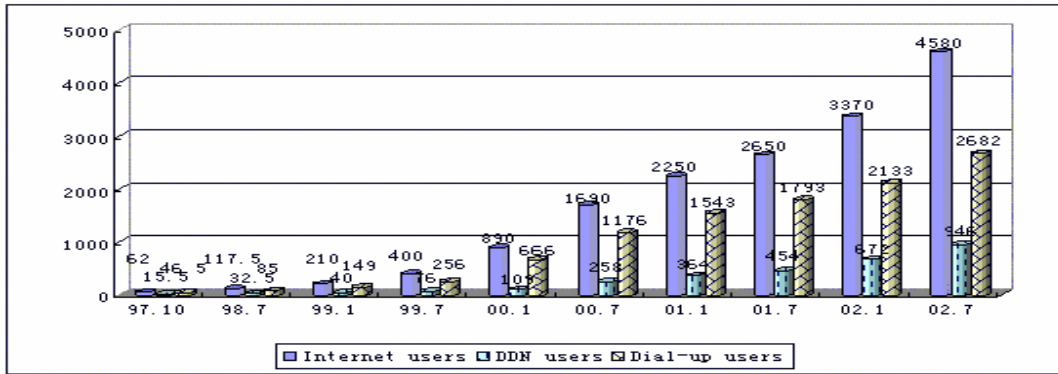
## **I. Introduction—the Internet in China**

### **1. The Internet development in China**

China's Internet industry is developing at an undeniably rapid rate. According to the latest survey report on Internet development in China released by the China Internet Network Information Center ("CNNIC"), by June 30, 2002, the number of Internet users in China reached 45.8 million<sup>3</sup>, a number which is more than the population of many nations in the world. The following figure illustrates the increase in Internet users (by CNNIC):

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<sup>3</sup> The Semi Annual Survey Report on Internet Development in China (2002.7), released by the CNNIC in July 2002, <http://www.cnnic.net.cn/develst/2002-7e/index.shtml>. CNNIC was founded on June 3, 1997, and is a non-profit and semi-government organization of administration and service, performing duties of National Internet Network Information Center in China. The operation and management work of CNNIC is done by Computers Network Information Center of Chinese Academy of Science. In terms of the scope of business, CNNIC is under the leading of Ministry of Information Industry, and administratively it is under the leading of Chinese Academy of Science. CNNIC Work Committee supervises and evaluates the construction, run and administration of CNNIC.



Numbers of Internet users (unit: 10,000)

Compared to the result of the last survey dated December 31, 2001, the number of Internet users has soared by 12.1 million in the past six months, a rise of 35.9%. Compared with the same period in 2001, it is an increase of 72.8% and it is 74 times the 0.62 million people obtained from the first survey in October 1997. Although the general environment of the Internet in China has fluctuated, there has been a strong tendency for the number of Internet users to rise, as demonstrated by the CNNIC surveys.

As Jiang Zemin, the President of China remarks, the Internet has become an essential part of the news media of China<sup>4</sup>. Undoubtedly, the Internet has played an active role in the average Chinese life, especially in the cities. Like in many other countries, for Internet users in China, the Internet is a non-fungible medium, an unprecedented information center.

<sup>4</sup> Jiang made this remark at a meeting with global media leaders participating in the seventh annual meeting of the International Council of the Museum of Television and Radio in Beijing. *Jiang Zemin claims that the Internet has become an essential part of news media of China* (Chinese-- Jiang Zemin cheng ying te wang yi cheng zhong guo xin wen chuan mei zhong yao zu cheng bu fen), <http://finance.sina.com.cn/b/20021107/0754275698.html>.

## 2. The Internet strategy of China

Generally, the CPC has encouraged the quick development of the Internet in China. Since economic development has become a major goal in CPC's agenda, the government is willing to grasp at any opportunity that might forward this goal. CPC regards the Internet as an essential tool to realizing this goal. A related objective involves China's desire to re-establish its status as a modern, advanced, and powerful nation. Some CPC officials believe that China experienced a belated industrial revolution, much to its own detriment. They hope to avoid such a delay with today's information revolution, by investing in and exploring the use of the Internet. More importantly, the CPC is aware that its political power will ultimately be linked to the increasing economic prosperity of the people. Information technology has been a "new bright point of economic growth" among the entire economy. One of the slogans used by Jiang Zemin was "[N]one of the four modernizations would be possible without informatization."<sup>5</sup> In a public speech at the World Computer Congress 2000 in Beijing, Jiang Zemin gave his most enthusiastic comments about the Internet, stating, "the melding of the traditional economy and information technology will provide the engine for the development of the economy and society in the 21st century."<sup>6</sup> and "[E]lectronic commerce, remote Medicare and remote

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<sup>5</sup> Milton Mueller and Zixiang Tan, *China in the Information Age: Telecommunications and the Dilemmas of Reforms*, Washington, DC, The Center for Strategic and International Studies, 1996, at 57. The concept of "four modernization," namely, the modernizations of agriculture, industry, national defense, and science and technology, was embraced by the leadership at the outset of China's economic reform in the late 1970s, and now has become a symbolic phrase for China's goal in terms of economic development.

<sup>6</sup> A March 2001 report from U.S. Embassy Beijing: *Kids, Cadres And "Cultists" All Love It: Growing Influence Of The Internet In China*, <http://www.usembassy-china.org.cn/sandt/netoverview.html>.

education will be instrumental in the drive to develop China's economy and society."<sup>7</sup> CPC has recognized that the Internet should be made available to the largest portion of the population possible and should be encouraged as a general policy.

On the other hand, as some western observers point out, information technology might be incompatible with China's authoritarian rule<sup>8</sup>. The Chinese leaders understand the potential risks posed by the rapid development of the Internet for its tyranny, but they cannot afford to deny the potential economic benefit. Hence the CPC is placed in the precarious position of trying to encourage the Internet's growth while attempting to control Internet activity, which will bring censorship to the Internet and block the free flow of information. CPC has attempted to promote the rapid economic development brought on by the Internet, while simultaneously preventing the "spiritual pollution"<sup>9</sup> that it also

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<sup>7</sup> See China Daily (08/22/2000): *Jiang says IT is a top priority*,

[http://search.chinadaily.com.cn/isearch/i\\_textinfo.exe?dbname=cndy\\_printedition&listid=10180&selectword=JIANG%20ZEMIN%20INTERNET](http://search.chinadaily.com.cn/isearch/i_textinfo.exe?dbname=cndy_printedition&listid=10180&selectword=JIANG%20ZEMIN%20INTERNET).

<sup>8</sup> Christopher R. Kedzie: *Communication and Democracy: Coincident Revolutions and the Emergent Dictator's Dilemma*, <http://www.rand.org/publications/RGSD/RGSD127/>. We will discuss this more in the following text.

<sup>9</sup> This is a term used by CCP to describe any unhappy information in the eye of CCP. In term of the internet, according to Article 15 of *Measures for Managing Internet Information Services* issued by the State Council in 2000, this notion includes: 1) Information that goes against the basic principles set in the constitution; 2) Information that endangers national security, divulges state secrets, subverts the government, or undermines national unity; 3) Information that is detrimental to the honor and interests of the state; 4) Information that instigates ethnic hatred or ethnic discrimination, or that undermines national unity; 5) Information that undermines the state's policy towards religions, or that preaches the teachings of evil cults or that promotes feudalistic and superstitious beliefs; 6) Information that disseminates rumors, disturbs social order, or undermines social stability; 7) Information that spreads pornography or other salacious materials; promotes gambling, violence, homicide, or terrorism; or instigates crimes; 8) Information that insults or slanders other people, or infringes upon other people's legitimate rights and interests; or 9) Other information

introduces to its domestic users. Considering both of these factors, China's prime guideline for the Internet is "[D]evelop it positively; Strengthen the management; Hasten the benefits while avoiding the harm; and Make it useful for us"<sup>10</sup> as instructed by Jiang Zemin. According to a brief by Nina Hachigian, a Senior Fellow at the Pacific Council on International Policy in Los Angeles, this guideline is a three-part strategy for maintaining authority in a networked society -- by providing economic growth and some personal freedoms, managing the Internet's risks, and harnessing its potential<sup>11</sup>.

Subsequently, China's target for the Internet is simple: the Internet should not only be strictly controlled, but should also be utilized to the fullest extent to hasten economic development. This may appear to be a controversial strategy in the eyes of western observers. However, we will see that the CPC has reached both its goals. International society has noted that the Internet-related economy has become a fast-growing sector in China. This article will be focused on the efficient regulation of the Internet in China.

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prohibited by the law or administrative regulations. This provision was iterated in other content administration regulations, i.e. Article 13 of *Provisional Rules for the Administration of the Operation of News Publication Services by Web Sites* (2000); Article 9 of *Rules for the Administration of Internet Bulletin Board System Services* (2000); Article 13 of *Rules for the Administration of Computer & Internet Bulletin Board System Services in the Colleges* (2001); Article 17 of *Interim Provisions on the Administration of Internet Publication* (2002).

<sup>10</sup> The original Chinese is "[J]i ji fa zhan, Jia qiang guan li, Qu li bi hai, Wei wo suo yong". See *Central Committee of CCP held legal course, Jiang Zemin made critical Speech* (Chinese--Zhong gong zhong yang ju ban fa zhi jiang zuo, Jiang zemin zhu chi bing zuo jiang hua), <http://news.sina.com.cn/c/299613.html>.

<sup>11</sup> Nina Hachigian: *China's Cyber-Strategy, Foreign Affairs*, March/April 2001, Volume 80, Number 2. Also available at <http://www.rand.org/nsrd/capp/cyberstrategy.html>.



## II. Could or should the Internet be controlled?

### 1. The limitation on the free flow of information

The Internet is attributable to the cold war legacy of its predecessor, ARPAnet, which was conceived and designed to survive the damage of nuclear attack. As a result, the Internet exhibits the feasibility of re-routing stems for free information flow. According to Burke's analysis in his *Cyberlaw and the Norms of Science*<sup>12</sup>, the Internet, as a scientific artifact, has some inherent features or scientific norms. These norms include universalism, disinterestedness, resource sharing, interactive communication, virtual space, unrestricted information flows, non-hierarchical dissemination of information, remote access, openness, decentralization, and anonymity. In Boyle's words, these norms are simply "the technology of the medium, the geographical distribution of its users, and the nature of its content"<sup>13</sup>, which Boyle calls the "Internet Holy Trinity"<sup>14</sup>. This Internet Holy Trinity makes the Internet seemingly out of control, and resisting control.

Is this true? The only certainty of the digital era is that it is in fact uncertain and unpredictable. The Internet has changed a great deal in only a few years, and has evolved into a realm with new rules. Lessig has given us a new picture about the present cyberspace in his *Code and Other Laws of Cyberspace*<sup>15</sup>-- the Internet, i.e. software and hardware by codes, has been controlled by American East Coast codes. Lessig forms a distinctive view

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<sup>12</sup> Available at [http://infoeagle.bc.edu/bc\\_org/avp/law/st\\_org/iptf/commentary/content/burk.html](http://infoeagle.bc.edu/bc_org/avp/law/st_org/iptf/commentary/content/burk.html).

<sup>13</sup> James Boyle: *Foucault in Cyberspace*, <http://www.wcl.american.edu/pub/faculty/boyle/foucault.htm>. However, Boyle does not think the internet is out of control due to these features or norms.

<sup>14</sup> Ibid.

on the regulation of the Internet and argues that Internet regulation is very much possible.

What obstructs the free flow of information on the Internet? As far as law is concerned, in my opinion, there are two kinds of limitations—those of the private realm, i.e. intellectual property, privacy, and those of the public realm, i.e. censorship. The law in the private realm ensures that the flow of information does not violate others' personal rights such as copyright and privacy. Meanwhile, the law in the public realm prevents the information some people would like to disseminate or share from flowing freely, which is called censorship.

Usually, the information subject to censorship is free of copyright problems. Instead, the government may consider such information illegal, and on this basis, will positively intervene or restrict its transmission. What information may be regarded as illegal? Each country has different answers. Pornography, hate propaganda, and terrorism-related information following the events of September 11, 2001, are all examples. But should speech dissenting from government policy be included? In answering this question, the CPC has a standard distinct from most democratic nations. The topic of this article, Internet content control, is mainly focused on this issue: what are Chinese characteristics of Internet regulation?

## **2. For the private realm**

Intellectual property should be respected and privacy should be protected. This is a crucial principle in international society, with most governments and scholars insisting that

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<sup>15</sup> Lawrence Lessig: *Code and Other Laws of Cyberspace*, Basic Books (New York), 1999.

cyberspace must not be an exception, and should be regulated as real life is.

The prosperity of the Internet has introduced many challenges to human society. In 1995 when the Internet burst onto the international scene, Negroponte said copyright law was outdated in his famous book, *Being Digital*<sup>16</sup>, which meant that he believed that copyright law could not function in cyberspace as it had done in real life. However, people are always working to find some ways to solve the new problems or issues resulting from the Internet. People review the technology of the Internet, and hope it could be altered as needed. In my opinion, creating new laws and revising current ones are the most efficient ways of maintaining order on the Internet.

In relation to copyright, the two international digital treaties of the World Intellectual Property Organization ("WIPO") have come into force in 2002<sup>17</sup>. In the United States, the *Digital Millennium Copyright Act of 1998* ("DMCA") makes Lessig anxious since he claims that some stipulations in the DMCA give too much copyright control over the Internet and technology<sup>18</sup>. The demise of Napster<sup>19</sup> at the hands of the DMCA confirms his concerns. Even in China where it is widely accepted that copyright is not protected

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<sup>16</sup> *Being Digital*, Vintage Books (New York), 1996.

<sup>17</sup> *WIPO Copyrights Treaty* ("WCT") and *WIPO Performances and Phonograms Treaty* ("WPPT"). Both treaties were adopted by the Diplomatic Conference on December 20, 1996, and become law three months after they are ratified by 30 states. Then, WCT entered into force on March 6, 2002, and WPPT entered into force on May 20, 2002. See WIPO Press release, <http://www.wipo.org/pressroom/en/index.html>.

<sup>18</sup> Lawrence Lessig: *Open Code and Open Societies*, <http://cyberlaw.stanford.edu/lessig/content/articles/works/opensocd1.pdf>.

<sup>19</sup> *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002). For a systematic analysis on MP3, Napster, Gnutella and other related online issues, see Stuart Biegel: *Beyond Our Control?--Confronting the Limits of Our Legal System in the Age of Cyberspace*, MIT Press, 2001.

effectively, the new copyright law has embraced the clauses providing what is the right of communication of information on networks and how they can be protected<sup>20</sup>.

### 3. For the public realm

As for censorship in the public realm, there are still some controversial claims even in western countries. One attempt involved the United States government's efforts to censor the Internet in order to protect children. In 1996, the Communications Decency Act ("CDA")<sup>21</sup> was created. However, the US Constitution's First Amendment<sup>22</sup> protects citizens' freedom of speech. Consequently, some organizations, e.g. the American Civil Liberties Union, held that the CDA's "indecent transmission" and "patently offensive display" provisions abridge "the freedom of speech" protected by the First Amendment. After two suits went through the US Supreme Court, the CDA was rendered obsolete<sup>23</sup>. From this, it is clear that the First Amendment interests surpassed the benefits of regulating speech. This has left the Internet content in the United States relatively free from

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<sup>20</sup> In October 2001, China amended the *Copyright law*. In this revised law, a new notion was introduced as one type of right of copyright. *See* Item 12 of Article 10: the right of communication of information on networks, that is, the right to communicate to the public a work, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them.

<sup>21</sup> CDA criminalizes the "knowing" transmission of "obscene or indecent" messages to any recipient under 18 years of age, and prohibits the "knowing" sending or displaying to a person under 18 of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."

<sup>22</sup> The First Amendment to the U.S. Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

<sup>23</sup> *RENO v. American Civil Liberties Union*, 117 S. Ct. 2329 (1997).

governmental control. Even though Federal Communications Commission chairman William Kennard has said his agency has no plans to regulate the Internet, Senator John McCain would offer more legislation, "ensuring that advanced [Internet] services are made available to all Americans."<sup>24</sup>

Meanwhile, in Australia and France, there are also different views on the desirability of government authority over Internet content<sup>25</sup>. In June 1999, the Australian legislature enacted the *Broadcasting Services Amendment (Online Services) Act 1999*.<sup>26</sup> The Australian Act is focused on the control of pornography<sup>27</sup>, while French case *LICRA et UEJF vs Yahoo! Inc and Yahoo France*<sup>28</sup> struggles to limit the availability of Nazi-related information.

Both governments think the Internet should be restricted from some sensitive contents. However, we found that it may be the governments' own ideal desires. According to the scholarly analysis, these two attempts to control access to Internet content presently appear equally ineffective, and the criticisms, even lampoons, of both government actions are prevailing in the domestic and international society<sup>29</sup>. Consequently, critics believe that

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<sup>24</sup> See *Wired* news, *McCain bill seeks unfettered Net*, <http://www.wired.com/news/business/0,1367,18855,00.html>.

<sup>25</sup> Carolyn Penfold: *Nazis, Porn and Politics: Asserting Control Over Internet Content*, Refereed article, 2001 (2) *The Journal of Information, Law and Technology (JILT)*. <<http://elj.warwick.ac.uk/jilt/01-2/penfold.html>>

<sup>26</sup> *Ibid.* Although the Australian Broadcasting Authority in 1996 recommended against legislative restriction of internet content, favoring instead the pursuit and development of better labeling and filtering products and protocols.

<sup>27</sup> *Broadcasting Services Act* (1992) (Cth). s3(1)(l), & (m): "restrict access to certain internet content that is likely to cause offence to a reasonable adult, and to protect children from exposure to internet content that is unsuitable for children."

<sup>28</sup> English translation found at *LICRA et UEJF vs. Yahoo! Inc and Yahoo France*, Tribunal de Grande Instance de Paris (Superior Court of Paris), 20/11/2000, <http://www.gigalaw.com/library/france-yahoo-2000-11-20-lapres.html>.

<sup>29</sup> *Supra* note 25, *Nazis, Porn and Politics: Asserting Control Over Internet Content*.

the Internet content ought not be censored, and may not even be subject to complete censorship, due to technological advances.

It is significant to note that the rationale for Internet content control in Australia and France are distinct from China. Australia only restricted pornography, and France's Yahoo case was solely intended to limit access to Nazi memorabilia. China's emphasis is to control the political, economic, social and cultural information, as well as any "unhappy information", which constitutes a broad and sometimes unpredictable category of content<sup>30</sup>.

#### **4. The debate on China's censorship**

In the west, journalists and politicians are widely aware that China has always controlled the access to the traditional media such as television, print and radio. As the Internet continues to take root in China, most western observers believe that China will fail to continue its strict censorship on the Internet, and that China's democracy will be expanded.

For instance, the former President of the United States, Bill Clinton, stated on March 8, 2000, "[I]n the new century, liberty will spread by cell phone and cable modem ... [W]e know how much the Internet has changed America, and we are already an open society. Imagine how much it could change China. Now, there's no question China has been trying to crack down on the Internet --- good luck. That's sort of like trying to nail Jello to the wall."<sup>31</sup> The famous think tank RAND also provided a report<sup>32</sup>, which

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<sup>30</sup> For detailed description, see Note 9, "spiritual pollution".

<sup>31</sup> Bill Clinton in a speech at Paul H. Nitze School for Advanced International Studies at Johns Hopkins University on 8

addresses the relationship between democracy and the new communication media by applying theory and data analysis to the task. In that report, the author hypothesizes that democracy and networked communication are positively correlated<sup>33</sup>.

Due to the inherent character of the Internet, the general consensus in the west is that China should stop its efforts to control the Internet<sup>34</sup>. Although the Chinese government attempts to block some sensitive websites, the information in cyberspace can still travel in China by re-routing the information around the filters. "The Net is the ultimate natural environment for information and trying to regulate the Net is like trying to prohibit evolution."<sup>35</sup> Subsequently, the popular opinion is that the CPC's attempts will be futile and ineffective.

Another prevailing view held by western commentators is that implementing a rigorous regulatory scheme will put the Internet in a stranglehold. In this respect, the Australian experience may be instructive. When the Australian legislature passed the

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March 2000, quoted after Shanthi Kalathil, William J. Drake, Taylor C. Boas: *Dictatorships in the Digital Age: Some Considerations on the internet in China and Cuba, Information Impacts*,  
[http://www.cisp.org/imp/october\\_2000/10\\_00drake.htm](http://www.cisp.org/imp/october_2000/10_00drake.htm).

<sup>32</sup> Christopher R. Kedzie: *Communication and Democracy: Coincident Revolutions and the Emergent Dictator's Dilemma* (RAND Document, 1997, Document No: RGSD-127), <http://www.rand.org/publications/RGSD/RGSD127/>.

<sup>33</sup> Ibid.

<sup>34</sup> Many authors reach this conclusion. See Thomas Friedman: *Censors Beware, The New York Times* (July 25, 2000); Robert Wright: *Gaining Freedom by Modem, The New York Times* (January 28, 2000); Barbara Crossette: *The World: Out of Control; The Internet Changes Dictatorship's Rules*, "New York Times Week In Review (August 1, 1999); Bay Fang: *Chinese 'Hacktivists' Spin a Web of Trouble: The Regime is Unable to Control the Internet*, *U.S. News and World Report* (September 1998); and Walter Isaacson: *Going Online when the Emperor's Away*, *Time* (June 4, 2001), <http://www.time.com/time/world/printout/0,8816,109632,00.html>.

<sup>35</sup> *Supra* note 13, *Foucault in Cyberspace*.

*Censorship Act*, and even after its enactment, the Australian government was criticized by Internet users, and by parts of Internet industry. It was said that the legislation would make Australia the 'village idiot' of the Internet world, and would slow, if not kill, the burgeoning Australian Internet industry<sup>36</sup>. As far as China is concerned, however, the prosperity of the Internet<sup>37</sup> and rapid economic development<sup>38</sup> there paints a different picture. According to the latest research<sup>39</sup>, it is clear that the control of Internet content in China has been unbelievably successful and it rarely sacrifices the economic interest. Three researchers at Carnegie Endowment for International Peace have explicitly stated, at least at present, that authoritarian regimes like China can in different ways benefit economically and politically from the Internet while successfully controlling the medium's political impact<sup>40</sup>. For example, China is promoting public Internet access while blocking Web sites, monitoring e-mail, arresting Internet dissidents and encouraging self-censorship. Some studies have even found that not only can the Internet be controlled in China, but also the Internet itself has been successfully transformed into a means for control by the CPC<sup>41</sup>.

In my opinion, today, the CPC is very confident that the Internet should and can be

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<sup>36</sup> More discussion, Supra note 25, *Nazis, Porn and Politics: Asserting Control Over Internet Content*.

<sup>37</sup> Refer to the introduction of internet Development in China at first section.

<sup>38</sup> China's GDP has always maintained an increase rate over 7%, even in the recent years when the global economy has been weak.

<sup>39</sup> Clara Liang: *Red Light, Green Light: Has China Achieved Its Goals Through the 2000 internet Regulations?*

<http://law.vanderbilt.edu/journal/Vol345/Liang.htm>.

<sup>40</sup> Shanthi Kalathil, William J. Drake, Taylor C. Boas: *Dictatorships in the Digital Age: Some Considerations on the internet in China and Cuba* "Information Impacts" (October 2000),

[http://www.cisp.org/imp/october\\_2000/10\\_00drake.htm](http://www.cisp.org/imp/october_2000/10_00drake.htm).

<sup>41</sup> Lokman Tsui: *Internet in China: Big Mama is Watching You*, <http://www.lokman.nu/thesis/010717-thesis.pdf>.



controlled. Insofar as it "should", this is easy to understand since the CPC desires to maintain its authoritarian regime and one-party reign through strict control of the Internet. But from the "should " to "could", the CPC has also come a long way from fear to confidence. In the following section, we will discuss how the CPC has made this "could" happen in China. The CPC's regulation of the Internet has been consistent with its regulation of traditional forms of media such as TV, radio and newspaper. Moreover, the CPC fully utilizes the Internet's inherent characters to reach its goals.

### **III. How does China Control the Internet? — Application of Lessig's theory**

#### **1. Lessig's theoretical method**

Lessig<sup>42</sup>, a leading scholar in the field of Internet law, has many insightful and compelling opinions about the Internet. In his famous *Code and Other laws of Cyberspace*<sup>43</sup>, Lessig provides a theoretical framework that adopts a comprehensive analysis to tackle the question of how governments can regulate the Internet. He arrives at the view that the Internet can be regulated. Lessig argues that the government can control behavior through law, architecture (generally, this term refers to technology; and it can be replaced with code, the analog for architecture in cyberspace), norms and the market. More importantly, developments in the code of the Internet are spurring changes that make the Internet easier to control. Lessig also canvasses his views on how these four modalities

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<sup>42</sup> Lessig has piles of influential speeches, articles and books for promoting his opinions. For a whole collection of Lessig's publications, see <http://cyberlaw.stanford.edu/lessig>. As a professor, he takes active part in the practice of the legislation, cases and other related activities. He has been consulted and or has appeared as an expert witness in the anti-trust trial of the U.S. versus Microsoft and in the Napster case, both landmark lawsuits.

<sup>43</sup> Supra note 15, *Code and Other laws of Cyberspace*.

apply in cyberspace.

According to Lessig, the law regulates by threat of state sanctions, and norms regulate by the threat of community sanctions. Code regulates through the environment, and markets regulate through price: "Architecture, law, norms and markets together regulate behavior. Together, they set the terms on which one is free to act or not; together, they set the constraints that affect what is and is not possible. They are four modalities of regulation; they together determine how individuals and states within their scope are regulated."<sup>44</sup>

This article will discuss attempts at Internet content control in China using Lessig's theoretical framework<sup>45</sup>. Lessig points out that current changes in the architecture of the Internet that have eroded the original libertarian concept are driven by commerce. In China, this change is driven by the CPC, the Chinese government, for political reasons. The CPC endeavors to make China's Internet system a "digital panopticon"<sup>46</sup>.

## 2. Law

Labeling themselves with the title "rule of law", a good democratic slogan but with

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<sup>44</sup> Lawrence Lessig: *Architecting for Control*, <http://cyber.law.harvard.edu/works/lessig/camkey.pdf>.

<sup>45</sup> The more specific analysis on this application in China, see note 41, *Internet in China: Big Mama is Watching You*. I am happy that I have the idea about this topic identical to Tsui.

<sup>46</sup> Panopticon was a Greek-based neologism for 'all-seeing place'. It was Jeremy Bentham who first invented the concept of Panopticon as a model prison designed as a means for social discipline. Then, Michel Foucault, in *Discipline and Punish*, developed how the Panopticon provides new insight into the surveillance in modern society. This made Panopticon a notion with modern meaning. For a deeper analysis, see Michel Foucault, *Discipline and Punish: the Birth of the Prison*. Penguin Books (Harmondsworth), 1977; and in terms of China's discussion, see note 41, *Internet in China: Big Mama is Watching You*.

a different meaning from that commonly understood from the ordinary use of the term<sup>47</sup>, Chinese governmental bodies at various levels repeatedly pronounce that the Internet should be legally deployed. So far, China has so many complicated regulations on the Internet that a researcher once asserted that "[C]hinese Internet entrepreneurs and foreign investors are faced with a heavy set of confusing Internet regulations" and "the current Chinese Internet regulations and interpretations are often vague, confusing, and inconsistent."<sup>48</sup>

Actually, the CPC is very cautious of Internet legislation, particularly with respect to laws on censorship, since the top leaders did not know enough about this novel technology when the Internet first debuted in China in 1994. Yet, the CPC intends to take the Internet under its control. At first, the CPC's legislation was just focused on the connection to the Internet. Then, with the blossoming of the Internet, motivated by a desire to promote economic development and allure foreign investment, as well as a determination to prevent "spiritual pollution", the CPC began to make enormous strides to shape a regulatory framework for the Internet. Since 1995, when the CPC began permitting commercial Internet accounts, at least sixty sets of regulations<sup>49</sup> have been issued aimed at controlling Internet content. Some rules are directly aimed towards content control, i.e. *Decision of the Standing Committee of the National People's Congress on Maintaining*

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<sup>47</sup> In the eyes of the CPC, 'rule of law' only means any activity must be regulated on the internet and there should be a specific rule available to govern each behavior.

<sup>48</sup> Jiang-yu Wang: *The internet and E-Commerce in China: Regulations, Judicial Views, and Government Policies*, *Computer & internet Lawyer*, January 2001.

<sup>49</sup> For comments and detailed introduction on these regulations, see *Freedom of Expression and the internet in China--A Human Rights Watch Backgrounder*, <http://www.hrw.org/backgrounder/asia/china-bck-0701.htm>.

*Internet Security* (2000); *Measures for Managing Internet Information Services* (2000); *Provisional Rules for the Administration of the Operation of News Publication Services by Web Sites* (2000); *Rules for the Administration of Internet Bulletin Board System Services* (2000); *Rules for the Administration of Computer & Internet Bulletin Board System Services in the Colleges* (2001); *Interim Provisions on the Administration of Internet Publication* (2002)<sup>50</sup>. Other rules are aimed at Internet café, state secrecy, network security, and encryption, but they also indirectly have a strong impact on Internet content regulation. Even some rules for infrastructure or connections include provisions on content governance.

These rules carry some distinctly Chinese characteristics: firstly, many terms are stringent. For example, sending "state secrecy" materials to overseas organizations or to individuals over the Internet may lead to life imprisonment<sup>51</sup>. According to Lessig, law, as a means of control, depends on the threat of sanctions by the state<sup>52</sup>. Subsequently, the stringent stipulations could constitute proactive intimidation for the public. As Tsui points out, intimidation is a very strong weapon in the battle for Internet control and something the Chinese government is very good at<sup>53</sup>.

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<sup>50</sup> The English versions of these statutes could be available at [www.isinolaw.com](http://www.isinolaw.com) or [www.lawinfochina.com](http://www.lawinfochina.com) (however, they are fee-based). Also, please refer to TransAsia Lawyers: *China's IT Policy & Legislation* (2001), <http://www.transasialawyers.com/ITbook2TableofContents.htm>.

<sup>51</sup> This is stipulated in Article 6 of *Interpretation of the Supreme People's Court on Specific Application of Laws When Hearing Cases of Stealing, Spying, Purchasing, and Illegally Providing State Secret and Information for Overseas Countries* (2001) and Article 111 of *Criminal Code of China*.

<sup>52</sup> Supra note 15, *Code and Other laws of Cyberspace*.

<sup>53</sup> Supra note 41, *Internet in China: Big Mama is Watching You*.

Secondly, some words or expressions in the rules are vague. For instance, pursuant to Article 15 of *Measures for Managing Internet Information Services*, "[i]nformation that is detrimental to the honor and interests of the state" is banned on the Internet. Yet, an Internet user has no way of knowing what topics might be considered injurious. Online speech, which only criticizes the current leaders or expresses some discontent with the government, will perhaps be interpreted to violate this provision. Such obscurity gives the government wide discretion, and a stronger basis on which to arrest and punish persons who engage in such forms of expression. Sometimes, the result is unpredictable.

Thirdly, these rules grant various government authorities full power to monitor organizations and individuals on the Internet. In order to control the Internet cafés effectively, the CPC has launched several campaigns to crack down on Internet cafés throughout the nation in recent years<sup>54</sup>. In addition to the Judicial units<sup>55</sup> and Legislators<sup>56</sup>, under the Administrative Authority—the State Council, there are at least nine separate agencies<sup>57</sup>, led by the Ministry of Public Security, that are involved in directly monitoring

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<sup>54</sup> Tim Richardson: *China clamps down on Net cafes – again*,

<http://www.theregister.co.uk/content/6/27586.html>.

<sup>55</sup> The Courts and the Procuratorates at all levels in China.

<sup>56</sup> The National People's Congress and its Standing Committee.

<sup>57</sup> Besides the Ministry of Public Security, The other bodies include the State Information Office (in charge of online news), Ministry of Culture (in charge of internet Cafe), Ministry of Information Industry (In charge of connection and general administration of internet), State Administration for Industry and Commerce (in charge of the internet companies registration and online advertising), the State Administration for the Protection of Secrets (in charge of State Secrecy and encryption), the State Administration for Press and Publications (in charge of online publication), Ministry of State Security (in charge of national security) and the State Administration of Radio, Film and Television (in charge of online video program).

and controlling the Internet.

Furthermore, unlike other laws in China, these related content control rules are tightly enforced. Government agencies have devoted considerable time and resources to try to implement these rules. As a punishment for their violation, the government may close the website for a few days or ban the website forever. For example, the *China Finance Information Network's* site was closed down when content was found that 'spread rumors that damaged the government's image'<sup>58</sup>. Further, more individuals<sup>59</sup> have been detained as a result of posting "unhappy" material on the Internet after Lin Hai, who was considered the first detained 'Internet dissident' in China<sup>60</sup>. These drastic enforcement actions are used to remind people of the fact that they are being monitored and may be punished.

Finally, many provisions of the rules have shifted primary responsibility for control of the Internet from the government to the Internet service providers themselves<sup>61</sup>. As the

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<sup>58</sup> Kathleen Hartford: *Cyberspace with Chinese Characteristics*, <http://www.pollycyber.com/pubs/ch/home.htm>.

<sup>59</sup> For an incomplete detained individuals list of China, see Digital Freedom Network: *Attacks on the internet in China: Chinese individuals currently detained for online political or religious activity*, <http://www.dfn.org/focus/china/netattack.htm>.

<sup>60</sup> Lin Hai was the first victim of Chinese censorship on the Internet. He used to be a Shanghai-based computer scientist, and spent 18 months in a Chinese prison for distributing forbidden e-mail addresses to an online dissident magazine *VIP Reference*, a U.S. based underground pro-democracy newsletter. See Michael GrebbLin: *China's Cyberwall Nearly Concrete*, <http://www.wired.com/news/politics/0,1283,56195,00.html>.

<sup>61</sup> Article 13 of *Rules for the Administration of Internet Bulletin Board System Services* reads: "If the provider of electronic bulletin service finds that the message on its electronic bulletin service system obviously fall within the content specified in Article 9 of the present Provisions (i.e. "spiritual pollution"), it shall delete the message immediately, reserve related information and advise relevant state organs." All regulations require that 1) the content service providers shall record the information in its website, as well as the issuing time, the internet address or domain name; 2) the access service provider shall keep record of such information as the users' browsing time, account numbers,

regulatory framework evolves, this trend becomes much clearer. These regulations decentralize responsibility. As a result, content is not double- but triple-checked: at the gateway of the dominant connectors such as China Telecom<sup>62</sup>, at the network responsible for delivering the content, and the receiver itself<sup>63</sup>. From the following discussion, we will find that this is a very effective way to make Internet participants adhere to those norms beneficial to the CPC's control.

All these regulations make surveillance on the Internet **legal** in China. In Tsui's words, Law makes the "digital Panopticon" of China legal<sup>64</sup>. These legal rules allow the CPC to control the Internet with the best manners and reasons. In China, there is no way to commence litigation claiming that some rule violates the Constitution according to *the Administrative Procedure Law*, and no courts will accept and hear such a case. This is so, even though Article 35 in the *Constitution* of China reads: "Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration." When your speech is deemed as "spiritual pollution", you will be denied that freedom. In practice, there are many terms of other laws or regulations that are against the *Constitution* (such as Article 15 of *Measures for Managing*

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internet addresses or domain names, as well as calling telephone numbers. Such records shall be kept for 60 days and provided to relevant state organs when the latter requires so according to law. For comments, see Human Rights Watch: *Freedom of Expression and the Internet in China--A Human Rights Watch Backgrounder*, <http://www.hrw.org/backgrounder/asia/china-bck-0701.htm>.

<sup>62</sup> One of China's dominant telecom operators. China Telecom used to be the former Ministry of Posts and Telecommunications and the monopoly of telecom service provider across China. With the telecom reform in China, China Telecom was broken up twice in 1998 and 2001.

<sup>63</sup> *Supra* note 41, *Internet in China: Big Mama is Watching You*.

<sup>64</sup> *Ibid*.

*Internet Information Services*) but there are no specific ways to rectify such laws and regulations except where the government decides to take actions to correct them.

### 3. Architecture (Code)

Code plays a crucial role in regulating the Internet since the Internet is an artificial craft. Lessig argues that the code that makes up the Internet, both hardware and software, sets the constraints on what is possible and impossible<sup>65</sup>. In the west, the market is a driving force behind the development for the code of the Internet, and the market is pushing for code that increasingly erodes the original characteristics of the Internet, such as freedom. Lessig has not been the only one to recognize this rationale; the CPC has also mastered this golden rule. The CPC proves Lessig's conclusion right through its practice in China. With the power of code itself and the regulations, the CPC has attempted to change the code and keep the code under surveillance.

China even had an astonishing plan to construct a network independent of the World Wide Web<sup>66</sup>. The CPC argues that China must break the west's monopoly on information resources and related industries. With the push of the government, there were some experimental networks that appeared in China, from the Public Multimedia Network, better known as the 169 network<sup>67</sup>, to the alternative C-Net, "an Internet working project of Chinese people" from a company called Sichuan Zhongcheng Network Development

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<sup>65</sup> Supra note 15, *Code and Other Laws of Cyberspace*.

<sup>66</sup> Arnold Zeitlin: *Jiang Zemin's son urges separate Internet for China*, <http://www.freedomforum.org/templates/document.asp?documentID=3823>.

<sup>67</sup> "169" refers to the dialup number to access the network.



Company Ltd, which has claimed that it has been eight years in the planning<sup>68</sup>. Although the idea of a nationwide intranet appealed to the CPC, most of these intranets failed miserably in capturing the public's interest and the viability of a nationwide intranet has not worked in China so far. Consequently, CCP had to put the emphasis on other ways of content control such as blocking and filtering to change the code.

China has long taken all possible measures to use blocking and filtering technology to control the Internet, which has gained much world attention. At Harvard Law School, there is specific research on China's Internet filtering -- *Real-Time Testing of Internet Filtering in China*<sup>69</sup>, which collects the websites filtered by the Chinese government provided by Internet users online.

For the relatively neutral websites, i.e. universities' websites and search engines, the CPC uses filtering code to thwart its free flow so that Internet users in China cannot access the "unhappy information" but can visit other appropriate information. This method is widely used for most websites outside China. Through filtering<sup>70</sup>, only the content deemed

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<sup>68</sup> Actually, this is a network like national intranet only within the territory of China.

<sup>69</sup> This research is conducted by Jonathan Zittrain (Faculty Co-Director, Berkman Center for internet & Society; Jack N. and Lillian R. Berkman Assistant Professor of Entrepreneurial Legal Studies, Harvard Law School) and Benjamin Edelman (J.D. Candidate, Harvard Law School), see <http://cyber.law.harvard.edu/filtering/china/test/>.

<sup>70</sup> For technical background and detailed analysis on technology, see *China's Cyber-Wall: Can technology break through?*

<http://www.cecc.gov/pages/roundtables/110402/index.php?PHPSESSID=3f9f6342ede025feff9713d4df2ef1e8>.

Also, please refer to *Replacement of Google with Alternative Search Systems in China*,

<http://cyber.law.harvard.edu/filtering/china/google-replacements/>, which describe the detailed story that Google.com was replaced with other Chinese search engines.

appropriate is accessible in China, while everything else is inaccessible. On the other hand, for some "retroactive" websites, i.e. FALUN GONG<sup>71</sup> and most western news websites, the CPC just blocks the whole site.

To secure the blocking and filtering, China strictly regulates the backbone networks' connection to the Internet outside China. According to *Telecommunications Regulation of China, Measures on the Administration of International Communication Ports* and other relevant rules, all international telecommunications gateways should be approved by the government; all the backbone network operators should meet some particular requirements for approval; all telecommunication enterprises that desire to operate the international telecommunication services must be approved by the administrative departments, and shall transact such services via the international telecommunication gateway set up upon approval of the government<sup>72</sup>. Further, the Article 10 of *Telecommunications Regulation* stipulates that a telecom basic service provider (including backbone network operators) must be 51% state-owned. So far, in China, there are only nine backbone Internets<sup>73</sup>. One should note that that these nine operators are all state-owned companies, and their bandwidth varies from 0 or 2M to 6,452M, which means the dominant operators control the interconnection. In other words, some main players

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<sup>71</sup> Falun Gong, a religion, has been deemed as devil cult, and has thoroughly been prohibited in China.

<sup>72</sup> See Article 65 of *Telecommunications Regulation of China*. Taiwan, Hong Kong and Macao are treated as "International".

<sup>73</sup> See CNINC Report, Supra note 3. These Backbone internet include: CSTNET: 55M; CHINANET: 6452M; CERNET: 257.5M; UNINET: 693M; CNCNET: 2870M; CIETNET: 2M; CMNET: 247M; CGWNET:(under construction); CSNET: (under construction).

control all the network traffic that travels outside China. Obviously, this type of makeup of backbone Internet players makes it easier to monitor the Internet. It is very easy to add all special code (hardware and software) at the gateways, the top of the hierarchy of the network structure, to meet the CPC's special requirement for surveillance.

The CPC never refuses to admit that it filters the Internet. During the Google.com's blocking, the official *China Daily* also gave a report with the title "Unhealthy Net search engines suspended"<sup>74</sup>. The claimed expositive reasons usually are "to protect the national interest" and "prevent some unhealthy information", which just makes people assume that what is being filtered is pornography and terrorism-related information rather than censorship over dissenting speech. President Jiang has argued, "[F]reedom of the press should be subordinate to the interests of the nation. How can you allow such freedom to damage the national interests?"<sup>75</sup> In April 2002, China's minister of the State Information Office, Zhao Qizheng, said: "[W]e block those Web sites that are enemies of China. We will not block your site if you are friendly to China."<sup>76</sup>

The United States government is also proposing surveillance of the Internet to implement anti-terrorism measures<sup>77</sup>. Hence, it is seemingly difficult for western nations to

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<sup>74</sup> See Jian Er: *Unhealthy Net search engines suspended*, <http://www1.chinadaily.com.cn/hk/2002-09-04/84914.html>.

<sup>75</sup> Jiang Zemin in an interview with Mike Wallace of CBS in Beidaihe, China on August 15, 2000, quoted after Lin Neumann, A.: *The Great Firewall Committee to Protect Journalists* (January 2001), [http://www.cpj.org/Briefings/2001/China\\_jan01/China\\_jan01.html](http://www.cpj.org/Briefings/2001/China_jan01/China_jan01.html).

<sup>76</sup> See Thomas Crampton: *China's Web Firms gain as Google loses*, <http://www.iht.com/articles/70149.htm>.  
Or news *Blocking Websites*, [http://www.websitesaboutchina.com/internet/internet\\_1.htm](http://www.websitesaboutchina.com/internet/internet_1.htm).

<sup>77</sup> See John Markoff: *Pentagon Plans a Computer System That Would Peek at Personal Data of Americans*, <http://www.nytimes.com/2002/11/09/politics/09COMP.html>.

condemn CPC's filtering code policy since the CPC could defend itself by responding that all governments need to filter the Internet. The real difference between the west and China involves identifying the criteria that is used to determine which websites should be blocked. In China, the blocked sites are mainly dissenting messages while such information is generally protected in Western democratic nations.

#### 4. Market

The Internet originated in the United States, and subsequently most advanced "code" is owned and developed by western companies. How does China obtain the "code" to modify the Internet of China to what the CPC wants? It is a commercial era, and economic interests are the prime considerations that are factored when making any vital decisions. The Market is the best and simplest way to get the code.

On August 9, 2002, Human Rights Watch (HRW) sent a letter<sup>78</sup> to Yahoo's CEO Terry Semel, to detail HRW's concerns about Yahoo being signatory to a "Public Pledge on Self-Discipline for the China Internet Industry"<sup>79</sup>. The Letter read that if Yahoo implemented the pledge, Yahoo would become an agent of Chinese law enforcement. It would switch from being an information gateway to an information gatekeeper. The Letter claimed that Yahoo! Inc. risks complicity in rights abuses if it remains a signatory<sup>80</sup>. However, Yahoo did not respond to the letter, and decided to sign off on the voluntary

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<sup>78</sup> For the full text of the letter, See <http://hrw.org/press/2002/08/yahoo-ltr073002.htm>.

<sup>79</sup> The Pledge essentially ensures that internet companies in China will abide by the country's pre-existing regulations, which include requirements that companies monitor and restrict information deemed "harmful".

<sup>80</sup> See the news: *Yahoo! Risks Abusing Rights in China*, <http://www.hrw.org/press/2002/08/yahoo080902.htm>; before this, there has been a similar news: *Prodigy CEO To Censor internet for Chinese Tyrants*, <http://www.self-gov.org/>: Good News, Bad News, Unbelievable News.

content limitations in China<sup>81</sup>.

Numerous researchers have revealed that most of the advanced technologies are provided by well-known western companies<sup>82</sup>. The United States has a very relaxed export restriction for advanced technology<sup>83</sup>, as the U.S. foreign policy set by the Clinton administration and continued by George W. Bush is based on the belief that once China enters the world market, democracy will flow into China. As a practical result of this policy, China is able to import the advanced technology that it needs to develop the Internet, including technology that enables Internet control such as monitoring and surveillance tools. Businesses adhere to the policy out of a fear of having to close their operations. China has such a tremendous market that no commercial corporation will willingly elect to lose it. No one wants to irritate the government if business is the principal objective even at the risk of overlooking human rights.

This issue is related to western value selection. How can the companies reconcile its commercial objectives with the western concept of human rights? The only company that has a known record with the Chinese government and refused to do business with it due to ethical motives is InfoGlide<sup>84</sup>. InfoGlide sells a technology that is able to search and

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<sup>81</sup> Jim Hu: *Yahoo yields to Chinese Web laws*, <http://news.com.com/2100-1023-949643.html?tag=rn>.

<sup>82</sup> Greg Walton: *China's Golden Shield: Corporations and the Development of Surveillance Technology in the People's Republic of China*,  
<http://www.ichrdd.ca/english/commdoc/publications/globalization/goldenShieldEng.html>;

Ethan Gutmann: *Who Lost China's internet?*

<http://www.weeklystandard.com/Content/Public/Articles/000/000/000/922dgmtd.asp>.

<sup>83</sup> For information concerning the U.S. export policy, see the website of the Bureau of Export Administration,  
<http://www.bxa.doc.gov>.

<sup>84</sup> Kathleen Hartford: *Cyberspace with Chinese Characteristics*, "<http://www.pollycyber.com/ch/pubs/home.htm>.

detect patterns in huge databases, and has asserted its prerogative to refuse to deliver its technology to China. But the question is, how many others adopted this stance? It seems that the market has stood on the side of the CPC.

On the other hand, some code might be used in a manner contrary to its original purpose. In such a situation, one could not expect a manufacturer to foresee the application of his technology for prohibitive purposes. A system for blocking access to websites may have been originally designed without authoritarian regimes in mind, but may be mainly used by corporations to monitor and restrict access of employees to inappropriate websites such as porn websites. As one company's spokesman states: "[W]e have no control over the categories of websites customers choose to block. It's up to them."<sup>85</sup> Furthermore, according to Lessig, the architecture of the Internet is changing because commerce is now developing code specifically for this purpose. Even though there is no code for "digital panopticon", some companies will be happy to develop one after China's big purchasing order comes out.

## 5. Norms

What are China's norms related to the Internet? Tsui's research has identified that the general attitude is "[W]ary of Foreign Technology, Not Wary of Privacy"<sup>86</sup>. Tsui concludes that the Chinese have a tradition of approaching foreign technology critically, and the Internet in particular. Copying a western model in China is doomed to fail, according to the Chinese. The central government uses this to legitimize the Internet

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<sup>85</sup> Marshall and Kuhn: *China Goes One-on-One With the Net*,

[http://www.latimes.com/business/cutting/lat\\_chitek010127.htm](http://www.latimes.com/business/cutting/lat_chitek010127.htm).

<sup>86</sup> Supra note 41, *Internet in China: Big Mama is Watching You*.

control policy by focusing on the harmful effects of the Internet such as instant messaging, games and porn. They deem these effects analogous to those created via use of electronic opium. Subsequently, this kind of norm helps the CPC justify its supervision goal easily. More importantly, the norms on the Internet which are taken for granted in western nations are not deemed to be norms in China.

Furthermore, what this author would like to emphasize is that since the Internet is a novel medium, norms in China are still in a rudimentary state. The CPC may use its stringent regulations as a deterrent to ensure that Internet users and Internet service providers conform to norms that the CPC accepts. According to Posner, "legal sanctions for norm violations are also important because many people are impervious to informal sanctions"<sup>87</sup>. Posner further states that "while norm creation is too slow to provide for all the rules necessary for the governance of society—so laws have their place too"<sup>88</sup>. This is applicable to the Internet in China. In this author's view, it is possible to consciously create and destruct some norms in cyberspace with the push and participation of the Government. Even more, in some instances, the norms of cyberspace have been replaced with regulations. For instance, in most of China's BBS, the relevant regulatory provisions are posted on the web as the virtual community's norms<sup>89</sup>, which is also required by the

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<sup>87</sup> Richard A. Posner and Eric B. Rasmusen: *Creating and enforcing norms, with special reference to sanctions*, <http://netec.mcc.ac.uk/WoPEc/data/Papers/wpawuwple9907004.html>.

<sup>88</sup> Ibid.

<sup>89</sup> Here is the public notice of Sohu's chatroom (Sohu is one of the three largest and popular portals in China):

*Please take note that the following issues are prohibited according to Chinese law:*

- 1. Criticism of the PRC Constitution*
- 2. Revealing State secrets, and discussion about overthrowing the Communist government*

mandatory regulation<sup>90</sup>.

We also need to note that Internet-related companies in China inflict a high degree of self-censorship. In November 2002, a semi-official organization, the Internet Society of China, launched the first Internet content examinations, and even selected some model sites for propaganda purposes<sup>91</sup>. The popular portal site Sina.com took pride in the fact that it has been selected as a Model website<sup>92</sup>. Self-censorship is necessary in order to gain the

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3. *Topics that damage the reputation of the State*

4. *Discussions that ignite ethnic animosity, discrimination or regional separatism*

5. *Discussion that undermines the state's religious policy, as well as promotes evil cults and superstition*

6. *Spreading rumors, perpetrating and disseminating false news that promotes disorder and social instability*

7. *Dissemination of obscenity, sex, gambling, violence, and terror. Cyber-sex is not permitted within the English chat-room.*

8. *Humiliating or slandering innocent people*

9. *Any discussion and promotion of content which PRC laws prohibit*

*If you are a Chinese national and willingly choose to break these laws, Sohu.com is legally obliged to report you to the Public Security Bureau.*

*Thank you for your cooperation.*

<sup>90</sup> In a regulatory document "Notice for the further optimizing the approval on internet Information Service Bulletin Board Service" by Ministry of Information Industry, it is required that all the relevant terms in various regulations i.e. *Decision of the Standing Committee of the National People's Congress on Maintaining internet Security* (2000) should be shown before the internet users use BBS.

<sup>91</sup> See news: *the Internet Society of China: the Result of First Website Content Examination is satisfactory* (Chinese: Zhong guo hu lian wang xie hui: shou ci nei rong jian cha jie guo ling ren man yi.) <http://tech.sina.com.cn/i/c/2002-11-08/0911148799.shtml>.

<sup>92</sup> See news: Sina.com as well as other sites are selected as Model Sites (Model Sites list attached) in the First Website Content Examination (Chinese: Sou ci wang zhan nei rong jian cha, xin lang deng bei ping wei mo fna dan wei (ming dan)), <http://tech.sina.com.cn/i/c/2002-11-09/0918148991.shtml>.



trust and cooperation of the government. Self-censorship has become a key NORM of the Internet service providers in China. This is imposed by two forces--market and intimidation. In China, market means that you may get more cakes if you do as you are instructed<sup>93</sup>. Intimidation is a very strong weapon in the battle for Internet control and something the Chinese government is adept at. Today, in China, nearly all the Internet service and content providers and Internet cafés have set up their own monitors, and they have even signed off on the public pledge<sup>94</sup> to guarantee they will keep the web "clean", as was discussed in Yahoo's scenario above.

## 6. Conclusion

The 'free' character of the Internet made the price of anonymity very low. Free services offered by volunteers were originally one of the characteristics of the Internet. These services, including proxy servers, provided a very easy and cost effective way to accept and maintain an anonymous identity. However, these services came under severe pressure and became hard to maintain as the Internet became more popular and commercialized in the last few years. Consequently, those who used to circumvent the firewall of CPC by proxy and other technologies find more difficulty in accessing some websites outside China. Now, in the United States, a new bill designed to fight foreign Web censorship, particularly in China, has been introduced in Congress<sup>95</sup>.

With the financial support of the United States, is it possible that the countermeasures against China's Internet content control could triumph and return the

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<sup>93</sup> See Thomas Crampton: *China's Web Firms gain as Google loses*, <http://www.iht.com/articles/70149.htm>.

<sup>94</sup> See note 79, the background of the pledge.

<sup>95</sup> Lisa M. Bowman: *Bill would circumvent foreign censors*, <http://news.com.com/2100-1023-960679.html>.

Internet to its original 'free state'? It is this author's opinion that this is not possible. In Lessig's view, architecture is the foremost regulator on the Internet. In his own words: "[C]yberspace is an architecture first. It is a platform that gets designed. It is constituted by a set of code – by software and hardware that make cyberspace as it is. This code imbeds certain values; it enables certain practices; it sets the terms on which life in cyberspace is lived, as crucially as the laws of nature set the terms on which life in real space is lived."<sup>96</sup> But from this author's experience in China, it would appear that for the Internet, the unprecedented new medium, the Law is the most crucial regulator, and it directly influences the other regulators, including the Architecture. As Boyle concludes, state power is still strong in the digital era, and technology is not neutral and can, in fact, be coercive<sup>97</sup>. It is this author's belief that the CPC has the power to displace our current notions about the Internet--it can be and has been effectively controlled.

#### **IV. Why could it be controlled in China—a more comprehensive discussion**

In China, the Internet has been controlled with efficiency. Why does this happen? Perhaps we may easily contribute this to the dictatorship or authoritarian regime of the CPC, as most western states have. While this may be one reason, it is suggested that this is not the essential cause. In this author's opinion, the essential cause involves the distinctive character of China's Society.

For poor or developing nations, is freedom of speech a luxury or a basic right of the people? There exist divergent answers to this question in academia, even amongst relatively unbiased scholars.

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<sup>96</sup> Supra note 44, *Architecting for Control*.

<sup>97</sup> Supra note 13, *Foucault in Cyberspace*.

In May 2002, Professor Ronald Dworkin, the highly regarded scholar who has for many years published his views in defense of civil and political liberties, visited China and gave some public lectures on human rights. He talked more about the differences in personal rights between the west and Asia. Professor Dworkin pointed out that Asia focused its attention on meeting the economic and social needs of its citizens, while western countries devoted considerably more attention to meeting its citizens' rights to freedom- including the right to free speech, freedom of association, and other related rights.<sup>98</sup> Dworkin stated that it was widely believed in the west that Chinese traditions and popular opinion endorsed a more collectivist, less individualistic view of citizens' rights and responsibilities than the post-Enlightenment view that was more popular in the west, and that the so-called "Asian" values the Chinese embraced were less supportive of individual human rights than the so-called "western" values<sup>99</sup>. He suggested that it would be useful to explore that supposed difference.

At this point, another scholar, Cass Sunstein in his *Republic.com* strongly objects to the idea that poor nation's free speech is a luxury<sup>100</sup>. Sunstein uses an astonishing finding by the economist Amartya Sen to support his view. Sen claims that in the history of the world, there has *never* been famine in a system with a democratic press and free

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<sup>98</sup> Dworkin's speech at Fudan University on May 24, 2002, the Chinese version available at

<http://www.cc.org.cn/zhoukan/xueshuxunxi/0204/0206211014.htm>.

<sup>99</sup> See Dworkin's *Taking Rights Seriously in Beijing* at

[http://www.nybooks.com/articles/article-preview?article\\_id=15692](http://www.nybooks.com/articles/article-preview?article_id=15692) or

[http://www.lawintime.com/bbs/showtopic.asp?TOPIC\\_ID=511&Forum\\_ID=3](http://www.lawintime.com/bbs/showtopic.asp?TOPIC_ID=511&Forum_ID=3).

<sup>100</sup> See Chapter 4 "Social glue and spreading information" in *Republic.com* (Princeton University Press, 2001).

elections<sup>101</sup>. Sunstein believes that it is "badly misconceived" that poor (or developing) nations like China should give priority to ensure the economic development and the material well-being-economic growth rather than to promote democracy and free speech. He argues that when there is a democratic system with free speech and a free press, the government faces a great deal of pressure to ensure that people generally have access to food. Free speech and free press are not mere luxuries or tastes of the most educated classes; they increase the likelihood that government will actually be serving people's interests.

Maybe Sunstein is right in theory; however, as Dworkin stressed, in China, the outstanding view about the sequence of freedom and material well-being (i.e., economic growth) is totally different from the west. The point has been widely accepted that freedom of speech should be secondary to substance wealth.

Traditionally, the conventional notion in China was that people could afford to engage in spiritual activities only after addressing material issues such as attaining clothing, food and shelter. There are many sayings<sup>102</sup> in Chinese which confirm that this fundamental theory is a basic life principle.

Marxist philosophy is identical to that expressed in the aforementioned Chinese proverbs. In China, after 1949, Marxism was employed as the exclusive ideology of China. Subsequently, materialism, the major branch of Marxism, influenced generations of Chinese thought, although its influence has declined in recent years. At the graveside of Karl Marx, Frederick Engels made his famous speech summarizing the kernel of Marxism,

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<sup>101</sup> Ibid.

<sup>102</sup> For example, *The person could know the etiquette only after his storehouse is full of rice; and the person could feel honor or disgrace only after he has enough food and clothes* (Chinese: cang lin shi er zhi li jie, yi shi zu er zhi rong yu).

stating: material means of subsistence decides ideology<sup>103</sup>.

First material, then spiritual, as a principle in people's life has been embodied in the minds of average Chinese. Consequently, the Chinese have grown to take for granted the notion that free speech is secondary to economic development. This is why China launched economic reform first, and has not begun the substantial political reform. In fact, surveys have shown that in the twenty-year period since Deng Xiaoping began emphasizing the economy along with ideology, the average Chinese citizen has become more concerned with his own family's well-being and less interested in politics<sup>104</sup>.

We will now turn to a debate to support this assertion. This debate occurred in China between two famous legal experts. The debate's core issue is whether the keystone of China's upcoming civil code is placed on property or the human itself. Liang Huixing, a professor at China Academy of Social Science<sup>105</sup> and the key drafter of the civil code, put the object of right ahead of the subject of right in his own draft civil code<sup>106</sup>. Liang argued that humans cannot live without property although the personality right is important. He further stressed that a man could not realize the personality right's significance until the man has food and clothes with the increase of wealth<sup>107</sup>. On the contrary, Xu Guodong, a

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<sup>103</sup> See <http://www.marxists.org/archive/marx/works/1883/death/dersoz1.htm>.

<sup>104</sup> Nina Hachigian: *China's Cyber-Strategy*, *Foreign Affairs*, March/April 2001, Volume 80, Number 2. Also available at <http://www.rand.org/nsrd/capp/cyberstrategy.html>.

<sup>105</sup> Which is CCP's think tank.

<sup>106</sup> The full text of *draft civil code of People's Republic of China* is available at *To Struggle for the Civil Code* (Chinese: *Wei zhong guo min fa dian er dou zheng*) by Liang Huixing, *Law Press* (Beijing), 2002.

<sup>107</sup> Liang illustrates that a poor man without shelter for living and without basic food and clothes, never has privacy. He even challenges, "May the man be a genuine man if he has no property and has difficulty in the subsistence? See Jiang Ping, Liang Huixing and Wang Liming: *The trains of thought and structure for the legislation of civil code in China*

professor at Xiamen University, also an ongoing visiting scholar at Columbia University as a Fulbright scholarship, insists that the basic principle for civil code should be humanism and he criticizes Liang's "propertism (wu wen zhu yi)"<sup>108</sup>. Based on his principle, Xu iterates that the right of personality should be given an independent status in the civil code and the sequence should be first subject of right, then the object of right<sup>109</sup>.

Professor Xu is much younger than Professor Liang, and is probably more influenced by western values in the United States. It is natural that Xu's idea is influenced by the western conception of human rights. Professor Liang is a famous civil law expert with high prestige and influence in academia. Even Professor Xu must admit that Liang is not a conservative person, but a serious scholar with independent thoughts<sup>110</sup>. Obviously, however, Liang's views represent the more dominant view in China.

That is also why the government of China always stresses that the developing right and living right should be given the first priority among the basic human rights. It can be argued that the CPC emphasizes this as an excuse to rebut the condemnations regarding the bad records of human rights in China from international societies. On the other hand, it

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(Chinese: Zhong guo min fa dian de li fa si lu he li fa ti li), <http://www.civillaw.com.cn/elisor/content.asp?type='立法聚焦'&programid=1&id=53>.

<sup>108</sup> This word is created by Xu in relation to "humanism".

<sup>109</sup> For detailed analysis, see Xu Guodong: *Two trains of thought for civil code—New Humanism and Propertism* (Chinese: Liang zhong min fa dian qi cao si lu: xin ren wen zhu yi dui wu wen zhu yi). [http://www.law-xmu.net/romanlaw/sub2-33.htm#\\_ftn1](http://www.law-xmu.net/romanlaw/sub2-33.htm#_ftn1).

<sup>110</sup> Liang has been always working for the push of China's modern legal system. He was the key person for the naissance of China's Contract Law 1999. His claim that law should protect the personal property, for China under CPC, is a tremendous progress.

shows that ideas truly diverge between China and western nations.

It is also significant to note the influence of China's distinctive history. After a long feudal system ruled by the Emperor, the nation underwent lethal ideological totalitarianism under Mao Zedong for nearly thirty years. During the Cultural Revolution, one might be arrested due to one's innocent words. In contrast, today one may privately rebuke the policy of the CPC, and perhaps even spread some political jokes about the top leaders among friends. China's government has abandoned its tyrannical regime, and is now focused on launching economic reform. To nurture a market economy, the CPC has allowed citizens the autonomy necessary to expand private enterprise. In recent years, most people can work, travel, speak privately, and surf the Web with relative freedom. In turn, this personal latitude may give citizens fewer incentives to challenge the government. Perhaps, most citizens of China do not feel too bad as the west imagine.

There is an interesting article<sup>111</sup> accurately reflecting the Chinese people's attitude to net censorship. In an interview with a columnist of *Business Week*, Shoucheng Zhang, a Chinese native, also a professor at Stanford's physics department and at Tsinghua doesn't buy the idea that scientific leadership and Internet censorship are mutually exclusive. "You can clearly have both," he says. After all, as explained by Zhang, Soviet physics research flourished during the darkest days of Stalinism. Zhang also admits that censorship of the Net can be inconvenient for China-based scholars who want to see what their American counterparts are doing, but he says that the problem can be overcome. If scientists in China can't access an American university's Web site, they can easily reach sites that have

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<sup>111</sup> Bruce Einhorn: *Beijing Beckons Its Scientific Exiles*,

[http://www.businessweek.com/technology/content/oct2002/tc2002107\\_2982.htm](http://www.businessweek.com/technology/content/oct2002/tc2002107_2982.htm).

archives of academic papers. Such science-only Web sites are "accessible by everyone," says Zhang<sup>112</sup>.

Therefore, based on the above analysis, it is this author's view that although the CPC has always taken stringent measures to govern the Internet, many Chinese citizens do not think this is a big problem in their life, and they do not view it as an appalling state of affairs. At least, we may conclude that for the common people, speech freedom is not so vital as western politicians think. Most users of the Internet could bear a regulated state. Unlike the fate of the Communication Decency Act of 1996 in the USA, there is no power or persons likely to change the control of the Internet immediately. Most people think it should be changed gradually, and they are ready for a long-term process.

This author's own personal point of view is that freedom of speech is a very essential right for all humankind, whether in the west or in Asian countries such as China. How does one make the Chinese people realize this or how does one make the CPC accept this, will be a huge task, which could not be discussed in this short article. At this point, Sunstein is right in stating that "[k]nowledge is the great ally of both freedom and welfare"<sup>113</sup>. Only on that day, when the instinctive consciousness for free speech deeply hidden in the minds of all the Chinese people has been called up, will there be an attempt to remove Internet control in China.

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<sup>112</sup> It is obvious that western media cannot understand this phenomenon. The columnist Einhorn comments, "[W]hen the websites are zapped, how can China be anything more than a bit player if the top minds at Tsinghua University -- Beijing's equivalent of Massachusetts Institute of Technology -- can't get to MIT's Web site?"

<sup>113</sup> *Supra* note 100, *Republic.com*.