COMMENTS

Breaching the Great Firewall of China: Congress Overreaches in Attacking Chinese Internet Censorship

Miriam D. D'Jaen†

I. INTRODUCTION

Hear no evil, see no evil, speak no evil.¹ According to one interpretation, this ancient adage solemnly warns that those who are exposed to wrongdoing are more likely to engage in it themselves. Today, the People's Republic of China (PRC) embraces a similar philosophy for blotting out evil, as evidenced by its steady crackdown on Internet content.² In fact, since President Hu Jintao came to power in 2003, Chinese government authorities have taken many steps to control and suppress political and religious speech on the Internet.³ The government's efforts have resulted in the world's most advanced system of Internet censorship and surveillance, supported by tens of thousands of employees and extensive corporate and private sector cooperation, including that of several U.S. technology companies.⁴

† J.D. candidate, Seattle University School of Law, 2008; B.A., History, University of Michigan, 2004. The author would like to thank her family and friends for their moral support, patience, interest (even if feigned at times), and advice. She also thanks Professor Ron Slye for his thoughtful comments and her colleagues at the Seattle University Law Review for their hard work and valuable contributions.


³ Id.

⁴ Id.
But whatever happened to *do no evil*? Or more ironically, what about *don’t be evil*, the bold company motto of Google, one U.S. company that actively participates in Chinese Internet censorship? In January 2006, Google launched Google.cn, a censored search engine for its Chinese users. The site filters thousands of keywords and web addresses, including politically-sensitive content related to Tiananmen Square, Tibet, and the government-banned spiritual movement Falun Gong.

Unfortunately, Google is not the only U.S. Internet company to compromise its users’ freedom of expression in order to tap into the lucrative Chinese market. Yahoo! and Microsoft have also created Chinese-version search engines and engage in active self-censorship. In addition, Yahoo! has provided Chinese authorities with private, confidential information about its users, resulting in the convictions of at least two Chinese journalists.

All three companies defend their actions by insisting that, despite the constraints, they are helping to increase access to information in China. Their collective justification is that limited information is better than no information at all. In response to criticism, Yahoo! rationalized that it “can make more of a difference by having even a limited presence and growing our influence, than . . . by not operating in a particular

---

6. **HUMAN RIGHTS WATCH, supra note 2, at 5.**
7. Id.
8. Id. at 55.
10. William Thatcher Dowell, *The Internet, Censorship, and China,* 7 GEORGETOWN J. INT’L AFF. 111, 112 (2006). In 1993, an estimated 2,000 Chinese had access to the Internet. By 2005, more than 94,000,000 Chinese were regularly connecting to the Internet. China represents the world’s second largest personal computer market and has the world’s third largest number of personal computer owners. The Chinese e-commerce market is expected to reach $6.5 billion by 2007. Id. at 113.
12. **AMNESTY INT’L, supra note 5.**
13. **HUMAN RIGHTS WATCH, supra note 2, at 6.**
14. **AMNESTY INT’L, supra note 5.**
country at all. Microsoft and Google have adopted a similar line of defense. In addition, the companies insist they have no choice but to comply with local laws and regulations if they are to operate in the Chinese market.

These arguments, however, have failed to shield Google, Microsoft, and Yahoo! from intense criticism, both at home and abroad. Human rights advocates, the U.S. government, the European Union, and numerous nongovernmental organizations have blasted the companies for being complicit and caving to the PRC's demands. These concerns eventually prompted the U.S. House of Representatives to hold a joint committee hearing at which top executives from the corporations were called to testify about their business practices in China. The following day, Representative Christopher Smith, a New Jersey Republican, introduced the Global Online Freedom Act of 2006. While this legislation expired at the end of the congressional session, Rep. Smith re-introduced the bill the following year as the Global Online Freedom Act of 2007 (the Act).

The Act promotes freedom of expression on the Internet by prohibiting U.S. businesses from cooperating with officials in Internet-restricting countries. While the Act should be commended for imposing a higher standard of ethical business practices on U.S. corporations, there are significant problems with curing China's censorship policies by imposing liability on U.S. Internet companies. The standards and recommendations proposed by Congress within the Act correspond with an inherently American conception of freedom of expression. Thus, the Act imposes our domestic standards, rooted in the First Amendment, on states with very different political ideologies. A better alternative for addressing China's crackdown on free speech would be to create an industry-wide code of conduct.

Part II of this Comment discusses the legal and technological infrastructures employed by the Chinese government to regulate Internet content and activity. Part III examines the complicity of U.S. corporations and possible means of holding them accountable. Part IV discusses the specific provisions of the Act, and Part V assesses whether it amounts to

18. Id. at 6.
19. Id. at 4.
an extraterritorial application of the First Amendment. Part VI addresses policy reasons that weigh against the Act and, finally, Part VII offers alternative solutions and recommendations.

II. CHINA’S LEGAL AND TECHNOLOGICAL ROADBLOCKS TO FREE SPEECH

The PRC relies on a combination of technology and legislation to sustain its comprehensive censorship and surveillance program. As the number of Internet users in China skyrockets, and as these users develop expertise in accessing information online, the Chinese government devotes extraordinary resources to maintain a nationwide firewall.

Dubbed “The Great Firewall of China,” this advanced filtering system enables Chinese officials to regulate the movement of information between the global Internet and the Chinese Internet. Forbidden keywords and websites are filtered at the router level and then again by sophisticated software that blocks selected portions of sites and emails according to keyword searches.

In addition to erecting technological barriers, the PRC regulates Internet activity through a complex web of local, regional, and national laws. In 1996, the highest authority of state administration, the State Council, passed the “Interim Provisions Governing the Management of Computer Information Networks in the People’s Republic of China Connecting to the International Network,” marking the PRC’s first critical step toward controlling the Internet. Two years later, it passed the “Provisions for the Implementation of the Interim Provisions Governing the Management of Computer Information Networks in the People’s Republic of China,” mandating restricted networks and government approval of Internet service providers (ISPs).

25. Testimony, supra note 11.
26. HUMAN RIGHTS WATCH, supra note 2, at 6.
30. See id. Article 13 of the Interim Provisions specifically prohibits certain Internet conduct and content. For example, no individual may use the Internet to engage in criminal activities such as harming national security or disclosing state secrets. In addition, using the Internet to retrieve, replicate, create, or transmit information that threatens social stability or promotes sexually suggestive material is prohibited. Id. at 121; Newbold, supra note 27, at 508.
Since 1996, content and use regulation has only intensified. In September 2005, the PRC adopted the “Provisions on the Administration of Internet News Information Services” (News Provisions). Article 4 of the News Provisions creates the legal authority for the government to supervise news websites. Article 19 prohibits reporting positions or information that the government finds embarrassing or too candid in its discussion of social problems. The News Provisions employ a variety of control methods, including registration requirements, external government supervision, broad-based content restrictions, and administrative penalties.

In 2002, the PRC passed yet another set of regulations, imposing strict safety standards and requirements for Internet businesses. Owners of cybercafés are now required to install Internet Police 110 software, which blocks access to more than 500,000 banned websites. Moreover, the government requires ISPs to self-censor their sites or risk being shut down. If an ISP wants to maintain its business license to operate in China, it is expected to block politically objectionable content. The government, however, refuses to publish an official blacklist of sites and keywords to be censored. Rather, it resorts to vague, far-reaching language, prohibiting content that “might harm the state’s honor, cause ethnic oppression, spread rumors, disrupt social stability, spread pornography, undermine state religious policy, or preach the beliefs of evil cults.” The result is that companies are forced to engage in a game of political mind-reading, intuiting government objections in advance. This works out well for the PRC; by having private companies assume responsibility for censorship activities, the government effectively outsources the otherwise unmanageable task of monitoring emails, news stories, blogs, and chat postings.

III. CORPORATE COMPLICITY

Google, Microsoft, and Yahoo! contend that they have no choice but to comply with Chinese laws if they are to operate within the

32. HUMAN RIGHTS WATCH, supra note 2, at 18.
33. Id.
34. Id.
35. Id.
37. Id.
38. HUMAN RIGHTS WATCH, supra note 2, at 12.
39. Thompson, supra note 9.
40. Newbold, supra note 27, at 509.
41. Thompson, supra note 9.
market.\(^{42}\) Corporate complicity, however, carries a heavy price: the violation of internationally recognized human rights—most notably, the right to freedom of expression.

A. Yahoo!

Yahoo! was the first major U.S. Internet company to enter the Chinese market, rolling out a Chinese-language search engine and establishing a Beijing office in 1999.\(^{43}\) Three years later, Yahoo! submitted to government pressure and signed the “Public Pledge of Self-Discipline and Professional Ethics for Chinese Internet Industry,” which commits signatories to “energetic efforts to carry forward the rich cultural tradition of the Chinese nation and the ethical norms of the socialist cultural civilization” by observing all state industry regulations.\(^{44}\) In particular, signatories vow to refrain “from producing, posting, or disseminating pernicious information that may jeopardize state security and disrupt social stability.”\(^{45}\) To date, Yahoo! is the only western company known to have signed the pledge.\(^{46}\)

Moreover, the case of Chinese journalist Shi Tao is particularly illustrative of the disturbing consequences of Yahoo!’s complicity in the Chinese censorship program. In April 2005, business journalist Shi was sentenced to ten years in prison after using his Yahoo! account to email a summary of a Chinese Central Propaganda Department communiqué to a pro-democracy website run by Chinese exiles in New York.\(^{47}\) Yahoo! provided government officials with confidential user information that was ultimately used to convict Shi of providing state secrets to foreign entities.\(^{48}\) While this is an extreme example of corporate complicity, U.S. corporations routinely cave to Chinese government demands and compromise their users’ freedom.

---

42. AMNESTY INT’L, supra note 5, at 23.
44. INTERNET SOC’Y OF CHINA, PUBLIC PLEDGE ON SELF-DISCIPLINE FOR CHINA INTERNET INDUSTRY, ch. 2, art. 6 (2002), available at http://www.bobsonwong.com/research/china/5/15/ (follow “Public Pledge on Self-Discipline for China Internet Industry” hyperlink).
45. Id.
46. HUMAN RIGHTS WATCH, supra note 2, at 12.
47. Thompson, supra note 9.
B. Microsoft

In 2005, Microsoft launched MSN China, and within one month of the rollout, the company came under fire for censoring. In particular, MSN China faced intense criticism for shutting down the popular blog of Zhao Jing, one of China’s edgiest and most well-read journalists. Zhao had started using MSN Spaces in August 2005 after Chinese ISPs blocked his original site. Four months later, Zhao lost his blog again when Microsoft deleted it at the request of Chinese authorities.

Public outcry and criticism of Microsoft’s complicity was so strong in the United States that by late January 2006, Microsoft decided to alter its Chinese blog censorship policy. Microsoft has since expressed concern about government control of Internet content and now supports a call for action.54

C. Google

Like Yahoo! and Microsoft, Google established a physical presence in China at the turn of the century. By 2004, the company had taken its first steps in the direction of compromise with Chinese censorship practices. After launching a Chinese-language edition of Google News, the company gave the PRC permission to filter certain words and phrases when users conducted keyword searches. Shortly thereafter, Google

---

51. HUMAN RIGHTS WATCH, supra note 2, at 43. Zhao Jing also writes under the pseudonym Michael Anti. Id.
52. Id. at 43–44. Apparently, Zhao used his blog to speak out when propaganda authorities cracked down on Beijing News, a relatively new tabloid with a national reputation for exposing corruption and official abuse. Id.
53. Id. at 44–45. Today, Microsoft will only remove access to blog content when it receives a legally binding notice from the government indicating that the material violates local laws. Id. In addition, Microsoft will remove access to content only in the country issuing the order. Id. Finally, when local laws require the company to block access to certain content, Microsoft will ensure that users know why that content was blocked by notifying them that access has been limited due to a government restriction. Id.
56. HUMAN RIGHTS WATCH, supra note 2, at 54–55.
57. Id.
received its license as a Chinese Internet service, and the company became the censor, not merely the victim of state censorship.  

\[D. \text{ Corporate Accountability under } U.S. \text{ and International Law}\]

By cooperating with the PRC’s censorship efforts, U.S. Internet companies may violate both domestic and international law. In the United States, free speech advocates turn to the First Amendment, which provides, in absolute terms, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”\(^{59}\) Free speech advocates in Congress argue that this constitutional provision guarantees the right to communicate “without restriction, including unfettered communication and association via the Internet.”\(^{60}\) The Framers of the Constitution intended to foreclose government authorities from assuming guardianship of the public mind by regulating speech.\(^{61}\) As such, freedom of speech is a fundamental characteristic of a free society.

Of course, there are limits to free speech, even in the United States. For example, the Communications Decency Act of 1996 is one example of a federal attempt to regulate Internet content. The act criminalizes the carriage and transmission of “indecent” materials on the Internet to persons under the age of eighteen.\(^{62}\) The U.S. Supreme Court, however, requires the government to provide substantial justification for the interference wherever it attempts to regulate the content of speech.\(^{63}\) Restrictions on speech are the exception to the rule, and freedom of expression remains a sacred tradition in the United States.

Freedom of speech is also an internationally recognized human right. In 1948, various nations adopted the Universal Declaration of Human Rights (UDHR), committing themselves to the promotion of freedom of speech and freedom of access to information as fundamental human rights.\(^{64}\) Specifically, article 19 of the UDHR provides that “[e]veryone has the right to . . . hold opinions without interference and to

---

\(^{58}\) HUMAN RIGHTS WATCH, supra note 2, at 56. Google.cn filters thousands of keywords and web addresses. \textit{id.}\n
\(^{59}\) U.S. CONST. amend. I.


seek, receive and impart information and ideas through any media and regardless of frontiers.65 Technically, as a resolution of the United Nations General Assembly (UNGA), rather than a treaty, the UDHR is not legally binding in its entirety on members of the United Nations. Yet, it serves as a declaration of basic human rights principles and establishes a common standard to be achieved by states for all individuals.66 Courts, jurists, and states have considered the UDHR as evidence of binding human rights norms.67

Freedom of speech is also granted unambiguous protection in international law by the International Covenant on Civil and Political Rights (ICCPR), which is binding on approximately 150 nations.68 By ratifying the ICCPR, the United States made it binding law under the terms of the Constitution.69 China also signed the document and is obliged to uphold the principles it embodies.70 Article 19 of the ICCPR provides:

Everyone shall have the right to hold opinions without interference.

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.

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 (ordre public), or of public health or morals.71

The freedoms outlined in article 19, however, are not absolute. Article 20 qualifies the right to speak freely, prohibiting the dissemination

65. Id. at art. 19.
66. Newbold, supra note 27, at 522.
67. Id.
69. The United States, however, has declared a number of reservations to the ICCPR, principally that its provisions are not enforceable in federal or state court without implementing legislation. HUMAN RIGHTS WATCH, IGNORANCE ONLY: HIV/AIDS, HUMAN RIGHTS AND FEDERALLY FUNDED ABSTINENCE-ONLY PROGRAMS IN THE UNITED STATES 41 (2002), available at http://hrw.org/reports/2002/usa0902/USA0902.htm#TopOfPage.
70. Testimony, supra note 11.
of war propaganda and any advocacy for national, racial, or religious hatred that incites violence or discrimination.  

While member states of the United Nations grant formal recognition to the UDHR and ICCPR, the extent to which free speech is actually protected varies greatly from state to state. While most Americans view China's obsession with information control as another manifestation of communism, China maintains that its censorship policies are necessary to promote its top priorities: stability and predictability. History has taught the Chinese government that loosening its grip on its citizens could result in losing the tenuous hold Beijing has over its immense population. The Chinese are concerned with centralizing authority and maintaining the prestige of governing officials.

Despite the PRC's justifications, its censorship program exceeds the scope of the ICCPR's allowable restrictions. While the ICCPR permits a state to restrict speech in order to maintain national security, public order, and the rights and reputations of others, China's Internet regulations are too expansive to qualify under these limited exceptions. For example, the government has blacklisted over 200 terms related to politics or current affairs. Among these are phrases which can hardly qualify as threats to national security, public order, or individual rights, such as the terms "pollution lawsuit," "horseracing," and "market access system." By extension, U.S. corporations that provide the technology to assist in the filtering and blocking of information are complicit in a clear violation of international law as well.

IV. THE GLOBAL ONLINE FREEDOM ACT AS A BASIS FOR CORPORATE LIABILITY

U.S. technology companies have succumbed to pressure by authoritarian governments and have violated standards of corporate responsibility to protect and uphold human rights. According to Representative Smith, the onus for combating Chinese censorship policies should fall on U.S. corporations that actively, openly, and deliberately collaborate with

72. Id. at art. 20.
73. Thompson, supra note 9.
74. Id.
75. Id.
76. Newbold, supra note 27, at 521.
79. Id.
80. Testimony, supra note 11.
81. Id.
the Chinese government. In January 2007, he re-introduced the Act, which is intended to “promote freedom of expression on the Internet” and to “protect United States businesses from coercion to participate in repression by authoritarian foreign governments.”

To promote freedom of expression on the Internet, the Act proposes that it shall be the policy of the United States

to promote as a fundamental component of United States foreign policy the right of everyone to freedom of opinion and expression, including the freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers;

to use all appropriate instruments of United States influence, including diplomacy, trade policy, and export controls, to support, promote, and strengthen principles, practices, and values that promote the free flow of information, including through the Internet and other electronic media; and

to deter any United States business from cooperating with officials of Internet-restricting countries in effecting the political censorship of online content.

To realize these objectives, drafters of the Act recommend that the President seek out international agreements to promote Internet freedom on a global scale. The Act further provides for annual reporting on the availability of Internet access and an assessment of the extent to which government authorities attempt to filter, censor, or otherwise block Internet content.

In addition, the Act establishes the Office of Global Internet Freedom (the Office) as part of the Department of State to serve as the focal point for interagency efforts to promote freedom of electronic information. The Office will: (1) develop a global strategy to combat state-sponsored Internet censorship; (2) identify and publicize keywords and phrases filtered by Internet-restricting countries; (3) work with human rights organizations and experts to develop a voluntary code of minimum

---

85. Id. § 102(1).
86. Id. § 103(a).
87. Id. § 104.
corporate standards; and (4) advise congressional committees of necessary legislative action.88

The bill also establishes minimum corporate standards for online freedom. Pursuant to the Act, Internet companies will be required to disclose the terms they filter and the rules they must observe in Internet-restricting countries.89 Companies will also be barred from providing foreign governments with information that personally identifies a user, except for legitimate law enforcement purposes.90 Finally, the Act prohibits companies from blocking or removing online content of U.S. government sites or government-financed sites.91 Violations of the Act can result in both civil and criminal liability with maximum penalties of $2,000,000 or imprisonment for up to five years.92 By imposing liability on Internet corporations, the United States can send a powerful message to the PRC, signaling its refusal to play a part in the denial of essential freedoms.93

V. EXTRATERRITORIAL APPLICATION OF U.S. LAW

Despite its good intentions, the Act risks exporting specifically American notions of free speech beyond U.S. borders. By attempting to regulate the activities of American businesses in Internet-restricting countries, the Act effectively extends the jurisdiction of U.S. courts beyond the nation’s boundaries and into the territories of sovereign states.

The term “extraterritoriality” refers to the act by which a state creates legislation regarding “the rights and obligations of its citizens with regard to transactions occurring beyond its boundaries.”94 American courts have long abided by a presumption against extraterritoriality, seeking to avoid unintended clashes between domestic and foreign laws which could lead to international discord.95 Almost a century ago, in American Banana Co. v. United Fruit Co., the U.S. Supreme Court refused to apply the Sherman Antitrust Act to a dispute involving two banana exporters in Panama, one of whom was an American citizen.96

88. Id. § 104(b).
89. Frank Davies, Internet Giants Pressured to Stop Censoring Overseas Content, CONTRA COSTA TIMES, July 22, 2006, at F4, available at 2006 WLNR 12615908.
90. Id.
91. Id.
92. H.R. 275 § 206(a)–(b).
93. Newbold, supra note 27, at 517.
Court noted that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." Given today's increasingly international order, however, courts have shifted away from a strictly territorial approach toward jurisdiction, recognizing particular state interests that may justify the application of domestic laws in a foreign jurisdiction.

In Environmental Defense Fund, Inc. v. Massey, the court recognized three exceptions to the presumption against extraterritoriality. First, the presumption gives way when there is a clear and affirmative intention of Congress to extend the scope of the legislation to conduct occurring within other sovereign nations. Second, domestic laws may be applied in a foreign setting if a failure to do so would result in adverse effects within the United States. Known as the "substantial effects" test, courts have routinely held that U.S. laws can be applied extraterritorially whenever conduct is intended to, and actually does, cause "substantial effects" within the United States. The third exception arises where the conduct Congress seeks to regulate occurs largely within the United States. With regard to the Act, the latter two exceptions to the presumption against extraterritoriality are inapplicable; Internet censorship in the PRC has no real adverse effect within the United States, nor does the Act seek to regulate activity within the nation's borders. Therefore, the sole justification for applying U.S. law in China rests on the affirmative intention of Congress to enforce its laws abroad. Whether Congress has in fact exercised this authority is a matter of statutory construction.

In the seminal case Foley Bros. v. Filardo, the Court analyzed Congress's intent to legislate extraterritorially in light of three key considerations: (1) whether the language of the statute in question provided any indication that Congress intended to apply the statute extraterritorially; (2) whether the legislative history evinced congressional intent to apply the statute extraterritorially; and (3) whether the relevant administrative interpretations of the statute illustrated congressional intent to extend the statute's reach.

97. Id. at 356.
100. Massey, 986 F.2d at 531; see also Maxwell Commc’n Corp. plc v. Societe Generale (In re Maxwell Commc’n Corp. plc), 93 F.3d 1036, 1052 (2d Cir.1996).
101. See Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 925 (D.C. Cir. 1984) (citing United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945)).
102. See Maxwell, 93 F.3d at 1048; Massey, 986 F.2d at 531.
103. Arabian, 499 U.S. at 247 (citing Foley Bros. v. Filardo, 336 U.S. 281, 284–85 (1949)).
Later, in *EEOC v. Arabian American Oil Co.*, the Court concluded
that unless a statute clearly expresses an affirmative intent to legislate
extraterritorially, courts must presume that Congress was primarily con-
cerned with domestic conditions. 105 Interestingly, *Arabian* did not over-
rule *Foley Bros.*, so courts continue to look beyond the language of the
statute for indicia of congressional intent. 106

With respect to the Act, there is undeniable congressional intent to
regulate activity in a foreign jurisdiction. The express purposes of the
Act are to prevent U.S. businesses from cooperating with repressive for-
eign governments and to regulate the conduct of these companies on an
international scale. 107 The language unambiguously expresses this inten-
tion and is sufficient to overcome the presumption against extraterritori-
ality. 108

While congressional intent is the ultimate touchstone of the extra-
territoriality analysis, courts have recently tempered the application of
U.S. laws in foreign jurisdictions with considerations of comity, 109 which
refers to the respect one sovereign nation affords another by limiting the
reach of its laws. 110 Over a century ago, the Court stated that comity

is neither a matter of absolute obligation, on the one hand, nor of
mere courtesy and good will, upon the other. But it is the recogni-
tion which one nation allows within its territory to the legislative,
executive or judicial acts of another nation, having due regard both
to international duty and convenience, and to the rights of its own
citizens, or of other persons who are under the protection of its
laws. 111

At its core, comity recognizes that there are circumstances in which the
application of foreign law may be more appropriate than that of domestic

---

105. 499 U.S. 244, 247 (1991); *Accord Subafilms, Ltd. v. MGM-Pathe Commc’n Co.*, 24 F.3d 1088, 1094–95 (9th Cir. 1994); *Van Blaricom v. Burlington N. R.R. Co.*, 17 F.3d 1224, 1225 (9th Cir. 1994); *Labor Union of Pico Korea, Ltd. v. Pico Prods., Inc.*, 968 F.2d 191, 194 (2d Cir. 1992).
106. *ACLU v. Gonzales*, 478 F.Supp. 2d 775, 811 (E.D. Pa. 2007) (reviewing legislative history of statute to determine its extraterritorial applicability); see also *Small v. United States*, 544 U.S. 385, 390–91 (2005) (assuming congressional intent is that a statute should apply domestically only, unless statutory language, context, history, or purpose establish otherwise).
109. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797–99 (1993) (noting that comity either may be relevant in determining whether a court should decline to exercise jurisdiction or may be used as a tool for initially ascertaining the scope of jurisdiction); *Maxwell Commc’n Corp. plc v. Societe Generale (In re Maxwell Commc’n Corp. plc)*, 93 F.3d 1036, 1047 (2d Cir.1996).
110. *Maxwell*, 93 F.3d at 1046.
Thus, even when Congress has the authority to legislate and apply its laws extraterritorially, statutes regulating foreign persons or conduct should be interpreted, if possible, to avoid conflict with foreign law.

In the event of a conflict of law, U.S. courts rely on a standard of reasonableness, as set forth in the Restatement (Third) of Foreign Relations Law of the United States, when determining whether to forego the application of domestic law due to principles of comity. This reasonableness inquiry turns on a number of nonexclusive factors, including:

- the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- the connections . . . between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted[];
- the existence of justified expectations that might be protected or hurt by the regulation;
- the importance of the regulation to the international political, legal, or economic system;
- the extent to which the regulation is consistent with the traditions of the international system;
- the extent to which another state may have an interest in regulating the activity; and
- the likelihood of conflict with regulation by another state.

While this approach has been criticized for its lack of predictability and inherent tendency to overvalue domestic interests, the Restatement

---

113. See Maxwell, 93 F.3d at 1047.
114. French, 440 F.3d at 153; see also Hartford, 509 U.S. at 799; Maxwell, 93 F.3d at 1048.
factors provide a workable framework for a comprehensive assessment of the competing interests at play.

With regard to the Act, several of the Restatement factors weigh heavily in support of Congress’s attempt to regulate U.S. companies operating in Internet-restricting countries. First, a substantial connection exists between the regulating state and the person principally responsible for the activity. Google, Microsoft, and Yahoo! are citizens of the United States, and as a result, they fall under the protections and limitations of U.S. law. Second, the importance of the regulation to the regulating country favors extraterritorial application. U.S. citizens value freedom of speech as much as, if not more than, nearly any other freedom enumerated in the Constitution. In fact, our Constitution provides the broadest protection for rights of expression known to the civilized world. As a signatory of both the UDHR and ICCPR, the United States further demonstrates its commitment to promoting and protecting notions of free speech around the world. Third, the Act is consistent with norms of international law, as evidenced by the broad acceptance and ratification of the UDHR and ICCPR. Both the UDHR and the ICCPR represent a widespread renunciation of illegitimate restrictions on speech and access to information.\(^{117}\)

There are, however, numerous factors which tip the scales against the extraterritorial application of First Amendment protections. First, the extent to which the censorship activity takes place within, or has effects on, the regulating state is very limited. The Act regulates Internet censorship and surveillance activities that occur within the PRC. Practically speaking, then, the regulated conduct has little effect on Internet users in the United States.

Second, there is a justified expectation that China, as a sovereign nation, should be able to devise its own policies regarding Internet use without interference from foreign states. The PRC has legislated extensively on the issue, and while the United States may not approve of Chinese laws, a certain degree of deference should nonetheless be given, based on China’s sovereignty.

Third, the risk of conflict between foreign and domestic laws is practically certain. Finally, while the Act is seemingly consistent with the traditions of the international system, it actually imposes American standards of free speech on foreign countries, not internationally construed norms. Section 105(a) of the Act gives the U.S. President the broad authority to designate countries as “Internet-restricting,” according to his or her own determinations of a country’s systematic pattern of

\(^{117}\) Newbold, supra note 27, at 522.
restrictions on Internet freedom.\footnote{118} The Act requires further that the President submit an annual report to appropriate congressional committees that identifies government agencies responsible for “substantial” restrictions on Internet freedom.\footnote{119} Determinations under the Act of what constitutes “substantial” are undoubtedly impacted by cultural biases and implicate an American view of freedom of expression.

Given the complexity of this reasonableness analysis, it is difficult to predict whether a court would find a justified basis for regulating Chinese Internet censorship vis-à-vis domestic law. Recent decisions by U.S. courts, however, reveal a reluctance to export First Amendment protections to extraterritorial activities.

In 2000, L’Union des Etudiants Juifs de France (The Union of French Jewish Students) (UEFJ) and La Ligue Contre La Racisme Et L’Antisemitisme (The Anti-Racism and Anti-Semitism League) (LICRA) sued Yahoo! in France.\footnote{120} The plaintiffs alleged that Yahoo! violated French law by hosting Nazi memorabilia on its auction site.\footnote{121} The plaintiffs obtained a judgment ordering Yahoo! to take certain measures to restrict access or remove the merchandise from the site.\footnote{122} A failure to do so would have resulted in significant fines for the U.S. Internet company.

Yahoo! complied with the French court’s order but commenced an action in U.S. district court seeking declaratory relief, on the ground that the French order infringed upon its First Amendment rights.\footnote{123} The district court held that the French order did, in fact, chill speech and contravene U.S. public policy.\footnote{124} In order to preserve the company’s First Amendment rights, the court granted Yahoo!’s motion for declaratory relief.\footnote{125}

UEFJ and LICRA immediately appealed the district court decision.\footnote{126} In Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme, the Ninth Circuit of the U.S. Court of Appeals reversed


\footnotesize{119} Id. § 105(a)(2).

\footnotesize{120} Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme, 433 F.3d 1199, 1202 (9th Cir. 2006).

\footnotesize{121} Lyombe Eko, New Medium, Old Free Speech Regimes: The Historical and Ideological Foundations of French & American Regulation of Bias-Motivated Speech and Symbolic Expression on the Internet, 28 LOY. L.A. INT’L & COMP. L. REV. 69, 72 (2006). French law prohibits the dissemination of racist and anti-Semitic material. Id.


\footnotesize{123} Eko, supra note 121, at 73.

\footnotesize{124} Id.

\footnotesize{125} Id. at 74.

\footnotesize{126} Id.
and remanded, holding that the district court lacked personal jurisdiction. The Ninth Circuit maintained that Yahoo! was obliged to wait for UEFJ and LICRA to initiate U.S. proceedings to enforce the French judgment before raising its First Amendment defense. The court’s ruling was essentially procedural, thus failing to resolve Yahoo!’s First Amendment claims. The decision, however, implicitly accepts the foreign judgment in spite of U.S. laws. In essence, the decision subjects Yahoo! to the speech restrictions of French law despite the legal protections afforded it under the First Amendment.

Yahoo! is significant because it leaves the First Amendment issue largely unresolved. The Ninth Circuit was presented with an opportunity to determine the extent of First Amendment protections for U.S. Internet companies operating in foreign jurisdictions. Unfortunately, the court skirted the constitutional issue, focusing instead on the procedural roadblocks. The issue will undoubtedly reappear before U.S. courts, perhaps in the context of the Act. Despite the absence of clear precedent, there are several policy arguments that weigh against the Act and its extraterritorial application of First Amendment rights.

VI. POLICY ARGUMENTS AGAINST APPLYING THE ACT EXTRATERRITORIALLY

A Unilateral, American-Centric Approach to Global Internet Regulation Disregards the Sovereignty, History, and Cultural Norms of Foreign Nations

Although free speech is an internationally recognized human right, it is not a right without limits. A degree of permissible censorship exists, and restrictions on speech are often shaped by the unique

127. Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme, 433 F.3d 1199, 1209 (9th Cir. 2006).
128. Id.
129. Eko, supra note 121, at 78.
131. Id.
134. See supra notes 64, 68 and accompanying text.
135. Newbold, supra note 27, at 527.
history, philosophy, and culture of a sovereign nation. For example, in the aftermath of the Holocaust, Germany and France established draconian laws criminalizing hate speech.\textsuperscript{136} Section 86 of Germany’s Criminal Code, for instance, forbids the distribution of propaganda that promotes (1) the precepts of the Nazi regime, (2) unconstitutional parties, or (3) prohibited associations.\textsuperscript{137} Sections 130 and 131 outlaw writings that “incite to race hatred or which describe cruel or other inhuman acts of violence . . . in a manner injuring human dignity . . .”\textsuperscript{138} Similarly, French law prohibits public speech or writings that incite racial or religious hatred, as well as those that deny the Holocaust.\textsuperscript{139}

In addition, the European Convention on Human Rights (ECHR) provides that restrictions on speech may be prescribed by law and are necessary in a democratic society.\textsuperscript{140} Specifically, article 10 provides that free speech may be restricted

in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.\textsuperscript{141}

Even in the United States, free speech is not an absolute right.\textsuperscript{142} The First Amendment does not protect libelous statements, false cries of fire in a crowded theater, fighting words, or obscenities.\textsuperscript{143} Other types of speech are guaranteed only limited protection under the First Amendment, including commercial speech and speech mixed with conduct.\textsuperscript{144}

The question of what constitutes permissible speech is left largely in the hands of each sovereign nation. Under the Act, however, the United States effectively usurps this authority from sovereign states and dictates the boundaries of protected speech. The Act gives the President unquestioned authority to label nations as “Internet-restricting,” a determination that requires the President to draw a line between permissible

\begin{itemize}
  \item \textsuperscript{136} Mayer-Schönberger & Foster, supra note 62, at 48 nn.13–15.
  \item \textsuperscript{137} Id. at 49.
  \item \textsuperscript{138} Id. at 48 n.15.
  \item \textsuperscript{139} See 9th Circuit, supra note 122.
  \item \textsuperscript{141} Id.
  \item \textsuperscript{143} Michael Birkhack, The Copyright Law and Free Speech Affair: Making-up and Breaking-up, 43 IDEA 233, 259 (2003).
  \item \textsuperscript{144} Id.
\end{itemize}
and non-permissible censorship. As a result, the Act facilitates the de facto exportation of American free speech standards to the rest of the world.

B. The Act May Produce Unintended Spillover Effects That Interfere with the Laws of Democratic Countries

Exporting American notions of free speech will likely have unexpected and perhaps undesirable impacts in those countries that do not share the same far-reaching free speech protections. For example, as discussed above, Germany and France both restrict certain forms of hate speech for legitimate and historic purposes. This proposed one-size-fits-all policy fashioned by the United States is, therefore, not a practical or respectful approach to combating Internet censorship.

C. Increased Government Regulation of the Internet Is Problematic

The Act represents a dangerous step towards government regulation of search engine operations. While the Act was designed to safeguard free speech and access to information, it actually empowers the U.S. government to regulate content on the Internet. The Act would require U.S. Internet companies to provide the Office with: (1) all terms and parameters used to filter, limit, or otherwise affect the results provided by the search engine; and (2) the Uniform Resource Locators (URLs) of all data and content that such businesses have removed from the content hosting service or blocked from the Internet. These provisions contradict a crucial objective of the First Amendment: to prevent government interference with speech.

D. The Act Imposes Significant Economic Consequences for Internet Companies While Having Little Effect on the Chinese Government

From an economic standpoint, the propriety of the Act should be questioned. Imposing liability on Google, Microsoft, and Yahoo! will have an insignificant impact on the PRC, but it will carry serious ramifications for U.S. Internet companies.

150. Id. § 204.
China now has more than 130 million Internet users, more than any country other than the United States.\textsuperscript{152} The far-reaching language of the Act presents a huge competitive disadvantage for U.S. companies, who will be cut out of the market for failing to comply with China's censorship policies.\textsuperscript{153} Already, a Chinese competitor, Baidu, has gained market share and is now the preeminent website in China,\textsuperscript{154} all the while complying with strict PRC censorship policies.\textsuperscript{155} If U.S. companies are forced to comply with the Act, Baidu and other Chinese Internet companies will continue to prosper with no detriment to the Chinese government.

\textit{E. The Act Will Harm Chinese Internet Users}

One must not overlook the impact of the Act on the very group it seeks to protect: Chinese Internet users. The higher standards imposed on Google, Microsoft, and Yahoo! place the companies at risk of losing their licenses to operate in China, ultimately resulting in \textit{less} online freedom for Chinese Internet users.\textsuperscript{156} Freedom of expression for Internet users around the world is a noble goal; imposing liability on U.S. companies alone, however, is not the best approach to securing this freedom. It is unrealistic to assume that Internet-restricting countries will change their policies because U.S. businesses might incur liability.\textsuperscript{157} Instead of merely imposing higher standards on U.S. companies, the development of a uniform, industry-wide code of conduct would better serve free speech.

\textbf{VII. INDUSTRY-WIDE CODE OF CONDUCT AS AN ALTERNATIVE SOLUTION}

Given the problems with imposing restrictions only on U.S. Internet companies, concerted and collective action by Internet companies around the world would prove a more effective means of withstanding Chinese government pressure. Speech restrictions on the Internet must be elivated

\textsuperscript{153} George, supra note 22.
\textsuperscript{154} Barboza, supra note 152.
\textsuperscript{155} Goldman, supra note 148. In 2006, Baidu held a 44% revenue market share, while Yahoo had 21.1% and Google only took 13.2%. China Report: U.S. Tech Desired, but Still Forbidden, TECHWEBNEWS, June 21, 2006, available at 2006 WLNR 10751368. Baidu has a market value of $3 billion and operates the fourth-most-trafficked website in the world. Barboza, supra note 152.
\textsuperscript{157} Id.
to the international level to be both subjectively acceptable and globally enforceable.\textsuperscript{158}

Several examples of international attempts to regulate the Internet already exist.\textsuperscript{159} For example, the Berne Convention oversees international copyright protection, and the Hague Convention is attempting to resolve uncertainty in online contracts through Internet jurisdiction.\textsuperscript{160} A unilateral attempt by the United States to combat Internet censorship would discredit these efforts and likely offend fellow U.N. member states. The U.S. government has a long-term interest in both being a cooperative member of an international system and sharing in its reciprocal benefits and burdens.\textsuperscript{161}

Since the February 2006 congressional hearing, a working group, composed of academics from the Berkeley China Internet Project of the Graduate School of Journalism at the University of California at Berkeley, the Berkman Center for Internet and Society at Harvard Law School, and the Oxford Internet Institute at Oxford University, has begun to draft a globally applicable corporate code of conduct.\textsuperscript{162} The Center for Democracy and Technology is also facilitating discussions about a code of conduct between academics, think tanks, and representatives from the Internet companies themselves.\textsuperscript{163}

In order to develop an industry-wide code of conduct, Internet companies must first identify the substantive categories of speech to be regulated.\textsuperscript{164} An answer to this question should be reached by global consensus to circumvent charges of national interests and to stimulate cross-cultural exchange.\textsuperscript{165} While information-related values are culture specific, there are certain core values to which the international community subscribes, including informational autonomy, diversity, and quality.\textsuperscript{166}

\begin{footnotesize}
\begin{enumerate}
\item[158.] Mayer-Schönberger & Foster, supra note 62.
\item[159.] Julie L. Henn, Targeting Transnational Internet Content Regulation, 21 B.U. INT’L L.J. 157, 164 (2003).
\item[160.] Maly, supra note 130, at 930.
\item[162.] HUMAN RIGHTS WATCH, supra note 2, at 73.
\item[163.] Id. at 73.
\item[164.] Mayer-Schönberger & Foster, supra note 62, at 60.
\item[165.] Id. at 57.
\item[166.] Law and Information, supra note 146.
\end{enumerate}
\end{footnotesize}
Beyond identifying substantive content to be regulated, a voluntary code should also bind Internet companies to the following terms:

No user data should be stored in jurisdictions where there is a strong record of punishing individuals for exercising basic rights such as freedom of expression;

Companies should not take on the role of active censors;

Companies should be prohibited from complying with oral, undocumented requests from the authorities for censorship of political speech;

Companies should make public on their websites when a government has forced them to censor political speech; and

When a search returns no results, or only censored results, companies should be required to clearly inform users.\(^\text{167}\)

These standards and practices should transcend the relationship of individual companies to any given market, therefore collectively strengthening the entire industry.\(^\text{168}\) In addition, these standards serve not only as a catalyst for corporate responsibility, but also as a buffer for companies operating in a political environment where freedom of expression is restricted.\(^\text{169}\) This corporate code of conduct will enable companies all over the world to serve the interests and rights of their users and to avoid being used by governments as tools for political manipulation.\(^\text{170}\)

Critics argue, however, that Internet companies are unlikely to sign on to a voluntary code, particularly in a competitive industry where non-compliance could lead to huge market gains.\(^\text{171}\) Despite this possibility, there are numerous incentives for companies to jump on board.

First, political censorship of the Internet degrades the quality of ISPs’ service and threatens the integrity and viability of the industry itself, both in the United States and abroad.\(^\text{172}\) Second, an industry-wide code would level the playing field and enable Internet companies to resist caving to Chinese demands without losing Chinese market share.\(^\text{173}\) Companies are likely to welcome standards by which they can conduct

---

168. *Id.* at 73.
169. *Id.*
171. **HUMAN RIGHTS WATCH**, *supra* note 2, at 77.
173. **HUMAN RIGHTS WATCH**, *supra* note 2, at 77.
business with authoritarian foreign governments while safeguarding human rights. Even Chinese Internet companies that willingly comply with strict censorship policies could stand to benefit from an industry-wide code of conduct. Various incentives could be offered to participating entities, such as access to new markets and increased corporate goodwill.

Third, there have been numerous indications of support from the Internet companies themselves. Microsoft has been very vocal on the issue and is “deeply concerned about issues of individual security and government control of Internet content.” Similarly, Yahoo! claims to condemn punishment of any activity recognized as free speech and has made its view “clearly known” to China. Yahoo! is working to preserve the Internet’s openness worldwide, through discussions with government, industry, academia, and nongovernmental bodies over policies guiding industry practices.

Finally, repressive governments cannot exercise full control over the Internet without the willing cooperation of the private sector companies that lead the industry. Changing Chinese government policies will be difficult, but if companies put up a united front and are supported by the international community, they will be in a very strong position. In 1999, for example, technology companies stood up to the Chinese government when it tried to clamp down on the commercial use of cryptography to maintain the confidentiality of corporate communications. Coordinated efforts by various companies and trade agencies forced the Chinese government to drop its demand that encryption codes be turned over.

For the reasons enumerated above, an industry-wide code of conduct is a better alternative to legislation that imposes a heavy burden on U.S. Internet companies alone. A concerted global effort is a more legitimate and effective means of withstanding China’s censorship policies.

174. Davies, supra note 89.
175. Pressure, supra note 54.
176. Id.
177. Id.
178. Testimony, supra note 11.
179. Id.
180. Id.
VIII. CONCLUSION

Technology should encourage and empower the oppressed, not serve as a tool of repression.\textsuperscript{181} In this respect, the Act is a commendable attempt to impose a higher standard of ethical business practices on U.S. corporations operating in China. The Act, however, applies domestic standards of free speech extraterritorially, imposing American values and standards on nations with very different political ideologies. The fight against Internet censorship would be better served by the development and implementation of a global, industry-wide code of conduct which takes diverse national values into account and holds all Internet companies to the same standard.