

# *Xiaoning v. Yahoo!:* **Piercing the Great Firewall, Corporate Responsibility, and the Alien Tort Claims Act**

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## I. INTRODUCTION

In a landmark settlement,<sup>1</sup> Yahoo!, Inc. (Yahoo!) reached a private agreement with the families of two Chinese dissidents who suffered imprisonment and alleged torture for their pro-democracy activities in China.<sup>2</sup> This settlement represents the first example of a U.S.-based Internet Technology company (IT company), under unprecedented Congressional pressure,<sup>3</sup> being “shamed”<sup>4</sup> into taking action to reach

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<sup>1</sup> Joint Stipulation of Dismissal, *Xiaoning v. Yahoo!, Inc.*, No. C07-02151 (N.D. Cal. Nov. 13, 2007) [hereinafter *Joint Stipulation of Dismissal*].

<sup>2</sup> Second Amended Complaint for Tort Damages at 2, *Xiaoning v. Yahoo!, Inc.*, No. C07-02151 (N.D. Cal. Nov. 13, 2007) [hereinafter *Second Amended Complaint for Tort Damages*].

<sup>3</sup> The House of Representatives Joint Committee on International Relations convened hearings on February 15, 2006 to investigate the role and complicity of U.S.-based IT companies in human rights abuses committed by the Chinese Communist Party (CCP). *The Internet in China: A Tool for Freedom or Suppression?: J. Hearing Before the Subcomm. on Africa, Global Human Rights and International Operations and the Subcomm. on Asia and the Pacific of the H. Committee on International Relations*, H.R., 109th Cong. (2006), available at <http://www.foreignaffairs.house.gov/archives/109/26075.pdf> [hereinafter *2006 Joint Hearing on the Internet in China*].

out to those aggrieved by their policies.<sup>5</sup> The settlement further invigorates the ongoing debate of the roles and ethical responsibilities of IT companies operating in China and the prospective efficacy of pending legislation, the Global Online Freedom Act of 2007.<sup>6</sup> It also demonstrates that claims filed under the Alien Tort Claims Act<sup>7</sup> can effectively produce “moral victory”<sup>8</sup> judgments in the court of public opinion.<sup>9</sup>

On September 12, 2003, Wang Xiaoning was sentenced by Beijing’s No. 1 Intermediate People’s Court to ten years imprisonment and two years subsequent “deprivation of political rights” for the crime of “incitement to subvert state power.”<sup>10</sup> Wang had operated as the editor of several online publications on political reform in China, which were distributed anonymously to an email list.<sup>11</sup> The Beijing court specifically relied on evidence supplied by Yahoo! Hong Kong, Ltd. (Yahoo! HK) that provided the Chinese government with the personally identifiable information of its users.<sup>12</sup> Since the court judgment and his continued imprisonment, Wang has related incidents of torture to his wife, Yu Ling, who has recalled him looking “emaciated, weak and . . . coughing nonstop.”<sup>13</sup>

In April 2007, Yu, a citizen and resident of China, brought an action in the Northern District of California accusing Yahoo!, and subsidiaries Yahoo! HK and Yahoo! China, of aiding and abetting in “the commission of torture and other major abuses violating international law that caused Plaintiffs’ severe physical and mental pain and suffering.”<sup>14</sup> The claims were sought under the Alien Tort Claims Act (ATCA),<sup>15</sup> also known as the Alien Tort Statute (ATS), and the Torture Victim Protection Act (TVPA),<sup>16</sup> “because their injuries resulted from violations of specific, universal, and obligatory standards of international law as embodied in a number of treaty obligations binding on the United States and implemented domestically here in the United States by a number of statutes including the TVPA.”<sup>17</sup>

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<sup>4</sup> *All Things Considered: Yahoo Settles Suit with Jailed Chinese Journalists* (NPR radio broadcast Nov. 13, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=16266333>.

<sup>5</sup> *Id.*

<sup>6</sup> H.R. 275, 110th Cong. (2007).

<sup>7</sup> 28 U.S.C. § 1350 (2006).

<sup>8</sup> Bill Baue, *Win or Lose in Court: Alien Tort Claims Act Pushes Corporate Respect for Human Rights*, BUS. ETHICS, Summer 2006, at 12, available at <http://www.globalpolicy.org/intljustice/atca/2006/06/winlose.pdf>.

<sup>9</sup> *Id.*

<sup>10</sup> *All Things Considered: Group Targets Yahoo Inc. over China Cases* (NPR radio broadcast, Apr. 18, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=9658200>.

<sup>11</sup> *Id.*

<sup>12</sup> Dua Hua Foundation, *More Evidence Emerges on Yahoo!’s Role in Chinese Internet Cases*, Jul. 30, 2007, <http://www.duihua.org/2007/07/more-evidence-emerges-on-yahoos-role-in.html>.

<sup>13</sup> *All Things Considered: Group Targets Yahoo*, *supra* note 10; see also *Listen: Yu Ling at Length* (NPR radio broadcast, Apr. 18, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=9678505> (interviewing Yu Ling, wife of Wang Xiaoning, who describes her husband’s appearance and alleged torture).

<sup>14</sup> *Second Amended Complaint for Tort Damages*, *supra* note 2, at 2.

<sup>15</sup> 28 U.S.C. § 1350 (2006).

<sup>16</sup> Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (2006)). The TVPA was passed as an amendment to the ATCA and was passed to fulfill the United States’ obligations under the Convention Against Torture and to codify the Second Circuit’s decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); see discussion *infra* Part IV.

<sup>17</sup> *Second Amended Complaint for Tort Damages*, *supra* note 2, at 3.

Wang's complaint was amended to include imprisoned Chinese dissident Shi Tao<sup>18</sup> as a named plaintiff.<sup>19</sup> There has been extensive media coverage regarding the circumstances behind Shi's detention and imprisonment.<sup>20</sup>

This Note argues that Wang and Shi's case has served as a critical nexus for the issues involved in, (1) defining the role and ethical responsibilities of IT companies operating in markets that restrict the flow of democratic information; (2) the efficacy of pending legislation, the Global Online Freedom Act of 2007 (GOFA),<sup>21</sup> in defining regulations that would restrict IT companies from operating in Internet-restricting Countries;<sup>22</sup> and (3) the increasing trend of alien plaintiffs seeking to impose third-party liability upon multinational corporations under the ATCA for torts that occurred on foreign soil.<sup>23</sup> This paper discusses Wang and Shi's complaint in view of the aforementioned debates. More specifically, it attempts to pin-down what influences it has had, and continues to have, on each of the parties involved: IT companies, Congress, and the U.S. judiciary.

Part II of this Note provides the background of Wang and Shi's claims against Yahoo! and its subsidiaries. Part III briefly presents the roles adopted by the "Internet Giants"<sup>24</sup> in choosing to operate in China and details the criticism that they have received for their participation in the Chinese marketplace, both by human rights groups and U.S. lawmakers. Part IV outlines the continuously evolving history of the ATCA and argues that recent judicial decisions demonstrate a reluctance to find liability in cases such as Wang and Shi's. Part V argues that companies such as Yahoo!, Cisco, Google, and Microsoft are faced with only three options: (1) comply with government requests for information, as required by local law; (2) refuse to comply and face sanctions by the local government; or (3) withdraw from operations in that marketplace.

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<sup>18</sup> Since his incarceration, Shi has been named a recipient of the International Press Freedom Award by the Committee to Protect Journalists, a prisoner of conscience by Amnesty International, and as a political prisoner by the U.S. Department of State Country Report on Human Rights Practices in China for 2006. *Id.* at 20.

<sup>19</sup> *Id.* at 5.

<sup>20</sup> See, e.g., Tom Zeller, Jr., *Yahoo in China: Rising Tide of Anger*, INT'L HERALD TRIBUNE, Oct. 24, 2005, available at <http://www.iht.com/articles/2005/10/24/business/yahoo.php?page=2> (discussing an open letter from a Chinese dissident to Yahoo! CEO, Jerry Yang, describing his indignation and contempt for Yahoo!'s actions in China); Tina Rosenberg, *Building the Great Firewall of China, with Foreign Help*, N.Y. TIMES, Sep. 18, 2005, available at [http://www.nytimes.com/2005/09/18/opinion/18sun3.html?\\_r=1&ex=1127707200&en=d121f1195d2a07fe&ei=5070&emc=eta1&oref=slogin](http://www.nytimes.com/2005/09/18/opinion/18sun3.html?_r=1&ex=1127707200&en=d121f1195d2a07fe&ei=5070&emc=eta1&oref=slogin) (describing criticism levied against Yahoo! for complicity in the jailing of dissident Shi Tao); *Obeying Orders*, WASH. POST, Sep. 18, 2005, at B06, available at [http://www.washingtonpost.com/wp-dyn/content/article/2005/09/17/AR2005091701135\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/09/17/AR2005091701135_pf.html) (criticizing Yahoo!'s response to accusations of complicity in human rights abuses in China); *Yahoo Founder Explains China Email Move*, SYDNEY MORNING HERALD, Sep. 12, 2005, available at <http://www.smh.com.au/news/breaking/yahoo-founder-explains-china-email-move/2005/09/10/1125772733089.html> (describing Yahoo!'s response to criticism levied against it by human rights organizations); *Yahoo Had to Comply in China Reporter Case, Founder Says*, INT'L HERALD TRIBUNE, Sep. 11, 2005, available at <http://www.iht.com/articles/2005/09/11/business/yahoo.php> (describing the positions taken by Yahoo! and human rights groups).

<sup>21</sup> H.R. 275, 110th Cong. (2007).

<sup>22</sup> *Id.* at § 3(6).

<sup>23</sup> Kristine Roberts, *Alien Tort Statute Suits on the Rise*, ABA SECTION OF LITIGATION, LITIGATION NEWS, Vol. 32 No. 4, May 2007, at 8.

<sup>24</sup> Statement by Rep. Chris Smith, *2006 Joint Hearing on the Internet in China*, *supra* note 3, at 172.

This Note concludes with the recommendation that, faced with such options, these companies should continue to engage in business in China, but adopt measures that would prevent the Chinese government from easily ordering the production of personally identifiable information such as Google has done. Moreover, U.S. laws should be limited in their ability to regulate what constitutes free speech and prohibited speech extraterritorially.

## II. XIAONING V. YAHOO!, INC.

### Facts

Wang Xianoning's wife, Yu, filed<sup>25</sup> claims on behalf of her husband and other unnamed plaintiffs against Yahoo!, its subsidiaries, Yahoo! HK and Yahoo! China, and other unnamed corporate defendants and their employees under the Alien Tort Claims Act,<sup>26</sup> the Torture Victim Protection Act,<sup>27</sup> specific provisions of California state laws,<sup>28</sup> and the U.S. Electronic Communications Privacy Act.<sup>29</sup> The complaint was filed on April 18, 2007 in the Northern District of California and sought general, compensatory, and punitive damages for injuries sustained as well as declaratory and injunctive relief.<sup>30</sup>

From 2000 to 2002, Wang edited *Free Forum of Political Reform* and *Commentaries on Current Political Affairs*, which were electronic journals containing articles written by Wang and others relating to democratic reform and the allowance of a multi-party system in China.<sup>31</sup> The complaint alleged that Wang freely published his journals by posting the writings on the "aaabbbccc" Yahoo! Group until 2001 when Yahoo! administrators noticed the political content of the postings and subsequently blocked him.<sup>32</sup> Thereafter, Wang continued to distribute his journals anonymously via direct email.<sup>33</sup> It was at this point that Yahoo!'s subsidiary, Yahoo! HK, provided identifying information regarding Wang's account to the Chinese government which was later used as the basis for his arrest, detention,

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<sup>25</sup> *Second Amended Complaint for Tort Damages*, *supra* note 2, at 2.

<sup>26</sup> 28 U.S.C. § 1350 (2006).

<sup>27</sup> Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (2006)).

<sup>28</sup> The complaint alleges violation of California state law which includes prohibitions against battery, false imprisonment, assault, intentional infliction of emotional distress, negligence, negligent supervision and the California Business & Professions Code § 17200. *Second Amended Complaint for Tort Damages*, *supra* note 2, at 3.

<sup>29</sup> 18 U.S.C. §§ 2511, 2701, 2702 (2006). Plaintiffs allege that Yahoo! exceeded authorization to "access and control highly private and potentially damaging information," knowingly divulged such information, and intentionally acquired and/or intercepted the contents of such electronic communications through the use of the Defendant's electronic communication systems. *Second Amended Complaint for Tort Damages*, *supra* note 2, at 3.

<sup>30</sup> *Second Amended Complaint for Tort Damages*, *supra* note 2, at 3.

<sup>31</sup> *Id.* at 13-15 (noting that Wang's writings cited by the Chinese court included: "Without a multi-party system, free elections and separation of powers, all types of political reform will come to nothing," "We should never forget that China is still a totalitarian and despotic country," "The Four Basic Principles [of Chinese Communist government] are the biggest obstacle to the establishment of the democratic system [in China]," "The main reason that the Chinese Communist Party has been able to retain power in spite of being so corrupt is that China does not yet have a party that can replace the Communist Party.").

<sup>32</sup> *Id.* at 13.

<sup>33</sup> *Id.*

as evidence during his trial, and, ultimately, led to his current term of imprisonment.<sup>34</sup>

Wang, after over a year of detention and alleged severe abuse by Chinese authorities, was charged on July 25, 2003 for “‘incitement to subvert state power,’ advocating the establishment of an alternative political party, and communicating with an overseas organization the Chinese government considers ‘hostile.’”<sup>35</sup> In September 2003, Wang was sentenced to ten years in prison and two years of additional deprivation of political rights.<sup>36</sup>

Beijing’s No. 1 Intermediate People’s Court specifically relied on evidence supplied by Yahoo! HK.<sup>37</sup> The court noted that Yahoo! HK informed investigators that a mainland China-based email account, bxoguh@yahoo.com.cn, was used to set up Wang’s “aaabbbccc” Yahoo! Group, and identified ahgq@yahoo.com.cn as an account used to post emails to the Yahoo! Group maintained by Wang.<sup>38</sup> Additional evidence cited by the court included statements attributed to Wang that had appeared in his electronic communications.<sup>39</sup>

The complaint notes that Wang was warned by authorities that he would face sanctions if he sought an appeal.<sup>40</sup> Wang persisted and filed an appeal which was rejected by the court.<sup>41</sup> Wang’s application for a second appeal was rejected on July 1, 2006.<sup>42</sup> Subsequently, Wang is alleged to have suffered from severe physical, psychological, and emotional abuse during his incarceration at Beijing Municipal No. 2 Prison – a “secretive, high-security forced labor prison where serious and ‘special control’ prisoners are held, particularly political prisoners.”<sup>43</sup>

Wang’s complaint was amended to include imprisoned Chinese dissident Shi Tao as a named plaintiff.<sup>44</sup> Shi worked as a reporter and head of the Editorial Department for *Contemporary Business News*.<sup>45</sup> On April 20, 2004, Shi, while at a staff meeting for the news organization, learned of a document sent by the Chinese government’s Central Propaganda Bureau alerting journalists to the security concerns and government preparations in anticipation of the 15<sup>th</sup> anniversary of the Tiananmen Square massacre.<sup>46</sup> Shi sent his meeting notes, under an alias, to the New York-based web site of *Democracy Forum* using his personal Yahoo! email account.<sup>47</sup> Yahoo! HK subsequently provided identifying information to Chinese authorities linking Shi to the email sent to *Democracy Forum* and also provided the physical address from which the email was sent.<sup>48</sup> Shi was arrested, detained and charged with “adopting positions and making statements contrary to the law and the

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<sup>34</sup> *Id.*

<sup>35</sup> *Second Amended Complaint for Tort Damages, supra* note 2, at 14.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Second Amended Complaint for Tort Damages, supra* note 2, at 15.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 5.

<sup>45</sup> *Second Amended Complaint for Tort Damages, supra* note 2, at 17.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 18.

Constitution” and “defiling and slandering the Communist Party and government.”<sup>49</sup>

Shi was sentenced to 10 years imprisonment on April 30, 2005 for “illegally providing state secrets overseas.”<sup>50</sup> The court, in its verdict, relied specifically on user information provided by Yahoo! HK that identified Shi.<sup>51</sup> Throughout his detention and current imprisonment Shi has alleged to have been tortured and subjected to severe physical and psychological injuries.<sup>52</sup> He is currently held at Chishan Prison, a forced labor prison known for extreme conditions.<sup>53</sup>

#### Procedural Posture

Yahoo!, on August 27, 2007, filed a motion to dismiss for lack of personal jurisdiction.<sup>54</sup> The merits of this motion are now moot and outside the scope of this Note.<sup>55</sup> It is, however, important to note the corporate structure adopted by Yahoo! will cause great difficulty for future plaintiffs seeking to find the parent of an IT company liable for harms done by its foreign subsidiary. Yahoo!, Inc., a California corporation, owns only 1% of Yahoo! HK, organized under the laws of Hong Kong. The remaining 99% is owned by Yahoo! International Subsidiary Holdings, Inc., a California corporation, which is wholly owned by Yahoo! Yahoo! China was a complete subsidiary of Yahoo! HK. In order to have prevailed against this motion, Wang would have had to demonstrate that Yahoo! HK has sufficient contacts with California<sup>56</sup> or reverse-pierce the corporate veil between the subsidiary Yahoo! HK and the parent Yahoo!<sup>57</sup>

Yahoo! has been accused of using legal tricks to further isolate its China operations from its U.S. corporate parent.<sup>58</sup> On August 11, 2005, Alibaba, China's

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<sup>49</sup> *Id.*

<sup>50</sup> *Second Amended Complaint for Tort Damages*, *supra* note 2, at 19. The definition of state secrets, as defined by Chinese law, is vague and constantly subject to additional laws being published. State secrets include activities that “harm[] the honor or the interests of the nation” and the “spreading [of] rumors, disturbing social order or disrupting social stability.” *2006 Joint Hearing on the Internet in China*, *supra* note 3, at 209.

<sup>51</sup> *See id.* at 19 (explaining that the Chinese court relied on “[a]ccount holder information [provided] by Yahoo! Holdings (Hong Kong) Ltd., which confirms that for IP address 218.76.8.201 at 11:32:17 p.m. on April 20, 2004, the corresponding user information was as follows: user telephone number 0731-4376362 located at the Contemporary Business News office in Hunan.”).

<sup>52</sup> *Id.* at 20.

<sup>53</sup> *See id.* (stating that “[s]urvivors of the prison have described the systemic use of torture and other cruel, inhuman or degrading treatment or punishment by prison guards. Prisoners are also denied necessary medical care, a particularly important consideration for Shi Tao considering his ulcer, heart ailment, and skin lesions.”).

<sup>54</sup> Motion to Dismiss for Lack of Personal Jurisdiction, *Xiaoning v. Yahoo!, Inc.*, No. C07-02151 (N.D. Cal. Nov. 13, 2007) [hereinafter *Motion to Dismiss for Lack of Personal Jurisdiction*].

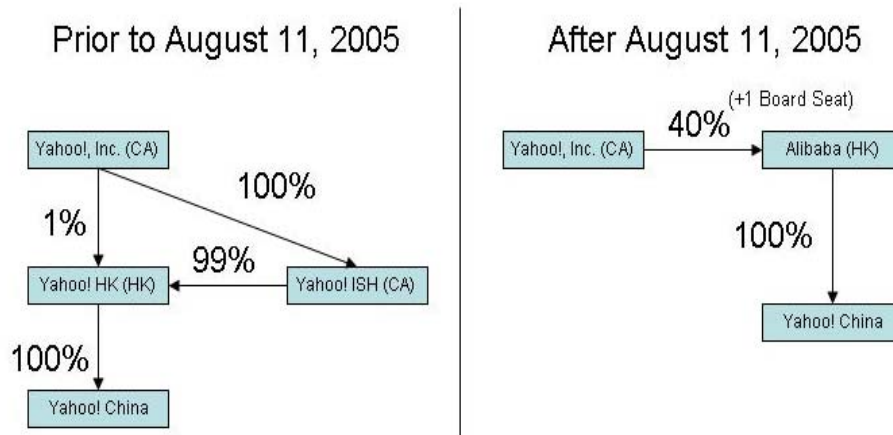
<sup>55</sup> *Id.* at 2.

<sup>56</sup> *See Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 108-09 (1987) (explaining that in order for an exercise of personal jurisdiction to comport with due process the defendant must have “purposefully established ‘minimum contacts’ in the forum State.”).

<sup>57</sup> *See generally* Matthew D. Caudill, *Piercing the Corporate Veil of a New York Not-for-Profit Corporation*, 8 FORDHAM J. CORP. & FIN. L. 449, 467 (2003) (describing reverse piercing and triangular piercing which involve finding a controlled corporation liable for the debts of a controlling shareholder or affiliated corporation; with triangular piercing “liability flows in a triangle, first from the controlled corporation to the controlling shareholder, then from the controlling shareholder to the affiliated corporation.”).

<sup>58</sup> *See* Jeffrey MacDonald, *Congress’ Dilemma: When Yahoo in China’s Not Yahoo*, CHRISTIAN SCIENCE MONITOR, Feb. 14, 2006, <http://www.csmonitor.com/2006/0214/p01s04-usfp.html> (explaining that the

largest e-commerce website, announced that it had signed an agreement with Yahoo! to acquire Yahoo! China (formerly a subsidiary of Yahoo! HK).<sup>59</sup> The agreement included licenses that provided Alibaba with Yahoo!'s search technology, the Yahoo! China website, the exclusive right to use the Yahoo! brand, and one billion US dollars of investment from Yahoo.<sup>60</sup> In return, Yahoo! received forty percent of Alibaba's shares, thirty-five percent of the voting rights in the company and Yahoo! co-founder Jerry Yang received a seat on the board of directors of Alibaba.<sup>61</sup> The present corporate structure effectively insulates the current incarnation of Yahoo! China from any liability that could be found under pending legislation, the Global Online Freedom Act (GOFA).



### III. OPERATING BEHIND THE GREAT FIREWALL, CORPORATE RESPONSIBILITY AND THE GLOBAL ONLINE FREEDOM ACT OF 2007

“While technologically and financially you are giants, morally you are pygmies.”  
Representative Tom Lantos (D - Cal.), November 6, 2007<sup>62</sup>

Since its founding in 1949, the Chinese Communist Party (CCP) has gone to great lengths to control and manipulate the dissemination of information to its citizenry.<sup>63</sup> The introduction of Internet technology in the mid-90s presented great challenges to party control over access to information considered “politically

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United States government may be unable to prevent Yahoo! from providing Chinese authorities with the identities of users with dissident postings because Yahoo! has sold a majority stake of its China service to Alibaba, a Chinese company).

<sup>59</sup> Embassy of the PRC in the USA, *Alibaba acquires Yahoo China*, Aug. 11, 2005, <http://www.china-embassy.org/eng/xw/t206942.htm>.

<sup>60</sup> *Id.*

<sup>61</sup> Yahoo!, *Yahoo! and Alibaba.com Form Strategic Partnership in China*, Aug. 10, 2005, <http://yhoo.client.shareholder.com/press/ReleaseDetail.cfm?ReleaseID=170768>.

<sup>62</sup> Corey Boyles, *Yahoo's Lashing Highlights Risks of China Market*, WALL STREET J., Nov. 7, 2007, at A1, available at <http://online.wsj.com/article/SB119436469294284018.html>.

<sup>63</sup> See Trina Kissel, Note, *License to Blog: Internet Regulation in the People's Republic of China*, 17 IND. INT'L & COMP. L. REV. 229, 231-59 (2007) (providing a general overview of the methods used by the CCP to regulate the Chinese Internet, including technological, legal and access control measures).

sensitive” or critical of the Communist Party.<sup>64</sup> As of January 2007, China attained an estimated 137 million total Internet users, ranking second behind the United States.<sup>65</sup> Commentators and policy makers heralded the surge of Chinese Internet users as a method not only to stimulate the Chinese economy but as a vehicle to facilitate political change and undermine the CCP.<sup>66</sup>

That has only partly been the case; China has thus far kept lockstep with technological advances by building the “Great Chinese Firewall.”<sup>67</sup> China’s Great Firewall is reportedly manned by over 30,000 government employees who prowl Websites, blogs, and chat rooms and are on constant lookout for offensive content; by contrast the entire CIA employs *only* 16,000 people.<sup>68</sup> In contrast to other restrictive regimes such as Saudi Arabia and Singapore, where a user attempting to access restricted content is directed to a web page stating the resource is restricted, China’s censors make resources ambiguously unavailable or require search engines to not return a full result set, effectively erasing the page from the accessible Internet.<sup>69</sup>

#### Four Giants go to China

According to an insider’s account of China’s Internet development, the Chinese Public Security Ministry and its police stations found their monitoring techniques inadequate and overwhelmed in the mid-90s.<sup>70</sup> Cisco Systems (Cisco), a U.S.-based company and worldwide leader in firewalls and Internet security, has been instrumental in providing infrastructure equipment and software to secure the Great Firewall by providing the core technology for the backbone networks of China’s Internet.<sup>71</sup> Groups such as Amnesty International, Human Rights Watch, and

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<sup>64</sup> THOMAS LUM, INTERNET DEVELOPMENT AND INFORMATION CONTROL IN THE PEOPLE’S REPUBLIC OF CHINA 1 (Cong. Research Serv., CRS Report for Congress Order Code RL33167, Feb. 10, 2006), available at <http://www.fas.org/sgp/crs/row/RL33167.pdf>.

<sup>65</sup> CHINA INTERNET NETWORK INFORMATION CENTER, STATISTICAL SURVEY REPORT ON THE INTERNET DEVELOPMENT IN CHINA, (2007), available at <http://www.cnnic.net.cn/download/2007/cnnic19threport.pdf>.

<sup>66</sup> *Breaching the Great Firewall: Hearings Before the U.S. –China Economic and Security Review Commission*, (Apr. 14, 2005) (testimony of James Mulvenon, Ph.D.) available at [http://www.uscc.gov/hearings/2005hearings/written\\_testimonies/05\\_04\\_14wrts/mulvenon\\_james\\_wrts.pdf](http://www.uscc.gov/hearings/2005hearings/written_testimonies/05_04_14wrts/mulvenon_james_wrts.pdf).

<sup>67</sup> Kristina Reed, Comment, *From the Great Firewall of China to the Berlin Firewall: the Cost of Content Regulation on Internet Commerce*, 12 *TRANSNAT’L LAWYER* 543, 566 (1999).

<sup>68</sup> Ben Elgin & Bruce Einhorn, *The Great Firewall of China*, *BUSINESS WEEK*, Jan. 12, 2006, available at [http://www.businessweek.com/technology/content/jan2006/tc20060112\\_434051.htm](http://www.businessweek.com/technology/content/jan2006/tc20060112_434051.htm).

<sup>69</sup> Benjamin Edelman, *When the Net Goes Dark and Silent*, *SOUTH CHINA MORNING POST*, Oct. 2, 2002, at 16, available at <http://cyber.law.harvard.edu/people/edelman/pubs/scmp-100102-2.pdf> (“The Saudi ‘access denied’ page also lets the user read more about the blocking policy. It even provides a form allowing the user to ask the administration to reconsider its block on the site. In contrast, a Chinese user requesting a prohibited site gets no explicit report that the site has been blocked.”).

<sup>70</sup> John Tkacik, Jr., *China’s Orwellian Internet*, *BACKGROUNDERS* No.1806 (The Heritage Foundation) Oct. 8, 2004, at 2, available at [http://www.heritage.org/Research/AsiaandthePacific/upload/70345\\_1.pdf](http://www.heritage.org/Research/AsiaandthePacific/upload/70345_1.pdf).

<sup>71</sup> See GREG WATSON, CHINA’S GOLDEN SHIELD: CORPORATIONS AND THE DEVELOPMENT OF SURVEILLANCE TECHNOLOGY IN THE PEOPLE’S REPUBLIC OF CHINA, 2001, <http://www.ichrdd.ca/english/commndoc/publications/globalization/goldenShieldEng.html> (describing how American and European technology firms provided resources to build China’s Internet surveillance network); Cisco Systems, *Cisco Systems to be Key Supplier for Building China’s Nation-Wide IP Backbone*, Oct. 14, 1998, <http://newsroom.cisco.com/dlls/fspnisapid67e.html> (describing Cisco’s first major infrastructure contract with the Chinese government, 1998); Cisco Systems, *CERNET Strengthens*

Reporters without Borders have consistently emphasized the corporate responsibility issues arising from the role that multinational corporations have played in developing and maintaining China's censorship and surveillance infrastructure.<sup>72</sup>

Yahoo! entered the Chinese marketplace in 1999 as the first western IT company to operate as a licensed Internet Content Provider (ICP).<sup>73</sup> Yahoo! was also the first U.S.-based ICP to physically station servers in China so that its services would operate more effectively given the infrastructure limitations existing in 1999.<sup>74</sup> In 2002, Yahoo! infamously, *voluntarily* signed the *Public Pledge on Self-Discipline for the Chinese Internet Industry*.<sup>75</sup> Article 9 of the pledge requires that IT companies “[r]efrain[] from producing, posting or disseminating pernicious information that may jeopardize state security and disrupt social stability, contravene laws and regulations and spread superstition and obscenity [and] [m]onitor [] information publicized by users on websites according to law and remove the harmful information promptly.”<sup>76</sup> Article 9 further restricts website operators from linking to other websites that “contain harmful information.”<sup>77</sup>

Microsoft (MSN) and Google entered the Chinese marketplace in 2005 and 2006, respectively.<sup>78</sup> Both companies have not signed the *Public Pledge on Self-Discipline for the Chinese Internet Industry*.<sup>79</sup> They were, however, required by local law to

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*Cooperation with Cisco Systems with Major Upgrade of National Backbone Network*, Sept. 2, 1998, <http://newsroom.cisco.com/dlls/fspnisapia57d.html> (describing further contracts seeking to enhance the surveillance and filtering capability of China's prime network); Cisco Systems, *Cisco Selected to Build Backbone and Premium Business Network for China Telecom's IP Next Generation Network*, Nov. 11, 2004, [http://newsroom.cisco.com/dlls/2004/prod\\_111104.html](http://newsroom.cisco.com/dlls/2004/prod_111104.html) (describing the continued involvement to implement advanced network architectures for next-generation Internet backbone infrastructure).

<sup>72</sup> OPENNET INITIATIVE, INTERNET FILTERING IN CHINA IN 2004-2005: A Country Study, *available at* <http://www.opennetinitiative.net/studies/china> (describing technologies that Cisco has sold to China for backbone routing purposes; specifically the Cisco 12000 series routers, which have low-level packet filtering capabilities that are capable of implementing up to 750,000 different filtering rules. Though the systems are designed to combat various Internet attacks, i.e. Denial of Service (DoS) attacks, worms, and viruses, the systems are very easily adapted for filtering of Internet content, political or otherwise. For example, to combat a specific worm threat, the Code Red worm, Cisco released instructions on how to configure their routers' Access Control Lists to block the spread of the worm – which is the same technique for blocking political content. Moreover, it is unlikely that Cisco would not provide customer support or training for its products inherent, relevant, and intended capabilities) (citations omitted); *see also* Lum, *supra* note 64, at 8 (noting Cisco's contract to provide 12000 series routers and their filtering capabilities).

<sup>73</sup> *2006 Joint Hearing on the Internet in China*, *supra* note 3, at 93 (citing testimony of Michael Callahan, Senior Vice President and General Counsel, Yahoo!, Inc.).

<sup>74</sup> The network infrastructure existing in the mid-90s required servers to be located in geographic proximity to the markets that they serve in order to reduce transmission lag. *Id.*

<sup>75</sup> *Id.* at 170 (Appendix, Material Submitted for the Hearing Record describing Yahoo!'s complicity).

<sup>76</sup> Internet Society of China, *Public Pledge of Self-Regulation and Professional Ethics for China Internet Industry*, Jul. 19, 2002, <http://www.isc.org.cn/20020417/ca102762.htm>.

<sup>77</sup> *Id.*

<sup>78</sup> Microsoft and Google both had varying degrees of a business presence in China prior to 2005 and 2006, respectively, but did not begin local operation of any Internet services until those years. Specifically, Microsoft has had a presence in China as researcher and retailer of its operating system since the 1990s and Google established a research office in China in 2005. AMNESTY INTERNATIONAL, UNDERMINING FREEDOM OF EXPRESSION IN CHINA 20-21 (2006), <http://web.amnesty.org/library/index/ENGPOL300262006>.

<sup>79</sup> Internet Society of China, *supra* note 76.

obtain the same license as Yahoo! in order to operate in the market as an ICP.<sup>80</sup> A condition precedent to receiving an ICP license, however, is an implicit agreement to adhere to the *Public Pledge* – as stated by Elliot Schrage, Google’s Vice President for Corporate Communications and Public Affairs, “it is a condition of the license ... that you comply with the law, and it is a condition of complying with the law that you restrict the content available.”<sup>81</sup>

Microsoft and Google have both received their share of criticism for doing business in the Chinese marketplace.<sup>82</sup> Microsoft’s MSN Spaces service<sup>83</sup> received criticism immediately after its launch for responding to directions from the Chinese government to restrict users from using certain terms in their account name, space name, space sub-title, or in their photo captions.<sup>84</sup> In late 2005, Microsoft removed the blog of Zhao Jing (pseudonym Michael Anti), a Beijing-based researcher for the New York Times, upon request by the Chinese government for failing to comply with local laws.<sup>85</sup> Zhao’s blog was shut down, without notice, shortly after he posted articles critical of a management purge at the Beijing News agency prompted by the publication of articles criticizing the government.<sup>86</sup>

Google has explicitly decided against providing email, blogging, and chatting services to China in order to avoid Yahoo! and Microsoft-type controversies.<sup>87</sup> In

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<sup>80</sup> Article 4 of the Measures for the Administration of Internet Information Services requires that there be “national implementation of a licensing system for commercial internet information services, and a registration system for non-commercial internet information services. No one who fails to be licensed or who fails to comply with registration measures may engage in internet information services.” Congressional-Executive Commission on China, *Measures for the Administration of Internet Information Services (CECC Partial Translation)*, Oct. 10, 2006, <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=1570>.

<sup>81</sup> *2006 Joint Hearing on the Internet in China*, *supra* note 3, at 95 (testimony of Elliot Schrage, Vice President for Corporate Communications and Public Affairs, Google, Inc.).

<sup>82</sup> See generally AMNESTY INTERNATIONAL, *supra* note 78 (criticizing Microsoft and Google for their complicity in human rights abuses and actions restricting free speech).

<sup>83</sup> MSN Spaces, also known as Windows Live Spaces, is a blogging and social networking platform with a world-wide subscription, which is reported to have over twenty million unique visitors in China alone. Microsoft, *MSN Spaces Now Largest Blogging Service Worldwide*, May 24, 2006, <http://www.microsoft.com/presspass/press/2006/may06/05-24SpacesLargestPR.mspx>.

<sup>84</sup> AMNESTY INTERNATIONAL, *supra* note 78, at 20 (noting filtered phrases include “democracy”, “human rights”, “freedom of expression”, “Tibet independence”, and “Falun Gong”). Microsoft’s page stated, “[w]e employ a ‘restricted term’ list for this purpose and we make every effort to keep the list to a minimum number of terms.” *Id.* at 19-21.

<sup>85</sup> Forbes, *Microsoft Faces Backlash after Site of Prominent China Blogger is Deleted*, Jan. 1, 2006, <http://www.forbes.com/business/feeds/afx/2006/01/04/afx2427279.html>; see also

*2006 Joint Hearing on the Internet in China*, *supra* note 3, at 80 (documenting the removal of Zhao’s blog on MSN Spaces because it was offensive to the PRC. Zhao intended to organize a walk-off of journalists at the Beijing News agency whose editor had been fired for reporting on clashes between Chinese citizens and police forces. Zhao’s blog, as all MSN Spaces blogs are, was hosted on servers based in the United States); Lum, *supra* note 64, at 8-9 (noting that in response to criticism received due to the removal of Zhao’s blog Microsoft announced in January 2006 a new policy for foreign countries such that the company would close blogs only if presented with a legally-binding order, would inform its users of the reason for the removal, and would continue to make targeted blogs accessible in other countries – as opposed to the case of Zhao where the blog was removed from all Microsoft servers internationally, without notice.) (citations omitted).

<sup>86</sup> Forbes, *supra* note 85.

<sup>87</sup> Elliot Schrage, Google’s Vice President for Corporate Communications and Public Affairs, stated to the Joint Hearing on the Internet and China in 2006 that

2002, without announcement or warning, Chinese authorities effectively banned access to Google.com.<sup>88</sup> It was not until 2006 that Chinese users were able to directly access any Google services.<sup>89</sup> Google, with its “Don’t Be Evil” corporate philosophy,<sup>90</sup> entered the Chinese marketplace with a censored China-specific version of its search engine, Google.cn.<sup>91</sup> Google has admitted that its Chinese search engine employs self-censoring techniques that seek to empirically determine what it is that the Chinese government’s firewall restricts, and then restrict that same content, in instances exceeding the government’s censorship.<sup>92</sup>

#### Four Giants go to Washington

Amid comparisons to IBM’s cooperation with the Nazi party during World War II,<sup>93</sup> Congress convened hearings on February 15, 2006 to investigate allegations of

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[Google has] agreed to enter the [Chinese] market to perform search services, but we made a fundamental, strategic decision that we were not going to offer services like G-mail or Blogger ... inside of China because we did not want to be put in a position where we would have possess[ion] of data that might create the kinds of problems we are discussing today. I want to be categorical in that.

*2006 Joint Hearing on the Internet in China, supra* note 3, at 86.

<sup>88</sup> Edelman, *supra* note 69, at 16 (noting that some accounts report that Google.com was at times completely inaccessible while at others the search results were being filtered by China’s governmental firewall of the Internet).

<sup>89</sup> AMNESTY INTERNATIONAL, *supra* note 78, at 21.

<sup>90</sup> Google’s founders Larry Page and Sergey Brin outlined a strategy for Google as a public company which would hold an obligation not just to its business stakeholders, customers, employees and shareholders, but to the greater global community. Page and Brin asserted in their registration with the SEC their now infamous “Don’t Be Evil” corporate philosophy. “Don’t be evil. We believe strongly that in the long term, we will be better served--as shareholders and in all other ways--by a company that does good things for the world even if we forego some short term gains.” Larry Page & Sergey Brin, An Owner’s Manual for Google Shareholders, Letter from the Founders, [http://investor.google.com/ipo\\_letter.html](http://investor.google.com/ipo_letter.html) (last visited Jan. 31, 2007). In view of Google’s operations in China (i.e. self-imposed search result filtering), Google has received significant criticism that such a philosophy is plainly hypocritical. *See, e.g.*, Clive Thompson, *Google’s China Problem (and China’s Google Problem)*, N.Y. TIMES, April 23, 2006, at 1, available at <http://www.nytimes.com/2006/04/23/magazine/23google.html?n=Top/News/Business/Companies/Google%20Inc>. (noting criticism levied against Google for willingly filtering search results in China).

<sup>91</sup> Thompson, *supra* note 90, at 1.

<sup>92</sup> Elliot Schrage described the techniques used to determine what to filter to the Joint Hearing on the Internet and China in 2006, he said,

[w]e did not only look at what our competitors did. We also sought to perform searches on our own search engine, google.com, from outside the restrictions imposed by the Chinese Government. So we would do many searches, many of the searches involving issues that are not controversial, not, as we are calling them, politically sensitive. They would yield all sorts of results. Many of the searches were the searches that are on categories that we are calling politically sensitive, when we performed those searches inside China seeking to go outside China, we were unable to get results outside China, but we were able to get some results, as in the example that the Chairman gave earlier, from within China. So that result was not obtained by looking at the performance of our competitors but was looking at the performance of the filtering of government authorities.

*2006 Joint Hearing on the Internet in China, supra* note 3, at 96.

<sup>93</sup> Representative Smith cited to the use of IBM’s technology by Germany during World War II which enabled the identification and cataloging of individuals such that “Hitler and the Third Reich were able

the complicity of IT companies in human rights abuses perpetrated by the Chinese government.<sup>94</sup> Present at the hearings were representatives from Cisco, Yahoo!, Microsoft, Google and numerous human rights groups.<sup>95</sup> The hearings focused on the acts and complaints against the aforementioned IT companies, the previously discussed services that they provide in China, and the role that the companies played in providing personally identifiable information to Chinese authorities.<sup>96</sup>

Yahoo! made representations to the committee that it had no knowledge regarding the nature of the investigation of Shi Tao or why the Chinese government was requesting his personally identifiable information.<sup>97</sup> As it turns out, this was not the case.<sup>98</sup> Yahoo! was requested to reappear before the committee in November 2007 where CEO Jerry Yang and Michael Callahan, Senior Vice President and General Counsel, were severely scolded by members of Congress for providing false information.<sup>99</sup> Present at the hearing were Wang's wife and Shi's mother, who, upon instruction from the committee, received apologies from the Yahoo! representatives.<sup>100</sup> Yahoo! was further advised by the committee to seek a settlement with the aggrieved parties immediately,<sup>101</sup> which it ultimately did.<sup>102</sup>

Notably, the committee did not vent any of their frustrations at the Chinese

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to automate the genocide of the Jews." *Id.* at 2. Representative Lantos directly asked the IT company representatives whether "IBM [should] be ashamed of that action during that period?" *Id.* at 98-99.

<sup>94</sup> 2006 Joint Hearing on the Internet in China, *supra* note 3, at 1-2.

<sup>95</sup> *Id.* at 1-2.

<sup>96</sup> See *supra* text accompanying notes 71-93 (describing the difficulties faced by IT companies in China).

<sup>97</sup> 2006 Joint Hearing on the Internet in China, *supra* note 3, at 56 ("When Yahoo! China in Beijing was required to provide information about the user, who we later learned was Shi Tao, we had no information about the nature of the investigation.").

<sup>98</sup> An investigation by the Dui Hua Foundation found requesting documents sent by Chinese authorities to Yahoo! Hong Kong allegedly demonstrating that Yahoo! was aware of the general nature of the request. The document stated,

According to investigation [sic], your office is in possession of the following items relating to a **case of suspecting illegal provision of state secrets to foreign entities** that is currently under investigation by our bureau. In accordance with Article 45 of the Criminal Procedure Law of the PRC, [these items] may be collected. The items for collection are: Email account registration information for huoyan1989@yahoo.com.cn, all login times, corresponding IP addresses, and relevant email content from February 22, 2004 to present.

Dui Hua Foundation, *Police Document Sheds Additional Light on Shi Tao Case*, Jul. 25, 2007, <http://www.duihua.org/2007/07/police-document-sheds-additional-light.html> (emphasis added).

<sup>99</sup> Rep. Tom Lantos, *Statement of Chairman Lantos at hearing, Yahoo! Inc.'s Provision of False Information to Congress*, Nov. 6, 2007, <http://foreignaffairs.house.gov/110/lantos110607.htm>.

<sup>100</sup> Corey Boles, *Yahoo's Lashing Highlights Risks of China Market*, WALL STREET J., Nov. 7, 2007, at A1, available at <http://online.wsj.com/article/SB119436469294284018.html>.

<sup>101</sup> Settling the case would be a good step forward. And you should settle with them generously in favor of the families. It can never make things whole, but it would be an important gesture. That would be one way that you could convey to the committee and the American people and especially the victims that there are true victims because of your complicity. You can settle that tomorrow or by the end of the week if you'd like to.

Rep. Chris Smith, *Smith Comments on Yahoo! Settlement of Lawsuit with Families of Jailed Chinese Journalists*, Nov. 13, 2007, <http://chrissmith.house.gov/News/DocumentSingle.aspx?DocumentID=78514>.

<sup>102</sup> *Joint Stipulation of Dismissal*, *supra* note 1, at 1.

government, the actual perpetrators of the human rights violations.<sup>103</sup>

#### Legislating the Global Web: The Global Online Freedom Act of 2007

Directly incident to the hearings in 2006 and 2007 was the proposed Global Online Freedom Act of 2007 (GOFA)<sup>104</sup> which, in October 2007, received unanimous endorsement from the House Foreign Affairs Committee.<sup>105</sup> The bill provides for the establishment of a system for designating a country as an “Internet-restricting country.”<sup>106</sup> Once a country has been designated as such, U.S. companies are restricted from disclosing a particular user’s personally identifiable information to foreign officials of that country except for “legitimate foreign law enforcement purposes.”<sup>107</sup> Major provisions of the act include restrictions that would bar companies from hosting or “locating” personally identifiable information within a designated country’s borders,<sup>108</sup> require transparency and reporting of any results filtered by search engine providers,<sup>109</sup> and establish a new Office of Global Internet Freedom which would monitor filtered terms and work with IT companies and non-profit groups to develop a voluntary code of minimum corporate standards for Internet freedom.<sup>110</sup> The Act would further establish a private right of action in U.S. courts for citizens of Internet-restricting countries against a company that is in violation of the Act.<sup>111</sup>

The proposed Act has received particularly strong and vocal support from numerous human rights organizations.<sup>112</sup> The Act has not, however, received unanimous support; online free speech organizations such as the Electronic Frontier Foundation, the Center for Democracy and Technology, and the Open Net Initiative

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<sup>103</sup> See generally 2006 Joint Hearing on the Internet in China, *supra* note 3 (the convened committee consistently lambasted the IT companies but did not address the Chinese Communist Party or the PRC as the perpetrators of human rights abuses).

<sup>104</sup> H.R. 275, 110th Cong. (2007); see generally Jennifer A. Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 HOFSTRA L. REV. 1095, 1130-36 (2007) (providing a detailed analysis of the background and provisions of GOFA).

<sup>105</sup> Rep. Chris Smith, *Global Online Freedom Act Passes Committee in Wake of Congressional Investigation of Yahoo*, Oct. 23, 2007, <http://chrissmith.house.gov/News/DocumentSingle.aspx?DocumentID=76972>.

<sup>106</sup> H.R. 275, 110th Cong. § 105.

<sup>107</sup> *Id.* at § 202(a).

<sup>108</sup> *Id.* at § 105 (“A United States business may not locate, within a designated Internet-restricting country, any electronic communication that contains any personally identifiable information.”). The term “locate” is defined broadly to include the “electronic storage by any electronic or computer server or facility of an electronic communications system” and “processing.” *Id.* at § 201(b)(2). “Electronic communications” is defined under GOFA to have the same meaning as in the Electronic Communications Privacy Act. 18 USC § 2510(12) (2006). “Personally Identifiable Information” includes name, address, telephone number, telephone records, and payment information. 18 USC § 2703(c)(2) (2006). The proposed Act would, therefore, effectively prohibit the storage and processing of all personally identifiable information in any country identified as Internet-restricting.

<sup>109</sup> H.R. 275, at § 203.

<sup>110</sup> *Id.* at § 104.

<sup>111</sup> *Id.* at § 202(c).

<sup>112</sup> Reporters without Borders, *Fourteen Human Rights Organisations Express Support for a US Draft Law on Free Expression Online (GOFA)*, Jul. 18, 2006, [http://www.rsf.org/article.php3?id\\_article=18304](http://www.rsf.org/article.php3?id_article=18304).

have not endorsed GOFA.<sup>113</sup> The Computer & Communications Industry Association, whose members include Google, Microsoft and Yahoo!, argue that GOFA would effectively place internet content providers in the

untenable position of choosing between complying with either U.S. or Chinese law, but not both, GOFA guarantees an exodus of U.S. businesses from the Chinese market [and, as a result, will] forfeit this critical frontier for spreading democracy to state-run and state-influenced Chinese enterprises with no interest in promoting American values.<sup>114</sup>

#### Applying GOFA prospectively on Yahoo!

The 2006 joint hearing placed particular emphasis on the actions of Yahoo! in China and, clearly, it is Yahoo!'s behavior that GOFA was intended to address. Unfortunately, a prospective application of GOFA, in its current state, would fail to reach Yahoo!'s operations in China and fail to "protect United States businesses from coercion to participate in repression" by the Chinese government.<sup>115</sup> It is more likely that the Act will simply punish those U.S. businesses who have already established a presence in the Chinese marketplace.<sup>116</sup>

First, the Act will fail to reach, or punish, Yahoo! for future production of personally identifiable information upon request by Chinese authorities where such information is ultimately used to commit human rights abuses. Yahoo! China cannot be reached by the conditions set by the Act because Yahoo!, Inc. does not have a controlling interest in the company.<sup>117</sup> As mentioned in previous sections, as part of Alibaba's acquisition of Yahoo! China, Yahoo!, Inc. received a minority interest in Alibaba.<sup>118</sup> Alibaba is organized and traded under the laws of Hong Kong, and, therefore, cannot be reached by the Act.<sup>119</sup> For example, during the joint hearing in 2006, Michael Callahan, senior vice president of Yahoo!, submitted a prepared statement stating that "[i]t is very important to note that Alibaba.com is the owner of the Yahoo! China businesses, and that as a strategic partner and investor, Yahoo!, which holds one of the four Alibaba.com board seats, does not have day-to-day operational control over the Yahoo! China division of Alibaba.com."<sup>120</sup> Yahoo!'s organization of its China presence has effectively isolated it from liability under GOFA which would leave aggrieved parties with the Alien Tort Claims Act as their only form of recourse in the United States.

Second, other U.S. businesses that face liability under GOFA may likely pursue

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<sup>113</sup> Rebecca MacKinnon, *Shi Tao, Yahoo! and the Lessons for Corporate Social Responsibility*, Dec. 30, 2007, at 22, <http://rconversation.blogs.com/YahooShiTaoLessons.pdf>.

<sup>114</sup> Bennet Kelley, *Privacy and Online Behavioral Advertising*, 11 NO. 6 J. INTERNET L. 24, 25 (2007) quoting Anne Broache, *Politicos OK Limits For U.S. Firms In Net-Censoring Countries*, CNET NEWS, Oct. 23, 2007, [http://www.news.com/8301-10784\\_3-9802616-7.html?tag=head](http://www.news.com/8301-10784_3-9802616-7.html?tag=head).

<sup>115</sup> H.R. 275, at Preamble.

<sup>116</sup> Christopher Stevenson, *Breaching the Great Firewall: China's Internet Censorship and the Quest for Freedom of Expression in a Connected World*, 30 B.C. INT'L & COMP. L. REV. 531, 553 (2007).

<sup>117</sup> See *supra* text accompanying notes 55-62 (describing the current corporate structure of Yahoo!).

<sup>118</sup> MacDonald, *supra* note 58.

<sup>119</sup> *Id.*

<sup>120</sup> 2006 Joint Hearing on the Internet in China, *supra* note 3, at 58.

strategies similar to Yahoo! in order to avoid liability.<sup>121</sup> Businesses such as Cisco, Google, and Microsoft have invested significant amounts of capital to establish their presence in China and will likely not be willing to lose their investments.<sup>122</sup> When faced with the risk of losing lucrative investments, businesses will follow investment strategies akin to Yahoo!<sup>123</sup> Moreover, Chinese businesses listed on U.S. security exchanges, such as Tom Online, Sohu.com, and Baidu.com, will similarly follow U.S. businesses in adopting strategies that help them avoid liability under GOFA.<sup>124</sup> These businesses will inevitably look towards other markets and exchanges for organizing their businesses.

U.S. businesses must be regarded as stakeholders to any legislation that seeks to regulate commerce with the Chinese government – basic rules for behavior cannot be properly imposed by a single government acting unilaterally, such action would only lead to the aforementioned exodus of businesses.<sup>125</sup> An alternate solution would require businesses to adopt self-regulating principles that would facilitate the democratizing power of the Internet by balancing the competing interests of information sharing and compliance with local laws.<sup>126</sup>

#### Self-Regulation as a Solution

Self-regulation can be achieved either by a business adopting a set of corporate ethics or by shareholder initiatives aimed at directing, or re-directing, the businesses' methods or strategies.<sup>127</sup> The United Nations Global Compact has often been cited as a starting point for establishing corporate ethical compliance standards.<sup>128</sup> The compact sets out to establish a set of principles derived from the Universal Declaration of Human Rights addressing human rights, labor, and anti-corruption.<sup>129</sup> The compact has, however, received significant criticism for being vague, lacking any method for monitoring, and serving as a symbolic, rather than actual, acceptance of the principles that it purports.<sup>130</sup> Moreover, the compact has not attracted a significant amount of U.S. businesses.<sup>131</sup>

Alternatively, a bottom-up approach would see shareholders demanding that businesses change their course or pursue alternative strategies that would avoid corporate complicity in human rights abuses.<sup>132</sup> Arguably, such actions would be the

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<sup>121</sup> Kelly, *supra* note 114, at 25. See also AFX News Limited, *FOCUS - Proposed 'Online Freedom Act' May Hurt US and US-listed China Firms*, Feb. 16, 2006, <http://www.forbes.com/business/feeds/afx/2006/02/16/afx2531410.html> (arguing that GOFA “may not only limit US companies' ability do business in China, but may also deter Chinese companies from tapping US equity markets.”).

<sup>122</sup> See generally AMNESTY INTERNATIONAL, *supra* note 78 (describing the significant efforts expended by US IT companies to penetrate the Chinese marketplace).

<sup>123</sup> Kelly, *supra* note 114, at 25; AFX News Limited, *supra* note 121.

<sup>124</sup> Stevenson, *supra* note 116, at 550.

<sup>125</sup> AFX News Limited, *supra* note 121.

<sup>126</sup> Surya Deva, *Corporate Complicity in Internet Censorship in China: Who Cares for the Global Compact or the Global Online Freedom Act?*, 39 GEO. WASH. INT'L L. REV. 255, 290-301 (2007).

<sup>127</sup> Fried Frank LLP, *Trends in the Use of Corporate Law and Shareholder Activism to Increase Corporate Responsibility and Accountability for Human Rights*, Dec. 2007, at 1-2, <http://www.business-humanrights.org/Links/Repository/846297>.

<sup>128</sup> *Id.*

<sup>129</sup> Deva, *supra* note 126, at 278-79.

<sup>130</sup> *Id.* at 294.

<sup>131</sup> *Id.* at 302-03.

<sup>132</sup> Fried Frank LLP, *supra* note 127, at 6-10.

most effective solution but are, unfortunately, the most difficult to achieve.<sup>133</sup> In 2006, Cisco's shareholders proposed a resolution requiring the company to adopt a comprehensive human rights policy for its dealings with the Chinese government, in response to criticism from organizations such as Amnesty International.<sup>134</sup> The resolution received a significant but insufficient twenty-nine percent vote.<sup>135</sup> In April 2007, the New York Pension Fund, one of the biggest and most powerful investors in the U.S., filed similar shareholder resolution requests with Google and Yahoo!<sup>136</sup> Although both resolutions were ultimately rejected,<sup>137</sup> the resolutions provide an example of activist shareholders who are willing to voice their concerns of complicity in human rights abuses by their investments. As the following section will show, the ATCA has been used as a vehicle to bring such issues to the attention of shareholders.

#### IV. CORPORATE LIABILITY UNDER THE ATCA

Wang and Shi, in their complaint, sought a remedy under the ATCA which, despite its two hundred year history, remains a mystery to both defendants and the judiciary. The ATCA, however, is a valuable tool for human rights organizations to bring media attention to important issues and gain a "moral victory" in the court of public opinion.<sup>138</sup>

The ATCA provides extraterritorial authority to U.S. courts to find liability for actors and events existing outside the United States.<sup>139</sup> The statute was written by the First Congress in 1789,<sup>140</sup> whose members included some of the original framers

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<sup>133</sup> *Id.*

<sup>134</sup> The shareholder resolution asked the company to "publish a report to shareholders within six months, at reasonable expense and omitting proprietary information, providing a summarized listing and assessment of concrete steps the company could reasonably take to reduce the likelihood that its business practices might enable or encourage the violation of human rights, including freedom of expression and privacy, or otherwise encourage or enable fragmentation of the Internet." Tom Zeller, Jr., *Nagging Cisco on Human Rights*, N.Y. TIMES, Nov. 17, 2006, <http://thelede.blogs.nytimes.com/2006/11/17/nagging-cisco-on-human-rights>. Notably, Cisco has distanced itself from this controversy by stating that "Cisco does not participate in any way with censorship by governments." Tom Zeller, Jr., *Tech Companies and Global Rights: Cisco Responds*, The Lede Blog, N.Y. TIMES, Jan. 24, 2007, <http://thelede.blogs.nytimes.com/2007/01/24/tech-companies-and-global-rights-cisco-responds>. From a practical perspective this seems reasonable, as Cisco employees are not likely to be the ones programming the filters in the sold routers; however, an expectation that said routers would be used to facilitate censorship is assumed.

<sup>135</sup> Tom Zeller, Jr., *Tech Companies and Global Rights: Cisco Responds*, The Lede Blog, N.Y. TIMES, Jan. 24, 2007, <http://thelede.blogs.nytimes.com/2007/01/24/tech-companies-and-global-rights-cisco-responds>.

<sup>136</sup> James Doran, *Funds Speak Out to Press Google on Freedom of Expression*, TIMES ONLINE, Apr. 5, 2007, [http://business.timesonline.co.uk/tol/business/industry\\_sectors/technology/article1615882.ece](http://business.timesonline.co.uk/tol/business/industry_sectors/technology/article1615882.ece); Jill Gardiner, *Thompson Targets Google, Yahoo Over China Policy*, N.Y. SUN, Dec. 14, 2006, <http://www.nysun.com/article/45150>.

<sup>137</sup> Elinor Mills, *Google Shareholders Vote Down Proposal on Censorship*, ZDNET NEWS, May 10, 2007, [http://news.zdnet.com/2100-9595\\_22-6182997.html](http://news.zdnet.com/2100-9595_22-6182997.html); BBC News, *Yahoo's China Policy Rejected*, Jun. 12, 2007, <http://news.bbc.co.uk/2/hi/business/6747095.stm>; see also MacKinnon, *supra* note 113, at 26-29 (providing a detailed account of the shareholder initiatives filed against Yahoo! and Google).

<sup>138</sup> Baue, *supra* note 8, at 12.

<sup>139</sup> 28 U.S.C. § 1350 (2006).

<sup>140</sup> See *Filartiga v. Pena-Irala*, 630 F.2d 876, 877-88 (2d Cir. 1980) ("Implementing the constitutional mandate for national control over foreign relations, the First Congress established original district court

of the Constitution, possibly as a method of providing federal courts jurisdiction over certain law of nations issues.<sup>141</sup> The ATCA provides simply that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>142</sup> Textually, the ATCA “confers federal subject-matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations.”<sup>143</sup>

For 191 years the statute remained dormant, only having been relied upon in two cases.<sup>144</sup> In 2004, the Supreme Court, in *Sosa v. Alvarez-Machain*, for the first time, considered the act and found that the ATCA remains good law as written and that nothing in the two centuries since its original enactment “has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law [and] Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute.”<sup>145</sup>

No court has yet held a multinational corporation liable for aiding and abetting a foreign state’s human rights violations under the ATCA.<sup>146</sup> In fact, the landscape of ATCA corporate liability is increasingly becoming peppered with divergent judicial opinions and conflicting perspectives.<sup>147</sup> Human rights organizations view it as an able vehicle for holding corporations liable for gross violations of international law,<sup>148</sup> while defendants fear liability for “merely doing business in countries with repressive regimes or for participating in activities that, with twenty-twenty hindsight, can be said to have been indirectly linked to human rights abuses.”<sup>149</sup> From a jurisprudential perspective, corporate liability under the ATCA creates the risk of U.S. courts becoming the “world’s court” for civil liability and, thereby, extending domestic views of justice onto an international stage.

#### ATCA Trilogy of Cases

The first case of the ATCA trilogy, *Filartiga v. Pena-Irala*,<sup>150</sup> is known as the case which exhumed the ATCA from obscurity<sup>151</sup> in 1980. A Paraguayan citizen,

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jurisdiction over ‘all causes where an alien sues for a tort only (committed) in violation of the law of nations.’”) (citing Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789), codified 28 U.S.C. § 1350).

<sup>141</sup> Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 599 (2002).

<sup>142</sup> 28 U.S.C. § 1350 (2006).

<sup>143</sup> *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996).

<sup>144</sup> Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1, 7 (2002) (citing *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795)).

<sup>145</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

<sup>146</sup> Philip A. Scarborough, *Rules of Decision for Issues Arising under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 459 (2007) (questioning whether courts will be willing to find such an expansive reading of the ATCA).

<sup>147</sup> See generally Neil J. Conley, Comment, *The Chinese Communist Party’s New Comrade: Yahoo’s Collaboration with the Chinese Government in Jailing a Chinese Journalist and Yahoo’s Possible Liability under the Alien Tort Claims Act*, 111 PENN ST. L. REV. 171 (2006) (providing a detailed overview of the difficulties found in pre-*Khulumani* ATCA jurisprudence as it would be applied to the case of Shi Tao and Yahoo).

<sup>148</sup> Baue, *supra* note 8, at 11-12.

<sup>149</sup> *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 289 (2d Cir. 2007).

<sup>150</sup> 630 F.2d 876.

<sup>151</sup> Baue, *supra* note 8.

whose son was kidnapped and tortured to death by a Paraguayan government official<sup>152</sup> in Asuncion, Paraguay, succeeded in claiming jurisdiction in the Second Circuit.<sup>153</sup> The court declared that jurisdiction was based on the fact that “an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.”<sup>154</sup>

*Filartiga* did not deal with determining whether the ATCA extends causes of action to non-state actors; it did, however, serve to stimulate the debate about the ATCA and to create a precedent that establishes that “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties” and, therefore, “whenever an alleged torturer is found and served with process by an alien within our borders [the ATCA] provides federal jurisdiction.”<sup>155</sup>

Second, *Kardic v. Karadzic*<sup>156</sup> in 1995 expanded *Filartiga* and extended ATCA liability to private actors.<sup>157</sup> The court interpreted the law of nations, in a modern context, to encompass “certain forms of conduct [that] violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”<sup>158</sup> The court also found aiding and abetting liability to be sufficiently “well-established [] [and] universally recognized” under international law to fall within the scope of ATCA liability.<sup>159</sup>

Finally, in 2004, the Supreme Court considered the ATCA for the first time in *Sosa v. Alvarez* and found the ATCA to provide subject matter jurisdiction and announced a standard for determining what causes of action may fall within the “law of nations” statutory text.<sup>160</sup> First, the claim must meet a threshold level of acceptance in the international community.<sup>161</sup> Second, the claim must have specificity comparable to the original set of violations.<sup>162</sup> Under this reasoning, “the ATCA will recognize a cause of action beyond the list of violations of safe conducts, piracy, and ambassador law, so long as it is accepted by the international community and defined with the same degree of specificity that those violations had been.”<sup>163</sup>

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<sup>152</sup> Pena-Irala, the Paraguayan government official, sold his house in Paraguay in July of 1978 and entered the United States under a visitor’s visa. Plaintiff, *Filartiga*, became aware of Pena-Irala’s presence in New York and informed the Immigration and Naturalization Service. Pena-Irala and his wife had overstayed their visitor’s visa and were subsequently scheduled to be deported following a hearing. *Filartiga* caused Pena-Irala to be served with a summons and civil complaint at the Brooklyn Navy Yard where he was being held pending deportation. *Filartiga*, 630 F.2d 878-79.

<sup>153</sup> *Id.* at 889.

<sup>154</sup> *Id.* at 880.

<sup>155</sup> *Id.* at 878.

<sup>156</sup> 70 F.3d 232.

<sup>157</sup> *Id.* at 236-37.

<sup>158</sup> *Id.* at 239.

<sup>159</sup> *Id.* (citations omitted).

<sup>160</sup> *Sosa*, 542 U.S. at 725.

<sup>161</sup> *Id.* at 732 (“we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”).

<sup>162</sup> *Id.* at 725 (“we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”).

<sup>163</sup> Igor Fuks, *Sosa v. Alvarez-Marchain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability*, 106 COLUM. REV. 112, 122 (2006).

## ATCA as applied to Multinational Corporations

The first case to bring a claim against a corporation under the ATCA was *Doe v. Unocal Corp.*<sup>164</sup> in 1997. Unocal was alleged to have subjected a group of Burmese villages to “death of family members, assault, rape and other torture, forced labor, and the loss of their homes and property” when a subsidiary of the Unocal Corporation was constructing a gas pipeline.<sup>165</sup> Allegedly, Unocal contracted with the Myanmar military to provide security to control the area on which the pipeline would be built, and it was from this arrangement that the alleged human rights violations arose.<sup>166</sup> Unocal “objected to being held responsible for the actions of a security partner of a far-flung subsidiary, which was itself part of a joint venture with a foreign corporation.”<sup>167</sup>

The case was advanced to the Ninth Circuit where an evolutionary step was taken in ATCA jurisprudence.<sup>168</sup> The court followed *Kadic* in allowing private actors to be held liable for instances of generally accepted violations of international law.<sup>169</sup> In December 2004 the case was settled in principle.<sup>170</sup> Although the terms are confidential, “the settlement in principle [compensated] plaintiffs and provide[d] funds enabling plaintiffs and their representatives to develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region.”<sup>171</sup> The decision was subsequently vacated.<sup>172</sup>

The *Unocal* settlement has been viewed as a great success for proponents of corporate accountability and marked the beginning of a long stream of corporate liability cases under the ATCA filed on behalf of plaintiffs by human rights organizations.<sup>173</sup>

## Second Circuit sets High Bar for finding Aiding and Abetting Liability under ATCA

In October 2007, the Second Circuit, in *Khulumani v. Barclay Nat'l Bank Ltd.*,<sup>174</sup> applied the standards provided in *Sosa* and held that there was ATCA jurisdiction for aiding and abetting claims brought against corporate defendants that traded with the

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<sup>164</sup> 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd*, 395 F.3d 932 (9th Cir. 2002), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003) (en banc), *vacated* 403 F.3d 708 (9th Cir. 2005).

<sup>165</sup> *Id.* at 883.

<sup>166</sup> *Id.* at 885.

<sup>167</sup> Fuks, *supra* note 163, at 118.

<sup>168</sup> *Id.* at 119.

<sup>169</sup> *Unocal*, 395 F.3d at 945-46.

<sup>170</sup> William Baue, *Unocal Alien Tort Claims Act Case Settlement Boosts Corporate Accountability*, SRI WORLD GROUP, Dec. 14, 2004, <http://www.socialfunds.com/news/article.cgi/article1591.html>.

<sup>171</sup> *Id.*

<sup>172</sup> *Unocal*, 403 F.3d at 708.

<sup>173</sup> See, e.g., *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 444 (2d Cir. 2000) (dealing with Jewish plaintiffs who alleged that defendant purchased property claimed to have been illegally seized by Egyptian government); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 12 (D.D.C. 2005) (describing prisoner abused by U.S. forces at Abu Ghraib in Iraq filed against American contractors who provided interpreters and interrogators); *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1288 (S.D.Fla. 2003) (describing Guatemalan union leaders who alleged corporate participation in torture); *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 992 (S.D.Ind. 2007) (dealing with Liberian rubber plantation workers alleged forced labor, forced child labor, poor working conditions, and low wages).

<sup>174</sup> 504 F.3d 254.

South African apartheid regime.<sup>175</sup> The *per curiam* opinion was delivered by a split three-judge panel.<sup>176</sup> Though the two concurring opinions of Judges Katzman and Hall reached the same conclusion, that aiding and abetting liability may be found under the ATCA, they disagreed as to whether the evaluation of aiding and abetting liability should be based on international or federal law.<sup>177</sup> Judge Katzman's controlling opinion set the bar for bringing such claims extremely high.<sup>178</sup> He relied upon customary international law which would only find liability when the defendant "(1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime."<sup>179</sup> Judge Katzman's holding is based upon the court adopting the Rome Statute of the International Criminal Court<sup>180</sup> as the basis for defining aiding and abetting liability under the ATCA.<sup>181</sup>

#### Applying the ATCA and *Khulumani* to Xiaoning v. Yahoo!

The string of cases leading up to *Khulumani* clearly establishes that multinational companies can be held accountable for aiding and abetting violations of the law of nations under the ATCA. Under *Khulumani*, Yahoo! clearly meets the first prong of the test.<sup>182</sup> It provided practical assistance to the Chinese government which ultimately led to the detention, incarceration, and subsequent torture of Shi and Wang.<sup>183</sup> The second prong of Judge Katzman's holding, however, requires Yahoo! to have done so "with the purpose of facilitating the commission of that crime."<sup>184</sup> It is neither clear, nor very likely, that Yahoo! provided personally identifiable information to the Chinese government with the intended purpose of facilitating torture.<sup>185</sup> Therefore, it is unlikely that Wang and Shi's claim under the ATCA would have succeeded in the Second Circuit.

Wang and Shi's claim was filed in the Northern District of California which is part of the Ninth Circuit.<sup>186</sup> If the case had advanced to the Ninth Circuit Court of

<sup>175</sup> *Id.* at 260 (holding "that in this Circuit, a plaintiff may plead a theory of aiding and abetting liability under the ATCA.").

<sup>176</sup> *Id.*

<sup>177</sup> Anthony J. Sebok, *The Second Circuit's Stunning Reversal, in Two Suits Involving the Alien Tort Claims Act: Part One in a Two-Part Series on the Decision*, FINDLAW, Oct. 23, 2007, <http://writ.news.findlaw.com/sebok/20071023.html>.

<sup>178</sup> Judge Korman's dissenting opinion is in agreement with Judge Katzman's opinion regarding where the bar for finding aiding and abetting liability should lie and, therefore, constituting a majority, Judge Katzman's opinion is controlling and must be applied upon remand. *Id.*

<sup>179</sup> *Khulumani*, 504 F.3d at 277.

<sup>180</sup> Rome Statute of the International Criminal Court art. 24(1), July 17, 1998, 37 I.L.M. 999, 1016. Countries that have ratified the Rome Statute have committed to cooperating fully with the International Criminal Court and to the investigation and the prosecution of crimes of genocide, crimes against humanity and war crimes in their own national courts. Notably, the United States has not signed the statute and has lobbied governments to not ratify the Rome Statute. Amnesty International, *The USA and the International Criminal Court*, Nov. 11, 2007, <http://www.amnesty.org/en/international-justice/issues/international-criminal-court/usa-icc> (describing the various positions that the US has taken for, and against, the ratification of the Rome Statute).

<sup>181</sup> *Khulumani*, 504 F.3d at 270.

<sup>182</sup> *Id.* at 277.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Second Amended Complaint for Tort Damages*, *supra* note 2.

<sup>186</sup> *Id.*

Appeals, it is plausible that the Ninth Circuit could have split from the Second Circuit decision in *Khulumani*. If a split were to occur, the Ninth Circuit would need to adopt the dissenting position of Judge Hall.<sup>187</sup> Judge Hall proposed a lesser standard of culpability that, due to the absence of direction from the Supreme Court decision in *Sosa*, would look towards the federal common law instead of international law.<sup>188</sup> The opinion states a standard which first looks at whether an international norm has been violated, and, if so, then looks towards domestic law for its domestic enforcement.<sup>189</sup> As noted by Judge Hall, the federal common law standard for aiding and abetting liability is found in *Halberstam v. Welch*<sup>190</sup> and the Restatement (Second) of Torts §876.<sup>191</sup>

Judge Hall states that liability under the ATCA for aiding and abetting claims in violation of a clearly established international law norm, consistent with §876, may be found in only three ways:<sup>192</sup>

(1) by knowingly and substantially assisting a principle tortfeasor . . . to commit [such a violation] []; (2) by encouraging, advising, contracting with, or otherwise soliciting a principle tortfeasor to commit an act while having actual or constructive knowledge that the principal tortfeasor will [commit such a violation] [] in the process of completing that act; or (3) by facilitating the commission of human right violation by providing the principal tortfeasor with the tools, instrumentalities, or services to commit those violations with actual or constructive knowledge that those tools, instrumentalities, or services will be (or only could be) used in connection with that purpose.<sup>193</sup>

The relevant inquiry here is the third circumstance where a defendant provides

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<sup>187</sup> *Khulumani*, 504 F.3d at 284-92.

<sup>188</sup> It remains inescapable, however, that *Sosa* at best lends Delphian guidance on the question of whether the federal common law or customary international law represents the proper source from which to derive a standard of aiding and abetting liability under the ATCA. **Lacking the benefit of clear guidance, I presume a federal court should resort to its traditional source, the federal common law, when deriving the standard.** Because I find that federal common law provides a standard by which to assess aiding and abetting liability, I do not address the alternative argument that such a standard may be derived from international law.

*Id.* at 286 (emphasis added).

<sup>189</sup> *Id.*

<sup>190</sup> 705 F.2d 472 (D.C. Cir. 1983).

<sup>191</sup> “*Halberstam* relied heavily upon the Restatement (Second) of Torts to set the parameters of aiding and abetting liability.” *Khulumani*, 504 F.3d at 287.

Section 876(b) of the Restatement of Torts provides: ‘For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he ... (b) knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.’

*Id.* *Halberstam* held that the Restatement called for three elements for aiding and abetting liability:

(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.

*Halberstam*, 705 F.2d at 477.

<sup>192</sup> *Khulumani*, 504 F.3d at 288.

<sup>193</sup> *Id.* at 288-89.

“the tools, instrumentalities, or services to commit [human rights] violations with actual or constructive knowledge that those tools, instrumentalities or services will be (or only could be) used in connection with that purpose.”<sup>194</sup> Wang and Shi claimed that Yahoo!

had every reason to know and understand that the electronic communication user information that they provided to the authorities could well be used to assist in the infliction of such abuses as arbitrary arrest, torture, cruel, inhuman, or otherwise degrading treatment, and prolonged detention and/or forced labor, to punish what might be viewed by authorities as pro-democracy or human rights activities.<sup>195</sup>

If Wang and Shi had proved such knowledge, which is likely given the numerous warnings, communications, and reports that Yahoo! received from human rights organizations,<sup>196</sup> Yahoo! could have been found liable by a court adopting Judge Hall’s position.

#### V. DEFINING THE ROLE OF IT COMPANIES IN THE CHINESE MARKETPLACE

Wang and Shi’s suit against Yahoo! has served as a catalyst and a detailed illustration of the obstacles IT companies face in today’s shrinking economic world.<sup>197</sup> A finding of liability against an IT company under GOFA or the ATCA would likely cause a dramatic change in the business strategies that such businesses employ when considering expanding to markets such as China. This section assumes that if GOFA is not passed, and ATCA liability for companies such as Yahoo! is not to be found; IT companies have only three options from which to choose a course of action: (1) comply with government requests for information, as required by local law; (2) refuse to comply and face sanctions by the local government; or, (3) withdraw from operations in that marketplace.

#### Comply with Governmental Requests for Information

The consequences of compliance with governmental requests for personally identifiable information are obvious. As in the case of Wang and Shi, the dissident whose information has been handed over will likely face treatment at the hands of Chinese authorities rising to the level of torture if detained or convicted.<sup>198</sup> The IT company, however, will be able to continue to operate in China freely and reap the financial benefits thereof.<sup>199</sup>

IT companies have advanced numerous arguments for staying the course in China. For example, Yahoo! maintains the position that its “continued presence and growth of the Internet in China empowers its citizens and will help advance Chinese society.”<sup>200</sup> Alternatively, if it were to leave China, Yahoo! argues, “Chinese

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<sup>194</sup> *Id.* at 289.

<sup>195</sup> *Second Amended Complaint for Tort Damages*, *supra* note 2, at 12.

<sup>196</sup> AMNESTY INTERNATIONAL, *supra* note 78; Dui Hua Foundation, *supra* note 98.

<sup>197</sup> See *supra* text accompanying notes 71-93 (discussing the difficulties faced by IT companies operating in China).

<sup>198</sup> *Second Amended Complaint for Tort Damages*, *supra* note 2.

<sup>199</sup> *Id.*

<sup>200</sup> Prepared Statement of Michael Callahan, Senior Vice President and General Counsel, Yahoo! Inc., 2006 *Joint Hearing on the Internet in China*, *supra* note 3, at 59.

citizens' ability to communicate and access independent sources of information" would be impeded.<sup>201</sup>

#### Refuse to Comply with Governmental Requests for Information

The consequences of refusing to comply with governmental requests for personally identifiable information are equally obvious. The IT company refusing to act in compliance with an official governmental request will risk losing its license to operate in the Chinese marketplace as an Internet Content Provider.<sup>202</sup> Moreover, any employees operating in offices in China may also face criminal liability and face the potentially harsh consequences related to detention, conviction, and imprisonment.<sup>203</sup> The ultimate result for non-compliance will be, at the least, the blacklisting of the IT companies' websites by the Great Chinese Firewall.<sup>204</sup>

#### Withdraw from the Chinese Marketplace

Withdrawing from the Chinese marketplace provides no benefit to the Chinese web-surfing public but may result in an opportunity loss to Chinese users. Chinese users will still have resources such as Baidu.com and other home-grown Internet services available to them which will certainly be monitored just as stringently as U.S.-based IT companies, but are more likely to comply.<sup>205</sup> An IT company that chooses to withdraw from the Chinese market will certainly lose its investment in the local economy, any goodwill built with consumers, and its users will likely defect to local Chinese companies.

#### A Fourth Path?

The existence of a fourth path first requires a determination as to whether a balance can be achieved in maintaining corporate policies that preserve the privacy interest of Chinese users and the Chinese government's efforts to maintain their Great Firewall. A first step in finding such a path can be located in the policies of Google, which has chosen not to host personally identifiable information on servers located within China.<sup>206</sup> This step provides an extra level of legal complexity that

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<sup>201</sup> *Id.*

<sup>202</sup> Statement Submitted for the Record by Mr. T. Kumar, Advocacy Director for Asia and the Pacific, Amnesty International USA, *Joint Hearing on the Internet in China*, *supra* note 3, at 208 (noting that "The Measures for Managing Internet Information Services" requires that ISPs and Internet Content Providers keep records of all subscribers' access to the Internet, account numbers, the addresses or domain names of the websites and telephone numbers used, maintain users' records for 60 days and provide such personally identifiable information to the "relevant authorities" when required).

<sup>203</sup> "It is our understanding that to refuse to comply would have subjected local employees in the local operation to potential criminal prosecution and criminal penalties, including imprisonment." Testimony of Michael Callahan, Senior Vice President and General Counsel, Yahoo! Inc., *2006 Joint Hearing on the Internet in China*, *supra* note 3, at 91.

<sup>204</sup> As has been discussed throughout this note, the Chinese government has demonstrated its ability and willingness to block websites which are not viewed to be consistent with the ideals of the PRC.

<sup>205</sup> Baidu is headquartered in Beijing and must, therefore, adhere to the restrictions of the Chinese government in order to maintain its business.

<sup>206</sup> *See supra* text accompanying notes 88-94 (discussing Google's policies and actions in the Chinese marketplace).

Chinese authorities would have to jump through in order to obtain user data.<sup>207</sup> A second step would be to enact policies that disassociate personally identifiable user data from subject-matter logs to preserve privacy.<sup>208</sup> Alternatively, retention periods for user data may be reduced to such a level that requests for timely production of logs will result in missing data.<sup>209</sup> Such methods are technologically feasible; however, the reaction by Chinese authorities can not be determined. Moreover, full compliance with Chinese law requires that such logs be maintained.<sup>210</sup>

A minority of Chinese Internet users have made use of proxy servers that allow them to bypass the Great Firewall.<sup>211</sup> IT companies should be encouraged to allocate research and development funds to further develop such technologies and make them more accessible to Chinese users.<sup>212</sup>

## VI. CONCLUSION

Wang, Shi and others have clearly suffered, and continue to do so, because of the gross failure of companies, such as Yahoo! and Microsoft, to anticipate the effects that their actions may have upon their users. As the previous sections show, Wang and Shi's claim against Yahoo! presents a unique nexus for the numerous issues facing IT Companies wishing to do business in China, both in terms of business strategies and potential liability.

Central to the debate is the existential question of whether IT companies should even participate in the Chinese marketplace. Clearly, Yahoo!'s actions have proven to be detrimental to the safety of its users and to its own reputation. The severe lambasting received from Congress and the substantial loss in public opinion has likely served as a lesson for IT companies.<sup>213</sup> GOFA, though well intentioned, falls short of its goal of protecting IT companies from coercion, as it only serves to punish those already in the thriving Chinese marketplace.<sup>214</sup>

The ATCA, however, has the potential to provide media attention and legal

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<sup>207</sup> IT companies operating in China would be able to cite to restrictions in their originating country or hosting country's laws that would delay or restrict transfer of personally identifiable information. IT companies may also find that they can require that additional information be supplied regarding the nature or intent of the request before any action be taken to fulfill the request.

<sup>208</sup> Stevenson, *supra* note 116, at 554.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> A proxy server is a server used by an end-user which will serve as a buffer between the user's client (internet browser) and the server that the user wishes to access. Free listings of IP addresses can be found online and, once configured properly, a user's web browser will be able to circumvent government imposed restrictions and allow viewing of websites or other blocked content as though the user was geographically located at the location of the proxy server address and not the actual local address. Activists have been known to smuggle proxy software into China and distribute it. Kissel, *supra* note 63, at 263-64 (citations omitted).

<sup>212</sup> There are numerous efforts by non-profit groups and private individuals to develop software and resources to enable Chinese Internet users to easily circumvent governmental controls such as DynaWeb and Freerate. *Id.* at 263. See also Mary Anne Simpson, *The Unleveling of Play: Internet Surveillance & Governmental Intrusion*, PhysOrg.com, Nov. 28, 2007, <http://www.physorg.com/news115486569.html> (describing the efforts of the Citizens Lab of the University of Toronto to develop and distribute educational materials that promote equal access to the Internet and make software, such as Psiphon, readily available to allow for the anonymous surfing of the Internet by individuals located behind the numerous governmental firewalls around the world).

<sup>213</sup> Boles, *supra* note 100, at A1.

<sup>214</sup> Stevenson, *supra* note 116, at 553.

recourse for parties aggrieved by companies such as Yahoo!<sup>215</sup> Wang and Shi's success in achieving a settlement demonstrates the positive value that the ATCA provides to human rights litigants.<sup>216</sup> The ATCA provides litigants with a public forum to bring attention to their issues such that lawmakers and investors can be made more aware of the activities of corporate firms.<sup>217</sup> *Khulumani* demonstrates a judicial willingness to find aiding and abetting liability for corporate complicity in human rights abuses,<sup>218</sup> but the bar set by Judge Katzman is exceedingly high and will deter many human rights organizations from seeking action under the ATCA. An alternative approach would adopt Judge Hall's lower standard based upon federal law<sup>219</sup> and encourage human rights organizations to use federal district courts as a forum for bringing corporate human rights abuses to attention. Moreover, although ATCA jurisprudence is still evolving, it is quickly becoming the preferred method by human rights organizations.<sup>220</sup> It would be advantageous to lawmakers to dismiss the current form of GOFA and instead roll some of its more useful edicts into a cause of action under the ATCA similar to the Torture Victims Protection Act.

Finally, it is recommended that a "Fourth Path" be sought by IT companies operating in China which attempts to balance the competing interests of user privacy and compliance with local laws.<sup>221</sup> The development of such a path will require a concerted effort by Cisco, Yahoo!, Microsoft, Google and others to establish minimum standards of disengagement, such as locating personally identifiable information outside of the repressive regime, and investing in research and development activities that provide Chinese users with alternate methods of accessing the Internet outside the Great Firewall.<sup>222</sup> If, however, IT companies decide to completely disengage from the Chinese marketplace, it is clear that China's domestic capability for developing and applying internet technologies has progressed to such a point that they could locally fill any void left by an exodus of western IT companies,<sup>223</sup> as clearly demonstrated by the presence, and success, of companies such as Alibaba and Baidu.<sup>224</sup>

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<sup>215</sup> Baue, *supra* note 8, at 12.

<sup>216</sup> *Joint Stipulation of Dismissal*, *supra* note 1, at 1.

<sup>217</sup> Baue, *supra* note 8, at 12.

<sup>218</sup> *Khulumani*, 504 F.3d at 277.

<sup>219</sup> *Id.* at 286.

<sup>220</sup> Roberts, *supra* note 23, at 8.

<sup>221</sup> See *supra* text accompanying notes 206-11 (describing proactive steps to secure user data).

<sup>222</sup> *Id.*

<sup>223</sup> Kelley, *supra* note 114, at 25.

<sup>224</sup> BusinessWeek News, *There's More Where Baidu Came From*, Aug. 22, 2005, BUSINESSWEEK, [http://www.businessweek.com/magazine/content/05\\_34/b3948025\\_mz011.htm](http://www.businessweek.com/magazine/content/05_34/b3948025_mz011.htm) (noting the success of Chinese IT companies on international exchanges and the expected increase in the number of local Chinese IT companies to meet the increasing domestic demand for internet technology).