

A GLOBAL FIRST AMENDMENT?

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INTRODUCTION

The Internet once held the promise of a utopian marketplace of ideas. It existed without borders and offered information to all who had a computer and a connection. Lawmakers from around the world, including some from the United States, feared this ultimate freedom and worried about the laws within their boundaries.¹ Meanwhile, technology companies disregarded territorial laws and fiercely maintained their autonomy, employing two principal arguments. First, these companies argued they had no physical way to monitor the monster of the Internet.² Second, technology companies argued that the Internet should be autonomous and international free speech rights should protect their actions regardless of their ability to physically control their reach.³ Today, most of the largest U.S. technology companies have succumbed to following not only U.S. law, but also the laws of nations around the world.⁴ With innovations in technology, regulating the previously unregulated Internet has become possible.⁵

In hopes of spreading American-style democracy and free speech around the globe, the United States wants to stop domestic technology companies from yielding to “totalitarian regimes” or “Internet-restricting” countries.⁶ In 2006, the U.S. House of Representatives (“House”)

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1. *See infra* Part I.

2. *See id.*

3. *See id.*

4. *See, e.g.*, JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD (2006).

5. *Id.*

6. Global Online Freedom Act of 2007, H.R. 275, 110th Cong. [hereinafter GOFA]. “Internet-restricting” countries are defined in GOFA: “A foreign country shall be designated as an Internet-restricting country if the President determines that the government of the country is directly or indirectly responsible for a systematic pattern of substantial restrictions on Internet freedom during the preceding 1-year period.” *Id.* § 105(a). The act also lists countries that are “Internet-restricting” until the President makes his determination. These are Belarus, Cuba, Ethiopia, Iran, Laos, North Korea, the People’s Republic of China, Tunisia,

introduced two bills to deal with this growing problem: the Global Online Freedom Act (“GOFA”) and the Global Internet Freedom Act (“GIFA”).⁷ Although neither bill was enacted in 2006, GOFA was re-introduced in 2007 and is still under consideration in 2008.⁸ GOFA is a lengthy bill aimed at prohibiting technology companies from assisting Internet-restricting countries with censorship programs.⁹ The bill includes both civil and criminal penalties.¹⁰ Unfortunately, GIFA has fallen off Congress’s to-do list and has not been reintroduced. A bill similar to GIFA should be adopted instead of a bill with GOFA’s aggressive, unrealistic tactics.

GIFA was a relatively short bill that would have provided 50 million dollars to counteract Internet jamming by totalitarian regimes.¹¹ The bill defined Internet jamming as “jamming, censoring, blocking, monitoring, or restricting Internet access and content by using technologies such as firewalls, filters, and ‘black boxes.’”¹² GIFA further focused on ways that technology and resolutions of the United Nations Human Rights Commission could stop Internet jamming.¹³

This Note explores whether there is a need for U.S. action to advocate a Global First Amendment and, if so, what that action should be. In this analysis, this Note also explores U.S. technology companies’ relationships with China. China is the best case study in this situation because its censorship policies and interaction with U.S. companies have been at the forefront of this debate.¹⁴ Further, this Note focuses on the actions of Yahoo, Google, Microsoft, and Cisco Systems in that market because their actions have been under fire recently.

As technology companies know, Chinese business is good for the United States and its ideals. The Chinese market is the newest, largest, and possibly most lucrative e-market in the world. Technology companies have taken and will continue to take the necessary steps to

and Vietnam. *Id.* § 105(a)(3). The Center for Democracy & Technology notes that absent from the list are allies of the United States in Iraq such as Libya, Syria, Saudi Arabia, and Uzbekistan, even though these countries also restrict their citizens’ access to the Internet. Memorandum from Paula Bruening & Leslie Harris, Ctr. for Democracy & Tech. (July 12, 2006), available at <http://www.cdt.org/international/censorship/20060712cdt.pdf>.

7. H.R. 4780, 109th Cong. (2006); Global Internet Freedom Act of 2006, H.R. 4741, 109th Cong. [hereinafter GIFA].

8. GOFA, *supra* note 6.

9. *Id.*

10. *Id.*

11. GIFA, *supra* note 7.

12. *Id.* § 6.

13. *Id.*

14. See, e.g., Jonathan Zittrain & Benjamin Edelman, Empirical Analysis of Internet Filtering in China (Apr. 2003) (Research Publication, Berkman Center for Internet & Society, Harvard Law School), available at <http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/2003-02.pdf>.

enter the Chinese market. They will not support an unrealistic law banning them from doing business in China. Not only will the maintenance and enhancement of the U.S. technology companies' positions in China help the United States economically, they will also keep a needed line of communication regarding democracy and free speech open. Therefore, the bill Congress enacts needs the support of the technology companies it is aimed at "protecting."¹⁵

A bill like GOFA, with idealistic goals that are unlikely to be supported by the technology community of the United States, is not the route the United States should take. In contrast, the aims of GIFA—developing technology to outsmart totalitarian regimes and pushing the global community to do the same—are more effective means to protect the transmission of the ideals of democracy and free speech in countries like China. A bill like GIFA would be more effective because domestic technology companies would back the bill. The bill will only be effective if actually supported by those who have to follow its mandates. Furthermore, China and other totalitarian regimes cannot avoid the impact of a law like GIFA. It might force these nations to address Internet freedom issues and work with the United States and the United Nations to commit to viable solutions. A law supportive of research and communication with technology companies and other Internet stakeholders is Congress's best option.

However, before passage of any bill, Congress should thoroughly analyze other solutions, such as self-regulation, because the U.S. government might not be able to solve this problem through legislation. Until the United States can act, technology companies should undertake self-regulation. Ultimately, the best way to curb free speech violations is through passage of a bill similar to GIFA and industry self-regulation.

Since the Internet was created, the friction between Internet free speech and territorial laws has been simmering. This Note discusses whether the Internet is ready for a step towards a solution. Part I of this Note discusses the development of the Internet and the corresponding need for a bill to promote democracy and free speech on the Internet. Part II outlines the two bills considered by Congress. By discussing the possible consequences of the bills, this section questions whether the United States should take action at this time and whether the United States has the authority to take such action. Part III explores options outside of the legal realm that could help alleviate both lawmakers' and free speech activists' concerns, while not expanding the United States' control in Internet governance. Finally, the Note argues that Congress should adopt a bill such as GIFA, in addition to supporting self-

15. GOFA, *supra* note 6, at § 201.

regulation until the bill can be passed, because this route is the moderate and most realistic course—a course that will win not only the support of U.S. companies, but also the support of those outside the United States.

I. BACKGROUND: HOW WE GOT TO THIS POINT

The Internet started out as uncharted territory with no controllers and no boundaries. When it began, people believed that the Internet would transcend the laws of individual countries and that the Internet community would create its own system of self-governance.¹⁶ Just ten years ago, governments had few choices regarding Internet content regulation: they could allow the free flow of information into their jurisdictions, prohibit all access to the Internet, or attempt to control the entire Internet.¹⁷ Technology companies rested on arguments of free speech and inadequate technology to claim that they did not have to and could not control their content. In only ten years, this vision of the Internet has changed.

The first indication of this impending transformation was Yahoo's fight with the French government over Nazi memorabilia. In April 2000, the French government began prosecuting Yahoo and Yahoo France for online auctions of Nazi memorabilia, a practice that is illegal in France.¹⁸ Yahoo staunchly denied the French court's right to restrict Yahoo's online content, which was accessed through servers in California.¹⁹ Yahoo also claimed that there was no technical way to comply with French orders to restrict French users' access to the content.²⁰ This argument had been relied on by the technology community as the basis for the unrestricted Internet, but French experts argued that Yahoo could identify 90% of French users through the combined use of geographical identification of IP addresses ("Geo-ID") and a question asking for one's nationality before accessing a Web page.²¹ The technology of Geo-ID firms forever changed the ability of technology companies to argue that identifying their users was impossible.²²

16. See GOLDSMITH & WU, *supra* note 4, at vii; David R. Johnson & David Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1378-92 (1996).

17. Johnson & Post, *supra* note 16, at 1394.

18. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1202 (9th Cir. 2006).

19. GOLDSMITH & WU, *supra* note 4, at 2-7. "Confronted by an obscure activist complaining about hate speech and invoking French law, [Yahoo] shrugged its high-tech shoulders." *Id.* at 2.

20. *Yahoo!*, 433 F.3d at 1203.

21. *Id.*

22. GOLDSMITH & WU, *supra* note 4, at 58-63. Geo-ID firms use technology that traces information's journey to determine the server from which the information originated.

In early 2001, Yahoo decided to voluntarily change its policy with respect to Nazi memorabilia and this action seems to have quelled the French government's prosecution of Yahoo.²³ When Yahoo brought the French orders to a U.S. court to determine if they could be enforced in the United States on First Amendment grounds, the U.S. Court of Appeals for the Ninth Circuit declined to answer the question because it said the case was not ripe without further action by France, as Yahoo had already seemingly complied.²⁴ Accordingly, the *Yahoo* case established two principles that countries now continue to capitalize upon. First, technology companies are physically and technologically able to identify their users. Second, such companies might be willing to compromise their dedication to U.S. free speech rights and abide by the laws of another nation.

Instead of a distinct body of law developing solely to govern the world of cyberspace, as some might have hoped and others had predicted,²⁵ laws regulating speech on the Internet have come to reflect each individual nation's existing speech law.²⁶ Nations have been successful in enforcing their Internet laws within their boundaries.²⁷ For example, the *Yahoo* case demonstrates that the French government was able to enforce its regulations; the Online Child Protection Act shows that the United States has also attempted to enforce its own regulations on the Internet; and the compliance of Yahoo and Google with Chinese regulation shows that China is successfully restricting access to the Internet through a combination of technology, law, and citizen education.²⁸

Id. at 60. A network of many databases locates the user with 99 percent accuracy in determining the user's country. *Id.* at 61. Geo-ID firms were not all bad for the Internet companies. The technology also aided Internet companies in their advertising. With this technology, companies can also advertise local products to individual users based on their location, which is the reason Cyril Lionel Hourii first developed Geo-ID. *Id.* at 59.

23. *Yahoo!*, 433 F.3d at 1205.

24. *Id.* at 1221.

25. GOLDSMITH & WU, *supra* note 4, at 27; Johnson & Post, *supra* note 16, at 1378-92.

26. John B. Morris, Jr. et. al., *The Global Nature of Speech on the Internet – What Kind of Speech is Most Likely to be Regulated?*, in 2 INTERNET LAW AND PRACTICE § 24:61 (2007); see also Markus Müller, *Who Owns the Internet? Ownership as a Legal Basis for American Control of the Internet*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 709, 724 (2005) (arguing that the United States will have a hard time attempting to regulate the Internet in other countries).

27. See, e.g., *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. Comm. on International Relations*, 109th Cong. 103 (2006) [hereinafter *The Internet in China Hearing*], available at <http://www.foreignaffairs.house.gov/archives/109/26075.pdf>.

28. Zittrain & Edelman, *supra* note 14.

A. *The Situation in China*

Since 1994, the first year Chinese citizens had access to the Internet, China has restricted Web content inside its boundaries.²⁹ From a technological standpoint, China uses a system of routers and software programs known as the “Great Firewall of China.”³⁰ This system pores over the Internet for specific keywords relating to political ideologies and historical events that China has banned from discussion and then filters these forbidden topics out.³¹ Legally, national agencies control information that comes into China from the outside world.³² In late 2005, China set new regulations affecting news providers, including entities dubbed “Internet News Information Services.”³³ This new step demonstrates that China has begun regulating its citizens’ electronic and print news sources with the same laws. These laws prohibit:

[J]eopardizing the security of the nation, divulging state secrets, subverting state power, or jeopardizing the integrity of the nation’s unity; harming the honor or the interests of the nation; inciting hatred against peoples, racism against peoples, or disrupting the solidarity of peoples; disrupting national policies on religion, propagating evil cults, and propagating feudal superstitions; spreading rumors, compiling and promulgating false news, disturbing social

29. OpenNet Initiative: Bulletin 012, China Tightens Controls on Internet News Content Through Additional Regulations, <http://opennet.net/bulletins/012/> (last visited Apr. 10, 2008).

30. Richard Clayton, Steven J. Murdoch, & Robert N. M. Watson, Ignoring the Great Firewall of China 1 (June 2006) (Paper Presented at the 6th Workshop on Privacy Enhancing Technologies), available at <http://www.cl.cam.ac.uk/~rnc1/ignoring.pdf>.

31. *Id.*

It is straightforward to determine that the keyword-based blocking is occurring within the routers that handle the connections between China and the rest of the world. These routers use devices based upon intrusion detection system (IDS) technology to determine whether the content of packets matches the Chinese Government’s filtering rules. If a connection from a client to a webserver is to be blocked then the router injects forged TCP resets (with the RST flag bit set) into the data streams so that the endpoints will abandon the connection. Once blocking has begun, it will remain in place for many minutes and further attempts by the same client to fetch material from same website will immediately be disallowed by the injection of further forged resets.

Id. at 1.

32. “Race to the Bottom”: Corporate Complicity in Chinese Internet Censorship, 18 HUMAN RIGHTS WATCH, Aug. 2006, available at <http://www.hrw.org/reports/2006/china0806/china0806web.pdf> [hereinafter *Race to the Bottom*].

33. *Id.* “Internet News Information Services” are organizations “involved in electronically transmitting content to the public that satisfies the expansive definition [given by the Chinese] of ‘News Information.’” OpenNet Initiative, *supra* note 29. Thus, the definition encompasses anyone who provides any news content on the Internet, including individuals. OpenNet Initiative, *supra* note 29.

order, or disrupting social stability; spreading obscenity, pornography, gambling, violence, terror, or abetting the commission of a crime; insulting or defaming third parties, infringing on the legal rights and interests of third parties; inciting illegal assemblies, associations, marches, demonstrations, or gatherings that disturb social order; conducting activities in the name of an illegal civil organization; and any other content prohibited by law or rules.³⁴

These regulations give the Chinese government the broad power to censor anything it finds subversive.

With foreign companies, China has not taken the French route. Instead of suing companies, they have negotiated with them, and these companies have agreed to play by China's rules to gain access to the Chinese e-market. Both Yahoo and Google admit to filtering words such as "democracy," "human rights," and others from their search results in China.³⁵ Spokespeople for both companies contend that they are only adhering to the laws and customs of other nations.³⁶ Yahoo used a similar argument after giving the Chinese government information leading to the imprisonment of journalist Shi Tao.³⁷ After the Chinese government warned journalists not to emphasize the anniversary of the Tiananmen Square massacre, Tao sent an email to a U.S. journalist about the warning.³⁸ Tao was sentenced to ten years in prison for this action.³⁹ Information provided by Yahoo may have also led to the imprisonment of a Chinese civil servant, Li Zhi, who criticized local government officials online.⁴⁰ Similarly, Microsoft has filtered certain words that offend the Chinese government from its MSN Spaces blog service and

34. Congressional – Executive Commission on China Virtual Academy, Provisions on the Administration of Internet News Information Services, Art. 19, <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingl=24396> (last visited Apr. 10, 2008) (internal numbering omitted), cited & quoted in OpenNet Initiative, *supra* note 29.

35. Tom Zeller, Jr., *Internet Firms Facing Questions About Censoring Online Searches in China*, N.Y. TIMES, Feb. 15, 2006, at C3.

36. *Id.*; Robert Firpo-Cappiello, *Search Engine Update*, 11 No. 5 INTERNET L. RESEARCHER 9 (2006); Erica Werner, *House Committee Head Lambasts Yahoo Inc.*, BREITBART.COM, Nov. 6, 2007, http://www.breitbart.com/article.php?id=D8SO2NP06&show_article=1.

37. See, e.g., James Heffernan, Comment, *An American in Beijing: An Attorney's Ethical Considerations Abroad with a Client Doing Business with a Repressive Government*, 19 Geo. J. Legal Ethics 721 (2006). On November 6, 2007, at a House Committee Hearing, Yahoo General Counsel, Michael Callahan, admitted that some Yahoo employees knew that China wanted information on Tao for disclosing "state secrets." Werner, *supra* note 36. In a previous committee meeting, Callahan had said that Yahoo didn't know the nature of the charges against Tao when it gave China the information. *Id.*

38. Heffernan, *supra* note 37.

39. *Id.*

40. Zeller, *supra* note 35.

shut down at least one blog at the request of the Chinese government.⁴¹ On the technical side, Cisco Systems sells its surveillance equipment to China, which uses the hardware to censor the Internet and other communications within its borders.⁴²

These companies have a strong incentive to bargain with China because China has a powerful bargaining chip on its side—the Chinese economic market. China has a population of over 1.3 billion with over 162 million Chinese accessing the Internet.⁴³ China's e-market is even more enticing to U.S. companies because its citizens are young, have disposable income, and want to buy Western products via the Internet.⁴⁴ Yahoo, Google, and Microsoft's advertisers want access to this market.⁴⁵

Another advantage aiding China in the bargaining process is that China does not need the Yahoo's and Google's of the world. China's homegrown search engine, Baidu, is the fifth most popular Web site in the world and has over one hundred million users.⁴⁶ Baidu relies on its expertise in Chinese language and culture to hang on to its customer base.⁴⁷ If U.S. technology companies refuse to bargain with China, China could cut them out of the market completely, and its citizens would still have ample Internet access. Although withdrawal of U.S. technology companies from the Chinese e-market would leave a hole, it would be eagerly filled with homegrown Chinese companies. In fact, because of the difficulty of entering the market in the first place, both Google and Yahoo have teamed with local Chinese companies. Google "has a small stake" in Baidu, and Yahoo holds 40% of Alibaba, a Chinese e-commerce company.⁴⁸ Yahoo's daily Chinese operations are now controlled by Alibaba and people have accused Yahoo of using this merger to withdraw its presence and responsibility from the Chinese

41. *Id.*

42. *Id.*; Foreign Press Center Briefing, Reporters Without Borders (Feb. 28, 2006), available at <http://fpc.state.gov/fpc/62387.htm>.

43. See China Population Information and Research Center, China Population, <http://www.cpirc.org.cn/en/eindex.htm> (last visited Apr. 10, 2008) (Chinese population counter). As of July 2007, China had 162 million Internet users (31.7% annual growth rate), but with only a 12.3% penetration rate. See CHINA INTERNET NETWORK INFORMATION CENTER, STATISTICAL SURVEY REPORT ON THE INTERNET DEVELOPMENT IN CHINA (2007), available at <http://www.cnnic.cn/download/2007/20thCNNICreport-en.pdf> [hereinafter CNNIC].

44. Sean Hargrave, *Chinese Ecommerce: Fortune Awaits*, NEW MEDIA AGE, Jan. 27, 2005, at 23.

45. See generally *id.*

46. Clare Goff, *International Search: Eastward Ho!*, NEW MEDIA AGE, June 1, 2006, at 21; see also Shu-Ching Jean Chen, *China is No. 2 Online*, FORBES.COM, Jan. 12, 2007, http://www.forbes.com/business/2007/01/12/china-internet-stats-biz-cx_jc_0112china.html.

47. Goff, *supra* note 46.

48. *Id.*; Zeller, *supra* note 35.

market.⁴⁹

With power over technology and the law, shrewd control over the Chinese people completes the effective censorship of the Chinese Internet. China has learned to appease its citizens. It gives them what they want from the Internet—mainly entertainment⁵⁰—and has taught them not to push the limits.⁵¹ It even subtly pushes them in the right direction when it feels the need. For example, the Chinese government, under a program called “Let the Winds of a Civilized Internet Blow,” recruited 500 student volunteers as moderators to sign in to school Internet forums anonymously at Shanghai Normal University.⁵² The moderators introduce acceptable discussion themes, point “negative conversations” in the right direction, and report anything they find offensive to the university webmaster.⁵³ The moderators see their role as guidance counselors, more than as spies or censors.⁵⁴ This program illustrates how Chinese citizens are more amenable to censorship when compared to Americans and shows acquiescence in their way of life. They are not looking for rescue by the U.S. Congress.

B. Worldwide Reaction to the Situation in China

The U.S. technology companies’ actions in China have not gone unnoticed. Human rights groups such as Amnesty International, Reporters without Borders, and Human Rights Watch have protested the activities of U.S. technology companies, but so far no concrete steps have been taken to prohibit the behavior.⁵⁵ Working with the Chinese

49. William Thatcher Dowell, *Internet, Censorship, and China*, 7 GEO. J. INT’L AFF. 111 (2006); see also Werner, *supra* note 36.

50. David Barboza, *Internet Boom in China is Built on Virtual Fun*, N.Y. TIMES, Feb. 5, 2007, at A1. “And in China, the No. 1 priority for Internet users is entertainment; in the U.S., it’s information. That’s why Google is dominant in the U.S., but Tencent rules China.” *Id.* at A4 (quoting Richard Ji, Analyst, Morgan Stanley). The article continues to explain how Tencent, a site that combines social networking, video sharing, and an online virtual world, thrives in China and U.S. companies fall short mainly because they are not in touch with what Chinese Internet users want. *Id.*

51. Although the government does not prosecute mass groups of Internet users who break small laws, it will punish one egregious case and use that person as an example to all not to test the waters. Perry Keller, *China’s Impact on the Global Information Society*, in REGULATING THE GLOBAL INFORMATION SOCIETY 265, 268 (Christopher T. Marsdsen ed., 2000).

52. Howard W. French, *As Chinese Students Go Online, Little Sister is Watching*, N.Y. TIMES, May 9, 2003, at A3.

53. *Id.*

54. *Id.*

55. See Irrepressible.info, <http://irrepressible.info/> (last visited Apr. 10, 2008) (Amnesty International’s campaign); Press Release, Reporters Sans Frontières, Government Unblocks Access to Wikipedia’s English-Language Version (Oct. 12, 2006), available at http://www.rsfb.org/article.php?id_article=15374 (example of the activism of Reporters Without Borders); *Race to the Bottom*, *supra* note 32 (Human Rights Watch perspective).

government is still a business decision made by these technology companies, although that might change soon.

On February 15, 2006, in between the introduction of the Global Internet Freedom Act of 2006 on February 14th and the Global Online Freedom Act of 2006 on February 16th, the House held a hearing on the issue entitled “The Internet in China: A Tool for Freedom or Suppression?”⁵⁶ Representatives from Google, Yahoo, Microsoft, and Cisco Systems gave testimony at the hearing. The companies elaborated on the same theme: complying with local laws and a small presence in China is better for bringing about democracy than no presence at all.⁵⁷ The House put Yahoo under further pressure at a more recent hearing entitled “Yahoo, Inc.’s Provision of False Information to Congress,” where Representatives pounded Yahoo’s C.E.O. and General Counsel about inaccuracies in its General Counsel’s statements at the first hearing.⁵⁸ At this hearing, Yahoo apologized for its actions directly to Tao’s mother, but it did not endorse GOFA, like the Representatives had wanted.⁵⁹

The State Department has also identified the issue as a problem. Secretary of State Condoleezza Rice announced the creation of the Global Internet Freedom Task Force (“GIFT”) in February 2006, and GIFT released its strategy in December 2006.⁶⁰ The Task Force is taking a slow, yet responsible approach to addressing the myriad of issues the problem presents. Its strategy is based on monitoring, responding to threats, and advancing Internet freedom.⁶¹ First, monitoring Internet freedom means that the United States will continue to report on Internet freedom in the annual country reports on human rights, with an additional section in future reports describing how the Internet restrictions occur, the legal authority for the restrictions in that country, and the government entities that carry out those restrictions.⁶² The future reports will also add information about the penalties in each

56. *The Internet in China Hearing*, *supra* note 27.

57. *Id.*

58. *Yahoo! Inc.’s Provision of False Information to Congress: Hearing Before the H. Comm. on Foreign Affairs*, 109th Cong. (2007); *see also* Postings of Declan McCullagh to The Iconoclast, http://www.news.com/8301-13578_3-9811598-38.html (Nov. 6, 2007) [hereinafter Postings of Declan McCullagh].

59. Postings of Declan McCullagh, *supra* note 58.

60. Press Release, U.S. Dep’t of State, Bureau of Democracy, Human Rights, and Labor, Global Internet Freedom Task Force (GIFT) Strategy: A Blueprint for Action (Dec. 28, 2006), *available at* <http://www.state.gov/g/drl/rls/78340.htm>.

61. *Id.*

62. Paula Dobriansky, Under Secretary for Democracy & Global Affairs, U.S. Dep’t of State, Global Internet Freedom Task Force Presentation (Dec. 20, 2006), *available at* <http://www.state.gov/g/rls/rm/78142.htm>.

country for exercising free speech rights through the Internet.⁶³ Second, the response to threats against Internet freedom will focus on working with international partners and the technology industry to address the problem, including addressing the problem with leaders during other international meetings with the United States.⁶⁴ Third, advancing Internet freedom will entail promoting access to the Internet.⁶⁵ GIFT announced that it has spent over \$250 million in its efforts thus far in bringing the Internet to developing countries and these efforts will continue.⁶⁶

GIFT is part of the State Department and does not work directly with Congress. Although legislative action on Internet freedom is important to GIFT and the issues are highly intertwined, GIFT and Congress have different aims and may be working in different directions on these issues. Any action or findings by GIFT will not necessarily translate into a law from Congress, and a law from Congress will not change GIFT's goals. GIFT has broad, but laudable ideals. Whether these ideals will transform into action is yet to be seen because the Task Force has only been talking thus far. One of GIFT's most promising goals yet is to develop a secure site for journalists and human rights defenders in closed countries.⁶⁷ Ideas like this one will help make positive changes, but some may be frustrated by ideas and want action. Congress is trying to take more immediate action.

II. LEGISLATIVE ACTION

U.S. Representatives and Senators from all shades of the political spectrum are calling for some kind of solution to prevent China from censoring the Internet.⁶⁸ During the current session, Congress may pass a bill that could put these calls into law. Congressman Christopher Smith (R - NJ) reintroduced GOFA on January 8, 2007.⁶⁹ Although Congress has not taken major action on GOFA, it is still under consideration in 2008.⁷⁰ Unfortunately, GIFA has yet to be reintroduced and seems to be a low priority compared to GOFA.

The first law in this area must be effective in bringing greater access to the Internet for Chinese citizens. If the law only prevents U.S.-based

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Libby George, *H.R. 4780 - Global Online Freedom Act of 2006*, CONG. Q. BILL ANALYSIS, July 14, 2006.

69. *Smith Reintroduces the Global Online Freedom Act*, GOV'T TECH., Jan. 9, 2007, <http://www.govtech.net/news/news.php?id=103194>.

70. H.R. 275, 110th Cong., 154 CONG. REC. H818 (2008).

companies from entering the Chinese market, the U.S. will lose two opportunities: the opportunity to bring greater Internet access to Chinese citizens and the opportunity for its technology companies (and its goods producers through the technology companies) to enter the world's largest economic market. The insights of the American companies that are working in China are important to this decision and the success of the law. Considering both GOFA and GIFA, the tools provided in GIFA work towards a long-term solution that would enable U.S. companies to continue doing business in China. GOFA is an overzealous attempt to take a bold stand on the issue, but the efforts could take away all hope of working with China and its citizens. Therefore, Congress should pass a bill resembling GIFA because it will not force U.S. technology companies out of China for good; instead it will allow U.S. technology companies to stand strong in China and gradually introduce free speech ideals.

Introduction of free speech principles could follow the path of the gradual introduction of free-market principles into China's economy. Slow growth in China's general economy, mirroring U.S. free-market principles, has been beneficial for both Chinese and U.S. citizens, although Americans always push for a "big bang."⁷¹ In comparison to Americans, Chinese citizens are much more likely to accept gradual change.⁷² Because it is a Chinese system, the best way to change it is to work with the accepted norms of the Chinese people.

Two bills have been introduced in the House: a "big bang" bill that advocates quick, radical change and a gradual bill that recognizes that slow change is effective change. The more aggressive bill, GOFA, operates under the basic assumption that U.S. technology companies must comply with the Universal Declaration of Human Rights.⁷³ GOFA has provisions for redirecting the policy of the United States, maintaining minimum corporate standards, and prohibiting sales of surveillance equipment to China.⁷⁴ The bill would shape policy by creating an Office of Global Internet Freedom to coordinate the many mandates of the bill as well as give the President the power to designate "Internet-restricting" countries.⁷⁵ The "Minimum Corporate Standards for Online Freedom" prohibit a search engine from operating computer hardware and from filtering out certain terms in Internet-restricting

71. Barry Naughton, *From Plan to Market: China's Gradualist Approach*, in CHINA IN THE NEW MILLENNIUM: MARKET REFORMS AND SOCIAL DEVELOPMENT 87, 88 (James A. Dorn ed., 1998).

72. *Id.*

73. GOFA, *supra* note 6.

74. *Id.*

75. *Id.* §§ 101, 104, 105.

countries.⁷⁶ The bill also would require each company to provide a report to the Office of Global Internet Freedom on foreign officials' requests for censorship.⁷⁷ It would outlaw giving technology companies' users' personally identifiable information to Internet-restricting countries.⁷⁸ It further would provide a private right of action and civil penalties against the companies of up to \$2 million or an individual punishment for willful violation of up to \$100,000 or five years in jail.⁷⁹ Violation of the search engine provisions would carry a fine of up to \$10,000 for the company or up to \$10,000 and one year in jail for individuals who willfully violate the law.⁸⁰ Finally, the bill would provide for a feasibility study about the exportation of technology to Internet-restricting companies for the purpose of Internet censorship.⁸¹

GIFA took a technological approach, attacking the problem not by prohibiting activity, but by trying to counteract the actions of the Internet-restricting governments.⁸² GIFA also would have established an Office of Global Internet Freedom under the International Broadcasting Bureau.⁸³ The first task of the Office would be to report to Congress on the state of Internet jamming in other nations and the technology these nations use to accomplish Internet jamming.⁸⁴ Only Internet jamming that violates the Universal Declaration of Human Rights would be subject to the bill, so there would be some discussion of which type of Internet jamming the United States is working against.⁸⁵ The Office would be given \$50 million for two years.⁸⁶ The bill also would have directed the United States to submit a resolution to the United Nations at the next meeting to address this issue.⁸⁷ Finally, the bill would have required deployment of anti-Internet jamming technology as soon as possible.⁸⁸

GOFA has received more press attention and is backed by fourteen human rights groups.⁸⁹ Its sponsor, Representative Smith, is a vocal

76. *Id.* §§ 201 - 207.

77. *Id.* § 204.

78. *Id.* § 202.

79. GOFA, *supra* note 6, at § 206.

80. *Id.*

81. *Id.* § 301.

82. GIFA, *supra* note 7.

83. *Id.* § 4(a).

84. *Id.* § 4(c).

85. *Id.* § 4(d).

86. *Id.* § 4(e).

87. *Id.* § 5(2).

88. GIFA, *supra* note 7, at § 5(3).

89. *Human Rights Crusaders Launch Web Freedom Campaign*, WARREN'S WASH. INTERNET DAILY, July 21, 2006.

advocate for these immediate changes.⁹⁰ The bill has bipartisan support, although real action has stalled.⁹¹ GIFA is less well-known, does not pack as much political punch, and has yet to be re-introduced this session, but it has the tools to make changes that will last.

A. Is the United States Ready for the Consequences of Legislation?

Although Congress could pass one, both, or neither bill, the actual bills are less important than the ideas for which each stands. The United States needs a law that will aid its technology companies in providing access to ideas of democracy and free speech, while also allowing those companies to actually enter the markets of Internet-restricting countries.

In fact, Google, Yahoo, Microsoft, and Cisco Systems asked for such a tool at the Congressional hearing on the subject.⁹² For example, Google Vice President for Corporate Communications and Public Affairs Elliot Schrage suggested both a “role for joint industry action” and a “role for government.”⁹³ He reaffirmed Google’s commitment to their slogan, “Don’t be evil,” which has been questioned recently because of the company’s activity in China, and said Google continues to disclose its filtering to Chinese users, maintains its users’ privacy, and continues access to the Chinese-language Google.com service.⁹⁴ Although Google has shown more concern than other technology companies about its image in this context, each company echoed Google’s sentiments to some degree at the Congressional hearing.⁹⁵

Only Microsoft directly addressed the possibility of Congress “enacting legislation that effectively forces [Microsoft] to withdraw from China.”⁹⁶ It is hard to discern from the testimony whether these companies think that a law forcing them to forget the Chinese market is a real possibility, but it seems that the companies’ representatives were not begging for forgiveness or for the rejection of any impending law. Instead, the companies seem to be calmly urging moderate change with the aid of the international community.

In the most recent congressional hearing on the issue, Yahoo expressed regret that its actions led to the imprisonment of Tao, but it still did not endorse GOFA.⁹⁷ Although Yahoo now recognizes its error

90. *The Internet in China Hearing*, *supra* note 27 (opening statement of Rep. Christopher Smith), *available at* http://www.house.gov/list/press/nj04_smith/opchinahearing.html.

91. H.R. 275, 110th Cong., 154 CONG. REC. H818 (2008).

92. *The Internet in China Hearing*, *supra* note 27.

93. *Id.* at 67.

94. *Id.* at 70.

95. *Id.*

96. *Id.* at 61.

97. Werner, *supra* note 36.

in giving information about Tao to the Chinese government, Representatives Smith and Chris Lantos held Yahoo CEO, Jerry Yang, and General Counsel, Michael Callahan, completely responsible for China's abuse of the Internet.⁹⁸ The Representatives' one-sided "grilling" led Internet bloggers to post Yahoo-sympathetic blogs, accusing the Representatives of being hypocritical about Yahoo's response to Chinese law when the U.S. currently wants the companies to behave in a similar way when the U.S. requests information for anti-terrorism purposes.⁹⁹

Agreeing with the need for modest, sensible change in the international community does not mean the United States would be allowing powerful technology companies to lead the way, while putting human rights issues in the backseat. Instead, it is a realistic acknowledgement that a drastic measure could lead to rapid disaster. Disaster could result if Congress jumps into a bill such as GOFA. U.S. technology companies could be effectively forced out of the Chinese market by the mandates of GOFA before the problem is fully developed. Right now, China needs U.S. technology companies less than the technology companies need the Chinese market. This situation is a broader problem than Congress anticipates. Therefore, the solution to the problem cannot be instantaneous, but will require research and investment. Slow change is important for three reasons, without even considering industry support. First, this problem is still developing and should be fully explored before Congress takes a step that it might regret. Second, China and nations like it will do without instead of accepting a free Internet inside their borders. Third, U.S. companies need the Chinese market, not the other way around.

First, Congress needs more information about this problem before it can truly help technology companies protect democracy and free speech on the Internet. The United States is not the only entity concerned about the future of the Internet—various stakeholders have different ideas and goals for progress on the Internet and Congress should take these stakeholders into account.¹⁰⁰ Stakeholders of the Internet include ordinary household users around the world, companies that provide access to the Internet and the infrastructure of the Internet, companies that use the Internet as an intra-company tool and a way to communicate with customers, non-profit organizations that use the Internet for fundraising and recruiting, the media, Internet interest groups, and national and local governments.¹⁰¹ U.S. lawmakers should

98. Postings of Declan McCullagh, *supra* note 58.

99. *Id.*

100. RICHARD SPINELLO, CYBERETHICS: MORALITY AND LAW IN CYBERSPACE 31-35 (2001).

101. *Id.*

be careful to keep other stakeholders in mind when making decisions that affect the global Internet: "Indeed, it can be plausibly argued that there is a moral obligation to deploy Internet-related technologies and to develop rules and policies for cyberspace in a conscientious manner that manifests respect for the rights and legitimate interests of these stakeholders."¹⁰² Other stakeholders may see a bold move by Congress as a step back for the democratic process because it does not take other interested groups into consideration.

When considering these stakeholders, Congress should also address whether it should legislate in this area at all or whether it should explore a different sort of Internet governance such as self-governance or an international governing body.¹⁰³ GIFT is already heading in the right direction and its work could help Congress make a more informed decision. Any bill passed should provide an allocation of funds to ensure a report on this issue is created. A law creating rules for U.S. companies will affect all the stakeholders of the Internet indirectly because many Internet stakeholders rely on U.S. companies for their Internet access and information. A U.S. law could become the norm, but Congress must ask whether it wants to be seen as pushing its ideals onto other governments.

The Internet is still young, and continuous development changes the Internet's problems from day-to-day. For example, Nitin Desai, the chair of the United Nations Internet Governance Forum, described the infancy of Internet debates with a useful analogy. He compared the current debates about the Internet to debates about the chemical composition of ink and the design of paper when the printer was invented—illustrating that people don't know where the industry is headed right now and could be worrying about the wrong problems.¹⁰⁴ Congress does not want to pass a law that will become quickly dated like many other recent technology laws.¹⁰⁵ More time and research will allay these problems and produce better results.

Second, China will do without and can do without U.S. technology companies. The U.S. Congress is being quite self-righteous if it thinks that the U.S. technology companies have enough clout in China to change Chinese laws and regulations by withholding their services.¹⁰⁶

102. *Id.* at 35.

103. *See infra* Part III.

104. K.C. Jones, *UN Forum Focuses on Internet's Future*, TECHWEB TECH. NEWS, Oct. 12, 2006, <http://www.techweb.com/wire/ebiz/193300316>. For more information on the Forum, see The Internet Governance Forum (IGF), <http://www.intgovforum.org/> (last visited Apr. 10, 2008).

105. Urs Gasser, *Regulating Search Engines: Taking Stock and Looking Ahead*, 8 YALE J. L. & TECH. 201, 225 (2006).

106. *See id.* at 226. For example, Microsoft's Managing Director of Federal

China has its own companies that will take the place of those forced out.¹⁰⁷ Joseph Wang, a China Derivatives Researcher and Software Developer at QuantLib, suggests that China would “secretly jump for joy” if Congress passed GOFA because it would allow Chinese domestic companies to expand.¹⁰⁸ He said that China allows U.S. technology companies now because of various World Trade Organization commitments it has made, not because it needs their technology expertise.¹⁰⁹

In terms of search engine popularity, U.S. companies are still not the most popular in China.¹¹⁰ In 2006, Baidu, a Chinese search engine, had at least 56.8% of the market share.¹¹¹ Google followed with 32.8% of the market, while Yahoo had less than 5% of the market.¹¹² However, Google’s apparently strong market position actually dropped from past years,¹¹³ while Baidu has shown continued growth with revenues from the fourth quarter of 2006 increasing 136.1% from the fourth quarter of 2005.¹¹⁴ Recent reports from Baidu show that it has 63.7% of the Chinese market as of October 2006 and Google only has 19.2%, but these reports have been denied by Google.¹¹⁵ Baidu relies on two Chinese surveyors for its information: iResearch and the Chinese Internet Network Information Center (“CNNIC”). Google has questioned the methodology used by these centers.¹¹⁶ The CNNIC’s most recent report shows that Baidu has 74.5% of the market and Google has 14.3%, although in the “High End User Market,” the two are much closer with 47.72% and 42.32% respectively.¹¹⁷ Whatever the

Government Affairs, Jack Krumholz, said that the bill could create more restrictions or force a total pull-out from China. Anne Broache, *House Panel OKs Global Rules for U.S. Net Firms*, CNET NEWS.COM, June 22, 2006, http://www.news.com/House-panel-OKs-global-rules-for-U.S.-Net-firms/2100-1028_3-6087112.html.

107. See *supra* Part II.A (discussing Baidu and Alibaba).

108. Email from Joseph Wang, China Derivatives Researcher & Software Developer, QuantLib, to author (Jan. 12, 2007) (on file with author).

109. *Id.* China became part of the WTO on December 21, 2001. For various commitments made, see Press Release, World Trade Organization, WTO Successfully Concludes Negotiations on China’s Entry (Sept. 17, 2001), available at http://www.wto.org/English/news_e/pres01_e/pr243_e.htm.

110. Goff, *supra* note 46, at 21.

111. Loren Baker, *Google & Baidu Dominate China Search Market*, SEARCH ENGINE J., Apr. 3, 2006, <http://www.searchenginejournal.com/?p=3208>.

112. *Id.*

113. *Id.*

114. *Baidu Posts Quarterly Search Engine Revenue Increase*, CHINATECHNEWS.COM, Feb. 15, 2007, <http://www.chinatechnews.com/2007/02/15/5005-baidu-posts-quarterly-search-engine-revenue-increase/>.

115. *Last week in China – A Lot of Baidu and a Bit of Microsoft and Google*, SEARCH ENGINE J., Dec. 17, 2006, <http://www.searchenginejournal.com/?p=4135>.

116. *Id.*

117. CHINA INTERNET NETWORK INFORMATION CENTER, 2007 SURVEY REPORT

precise numbers, Baidu is the clear leader in the Chinese Internet search market.¹¹⁸

For many Americans, it is hard to imagine a company more successful than Google, but American and Chinese Internet users are very different and Google has yet to capture what Chinese Internet users want. Chinese Internet users do not rely on their highly-censored Internet for information or business communication; instead, they use the Internet for entertainment and discussion.¹¹⁹ The success that Google has found in the Chinese markets stems from “white-collar urban professionals in the major Chinese cities, aspirational types who follow Western styles and sprinkle English words into conversation.”¹²⁰ These people like U.S. products and are not tough converts for U.S. companies. A harder crowd to win over is the teenagers who see nothing wrong with downloading MP3s and videos for free from Chinese sites, those who play in virtual worlds for hours in Internet cafes, and those who value Chinese companies because of nationalistic tendencies.¹²¹ While U.S. technology companies try to break through to the Chinese market, they do not have the power to pull their services as a threat to the Chinese government.

In addition, the Chinese government’s system of filtering would not change with U.S. companies leaving the market. China’s filtering system is backed up by a team of more than thirty thousand “Internet spies” and a national culture that looks down upon dissent.¹²² It reinforces its position with self-regulation—not every Chinese citizen is aching to search for terms like democracy and human rights.¹²³ Although it is impossible to determine the number of citizens who find China’s practices oppressive, Wang argues that most Chinese citizens don’t care much about their censorship because they can do most of what they want.¹²⁴ Many Chinese citizens feel like they have already been

ON SEARCH ENGINE MARKET IN CHINA (2007). “High End Users” are “non-student users aged 25 and above, receiving Bachelor’s Degree and above, having a monthly income of over 3,000 yuan.” *Id.* Therefore, this market may be the prime market for American companies and the “High End Users” would be disappointed if they pulled out of China. However, the majority of Chinese users do not fall into this category.

118. However, Google was ranked number one in terms of quality during a study by Keynote. Press Release, Keynote Systems, Google Poses Strong Challenge to Leader Baidu in China Search Engine Market (Jan. 18, 2006), *available at* http://www.keynote.com/news_events/china/06jan18.html.

119. Clive Thompson, *Google’s China Problem (And China’s Google Problem)*, N.Y. TIMES, Apr. 23, 2006.

120. *Id.*

121. *Id.*; *see also* Barboza, *supra* note 50.

122. Dowell, *supra* note 49.

123. *Id.* “Many Chinese people share a cultural disinclination to disclose information outside established personal and institutional networks.” Keller, *supra* note 51.

124. Email from Joseph Wang, *supra* note 108; *see also* Thompson, *supra* note 119.

transformed by the Internet and they are not pushing their luck: "If the Internet is bringing a revolution to China, it is experienced mostly as one of self-actualization" ¹²⁵ China has not prosecuted anyone for reading information; its main concerns are organizations and Web posters, which are easier to monitor. ¹²⁶ The Chinese government will actively prosecute individuals to teach lessons to all, but will not prosecute vast numbers of individuals. ¹²⁷ Self-censorship does a far better job than a formal government censorship program. ¹²⁸ Plus, China is already trying to placate its citizens' never-ending appetite for information on the Internet and has started at least 150 new Web sites. ¹²⁹

Some experts predict that the Chinese system will eventually bust because the size of the Internet will literally overwhelm it, but this would be the progress of time, not instant regulation. ¹³⁰ Wang, however, disagrees with this prediction altogether. He argues that China's control is maintainable because it is light enough to let Chinese citizens do most of the Internet activities they want to do. ¹³¹

Chinese citizens are comfortable with the way their government works. ¹³² Through GOFA, Congress wants to attack the free speech problem in the American way—directly and with a "big bang," ¹³³ however, this type of change is not the Chinese way. Congress could learn much about how to approach change in China by looking at the gradual growth of China's free-market economy. ¹³⁴ It teaches two lessons. First, Chinese culture is more receptive to gradual change than rapid revolution. ¹³⁵ Second, the free-market economy has introduced levels of democratic thinking previously thought impossible in totalitarian China. ¹³⁶ A gradual and well-developed plan for introduction of U.S. Internet ideals of democracy and free speech should follow the same path as the free-market economy—slow growth gradually opening new territory. China's shift to a market economy has been characterized by some problems, but it has continued heading in

125. Thompson, *supra* note 119.

126. *Id.*

127. Known as "killing the chicken to frighten the monkeys," this technique is often used to ensure that Chinese citizens follow the Chinese laws. See Keller, *supra* note 51, at 265.

128. Thompson, *supra* note 119.

129. *Id.*

130. Barboza, *supra* note 50; Dobriansky, *supra* note 62; Thompson, *supra* note 119.

131. Email from Joseph Wang, *supra* note 108.

132. *Id.*; Thompson, *supra* note 119.

133. BARRY NAUGHTON, GROWING OUT OF THE PLAN: CHINESE ECONOMIC REFORM 311 (1995).

134. *Id.*

135. *Id.*

136. *Id.*

this direction despite the negatives.¹³⁷ Not only has China's experimentation brought economic success, it also has given China the confidence to continue in the same direction with a more narrow role for the state in economic planning.¹³⁸ This confidence might allow U.S. technology companies to push the limits of Internet freedom *if* Americans play by China's rules and *if* they are there to do so. With the adoption of a bill like GOFA, U.S. technology companies will not get the opportunity to help expand Chinese free speech rights because the bill could force the companies out of China. GIFA or a similar bill could give U.S. companies the tools to succeed in China by researching both international free speech efforts and technological ways to counteract China's strong censorship machine.

Finally, U.S. companies need the Chinese market more than the Chinese market needs them. As discussed above, the Chinese Internet market has the capability to exist without U.S. technologies. This uneven bargaining power is largely responsible for why the companies have agreed to Chinese regulation and why a strict U.S. law will not be effective. China has 162 million people online, second only to the United States.¹³⁹ These users spent an average of \$22 a month online in 2006, a 47% increase from 2005.¹⁴⁰ With a population of 1.3 billion, China has a seemingly unlimited potential for growth.¹⁴¹ It is predicted that Asian Internet users will outnumber total users in Europe and North America within five years.¹⁴² If China does not have the technology it needs and the United States will not supply it, another nation will. Other nations do not have the qualms that U.S. politicians have about a Chinese threat.¹⁴³ Instead they welcome a large, powerful nation that could balance the power of the United States.¹⁴⁴ Whether China acquires its technology from its own programs or European, Japanese, Israeli, or Russian companies, it can live without U.S. companies and Congress would be making a mistake by excluding its companies—and

137. Gary H. Jefferson & Thomas G. Rawski, *Enterprise Reform in Chinese Industry*, 8 J. ECON. PERSP. 47, 66 (1994).

138. *Id.*

139. CNNIC, *supra* note 43.

140. Chen, *supra* note 46.

141. CIA — The World Fact Book — China, <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html#People> (last visited Apr. 10, 2008); *see also* China Population Information and Research Center, *supra* note 43.

142. Derek Gatopoulos, *U.S. Control of Internet Remains Touchy*, MSNBC.COM, Oct. 26, 2006, <http://www.msnbc.msn.com/id/15430428/> (quoting an Oct. 9th, 2006 speech by Nitin Desai, Chair of the United Nations Internet Governance Forum).

143. JAMES MCGREGOR, ONE BILLION CUSTOMERS: LESSONS FROM THE FRONT LINES OF DOING BUSINESS IN CHINA 185-87 (2005).

144. *Id.*

its big business supporters—from the Chinese market.¹⁴⁵

U.S. leaders will not admit that China has the ultimate bargaining power, arguing that China's system will eventually break down. Addressing countries that give their citizens economic freedom but not political freedom, Paula Dobriansky, the U.S. Under Secretary for Democracy and Global Affairs, said that these countries will have to give their citizens political freedom "in the long run" (which would include freedom on the Internet).¹⁴⁶ Right now, China shows no indications of fulfilling this proclamation. However, the same could have been said for the free-market economy in China not long ago. For now, China's Internet growth has been achieved without giving its citizens access to illegal online content or the freedom to voice their anti-government opinions online.¹⁴⁷ However, the presence of U.S. companies and their control (instead of control vested in Chinese companies) could eventually bring more democratic principles to China. Just as the free-market economy has replaced the planned economy in China, former inflammatory economic views are now the exact approach the Communist government of China espouses. Although an about-face on free speech rights is unlikely in the near future and possibly unlikely in the distant future, as Chinese consensus on the positive aspects of the Internet grows, Chinese citizens might feel more free to branch out. For example, according to an avid Chinese blogger, China has already changed drastically since the Internet came to China in the late nineties.¹⁴⁸ Before the Internet, the only "opinions" people read about—on politics, clothes, or music—were in the state-controlled media.¹⁴⁹ Now every Chinese citizen can have an opinion and publish it (even if it can't be political).¹⁵⁰ This change was a fundamental difference in the way an average Chinese citizen lived his life in the past ten years.¹⁵¹ In the next ten years, other changes could be just as radical.

B. Is the United States Overstepping Its Bounds?

With many nations objecting to the United States' control over the Internet Corporation for Assigned Names and Numbers ("ICANN"), Congress should question whether it wants to become more active in Internet governance on the content side.¹⁵² The United States already

145. *Id.*

146. Dobriansky, *supra* note 62.

147. Chen, *supra* note 46.

148. Thompson, *supra* note 119.

149. *Id.*

150. *Id.*

151. *Id.*

152. Müller, *supra* note 26, at 726.

has more influence in Internet decisions on the technical side than any other nation.¹⁵³

One of the United States' first attempts to regulate Internet content was driven by concern over the protection of minors. The Internet opened a new world to criminals who wanted access to children. Congress quickly passed the Child Online Protection Act and sought the cooperation of technology companies to aid in its regulation.¹⁵⁴ Congress's desire to prevent certain Americans from viewing content they shouldn't see stands in contrast to its goals of protecting free expression of the Internet in other nations who are doing the same.¹⁵⁵ The State Department even recognized this paradox:

The United States is determined to [maximize] the free flow of information over the [I]nternet and [minimize] success by repressive regimes in censoring information and silencing legitimate debate in this global town hall. Nonetheless, we oppose illicit online activities, such as copyright infringement, child pornography crimes, and criminal incitement to commit violent acts.¹⁵⁶

For example, the United States and other Western nations have been actively attempting to enforce copyrights on the Internet. Pushed by movie and music producers, Congress and the courts acted quickly to "protect" the rights of copyright holders, even before acting to prevent pornography from entering American families' homes.¹⁵⁷ Now, Congress is hearing the agenda of free speech activists in the debate over GOFA and GIFA, but it still may not be the right time.

Although both bills presented in the House focus on protecting the Universal Declaration of Human Rights, GOFA also makes a special provision for search engines to maintain access to U.S. government-sponsored sites.¹⁵⁸ This provision shows the commonality of all governments—they want to use the Internet to promote themselves and their values. If an Internet-restricting country will not allow a U.S.-sponsored site in their country, the country may lose all the benefits of the U.S. technology company's service when the company must conform

153. *Id.*

154. Gasser, *supra* note 105, at 217-18.

155. *Id.*

156. Josette Shiner, Comment, *Why Global Internet Freedom Matters*, FIN. TIMES, May 5, 2006, available at <http://www.ft.com/cms/s/2/b2a89236-db8d-11da-98a8-0000779e2340.html>; see also Gasser, *supra* note 105, at 218 ("Thus, there has been a desire on the part of Congress to limit access by certain classes to content on the one hand, and preserve the free expression of content on the other.")

157. See LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 199 (2001).

158. GOFA, *supra* note 6.

to this part of GOFA. This provision raises an important question: should the citizens of an Internet-restricting country lose all access to U.S.-based Internet services just because their government will not allow a U.S. government site?¹⁵⁹ The technology companies' answer is "no."¹⁶⁰ They advocate that these citizens are better off with access to U.S. Internet services conforming to Internet-restricting governments than with no access to this service at all.¹⁶¹ Their theory is that if they can get part of the way in the door, eventually, they can get all the way in. Support for this theory can be found in the gradual acceptance of a free-market economy in China and U.S. companies' subsequent economic success there.

Also showing the commonality of all governments in this area is the House Foreign Affairs Committee's most recent hearing on the subject. At the hearing, the Representatives belabored the issue of Yahoo bending to the Chinese government despite obvious parallels to the U.S. system for obtaining information about alleged terrorists.¹⁶² At the base of the problem is the question of who should control the global Internet. Congress wants U.S. companies to ignore the Chinese government and subscribe to GOFA. However, the mandates of GOFA are so strict that they could cut U.S. companies out of China permanently.

At first glance, both the restrictions on Internet content designed to protect children and the proposed laws to support democracy and free speech seem harmonious and necessary. However, once Congress starts regulating the Internet on a global scale, it might be hard to draw the line. For example, the Ninth Circuit declined to answer the question of whether the French government could stop Yahoo from selling Nazi memorabilia, but if it had decided the question in favor of U.S. law, there might have been an outcry from other nations.¹⁶³ The First Amendment protects this type of speech in the United States, but it is not unreasonable for a government to want it censored. Under GOFA, this censorship of Nazi material probably would not be the type of infraction that would violate the Universal Declaration of Human Rights and earn France the label of an Internet-restricting country.¹⁶⁴ This distinction

159. Memorandum from Paula Bruening & Leslie Harris, *supra* note 6.

160. *The Internet in China Hearing*, *supra* note 27.

161. *Id.*

162. Posting of Sarah Lai Stirland to Threat Level, Yahoo Foreign Affairs Committee Hearing Members Blast Yang, Callahan (Nov. 6, 2007), <http://blog.wired.com/27bstroke6/2007/11/yahoo-foreign-a.html>.

163. *Yahoo!*, 433 F.3d at 1221 (stating that the existence an extraterritorial right under the First Amendment is uncertain).

164. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. Doc. A/810 (Dec. 10, 1948), *available at* <http://www.unhchr.ch/udhr/> (follow English language version hyperlink) (balance Article 19 with Article 29). The vagueness of the Declaration shows that it might be difficult to define what a government may or may not prohibit on the

might be so because the harm done by the Nazis was more prevalent in Europe and France's control of Nazi memorabilia could be compared to the stricter pornography laws of the United States. Acceptance of nudity and pornography is greater in Europe than in the United States and acceptance of highly inflammatory free speech is greater in the United States than Europe. What one culture finds repulsive, another might view as free speech or, more likely, what is illegal in one nation is legal in another.¹⁶⁵ Had the fight over Nazi memorabilia gone on, the international community might have rallied behind France. Regulation of Internet content on an international level should be approached slowly so that the United States does not look like a hypocritical bully in the process. American ideals are laudable, but they are not the only ones that are worthy of protection.

At the same time, if GOFA passes, U.S. Internet companies might fight the bill (supposedly protecting the First Amendment) with the First Amendment.¹⁶⁶ A bill that forces companies to publish information, to use their free speech rights when they do not want to, could harm their First Amendment rights just as much as a bill that forces one not to publish information. The First Amendment not only protects what people choose to say, but also what people choose not to say.¹⁶⁷

Governing the Internet raises unavoidable jurisdictional issues.¹⁶⁸ How can a country exert control over something that is not within its boundaries—something that is arguably not within any country's boundaries and within all countries' boundaries at the same time?¹⁶⁹ Legislation is of no effect if it cannot be enforced.¹⁷⁰ In this respect, the United States might be the best regulator of the Internet content of U.S. companies because these companies are subject to U.S. laws—but to what extent? These issues are mainly outside the scope of this Note, but

Internet. Americans should not be the final judges of this interpretation.

165. See LESSIG, *supra* note 157, at 190 (discussing iCraveTV).

166. Email from Joseph Wang, *supra* note 108.

Ironically, I could imagine in the very unlikely case that the bill passes is that [it] would be subject to a First Amendment challenge. If Google wants to censor its website at the request of the Chinese government in order to make money in China, one could argue that it has a constitutional right to do so.

Id.

167. See *Wooley v. Maynard*, 430 U.S. 705 (1977). "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Id.* at 714.

168. See *generally* HENRIK SPANG-HANSEN, *CYBERSPACE & INTERNATIONAL LAW ON JURISDICTION* (2004).

169. See Clyde Wayne Crews Jr. & Adam Thierer, *Introduction to WHO RULES THE NET?: INTERNET GOVERNANCE AND JURISDICTION* xv, xvi - xix (Adam Thierer ed., 2003) (discussing whether the Internet is a separate place or whether it should be subject to the same rules of the "offline world").

170. *Id.*

suggest that foreign nations might object to a strict U.S. law. Without consensus among countries, each country might develop its own GOFA or GIFA and technology companies would have to sift through a mess of laws they could be subject to if they have assets in a specific country or if they target the citizens of a specific country.¹⁷¹

III. POSSIBILITIES WITHOUT THE LAW

Proponents and opponents of both bills support other means to achieve the goal of free speech and democracy on the Internet. Congressional regulation might be unnecessary if the Internet companies self-regulate.¹⁷² For example, Reporters without Borders has offered six suggestions for self-regulation including banning the location of servers in certain countries, blocking search engines from filtering out certain words, prohibiting companies from selling filtering software, and regulating those who sell monitoring technology to certain countries or who train people on Internet surveillance and censorship in those countries.¹⁷³ These proposals are similar in many ways to GOFA and also seem overly idealistic. Nevertheless, they could serve as starting points to discuss the options. The strongest idea Reporters without Borders has is the recognition that government and industry should work together as they did when confronting child pornography on the Internet.

Congress has worked with Internet companies to censor child pornography and other explicit material in the United States. At a recent Congressional briefing on combating the sexual exploitation of children, leaders recognized the help they receive from Internet companies in this regard.¹⁷⁴ This recognition shows that exerting control over the Internet is much easier if the government has the help of the Internet companies. The government and the Internet companies should work together as they have in other countries, such as Germany, where there is a voluntary

171. WHO RULES THE NET?, *supra* note 169, at 440. For “Default Jurisdictional Rules,” see *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*, 55 Bus. Law. 1801 (2001).

172. See SPINELLO, *supra* note 100, at 35 (listing three options for Internet governance). The first option is the model that the United States seems to be pursuing with GOFA: direct state intervention. The second is an international organization that would control the management of both the technicalities and the substance of the Internet. The third is self-regulation. *Id.*

173. *Corporate Responsibility: Reporters Without Borders Urges Internet Users and Bloggers to Support Its Recommendations on Freedom of Expression*, REPORTERS SANS FRONTIÈRES, Oct. 1, 2006, http://www.rsf.org/article.php3?id_article=16121.

174. *U.S. Senator Sam Brownback (R-KS) Holds a Briefing on Combating the Sexual Exploitation of Children*, FDCH CAP. TRANSCRIPTS, Sept. 27, 2006, available at 2006 WLNR 16820665.

code of conduct that search engines follow.¹⁷⁵

The Electronic Frontier Foundation has suggested such a code with the following guidelines: (1) Internet companies should keep user-identifier information only so long as necessary to do their job, so they are technologically incapable of providing this data when it is asked for; (2) Internet companies should disclose the censorship they do participate in and should keep detailed records of censorship requests so that the information will come out eventually; (3) Internet companies should not pretend they don't know when their services are used for the suppression of human rights; (4) Internet companies should offer Secure Socket Layer ("SSL") encryption for all sites to prevent governments from being able to track users; and (5) Internet companies should support innovation that will lead to the inability of governments to censor this content.¹⁷⁶ These goals are realistic and combat censorship from a different level—through honesty and technology. They do not impose harsh restrictions on Internet companies, but make sure that they are held accountable for their actions in the long run.

Congress could also start by taking smaller steps than even GIFA proposed. For example, adding filtering technologies to the list of products that companies have to file with the State Department before exporting would bring transparency to a practice that seems suspicious.¹⁷⁷ Greater transparency in general, by collecting data on what types of words are censored or which sites are illegal, would also improve relationships between the U.S. companies that want to do business in China and the U.S. politicians who are calling for action.

An international community or an organization with no territorial ties could also come together to influence Internet-restricting nations to open their borders and relax strict speech regulations. This organization might have more authority in some nations because the organization (ideally) would not have any single country's agenda on hand and would operate as a sort of Internet United Nations.¹⁷⁸ This model has its share of problems as well, starting with how the organization would be able to control its Internet citizens in the first place.¹⁷⁹ This organization could

175. Freiwillige Selbstkontrolle Multimedia-Diensteanbieter, Subcode of Conduct for Search Engine Providers, http://www.fsm.de/en/SubCoC_Search_Engines (last visited Apr. 10, 2008).

176. Letter from Danny O'Brien, Electronic Frontier Foundation, to the H. Subcomm. on Africa, Global Human Rights, and International Operations (Feb. 15, 2005), available at <http://www EFF.org/deeplinks/2006/02/code-conduct-internet-companies-authoritarian-regimes>.

177. Xeni Jardin, Op-Ed, *Exporting Censorship*, N.Y. TIMES, Mar. 9, 2006, at A23.

178. SPINELLO, *supra* note 100, at 36.

179. *Id.*

also become controlled by factions with ulterior motives.¹⁸⁰

A private solution has the positive effect of not coming from the U.S. government. This route might be better than U.S. legislation because many nations are growing tired of the United States controlling the Internet.¹⁸¹ An attempt at respecting the governments of other nations could build relationships for future Internet endeavors. The private route would also be favorable for U.S. companies because they could maintain their positions in China and attempt to gain more of the market. U.S. companies in China walk a fine line between maximizing profits and minimizing criticism from both Chinese customers and American activists—the Chinese are still skeptical about U.S. exploitation and the Americans criticize companies for moving to China and allowing the abuse of human rights.¹⁸² Self-governance would allow U.S. companies to attempt to placate both sides, although the fine line will always exist. Finally, the private route would not set the Chinese government against the U.S. government and would allow the technology companies the ability to continue to push the limits in China.

CONCLUSION

Congress should not take action on the Global Online Freedom Act and should reintroduce the Global Internet Freedom Act or a similar bill. A bill modeled after GIFA would dedicate money to solve this problem in the long term and it would take the time necessary to deal with the complexities of the global Internet structure and its stakeholders. In addressing the problem at the next United Nations meeting and in establishing an office to monitor the issue, GIFA would actually make progress. This bill supports a commitment by the United States government to address the problem, but it does not overreact to the issue before legislators and policymakers see the big picture. If technology can circumvent the “Great Firewall of China,” there will be no need to use U.S. search engines as bait to make China allow free Internet access. China won’t bite and U.S. companies will be worse off.

Until Congress can pass a bill like GIFA, self-regulation is the most viable option. Democracy and free speech on the Internet are not on the top of Congress’s agenda while the war in Iraq continues. This issue seems to be an issue that only comes to the forefront sporadically, but technology companies should still do their part. With more transparency in their processes, technological development, and a Code of Conduct, the companies could stay in China and conform with human rights laws.

180. *Id.*

181. Müller, *supra* note 26, at 726.

182. *Id.*

They should become as transparent as possible so that Internet users know what they are receiving from a search engine. They should monitor the requests of repressive regimes so that they may aid the world in counteracting their attempts. Although hard to draw the line, they should try to enter the Chinese market without giving up all of their values. For example, Yahoo can still redeem itself if it stops collecting user data and takes responsibility for its past mistakes.¹⁸³ Future advances in technology could also help U.S. companies avoid having to make censorship decisions by circumventing the Great Firewall of China.

Along with passage of the Global Internet Freedom Act, the government and the technology companies should work together to develop a Code of Conduct that makes Internet companies, once again, the purveyors of a new world for their users. This new world may be a relatively minor change for some of the users, but by taking smaller steps together, democratic governments and capitalist companies may be able to make progress in Internet-restricting countries.

183. Perhaps Yahoo can redeem itself, in part, by settling the lawsuit against it for the imprisonment of Shi Tao.