

Shi Tao, Yahoo!, and the lessons for corporate social responsibility

**A working paper
(Version 1.0 – December 30, 2007)**

by

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ABSTRACT:

In 2005, Chinese journalist Shi Tao was convicted and sentenced to ten years in prison for leaking state secrets abroad. Key evidence cited in Chinese court documents included information about Shi's account supplied by Yahoo! to the Chinese State Security Bureau. Condemnation by human rights groups and investors, U.S. congressional hearings, a Hong Kong government investigation, and a U.S. lawsuit followed. This paper documents the core facts, events, issues and debates involved. The Shi Tao case highlights the complex challenges of corporate social responsibility for Internet and telecommunications companies: They are caught between demands of governments on one hand and rights of users on the other – not only in authoritarian countries such as China but in virtually all countries around the world. While there are no simple or quick solutions, Internet and telecoms companies seeking to establish trustworthy reputations across a global customer base cannot afford to ignore the human rights implications of their business practices. Users and investors have a right to demand that user rights be respected. If companies fail to respect user rights, the need to develop non-commercial, grassroots alternatives will become increasingly important if privacy and free expression are to be possible anywhere.

Introduction

In November 2007, Yahoo!'s top executives finally did what they could have done more than two years previously after Chinese journalist Shi Tao was sentenced to ten years in prison on charges of revealing state secrets.

In a legal settlement, Yahoo pledged to provide an undisclosed amount of "financial, humanitarian and legal support" to the families of Shi Tao and Wang Xiaoning, another dissident jailed for ten years on the basis of evidence including e-mail data supplied by Yahoo! to Chinese authorities.¹ At a Congressional hearing, Yahoo! founder and CEO Jerry Yang made a dramatic public apology to Shi Tao's mother, Gao Qinsheng, bowing solemnly to her three times as tears rolled down her cheeks. "I want to say we are committed to doing what we can to secure their freedom," Yang said, referring to Shi and Wang. "And I want to personally apologize for what they are going through."²

The pledge of support to the jailed dissidents' families and Yang's public apology did not come easily to Yahoo!: the company first had to spend two years getting raked over the coals in the international media. Corporate acts of remorse and contrition came only after two Congressional hearings, a U.S. lawsuit by the families, a shareholder resolution, the featuring of Yahoo! on the covers of two major human rights reports, and widespread condemnation by free speech and human rights groups across the globe.

Why didn't Yahoo! executives save themselves and their company a lot of grief by apologizing and pledging support for the victims' families, and vowing to work for the release of the jailed dissidents right from the start? More importantly, how might Yahoo! have avoided complicity in the conviction of Chinese political dissidents in the first place? The answers to these questions bring sobering lessons, not only for Yahoo! but for all Internet and telecoms companies when it comes to the human rights implications of their business decisions and practices. The Yahoo! case has also served as a wake-up call for investors, civil society, and users of telecommunications technology around the globe about the extent to which companies are used by governments to infringe upon their users' rights to privacy and freedom of expression.

While Yahoo! is known to have been complicit in the conviction of four Chinese dissidents, this paper focuses primarily on the Shi Tao case for several reasons: It was the publication in September 2005 of the official court judgment against Shi Tao, citing e-mail account information provided by Yahoo!, which first brought Yahoo!'s complicity in

¹ Associated Press, "Yahoo settles lawsuit by families of Chinese journalists," *The International Herald Tribune*, November 14, 2007, at: <http://www.ihf.com/articles/2007/11/14/business/yahoo.php> (accessed December 5, 2007).

² Corey Boles, Don Clark, and Pui-Wing Tam, "Yahoo's Lashing Highlights Risks of China Market," *The Wall Street Journal*, November 7, 2007, Page A1, online at: <http://online.wsj.com/article/SB119436469294284018.html> (Accessed December 5, 2007)

Chinese dissident cases to global attention. While three other cases came to light in early 2006, Shi Tao's case remained the focus of international activism. It was also the focus of legal action and an official investigation in Hong Kong over the role played by Yahoo! (Hong Kong) Holdings – under whose name Yahoo!'s China operations was registered in 2004 when Shi Tao was arrested – over whether user account data might have been moved by Yahoo! employees between the separate jurisdictions of Hong Kong and Mainland China.

The Shi Tao case highlights the complex challenges of corporate social responsibility for Internet and telecommunications companies. Companies are caught between demands of governments on one hand and rights of users on the other – not only in authoritarian countries such as China but in virtually all countries around the world. Compliance with local laws or regulations in this sector often conflicts with international law and global human rights norms. While there are no simple or quick solutions, the Shi Tao case demonstrates how simply being in “legal compliance” in all jurisdictions where a company operates is not sufficient for an Internet or telecoms company seeking to establish a trustworthy reputation across a global customer base. Companies that choose to ignore the broader human rights implications of their business practices are gambling with their long-term global reputations as trustworthy conduits or repositories of people’s personal communications and information.

This paper is divided into six parts. Part 1 overviews the cases of Shi Tao and others; Part 2 discusses the problem that while Yahoo! may have been legally "off the hook" in the Shi Tao case, no amount of good lawyering could save it from condemnation in the international "court of public opinion"; Part 3 examines the extent to which Internet companies doing business in China can in fact make choices about what they will and won't do, and how Google and Microsoft's MSN network have acted differently from Yahoo!; Part 4 examines an effort in the U.S. Congress to legislate ethical behavior in the communications industry; Part 5 discusses privacy and freedom of expression as new areas for Corporate Social Responsibility (CSR); and finally, Part 6 examines the lessons of the Shi Tao case for citizens and users of telecoms and Internet services around the world.

Section 1: The cases of Shi Tao and others

Shi Tao worked as an editor and reporter for *Dangdai Shangbao* (Contemporary Business News), based in Changsha, Hunan at the time of his arrest. On April 20, 2004, Shi attended an internal editorial meeting to discuss a classified internal document containing a series of instructions about how the media should work to prevent social unrest in the run-up to the anniversary of the 1989 June 4th crackdown. The deputy general editor who convened the meeting did not distribute copies of the document, and instead summarized its contents to meeting participants. Shi Tao took notes during the meeting. Later that night he wrote up his notes summarizing the document and sent them from his office computer via his Yahoo! China e-mail account ([huoyan-](#)

1989@yahoo.com.cn) to the e-mail address caryhung@aol.com which belonged to New York-based editor for the overseas pro-democracy publication and website, *Minzhu Luntan* (Democracy Forum), requesting that the contents of his e-mail be published immediately under the name “198964.”³

Two days later, on April 22nd, the Beijing State Security Bureau issued a “Notice of Evidence Collection” to Yahoo! China, which was at the time a subsidiary of Yahoo! Holdings (Hong Kong), Ltd. The order requested “email account registration information for huoyan-1989@yahoo.com.cn, all login times, corresponding IP addresses, and relevant email content from February 22, 2004.” Beijing-based employees of Yahoo! China complied with the request on the same day.⁴

Shi was detained by the Changsha City State Security bureau on November 23, 2004, and formally arrested on December 14th of that same year, charged with “leaking state secrets.”⁵ On March 11, 2005 he was tried for two hours. The guilty verdict and ten-year prison sentence was issued on April 27. In his unsuccessful appeal, Shi Tao claimed he was not aware at the time that the document that he had written about in his e-mail was classified as “top state secret,” and disputed the validity of the manner in which the document been declared classified.⁶

On September 6, 2005, a copy of the court verdict, obtained and translated by the Dui Hua Foundation, was published on the website of Reporters Without Borders. Among the evidence it listed: “Account holder information furnished by Yahoo Holdings (Hong

³ “Information supplied by Yahoo! helped journalist Shi Tao get 10 years in prison,” Reporters Without Borders, September 6, 2005 (including copy of verdict) at: http://www.rsf.org/article.php3?id_article=14884; Copy of appeal: <http://peacehall.com/news/gb/china/2005/05/200505201033.shtml>; “Abstract of the CCP Central Committee Document No. 11 (Provided by 198964)”, *Minzhu Tongxun* (Democracy Newsletter), 20 April 2004, at: <http://www.asiademo.org/b5/news/2005/01/20050128.htm#art03> Translated by Roland Soong at: http://www.zonaeuropa.com/20050501_1.htm (all accessed December 7, 2007).

⁴ “Documents of the Chinese courts and state security bureaus regarding the cases of Shi Tao and Wang Xiaoning”, *Boxun.com*, 23 July 2007, at: <http://news.boxun.com/news/gb/china/2007/07/200707231212.shtml> (In Chinese) (accessed December 7, 2007); “Police document sheds additional light on Shi Tao Case”, *The Dui Hua Foundation*, 25 July 2007, at: <http://www.duihua.org/2007/07/police-document-sheds-additional-light.html> (accessed December 7, 2007).

⁵ “Shi Tao's Application for Appeal,” China Rights Forum, No. 2, 2005, republished by Human Rights in China at: <http://www.cpj.org/news/2005/China25aug05na.html> (accessed December 10, 2007); “Imprisoned journalist Shi Tao's family files for review of appeal,” Committee to Protect Journalists, August 25, 2005, at: <http://www.cpj.org/news/2005/China25aug05na.html> (accessed December 10, 2007).

⁶ “Shi Tao’s Application for Appeal,” translation of original Chinese-language appeal by Human Rights In China, at: <http://www.hrichina.org/public/highlight/hric/appeal-app.html> (accessed December 7, 2007).

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; address: 2F Building 88, Jianxiang New Village, Kaifu District, Changsha.” Other evidence listed in the court judgment included: contents of the e-mail sent by Shi to caryhung@aol.com, the e-mail belonging to *Minzhu Luntan* editor Hong Zhesheng (who is identified in the court documents as an “overseas hostile element”); as well as copies of the same content as it appeared on overseas dissident websites; Shi Tao’s notebook from the meeting to discuss the official document as well as another notebook containing Hong Zhesheng’s e-mail; a check from Hong Zhesheng, etc.⁷

Media reports of about Yahoo!’s complicity in Shi Tao’s conviction, accompanied by wide-scale condemnation of Yahoo! by human rights groups, were quick to follow. Details about the nature of this criticism and Yahoo!’s response will be discussed in the next section.

Other cases: In addition to Shi Tao, there are three other cases in which Yahoo! is known to have handed over information to Chinese authorities about people who used Yahoo China e-mail accounts to transmit political information: Wang Xiaoning, Li Zhi, and Jiang Lijun. All were tried and sentenced in 2003 – one year before Shi’s arrest. In all three cases, Chinese court documents cite Yahoo! Holdings (Hong Kong) as the source of information about the defendants’ Chinese Yahoo accounts. Yahoo’s role in these three cases did not come to light until the first half of 2006, after the media furor over Yahoo’s complicity in Shi Tao’s 2005 conviction had been underway for months.

Wang Xiaoning: Yahoo!’s role in Wang’s case first came to light on April 27, 2006 when the U.S.-based group Human Rights in China obtained and published the original court judgment against Wang.⁸ Sentenced to 10 years in prison on September 12, 2003 for “inciting subversion,” Wang had been taken into custody by state security police exactly one year and eleven days previously. Evidence presented by the prosecution included account information and e-mail content provided by Yahoo! (Hong Kong) Holdings. Wang’s “crimes” included: editing an online journal called the “Free Forum for Political Reform” in which he is charged with attacking the Communist Party leadership and advocating a multi-party system; using a false name to disseminate political writings via Yahoo! email and Yahoo! Groups, and using email to communicate with an overseas dissident political party and to discuss the establishment of a new political party called the “Chinese Third Way Party.”

⁷ "Information supplied by Yahoo! helped journalist Shi Tao get 10 years in prison," Reporters Without Borders, September 6, 2005, at: http://www.rsf.org/article.php3?id_article=14884 (accessed December 10, 2007).

⁸ “Yahoo! Cited in Decision Sentencing Internet Dissident Wang Xiaoning to 10 Years,” Human Rights Watch website, April 27, 2006, at: <http://hrichina.org/public/contents/press?revision%5fid=27803&item%5fid=27801> (accessed August 12, 2007)

In July 2007 two notices from the Beijing State Security Bureau issued to Yahoo!'s Beijing office in April and August 2002 surfaced on some Chinese-language websites and were subsequently verified, published, and translated by the U.S.-based human rights dialogue organization, Dui Hua.⁹ Issued two years prior to the notices served to Yahoo! in the Shi Tao case, they are written according to the same formula, citing the nature of the case (“inciting subversion” in Wang’s case, “illegal provision of state secrets to foreign entities” in Shi’s case), and also stating that the items requested from specified e-mail accounts may be collected under Article 45 of the Criminal Procedure Law of the PRC. In Wang’s case, documents also verified, translated and published by Dui Hua showed that Yahoo!’s Beijing office responded to the request on the very same day.¹⁰

In April 2007 Wang’s wife, Yu Ling, filed a lawsuit in the United States against Yahoo!. seeking reparations for the company’s role in Wang’s arrest and sentencing. Shi Tao’s mother later joined the lawsuit (see Section 2 for further details). The *San Francisco Chronicle* quoted Yu as saying: “If Yahoo did not give out this information, then the Chinese government would not be able to sentence him.” The reality appears more murky, however. The court ruling against Wang says that Yahoo! Holdings (Hong Kong) provided confirmation that the Yahoo! Group called "aaabbbccc" run by Wang was set up using the Yahoo China e-mail address bxoguh@yahoo.com.cn, and that certain documents were sent from that e-mail address. The sentencing document also cites documents found in a search of Wang’s home. What exactly led investigators to his home we do not know from the sentencing document. It does not specify whether investigators determined the connection between Wang and this e-mail account from searching Wang’s computer, or confirmation obtained from Yahoo!, or some other way.

The documents that surfaced in July 2007 and published by Dui Hua indicate that Yahoo! also provided the contents of e-mails sent by Wang, although the official sentencing document makes no mention of this.¹¹

Li Zhi: Yahoo!’s role in Li Zhi’s case came to light on February 8, 2006 when Beijing-based writer Liu Xiaobo posted an article citing the defense statement by Li’s lawyer, quoting extensively from the court sentencing document, which had been posted online.¹² This English was then publicized widely in English by Reporters Without Borders, China

⁹ “More Evidence Emerges on Yahoo!’s Role in Chinese Internet Cases,” Dui Hua News, July 30, 2007; at: <http://www.duihua.org/2007/07/more-evidence-emerges-on-yahoos-role-in.html> (accessed August 13, 2007)

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Liu Xiaobo, “Yahu zaozai zhuzhou weilue,” *Boxun Xinwen Wang*, February 8, 2006, at: <http://www.peacehall.com/news/gb/pubvp/2006/02/200602081708.shtml> (accessed August 14, 2007); “Lizhi ‘dianfu guojia zhengquan’ an ershen bianhu ci,” Wu Luan Zhao Yan Attorneys-at-law website, August 31, 2005, at: http://www.wlzy.cn/News/news_detail.asp?id=61 (accessed August 14, 2007),

Digital Times, and others.¹³ Convicted on December 10, 2003 for subversion by the Dazhou Intermediate People's Court in Sichuan Province, Li is now serving an 8-year prison sentence in Sichuan Province's Chuandong Prison. A government employee from Sichuan's Da county, Li was taken into custody by security police in August of that same year. Evidence used against Li included documents from Beijing SINA Information Technology Co. Ltd. And Yahoo! Holdings (Hong Kong), confirming Li to be the registered owner of the e-mail accounts used in the case. Li was alleged to have used these e-mail accounts to establish contact with an overseas representative of the outlawed China Democracy Party. He was also charged to have used a personal webpage and anonymous chat room to post articles advocating election of CDP members to people's congresses and other government posts, in order to bring about a "peaceful evolution" and eventual seizure of power from the Communist Party. Li's appeal of the verdict was rejected by the Sichuan Higher People's Court in February 2004.

According to Human Rights Watch Li's lawyer claims that Yahoo!'s report to the police included e-mail content in addition to account information, as with Wang Xiaoning's case, although this fact was not mentioned in the court documents from his trial.¹⁴

Jiang Lijun: Yahoo's role in Jiang's case came to light on April 19, 2006 with the publication by Reporters Without Borders of the court verdict obtained and translated by the Dui Hua Foundation.¹⁵ Convicted of subversion by the Beijing No. 2 Intermediate People's Court on November 28, 2003, Jiang was sentenced to four years in prison (with the prison time calculated from the beginning of his detention on November 6, 2002). He was released in November 2006 from Jinzhou Prison, Liaoning Province, where he had been transferred after trial to serve out his sentence.¹⁶ A heating company employee in Tieling city, Liaoning Province, Jiang had been detained previously by police in 1988 and 1995 for "reactionary" writings. He was alleged to have joined forces with three young people in Beijing (Liu Di, Wu Yiran and Li Yibing) to advocate "Western-style democracy" and a multiparty system of government. He was also alleged to have raised the idea of forming a "Freedom and Democracy Party" and making a bomb threat during

¹³ "Another cyberdissident imprisoned because of data provided by Yahoo," Reporters Without Borders website, February 9, 2006, at: http://www.rsf.org/article.php3?id_article=16402 (accessed August 14, 2007); Xiao Qiang, "Yahoo helped sentence another cyber dissident to 8 years - Liu Xiaobo (Updated)," China Digital Times, February 8, 2006, at: http://chinadigitaltimes.net/2006/02/yahoo_helped_sentence_another_cyber_dissident_to_8_year_1.php (accessed August 14, 2007)

¹⁴ Human Rights Watch, op. cit.

¹⁵ "Yahoo ! implicated in third cyberdissident trial- US company's collaboration with Chinese courts highlighted in Jiang Lijun case," Reporters Without Borders website, April 19, 2006, at: http://www.rsf.org/article.php3?id_article=17180 (accessed August 14, 2007)

¹⁶ "Cyber-dissident convicted on Yahoo! information is freed after four years," Reporters Without Borders website, November 9, 2006, at: http://www.rsf.org/article.php3?id_article=8453 (accessed August 14, 2007)

a meeting in Beijing of the National People's Congress. According to the sentencing document obtained and translated by Dui Hua in 2006, evidence against Jiang included user information provided by Yahoo! Holdings (Hong Kong) for an account that he was jointly using with Li.¹⁷ According to Human Rights Watch, at least one member of the group has since speculated that Li may have been a police informant due to his disappearance after being released without trial along with Liu and Wu.¹⁸ While police information requests and Yahoo!'s response to them have not surfaced in Jiang's case as they have in the cases of Shi and Wang described above, it is reasonable to assume that since Yahoo! provided contents of e-mails in Wang's case, they are likely also to have done so in the other cases including Jiang's.

Section 2: Legal compliance vs. ethical behavior.

When Yahoo!'s role in the Shi Tao case first came to light, the company's response focused on the fact that Yahoo! employees in China had been obeying Chinese law, and had no choice but to do so in order for the company to remain in business in China. Speaking at a conference in 2006, Yahoo! co-founder Jerry Yang said that while he felt "horrible" about what had happened, "We have no way of preventing that beforehand... If you want to do business there you have to comply."¹⁹

This answer did not satisfy Yahoo!'s critics who argue that Yahoo! and other Internet companies have larger moral obligations. They point out that Chinese law contradicts international law as well as global covenants such as the International Declaration of Human Rights. However, no convincing arguments or pieces of evidence have yet to emerge to support the possibility that Yahoo! China employees could have refused to comply with the State Security Bureau order without risking serious consequences for themselves and for Yahoo!'s China operations. Furthermore, actions by Yahoo!'s China-based employees were consistent with the user "terms of service" which Shi Tao and all other Yahoo! e-mail users must agree to in order to create an account. At the time when Shi Tao signed up for an e-mail account on yahoo.com.cn, he clicked "agree" on terms of service in which the user agrees not to commit a list of actions, including "damaging public security, revealing state secrets, subverting state power, damaging national unity,"

¹⁷ "Yahoo! implicated in third cyberdissident trial," Reporters Without Borders website.

¹⁸ Human Rights Watch report Appendix V: Details of Jiang Lijun's case, at: http://www.hrw.org/reports/2006/china0806/12.htm#_Toc142395842 (accessed August 14, 2007)

¹⁹ Elinor Mills, "Yahoo's founder responds to criticism," CNET News.com, March 9, 2006 at: <http://news.zdnet.co.uk/internet/0,1000000097,39256655,00.htm> (accessed December 7, 2007).

etc. The same document, to which he technically agreed, acknowledged that his information would be disclosed if required to do so by law.²⁰

Mention of “Yahoo Holdings (Hong Kong)” in the Chinese court verdict raised concerns in Hong Kong that user information had been passed from Yahoo!’s operations in Hong Kong to the mainland, or that Hong Kong personnel were otherwise involved in handing over Shi Tao’s information to the mainland police. In 2006 Hong Kong legislator Albert Ho filed a complaint with the Hong Kong Privacy Commissioner, which launched an investigation into the matter. In March 2007, The Hong Kong Privacy Commissioner found Yahoo! (Hong Kong) Holdings had transferred user data from Yahoo!’s Hong Kong-based operations to authorities in Mainland China. Yahoo! (Hong Kong) Holdings was cited in the court verdict because at the time of the Beijing State Security Bureau request in 2004, Yahoo! China was wholly owned by Yahoo! (Hong Kong) Holdings and Yahoo! China’s business license was officially in the name of Yahoo! (Hong Kong) Holdings. Actual operations of Yahoo! China were conducted in mainland China by two mainland-China based entities: Yahoo! Beijing and the Peking University Founder Group. This arrangement continued until October 2005, ownership of Yahoo! China was transferred to the Chinese company, Alibaba, with the Sunnyvale-based Yahoo!, Inc. retaining one board seat.²¹ Thus the Privacy Commissioner determined that no Hong Kong law had been violated by Yahoo! China’s compliance with the Beijing State Security Bureau request.

Upon consultation with experts in PRC law, the Hong Kong Privacy Commissioner also concluded that given the contents of mainland China’s State Security Law as well as the Regulation on Telecommunication of the PRC, employees of Yahoo! China would themselves be liable to “penal apprehension” (i.e., arrest) if they were to refuse to hand over user data in the face of a Beijing State Security Bureau request.²²

In July 2007, a copy of the Beijing State Security Bureau’s request for evidence, addressed to the Beijing Representative Office of Yahoo! (HK) Holdings Ltd. on April 22, 2004, surfaced on the Internet.²³ Its appearance further reinforced the Hong Kong Privacy Commissioner’s conclusion that user data in Shi Tao’s case had not crossed jurisdictional borders. However the document also created a furor because the SSB’s

²⁰ "Yahoo – fuwu tiaokuan", original Chinese-language terms of service, Copyright Yahoo! China 2004, available at: <http://cn.yahoo.com/statics/docs/info/terms/index.html> (accessed August 11, 2007)

²¹ "The Disclosure of Email Subscriber's Personal Data by Email Service Provider to PRC Law Enforcement Agency," Office of the Privacy Commissioner for Personal Data, Hong Kong, Report Number: R07-3619, March 14, 2007, at: http://www.pcpd.org.hk/english/publications/files/Yahoo_e.pdf (accessed December 7, 2007)

²² *Ibid*, pp. 23-24.

²³ "Police Document Sheds Additional Light on Shi Tao Case," *Dui Hua News*, July 25, 2007, at: <http://www.duihua.org/2007/07/police-document-sheds-additional-light.html> (accessed August 11, 2007).

request clearly stated that the investigation related to “a case of suspecting illegal provision of state secrets to foreign entities.”²⁴ This contradicted the sworn Congressional testimony by Yahoo! Senior Counsel Michael Callahan in February 2006, in which he stated:

The Shi Tao case raises profound and troubling questions about basic human rights. Nevertheless, it is important to lay out the facts. ***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.*** Indeed, we were unaware of the particular facts surrounding the case until the news story emerged. Law enforcement agencies in China, the United States, and elsewhere typically do not explain to information technology companies or other businesses why they demand specific information regarding certain individuals. In many cases, Yahoo! does not know the real identity of individuals for whom governments request information, as very often our users subscribe to our services without using their real names. [emphasis added]²⁵

Called back to Congress in November 2007 to explain why his original testimony had not squared with the full facts, Callahan insisted that the factual error was due to internal communication lapses within the company, rather than an intentional lie. According to Yahoo!’s explanation, a Hong Kong based lawyer working for Yahoo! at the time had not deemed the information important enough to pass on a full translation to headquarters.²⁶ Callahan insisted, however, that knowledge of this extra detail by executives at Yahoo! Inc. headquarters in Sunnyvale did not change the nature of Yahoo!’s options at the time; with or without knowing that the account in question related to a “state secrets” investigation, Yahoo! China was equally compelled to comply with a request from the Beijing State Security Bureau which was legally binding according to Chinese law.²⁷

²⁴ *Ibid.*

²⁵ “Testimony of Michael Callahan, Senior Vice President and General Counsel, Yahoo! Inc., Before the Subcommittees on Africa, Global Human Rights and International Operations, and Asia and the Pacific,” U.S. House of Representatives Committee on International Relations, Joint Hearing: “The Internet in China: A Tool for Freedom or Suppression?” February 15, 2006, online at: <http://www.nytimes.com/packages/pdf/business/YahooStatement.pdf> (accessed December 10, 2007).

²⁶ Corey Boles, “Yahoo Executive Apologizes Over Chinese Journalist Incident,” Dow Jones Newswires, November 1, 2007, at: <http://www.easybourse.com/Website/dynamic/News.php?NewsID=331591&lang=fra&NewsRubrique=2> (accessed December 7, 2007)

²⁷ Jim Puzzanghera, “Yahoo Taken to Task over China,” November 7, 2007, at: <http://www.latimes.com/business/la-fi-yahoo7nov07,0,5198009.story?coll=la-home-center> (accessed December 7, 2007)

Soon after the November 2007 Congressional hearing at which Yahoo! CEO Jerry Yang made a dramatic apology to Shi Tao's mother, Yahoo! also settled a lawsuit brought against it in U.S. court by Shi Tao's mother and Yu Lin, the wife of Wang Xiaoning. The lawsuit, filed in April 2007, alleged: "Defendants unlawfully accessed and used, and voluntarily disclosed, the contents of the intercepted communications to enhance their business in China. This disclosure was not necessary for the operation of Defendants' system or to protect Defendants' rights or property."²⁸ In late August, Yahoo! filed a motion to dismiss the case with the U.S. District Court for Northern California. In addition to arguing that the case did not fall within the court's jurisdiction, the Yahoo! motion repeated the argument that the company could not be held liable because it was bound to comply with a lawful request by Chinese authorities.²⁹ Human Rights USA, the organization representing the family members' lawsuit, retaliated by seeking discovery of relevant internal records and documents from Yahoo! related to Yahoo!'s handling of the Shi Tao and Wang Xiaoning cases.³⁰ Settlement was reached between Yahoo! and the plaintiffs soon thereafter in mid-November.

Given the Terms of Service to which Shi Tao technically agreed (regardless of whether he actually read or understood them), and given that Yahoo China employees handed over his information in response to a legally-binding, written police order, it is possible that if the families' lawsuit had proceeded in U.S. court, Yahoo!'s lawyers may have prevailed in the end. But victory after a prolonged lawsuit would also likely have come with further reputational cost to the company: More documents related to Yahoo!'s China internal operations in 2003 and 2004 would likely have come into the public domain, lifting the lid on an operation which – based on what we now know about communication failures between the regional offices and Sunnyvale headquarters in 2004 – most likely would have brought additional embarrassment for the company at very least, and might also have had other unknown consequences. What's more, a legal victory would have been hollow because it would not have absolved Yahoo! in the eyes of the human rights community, investors, and Yahoo! users around the world.

²⁸ "Complaint for Tort Damage," Wang Xiaoning, Yu Ling, et. al., v. Yahoo! Inc., Yahoo! Holdings (Hong Kong), Ltd., Alibaba.com, Inc. et. al., downloaded April 20, 2007 from: <http://www.humanrightsusa.org/modules.php?op=modload&name=UpDownload&file=index> (file no longer available as of December 7, 2007).

²⁹ Sam Diaz, "Yahoo Asks Court In U.S. to Dismiss Suit Over China," Washington Post, August 28, 2007, Page D03, at: <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/27/AR2007082701581.html> (accessed December 7, 2007); Rebecca MacKinnon, "Full legal documents: Yahoo! asks court to dismiss jailed Chinese dissidents' lawsuit," *RConversation*, August 29, 2007, at: <http://rconversation.blogs.com/rconversation/2007/08/full-legal-docu.html> (accessed December 7, 2007).

³⁰ "Yahoo! Case Study," Human Rights USA website at: http://www.humanrightsusa.org/index.php?option=com_content&task=view&id=15&Itemid=35 (accessed December 7, 2007).

Upon obtaining and publishing the text of the court verdict against Shi Tao in September 2005, Reporters Without Borders wrote: “does the fact that this corporation operates under Chinese law free it from all ethical considerations? How far will it go to please Beijing?”³¹ In 2006 Yahoo! (along with Google and Microsoft) was the subject of comprehensive reports by Human Rights Watch and Amnesty International, condemning the company's complicity with suppression of human rights and free speech in China. “The actions of these Internet companies are contrasted with their proclaimed values,” wrote Amnesty International, arguing that the “defences they use to justify their behaviour...do not stand up to scrutiny.” Speaking at a U.S. Congressional Hearing on February 15, 2006 (to be described in greater detail later in this chapter), U.S. Representative Tom Lantos delivered a scathing speech:

When Yahoo was asked to explain its actions, Yahoo said that it must adhere to local laws in all countries where it operates. But my response to that is: if the secret police a half century ago asked where Anne Frank was hiding, would the correct answer be to hand over the information in order to comply with local laws? These are not victimless crimes. We must stand with the oppressed, not the oppressors.³²

Upon awarding the 2007 Golden Pen Award to Shi Tao at the World Editors' Forum in Capetown, South Africa on June 4th 2007, World Editors Forum president George Brock said:

Yahoo has argued that it must comply with the laws in the countries where it operates, and was therefore compelled to cooperate with state security authorities. And while those who do business around the globe must often deal with non-democratic governments, we believe that new media companies that provide more and more of the means for global communications, have a special responsibility. They have an obligation to ensure that the basic human rights of their users will be protected, and they must carefully guard against becoming accomplices in repression.³³

³¹ “Information supplied by Yahoo! helped journalist Shi Tao get 10 years in prison,” Reporters Without Borders, September 6, 2005, at:

http://www.rsf.org/article.php3?id_article=14884 (accessed August 11, 2007)

³² Testimony by U.S. Rep. Tom Lantos, “The Internet in China: A Tool for Freedom or Suppression?” Joint Hearing before the Subcommittee on Africa, Global Human Rights and International Operations and the Subcommittee on Asia and the Pacific of the Committee on International Relations, House of Representatives, 109th Congress, Second Session February 15, 2006; Transcript at:

http://commdocs.house.gov/committees/intlrel/hfa26075.000/hfa26075_of.htm (Accessed August 11, 2007)

³³ “Golden Pen presentation speech by George Brock, President of the World Editors Forum,” World Association of Newspapers website, June 4, 2007, at: <http://www.wanpress.org/article14358.html> (accessed August 11, 2007)

Nor has the condemnation been limited to foreigners. In an open letter to Yahoo! founder Jerry Yang, Beijing-based writer Liu Xiaobo wrote: “Profit makes you dull in morality. Did it ever occur to you that it is a shame for you to be considered a traitor to your customer Shi Tao? Profit makes you foolish.”³⁴ Chinese blogger Zhao Jing (pseudonymously known as “Michael Anti”) wrote: “A company such as Yahoo! which gives up information is unforgivable. It would be for the good of the Chinese netizens if such a company could be shut down or get out of China forever.”³⁵

Discussion of what Yahoo! could have done differently – and should do differently in the future – tends to focus on three different possibilities: 1) Companies such as Yahoo! should comply with government information requests only in truly criminal cases, and decline to comply with cases concerning political dissent; 2) Yahoo! was ethically irresponsible to have established an e-mail service hosted on computer servers inside a jurisdiction such as the PRC, whose definition of “crime” is well known to include political activities and speech; and 3) While Yahoo! may have covered its *legal* obligations in its Terms of Service, it has a *moral* obligation in jurisdictions such as the PRC to make much more clear to users where their data is being stored and how it may be used. Shi Tao and others may have had a false sense of security when choosing to use an e-mail account of a foreign brand-name company, not realizing that their data was housed in computer servers located inside mainland Chinese jurisdiction.

Option 1 effectively amounts to cessation of business in China, since this option advocates a stance of corporate “civil disobedience” which the PRC authorities have no track record of tolerating. While some in Hong Kong, the United States, and elsewhere have advocated this option, it is further unclear whether they have considered the implications of trying to remain in China while adhering to Option 1: making unaccountable employees of technology companies, who are generally not trained in law or human rights, arbiters of what constitutes a valid “crime” and what constitutes political dissent deserving of protection.³⁶ This of course assumes that investigating authorities give company staff enough information to make this determination, which in many jurisdictions including the United States is generally not the case. Option 2 has been cited as the reason why companies such as Google and Microsoft have not offered e-mail

³⁴ *Race to the Bottom: Corporate Complicity in Chinese Internet Censorship*, Human Rights Watch report, August 10, 2006, Appendix VII: Liu Xiaobo’s letter to Yahoo!, at: http://www.hrw.org/reports/2006/china0806/14.htm#_Toc142395844 (accessed August 11, 2007)

³⁵ Zhao Jing, “The Freedom of Chinese Netizens Is Not Up To The Americans,” blog, original Chinese at <http://anti.blog-city.com/1634657.htm>; English translation by Roland Soong at EastSouthWestNorth, http://www.zonaeuropa.com/20060217_1.htm (accessed August 12, 2007).

³⁶ The Associated Press, “Informing case against Yahoo is dropped in Hong Kong,” *International Herald Tribune*, March 14, 2007, at: <http://www.iht.com/articles/2007/03/14/business/yahoo.php> (accessed August 12, 2007).

services hosted in China.³⁷ Option 3 – in some form – has become a key component of voluntary industry standards now in the process of being developed by Yahoo!, Google, Microsoft, and others. The issues surrounding Options 2 and 3 will be discussed in greater detail below.

Section 3: Different companies, same country, different choices.

Other companies, including Microsoft and Google, have come under fire for assisting the Chinese government in the suppression of free speech. However each company has drawn the line in different places. They have all made different choices about what kinds of services to provide or not provide to users in the People’s Republic of China. Choices have also been made about where – and in what jurisdiction – computer servers hosting user data are ultimately located.

Yahoo! is the only foreign brand providing e-mail services with user data hosted on computer servers inside mainland China. In September 1999, four years after the Internet arrived in China, Yahoo! unveiled a simplified Chinese-language portal including search engine, e-mail, and instant messaging services. It also set up a Beijing office, in close partnership with Beijing Founder Electronics Co., Ltd, which according to the Yahoo! corporate press release would “play a strategic role in guiding and supporting Yahoo! China in China.”³⁸ (Yahoo Hong Kong was launched in January 1999.³⁹) Thus Yahoo! became the first major U.S. Internet company to enter the China market. It also became the first major U.S. company to find itself faced with Chinese government requirements for censorship and data sharing with authorities.

Yahoo! set the tone for the way in which foreign companies are expected to comply not only with demands for user e-mail information, but also how they should comply with censorship of public online content on search engines and web portals. China’s Internet controls are a multi-layered system combining official actions with private industry cooperation. Official actions take the form of “filtering” forbidden websites and keywords at the level of Internet Access Providers and also at the limited number of “gateways” through which the global Internet enters China’s domestic telecoms

³⁷ Human Rights Watch, op. cit; Andrew McLaughlin, Senior Policy Counsel, “Google in China,” *The Official Google Blog*, January 27, 2006, at: <http://googleblog.blogspot.com/2006/01/google-in-china.html> (accessed August 12, 2007)

³⁸ “Yahoo! Introduces Yahoo! China,” Yahoo! Media Relations Press Release, September 24, 1999, at: <http://docs.yahoo.com/docs/pr/release389.html> (accessed August 14, 2007)

³⁹ “Yahoo! Expands Position in Asia,” Yahoo! Press Room, January 28, 1999, at: <http://yhoo.client.shareholder.com/press/ReleaseDetail.cfm?ReleaseID=173653> (accessed August 14, 2007)

networks.⁴⁰ Surveillance is conducted online and in Internet cafes by various public security bodies. It is argued, however, that China's Internet controls would not be nearly as successful as they have been so far in preventing the rise of domestic political opposition movements if it were not for the strong cooperation and self-censorship by private Internet companies.⁴¹

In China, all commercial or noncommercial Internet Content Providers (ICP's) are required to register for and display a license in order to operate legally. They are held liable for all content appearing on their websites, no matter whether that content is created by the organization's employees, or by any of the site's visitors, or users of its content-creation and content-sharing services.

The ICP's obligations are manifested in the "Public Pledge on Self-discipline for the Chinese Internet Industry," initiated by the quasi-official Internet Society of China (ISOC), the major professional association for the Chinese Internet industry. While the ISOC is called a "nongovernmental organization," its "governing body" is the Ministry of Information Industry, the government ministry in charge of China's national Internet infrastructure.⁴² Signed by hundreds of organizations including Chinese companies, universities, and government offices, the pledge commits signatories to "energetic efforts to carry forward the rich cultural tradition of the Chinese nation and the ethical norms of the socialist cultural civilization" by observing all state industry regulations. In particular, signatories vow to refrain "from producing, posting, or disseminating pernicious information that may jeopardize state security and disrupt social stability."⁴³ Yahoo! signed the pledge in August 2002 and was met with the immediate criticism of human rights groups, who pointed out that Yahoo! was not required by Chinese law to sign the

⁴⁰ Eric Harwit and Duncan Clark, "Shaping the Internet in China: Evolution of Political Control Over Network Infrastructure and Content," *Asian Survey*, 41:3, May-June 2001, pp. 337-408.; OpenNet Initiative, "Internet Filtering in China 2004-2005: A Country Study," April 14, 2005 [online], <http://www.opennetinitiative.net/studies/china/> (retrieved August 22, 2007); China Internet Network Information Center, "17th Statistical Survey Report on The Internet Development in China," January 2006 [online], <http://www.cnnic.net.cn/download/2006/17threport-en.pdf> (accessed August 22, 2007); Steven Cherry, "The Net Effect," *IEEE Spectrum*, June 2005 [online], <http://www.spectrum.ieee.org/print/1219> (accessed August 22, 2007); Human Rights Watch, op cit.;

⁴¹ Rebecca MacKinnon, "Flatter world and thicker walls? Blogs, censorship and civic discourse in China," In Drezner, D., and H. Farrell, eds., *WILL THE REVOLUTION BE BLOGGED? (Special Issue)*, *Public Choice*, (Springer Netherlands), Published online at Springerlink August 9, 2007.

⁴² The Internet Society of China's homepage is at <http://www.isc.org.cn/English/> (accessed August 22, 2007)

⁴³ Internet Society of China, "Public Pledge of Self-Regulation and Professional Ethics for China Internet Industry," July 19, 2002 [online], <http://www.isc.org.cn/20020417/ca102762.htm> (accessed August 22, 2007).

pledge.⁴⁴ Yahoo! lawyers responded that “the restrictions on content contained in the pledge impose no greater obligation than already exists in laws in China.”⁴⁵

The display of politically objectionable content can result in reprimands to company management and employees from the Ministry of Information Industry (MII), the State Council Information Office, the Communist Party’s Propaganda Department, and/or various state security organs, accompanied by warnings that insufficient controls will result in revocation of the company’s license. In order to minimize reprimands and keep their licenses in good standing, companies operating search engines maintain lists of thousands of words, phrases and web addresses to be filtered out of search results so that links to politically objectionable websites do not even appear on the search engine’s results pages, even when those websites may be blocked at the backbone or Internet Service Provider (ISP) level.⁴⁶ As an early entrant into the Chinese search engine market, Yahoo!’s search engine filtering evolved along with the system. Tests conducted in 2006 by Human Rights Watch showed that Yahoo!’s Chinese search engine censored its search results to the same degree as the leading domestic search engine, Baidu, and much more thoroughly than Google.cn and somewhat more thoroughly than Microsoft’s Chinese-language search engine.⁴⁷

In August 2005, Yahoo! announced it would purchase a 40 percent stake in the Chinese e-commerce firm Alibaba.com. Yahoo! merged its China-based subsidiaries into Alibaba, including the Yahoo! Chinese email service (cn.mail.yahoo.com) and the Chinese search engine at: cn.yahoo.com. Since then, Yahoo! has held only one of four board seats for Alibaba.com, and no longer held day-to-day operational control over Yahoo! China, which had become a division of Alibaba.com.⁴⁸ According to Yahoo! executives, as of

⁴⁴ “Yahoo! Risks abusing human rights in China,” Human Rights Watch news release, August 9, 2002, <http://www.hrw.org/press/2002/08/yahoo080902.htm> (accessed August 22, 2007)

⁴⁵ Jim Hu, “Yahoo yields to Chinese web laws,” CNet News.com.

⁴⁶ Human Rights Watch, *op. cit.*; Clive Thompson, “Google’s China Problem,” New York Times Magazine, April 23, 2006, <http://www.nytimes.com/2006/04/23/magazine/23google.html?ex=1303444800en=9721027e105631bfei=5088partner=rssnytemc=rss&pagewanted=all> (accessed August 22, 2007)

⁴⁷ Human Rights Watch, *op cit.*

⁴⁸ “Testimony of Michael Callahan, Senior Vice President and General Counsel, Yahoo! Inc., Before the Subcommittees on Africa, Global Human Rights and International Operations, and Asia and the Pacific,” U.S. House of Representatives Committee on International Relations, Joint Hearing: “The Internet in China: A Tool for Freedom or Suppression?” February 15, 2006, and Yahoo! corporate press release, undated, <http://yhoo.client.shareholder.com/press/ReleaseDetail.cfm?ReleaseID=187725> (accessed August 22, 2007).

October 2005 Alibaba has had full control over both operational and compliance policies of Yahoo! China.⁴⁹

Statements by Alibaba's CEO Jack Ma have shown that he had no intention of changing the policies of Yahoo! China when it comes to compliance with official investigations. In a November 2005 interview with the *Financial Times*, when asked about the Shi Tao case, he replied: "I would do the same thing... I tell my customers and my colleagues, that's the right way to do business."⁵⁰ Three months after Yahoo! was chastised in Congress for its handling of the Shi Tao case, In a May 7, 2006 Ma gave an interview with the *San Francisco Chronicle* in which he alluded to a slight change in emphasis when he said: "The authorities must have a license or a document. Otherwise, the answer is no."⁵¹

In a letter to Human Rights Watch dated August 1, 2006, Yahoo! Deputy General Counsel Michael Samway insisted that Yahoo! has not relinquished all responsibility for Alibaba's administration of Yahoo! China, and that Yahoo! Inc. "will continue to use our influence in these areas given our global beliefs about the benefits of the Internet and our understanding of requirements under local laws."⁵²

Microsoft: Microsoft entered China in 1992 and has since then developed an extensive business and R&D network. However Microsoft's online content division, the Microsoft Network known as MSN, did not launch a mainland China portal until May 2005. It did so with the help of a joint-venture partner, Shanghai Alliance Investment Ltd. (SAIL) - a venture fund supported by the Shanghai City Government and led by Jiang Mianheng, son of former PRC president Jiang Zemin.⁵³

In 2005 the Chinese MSN initially offered a simplified Chinese language portal catering to the interests of mainland Chinese users as well as a localized version of the blog

⁴⁹ "Yahoo Writer Jailed in China," Red Herring, February 9, 2006, at: <http://www.redherring.com/Article.aspx?a=15659&hed=Yahoo+Writer+Jailed+in+China> (accessed August 22, 2007).

⁵⁰ Mure Dickie, "Yahoo backed on helping China trace writer," FT.com. November 10, 2005 [online], <http://news.ft.com/cms/s/7ed7a41e-515f-11da-ac3b-0000779e2340.html> (accessed August 22, 2007).

⁵¹ "ALIBABA.COM On the Record: Jack Ma," San Francisco Chronicle, May 7, 2006 [online], <http://www.sfgate.com/cgi-bin/article.cgi?f=/chronicle/archive/2006/05/07/BUGAQIJ8221.DTL> (accessed August 22, 2007).

⁵² Human Rights Watch, Appendix VIII: Letter from Human Rights Watch to Yahoo! and Yahoo!'s response, at: http://www.hrw.org/reports/2006/china0806/15.htm#_Toc142395845 (accessed August 22, 2007)

⁵³ "Microsoft Prepares to Launch MSN China," Microsoft news release, May 11, 2005, <http://www.microsoft.com/presspass/press/2005/may05/05-11MSNChinaLaunchPR.mspx> (accessed August 22, 2007)

hosting service MSN Spaces. The blog-hosting service came under immediate international criticism because it blocked users from entering certain politically sensitive keywords into the titles of their blogs. MSN Spaces came under even greater fire in January 2006 after it deleted the blog of the prominent Beijing-based blogger Zhao Jing, aka “Michael Anti.”⁵⁴ In response to criticism, MSN adjusted its policies to require that employees not censor any blogs without a written, legally-binding order from Chinese authorities, and that censored blogs would not be deleted but would rather be “filtered” from view by people trying to visit them from IP addresses located from within mainland China.⁵⁵

In 2006 MSN introduced a customized Chinese search engine for the mainland market which, like Yahoo! China’s search engine, actively de-listed politically sensitive websites. Unlike Yahoo!, however, MSN has opted not to host a localized version of its e-mail service, Hotmail, on computer servers inside China. It has done so even though keeping the account data for Hotmail’s Chinese users on servers outside the PRC has from time to time made it difficult for Chinese Hotmail users to access their e-mail.⁵⁶ According to Human Rights Watch and other sources, Microsoft executives have acknowledged that one of the reasons Microsoft opted not to offer Hotmail in China relates to concerns that Microsoft would find itself in the same position as Yahoo! did in the cases of Shi Tao and at least three others: having to choose between breaking Chinese law or providing information about political dissidents to the Chinese police.⁵⁷ Industry insiders have confirmed to this author that Microsoft has in the past refused Chinese government requests for Hotmail user data, on the grounds that the data is not under PRC legal jurisdiction.

Google: Google first introduced a U.S.-hosted simplified Chinese version of its global search engine in 2000.⁵⁸ However it did not set up an office in mainland China until July of 2005 with the launch of its research and development center in Beijing.⁵⁹ On January

⁵⁴ MacKinnon, “Flatter world and thicker walls?,” *op cit.*

⁵⁵ Testimony of Jack Krumholtz, Associate General Counsel and Managing Director, Federal Government Affairs Microsoft Corporation, House of Representatives Committee on International Relations Joint Hearing of the Subcommittee on Africa, Global Human Rights and International Operations and the Subcommittee on Asia and the Pacific: “The Internet in China: A Tool for Freedom or Suppression?” February 15, 2006

⁵⁶ Goff Dyer and Mure Dickie, “Chinese Hotmail users suffer disruptions,” *Financial Times*, May 12, 2006, at: <http://www.ft.com/cms/s/7d186064-e1e2-11da-bf4c-0000779e2340.html> (accessed August 22, 2007)

⁵⁷ Human Rights Watch, Section IV., *op. cit.*

⁵⁸ “Google Launches New Japanese, Chinese, and Korean Search Services,” Google corporate news release, September 12, 2000 <http://www.google.com/press/pressrel/pressrelease34.html> (accessed August 22, 2007)

⁵⁹ “Google to Open Research and Development Center in China,” Google corporate news release, July 19, 2005, http://www.google.com/press/pressrel/rd_china.html (accessed August 22, 2007).

26, 2006, Google unveiled a censored Chinese-language search engine at Google.cn. The move was greeted with widespread criticism by human rights and free speech groups who accused Google of violating its own core philosophy, “don’t be evil.” Google executives insisted that the censored search engine was the best way to serve the Chinese market, because they claimed that the appearance of sensitive websites and keywords in search results was causing access difficulties for mainland users.⁶⁰

Testifying on February 15, 2006 before the U.S. Congress, Google Vice President Eliot Schrage indicated that Google had drawn important lessons from the experiences of Yahoo! and Microsoft: “Google.cn today includes basic Google search services, together with a local business information and map service. Other products—such as Gmail and Blogger, our blog service—that involve personal and confidential information will be introduced only when we are comfortable that we can provide them in a way that protects the privacy and security of users’ information.”⁶¹

Thus, different Internet companies can make – and have made – different choices. The two Internet giants that entered China after Yahoo! were fortunate to be able to learn from Yahoo!’s mistakes. By not offering e-mail services hosted inside mainland China they have avoided having to assist the regime in jailing dissidents in order to remain in compliance with Chinese law. While Google and Microsoft have come under fire in China for complying with government demands to censor search engine results and blogs (in Microsoft’s case), they have avoided being directly responsible for ruining the lives of specific human beings who have spoken critically of the Chinese regime. These choices indicate that engagement by Internet companies with China is not entirely an “either-or” proposition in which foreign companies have absolutely no control over their behavior if they are to conduct business in China at all. Choices can be made about how and at what level to engage.

⁶⁰ Andrew McLaughlin, “Google In China,” Google Blog, January 27, 2006, <http://googleblog.blogspot.com/2006/01/google-in-china.html> (accessed August 22, 2007); Danny Sullivan, “Google Created EvilRank Scale To Decide On Chinese Censorship,” *Search Engine Watch*, January 30, 2006, <http://blog.searchenginewatch.com/blog/060130-154414> (accessed August 22, 2007); Clive Thompson, “Google’s China Problem,” *New York Times Magazine*, April 23, 2006, <http://www.nytimes.com/2006/04/23/magazine/23google.html?ex=1303444800en=9721027e105631bfei=5088partner=rssnytemc=rss&pagewanted=all> (accessed August 22, 2007)

⁶¹ “Testimony of Google Inc. before the Subcommittee on Asia and the Pacific, and the Subcommittee on Africa, Global Human Rights, and International Operations” given by Eliot Schrage, vice president, Global Communications and Public Affairs, Google Inc., U.S. House of Representatives Committee on International Relations, Joint Hearing: “The Internet in China: A Tool for Freedom or Suppression?” February 15, 2006, online at: <http://googleblog.blogspot.com/2006/02/testimony-internet-in-china.html> (accessed August 22, 2007)

Section 4: Can global information ethics be legislated?

On February 16, 2006, a Congressional hearing was held in which Google, Microsoft, Yahoo! and Cisco were publicly chastised for assisting Chinese censorship and/or surveillance.⁶² The next day, proposed legislation entitled the Global Online Freedom Act of 2006 (GOFA) was introduced by Congressmen Tom Lantos, a Democrat from California, and New Jersey Republican Christopher Smith.⁶³ In its original form, the bill included provisions that would forbid the storage of user data on servers inside China, would make it illegal to sell equipment or services to law enforcement agencies in countries like China and would enable victims of Yahoo!'s police collaboration to sue Yahoo! in US court. The bill would require US Internet companies to hand over all lists of forbidden words provided to them by "any foreign official of an Internet-restricting country" (as defined by the US State Department) to a specially created US Office of Global Internet Freedom. It would also require these companies to report all content deleted or blocked at the request of such a government to the same government office. Free speech groups like the Electronic Frontier Foundation pointed out that this would place US Internet companies in the position of acting as informers to the US government about actions of a foreign government. It also would result in handing over Chinese user information to the US government. GOFA was then substantially amended by the House Foreign Affairs Committee in the wake of critical feedback. In July 2006 GOFA was endorsed by fourteen human rights organizations, including Human Rights Watch, Amnesty International, Reporters Without Borders, and the Committee to Protect Journalists.⁶⁴

By the end of 2006, when the 109th Congress came to an end, there had been no further movement on this proposed piece of legislation. On January 5, 2007 Congressman Chris

⁶² Declan McCullagh and Anne Broache, "Politicians lash out at tech firms over China," CNet News.com, February 15, 2006, at:

http://news.com.com/Politicians+lash+out+at+tech+firms+over+China/2100-1028_3-6039834.html?tag=st.rn (accessed August 22, 2007)

⁶³ Declan McCullagh, "Proposed law targets tech-China cooperation," CNet News.com, February 16, 2006, at: http://news.com.com/Proposed+law+targets+tech-China+cooperation/2100-1028_3-6040303.html (accessed August 22, 2007); For a copy of the original, un-amended text of the bill, see:

http://rconversation.blogs.com/rconversation/files/SMITNJ_094_XML.pdf; For a critique of the bill's initial version written by this author, see: Rebecca MacKinnon, "America's Online Censors," February 24, 2006, at:

<http://www.thenation.com/doc/20060313/mackinnon> (accessed August 22, 2007); For the amended version of the bill see: <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.04780>: (accessed August 22, 2007)

⁶⁴ "Fourteen human rights organisations express support for a US draft law on free expression online (GOFA)," Reporters Without Borders website, July 18, 2006, at: http://www.rsf.org/article.php3?id_article=18304 (accessed August 22, 2007)

Smith reintroduced the bill as the Global Online Freedom Act of 2007.⁶⁵ As summarized in a press release issued by Smith's office, the Act in its present form seeks to do the following:

- Prohibits US companies from disclosing to foreign officials of an "Internet Restricting Country" information that personally identifies a particular user except for "legitimate foreign law enforcement purposes" [as defined by the Department of Justice];
- Creates a private right of action for individuals aggrieved by the disclosure of such personal identification to file suit in any US district court;
- Prohibits US internet service providers from blocking online content of US government or US-government financed sites;
- Authorizes \$50 million for a new interagency office within the State Department charged with developing and implementing a global strategy to combat state-sponsored internet jamming by repressive countries;
- Requires the new Office of Global Internet Freedom to monitor filtered terms; and to work with Internet companies and the non-profit sector to develop a voluntary code of minimum corporate standards related to Internet freedom.
- Requires Internet companies to disclose to the new Office of Global Internet Freedom the terms they filter and the parameters they must meet in order to do business in Internet Restricting Countries;
- Requires the President to submit to Congress an annual report designating as an "Internet Restricting Country" any nation that systematically and substantially restrict internet freedom;
- Establishes civil penalties for businesses (up to \$2 million) and individuals (up to \$100,000) for violations of the new requirements;
- Mandates a feasibility study, by the Department of Commerce, to determine what type of restrictions and safeguards should be imposed on the export of computer equipment which could be used in an Internet Restricting Country to restrict Internet freedom.⁶⁶

⁶⁵ For full text of the Global Online Freedom Act of 2007 see:

http://thomas.loc.gov/home/gpoxmlc110/h275_ih.xml (accessed August 22, 2007)

⁶⁶ "Smith Reintroduces the Global Online Freedom Act," PRNewswire, January 8, 2007, at: <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/01-08-2007/0004502076&EDATE=> (accessed September 20, 2007)

In early February 2007 GOFA was sent to the House Subcommittee on Commerce, Trade and Consumer Protection, where it has remained without action since then.⁶⁷

GOFA 2007 was endorsed by the same fourteen human rights organizations that endorsed the 2006 version.⁶⁸ Notably, online free speech organizations such as the Electronic Frontier Foundation (EFF) and the Center for Democracy and Technology (CDT), as well as academic centers for the study of Internet and policy such as the Berkman Center for Internet and Society and the Open Net Initiative, have not endorsed GOFA. One reason was, as Oxford's Jonathan Zittrain and Harvard's Jonathan Palfrey put it, GOFA's restrictions on the business of U.S. technology firms overseas are so restrictive "that opening your new business line in China would probably be a nonstarter."⁶⁹ The organizations and academics who did not endorse GOFA are inclined to view legislation as an instrument of very last resort, preferring a light government touch when it comes to government regulation of the technology sector in general. There is also the concern, as expressed in the daily work of the EFF and CDT in particular, that it is impossible to divide up the world definitively into "internet restricting countries" and non-internet restricting countries: even in the United States there have been recent cases of companies being sued for not adequately protecting user rights in the face of encroachments by U.S. government agencies.⁷⁰ In its study of countries that censor the Internet, the Open Net Initiative has pinpointed 25 countries, including democracies such as Thailand where Internet "filtering" occurs.⁷¹ Another concern relates to the role of the U.S. government – in particular, the Department of Justice (DOJ) – in acting as final arbiter of what constitutes a "legitimate law enforcement purpose" and what does not in cases concerning non-Americans. Given the DOJ's negative international reputation for its stance on torture, it is reasonable to conclude that the DOJ's involvement with U.S. business operations overseas is not likely to have a positive impact on these companies'

⁶⁷ "H.R. 275, The Global Online Freedom Act of 2007," Washingtonwatch.com, at: http://www.washingtonwatch.com/bills/show/110_HR_275.html (accessed September 20, 2007)

⁶⁸ "Support the Global Online Freedom Act of 2007 - Joint NGO Statement to Members of Congress in Support of H.R. 275," Human Rights Watch, January 16, 2007, at: <http://hrw.org/english/docs/2006/07/18/usint14013.htm> (accessed September 20, 2007)

⁶⁹ John Palfrey and Jonathan Zittrain, "Companies need guidance to face censors abroad," CNet News.com, August 14, 2007, at: http://news.com.com/Companies+need+guidance+to+face+censors+abroad/2010-1028_3-6202426.html (accessed September 20, 2007)

⁷⁰ See Lesley Cauley, "Support the Global Online Freedom Act of 2007 Joint NGO Statement to Members of Congress in Support of H.R. 275," USA Today, May 11, 2006, at: http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm (accessed September 20, 2007); See also "AT&T Class Action: EFF's Class Action Lawsuit Against AT&T for Collaboration with the Illegal Domestic Spying Program," Electronic Frontier Foundation website, at: <http://www.eff.org/legal/cases/att/> (accessed September 20, 2007)

⁷¹ "Thailand," Open Net Initiative, at: <http://opennet.net/research/profiles/thailand> (accessed September 20, 2007)

competitiveness in many markets.⁷² Thus, the structure of GOFA has been called "hypocritical" and "arrogant" by some critics (including this author) who would nonetheless like to see Internet companies adhere to higher ethical standards on free expression and privacy.⁷³ As Zittrain and Palfrey put it, "The threat of legislation may be more effective in improving behavior than actually passing the law."⁷⁴

Section 5: Privacy and free expression: a new realm of "Corporate Social Responsibility."

Views of Human Rights Organizations: In the spring and summer of 2006 Human Rights Watch, Amnesty International, and Reporters Without Borders all published recommendations for how companies might support rather than hinder human rights and free expression in places like China.

In January 2006 Reporters Without Borders published the following recommendations for Internet companies:

- **E-mail services:** No US company would be allowed to host e-mail servers within a repressive country*. So, if the authorities of a repressive country want personal information about the user of a US company's e-mail service, they would have to request it under a procedure supervised by US.
- **Search engines:** Search engines would not be allowed to incorporate automatic filters that censor "protected" words. The list of "protected" keywords such as "democracy" or "human rights" should be appended to the law or code of conduct.
- **Content hosts (websites, blogs, discussion forums etc):** US companies would not be allowed to locate their host servers within repressive countries. If the authorities of a repressive country desire the closure of a publication hosted by a US company, they would have to request it under a procedure supervised by the US judicial authorities. Like search engines, content hosts would not be allowed to incorporate automatic filters that censor "protected" key-words.

⁷² Anne Broache, "Politicos OK limits for U.S. firms in Net-censoring countries," CNet News, October 23, 2007, at: http://www.news.com/8301-10784_3-9802616-7.html?part=rss&subj=news&tag=2547-1_3-0-5 (accessed December 10, 2007).

⁷³ Rebecca MacKinnon, "Global Online Freedom Act Passes House Committee," Rconversation, October 24, 2007 at: <http://rconversation.blogs.com/rconversation/2007/10/global-online-f.html> (accessed December 10, 2007); Rebecca MacKinnon, "How Google, Yahoo, and Microsoft Sold their Souls to China," GOOD Magazine, July 2007, at: http://www.goodmagazine.com/section/Provocations/internet_intervention (accessed December 10, 2007).

⁷⁴ Palfrey and Zittrain, *op cit.*

- **Internet censorship technologies:** Reporters Without Borders proposes two options:
 - **Option a:** US companies would no longer be permitted to sell Internet censorship software to repressive states.
 - **Option b:** They would still be able to market this type of software but it will have to incorporate a list of “protected” keywords that are rendered technically impossible to censor.
- **Internet surveillance technology and equipment:** US companies would have to obtain the express permission of the Department of Commerce in order to sell to a repressive country any technology or equipment which can be used to intercept electronic communications or which is specifically designed to assist the authorities in monitoring Internet users.
- **Training:** US companies would have to obtain the express permission of the Department of Commerce before providing any programme of training in Internet surveillance and censorship techniques in a repressive country.

* A list of countries that repress freedom of expression would be drawn up on the basis of documents provided by the US State Department and would be appended to the code of conduct or law that is adopted. This list would be regularly updated.⁷⁵

Many of the ideas in Reporters Without Borders’ recommendations above influenced the first draft of the Global Online Freedom Act of 2006.

While Amnesty International and Human Rights Watch supported GOFA, these organizations chose to avoid repeating Reporters Without Borders’ initial idea – picked up by the Congressional staffers who drafted GOFA – of involving the U.S. government as arbiter for deciding what constitutes a “repressive” country. Instead they issued recommendations that would be less dependent on a specific role for the U.S. or any other government.

In July 2006, Amnesty International outlined the following recommendations to “Yahoo!, Microsoft, Google and other Internet companies operating in China:”

1. **Publicly commit to honouring the freedom of expression provision** in the Chinese constitution and lobby for the release of all cyber-dissidents and journalists imprisoned solely for the peaceful and legitimate exercise of their freedom of expression.
2. **Be transparent about the filtering process** used by the company in China and around the world and make public what words and phrases are filtered and how these words are selected.

⁷⁵ "Do Internet companies need to be regulated to ensure they respect free expression?" Reporters Without Borders, January 6, 2006, at: http://www.rsf.org/article.php3?id_article=16110 (accessed December 10, 2007).

3. **Make publicly available all agreements** between the company and the Chinese government with implications for censorship of information and suppression of dissent.
4. **Exhaust all judicial remedies and appeals in China and internationally before complying with state directives** where these have human rights implications. Make known to the government the company's principled opposition to implementing any requests or directives which breach international human rights norms whenever such pressures are applied.
5. **Develop an explicit human rights policy** that states the company's support for the Universal Declaration of Human Rights and complies with the UN Norms for Business and the UN Global Compact's principle on avoiding complicity in human rights violations.
6. **Clarify to what extent human rights considerations are taken into account** in the processes and procedures that the company undertakes in deciding whether and how the company's values and reputation will be compromised if it assists governments to censor access to the Internet.
7. **Exercise leadership in promoting human rights in China** through lobbying the government for legislative and social reform in line with international human rights standards, through seeking clarification of the existing legal framework and through adopting business practices that encourage China to comply with its human rights obligations.
8. **Participate in and support the outcomes of a multi-stakeholder process** to develop a set of guidelines relating to the Internet and human rights issues, as well as mechanisms for their implementation and verification, as part of broader efforts to promote recognition of the body of human rights principles applicable to companies.⁷⁶

In its August 2006 report, Human Rights Watch outlined the following recommendations "to Internet companies working in China:"

- **Lobby** and attempt to convince the Chinese government and its officials to end political censorship of the Internet.
- **Develop and adhere to a code of conduct** that prohibits participation in or facilitation of infringements of the right to free expression, information, privacy, association, or other internationally recognized human rights.
- **Never turn over personal user information if it could lead to prosecution for protected expression.** In order to minimize conflicts with Chinese law, companies should not store such data in China.
- **Never censor any material unless required by legally binding and written government request.** The practice of proactively seeking and censoring search terms, words or phrases in blogs, chatrooms, online

⁷⁶ *Undermining Freedom of Expression in China: The role of Yahoo!, Microsoft, and Google*, Amnesty International report, July 2006, online at: <http://www.amnesty.org/en/report/info/POL30/026/2006> (accessed December 10, 2007).

bulletin boards, and websites, as well as entire website addresses, crosses the line from being censored to becoming the censor, and must end immediately. There is an ethical difference between being censored and being the censor.

- **Use all legal means to resist demands for censorship** of searches, blogs, web addresses, etc. Companies should only comply with such demands if they are made via legally binding, documentable procedures and the company has exhausted all reasonable legal means to resist them.
- **Document all cases in which content has been censored** in compliance with legally binding government demands and make this information publicly available.
- **Make websites and email available to users to allow for secure communication** via secure protocols such as https (an encrypted version of the Hypertext Transfer Protocol “http,” the primary method used to convey and transfer information on the world wide web), IMAPS (a secure version of the Internet Message Access Protocol that allows a local client to access email on a remote server), and POPS (encrypted version of the Post Office Protocol commonly used by email services so that users can retrieve email from a remote server).⁷⁷

Shareholder activism: Research and recommendations of human rights groups have been particularly influential with activist shareholders and investment funds that specialize in socially responsible investing. Investors and shareholders concerned about corporate social responsibility (CSR) have been asking questions about companies’ labor and environmental practices for many years now, but the free speech and privacy aspect of corporate social responsibility is new territory for CSR investors. In May 2005 the socially responsible investment funds Domini Social Investments and Boston Common Asset Management filed a shareholder resolution that would have required Cisco Systems to follow stricter human rights criteria. While the resolution only received 11 percent support in 2005, a similar resolution filed in 2006 gained a favorable vote of 29 percent, reflecting growing concerns by investors over human rights and privacy implications of the business choices by IT companies in authoritarian countries.⁷⁸ 2005 was also the year that fund managers and investment groups also began to organize and strategize around free speech and privacy issues. In November of that year, two dozen fund managers and investment analysts signed a joint statement pledging to monitor the human rights impact

⁷⁷ *Race to the Bottom*, Human Rights Watch, Part VI, Recommendations.

⁷⁸ Kevin Poulsen, “Critics Squeeze Cisco Over China,” *Wired*, July 29, 2007, at: <http://www.wired.com/techbiz/media/news/2005/07/68326> (accessed September 22, 2007); “Shareholders ask Cisco Systems to account for its activities in repressive countries,” Reporters Without Borders, November 17, 2006, at: http://www.rsf.org/article.php3?id_article=19782 (accessed September 22, 2007); “Human Rights and Internet Fragmentation Proposal Receives Record Shareholder Support,” Boston Common Asset Management, LLC website, November 15, 2006, at: <http://www.bostoncommonasset.com/news/cisco-agm-111506.html> (Accessed September 22, 2007)

of technology companies doing business in authoritarian countries, and also called for companies to publicly affirm their commitment to freedom of expression.⁷⁹

In 2007, the New York City Comptroller filed a shareholder resolution on behalf of several New York City employee pension funds. It “called for management at Yahoo! to institute policies, with certain minimum standards, to protect freedom of access to the Internet.”⁸⁰ The resolution further asked that those standards include the following:

Data that can identify individual users should not be hosted in Internet restricting countries, where political speech can be treated as a crime by the legal system; the company will not engage in pro-active censorship; the company will use all legal means to resist demands for censorship. The company will only comply with such demands if required to do so through legally binding procedures; users will be clearly informed when the company has acceded to legally binding government requests to filter or otherwise censor content that users are trying to access; users should be informed about the company’s data retention practices, and the ways in which their data is shared with third parties; and, the company will document all cases where legally-binding censorship requests have been complied with, and that information will be publicly available.⁸¹

Yahoo! attempted to block the resolution from appearing on the shareholder ballot, but the U.S. Securities Exchange Commission rejected Yahoo!’s request to omit it from the ballot.⁸² At the annual Yahoo! shareholder meeting on June 12, 2007, only 15.2 percent of shareholders voted in favor of the resolution.⁸³ A similar resolution was rejected by

⁷⁹ Associated Press, “Money’s Nice, but Freedom’s Nicer,” *Wired*, November 8, 2005, at: <http://www.wired.com/politics/law/news/2005/11/69508> (accessed September 22, 2007); Tom Zeller Jr., “Critics Press Companies on Internet Rights Issues,” *New York Times*, November 8, 2006, at: <http://www.nytimes.com/2005/11/08/technology/08data.html?ex=1289106000&en=f637437c39fdffa7&ei=5088&partner=rssnyt&emc=rss> (accessed September 22, 2007); Full text of the pledge can be downloaded here: <http://www.nytimes.com/packages/pdf/business/20051108statement.pdf> (accessed September 22, 2007).

⁸⁰ “Thompson statement on Yahoo! shareholder vote to protect global freedom of access to the Internet,” Press Release, NYC Comptroller website, June 11, 2007, at: http://www.comptroller.nyc.gov/press/2007_releases/st07-06-013.shtm (Accessed September 22, 2007)

⁸¹ *Ibid.*

⁸² “Thompson urges Yahoo! to protect global freedom of access to Internet,” Press Release, NYC Comptroller website, June 8, 2007, at: http://www.comptroller.nyc.gov/press%2F2007_releases/pr07-06-068.shtm (Accessed September 22, 2007)

⁸³ “Yahoo’s China policy rejected,” BBC News, June 12, 2007, at: <http://news.bbc.co.uk/2/hi/business/6747095.stm>, and Emma Thelwell, “Yahoo!

Google shareholders in April.⁸⁴ In its statement to shareholders, the Yahoo! Board of Directors argued against the shareholder resolution because:

http://www.yahoodocs.com/2007/06/13/bcnyahoo113.xml

Yahoo! believes that it would be imprudent for the Company to be constrained by a set of specific, static and highly prescriptive standards and policies that may not be workable and effective across countries and business lines. Instead, Yahoo!, its stockholders and its users are better served by more generalized policies that fully reflect the Company's commitment to the principles of free speech and user privacy and still afford the Company enough flexibility to design and implement procedures that comply with the various legal systems under which the Company chooses to operate.⁸⁵

The report cited an action plan announced in February 2006 at the Congressional hearings:

- **Collective Action:** Yahoo! will work with industry, government, academia and non-governmental organizations to explore policies to guide industry practices in countries where content is treated more restrictively than in the United States and to promote the principles of freedom of speech and expression.
- **Compliance Practices:** Yahoo! will continue to employ rigorous procedural protections under applicable laws in response to government requests for information, maintaining its commitment to user privacy and compliance with the law.
- **Information Restrictions:** Where a government requests that Yahoo! restrict search results, Yahoo! will do so if required by applicable law and only in a way that impacts the results as narrowly as possible. If Yahoo! is required to restrict search results, it will strive to achieve maximum transparency to the user.
- **Government Engagement:** Yahoo! will actively engage in ongoing policy dialogue with governments with respect to the nature of the Internet and the free flow of information.⁸⁶

shareholders reject call for greater internet freedom," *The Daily Telegraph*, June 14, 2007, at:

<http://www.telegraph.co.uk/money/main.jhtml?xml=/money/2007/06/13/bcnyahoo113.xml> (Accessed September 22, 2007)

⁸⁴ Elinor Mills, "Google shareholders vote down proposal on censorship," ZDNet, May 10, 2007, at: http://news.zdnet.com/2100-9595_22-6182997.html (Accessed September 22, 2007)

⁸⁵ Yahoo! Inc. Proxy Statement (definitive) Filed 4/30/2007 For Period Ending 6/12/2007, pp. 33-34; downloadable at:

<http://yhoo.client.shareholder.com/common/download/sec.cfm?companyid=YHOO&fid=891618-07-262&cik=1011006> (Accessed September 22, 2007).

⁸⁶ *Ibid.*, p 33.

The Yahoo! Board of Directors statement went on to describe how the company has since “also established a multi-disciplinary and cross-functional team of Yahoo! employees worldwide to coordinate and support the Company’s efforts to address privacy and free expression issues on a global basis.” According to Yahoo!, the team consults frequently with government agencies, outside experts, and other technology companies in order to “seek solutions to free expression and privacy challenges.”⁸⁷

At the June 12 shareholder meeting, Yahoo! founder Jerry Yang also made a statement on human rights and China in which he condemned the Chinese government’s imprisonment of people who express political views online:

We remain deeply concerned about governments that imprison their own citizens for exchanging ideas and expressing political views, especially online. Yahoo! condemns these actions. We join the global Internet community in calling for the release of those imprisoned for expressing their political views online, in particular in places like China. We’ve expressed those views to the Chinese government and to the U.S. government. Over the past year, we’ve met with the U.S. government and outside experts in this field, including as recently as last week when I was with some senior officials at the State Department on the topic of Internet censorship and political dissidents and to ask for the U.S. government’s help.⁸⁸

Voluntary industry principles: When arguing against what company executives called “highly prescriptive” shareholder resolutions on freedom of expression, Jerry Yang’s speech and Yahoo!’s Board of Directors statement used one further example of alternative efforts to incorporate free expression and privacy concerns into the company’s business practices. Along with Google, Microsoft, Vodaphone, and the Swedish telecoms company TeliaSonera, Yahoo! has been participating in a “multi-stakeholder process” with 24 “stakeholder groups:” human rights groups (including Human Rights Watch, Amnesty International, Reporters Without Borders, and Human Rights in China), free speech organizations (including the Center for Democracy and Technology, the Electronic Frontier Organization, and the OpenNet Initiative), socially responsible investment funds (including Calvert, Domini, and Boston Common), and several academic institutions (including Berkeley, Harvard, and Oxford). The group aims to develop global industry principles that will set standards for internet and telecommunications companies to protect users’ privacy and freedom of expression. Facilitated by two groups, the San Francisco-based Business for Social Responsibility

⁸⁷ *Ibid.*, p. 34

⁸⁸ “Jerry Yang Human Rights Statement,” reproduction of unpublished document: “Statement on the Internet & Human Rights, Jerry Yang, Yahoo! Co-Founder Yahoo! Stockholder Meeting, June 12, 2007,” RConversation.com, at: http://rconversation.blogs.com/rconversation/jerry_yang_human_rights_s.html (accessed September 22, 2007)

and the Washington-based Center for Democracy and Technology, the process began behind closed doors in 2006 and was made public in January 2007.⁸⁹

Participants expect that the global principles will be finalized and made public in 2008. The principles on privacy and free expression are not specifically China-focused, but rather are meant to be truly global. As participants in the process (including this author) have pointed out, it is hard to find any country where Internet and telecoms companies do not face the challenge of balancing government demands for control and information on the one hand, and users' interests as well as rights to free speech and privacy on the other.⁹⁰ In 2006, the Electronic Frontier Foundation filed a class-action lawsuit against the U.S. telecoms company AT&T accusing it of "violating the law and the privacy of its customers by collaborating with the National Security Agency (NSA) in its massive, illegal program to wiretap and data-mine Americans' communications."⁹¹ By the middle of 2007 it had become clear that AT&T's actions were part of a massive, sophisticated and illegal data-mining and wire-tapping program involving dozens of U.S. telecommunications companies and internet service providers, which had been going on since 2001 at the behest of the National Security Agency.⁹² In August 2007 Google conceded to pressure from the Thai government and agreed to censor videos that violate Thai law.⁹³ The deal was condemned by the International Federation of Journalists.⁹⁴ These are just two of many examples of how Internet and telecoms companies are under pressure to conduct censorship or violate user privacy even in countries with democratic governments.

⁸⁹ "Companies, Human Rights Groups, Investors, Academics and Technology Leaders to Address International Free Expression and Privacy Challenges," Press Release from Business for Social Responsibility, SocialFunds.com, January 18, 2007, at:

<http://www.socialfunds.com/news/release.cgi/7272.html> (accessed September 22, 2007)

⁹⁰ MacKinnon, "How Google, Yahoo, and Microsoft Sold their Souls to China," *op. cit.*; Rebecca MacKinnon, "Free speech, privacy, and corporate responsibility: an update," *Rconversation*, June 26, 2006 at: <http://rconversation.blogs.com/rconversation/2007/06/a-global-commit.html> (accessed September 22, 2007)

⁹¹ Electronic Frontier Foundation, *op. cit.*

⁹² Eric Lichtblau, James Risen and Scott Shane, "Wider Spying Fuels Aid Plan for Telecom Industry," *The New York Times*, December 16, 2007, at: <http://www.nytimes.com/2007/12/16/washington/16nsa.html> (accessed December 30, 2007)

⁹³ The Associated Press, "Thailand lifts ban on YouTube after site agrees to bar videos that break country's law," *International Herald Tribune*, August 31, 2007, at: <http://www.ihf.com/articles/ap/2007/08/31/asia/AS-GEN-Thailand-YouTube-Ban.php> (accessed September 22, 2007);

⁹⁴ "IFJ concerned over Google Censorship Deal with Thailand," International Federation of Journalists website, September 5, 2007, at: <http://www.ifj.org/default.asp?index=5275&Language=EN> (accessed September 23, 2007)

A major challenge in developing a global industry code of conduct for free expression and privacy relates to the conflict between domestic laws on one hand and international law on the other. As Human Rights Watch pointed out in a 2006 report: “The broad content restrictions found in Chinese Internet law and reiterated by the Provisions [on the Administration of Internet News Information Services issued jointly by the State Council Information Office (SCIO) and the Ministry of Information Industry in September 2005] are impossible to reconcile with the free speech protections found in international law.”⁹⁵ To what extent should non-state actors like Yahoo! be held responsible for protecting human rights when host governments fail to uphold their own human rights obligations?

While international law places primary responsibility for protecting human rights with governments, the idea that corporations do have a “sphere of influence” for which they should be held responsible was the basis of the UN Global Compact. Launched in 2000, signatories now include 3000 firms from 116 countries. The compact’s first two principles relate directly to human rights “Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; Principle 2: make sure that they are not complicit in human rights abuses.”⁹⁶ Yahoo! violated both these principles in the cases of Shi Tao, Wang Xiaoning, Li Zhi and Jiang Lijun.

As indicated in their recommendations earlier in this section, the world's most influential and prominent human rights groups are of the view that companies such as Yahoo! have a responsibility to lobby local governments in an effort to bring the legal systems and human rights practices more into line with international law. However as statements by Yahoo! CEO Jerry Yang and others quoted above indicate, the corporate view is that the job of lobbying the Chinese government to change its legal system and human rights practices is for the U.S. government and other governments.

Thus, the “multi-stakeholder process,” in which human rights groups, companies, investor groups and academics are negotiating a corporate code of conduct, is not expected to result in a corporate pledge of civil disobedience. Rather, based on this author’s participation in some of the drafting meetings, the principles can be expected to focus primarily on transparency and accountability around privacy and censorship. Companies have an obligation respond to and interpret local laws and regulations in a way that maximizes free expression and privacy. They also have an ethical obligation to better inform users about what is happening with the information they are producing, transmitting, or consuming, so that users can make more informed choices about how to use – or not use – a company’s service. The principles and the process surrounding them

⁹⁵ http://www.hrw.org/reports/2006/china0806/3.htm#_Toc142395821

⁹⁶ “United Nations Global Compact: Third world way,” The Economist.com, July 20, 2007 at: http://www.economist.com/business/globalexecutive/displaystory.cfm?story_id=9531002 (accessed December 8, 2007); Also see the official Global Compact website at: <http://www.unglobalcompact.org>; section on the human rights principles: <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/humanRights.html> (accessed December 8, 2007).

are also likely to include a commitment by all signatories to global industry and policy dialogue on issues of privacy and free expression, and public education to improve general public awareness of the vulnerabilities to users' privacy and free expression when using any Internet or telecoms product or service.

Several of the groups involved with the principles process have experience in dealing with industry codes of conduct in other industries, focusing on other concerns such as environmental protection and labor standards. Three oft-cited examples of best practice are the Voluntary Principles on Security and Human Rights which promotes human rights impact assessments in the extractive sector, the Extractive Industries Transparency Initiative (EITI) in which companies disclose payments to host governments, and the Kimberley Process which aims to stem the flow of conflict diamonds.⁹⁷ Those with experience in developing such codes point out that developing a code is the easiest part – achieving successful and meaningful application of those codes over time is much more challenging.⁹⁸ Signatories must adhere to meaningful reporting requirements, and compliance must be monitored. Thus the challenge is not only to develop a code of conduct for free speech and privacy, but also to develop effective and credible reporting and assurance mechanisms around it.

In a March 2007 report to the U.N. Human Rights Council, John Ruggie, Harvard professor and Special Representative to the Secretary-General on business and human rights, lauded voluntary corporate codes of conduct as an innovative way to “fill regulatory gaps” between international and domestic laws that can contribute to human rights abuses. He found that when companies conduct “human rights impact assessments” on a regular basis as part of compliance in such initiatives, there are tangible improvements in corporate behavior. However Ruggie expressed concern about the lack of accountability of such initiatives – a concern that the NGO sector has also stressed. Ruggie also concluded that voluntary initiatives have so far been relevant only to large multinational companies:

First, because many of the tools were developed for large national and transnational firms, they are not directly suitable for small- and medium-sized enterprises. Existing tools need to be adapted or new ones developed. Second, as noted, large developing country firms are just beginning to be drawn into this arena. Third, a more serious omission may be major state-owned enterprises based in some emerging economies: with few exceptions, they have not yet voluntarily associated themselves with such initiatives, nor is it well understood when the rules of State attribution apply to their human rights performance.⁹⁹

⁹⁷ For the websites of these three organizations see: <http://www.voluntaryprinciples.org/> , <http://www.eitransparency.org/> and <http://www.kimberleyprocess.com/> .

⁹⁸ For one example of issues related to codes of conduct see Sven Helin, Johan Sandström. (2007) An Inquiry into the Study of Corporate Codes of Ethics. *Journal of Business Ethics* 75:3, 253.

⁹⁹ John Ruggie, "Business and human rights: mapping international standards of

In China, Corporate Social Responsibility (CSR) is by no means a taboo subject. In 2003, the China Business Council for Sustainable Development was founded in Beijing, CSR conferences have been held around mainland China, and a growing number of Chinese companies are publishing CSR reports – including most recently Alibaba, Yahoo!’s partner in China.¹⁰⁰ Currently in China, CSR focuses entirely on environmental and labor practices, in addition to support for community education and sustainable development. Generally these areas do not bring corporate business ethics into conflict with existing local law. In fact, CSR in most parts of the world and in most issues such as environment and labor is intended to assist governments in preventing behavior that runs counter to local law in the first place – or at least does not contradict it. The problem with the Internet and telecommunications sector is that Chinese domestic laws and regulations compel corporate behavior that is in clear violation of users’ rights to privacy and freedom of expression as outlined by international law.

Not only is it difficult for foreign Internet and telecoms companies to avoid violating the Global Compact when operating in China; domestic Chinese companies are in an even tougher situation. Would signing on to a global corporate code of conduct for free speech and privacy – and attempting to adhere to the code’s reporting and assurance processes – inevitably place domestic Chinese companies in an adversarial position *vis a vis* Chinese law enforcement, state security, propaganda organs, and other government bodies? Furthermore, in China where domestic Internet and telecoms services dominate, if foreign multinationals are encumbered by a code of conduct while their domestic competitors are not, will that inevitably result in a weakening of those foreign companies’ market position - and thus a weakening of their influence on domestic business norms and practices? Or will Chinese consumers care enough about the extra respect that foreign companies are paying to their rights that these companies could gain business advantage? More research needs to be done to determine whether such a factor could over the long run comprise a competitive advantage.

Thus the problem of how Internet and telecoms companies can engage successfully in the Chinese market while avoiding collaboration in suppressing their users’ right to free speech – as recognized in the Universal Declaration of Human Rights and other documents that China has signed – remains unsolved. It is unclear whether the corporate principles and the compliance process surrounding them will enable Yahoo! to prevent a

responsibility and accountability for corporate acts," A/HRC/4/35, 19 February 2007, downloadable at: <http://www.business-humanrights.org/Documents/RuggieHRC2007> (accessed December 8, 2007).

¹⁰⁰ See the CBCSD website at: <http://english.cbcsd.org.cn>; “Alibaba Releases Corporate Social Responsibility Report,” China CSR, December 7, 2007 at: <http://www.chinacsr.com/2007/12/07/1925-alibaba-releases-corporate-social-responsibility-report/>; J.R. Wu, “In China, Pangs of Social Conscience,” Wall Street Journal Asia, April 25, 2007, at: <http://online.wsj.com/article/SB117743804349980758-search.html?KEYWORDS=corporate%2Bresponsibility&COLLECTION=wsjie/6month> (accessed December 8, 2007).

case like Shi Tao's from ever happening again. That said, Yahoo!'s experience is a clear example of how the "when in Rome, do as the Romans do" approach to business practices on free expression and privacy poses serious reputational risks for a multinational company whose business depends in large part on maintaining user trust in all of its markets around the world. Yahoo! cannot afford another Shi Tao, in China or elsewhere. Nor can Microsoft or Google afford to have one some day. Thus these companies and others are devoting substantial time and resources to figuring out how to avoid being accused of collaboration with government human rights violations, wherever they operate, regardless of whether they might be able to keep their noses legally clean.

Section 6: Conclusion - Lessons for everyone

Without speaking directly to Shi Tao, it is impossible to confirm how much he truly understood about the extent to which information linking himself to his e-mail address was being stored by Yahoo! China. We don't know whether he understood that this data was being housed on computer servers inside the PRC despite the fact that Yahoo! is a U.S.-based company, and whether he understood that the content of his emails and all of his user information could potentially be shared with Chinese police. We know that most users of free web mail services do not read the fine print in the Terms of Service or User Agreement before clicking "Agree" to set up their account. Those who follow human rights issues in China also know that sometimes people choose to take substantial risks in order to express dissenting views or communicate with groups abroad, are fully aware of the risks they are taking when they do so, and make a clear decision that those risks are worth taking. But we do not know whether Shi Tao was making fully informed decisions to use his Yahoo! China e-mail account to transmit politically sensitive information overseas. Nor do we know whether he would have made different decisions about how to use – or not use – his Yahoo! China e-mail account if he were fully aware of the technical and legal situation surrounding use of that particular e-mail service.

Legally, Yahoo! may be off the hook in the Shi Tao case. But if Yahoo! management truly intend to prevent another case like Shi Tao's from happening in conjunction with any Yahoo! owned or branded products anywhere on the globe, Yahoo! must take its ethical obligations to the user much more seriously than it did when setting up Yahoo! China and in its subsequent management of its China-based business interests. Yahoo! must take stronger measures to inform and educate users, so that users can make informed choices about how to use Yahoo! services. While Yahoo! China is now operated by Alibaba, inasmuch as the e-mail and other Yahoo! China services still carry the brand name of Yahoo!, an American company, Yahoo! has a moral obligation to insist that the Alibaba managers who run Yahoo! China make it as clear as possible to users that when it comes to privacy, user data is very much in PRC jurisdiction, which means that "criminal investigations" will be conducted under the PRC definition of "crime." Users and investors of Yahoo! and Alibaba in China and around the world should use their influence to demand maximum transparency and honesty from their service provider.

Furthermore, if we want to make sure that cases like Shi Tao's never happen again, it is not enough to wait for Internet and telecoms service companies to alter their business practices and the way that they communicate with users. Widespread public ignorance - even among well-educated people - about information security, censorship, and surveillance technologies has particularly acute consequences in a place like Mainland China. We must also not overlook the potential implications of such ignorance in freer societies with stronger civil liberties protections, including Hong Kong, the United States, and Western Europe. Basic information technology literacy should be an urgent educational priority in all societies that cherish pluralism and free public discourse.

Universities, schools, NGO's, and governments have an obligation to do a much better job than we have done so far in educating the public about the realities of privacy and surveillance when using Internet and telecoms technologies. Globally, most publics are largely ignorant of the extent to which their e-mail communications can be intercepted - legally or illegally - at various stages. Even many human rights activists and journalists are frightfully ignorant about information security. If we want to ensure that free speech remains a possibility in any society, we must do everything possible to educate our fellow citizens about the barriers and threats to their privacy, free speech, and free access to information.

Finally, the story of Shi Tao and Yahoo! highlights the extent to which people whose privacy or right to free speech is most at risk cannot necessarily count on commercial options for their communication and publishing needs. Codes of conduct, no matter how well constructed, may still fail to prevent more cases like Shi Tao's from happening in China and elsewhere. Recent research on "Web2.0" companies in China indicate that high degree of government-corporate cooperation on censorship and surveillance has become the norm.¹⁰¹ Must we write off the private sector when it comes to preserving privacy, free speech, and improving rather than restricting global flows of information? We have a right as customers, investors and citizens to demand that user rights be respected by service providers. If neither government nor the private sector can be counted upon to protect our fundamental rights to free expression and privacy, the need to develop non-commercial, non-governmental, grassroots, and community-driven alternatives will become all the more urgent.

¹⁰¹ See for example: David Bandurski, "Pulling the Strings of China's Internet" *Far Eastern Economic Review*, December 2007, at: http://www.feer.com/articles1/2007/0712/free/p018.html?Pulling_the_Strings_of_China%E2%80%99s_Internet; "A Journey to the Heart of Internet censorship on eve of party congress," Reporters Without Borders, October 10, 2007, at: http://www.rsf.org/article.php3?id_article=23924; MacKinnon, "Is Web2.0 a wash for free speech in China?" *Rconversation*, December 2, 2007 at: <http://rconversation.blogs.com/rconversation/2007/12/is-web20-a-wash.html>; MacKinnon, "China's Censorship 2.0," *Rconversation*, October 13, 2007, at: <http://rconversation.blogs.com/rconversation/2007/10/navigating-chin.html> (all accessed December 10, 2007)