

## Chapter 12

### Paradoxes, Google and China - How censorship can harm and intellectual property can harness innovation

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Abstract. Google and China have found each other in a marriage of convenience, in order to serve the one god they both live by: innovation. This article deals with censorship and intellectual property. Two of the biggest challenges that the internet present to the legal community. The main characters are two of two of the biggest actors on the internet stage: Google and China. Google wants to offer all the information available to everyone, while not doing evil. China interprets having all the information available to everyone as an evil that will lead to instability.

#### 12.1. Introduction

One could argue that Adam and Eve were exposed to censorship. The highest authority Himself deemed the first man and woman not ready to eat from the Tree of Good and Evil. Many governments, including the Chinese government, also do not want their citizens to decide for themselves and therefore filter their internet access. China has already the most internet users in the world<sup>1</sup> while their internet market has not been saturated by far. This makes China the promised land for each online service provider. Google is such a provider and wants to be perceived as the freedom of choice champion. With its mission of “organizing all information and making it universally accessible and useful”<sup>2</sup> Google is similar to the snake. “Pssst Eve! Pssst Eve, eat the apple!”<sup>3</sup> While this is the path chosen by Google, the Chinese government asserts its sovereign rights and filters the internet in the most extensive and sophisticated ways possible. From a utilitarian point of view the Chinese government believes this is the way to lead their citizens to prosperity. Due to their fundamental conceptional differences the collision course of these giants could be expected.

Mid December 2009, there were alleged cyberattacks on Google's corporate infrastructure that originated from China. The attacks on Google were not isolated cases. Other foreign companies in China were also attacked. Google believed the attacks were focused on getting access to Gmail accounts of human rights advocates. This in combination with China's measures to limit the free speech made the American company threaten to leave China. Google came to the conclusion that China was not trying to stop them, because most Chinese use Baidu as their search engine. Google decided that they had more to gain by staying and redirecting the users of

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<sup>1</sup> China announced Thursday, December 31, 2010, that it has 450 million users, which is the most in the world. Wang G, 450 million Chinese use internet, China Daily, December 31, 2010, via English Xinhua. [http://news.xinhuanet.com/english2010/china/2010-12/31/c\\_13671684.htm](http://news.xinhuanet.com/english2010/china/2010-12/31/c_13671684.htm).

<sup>2</sup> Google's mission is stated on Google's corporate website. Google Corporate. <http://www.google.com/corporate/>.

<sup>3</sup> Genesis 3:2-3:5: “The woman said to the snake: From the fruit of the (other) trees in the garden we may eat, but from the fruit of the tree that is in the midst of the garden, God has said: You are not to eat from it and you are not to touch it, lest you die. The snake said to the woman: Die, you will not die! Rather, God knows that on the day that you eat from it, your eyes will be opened and you will become like gods, knowing good and evil.” Old Jewish English Bible 1917.

Google.cn to the Hong Kong site. This way Google cleanses its corporate conscience to some degree and some Chinese citizens, though not all the time, can see some uncensored search results. Did Google overplay its hand? Some considered that the Chinese government would expel Google from paradise. But in July 2010, China renewed Google's Internet Content Provider license<sup>4</sup>. So Google's adventure in China continues. This article not only deals with the snake and those trying to stop it from speaking up. It will also discuss intellectual property rights, a subject already topical since man was created in the image of the Creator himself. This article will look at these two important legal challenges of the internet through the lens of innovation.

Officially China wants to lead its citizens to a socialist society and Google wants to offer all the information available to everyone, while not doing evil. Having these ideals worked for both China and Google as a magnet: they became popular and powerful. However, China and Google are finding out that it is impossible to continue political and economic success without leaving the straight and narrow. They demonstrate their megalomania by thinking that if they digress a bit from their lofty goals to continue their power or expand their market position, they can make up for it by doing good in the longer run and remain faithful to their ideals at the same time.

In Section 12.2., it becomes clear that Google is involved in a growing number of litigation cases in which it is accused of infringing intellectual property rights. It is argued that online service providers are in the best position to enforce intellectual property rights and therefore they can be even more than a solution for the problems they create (Google Paradox 1). The chapter discusses Google's adventure to give access to information to the people of China. It also illuminates the second Google paradox: Google wants to be perceived as the champion of freedom of information, while it is censoring in most countries. Google has even filed a patent application for a methodology to censor depending on user location.

Section 12.3 takes a look at two World Trade Organization cases the U.S. brought against China, in which the issues of censorship meet intellectual property rights. Then the legitimacy of censorship is assessed in light of China's international treaty obligations and its national law. The question arises whether foreign countries can do something to prevent that their native industries will become complicit in censorship by providing filter products and services. In other words the question will be answered whether domestic law can be exported to domestic companies that are operating abroad.

Section 12.4 is about transparency on censorship. The Chinese government has three narratives on the internet. These narratives show the triple moral bookkeeping of China's policy. One of the narratives is directed abroad, one to its citizens and one to party officials. Because the Chinese government is censoring information about censorship, one needs to research the available research on censorship. This section will make use of the results of the Open Net Initiative to paint a picture of the methodology of censorship in China and which content is filtered. This section closes with an assessment of the effectiveness of censorship.

Section 12.5 will explore the relation between intellectual property and innovation, censorship and innovation, and the crucial role innovation plays for the Chinese government.

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<sup>4</sup> China renewed Google's Internet Content Provider (ICP) on July 9, 2010. See Drummond D, An update on China, The Official Google Blog, July 9, 2010, available at <http://googleblog.blogspot.com/2010/06/update-on-china.html>.

## 12.2. Google Paradox: Freedom of Information Champion Executes Censorship

### 12.2.1. Censoring in the Name of Intellectual Property

What most of Google's innovative services have in common is that they are based on selling advertisements. Despite its corporate mantra “Don't be evil”<sup>5</sup> Google frequently has been accused of intellectual property rights infringements by linking keywords of trademarked brands in advertisements to sites providing counterfeit goods and downloading pirated products or of neglecting intellectual property rights in other ways<sup>6</sup>. Intellectual property infringements often concern copycats that free ride on the reputation and goodwill of a trademark or the creativity of an author. Besides these commercial damages, counterfeit goods can seriously harm the health or even be fatal to online purchasers. Google was invited for the February 2011 Senate Judiciary Committee hearing on “targeting websites dedicated to stealing American intellectual property” but refused to testify. In its absence the company was labeled a profiteer because of the nature of its relationship with sites that offer counterfeit goods and pirated products: Google gets paid each time links are clicked<sup>7</sup>. If the U.S. law proposal “Combating Online Infringement Counterfeit Act (COICA)”<sup>8</sup> will be adopted, Google will have to stop providing advertisement services and start filtering domestic and overseas domain names that are suspected of distributing counterfeit and pirated materials. Rights holders are constantly trying to make online service providers such as Google contributorily liable<sup>9</sup> for copyright and trademark infringements. It makes sense, since they are in the best position to enforce. It could be difficult to locate the end users who might not even have the financial means to compensate for the damages. In Section 11.4.2. one can see a parallel development with China making online service providers contributorily liable for filtering certain information. According to the Electronic Frontier Foundation, the COICA bill would *de facto* force search engines such as Google to censor some domain names. The targeting of domain names “that are dedicated to infringing activities”, without judicial review, is considered a serious restriction to the freedom of speech.<sup>10</sup>

<sup>5</sup> Code of conduct, Google investor relations. <http://investor.google.com/corporate/code-of-conduct.html>.

<sup>6</sup> For example Google's Book/Library Project, a project whereby books are scanned and online indexed and searchable, whereby the copyright holders could opt-out (since August 2005) before a deadline, so that the work will be removed from the project. To apply here this kind of implied license theory is controversial. Google assumes that all copyright holders will join the project and if they do not want to, they have to opt-out, laying the burden to the right holders . Google Book Settlement (2005). [http://www.googlebooksettlement.com/r/enter\\_opt\\_out](http://www.googlebooksettlement.com/r/enter_opt_out).

<sup>7</sup> Tony Adams, CEO of Rosetta Stone: “Profit relationship between right now between illicit websites and Google. Because they pay them for every click.” Senate Judiciary Committee (2011) 226 SD hearing on Targeting Websites Dedicated To Stealing American Intellectual Property, February 16, 2011. <http://judiciary.senate.gov/hearings/hearing.cfm?id=4982>.

<sup>8</sup> U.S., Section 3804 (2010), Combating Online Infringement Counterfeit Act, introduced September 20, 2010 by Senator Patrick Leahy. <http://www.govtrack.us/congress/bill.xpd?bill=s111-3804>.

<sup>9</sup> Contributory liability has a knowledge requirement and material contribution requirement. Ludwig 2006, p 478. There are “two prongs to contributory liability: (1) the defendant's knowledge of the infringing activity, and (2) the defendant's contribution to, or participation in, the infringing activity. Karnow C (1999), Indirect Liability on the Internet and the Loss of Control, INET'99, Internet Society, June 8, 1999. [http://www.isoc.org/inet99/proceedings/3e/3e\\_2.htm](http://www.isoc.org/inet99/proceedings/3e/3e_2.htm).

<sup>10</sup> Esguarra R, Censorship of the Internet Takes Center Stage in “Online Infringement” Bill, EFF, September 21, 2010, available at <http://www.eff.org/deeplinks/2010/09/censorship-internet-takes-center-stage-online>.

### 12.2.2. “Freedom of Information Champion”

Google cultivates an image of being a champion of the freedom of information. The freedom of expression is in no country absolute. As a result Google filters in nearly all countries related to intellectual property infringements, in the U.S. it filtered information critical to Scientology in 2002<sup>11</sup> to comply with the Digital Millennium Copyright Act<sup>12</sup>, in France and Germany it is filtering search results to Nazi memorabilia, Holocaust deniers, white supremacists and sites that make propaganda against the democratic constitutional order<sup>13</sup>, in Thailand Google filters sites that allegedly insult its king<sup>14</sup>. In some countries adult pornography is blocked and almost in all countries child pornography<sup>15</sup> is blocked.

Google started its adventure in China in 2005<sup>16</sup>. Google learned a lesson from the controversy around Yahoo's conduct. Yahoo turned over information concerning subscribers, who were later imprisoned. The lesson was not to provide blogging and email services. In 2006 Google's senior policy council McLaughlin thought that Google.cn was the answer for the inaccessibility of Chinese citizens to Google.com, Google News and Google Images. McLaughlin: “Filtering our search results clearly compromises our mission. Failing to offer Google search at all to a fifth of the world's population, however, does so far more severely.”<sup>17</sup> The next month Elliot Schrage, vice president, global communications and public affairs of Google repeated this message during a testimony before the subcommittee 'Asia and the Pacific, global human rights and international operations'<sup>18</sup>. Schrage said Google's “(..) decision was based on a judgment that Google.cn will make a meaningful – though imperfect – contribution to the overall expansion of access to information in China.”

However, after some cyberattacks that were allegedly aimed at Gmail accounts of human rights advocates and originated from China, Google announced in January 2010 that it would no longer censor the search results<sup>19</sup>. Further, Google announced that if China would not agree it would leave the country. At the same time Google called on the U.S. and other western governments to challenge internet censorship as a restraint on global trade. Bob Boorstin, Google's director of Public Affairs said: “Governments that block the free flow of information not only are breaking trade agree-

<sup>11</sup> F.A.C.T. Net, Google, Censorship and Scientology, March 21, 2002., available at [http://www.factnet.org/Scientology/Google\\_Scientology.html](http://www.factnet.org/Scientology/Google_Scientology.html).

<sup>12</sup> Digital Millennium Copyright Act 1998.

<sup>13</sup> 113 white supremacist, antisemitic, Holocaust denial and Nazi memorabilia sites were excluded of the search results of Google.fr and Google.de. Zittrain J, Edelman B, Localized Google search result exclusions, Statement of issues and call for data, Harvard, October 26, 2002. <http://cyber.law.harvard.edu/filtering/google/>.

<sup>14</sup> Greenberg A, Where Google Still Censors, Forbes, January 21, 2010. <http://www.forbes.com/forbes/2010/0208/outfront-technology-china-where-google-still-censors.html>.

<sup>15</sup> “Most societies share the view that imagery of children under a certain age in a sexually compromising position is unlawful to produce, possess, or distribute.” Zittrain and Palfrey 2008, p 44.

<sup>16</sup> In 2005 Google opened its headquarters in Beijing and in 2007 opened an Research & Development office in Shanghai.

<sup>17</sup> McLaughlin A, Google in China, the Official Google Blog, January 27, 2006. <http://googleblog.blogspot.com/2006/01/google-in-china.html>.

<sup>18</sup> Schrage E, Internet in China, testimony to the Subcommittee on Asia and the Pacific, and the Subcommittee on Africa, Global Human Rights, and International Operations, Committee on International Relations, United States House of Representatives, February 15, 2006 <http://googleblog.blogspot.com/2006/02/testimony-internet-in-china.html>.

<sup>19</sup> Johnson B, Google stops censoring Chinese search engine: How it happened, The Guardian, March 22, 2010. <http://www.guardian.co.uk/technology/blog/2010/mar/22/google-china-live>.

ments in certain ways, but they're hurting their own economies as well.”<sup>20</sup> Did Google lose its patience? Eric Schmidt, CEO of Google said: “We will take a long-term view to win in China. The Chinese have 5,000 years of history. Google has 5,000 years of patience in China.”<sup>21</sup> Instead of leaving China, Google relocated its Google Search, Google News, and Google Images from Google.cn to Google.com.hk<sup>22</sup>. However, since the relocation to Google.com.hk<sup>23</sup>, results are not always and not everywhere in China available. So Google.cn was not the answer for the inaccessibility of Google.com and the relocation of Google.com.hk leads to the same accessibility challenges as to Google.com. Google is back where it started.

It is hard to believe that after five years in China Google suddenly realizes that the extensive level of censorship it is forced to apply is incompatible with its mission statement. It is more likely that Google realized that its market share in China is dwarfed by the Chinese search engine Baidu, who is favoured by the Chinese government. It's not unlikely to assume that a strong market position of Baidu in combination with the data integrity which Google could no longer guarantee pushed Google to a decision. This decision was whether Google would risk losing its license but gain the goodwill of the public.

After playing so explicitly the role of freedom of speech champion, it is ironic to find out that Google filed an application in the U.S. to patent censoring methodology, that censors depending on the location of the user<sup>24</sup>. Actually the censoring methodology devised by Google goes beyond what countries ask of online service providers, namely to be more restrictive or less restrictive depending on the country of origin of the user. It almost seems that Google developed a product with which they believed it fulfills a gap in some of the host countries' needs.

## 12.3. Where Intellectual Property and Censorship Meet

### 12.3.1. Case Studies

The U.S. filed a case against China at the WTO for measures that allegedly affect the protection and enforcement of intellectual property rights negatively<sup>25</sup>. One of the complaints of the U.S. was that article 4 of China's Copyright Law<sup>26</sup> did not offer

<sup>20</sup> Waters R, Google opens new front in censorship battle, Financial Times, November 16, 2010. <http://www.ftchinese.com/story/001035559/en>.

<sup>21</sup> Lee K, Lecture: Google in China, Carnegie Mellon University, YouTube, February 27, 2008. [http://www.youtube.com/watch?v=sgDGNPnb124&feature=player\\_embedded](http://www.youtube.com/watch?v=sgDGNPnb124&feature=player_embedded).

<sup>22</sup> “Users visiting Google.cn are being redirected to Google.com.hk, where we are offering uncensored search in simplified Chinese, specifically designed for users in mainland China and delivered via our servers in Hong Kong. On Google.cn users can use services such as music and text translate, which are provided without filtering.” See Drummond D, An update on China, The Official Google Blog, July 9, 2010.

<sup>23</sup> Since no servers in China are used to generate search results it does not fall within the jurisdiction of China.

<sup>24</sup> 'Variable user interface based on document access privileges', U.S. Patent application number: 10/953,496, filed: September 30, 2004, assignee: Google Inc. (Mountain View, CA). <http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=/netahtml/PTO/srchnum.htm&r=1&f=G&l=50&s1=7,664,751.PN.&OS=PN/7,664,751&RS=PN/7,664,751>.

<sup>25</sup> *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362, WTO Panel Report, January 26, 2009. [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds362\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm).

<sup>26</sup> Article 4 Copyright Law 2001: “Works the publication or distribution of which is prohibited by law

copyright protection to works of which publication or distribution are prohibited or under assessment by a censor. China's argument was that a censored work did have copyright, but that China did not have to protect it, based on article 17 Berne Convention<sup>27</sup>. However, this provision states the opposite, namely that the protection of copyright cannot affect the possibility to control the circulation, presentation and exhibition of works. Therefore China's argument did not convince the panel. In the panel report it was determined that a denial of copyright protection based on article 4 Copyright Law was not compatible with China's obligations under the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs)<sup>28</sup> and the Berne Convention. China amended its copyright law, which now includes a revised article 4 Copyright Law, which became effective on April 1, 2010<sup>29</sup>.

The U.S. brought another case against China at the WTO regarding market access<sup>30</sup>. The issue of market access brings censorship and intellectual property rights together. Censorship is not only barrier to market access, it is also a boon for pirated versions of movies or books<sup>31</sup>. So far only twenty foreign movies were allowed to the Chinese market<sup>32</sup>, each year handled by an importer with a distribution monopoly<sup>33</sup>. The reason given for this restrictive policy has been to protect the fledgling Chinese movie industry, or to protect the security of the state. Some are banned directly and the arrival of other films is delayed by lengthy censorship reviews of Chinese

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shall not be protected by this Law. Copyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interests." Amended Copyright Law 2001.

<sup>27</sup> Article 17 Berne Convention: The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right. Berne Convention for the Protection of Literary and Artistic Works was established in 1886, China became a contracting party since October 15, 1992.

<sup>28</sup> China became a member of the World Trade Organization on December 12, 2001, and the Agreement on Trade-related Aspects of Intellectual Property Rights of 1994 is an integral part of this agreement.

<sup>29</sup> Article 4 Copyright Law: Copyright holders, when exercising their copyright, may not violate the Constitution and laws, and may not damage the public interest. The State implements supervision and management over publishing and dissemination according to the law. Article 4 Copyright Law amendment 2010.

<sup>30</sup> *China – Measures Affecting Trading Rights and Distribution Services for Certain Publication and Audiovisual Entertainment Products*, WT/DS363, WTO Panel Report, August 12, 2009. [http://www.wto.org/english/news\\_e/news09\\_e/363r\\_e.htm](http://www.wto.org/english/news_e/news09_e/363r_e.htm).

<sup>31</sup> "We cannot divorce the concept of market access from the question of piracy. In no case is that more apparent... [than] China", Bloomberg news agency quoted Pat Schroeder, president of the Association of American Publishers, as saying, InTheNews.co.uk, Chinese copyright piracy faces US threat, February 16, 2007. [http://www.inthenews.co.uk/money/news/finance/chinese-copyright-piracy-faces-us-threat-\\$1053067.htm](http://www.inthenews.co.uk/money/news/finance/chinese-copyright-piracy-faces-us-threat-$1053067.htm).

<sup>32</sup> The number of foreign movies that can be shown in Chinese cinemas is limited to 20 movies per year. One can argue that this stimulated pirated DVDs to the point that only 7 per cent of the DVD's on the market are legitimate. Reuters, Market access key to piracy fight, via The Age, December 8, 2006. <http://www.theage.com.au/news/World/Market-access-key-to-piracyfight/2006/12/08/1165081128349.html#>.

<sup>33</sup> *Film Distribution Company and Huaxia*, USTR (2005), Trade summary. [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2005/2005\\_NTE\\_Report/asset\\_upload\\_file469\\_7460.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_NTE_Report/asset_upload_file469_7460.pdf), p. 113

authorities<sup>34</sup>. Because of this censored Hollywood films are broadly pirated in China<sup>35</sup>. However under the WTO ruling foreign producers will be able to contract private film companies as of March, 2011 to distribute their films in China. According to the state newspaper China Daily it is expected that the number of foreign films allowed in Chinese cinemas will be increased.<sup>36</sup> Not only legitimate foreign movies cannot compete against pirated movies who pay no taxes and bear marginal production costs, also domestic movies have the same problem<sup>37</sup>. This makes the argument that restricting foreign movies is in the interest of China's fledgling domestic film industry less convincing.

### 12.3.2. Legitimacy of Censorship

#### 12.3.2.1. International law

Since the Peace of Westphalia<sup>38</sup> the following key principles are recognized as the foundations of international law: The principle of sovereignty<sup>39</sup>, the fundamental right of political self determination, the principle of legal equality between states and the principle of non-intervention of one state in the internal affairs of another state. Therefore, based on sovereignty a state can control its domestic matters, including those in cyberspace. Based on the principle of non-intervention the other states cannot do much about it to stop it. Of course states can voluntarily bind themselves via treaties to some standards of conduct. The Universal Declaration of Human Rights<sup>40</sup> was proclaimed in 1948 by 48 states, including the Republic of China. The word “universal” refers to the aspiration of the declaration to make it applicable to all people no matter in which country. But the declaration has no signatories and is not legally binding to any country. Even if it were binding, it was proclaimed Republic of

<sup>34</sup> The criteria for censorship are: the state advocates to create excellent films that have both ideological content and artistic quality". They should "get close to reality, life and the masses"; be of "benefit to the minors' healthy growth"; and "try to transform backward culture and combat firmly the decadent culture". And maybe most important no politics can be involved in entertainment, Toy M, Piracy still pays despite party line on what's fit for Chinese eyes, Sidney Morning Herald, February 10, 2007. <http://www.smh.com.au/news/world/piracy-still-pays-despite-party-line-on-whats-fit-for-chineseeyes/2007/02/09/1170524304056.html>.

<sup>35</sup> “China’s censorship process means that legitimate titles are a subset of all titles produced, i.e. producing pirated titles allows distributors to offer customers much wider choice; with no royalties and taxes to pay, and no quality control requirements to meet, pirated movies provide distributors with significantly higher profits, because sellers of pirated movies are generally unlicensed, the distribution network for pirated movies is far more developed than that for legally licensed movies”, *Chinese Academy of Social Sciences report, Study of the Impact of Movie Piracy on China’s Economy*, June 2006. [http://www.uschina.org/public/documents/2006/07/cass\\_piracyimpact\\_e.pdf](http://www.uschina.org/public/documents/2006/07/cass_piracyimpact_e.pdf).

<sup>36</sup> Zhao Y, Dawson KC, Opening-up of movie industry urged, China Daily, February 10, 2011. [http://www.chinadaily.com.cn/china/2011-02/10/content\\_11977999.htm](http://www.chinadaily.com.cn/china/2011-02/10/content_11977999.htm).

<sup>37</sup> Legitimate foreign and domestic movies cannot compete with pirated movies “who endure no censorship, pay no taxes, and bear minimal production costs”, Ranjard P, Misonne B, Study 12: Exploring China’s IP Environment, Study on the Future Opportunities and Challenges of EU-China Investment Relations, February 15, 2007. [http://trade.ec.europa.eu/doclib/docs/2007/february/tradoc\\_133314.pdf](http://trade.ec.europa.eu/doclib/docs/2007/february/tradoc_133314.pdf), p 13.

<sup>38</sup> Peace of Westphalia in 1648, Wikipedia.

<sup>39</sup> Westphalian sovereignty, Wikipedia.

<sup>40</sup> Article 19: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Universal Declaration of Human Rights, December 10, 1948. <http://www.un.org/en/documents/udhr/index.shtml>.

China a year before the founding of the People's Republic. As a successor state it is up to the People's Republic of China's discretion whether it will abide to the declaration.

China did sign the International Covenant on Civil and Political Rights (ICCPR)<sup>41</sup> on October 5, 1998<sup>42</sup>. Article 19.1 ICCPR states that everybody has the right to hold opinions without interference. And article 19.2 ICCPR articulates that everybody shall have the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas<sup>43</sup>. However, article 19.3 ICCPR states that the exercise of the rights carries special duties and responsibilities: “It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary. a. For respect of the rights or reputations of others; b. For the protection of national security or of public order (*ordre public*), or of public health or morals.” There is no controversy about respecting the rights or reputations of others, which includes intellectual property rights. But when exactly are certain restrictions necessary? And when does information or an idea fall under national security<sup>44</sup>, public order or morals? These undefined terms leave space for authoritarian regimes to justify any kind of censorship. China can use any kind of censorship, as long as it frames the justification in a wording of article 19.3 ICCPR. Then again, even if China deviates from the ICCPR, it has not much to fear. The Human Rights Committee, the treaty's enforcement mechanism, is *de facto* toothless. “Necessary” is a highly subjective term and is hard to examine, but one can peruse whether China provides law for restrictions, such as censoring the internet.

#### 12.3.2.2. National law

China has a comprehensive system of on-line media control in place, which is built on principles already developed in controlling other forms of news and entertainment media<sup>45</sup>. Institutionally, it is implemented through party orders.<sup>46</sup> According to Chinese copyright/media scholar Creemers the Central Propaganda Department is at the central level the most important organ. It forms the Chinese Communist Party's trinity of power, together with the Organization Department and the Army. This organ controls all State media entities, such as the General Administration of Press and Publications, the State Administration of Radio, Film and Television (SARFT), the Ministry of Information Industry, the Ministry of Culture, etc. These in turn regulate the media, including on-line media.

Creemers explains that this media is mostly controlled through administrative regulations. In addition, some more egregious violations against social order are also included in the Criminal Law, for example, the provisions on subversion - Article 105

<sup>41</sup> International Covenant on Civil and Political Rights, opened for signature, ratification and accession December 16, 1966, entered into force on March 23, 1976. <http://www2.ohchr.org/english/law/ccpr.htm>.

<sup>42</sup> International Covenant on Civil and Political Rights, China's signature October 27, 1997 and ratification March 27, 2001. China's reservations about Macao, Hong Kong and Taiwan. [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en).

<sup>43</sup> John Stuart Hill argued that freedom of speech should be understood as a multifaceted right. These include the right to seek, receive and impart information and ideas. Puddephatt 2005, p 128.

<sup>44</sup> “ Put more simply, Internet filtering and surveillance, in an environment where the Internet is considered a form of territory alongside land or sea or air, are an expression of the unalterable right of a state to ensure its national security” Zittrain and Palfrey 2008, p 45.

<sup>45</sup> Creemers 2011.

<sup>46</sup> Creemers 2011.

– was one of the grounds on which Liu Xiaobo was convicted<sup>47</sup>. The administrative regulations provide the basic operating framework for works, but they also contain "safeguard provisions", which provide a legal basis for discretionary intervention that can be construed quite broadly. For example: in special circumstances, SARFT can order the withdrawal of an approved media product from the works. SARFT has the discretionary power to interpret.<sup>48</sup>

All regulations contain provisions on what cannot be published on-line, which internal safeguard mechanisms web-sites must have to avoid content problems, and penalization provisions<sup>49</sup>. The government keeps most control by giving licenses to products (films, television programmes, games, etc.), and companies. The State has a monopoly over market access. Creemers writes that "[t]hose who are not doing what the Party-State requires of them, will lose their legal status and their possibility to earn a living"<sup>50</sup>.

### *12.3.3. How to Stop Domestic Companies Facilitating Censorship Abroad?*

Can U.S. companies such as Yahoo and Google do whatever they want when they operate abroad? Is there a way to hold them accountable for their conduct? Yahoo's behaviour was described by the chairman of the House Foreign Affairs Committee at the 'Internet in China: A Tool for Freedom or Supression' hearing in 2006 as "at best inexcusable negligent"<sup>51</sup>. But besides some scathing remarks and some public indignation, the company was not penalized. To avoid similar scenarios in the future some want to make it a crime for U.S. companies to share personal user information with internet restricting countries. U.S. representative Christopher Smith proposed the Global Online Freedom Act (GOFA) in 2007 to no avail, and again in 2009<sup>52</sup>. But thus far the bill never became law. Google proposed voluntary industry action in 2006<sup>53</sup> and endorsed the GOFA in 2008<sup>54</sup>. However, there already is an working example of a U.S. law that restricts domestic companies doing business abroad: the Foreign Corrupt Practices Act<sup>55</sup>. It prohibits corporations chartered in the U.S. to bribe foreign officials<sup>56</sup>. Also within the European Union there are now calls for export licenses to

<sup>47</sup> Creemers 2011.

<sup>48</sup> Creemers 2011.

<sup>49</sup> An example is the Internet Audiovisual Programme Service Management Regulations, Creemers R, Internet Audiovisual Programme Service Management Regulations, China Copyright and Media, December 20, 2007, available at <http://chinacopyrightandmedia.wordpress.com/2007/12/20/internet-audiovisual-programme-service-management-regulations/>.

<sup>50</sup> Creemers 2011.

<sup>51</sup> "Let me be clear - this was no misunderstanding. This was inexcusably negligent behaviour at best, and deliberately deceptive behaviour at worst." Lantos T (2007), Yahoo! Inc.'s Provision of False Information to Congress, Hearing House Committee on Foreign Affairs, November 6, 2007. <http://foreignaffairs.house.gov/110/lantos110607.htm>.

<sup>52</sup> Global Online Freedom Act, H.R. 2271, sponsored by Representative Christopher Smith in May 6, 2009, available at <http://www.govtrack.us/congress/bill.xpd?bill=h111-2271>.

<sup>53</sup> Schrage E, Internet in China, testimony to the Subcommittee on Asia and the Pacific, and the Subcommittee on Africa, Global Human Rights, and International Operations, Committee on International Relations, United States House of Representatives, February 15, 2006.

<sup>54</sup> Smith C, Introducing the Global Internet Freedom Caucus, excerpts from his statement to the House of Representatives, March 9, 2010. [http://chrissmith.house.gov/UploadedFiles/2010-03-09\\_Statement\\_on\\_Global\\_Internet\\_Freedom\\_Caucus.pdf](http://chrissmith.house.gov/UploadedFiles/2010-03-09_Statement_on_Global_Internet_Freedom_Caucus.pdf).

<sup>55</sup> Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 and ff, 1977.

<sup>56</sup> "The analogy in the United States context runs to the Foreign Corrupt Practices Act, which disallows corporations chartered in the United States from bribing foreign officials and other business

prevent European companies that facilitate internet censorship.<sup>57</sup>

## 12.4. Information about Censorship Censored

### 12.4.1. Transparency of Censorship

As can be read above, the International Covenant on Civil and Political Rights has two main prerequisites in order to tolerate censorship: it should be necessary and legitimized by positive law. A discussion about what is necessary is difficult if the participants of the discussion do not share one set of universal values. One could argue that in the West censorship is deemed necessary if it prevents that the individual freedom of one person harms the individual freedom of another. In China, where a stable society is deemed crucial for its continued economic growth, the same could be argued: if individual freedom is abused so that the harmonious society falls apart, conflicts will make economic growth impossible, which will make it impossible for individuals to enjoy their individual freedoms.

When Google agreed to censor so that at least they could give higher quality access to Chinese internet users, it decided to at least provide a clear notice to the users which one or more links had been removed from their search results. “The disclosure allows users to hold their legal systems accountable.”<sup>58</sup> But holding legal systems of authoritarian regimes accountable is not without risks. One cannot accuse Google's public affairs vice president Schrage of not having chutzpah when he was boasting that “Google's experience dealing with content restrictions in other countries provided some crucial insight as to how we might operate Google.cn in a way that would give modest but unprecedented disclosure to Chinese internet users.” In other words: “We have done so much censoring, now we know how to do it in the best way.”

The second prerequisite for the censorship is that this right should be written in laws. But these laws and regulations are a complex patchwork, and many have not been disclosed. In its Google Transparency Report it states “Chinese officials consider censorship demands as state secrets, so we cannot disclose that information at this time.”<sup>59</sup> The wording is interesting, since it does not say Chinese law and it leaves room that it will disclose the information at a later moment in time. Thus, China nor Google make transparent what methodologies are used for censoring and what content is filtered. Fortunately, the scholars of the Open Net Initiative have been measuring scope and depth of China's internet filtering system, “the Great Firewall of China” in 2006-2007, and again in 2008-2010<sup>60</sup>. Their results shed light on the kind of filtering methods applied in China and who are involved in these activities.

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dealings that would violate U.S. law if carried out in the home market.” Zittrain and Palfrey 2008, p 117.

<sup>57</sup> Atzo Nicolai and Han ten Broeke, two members of the Dutch House of Representatives, are advocating to implement European Union export licenses to prevent European companies to facilitate internet censorship. Jong, S de, VVD: geen internet filters meer naar dictaturen. NRC Handelsblad, February 21, 2011. [http://www.nrc.nl/nieuws/2011/02/21/vvd-geen-internetfilters-meer-naar-dictaturen/\(Dutch\)](http://www.nrc.nl/nieuws/2011/02/21/vvd-geen-internetfilters-meer-naar-dictaturen/(Dutch)).

<sup>58</sup> Schrage E, Internet in China, testimony to the Subcommittee on Asia and the Pacific, and the Subcommittee on Africa, Global Human Rights, and International Operations, Committee on International Relations, United States House of Representatives, February 15, 2006.

<sup>59</sup> Google Transparency Report (2011). <http://www.google.com/transparencyreport/faq/#governmentrequestsfaq>.

<sup>60</sup> Open Net Initiative, China Profile June 15, 2009. <http://opennet.net/research/profiles/china>.

## 12.4.2. Methodologies to Filter

### 12.4.2.1. Filtering

The Open Net Initiative report of 2009 describes the Great Firewall of China, to be the most sophisticated and extensive in the world. China has the most consistent record of responding to the shifting content of the Web<sup>61</sup>. China uses all kinds of filtering methods: from blocking whole general domain names, such as YouTube<sup>62</sup>, Blogger or Facebook<sup>63</sup>, to more keyword-based URL filtering to more precise filtering systems of content on a webpage<sup>64</sup>. The filtering can be done by the main Internet Service Providers. China Telecom, provides internet services to over 55 million people in the south of China and China Unicom to over 40 million people in the north of China<sup>65</sup>. If the filtering can be done locally, China chooses to do so from a corporate, university or school network or local blog provider<sup>66</sup>. Or the filtering can be on local computers, as in the case of Green Dam Youth Escort. Filtering can be temporarily<sup>67</sup> or permanent. The trend in censorship is just like intellectual property enforcement toward decentralization: making local networks contributorily liable<sup>68</sup> for non-compliance to the legal instruction to filter the internet.

In 2009 the Ministry of Industry and Information Technology (MIIT) mandated that by July 1st of that year all computers sold in China must be pre-installed with a specific filter software: “Green Dam Youth Escort.” Officially the purpose of “Green Dam” was to protect children. But researchers found out that it censored political and religious content as well. Moreover, it logged user activity and sent this information to the server of the software developer, it made the user vulnerable to cyber-attacks and it allegedly infringed the copyright of a U.S. company that develops filtering software. After a massive outcry by Chinese users and foreign computer manufacturers, MIIT withdrew its plan and made the pre-installation of

<sup>61</sup> Zittrain and Palfrey suggest that this likely reflects a devotion of the most resources “to the filtering enterprise”, Zittrain and Palfrey 2008, p 35.

<sup>62</sup> Another reason to block a site as YouTube could be that it gives China's YouTube clone, Youku the opportunity to develop and become market leader in China.

<sup>63</sup> Mark Zuckerberg toured China. The amount of Chinese with Facebook went up from 300,000 to 700,000. “Facebook China” censor and who not? How would Facebook wall off the accounts of young Chinese who study overseas, set up accounts, and return to China? Would Facebook stop current news, like Nobel winner Liu Xiaobo, from spreading and trending? Would it turn over the personal details tied to accounts? Lukoff K, Why Mark Zuckerman Came to China and Why Facebook Will Not, December 27, 2010. <http://techrice.com/2010/12/27/why-mark-zuckerberg-came-to-china-and-why-facebook-will-not/>.

<sup>64</sup> OpenNet Initiative researcher Steven Murdoch along with his colleagues Richard Clayton and Robert N. M. Watson have published a paper that describes in detail the workings of the “Great Firewall of China,” including this dynamic filtering based on Web page content. As Clayton, Murdoch, and Watson note, “We have demonstrated that the ‘Great Firewall of China’ relies on inspecting packets for specific content.” Zittrain and Palfrey 2008, p 37.

<sup>65</sup> Anderson N, Just two Chinese ISPs serve 20% of world broadband users, Ars Technica, July 2010, available at <http://arstechnica.com/tech-policy/news/2010/07/just-two-chinese-isps-serve-20-of-world-broadband-users.ars>.

<sup>66</sup> Open Net Initiative (2005), Filtering by Domestic Blog Providers in China, January 20, 2005. <http://www.opennetinitiative.net/bulletins/008/>.

<sup>67</sup> China allows CNN to be broadcast within the country with a form of time delay so the feed can be temporarily turned off when, in one case, stories about the death of political reformer Zhao Ziyang were broadcast. Zittrain and Palfrey 2008, p 48.

<sup>68</sup> See Sect. 11.2.1 for contributory liability in the enforcement of intellectual property rights.

Green Dam voluntary.

By blocking<sup>69</sup> and then unblocking<sup>70</sup> some sites, such as Wikipedia, Zittrain and Palfrey suggest China is giving a signal, “that the state is watching in order to prompt self-censorship online.”<sup>71</sup> The concept of Wikipedia, an online encyclopedia where users can add and edit content, might be threatening for a government whose legitimacy is dependent on official stories<sup>72</sup>. Not only because such a site offers alternative versions of the truth, but also because these are held by many users authoritative.

#### *12.4.2.2. Removal of Content, Temporary Stop and Restrictions*

Beside filtering, Chinese authorities can order online service providers, whether they are internet service providers or blog platforms, to take down content or shut down a website, if the server is in China<sup>73</sup>. The spread of information during ethnic conflicts can exacerbate problems. To contain the conflict and stabilize the situation, China is willing and able “to pull the plug”<sup>74</sup>. After ethnic riots in Xinjiang Uyghur Autonomous Region, in July 2009, China cut off the internet, text messaging and international phone service for half a year. After that the internet and phone service was restored, but with severe limitations: people have a limited number of text messages they can send, no access to non-Chinese websites and even limited access to Chinese websites<sup>75</sup>.

#### *12.4.2.3. Cyber-Attacks*

The “highly sophisticated” cyber-attacks targeted at Gmail accounts of human rights activists originated allegedly from China. But a causal link to the Chinese authorities could not be construed. One cannot categorize this as a form of censorship by the government, if the origin could not be established. The perpetrators could also be sympathizers with the government. MacKinnon observes that this example “serves as an important reminder that governments and corporations are not the only victims of

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<sup>69</sup> Blocking of Wikipedia in mainland China, Wikipedia.

<sup>70</sup> “Wikipedia has grown so influential, in fact, that it has attracted the attention of China’s censors at least three times between 2004 and 2006. The blocking and unblocking of Wikipedia in China—as with all other filtering in China, without announcement or acknowledgment — might also be grounded in a fear of the communal, critical process that Wikipedia represents.” Zittrain and Palfrey 2008, p 29.

<sup>71</sup> Zittrain and Palfrey 2008, p 35.

<sup>72</sup> “While its decentralization creates well-known stability as a network, this decentralization reflected at the “content layer” for the purpose of ascertaining truth might give rise to radical instability at the social level in societies that depend on singular, official stories for their legitimacy.” Zittrain and Palfrey 2008, p 29.

<sup>73</sup> “In Anglo-European legal parlance, the legal mechanism used to implement such a system is called “intermediary liability.” The Chinese government calls it “self-discipline,” but it amounts to the same thing, and it is precisely the legal mechanism through which Google’s Chinese search engine, Google.cn, was required to censor its search results.” MacKinnon 2010.

<sup>74</sup> The possibility to shut down the internet is sometimes referred to as the kill switch. Kill switch, Wikipedia.

<sup>75</sup> “Xinjiang-based Internet users can only access specially watered-down versions of official Chinese news and information sites, with many of the functions such as blogging or comments disabled.” MacKinnon 2010.

cyber-warfare and cyber-espionage.<sup>76</sup>

#### 12.4.2.4. Domain Name Controls

To control the internet one can try to filter or delete content. Another method is to control the registration of domain names. In December of 2009, the government-affiliated China Internet Network Information Center (CNNIC) announced that only companies and organizations could register websites with the country code toplevel domain name .cn. This to prevent registrations using a false name. The measure was sometimes explained as a way to clean up pornography, fraud and spam. An underlying reason could be that businesses, who can only operate with a license, can get a .cn domain name. This, *de facto* resulted into two layers to control who could own a .cn domain name. After some protests, and probably some registrants choosing another toplevel domain name, CNNIC announced in February that individuals will again be allowed to register .cn domains. However, this time applicants have to appear in person to confirm their registration, show a government ID and submit a photo of themselves with their application. It is clear to applicants that they could easily be tracked and held responsible when compromising information is uploaded to a website connected to their domain name.

#### 12.4.2.5. Surveillance

There is a difference between withholding information to users and giving information about the users to the authorities, the latter being far less passive. The technology used for filtering can be used to detect who wanted to see which content. Search engines are especially suited for this purpose. Internet users that have a sense of anxiety that their conduct online is under surveillance, real or imagined, are more likely to self-censor themselves. Cybercafes can be used as surveillance tools<sup>77</sup>. Cybercafes, are required to monitor the visitors via, for example ID registration, login, surveillance cameras and monitoring software on the computers.

#### 12.4.2.6. Fifty Cent Party Commentators

Chinese authorities realize that social media are not only risky, but also provide opportunities to make their side of the story heard and promote values endorsed by the Chinese Communist Party. According to an official white paper issued in September internet is an important channel "for the Chinese government to get to know the public opinion and amass the people's wisdom."<sup>78</sup> China's cultural ministries are

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<sup>76</sup> MacKinnon points out that websites run by Chinese exiles, dissidents, and human rights defenders, journalists and academics have seen increasingly aggressive attacks over the past few years. "In other cases the effect is to compromise activists' internal computer networks and e-mail accounts to the point that it becomes too risky to use the Internet at all for certain kinds of organizing and communications because the dissidents don't feel confident that any of their digital communications are secure." MacKinnon 2010.

<sup>77</sup> "One might also consider the cybercafe-based controls in China, say, as compared to the approach of setting up the "Great Firewall" at the state's geopolitical boundaries." Zittrain and Palfrey 2008, p 43.

<sup>78</sup> Hewitt D, The March of the Netizens, BBC News, November 2, 2010.

training freelancers to channel the public opinion. Bandurski estimated in 2008 that in the whole of China there were at least 280,000 of these freelancers active<sup>79</sup>. These freelancers are derisively called Fifty Cent Party commentators, because they are getting 50 cents (half a Renminbi) for each comment they make. Next to softening some online positions, and stressing propaganda points, they function also as the eyes and ears of the party<sup>80</sup>.

### ***12.4.3. What Content is Filtered?***

Google is prohibited to disclose what kind of content it is ordered to filter by the Chinese government. The OpenNet Initiative did empirical testing for internet blocking in 40 countries, including China, which started in 2006. It found evidence of technical filtering in 26 countries, including China<sup>81</sup>. The OpenNet Initiative's methodology was to compile lists of sites that cover a wide range of topics targeted by internet filtering with topics ranging from gambling, pornography, and crude humor to political satire and sites that document human rights abuses and corruption. Subsequently researchers test these lists to see which sites are available from different locations within each country.<sup>82</sup> The results were illustrated in a figure, whereby each country was positioned along a horizontal axis representing the scope of the filtering (the ambition of the censoring country), and the vertical axis that was depicting the depth of the filtering (the success of the censoring in that country). Regarding the breadth of filtering, only the Arab Emirates and Saudi Arabia scored higher than China. In respect of depth of filtering only Iran scored higher than China<sup>83</sup>.

The keywords filtered in China can be categorized into 5 groups: 1. national minorities' independence movements<sup>84</sup>; 2. All references to the Tiananmen Square incident on June 4, 1989, including "6-4"; 3. Chinese communist leaders; 4. the religious organization Falun Gong; and 5. keywords to uprisings or suppression<sup>85</sup>.

Comparing to most authoritarian regimes, China is more engaged in filtering political than social material. China is blocking just as Vietnam and some countries in the Middle East and North Africa sites related to religion and minority groups. In China, sites that represent the Falun Gong and the Tibetan exile groups are widely blocked. Just like Iran and Yemen, China blocks by keyword in the domain or URL path. China filters by keywords that appear in the host header (domain name) or URL path<sup>86</sup>.

China is sometimes denying it is even filtering. This was demonstrated by Chinese official Yang Xiaokun, who stated at the 2006 Internet Governance Forum: "In China, we don't have software blocking Internet sites. Sometimes we have trouble

<http://www.bbc.co.uk/news/world-asia-pacific-11576592>.

<sup>79</sup> Goldkorn J, More on the 50 cent army, Danwei, July 14, 2008.

[http://www.danwei.org/propaganda/more\\_on\\_the\\_50\\_cent\\_army.php](http://www.danwei.org/propaganda/more_on_the_50_cent_army.php).

<sup>80</sup> China Media Project of the University of Hong Kong. See the interview to David Bandurski by Restall H, FEER, China's Guerilla War for the Web, YouTube video, July 31, 2008, available at <http://www.youtube.com/watch?v=Zpomfqb3QVY>.

<sup>81</sup> Faris and Villeneuve 2008, p 5.

<sup>82</sup> Faris and Villeneuve 2008, p 5.

<sup>83</sup> Faris and Villeneuve 2008, Figure 1.1, p 8.

<sup>84</sup> National minorities' independence movements, in Tibet, Xinjiang and Inner Mongolia and contacts with Taiwanese politicians known for their pro-independence standpoint.

<sup>85</sup> Deibert and Rohozinsky 2008, p 141.

<sup>86</sup> An example: the site <http://archives.cnn.com/> is accessible, the URL <http://archives.cnn.com/2001/ASIANOW/east/01/11/falun.gong.factbox/> is not. When this URL is requested reset packets are sent that disrupt the connection, because of the keyword falun.gong.

accessing them. But that's a different problem. . . We do not have restrictions at all."<sup>87</sup> Or China justifies its filtering to help enforce intellectual property rights.<sup>88</sup> Illustrative for China's perception of censorship are the statements of Wang Chen. This deputy head of the Communist party's propaganda department and head of the State Council Information Office said that by November about 350 million pieces of harmful information, including text, pictures and videos, had been deleted: "There was a notable improvement in the online cultural environment."<sup>89</sup>

The editors of the China Rights Forum present three narratives how the Chinese government sees the internet<sup>90</sup>. The history of the narratives is also illustrative that the topic of internet censorship itself is not free of being censored<sup>91</sup>. The internal narrative shows that the government is very apprehensive about the open character of the internet<sup>92</sup>, the distinction between the Chinese internet and global internet is also significant. The focus is on the flies that come in if you open the window for fresh air, to use the words of Deng Xiaoping<sup>93</sup>.

In the made-for-export narrative, China states that it is maintaining tight control over the internet, because it is an important national infrastructure and it is just asserting its sovereignty. China wants to be perceived by the international community as a loyal and responsible member that deals according to international law. Therefore it articulates that China guarantees its citizens' freedom of speech on the internet as well as the public's right to know, to participate, to be heard and to oversee in accordance with the law. In other words it wants to show the world that in China there is freedom of expression, only limited by China's law. This narrative also states that China provides a safe environment in which businesses can operate. Hereby inviting foreign companies to do business in China and welcoming foreign direct investments.

The official narrative for the Chinese people is the internal narrative purified from any wordings about censorship<sup>94</sup>. The editors suggest that the Chinese authorities

<sup>87</sup> Internet Governance Forum (2006), "Openness", transcription session, October 31, 2006. <http://www.intgovforum.org/IGF-Panel2-311006am.txt>.

<sup>88</sup> Rundle and Birdling 2008, p 83.

<sup>89</sup> It is interesting that Wang cites the growing number of press releases as evidence of the government's and the party's increasing transparency. Hill K, Chinese internet censors boast of good year, December 30, 2010, Financial Times, <http://www.ft.com/cms/s/0/69baa762-1431-11e0-a21b-00144feabdc0.html#axzz1AzVjekLO>.

<sup>90</sup> The editors of the China Rights Forum make a distinction between three narratives on the internet in China: 1. the internal narrative of the government; 2. the-made-for-export narrative; and 3. the official narrative. See China Rights Forum 2010.

<sup>91</sup> The internal narrative was the report by Wang Chen, Concerning the Development and Management of Our Country's Internet, April 29, 2010, and was posted on the website of the National People's Congress and was removed from the site shortly after. China Rights Forum 2010.

<sup>92</sup> "As long as our country's Internet is linked to the global Internet, there will be channels and means for all sorts of harmful foreign information to appear on our domestic Internet. As long as our Internet is open to the public, there will be channels and means for netizens to express all sorts of speech on the Internet." China Rights Forum 2010.

<sup>93</sup> Deng Xiaoping alluded with his winged words: "Open the windows, breath the fresh air and at the same time fight the flies and insects," to China's reform policy of 1979 of opening up to the world and taking some negative side effects for granted. Hays J (2008), China under Deng Xiaoping, Facts and Details. <http://factsanddetails.com/china.php?itemid=80&catid=2&subcatid=7>.

<sup>94</sup> The deletions include everything related to censorship: "description of domestic propaganda and ideological work to guide public opinion online and unify public thinking and expansion of China's cultural soft power abroad via news and commercial channels and websites in foreign languages; description of the preliminary Internet information security protection system and the policy of "active defense and comprehensive prevention"; description of the need to construct a legal system for the Internet; and description of the overall allocation of responsibility and management structure that integrates regulation, supervision, industry self-regulation, and technological safeguards, and calls for a

could be anxious about “the consequences of informed public debates or push back by netizens over such issues as implementation of real-name identification for forum moderators and an identity authentication system for bulletin boards.” The editors might be right, as evidenced by the massive public outcry against Green Dam<sup>95</sup>.

#### *12.4.4. Effectiveness of Censorship*

Bob Marley sang: “You can fool people sometimes, but you can't fool all the people all the time.”<sup>96</sup> And this is also true for Chinese citizens, who are getting more internet savvy and cynical towards government propaganda. Many have already manifested their online power, by participating in the “human flesh search engine”<sup>97</sup> phenomenon. The most effective filtering model is, according to Zittrain and Palfrey, to require blog service publishers to block keywords in blog posts. However, “even this approach can be only a partial means of blocking subversive content over time. Chinese bloggers routinely turn to broadly understood code words to evade the censorship built into the tools.”<sup>98</sup> A famous example is the word “grass mud horse”: it is a code word and metaphor for the power struggle over internet expression. China Digital Times started in 2009 a comprehensive online glossary of translations of coded terms created by Chinese netizens and frequently encountered in online political discussions, called the Grass-Mud Horse Lexicon<sup>99</sup>. Another problem for the authorities is to find balance in filtering. If the authorities filter too much (overbreadth) they will include innocuous content. And if they filter too less (underbreadth) they do not achieve the government's goals. Then there are many ways to evade the filtered internet, for example with a virtual private network<sup>100</sup>. It will probably continue to be a cat and mouse game between censor and user. But there are many many more mice and they are resourceful<sup>101</sup>.

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cross-department mechanism for preventing infiltration and handling harmful information from overseas.” See China Rights Forum 2010.

<sup>95</sup> In the spring of 2009 the Ministry of Industry and Information Technology (MIIT) mandated that by July 1, 2009 all computers sold in China would be pre-installed with Green Dam Youth Escort. This software would filter pornography, but it censored additional political and religious content, it also logged user activity and sent this information to a central computer of the software's developer's company. In addition it was vulnerable to cyber-attacks. After a public outcry and protests of the U.S. computer industry and government, MIIT withdraw its mandate and made the use voluntary. Green Dam Youth Escort, Wikipedia.

<sup>96</sup> Bob Marley and The Wailers, lyrics of the song Get up, stand up, 1973. Before Marley, Abraham Lincoln said: “You can fool some of the people all of the time, and all of the people some of the time, but you can not fool all of the people all of the time.”

<sup>97</sup> A crowd-sourced technique that Chinese netizens use to dig up personal information to locate someone, exposing government corruption or hit and run drivers. Human flesh search engine, Wikipedia.

<sup>98</sup> Zittrain and Palfrey 2008, p 52.

<sup>99</sup> Qiang, CDT Launches the Grass-Mud Horse Lexicon, China Digital Times, December 7, 2010. <http://chinadigitaltimes.net/2010/12/introducing-the-grass-mud-horse-lexicon/>.

<sup>100</sup> Dingedine R, Ten Things To Look For In Tools That Circumvent The Internet Censorship, In: “China's Internet”: Staking Digital Ground, Human Rights in China, number 2, 2010, available at <http://www.hrichina.org/public/contents/article?revision%5fid=175279&item%5fid=175276>.

<sup>101</sup> “The Chinese are very resourceful in this. A site about popular movie stars may become a vehicle for discussing delicate political issues. Among Chinese ‘nerds’ hacking systems are circulating that completely bypass censorship, but you must be knowledgeable enough to download these from non-blocked sites. And then there are weblogs that appear to discuss dogs but are in fact describing the political situation in China.” Great Chinese Fire Wall of China (non-profit group of creatives). Great Chinese Fire Wall of China (undated).

## 12.5. Innovation Crucial for Chinese Government

### 12.5.1. Innovation and Intellectual Property

After the Olympic Games the level of China's resolve to enforce intellectual property rights seemed to have faded somewhat. This is not the case: the Chinese government realises how crucial intellectual property rights are for the survival of the Chinese Communist Party's hegemony. The only legitimacy the party has is continuing China's economic growth and lifting millions of people out of poverty. Since the labour costs are rising and the currency is appreciating China's strategy to be the low cost producer of the world is not sustainable. Therefore Chinese companies need to climb the value ladder and add more value to their products and services. In other words they need to innovate. Intellectual property rights can harness innovation (patents), creativity (copyrights) and commerce (trademarks). Therefore, one can argue a direct link between the ability of China's industry to innovate and the survival of the one-party model in China.

### 12.5.2. Innovation and Censorship

The fate of the Chinese Communist Party is connected by its ability to bring economic prosperity to China. It believes that censorship is indispensable to keep social stability, so that the economy can grow in a harmonious way. However, censorship is not compatible to net neutrality, a word coined by Tim Wu<sup>102</sup>. Net neutrality is seen by many as the necessary architecture to make the internet into such a varied, innovative ecosystem. It is using the end-to-end principle of network design, whereby the intelligence in the network should not be placed in the middle of the network, but at the fringes. By imposing control in the middle of the network, for example via the Great Firewall of China, the censors are obstructing the growth of the network. Also censorship and surveillance of user-generated content could have serious chilling effects<sup>103</sup> on creativity and innovation<sup>104</sup>.

In this time and age the free flow of information via the internet and innovation are intimately connected. One can argue that the one cannot progress without the other. The assumption is often made that creativity that is needed for innovation can only thrive in an environment with freedom of expression and the possibility to experiment. If this is true, the inverse might also be true. A country that is obstructing the free flow of information and where there is only marginal room for experimenting, might harm its ability to innovate and therefore its economic progress. Hillary Rodham Clinton put it this way: "When countries curtail internet freedom, they place limits on their economic future."<sup>105</sup> Then there are intrinsic values

[http://www.greatfirewallofchina.org/faq/14/How\\_do\\_the\\_people\\_of\\_China\\_counter\\_this?](http://www.greatfirewallofchina.org/faq/14/How_do_the_people_of_China_counter_this?)

<sup>102</sup> Wu 2003.

<sup>103</sup> The term "chilling effect" was used by Paul Freund. Freund 1950. See also the site Chilling Effects Clearinghouse (<http://www.chillingeffects.org/>), a joint project of the Electronic Frontier Foundation, Harvard, Stanford, Berkely, University of San Francisco, University of Main, George Washington School of Law, Santa Clara University School of Law.

<sup>104</sup> Zittrain and Palfrey 2008, p 51.

<sup>105</sup> "When countries curtail internet freedom, they place limits on their economic future. Their young people don't have full access to the conversations and debates happening in the world or exposure to

attributed to the internet: it could lead to a more open information environment, where there is greater access to information, more transparency, better governance and faster economic growth<sup>106</sup>. "All censorships exist to prevent any one from challenging current conceptions and existing institutions. All progress is initiated by challenging current conceptions, and executed by supplanting existing institutions. Consequently the first condition of progress is the removal of censorships"<sup>107</sup>. Although George Bernard Shaw wrote these words in 1905 they still sound plausible. Joseph Schumpeter stated that innovation "must be seen in its role in the perennial gale of creative destruction (...)"<sup>108</sup>. The internet has been a catalyst of innovation, and has disrupted many business models, such as the record, movie and publishing industries. And it is safe to say that the internet will disrupt other industries<sup>109</sup> as well. Moreover, it is likely that completely new industries will emerge. If a country such as China wants to be competitive one can argue that it needs to make room for experiments. Then again, one could say that China already uses the Special Administrative Regions of Hong Kong and Macau and arguably Taiwan as test grounds where these greater freedoms are allowed. Within China, the Chinese government could experiment with greater freedom in Special Economic Zones, such as Shenzhen, and see whether greater freedom actually leads to more innovation.

Competition forces companies to come up with better products and services: in other words innovation. If China keeps shielding some companies from international competition by raising market barriers via censorship, it is not doing a service to these companies nor to its citizens. The companies stay less innovative, while counterfeit and pirated products will thrive.

## 12.6. Conclusions

The Chinese government started with the plan to create a more just and social society where the citizens share their resources. Now that the economic growth of China has continued for over thirty years, a big income gap between poor and rich and huge environmental problems has arisen. There is a lot of room for improvements of the individual online freedom of China's citizens.

Google started with the plan to give access to as many people as possible under the mantra of not doing evil. When it wanted to provide China's people with high quality access to its search results, it did not listen to its own mantra and condoned to become a censoring tool in the hands of the Chinese government.

Trademark and copyright holders are trying to hold Google contributorily liable for intellectual property rights infringements. One of the paradoxes is that

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the kind of free inquiry that spurs people to question old ways of doing and invent new ones. And barring criticism of officials makes governments more susceptible to corruption, which create economic distortions with long-term effects. Freedom of thought and the level playing field made possible by the rule of law are part of what fuels innovation economies." Clinton HR, Internet Rights and Wrongs: Choices & Challenges in a Networked World, February 15, 2011, available at <http://www.state.gov/secretary/rm/2011/02/156619.htm>.

<sup>106</sup> Zittrain and Palfrey suggest that this likely reflects a devotion of the most resources "to the filtering enterprise", Zittrain and Palfrey 2008, p 51.

<sup>107</sup> Shaw 1905, p 41.

<sup>108</sup> Schumpeter 1942.

<sup>109</sup> This author foresees that 3D printers in combination with the internet will have an unprecedented influence on intellectual property rights. See also Print me a Stradivarius, How a new manufacturing technology will change the world, The Economist, February 10, 2011, available at <http://www.economist.com/node/18114327>.

Google can solve this way more intellectual property related problems that it causes. Governments, including China's are trying the same strategy in case it provides users uncensored content.

Google decided to provide users in China with a censored search engine Google.cn, so that it could guarantee the quality of its accessibility to the site. Only after Google experienced problems guaranteeing data-integrity and disappointing market expansion, the company decided to provide uncensored search results. Because otherwise the Chinese government would not have continued their license, they decided to relocate the search results to the Hong Kong version: Google.com.hk. Google's stance against censorship and its mantra of not doing evil sounds laudable but is paradoxical. Google exaggerates when it is playing the role of freedom of information champion, because Google is censoring its search results in many countries. Google even filed an application to patent a methodology to censor, making the company actively involved in censorship.

Where there are a lot of clear-cut international obligations for a country as China in the field of intellectual property rights, there are almost none in the field of censorship. One obligation based on the International Covenant on Civil and Political Rights, prescribes that censoring measures should be necessary and codified by law. These terms are vague and hard to assess, since China makes these laws secret. Total lack of transparency gives a lot of uncertainty for Chinese internet users about what is not allowed. This could have chilling effects to creativity. Furthermore it stimulates self-censorship, which might be the most effective form of censorship. So far, there are no laws, national or international, to prevent a U.S. company such as Google, to be involved in censorship in China.

Although the level of enforcement of intellectual property is insufficient, the Chinese government realises how important intellectual property rights are, since they can harness innovation. And innovation is the way to continue China's economic growth spurt. China is censoring the internet in the most extensive and sophisticated way of all countries, because it believes it is the only way to guarantee social stability needed for continued economic growth. The economic growth has and will lift millions of Chinese out of poverty and will consolidate the supreme position of the Chinese Communist Party.

Both China and Google have overshot their marks. Google will probably reach the borders of its arrogance soon, and will have to start respecting intellectual property rights more. Further, one should not have any illusions about the Google's moral leadership. It is more likely that the internet behemoth will develop into a typical multinational that is mostly concerned in satisfying its shareholders' financial motifs. Like all countries and businesses, Beijing and Mountain View<sup>110</sup> are only listening to arguments that can help achieve their own goals. China's economic growth strategy to be the low cost producer and exporter to the world is not sustainable. Therefore innovation is crucial for China. It can be argued that balanced intellectual property rights and minimal censorship are best for innovation. And this might be the only argument China is willing to listen to.

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<sup>110</sup> Google Inc., is headquartered in Mountain View, California, U.S.

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