

# **The Separation of Internet Content Regulation in the face of the Convergence of Information and Communication Technologies:**

**The Controversies, Challenges and Solutions for China<sup>1</sup>**

**LA SEPARATION DES CONTROLES DU CONTENU D'INTERNET EN FACE DE LA CONVERGENCE DES INFORMATIONS ET DES TECHNOLOGIES DE COMMUNICATION:**

**LES CONTROVERSESES, LES DEFIS ET LES SOLUTIONS POUR LA CHINE**

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**Abstract:** More than ten different departments in China have varying responsibilities for the regulation of the content of publications on the Internet. This separated regulatory structure has caused many challenges in the face of the convergence of information and communication technologies (ICTs), particularly the Internet. These challenges include the high compliance cost to ICT enterprises which effectively reduce incentives for high-tech startup companies and are detrimental to the innovative ability of the Internet itself. More generally, it creates tension for China's successful engagement with the international community, decreases the international competitiveness of the Chinese ICT enterprises and stifles the development of global ICTs. China needs to adopt a more sophisticated approach to regulate Internet content and overcome these challenges in the near future. Failure to do so will widen the gap between China and the world's developed countries in the Information Age.

**Key words:** the Internet; the regulation of the Internet; content regulation; China

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**Résumé:** Plus d'une dizaine de départements différents en Chine assument les responsabilités variées du contrôle du contenu des publications sur Internet. Cette structure régulatrice séparée a causé beaucoup de défis en face de la convergence des informations, des technologies de communication et surtout de l'Internet. Tous ces défis contiennent un coût de conformité élevé pour les entreprises ICT (Information and communication technologies en anglais), qui découragent effectivement les startups high-tech et qui sont défavorables pour la capacité innovatrice d'Internet lui-même. Plus généralement, il crée de la tension pour l'engagement de la Chine avec la communauté internationale, diminue la compétitivité internationale des entreprises ICT chinoises et ralentit le développement de l'ICT. La Chine a besoin d'adopter une approche plus sophistiquée pour régulariser le contenu d'Internet et surmonter tous ces défis dans le proche futur. Si l'on faillit faire cela, la distance entre la Chine et les pays développés s'agrandira dans l'Age d'Information.

**Mots-Clés:** Internet; régularisation d'Internet; contrôle du contenu; la Chine

Regulating the content of published information has been a common public policy challenge for both Eastern and Western political regimes throughout history. The regulatory challenge has included attempts to protect children from exposure to material containing erotic content to the prevention of hate speech. In some periods of Chinese history, China has been one of the most regulated jurisdictions as far as content regulation has been concerned. This is paradoxical because China has made great contributions to enable information flow and knowledge sharing since ancient times: China was the country in which paper and typed letter printing technologies were invented. Each of these inventions was revolutionary in enhancing the exchange of information and knowledge. By contrast, China's strict approach to content regulation has sometimes also been very shocking. The notorious event of burning books and burying Confucian scholars in the Qin Dynasty (221BC-206BC)<sup>3</sup> and the so called "literary inquisitions" in the middle of Qing Dynasty (1644AC – 1911AC) are just two examples.<sup>4</sup> The pages of history both in China and in some parts of Europe record that content regulation has been a very controversial issue for societies around the world.

Entering the age of the Internet, with its widespread information dissemination capabilities and without centralized administration, the question of whether and how to regulate online content presents even greater challenges. As John Perry Barlow observed: "the Internet is too widespread to be easily dominated by any single government. By creating a seamless global-economic zone, borderless and unregulateable, the Internet calls into question the very idea of a nation-state."<sup>5</sup>

However, many scholars maintain that the Internet and its content can be regulated. As Professor Lessig said: "That Cyberspace as a place that governments could not control was an idea that I never quite got. The word itself speaks not of freedom but of control."<sup>6</sup> With more and more inappropriate or illegal content appearing on the Internet, such as pornography and computer viruses, sites operated by organized criminals, defamatory material and publications involving intellectual property infringements,

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<sup>3</sup> The Qin dynasty (221-207 B.C.) was one of the most important federal dynasties in the history of China because it unified the whole of China and standardized the Chinese language and measures of weight and distance. But the cost involved was also very high, including the notorious burning of books and buryal of Confucian scholars whilst they were still alive. L. S. Stavrianos, *A Global History: From Prehistory to the 21<sup>st</sup> Century*, 7<sup>th</sup> edition, Chinese version, Peking University Press, 2004, pp 161-162.

<sup>4</sup> **Literary Inquisition** (Chinese: 文字獄 *wénzìyù* "imprisonment due to writings") refers to official persecution of intellectuals for their writings in Imperial China. *Wénzìyù* flourished during the Ming and Qing dynasties. Such persecutions could owe even to a single phrase or word which the ruler considered offensive. Some of these owed to the naming taboo. In a serious case, not only the writer but also his immediate and extended families would be killed. Wikipedia: Literary Inquisition: <http://www.answers.com/topic/literary-inquisition>

<sup>5</sup> Barlow, J. P. *A Declaration of the Independence of Cyberspace*, <http://homes.eff.org/~barlow/Declaration-Final.html>

<sup>6</sup> Lessig L. 1999. *Code and Other Laws of Cyberspace*. P.5, published by Basic Books.

most governments worldwide recognize that the Internet is not a legal vacuum and that Internet content needs to be regulated.

In 2000, the Group of Eight industrialized countries (G8) brought together about 300 law enforcement officials, diplomats and high-tech business leaders to help draw up ideas for the Group's annual summit in Okinawa. France proposed a strongly interventionist State role in regulating the Internet despite the fact that industry groups urged the G8 not to fight cybercrime with a rash of new regulations. President Jacques Chirac told delegates at a G8 cybercrime conference that law enforcement agencies must help industry to fight hackers, virus writers and Internet fraud.<sup>7</sup> Subsequently, the G8 nations have scheduled negotiations regarding international agreements on a whole series of questions relating to the Internet: child pornography, sexual abuse, drug dealing, money laundering, electronic fraud, computer piracy, as well as industrial and State espionage.<sup>8</sup>

Currently, perhaps the most significant challenge is how to regulate the Internet content in the most effective way. The pages of Chinese history reflect the controversial relationship between content regulation and information communication. What is the optimal extent of content regulation is a much debated question in many countries, even though some western commentators prefer to scrutinize the current position in China more closely. In the United States, with its Constitutional protections for freedom of expression, the laws of Internet content regulation are also complicated and unpredictable as is demonstrated by the fate of the Communication Decency Act (CDA) and Children's Online Protection Act (COPA). Further, inconsistencies in judicial decisions and governmental action between western countries have also arisen, such as the conflict between the decisions in the United States and France about restrictions on online Nazi auctions<sup>9</sup> and the United States' legislative crack-down on web gambling services which caused serious economic damage to several small Caribbean economies.<sup>10</sup>

However, despite these differences, there are also some common elements in relation to content regulation, such as the prohibitions on child pornography, hate speech, racial discrimination and the various laws of defamation.

This article comprises five sections. Section I provides a brief introduction of Internet content regulation in some western countries, especially in the United States; section II discusses content regulation in China and why the regulatory administrations are separated; section III gives some examples of the convergence of ICTs; section IV identifies the controversies and challenges caused by separate regulation in the face of the convergence of ICTs themselves; and section V, as the conclusion of the paper, seeks to provide some practical suggestions for more effective Internet content regulation in China in the future.

## **1. INTERNET CONTENT REGULATION IN WESTERN COUNTRIES**

### **1.1 The Difficulties of Content Regulation of the Internet in the Western Countries**

How to regulate online content in the digital era has been being one of the most controversial questions in the past twenty years worldwide.

For instance, in the USA, the COPA, which was one of several laws passed by the legislature to

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<sup>7</sup> France Defends Net Regulation, Reuters, <http://www.wired.com/politics/law/news/2000/05/36363>

<sup>8</sup> Jack Goldsmith, Against Cyberanarchy, Occasional Papers from The Law School The University of Chicago Number 40, <http://www.law.uchicago.edu/academics/againstcyberanarchy.html>

<sup>9</sup> French Nazi item ruling nixed by U.S. court, USA TODAY, 11/08/2001 - Updated 11:59 AM ET, <http://www.usatoday.com/tech/news/2001/11/08/yahoo-nazi-items.htm>

<sup>10</sup> Wu, Tim. May 3<sup>rd</sup>, 2006. *The World Trade Law of Internet Filtering*. p. 1. Available at SSRN: <http://ssrn.com/abstract=882459>.

regulate the content of the Internet, required that internet sites collecting personal information from children under the age of 13 must first obtain parental permission. The COPA was fiercely criticized because it imposed an extra cost to e-commerce enterprises and led to the isolation of children from the Internet.<sup>11</sup> The intent of the legislation was to prohibit children from viewing on-line pornography and to require that all viewers submitted proof of adulthood. At the time of publication, a coalition led by the American Civil Liberties Union (ACLU) which opposes COPA has succeeded in indefinitely postponing the implementation of the legislation after several rounds of litigation before the District Courts and the Supreme Courts.<sup>12</sup>

Before the COPA, another law which concerned Internet content regulation was the Communication Decency Act in 1995 (CDA).<sup>13</sup> In *ACLU v. Reno*, in which the CDA was challenged as unconstitutional, the Supreme Court struck down the Internet pornography provisions of the CDA, finding that the Act was a "content-based blanket restriction on speech" subject to strict scrutiny and thus could not be analyzed under intermediate scrutiny as a content-neutral "time, place and manner regulation". The Court also found that the language restricting speech in the CDA lacked the precision that the First Amendment requires when a statute regulates the content of speech. Because of this vagueness, the Court held that the CDA effectively suppressed a large amount of speech that adults have a constitutional right to receive and to address to one another and, as such, was not narrowly tailored to achieve the government's interest in protecting children from Internet pornography.<sup>14</sup>

State sovereignty conflicts caused by differences in online content regulation between different countries are also likely to be considerable. For example, the American Congressman Smith introduced the Global Online Freedom Bill of 2006. The Bill's aims were to: Amend the Foreign Assistance Act of 1961 to require, in reports relating to foreign economic and security assistance, assessments of the freedom of electronic information in each foreign country; Establish in the Department of State the Office of Global Internet Freedom to take specified actions to strengthen global freedom of electronic information; Direct the President to designate Internet-restricting countries; Provide minimum standards for U.S. businesses with respect to the protection of online freedom in foreign countries; Authorizes the establishment of export controls against Internet-restricting foreign countries.<sup>15</sup>

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<sup>11</sup> Many online businesses have also complained that COPA compliance is expensive. According to Campanelli, some of the major costs of compliance include employing staff to compose and maintain the online privacy policy statements, hiring attorneys to review the policies, and coordinating the collection and secure storage of parental consent forms. Experts estimate that these costs would amount to between fifty cents and three dollars per child interaction, or up to \$100,000 per year, for a medium-sized Web site. Faced with these potential costs, some sites were forced to limit access to children over the age of 13. Other sites—like the popular United Kingdom-based site for the "Thomas the Tank Engine" series of books and toys—decided to eliminate their e-mail and chat room features because they could not afford to comply with COPPA. See <http://www.answers.com/topic/children-s-online-privacy-protection-act>

<sup>12</sup> Preston, C. B. 2007. Zoning the Internet: A New Approach to Protecting Children Online (pp. 1417-1467). *Brigham Young University Law Review*, p.35. Available at SSRN: <http://ssrn.com/abstract=1147163>.

<sup>13</sup> The CDA prohibited (1) knowingly transmitting "obscene or indecent messages to any recipient under 18 years of age", and (2) "knowingly" sending or displaying...patently offensive messages in a manner that is available to a person under 18 years of age over the Internet. Under the statute, a Web publisher who violates these provisions could be fined, imprisoned, or both. Additionally, the CDA provided defenses against prosecution, including "taking...reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specific in the CDA or restricting access to such communication by requiring use of a verified credit card, debit card, debit account, adult access code or adult personal identification number. 47 U.S.C. Section 223(e)(5)(A)-(B).

<sup>14</sup> *Reno v. ACLU*, 519, U.S. 1025 (1996), Preston, Cheryl B., Zoning the Internet: A New Approach to Protecting Children Online (2007). *Brigham Young University Law Review*, pp. 1417-1467, 2007, Available at SSRN: <http://ssrn.com/abstract=1147163>, pp35.

<sup>15</sup> Global Online Freedom Act of 2006 - States that it is the policy of the United States to: (1) promote the ability of all to access and contribute information, ideas, and knowledge via the Internet; (2) use all instruments of U.S. influence, including diplomacy, trade policy, and export controls, to support, promote, and strengthen the free flow of information; and (3) prohibit any U.S. business from cooperating with officials of Internet-restricting countries in effecting potential censorship of online content. The Bill expresses the sense of Congress that: (1) the President

If the Bill is passed into law, American-based international Internet enterprises would face a dilemma between complying with the law of the United States and investing in other countries in which they may wish to conduct business. Obviously, it will be very difficult commercial decision for these enterprises. The Bill has not yet been passed mainly because of the strong opposition to it by these enterprises.

## 1.2 Some Theories of Internet Content Regulation

Since the introduction of the Internet, scholars worldwide have developed many theories for content regulation for the Internet. Some primary theories regarding Internet content regulation have now emerged. This paper selects some of them by way of brief introduction even though the principles themselves are still far from concluded and stable.

### 1.2.1 The “Code” Thesis

The “code” thesis is advanced by Professor Lessig in his well known book: *The Code and Other Laws of Cyberspace*. According to Professor Lessig’s theory, software and code has regulatory effects on human behavior. In this sense, Internet architecture is like the architecture of a building, which could enable or encourage humans to move and congregate in certain ways. So also, the architecture of the Internet enables some activities by users and regulators while discouraging others: “There is regulation of behavior in cyberspace, but that regulation is imposed primarily through code. What distinguishes different parts of cyberspace are the differences in the regulations effected through code. In some places life is fairly free, in other places controlled, and the difference between them is simply a difference in the architectures of control—that is, a difference in code.”<sup>16</sup>

The “code” thesis exemplifies a theory which draws on a technological solution to the issues which arise on the Internet. That is, the answer to the regulatory issues which are raised by the machine (in this case, the Internet) is to be found within the machine (the computers, software and digital network which supports the Internet). However, one of the concerns with this approach is that to construct the Internet with such purposeful technology may impose strong governmental intervention into the Internet, which may undermine the neutral characteristics of the Internet. This could harm the innovative ability of the Internet.

### 1.2.2 The “Layers Principle” Thesis

The Layers Principle is advanced by Professor Lawrence Solum. In essence it seeks to respect the integrity of the layers of the Internet. The layers principle and its corollaries are as follows: (1) the layers principle: public Internet regulators should not adopt legal regulations of the Internet that violate the integrity of the layers absent a compelling regulatory interest and consideration of layer respecting alternatives; (2) corollary one: the principle of layer separation: public Internet regulators should not adopt any regulation that would require one layer of the Internet to differentiate the handling of data on the basis of information available only at another layer absent a compelling regulatory interest; (3) corollary two: the principle of minimizing layer crossing: if compelling regulatory interests require a layer-crossing regulation, the public Internet regulators should adopt that feasible regulation that minimizes the distance between the layer at which the law aims to produce an effect and the layer directly targeted by legal regulation.<sup>17</sup>

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should commence international negotiations to obtain the agreement of other countries to enact legislation similar to this Act and to pursue the development of international agreements protecting Internet freedom; and (2) some U.S. businesses, in assisting or empowering an authoritarian foreign government to restrict online access to websites such as the Voice of America and other broadcasts and information, are working contrary to U.S. foreign policy interests and undercutting efforts to promote freedom of information for all people.

<http://www.govtrack.us/congress/bill.xpd?bill=h109-4780&tab=summary>

<sup>16</sup> Lessig L. 1999. *Code and Other Laws of Cyberspace*. P.20, published by Basic Books.

<sup>17</sup> Solum, L. B. and Chung, Minn. The layers principle: Internet architecture and the law. *U San Diego Public Law*

The Layer Principle is a kind of reflection of the proportionality principle in the administrative system. Simply put, the principle of proportionality is a political maxim which states that no layer of government should take any action that exceeds that which is necessary to achieve the objective of government. It was initially developed in the German legal system.<sup>18</sup> The Layer Principle reminds us that when governments seek to regulate the content of the Internet, they need to be careful in selecting the methods of such regulation. This is especially meaningful in China because sometimes too much attention is placed on the final result and insufficient attention is given to whether the regulation is proportional.

### 1.2.3 The “End-to-End” Principle

The “end-to-end” principle also relies upon the principle of the separation of layers.<sup>19</sup> Under this principle, a neutral network is a “dumb” network, merely passing packets of data regardless of the applications which they support. This point of view was expressed by David S. Isenberg as follows: “A new network “philosophy and architecture,” is replacing the vision of an Intelligent Network. The vision is one in which the public communications network would be engineered for “always-on” use, not intermittence and scarcity. It would be engineered for intelligence at the end-user’s device, not in the network. And the network would be engineered simply to “Deliver the Bits, Stupid,” not for fancy network routing or “smart” number translation. . . . In the Stupid Network, the data would tell the network where it needs to go. (In contrast, in a circuit network, the network tells the data where to go.) In a Stupid Network, the data on it would be the boss. . . .End user devices would be free to behave flexibly because, in the Stupid Network the data is boss, bits are essentially free, and there is no assumption that the data is of a single data rate or data type.”<sup>20</sup>

The end-to-end principle keeps intelligence in a network at the ends or in the applications, leaving the network itself to be relatively simple. In short, the principle calls for a “stupid network” but “smart application”. The network simply forwards or routes the data packets and does not and cannot by architecture discriminate or differentiate traffic generated by different applications.<sup>21</sup> This characteristic is also called Internet transparency. The end-to-end principle or the transparent characteristic of the Internet is the essential nature of the Internet: firstly, the transparent characteristic of the Internet dramatically lowers the investment required for an innovation or creation;<sup>22</sup> secondly, the transparency of the Internet reduces the cost to the consumer. Consumers who want to use the Internet only need to invest in the application level. For instance, a consumer of an email service only needs to obtain and run the email application program and does not bear the cost of the construction of the Internet itself.

### 1.2.4 The Principle of Network Neutrality

The concept of network neutrality has many different meanings. Professor Tim Wu stated: “Network neutrality is best defined as a network design principle. The idea is that a maximally useful public information network aspires to treat all content, sites, and platforms equally. The principle suggests that information networks are often more valuable when they are less specialized – when they are a platform

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Research Paper No. 55. pp. 43-45. Available at SSRN:

<http://ssrn.com/abstract=416263> or DOI: 10.2139/ssrn.10.2139/ssrn.416263.

<sup>18</sup> <http://www.answers.com/the%20principle%20of%20proportionality>

<sup>19</sup> Solum, L. B. and Chung, Minn. The layers principle: Internet architecture and the law. *U San Diego Public Law Research Paper No. 55*. p. 25. Available at SSRN:

<http://ssrn.com/abstract=416263> or DOI: 10.2139/ssrn.10.2139/ssrn.416263.

<sup>20</sup> Isenberg, D. *Rise of the Stupid Network*, <http://www.rageboy.com/stupidnet.html>

<sup>21</sup> Solum, L. B. and Chung, Minn. The layers principle: Internet architecture and the law. *U San Diego Public Law Research Paper No. 55*. p. 15. Available at SSRN:

<http://ssrn.com/abstract=416263> or DOI: 10.2139/ssrn.10.2139/ssrn.416263.

<sup>22</sup> It is a very common phenomena not only in the world but also in China that many teenagers and young students enthusiastically involve in the innovative activity of the Internet. For instance, a well-known website in China called pcpop.com is created by Li Xiang, a young man who only has middle school education background.

for multiple uses, present and future."<sup>23</sup> Google, the world's largest Internet search engine company, gives the following working definition on its website: "Network neutrality is the principle that Internet users should be in control of what content they view and what applications they use on the Internet. The Internet has operated according to this neutrality principle since its earliest days... Fundamentally, net neutrality is about equal access to the Internet. The broadband carriers should not be permitted to use their market power to discriminate against competing applications or content. Just as telephone companies are not permitted to tell consumers who they can call or what they can say, broadband carriers should not be allowed to use their market power to control activity online."<sup>24</sup>

## 2. THE CURRENT STATUS OF INTERNET REGULATION IN CHINA

### 2.1 The Necessity of Content Regulation in China

#### 2.1.1 The Role of the Internet in China

China's regulatory model of the Internet is a heated topic which is discussed by both western and Chinese scholars.<sup>25</sup> To promote the Internet civilization is one of the most significant issues for the summit of China, as President HU Jintao stressed in the 17<sup>th</sup> CPC national congress report: "A culture of harmony provides important intellectual support for the unity and progress of all our people. We must step up the development of the press, publishing, radio, film, television, literature and art, give correct guidance to the public and foster healthy social trends. We must balance cultural development between urban and rural areas and among different regions, focusing on enriching the cultural life in rural and remote areas and of rural migrant workers in cities. We will strengthen efforts to develop and manage Internet culture and foster a good cyber environment."<sup>26</sup> The subject of Internet content regulation forms part of the future development and administration of China's Internet. As Xinhua News Agency reported, Chinese President HU Jintao on January 23rd, 2007 also called on government officials to promote and better regulate rapidly developing Internet services in China. Hu made the call at a study session of the Political Bureau of the Central Committee of Communist Party of China (CPC), saying officials should "actively and creatively nurture a healthy online culture" that meets public demand. The rapid development of the Internet in China has played an important role in spreading information, knowledge, and CPC's policies, and it has also raised new issues for the country's cultural development, HU said. "Whether we can cope with the Internet is a matter that affects the development of socialist culture, the security of information, and the stability of the state," HU said, asking officials to use the Internet as a platform to spread healthy information.<sup>27</sup> The voice of the summit of the government tells us that promoting the Internet development and maintaining its healthy content are part of basic Chinese governmental policy.

Besides the clear voice from the summit of the government, in practice, the Internet is also playing a very important role in the process of democratic development in China. Compared with the traditional

<sup>23</sup> [http://timwu.org/network\\_neutrality.html](http://timwu.org/network_neutrality.html)

<sup>24</sup> <http://www.google.com/help/netneutrality.html>

<sup>25</sup> See Lawrence Solum in his paper: The Layers Principle: Internet Architecture and the Law; Philip Sohmen in his paper: Taming the Dragon: China's Efforts to Regulate the Internet; William Foster in his paper: The Diffusion of the Internet in China; Tim Wu in his paper: Legal Implications of a Rising China: the World Trade Law of Censorship and Internet Filtering; and Trina Kissel in her paper License to Blog: Internet Regulation in the People's Republic of China.

<sup>26</sup> Full text of Hu Jintao's report at 17th Party Congress, [http://news.xinhuanet.com/english/2007-10/24/content\\_6938749\\_6.htm](http://news.xinhuanet.com/english/2007-10/24/content_6938749_6.htm)

<sup>27</sup> HU Jintao asks Chinese officials to better cope with Internet, UPDATED: 07:43, January 25, 2007, [http://english.peopledaily.com.cn/200701/24/eng20070124\\_344445.html](http://english.peopledaily.com.cn/200701/24/eng20070124_344445.html).

media, the Internet is a kind of additional media by which more and more common people have a channel to express their voice and opinion.<sup>28</sup> For a country with more than 1.4 billion people, obviously the Internet is the most economic media platform for the people to be able to more directly participate in the administration of the country. This is very important for the development of democracy. For instance, in the recent ZHOU Zhenglong's Paper Tiger event, the netizens continuously doubted the authenticity of a fake photo of the Southern Chinese tiger and uploaded the key evidence of the tiger picture drawn for the Spring festival, which eventually led the relevant government to investigate the matter.<sup>29</sup> Another example involved CNN who, on the 14<sup>th</sup> of March 2008, purported to publish a riotous event in Tibet with series of forged photos, which spurred widespread criticism not only from the Chinese government and traditional Chinese media but also from the mass Chinese public through the Internet. A graduate from Tsinghua University even set up a website, named anti-CNN, to list all the fake photos and which drew much attention and hits and has developed into a website which specializes in correcting incorrect or unfair reports from western media.<sup>30</sup>

### 2.1.2 The Negative Aspects of the Internet in China

The Internet not only brings many benefits for China as referred to above, but also causes many problems. For instance, because of the very appealing content online such as computer games, online chat, and even pornographic content, many teenagers are spending vast amounts of time in Internet cafés day and night, which seriously reduces their ability to study and undermines their mental and physical health. For their parents and schools, the Internet is one of the biggest challenges which they have to fight against<sup>31</sup> and they have requested governmental intervention to reduce the capacity of teenagers to access the Internet.<sup>32</sup> All major cities in China moved quickly to tighten controls on Internet cafes after a Beijing-based Internet cafe burned down on June 16, 2002, causing 24 deaths.<sup>33</sup>

So called "human flesh" search engines are another example which has caused great controversy recently. The 'human flesh search engine' is a very different search engine from the familiar Baidu and Google search engines. The idea of the human flesh search engine is to employ thousands of individuals who are all mobilized with one aim: to dig out facts and expose them to the baleful glare of publicity. To do this they use the Internet and conventional search engines.<sup>34</sup> This kind of research online raises

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<sup>28</sup> By the end of June 2008, the amount of netizens in China had reached 253 million, surpassing that in the United States to be the first place in the world. This is according to a newly released Suvery Repot by China Internet Network Information Center (CNNIC). According to CNNIC Report, the scale of Chinese netizens has been displaying the trend of continuous rapid growth. The number of Chinese netizens has increased by 91 million from that in the same period last year. This is the year 2008 that has witnessed the biggest increase in the number of netizens in history, with a growth rate of 56.2%. In the first half of 2008 alone, the net increase of Chinese netizens reached 43 million, outnumbering the US in this regard and rising to the first place in the world in terms of netizen amount. <http://www.cnnic.net.cn/html/Dir/2008/07/31/5247.htm>

<sup>29</sup> "The Provincial Forestry Department claimed at a press conference that the photos, first published on October 12, were proof the rare tiger still existed in the wild. But Internet users accused Zhou of making the tiger images with digital software, and local authorities of approving the photos to bolster tourism. The "paper tiger" saga aroused widespread interest among the public after the appearance of a Lunar New Year commemorative poster with a picture of a tiger that bore a striking resemblance to the one in Zhou's pictures. This led to strong public demands for official proof of authenticity. " South China tiger photos are fake: provincial authorities (Xinhua) Updated: 2008-06-29, [http://chinadaily.com.cn/china/2008-06/29/content\\_6803353.htm](http://chinadaily.com.cn/china/2008-06/29/content_6803353.htm)

<sup>30</sup> <http://www.anti-cnn.com/>

<sup>31</sup> Millions of young Chinese addicted to 'unhealthy' Internet games: Report, [http://news.yahoo.com/s/afp/20080829/lf\\_afp/lifestylechinaInternetgamesyouth\\_080829161250](http://news.yahoo.com/s/afp/20080829/lf_afp/lifestylechinaInternetgamesyouth_080829161250)

<sup>32</sup> Professor Tao, Hongkai, an educator become well-known in China in recent years because of his series success of helping the teenagers get rid off the Internet addiction. <http://big5.cctv.com/program/upclose/20060901/102084.shtml>

<sup>33</sup> Fire Prompts Tight Control on Internet Cafes in China, [http://english.peopledaily.com.cn/200206/18/eng20020618\\_98048.shtml](http://english.peopledaily.com.cn/200206/18/eng20020618_98048.shtml)

<sup>34</sup> "Human flesh search engine": An Internet lynching? [http://news.xinhuanet.com/english/2008-07/04/content\\_8491087.htm](http://news.xinhuanet.com/english/2008-07/04/content_8491087.htm)

significant issues of privacy, personal data safety, defamation and dignity. Recently, WANG Fei, one of the victims searched by a human flesh search engine sued the Tianya and Daqi websites in April, 2008, for infringing his privacy and reputation, which ticked off the first lawsuit against a human flesh search. The Court has held two conferences with the relevant legal and IT experts to discuss how to proceed with such kind of case because the judiciary has not adjudicated on such a dispute previously. Public opinion is also divided, some claim that the human flesh search should be strictly prohibited and criminalized; others maintain that the human flesh search also has positive aspects such as anti-corruption and assistant catching suspected criminals.<sup>35</sup>

## 2.2 The Separation of the Internet Content Regulators in China

### 2.2.1 The Background and Criteria of Content Regulations in China

The essential reason for the separate regulation of internet content in China is a historical one. In the era of analogue technology, information communication technologies followed the principle of mass production and consumption, which could be divided into three parts: production, wholesale transmission and retail distribution.<sup>36</sup> Paper media, film, radio and television did not emerge simultaneously, and their content did not over-lap and their consumers were also not the same. Separate regulators were established at different times to meet perceived regulatory requirements.. This separation of regulatory environments is now out-dated as a result of the convergence of the digital technology.

In China, before the wide spread usage of Internet, the different media were separately supervised and regulated by the different administrative organizations separately. For example, the paper media, such as publications and distributions of the newspapers, journals, magazines and books were administrated and supervised by the General Administration of Press and Publication of China (GAPP) and its sub-institutions in the local provinces.<sup>37</sup> The broadcasting media including radio, television and films were supervised and administrated by the State Administration of Radio, Film and Television of China (SARFT).<sup>38</sup> The industries responsible for advertising are regulated by the State Administration for Industry and Commerce (SAIC).<sup>39</sup> The remainder, which were not covered by GAPP and SARFT, such as the stage live performances, are supervised and administrated by the Ministry of Culture of China (MOC).<sup>40</sup> The standard or criteria by which the several administrative institutions regulated Internet content were generally uniform or standard, and called content review criteria.<sup>41</sup> These content review criteria have been repeated in several regulations for instance, the Regulation of Publication issued by the State Council no 292, article 26; the Law of Advertisement, article 7; the Regulation of

<sup>35</sup> For example, Mr. Zhang was stolen by the theft from his parking car and fled away when he fueled at the gas station. He uploaded the pictures of the theft ripped from the video monitor at the gas station onto the Internet and called for the human flesh search of the theft for the purpose of identification and catching. See <http://club.comment.news.sohu.com/t10000099203.html>

<sup>36</sup> Chen, Jim, Conduit-Based Regulation of Speech. Minnesota Legal Studies Research Paper No. 05-38. p. 1364. Available at SSRN: <http://ssrn.com/abstract=796505>.

<sup>37</sup> The official website of GAPP, <http://www.gapp.gov.cn/>

<sup>38</sup> <http://www.sarft.gov.cn/>

<sup>39</sup> <http://www.saic.gov.cn/>

<sup>40</sup> <http://www.ccnt.gov.cn/>

<sup>41</sup> According to the Content Review Criteria, the following content or information is prohibited to produced or distributed: (1)Information that goes against the basic principles set in the constitution; (2) Information that endangers national security, divulges state secrets, subverts the government, or undermines national unity; (3)Information that is detrimental to the honor and interests of the state; (4)Information that instigates ethnic hatred or ethnic discrimination, or that undermines national unity; (5)Information that undermines the state's policy towards religions, or that preaches the teachings of evil cults or that promotes feudalistic and superstitious beliefs; (6)Information that disseminates rumors, disturbs social order, or undermines social stability; (7)Information that spreads pornography or other salacious materials; promotes gambling, violence, homicide, or terrorism; or instigates crimes; (8)Information that insults or slanders other people, or infringes upon other people's legitimate rights and interests; or (9)Other information prohibited by the law or administrative regulations.

Film Administration, article 25; the Regulation of Radio and Television Administration, article 32; and the Regulation of Audio and Video Administration, article 3. These criteria have been entirely transplanted to the Internet environment, that is, the content filtering standard has been consistent with the analogue technology environment. In the Internet environment, questions arise as to whether the filtering standard should remain the same and who should be the supervisors.

### 2.2.2 The Chart of the Separation of Content Regulators

The following chart illustrates the complicated, separate regulators in China:

The centre government in charge of these ministries or bureaus	The ministries or bureaus as the regulators	The regulating object in the traditional environment (above) and the Internet environment(below) of these regulators
	The State Administration of Radio, Film and Television of China (SARFT)	Broadcasting, radio and Television, film Audio and video program online; digital TV
	The Ministry of Information Industry (MII)	Telecommunications, Voice online, value added service
	The General Administration of Press and Publication of China (GAPP)	Paper media, such as books, newspapers, journals News, publications online
	The State Administration for Industry and Commerce (SAIC)	General advertisement; registration of enterprises and trademarks, fair competition; Advertisement online; the registration of online shops
The State Council	Ministry of Health (MOH)	The administration of the medical advertisements The administration of the medical advertisements by Internet
	Ministry of the Public Security (MOPS)	Illegal content distributed in any tangible forms, such as such as pornographic content, computer virus, IP infringement content, information of secessionists and harm to public security etc Illegal content distributed through the Internet, such as pornographic content, computer virus, IP infringement content, information of secessionists and harm to public security etc
	The Ministry of State Security (MOSS)	Any illegal information harm to the national security Any illegal or confidential information harm to the security of the country distributed through the Internet.
	The Ministry of Commerce (MCPRC)	International and domestic commerce regulation Electronic commerce, online sale,
	The Ministry of Culture (MOC)	The general regulator of the cultural products and market in China The general regulator of the cultural products and performance online.
	The State Food and Drugs Administration (SFDA)	The quality and safety of food and drugs The sale of medicines and chemical reagents and medical apparatus and instruments online

Regulation of the Internet can be divided into two stages in China, they are preventative regulation and after-the-event regulation. Preventative regulation means that the regulators only allow qualified enterprises to run Internet businesses and seek to prevent unhealthy or illegal information from being created or distributed from the beginning. This form of regulation is also supported by a license or permission system. The logic of it is simple: firstly, permission or license system could be used as a kind of precautionary system by which only qualified entities are allowed to run such kind of business; and secondly, the system could be used to enforce after-the-event punishments on offending entities by revoking their licenses or permissions or other disciplinary action. After the event regulation involves the regulators punishing the distribution or creation of the illegal content after the distribution or created of the offending content has occurred. In the Internet, the enforcement of law for the purpose of punishing offenders is much more difficult than in the traditional environment because it is much harder to identify the wrongdoers because of the speed and mass-distribution ability of the Internet.<sup>42</sup> Therefore, in recent years, the Chinese government has sought to rely more on the preventative regulation to regulate the Internet. As illustrated in the above chart, except the MOPS and the MOSS that mainly regulate the Internet by the after-the-event punishment, all the other administrative organizations regulate the Internet by the preventative method or by the both of them, which cause many limits and much burden for the SMEs to enter the Internet market.

### 3. THE CONVERGENCE OF ICTS

As with other countries, China is experiencing the impacts of convergence of ICTs from the analogue to the digital. This is partly initiated and promoted by the government and partly happens naturally because of the innovative nature of the technologies themselves. For instance, in 2003, the SARFT issued the Outlines of Digitalization of Film, according to which, by the year of 2010, the SARFT will guide to establish the strategy position of the digital film in the film industry and deploy the new markets in the new technology.<sup>43</sup> In 2007, the SARFT issue the Timetable of Transformation of the television service from analogue to Digital technology, according to which, by 2010, all the programs of television are to be digitalized; and by 2015, all the analogue programs will be stopped.<sup>44</sup> Besides the digitalizing process of televisions being guided and promoted by the SARFT, IPTV is also developing in the Internet field encouraged by the former Ministry of Information Industry, now called the Ministry of Industry and Information Technology (MIIT) after the recent reform of the governmental institutions.<sup>45</sup>

Convergence is also driven by market forces. A good example of the technology convergence maybe is the voice online. Telecommunication service, especially telephone services including wire and wireless are monopolized by the state-controlled enterprises in China, such as China Telecom, which service is fixed telephone communication, and China Mobile, which service is wireless communication.<sup>46</sup> The convergence of these technologies have developed voice communication online, that is VOIP, such as Skype and QQ.<sup>47</sup> These VOIPs are created besides the traditional telephone

<sup>42</sup> For example the Edison Chen photo scandal involved the illegal distribution over the Internet of intimate and private photographs of Hong Kong actor Edison Chen with various women. The scandal shook the Hong Kong entertainment industry in early 2008 and received high profile media attention locally and around the world. Despite enlisting the assistance of Interpol, the Hong Kong police were unable to stem the spread of the photographs. More information about it available at [http://en.wikipedia.org/wiki/Edison\\_Chen\\_photo\\_scandal](http://en.wikipedia.org/wiki/Edison_Chen_photo_scandal)

<sup>43</sup> <http://www.dmcc.gov.cn/index/asp/zcfg/2006929103611.asp>

<sup>44</sup> <http://www.sarft.gov.cn/articles/2007/02/16/20070914165147430772.html>

<sup>45</sup> <http://www.miit.gov.cn/>

<sup>46</sup> According to The Regulation on Telecommunications of the People's Republic of China (Decree of the State Council No. 291), Article 10. "A basic telecommunications business provider shall meet the following requirements: (1) being a company established in accordance with the law and specialised in basic telecommunications business and the State-owned equity or shares in the company not lower than 51% ..."

<sup>47</sup> Tencent Holdings Limited (SEHK 700) , <http://www.qq.com/>

service as the consequence of the convergence of the technology.

Convergence leads to the mass participation of the content creation and distribution and also raises new issues for the regulators of China. One example is the DIY films made by individuals, which are called by Professor Fisher III as “semiotic democracy”.<sup>48</sup> Before digital technology became widespread, such as digital camera, digital video and the Internet, these kinds of films were not readily available because of the limited number of film production houses, distribution, importing and exporting channels and entities. There was also the issue of State controlled gatekeepers of film from production to distribution. But the convergence of the technology caused by the digital revolution has brought great change to this system. Nowadays, DIY films can be made by farmers and can be distributed online by anyone if they avoid the State gatekeepers. For instance, in 2006, a 19 years old farmer Bai Lang in the undeveloped western countryside area of China organized a group of local peoples to produce a film named Red Girth. All the roles in the film were performed by the local people as amateurs, and the main actor was a barber. The film was overwhelmingly supported by the local people. The slogan of Bai Lang for this film was “Not for Money But for Enthusiasm”.<sup>49</sup>

Prior to this, a preliminary school educated level female farmer called Tian Shao in HuNan province of China also directed and produced a film called “Seeking Mum In Thousands Miles”. The film was about the poor life of the uncared children in the countryside after their parents moved into the cities to work as migrant workers. The purpose of the film was to call for the return of their parents and raise social awareness of this abandoned group of children.<sup>50</sup> The film was quite popular online and in the local video showing cafés. The content which is created and distributed by the mass public raises the questions about who does and how to regulate its content.<sup>51</sup>

#### **4. THE CONTROVERSIES CAUSED BY THESE SEPARATE REGULATIONS IN THE CONVERGENT ICTS.**

The Internet merges nearly all separate media into one platform, such as print media, television, radio, film, telecommunication and related activities such as marketing and advertising. However, the regulatory framework in China for these media is still in the same situation as existed prior to convergence. The consequence of the separation of regulators is that they each have a role to play in Internet content regulation which leads to duplication and inconsistency.

##### **4.1 The Convergence of Technology Blurs the Authority of the Administrations**

China has strict regulation for films and TV programs and their creation, distribution and broadcasting. Firstly, only licensed entities have the authority to make, import, export, distribute and show the films. It is illegal for any unlicensed entities or individuals to carry out those activities and those who do face administrative or criminal penalties.<sup>52</sup> Secondly, the country maintains a film review system whereby no film shall be produced, distributed, shown, imported or exported before it has been reviewed by the

<sup>48</sup> William W. Fisher III. 2004. *Promises to Keep—Technology, Law, and the Future of Entertainment, Stanford Law and Politics*. pp. 28-29.

<sup>49</sup> See the Interview Program hosted by LuYu of Phoenix Television of 2007 -11-07, [http://phtv.ifeng.com/program/lyyy/200711/1107\\_1618\\_289128\\_1.shtml](http://phtv.ifeng.com/program/lyyy/200711/1107_1618_289128_1.shtml).

<sup>50</sup> See the CCTV program Society Records, <http://v.ku6.com/show/PtI0S-pytrWoXcEc.html>.

<sup>51</sup> The convergence of the technology also provides the additional channel of the film distribution and broadcast besides of the traditional channel such as cinema, theaters or televisions. For example, in 2007, the film named Apple was not passed the review of the SARFT and prohibited to show in the cinemas, theaters or televisions. But the film was uploaded online for browsing or downloading until the producer was administratively penalized by the SARFT. But the content has been accessed by millions of netizens. The administrative penalty of the SARFT see: <http://www.sarft.gov.cn/articles/2008/01/03/20080103170651960259.html>

<sup>52</sup> The Regulation of Film Administration, State Council No. 342, Article 5.

relevant administrative authorities.<sup>53</sup> The criteria for the review of film is substantially the same as the abovementioned content review criteria. For films produced by licensed film producers, the producers have the obligation of review. For films produced by any entities which are not licensed film producers, the entity has to apply for the specific permission from the relevant administrative authorities.<sup>54</sup> However, as the result of the convergence of technology and the means to do so, many individuals can now make films or audio-video programs by themselves without regard to these permissions or licenses. The consequence of this is that anyone can participate in the activities of information creation, storage, transmission and adaptation. Some scholars describe this characteristic of the Internet as “egalitarian culture”.<sup>55</sup>

Should these products be regulated by the SARFT? The SARFT thinks that they should be because in 2004, the SARFT itself issued a new order titled the Administrative Rules of Audio-Video Program Communication Through the Internet (SARFT No. 39) which authorizes the SARFT to regulate any kind of audio-video programs online. SARFT still tries to keep the Internet service providers as the gatekeepers for review of these audio-video programs. But in the practice, as above mentions, many individuals doubt and refuse the overreach regulation of the SARFT. They just do what they want and ignore the regulation.

Compared with traditional telephone services, VOIP technologies are very cheap. This presents major challenges to the commercial profitability of telephone enterprises such as the State controlled enterprises. MII, the governmental regulator of the telecommunication industry, issued an order to prohibit VOIP service without its permission, and only allows 5 State controlled telecommunications enterprises to run such services.<sup>56</sup> For the same reason, Wi Fi mobile phones are also prohibited to sell in China. However, because of the low technology requirement, this prohibition does not work well in practice. Many IP telephone services without such permission actually exist online, and online end to end voice or audio-video communication develops quickly.

## 4.2 The Separating Internet Content Regulation Causes Extra Costs to ICT Enterprises

Sina.com is a well-known comprehensive website in China which grew from a startup in 1998, and is now publically listed on the NASDAQ (NASDAQ: SINA).<sup>57</sup> The homepage of Sina shows more than ten licenses or permissions listed, which are issued by different regulating organizations. They are (1) the ICP issued by the former the MII, (2) the Network Cultural Business Permission issued by the MOC, (3) the Internet Audio-video Program Permission issued by the SARFT, (4) the Internet News Service Permission issued by the State Council News Office, (5) the Internet Pharmaceutical Information Service Permission issued by the SFDA, (6) the Permission of the Education through the Internet issued by the Beijing Education Committee, (7) the Permission of BBS Service issued by the Beijing

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<sup>53</sup> The Regulation of Film Administration, State Council No. 342, Article 24.

<sup>54</sup> The Regulation of Film Administration, State Council No. 342, Article 26 and Article 16.

<sup>55</sup> Engel, Christoph, *The Role of Law in the Governance of the Internet* (2002). MPI Collective Goods Preprint No. 2002/13. Available at SSRN: <http://ssrn.com/abstract=325362> or DOI: 10.2139/ssrn.10.2139/ssrn.325362, p10.

<sup>56</sup> The Notice of IP Telephone Service Ban Lift, MII March 4, 2000.

<sup>57</sup> SINA Corporation (NASDAQ: SINA) is a leading online media company and value-added information service provider in China and the global Chinese communities. With a branded network of localized web sites targeting Greater China and overseas Chinese, the Company provides services through five major business lines including SINA.com (online news and content), SINA Mobile (MVAS), SINA Community (Web 2.0-based services and games), SINA.net (search and enterprise services) and SINA E-Commerce (online shopping). Together these business lines provide an array of services including region-focused online portals, MVAS, search and directory, interest-based and community-building channels, free and premium email, blog services, audio and video streaming, game community services, classified listings, fee-based services, e-commerce and enterprise e-solutions. The Company generates the majority of its revenues from online advertising and MVAS offerings, and, to a lesser extent, from search and other fee-based services. With more than 280 million registered users worldwide and over 900 million daily page views, SINA is the most recognized Internet brand name in China and among Chinese communities globally. [http://corp.sina.com.cn/eng/sina\\_intr\\_eng.htm](http://corp.sina.com.cn/eng/sina_intr_eng.htm)

Telecommunication Administration Bureau, (8) the Value-Added Telecommunication Service Permission issued by the former MII, (9) the Permission of Internet Publication issued by the GAPP, and (10) the Permission of Distribution Health Information through the Internet issued by the MOH.<sup>58</sup> In addition to these permissions and the relevant administrative organizations listed, other administrative organizations also have the power to regulate the Internet, such as the National Copyright Administration, the MOPS and the MOSS. The Internet is a network of multimedia convergences in which one website can comprise all information and communications activities which previously existed in the analogue technology environment. Therefore, most of the ICT enterprises need many permits to conduct their business. The applications for these permissions have a very high cost and are time-consuming to prepare for the following reasons:

Firstly, most of the permissions have threshold requirements. For example, the ICP issued by MII is a comparatively easy permission to be obtained compared to other permissions and is a compulsory one for any ICT enterprises operating in China. The minimum registered capital of the enterprise as one of the conditions to be granted for the local ICP is RMB 1,000,000 Yuan, and for the national ICP is RMB10,000,000 Yuan.<sup>59</sup> These minimum requirements obviously increase the economic burden on ICT startups since they have to issue enough registered capital for the grant of ICP which is compulsory for the conduct of any e-commerce business. In 2005, the Company Law was amended by the Standing Committee of the National People's Congress to decrease the level of capital required to set up a company. The mandatory minimum registered capital of a limited liability company was decreased from RMB100,000 Yuan to RMB30,000 Yuan.<sup>60</sup> The purpose was very clear to make it easier to carry out such business activities. More importantly, all the regulations related to the permission system are lower statutes than the Company Law issued by the Standing Committee of the National People's Congress. This means that the junior regulations have derogated and undermined the purposes of the senior law because according to the Legislative Law of China, the effect of laws is higher than that of administrative regulations, local regulations, and rules and the effect of administrative regulations is higher than that of local regulations, and rules.<sup>61</sup>

Secondly, a further cost is the commission fee involved in obtaining these permissions. The relevant administrative organizations do not charge fees directly from the applicants for these permissions because it is illegal to charge fees without the authorization of the law.<sup>62</sup> But for most applicants the applications are complicated and time consuming, and need considerable experience to negotiate with the governments since they have wide discretions as to whether to grant such permits or not. This situation creates a new agency service for these applications being the agencies who help these applicants handle the documents and negotiate to obtain the authorizations. The amount of the commission fees for these services is from RMB several thousands Yuan to more than one hundred of thousands Yuan depending on the difficulties of the application.<sup>63</sup>

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<sup>58</sup> All these Permissions are listed at the homepage of Sina.com according to the requirements of the regulations, <http://www.sina.com/>

<sup>59</sup> <Http://www.miit.gov.cn/col/col5250/index.html>

<sup>60</sup> The Company Law of the People's Republic of China, 2005. Article 26 "The minimum amount of registered capital of a limited liability company shall be RMB 30, 000 Yuan. If any law or administrative regulation prescribes a relatively higher minimum amount of registered capital of a limited liability company, the provisions of that law or administrative regulation shall be followed."

<sup>61</sup> Legislation Law of the People's Republic of China, Article 79.

<sup>62</sup> The Administrative License Law of the People's Republic of China, Article 58 When implementing an administrative license and conducting inspection on the licensing matters, the administrative organ shall not charge anything for that; but if it is otherwise provided for in the laws and administrative regulations, the latter shall prevail. When offering exemplary application form of administrative license, the administrative organ shall not charge anything for that. The essential fund for the administrative organ to implement an administrative license shall listed in the budget of this administrative organ, which shall be ensured, checked and appropriated by the finance department of the same level according to the ratified budget.

<sup>63</sup> For instance, when input the key words such as ICP application into the search engine Baidu.com, the information and advertisements of the ICP application agencies come out. Nihao! is one of them, <http://www.nihao.cn/kefu/icp.asp>

The cost incurred by the separate regulatory framework also offsets the benefits which are offered to the startups and high tech enterprises. The basis for the growth of economy and job opportunities in China depends on the prosperity of small and middle size enterprises (MSE) even though sometimes the giant enterprises which are listed on the Fortune 500 are better known. With the pressures of energy shortages and the cost of labor intensive products, the Chinese government has continuously encouraged the development of innovative types of enterprises such as high tech enterprises in recent years.

In 2002, the Middle and Small Size Enterprises Promotion Act was promulgated by the Standing Committee of the National People's Congress, according to which, the MSE is promoted by five methods including, special finance support; venture deployment support; innovation and technology support; market deployment support; and social services support.<sup>64</sup> For hi-tech enterprises, tax incentives and privileges are also provided. The new Enterprises Income Tax Law amended in the 2007 proscribes that high and new technology enterprise that require key State support are subject to the applicable enterprises income tax rate with a reduction of 15%.<sup>65</sup> Many qualified high and new technology enterprises are IT enterprises in China and most of them are middle and small size so these privileges and incentives are very important to them.

However, the privileges offered to the high and new technology enterprises and MSE could be largely offset by the high cost of the separated permission system.

### 4.3 The Separated Regulations Are Disadvantageous to the Chinese Startups in the International Markets

The Internet operates across borders for the information flowing on the Internet, the geographic borders of a country are relatively meaningless because the Internet does not recognize the borders or geographic positions. An example of this border transparency is shown in the LICRA v. Yahoo! case in which the question was whether the American enterprise has the obligation to comply with the decision of a French court and how the French court's decision was to be enforced on the American enterprise.<sup>66</sup> When one country adopts stricter rules on the conduct of Internet business, the rules could stifle local Internet businesses operating in that country. Local consumers could be targeted by international enterprises with the same service which are prohibited by the local rules. The rules decrease the international competitiveness of the local enterprises but do not shield the local consumers from unwelcome content.

This situation is common in China but, unfortunately, it has not caused much attention from the regulators. Currently, pornographic content in China is strictly prohibited. As happening in other western countries, the Internet is also very popular for the production and distribution of pornographic content in China. The Chinese government has continuously cracked down on such online content by blocking the websites and punishing the offenders with criminal penalties.<sup>67</sup> However, this has led to changes in business methods from the simple local content providers to the international organizers and cooperators. More and more pornographic content websites are set up outside China, where the regulations are much less strict, and the operators are also spending most of their time outside China while most of the websites visitors and users are Chinese in China.<sup>68</sup> In this situation the only thing the government could do is to block the IP of the websites. But the block can be easily circumvented by technology method such as proxy servers and the amount of the pornographic content websites is too

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<sup>64</sup> The Middle and Small Size Enterprises Promotion Act, chapter II, III, IV, V and VI.

<sup>65</sup> The Law of the People's Republic of China on Enterprise Income Tax, Article 28.

<sup>66</sup> More information about the case is available on [http://en.wikipedia.org/wiki/LICRA\\_v.\\_Yahoo!](http://en.wikipedia.org/wiki/LICRA_v._Yahoo!)

<sup>67</sup> Ryan Paul, China declares war on Internet pornography, <http://arstechnica.com/news.ars/post/20051231-5873.html>

<sup>68</sup> For example, in 2007, a big pornographic website was cracked down by the police, the users of which are more than 1 million, but the servers of the website are located outside China and the chief organizer is also outside China. Only four local operators were arrested and the chief organizer is still out of the punishment even though the announcement of the police said that they have asked the cooperation from the international police organization, more information is available at the video of <http://www.tudou.com/programs/view/obbuEZXAwDA/>

large to block effectively.<sup>69</sup> The border transparent characteristic of the Internet seriously undermines the effectiveness of the separate regulations.

Many international websites located outside China are accessible by the large amount of the Chinese users, such as yahoo, Google, New York Times, Amazon, Facebook, Second Life and Playboy. These international enterprises have not had to obtain the permissions and licenses which the local Chinese enterprises have to obtain. These international enterprises contain content which could not be provided by the Chinese local enterprises. This content vacuum which arises as a result of the Chinese regulations can be easily filled by the international competitors. The consequence of the high regulatory cost means that Chinese users are moving from the local Chinese enterprises to the international competitors. Other than hurting the Chinese enterprises, there is little or no benefit from these regulations.

The regulation of online video service providers is another example of the difficulties faced by Chinese Internet operations. The SARFT and the MII have co-published the new Regulations for Online Audio and Video Services (Video Regulation), which will take effect from January 31, 2008. The Video Regulation covers the production, editing, and aggregation of audio and video content and provision to the public through both Internet and mobile networks. The Video Regulation defines SARFT as the authority to administer, monitor, and regulate the industry's development, while the MII, with authority over the Internet and mobile industry, will take related monitoring responsibilities and provide a set of service guidelines. All online audio and video service providers will be required to apply for an "Online Audio-Visual Broadcasting License", key qualifications for which include: being majority state-owned and possessing a comprehensive program censoring system, legal program resources, legal funding sources, and "standardized technology".<sup>70</sup>

The promulgation of the Video Regulation is not surprising given that the Chinese government has strict control on the media industry. Before the Internet era the Chinese government required that only the State owned enterprises could operate the radio, television film and print media services. All such media enterprises needed permission from the relevant government to set up and State control was the precondition to be granted such permission.<sup>71</sup> As shown in the Catalogue of Prohibited Foreign Investment Industries in China (2007), these areas are prohibited for foreign investment to enter.<sup>72</sup> As one analyst said: "What China is trying to do is have the same set of rules for the online world as they do with traditional media" and added that the move to regulate online audio and video content was "a recognition and pat on the back" for the Internet in China for being able to have as much impact in shaping people's opinions as traditional media.<sup>73</sup>

One of the serious consequences of the Video Regulation is that all the forthcoming video enterprises after the Video Regulation came into effect must be state owned or controlled enterprises. Therefore, the private enterprises will be ousted out of the business, or as some enterprises said they have to seek the license fee from the State owned or controlled enterprises. Often the State owned or controlled

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<sup>69</sup> Thousands of pornographic websites are accessible to Chinese Internet users which means that the block doesn't work very well.

<sup>70</sup> Marbridge Daily, SARFT, MII Co-Issue Online Video Regulation, [http://www.marbridgeconsulting.com/marbridgedaily/2007-12-29/article/7063/sarft\\_mii\\_co\\_issue\\_online\\_video\\_regulation](http://www.marbridgeconsulting.com/marbridgedaily/2007-12-29/article/7063/sarft_mii_co_issue_online_video_regulation)

<sup>71</sup> The Regulation of the Film Administration, 2001, the State Council Order no.342, Article 8, Article 9. the Regulation of Publication Administration, , the State Council Order no.343, Article 10 and Article 11.

<sup>72</sup> Catalogue of Prohibited Foreign Investment Industries: X. Art, Sports and Entertainment Industries: 1. News agencies;2. Business of publishing, producing, master issuing, and importing of books, newspaper and periodical ;3. Business of publishing, producing, master issuing and importing of audio and visual products and electronic publications ;4. Radio stations, TV stations, radio and TV transmission networks at various levels (transmission stations, relaying stations, radio and TV satellites, satellite up-linking stations, satellite receiving stations, microwave stations, monitoring stations, cable broadcasting and TV transmission networks) ;5. Companies of publishing and playing of broadcast and TV programs ;6. Companies of films making, issuing, business ;7. News website, network audiovisual service, on line service location, Internet art management 8. Video screening companies ; 9. Construction and management of golf course ;10. Gambling industry (including gambling turf).

<sup>73</sup> Chinese govt clarifies online video rules, By [Vivian Yeo](#), ZDNet Asia, Wednesday, February 06, 2008 01:42 PM, <http://www.zdnetasia.com/news/Internet/0,39044908,62037492,00.htm>

enterprises join in their enterprises as the major shareholder with no investment at all. The private SMEs are in a disadvantageous position compared with the State owned or controlled enterprises which seriously impedes their development.

#### 4.4 The Separated Regulations May Give Rise to Disputes With Other Countries

The complicated and controversial separated regulations have caused extra cost and heavy burdens to the Chinese ICT enterprises and lowered their ability to compete internationally.

But the controversies do not end there. Besides these Chinese enterprises, other international IT enterprises that set up branches in China also need to comply with these regulations. Tim Wu calls this the “Yahoo presumption”, that is, the presumption that the burden lies with Internet companies to adapt to national legal system.<sup>74</sup> These regulations have caused heated debate as to whether these international enterprises should comply with the national regulations. For example, in the United States, some Congressmen are trying to pass laws to prohibit the USA-based enterprises from having to comply with the above Chinese regulations. In 2007, Congressmen Smith and Wolf proposed a Bill called “Global Online Freedom Act of 2007”, which purpose is to promote freedom of expression on the Internet, to protect United States businesses from coercion to participate in repression by authoritarian foreign governments, and for other purposes. In the pretext section of the law, China has been mentioned two times: “(4) The Internet has played a role in bringing international attention to issues the discussion of which are forbidden by authoritarian foreign governments, such as attempts by the Government of the People’s Republic of China to suppress news of the severe acute respiratory syndrome (SARS) outbreak in 2004. (7) Authoritarian foreign governments such as the Governments of Belarus, Cuba, Ethiopia, Iran, Laos, North Korea, the People’s Republic of China, Tunisia, and Vietnam block, restrict, and monitor the information their citizens try to obtain.”<sup>75</sup>

Obviously, this Bill could not touch the territory of China directly because the laws of one country cannot apply extra-territorially. But if the Bill is passed, the USA based ICT enterprises will be faced with the dilemma between the threat of punishment from the USA and the enforcement of law in China.<sup>76</sup> It will affect the direct investment from the United States to China. As some analysts have said: “A bill to be introduced to the US Congress, which aims to prevent Internet companies from facilitating censorship overseas, may not only limit US companies’ ability do business in China, but may also deter Chinese companies from tapping US equity markets.”<sup>77</sup> It is not only the USA which has proposed such an initiative, the European Parliament recently passed a proposal to treat Internet censorship by repressive regimes as a trade barrier. The proposal, submitted by Jules Maaten of the rightist Dutch VVD party, passed on a 571-38 vote. Maaten describes it as an “unusual, but effective way” to promote freedom of expression on the Internet.<sup>78</sup>

Some scholars such as Tim Wu are concerned that these proposals may have implications which involve the WTO.<sup>79</sup> These concerns are not totally unjustified because the legislatures of the developed countries have already had some success with so called “regime shift”. Two examples illustrate what is meant by “regime shift”: (i) the history of the Digital Millennium Act (DMCA) has shown that when the bill countered the obstacle in the national legislative process, it could be shifted to the International

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<sup>74</sup> Wu, Tim. *Symposium: Legal Implications of a Rising China: The World Trade Law of Censorship and Internet Filtering*, 7 *Chi.J. Int’l L.* 263. p. 159.

<sup>75</sup> The text of the bill is available at [http://thomas.loc.gov/home/gpoxmlc110/h275\\_1h.xml](http://thomas.loc.gov/home/gpoxmlc110/h275_1h.xml)

<sup>76</sup> Bill would penalize companies for aiding Internet censorship, By Jacqui Cheng, <http://arstechnica.com/news.ars/post/20080501-bill-would-penalize-companies-for-aiding-Internet-censorship.html>

<sup>77</sup> FOCUS - Proposed 'online freedom act' may hurt US and US-listed China firms 02.16.2006, 07:01 AM, <http://www.forbes.com/business/feeds/afx/2006/02/16/afx2531410.html>

<sup>78</sup> EU may begin treating 'Net censorship as a trade barrier, By Eric Bangeman, <http://arstechnica.com/news.ars/post/20080227-eu-may-begin-treating-net-censorship-as-a-trade-barrier.html>

<sup>79</sup> Wu, Tim. *Symposium: Legal Implications of a Rising China: The World Trade Law of Censorship and Internet Filtering*, 7 *Chi.J. Int’l L.* 263. p. 159.

legislative level such as WIPO; and then, the Law easily overcame the obstacle on the reason of comply with the international obligation; and (ii) TRIPs in which intellectual property issues were shifted from WIPO to WTO and the developed countries successfully raised the level of protection globally. The proposal of the Global Online Freedom Act was strongly opposed by the ICT enterprises because these enterprises would be pressured by the regulations from both sides. But if the western countries shift the target object from the enterprises to China and force China to loosen the regulations through the multilateral treaties such as WTO or bilateral treaties, these international enterprises obviously benefit most once the regulations loosen. Whether the domestic Chinese ICT enterprises have the ability to compete with them is really an open question since they have been stifled by their own regulations for long time.

#### 4.5 The Non- Proportionality of the Separated Regulations

One of the fundamental requirements of administrative regulations is the requirement for proportionality as introduced in the Section 1.2.2. The separated regulations in China not only cause many challenges and controversies but also lead to non-proportionality.

One typical example of this non-proportionality is the prohibition on minors from Internet cafés. In 2001, the Place of Internet Access Service Administrative Order was jointly issued by the MII, MOC, MPS and SAIC. Its purpose was to regulate access by minors to Internet Cafés.. In 2002, the Order was replaced by the senior statute, the Regulation of the Place of Internet Access Service Administration, issued by the State Council.<sup>80</sup> According to the regulation, the Internet Cafés, as the place of Internet Access Service, are under the administration of the permission system, that is, they are required to obtain the permission from the MOC and the business license from the SAIC is the precondition for operating the Internet Cafés.<sup>81</sup> Internet Cafés, which are set up after passing these regulations are strictly prohibited from being accessed by minors. The methods of prohibition include the Internet Cafés are not allowed to set up within 200 meters scope of the high schools and preliminary schools or within the residential communities. All the users shall be checked for ID by the operators of the Internet Cafés to be sure they are not minors. Any violation gives rise to fines from RMB 15,000 Yuan or the possible revocation of the permissions and business licenses.<sup>82</sup>

From this Regulation, the government has transformed the task of providing clean content online to minors into strict regulation of Internet Cafés operators. That is, the government has shifted her content regulating burden to the Internet access service entities, who are obligatory to act as gatekeepers to keep the minors away from the Internet. This form of regulation has been described by Professor Solum as a kind of layer violating regulation and out of proportion because it crosses the layer too far by denying access to the Internet in order to regulate a layer of content.<sup>83</sup>

This form of regulation creates a very difficult situation: firstly, the high demand for Internet access puts significant pressure on the ability to enforce the Regulation. The computers and Internet have unmatched appeal to minors who will try every method possible to enter the Internet cafés. At the same time, the Internet cafés operators run their businesses to make a profit and the large number of minors are the main consumers for their services. Therefore, the minors and the Internet cafés operators have a strong initiative to collude to bypass the Regulation.<sup>84</sup> The governments have noticed this loophole and

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<sup>80</sup> The State Council no. 363.

<sup>81</sup> The Regulation of the Place of Internet Access Service Administration, the State Council no. 363, Article 7.

<sup>82</sup> The Regulation of the Place of Internet Access Service Administration, the State Council no. 363, Article 9, Article 21, Article 23, Article 30 and Article 34.

<sup>83</sup> Solum, L. B. and Chung, Minn. The Layers Principle: Internet Architecture and the Law. *U San Diego Public Law Research Paper No. 55*. p. 64. Available at SSRN: <http://ssrn.com/abstract=416263> or DOI: 10.2139/ssrn.10.2139/ssrn.416263.

<sup>84</sup> Despite a Ban, Chinese Youth Navigate to Internet Cafes, By Edward Cody Washington Post Foreign Service Friday, February 9, 2007; Page A01, <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/08/AR2007020802389.html>

some have required the installation of online simultaneous video monitors in every Internet café.<sup>85</sup>

Secondly, this Regulation induces the proliferation of the black-market Internet cafés. Because of the high demand from minors to access the Internet and the strict regulations on the Internet cafés' setting up and operating, and because of the easily accessible technology and low investment required to set up an Internet café, the black-market Internet cafés are proliferating. These black-market Internet cafés not only fail to comply with the Regulation but also have very poor conditions and safety.<sup>86</sup> The problem of the black-market Internet cafés is more serious in the rural areas because of the comparatively weaker enforcement of the laws.

Thirdly, the Regulation differentiates in its application between rich and poor minors. For minors coming from the relatively rich families, especially from the urban areas, most of them can access the Internet in their homes or schools because their families or schools can afford the computer facilities and the cost of the Internet. But for poor minors, especially from the rural areas, most of them have no other way to access the Internet if they are barred from the Internet cafés. The Regulation only prohibits the minors from accessing the Internet in the Internet cafés, but no law deprives the minors' rights to access the Internet elsewhere. Unfortunately, the consequence of the Regulation is that it either deprives them of their rights to access the Internet or means they seek out the black-market Internet cafés.

## 5. CONCLUSION ---SOME PRACTICAL SUGGESTIONS

It is a worldwide challenge to regulate the content of the Internet in an effective way. For China, which was a late-comer to modern industrial society, it might have learnt from the lessons or experiences of the first developed countries. This could have provided a helpful short cut for the establishment of an effective system. However, China also stands on the cutting edge of developments on the Internet at the same time as developed countries. This forces China to develop her own system and ideas of regulation. But no matter whether the international models or Chinese models are accepted, effective Internet regulation is still far from satisfactory. As David Clark said about the Internet neutrality debate: "most of what we have seen so far (in my opinion) either greatly overreaches, or is so vague as to be nothing but a lawyer's employment act."<sup>87</sup>

There are only three ways available for a government to regulate the content of the Internet, they are permissions, technology or prohibitions. Each of these three forms of regulation has been frequently used by the government of China to regulate the content online with varied results. Much of what have been achieved by the current system of separate regulators is similar to temporary patches trying to cover the loopholes whenever they are found. These regulations sometimes overlap, sometimes conflict and sometimes are ambiguous. Most of them are lower than the regulations issued by the State Council which implies that they are temporary and simply trial. These regulations have put a heavy burden on the Internet enterprises from both the economic point of view and the psychological point of view. The shadow of the regulatory framework has harmed the ability for innovation by Chinese companies and the possibility of foreign investment. It has been often said that the Chinese Internet market is short of innovations. Most Chinese Internet enterprises are just copies of models which have been successful outside China. This means the gap in the innovative ability between China and the developed countries such as the USA and some European countries is becoming wider even though all they each started nearly at the same starting line.

What solutions can be offered to overcome these controversies? Internet regulation, particularly of content, is a critical question worldwide. China could make some efforts in the following directions:

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<sup>85</sup> Shanghai cameras spy on web users, Thursday, April 22<sup>nd</sup>, 2004, <http://news.bbc.co.uk/2/hi/asia-pacific/3648813.stm>

<sup>86</sup> China cracks down on Internet cafes, Author: Joe Martin, Published: February 18<sup>th</sup>, 2008, [http://www.bit-tech.net/news/2008/02/18/china\\_cracks\\_down\\_on\\_Internet\\_cafes/1](http://www.bit-tech.net/news/2008/02/18/china_cracks_down_on_Internet_cafes/1)

<sup>87</sup> Weiser, P. 2008. The Next Frontier for Network Neutrality. *Administrative Law Review*, 60(2), 3, Available at SSRN: <http://ssrn.com/abstract=1080672>.

Firstly, maybe it is the time to promulgate a basic law to unify the separated regulators and regulations recording to the content on the Internet. The separated low level regulations have caused many controversies to the ICT industry and seriously stifle its development. But so far no basic and uniform law regulating the content of the Internet has been made out except the law for the intellectual property.

Secondly, the basic law needs to properly balance the need for innovation and the requirement for content regulation. The current overreaching regulations and heavy compliance costs have reduced the innovative ability of the Internet in China. With the further development of the Chinese market economy, industry and enterprises are more and more aware of compliance with regulations. Therefore, laws must be refined instead of heavy-handed to achieve any benefit. What the market needs is a scalpel approach not an axe approach.

Thirdly, the methods of regulation need to develop with the technological characteristics of the Internet. End to end of transmission, border transparency, decentralization, layer transparency and multimedia convergence are the characteristics of the Internet and are considerably different from the traditional media. However, currently the regulation of Internet content simply replicates the regulation in the analogue technological environment. This has caused many unsatisfactory results, such as the high cost, high risk and low effectiveness of the regulations. We need to open our mind from our experience in the past to the Internet era.

And lastly, seeking international cooperation shall be more important than in any era which China has experienced previously. Economic globalization and the Internet technology arrived at the same time which raises the importance of the need for international cooperation both from the technological point of view and from the economic point of view. But the current Chinese regulations have little thought for international cooperation and even try to force the Internet into a localized environment. The attempt to regulate in this way is not only in conflict with the nature of the Internet but inconsistent with the open policy and the process of internationalization.

In summary, the Internet has changed the world tremendously in nearly all aspects of its culture, economy, politics and psychology. It is unworkable to try to regulate the Internet by simply transferring the regulatory regime from the analogue technology environment to the convergent digital one. Simplistic and arbitrary regulations will hurt the economy of the Internet, stifle its innovation and widen the gap of between the Chinese Internet industries and their counter-parts in developed countries. What is required is to create a comprehensive and systematic framework of law which copes with international harmonization. This year is the 30<sup>th</sup> anniversary of the Policy of Openness and Reform in China which began in 1978. The central government has positively confirmed the success and achievement of the policy and claims that the policy is still the principal guide for the future development of China. The policy of openness and reform is required in the regulation of the Internet content now.