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## China's tackling of online pornography: Puzzles, issues and trends

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# **China's Tackling of Online Pornography – Puzzles, Issues and Trends**

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## **Abstract:**

In the People's Republic of China (China), it has been a common practice for the authorities to conduct periodic "strike-hard" campaigns to fight certain types of unlawful activities. During these campaigns, the police and other government departments carry out waves of massive operations on the targeted activities, resulting in a huge number of arrests, prosecutions, convictions and the handing down of harsh sentences. In the past two years, the Chinese government has launched a series of "strike-hard" campaigns against online pornography. In early 2009, a campaign against "vulgar" online content was jointly launched by seven ministries and government departments aiming at cleaning up the Internet, which was considered to be full of "vulgar" content that would cause serious harm to minors. The campaign turned out to be unprecedented in terms of scale and duration. In late 2009, two more ministries and government departments joined in for a new round of the campaign to curb "obscene and vulgar content transmitted online and via mobile phones." The prolonged attack on online pornography is still going on in China at the time of writing this conference paper.

There are obvious questions in relation to these campaigns. To begin with, how serious and widespread is online pornography? What sort of impact or consequences does online pornography have on Chinese Internet users, minors in particular? Does it warrant the effort the Chinese authorities have been putting into the "clean up"? Furthermore, China has for years been well known for its strict control of Internet content. So there should be little fertile ground for online pornography to exist, not to say prosper, in the first place. How did online pornography begin and how did such content manage to get through filtering and monitoring? What exact types of pornographic online content are the Chinese authorities targeting? How effective are these campaigns against online pornography, particularly in view of the long period of time they have lasted? All these are indeed difficult questions, the answers of which are not readily available. To some extent, these questions can be viewed as unresolved puzzles concerning China's tackling of online pornography and control over the Internet.

This paper will not provide answers to the above-mentioned puzzles, which may only possibly be resolved with findings from a large quantity of social sciences research. Instead, in view of these questions/puzzles, this paper examines major issues and trends concerning the regulation of online pornography in China with particular reference to recent campaigns. The focus is on Chinese laws and policies regulating online pornography and their effectiveness in achieving the stated goal of protecting minors. The paper addresses several key issues like the complicated question of defining online pornography and the possibility of online content classification. In addition, this paper examines an apparent trend of increasing reliance by the Chinese authorities on the goal of protecting minors from harmful content in justifying its strict control on the Internet, both domestically and in the international arena.

## **Keywords**

Online pornography, obscenity and indecency, People's Republic of China, protection of minors, Internet regulation

**Bio**

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## I) Introduction

For the past two years, the Chinese government has been staging a fierce battle against online pornography.<sup>1</sup> A campaign against “vulgar” online content, intended to last for one month, was jointly launched by seven ministries and government departments in January 2009.<sup>2</sup> It was aimed at cleaning up the Internet, which was considered to be full of “vulgar” content that would cause serious harm to minors.<sup>3</sup> The campaign turned out to be unprecedented in terms of scale and duration. In late 2009, two more ministries and departments joined in for a new round of the campaign to curb “obscene, pornographic and vulgar content transmitted online and via mobile phones.”<sup>4</sup> In late 2010, the Chinese authorities stressed that the fight against “obscene and pornographic content transmitted online and via mobile phones” would be a long-term task; periodic campaigns were being transformed into a regular and continuous pursuit.<sup>5</sup>

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<sup>1</sup> This paper studies the situation in mainland China only, and does not include situations in Hong Kong, Macau or Taiwan. For a list of special features complied by government departments and major web portals on the campaigns [全国整治互联网低俗之风各网站专题展示], see [http://www.net.china.cn/ywdt/txt/2009-01/09/content\\_2680030.htm](http://www.net.china.cn/ywdt/txt/2009-01/09/content_2680030.htm).

<sup>2</sup> *China Begins Month-Long Crackdown on Internet Porn*, BBC MONITORING ASIA PACIFIC – POLITICAL, Jan. 5, 2009, available in LEXIS NEXIS. See also 全國將開展為期 1 個月的整治互聯網低俗之風行動 [A Nationwide Month-Long Campaign Against Online Vulgar Content Will be Launched], HUBEI DAILY (WUHAN), Jan. 6, 2009, at 5.

<sup>3</sup> See 7 部门开展整治互联网低俗之风行动 曝光一批网站 [Seven Ministries and Departments Launched Campaign Against Online Vulgar Content, Several Websites Named], PRC Government Portal, Jan. 5, 2009, available at [http://www.gov.cn/jrzq/2009-01/05/content\\_1196447.htm](http://www.gov.cn/jrzq/2009-01/05/content_1196447.htm).

<sup>4</sup> *China Launches New Crackdown on Internet, Mobile Phone Porn*, BBC MONITORING ASIA PACIFIC – POLITICAL, Dec. 8, 2009, available in LEXIS NEXIS. See also 九部门部署专项行动深入整治互联网和手机媒体淫秽色情及低俗信息 [Special Project in Pipeline from Nine Ministries and Departments to Further Combat Obscene, Pornographic and Vulgar Content Transmitted Online and Via Mobile Phones], XINHUA, Dec. 8, 2009, available at [http://news.xinhuanet.com/legal/2009-12/08/content\\_12612465.htm](http://news.xinhuanet.com/legal/2009-12/08/content_12612465.htm).

<sup>5</sup> See 整治互联网和手机传播淫秽色情信息现场经验交流会在云南召开 刘云山出席会议并讲话 [Working Conference Held in Yunan on Combating Obscene and Pornographic Content Transmitted Online and Via Mobile Phones: Liu Yunshan Attended and Addressed], XINHUA, Dec. 13, 2010, available at [http://news.southcn.com/z/2010-12/13/content\\_18404705.htm](http://news.southcn.com/z/2010-12/13/content_18404705.htm).

This paper examines China's policy and legislative measures against online pornography. Tackling online pornography has not been easy in China or many other parts of the world. Some fundamental yet controversial issues include: a) What is pornography? How to define it?<sup>6</sup> b) Should pornography be regulated or even banned? Or should different kinds of pornography be subjected to different treatment? c) Is it possible to strike a proper balance between different kinds of rights and interests, like the protection of minors and the protection of public morals on the one hand, and the protection of privacy and freedom of expression of the adults on the other? and d) Can a crackdown on online pornography ever be effective given the nature of the Internet? If not, are there any other alternatives?<sup>7</sup>

In addition to the complicated and controversial issues mentioned, there are obvious questions in relation to China's recent campaigns against online pornography. To begin with, China has been for years well known for its strict control of Internet content. As such, there should be little fertile ground for online pornography to exist, not to say prosper, in the first place. How did online pornography begin and how did such content manage to get through filtering and monitoring? How serious and widespread is online pornography? What sort of impact or consequences does online pornography have on Chinese Internet users, minors in particular? Does it warrant the effort the Chinese authorities have been putting into the "clean up"? Furthermore, what exact types of pornographic online content are the Chinese authorities

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<sup>6</sup>Literally, "pornography" means a description of the acts of harlots. And pornography can be in the form of a book, film, photograph or other image, see in Barendt, *infra* note 7, at 354, quoting William Committee Report, para. 8.2. The William Report published in the United Kingdom in 1979 defined "pornography" as a description or depiction of sex involving the dual characteristics of sexual explicitness and intent to arouse sexually. But, in the United States, the Meese Commission found such a definition unsatisfactory and regarded the approach adopted by Fraser Committee in Canada was the best – definition was simply futile. The Meese Commission partly followed the Canadian approach by minimizing the use of the word "pornography" in its report. The Meese Commission report is reproduced in <http://www.porn-report.com>.

<sup>7</sup>For discussions on these issues, see, for example, Feona Attwood, *Pornography and the Internet: Re-reading Pornography* in IDEOLOGIES OF THE INTERNET 179 (Katharine Sarikakis & Daya K. Thussu eds., 2006); Eric Barendt, FREEDOM OF SPEECH, Chapter X: Pornography (2005); and Helen Fenwick & Gavin Phillipson, MEDIA FREEDOM UNDER THE HUMAN RIGHTS ACT, Chapter 8: Pornography: Hate Speech? (2006).

targeting? How effective are these campaigns against online pornography, particularly in view of the long period of time they have lasted? All these are indeed difficult questions, the answers of which are not readily available. To some extent, these questions can be viewed as unresolved puzzles concerning China's tackling of online pornography and control over the Internet.

This paper will not provide answers to the above-mentioned puzzles, which may only possibly be resolved with findings from a large quantity of social sciences research. Instead, in view of these questions/puzzles, this paper examines trends and major issues concerning the regulation of online pornography in China. The focus is on Chinese laws and policies regulating online pornography and their effectiveness in achieving the stated goal of protecting minors.

Part II of this paper gives an account of recent campaigns and measures introduced by the Chinese authorities. Part III describes in detail existing legal provisions governing obscene articles and the efforts made by the Chinese authorities in the past decade in devising rules, regulations and punishments to tackle online pornography. Taken together, Parts II and III serve to map out recent trends and emphases of China's regulation of online pornography.

Part IV addresses the complicated question of defining online pornography, the possibility of online content classification, and the effectiveness of the Chinese law enforcement. These issues are examined so to assess whether the fight against online pornography can on the one hand achieves the aim of protecting minors whilst on the other not infringing the legitimate rights of adults to privacy and freedom of expression. Part IV also studies an apparent trend of increasing reliance by the Chinese authorities on the goal of protecting minors from harmful content in justifying its strict control on the Internet, both domestically and in the international arena.

## **II) Prolonged and Large-scale Campaigns Against Online Pornography Since Early 2009**

In China, it is a common practice for the authorities to conduct periodic “strike-hard” campaigns to fight certain types of unlawful activities. During these campaigns, the police and other relevant government departments carry out waves of massive operations on the targeted activities, resulting in a huge number of arrests, prosecutions, convictions and the handing down of harsh sentences.

### **A) Early 2009 – Campaign Against Vulgar Online Content**

Seven ministries and government departments jointly launched on January 5, 2009 a campaign to crack down on “vulgar” content on the Internet (2009 Campaign).<sup>8</sup> All of these authorities have a key role to play in regulating the Internet, namely, the Information Office of the State Council (SCIO), which is tasked with overseeing Internet regulation; the Ministry of Industry and Information Technology (MIIT), which regulates telecommunications operators and Internet Service Providers (ISPs); the Ministry of Public Security, i.e. the police; the Ministry of Culture; the State Administration for Industry and Commerce; the State Administration for Radio, Film and Television; and the General Administration of Press and Publication (GAPP).<sup>9</sup> In particular, the GAPP has over the years been in charge of combating pornographic and illegal publications. The Chinese authorities stressed that the sole purpose for the campaign was to provide a clean and healthy environment for minors and the launching time came just before the

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<sup>8</sup> See *Supra* note 3.

<sup>9</sup>The Chinese government announced in early May 2011 that a new State Internet Information Office [国家互联网信息办公室] had been established to better coordinate the country’s Internet regulation. Apparently, the SCIO is still in charge of Internet regulation but will be better equipped with more resources and power.

long Chinese New Year holiday taking into account that children would spend more time at home online.<sup>10</sup> Officials stressed that the campaign was a response to the repeated calls by parents to clean up the Internet.<sup>11</sup>

At the launching of the campaign, a senior SCIO official gave an account of what constitutes “vulgar” content: a) information that promotes bloodshed, violence or murder or consists of malicious verbal abuse, or insulting or defamatory remarks; b) information that seduces adolescents and interferes with their studies, including i) showing of private body parts or sexual conduct whether explicitly or implicitly, ii) pictures, audiovisuals, cartoons, or writings with sexual appeal or portraying sexual abuses; iii) illegal advertisements on sex tools or venereal disease treatment; or iv) information on sex trade or causal sex; c) information that intrudes into others’ privacy including i) up-shirt filming and pictures that expose private body parts, and ii) the use of the Internet to publicize maliciously private information of other individuals; d) information that is against traditional marital and family values, including extra-marital affairs, one-night-stands and partner-swapping.<sup>12</sup> In sum, the 2009 campaign prohibited all websites in China to carry any “vulgar” content, which had a very wide meaning but with an emphasis on sex and violence as supposedly harmful for minors.

On the launching ceremony of the 2009 Campaign, nineteen websites operating in China consisting of major portals and search engines including Sina, Sohu, Netease, Google and Baidu

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<sup>10</sup>See 刘正荣谈“淫秽”、“色情”、“低俗”相关标准的界定 [*Liu Zhengrong Briefs on How to Define “Obscene”, Pornographic”, “Vulgar”*], XINHUA, Feb. 24, 2009, available at [http://news.xinhuanet.com/politics/2009-02/24/content\\_10887320.htm](http://news.xinhuanet.com/politics/2009-02/24/content_10887320.htm).

<sup>11</sup>国新办等七部委开展 整治互联网低俗之风专项行动 [*Seven Ministries and Departments to Launch A Special Task Curbing Trend of Online “Vuglar” Content* ], CHINA.COM.CN, January 5, 2009, available at [http://www.china.com.cn/policy/txt/2009-01/05/content\\_17056784.htm](http://www.china.com.cn/policy/txt/2009-01/05/content_17056784.htm).

<sup>12</sup>See 新办副主任蔡名照详解何为网络低俗内容 [*Deputy Head Cai Mingzhao Expounds What is Online “Vulgar” Content*], Jan. 6, 2009, available at <http://www.scio.gov.cn/zl2009/zl0902/1/2/200901/t253471.htm>.

were cited for failing to take action to stop “vulgar” content from spreading.<sup>13</sup> Many of these websites were criticized for containing a lot of “vulgar” photographs of pretty young women and female movie stars and for failing to delete them in time.<sup>14</sup> In particular, Google.cn was said to provide a huge quantity of links to pornographic and obscene sites in its search results and images and did not take any effective measures to tackle the problem even after it was notified by China Internet Illegal Information Reporting Centre (CIIIRC).<sup>15</sup> The latter was set up by the Internet Society of China and handles public complaints against online content.<sup>16</sup>

The 2009 Campaign spokesman vowed to take tough actions against websites persisting in carrying “vulgar” content by naming and shaming them, and punishing or even shutting some of them down.<sup>17</sup> In just over two weeks, it was announced that actions had been taken to shut down 1,200 “obscene, pornographic or vulgar” websites and deleted 3.2 million items of “pornographic or vulgar” online information.<sup>18</sup> But, apparently, many websites including some of those nineteen named at the launch of the 2009 Campaign did not take the campaign very seriously in the initial period. Google.cn, for example, told Xinhua that providing website links did not mean Google was intentionally spreading inappropriate information because the search engine giant was not the owner of those websites and pornography.<sup>19</sup> Also, some website operators complained privately to the press that many of the so-called “vulgar” photographs or

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<sup>13</sup> See *supra* note 2.

<sup>14</sup> See *supra* note 3.

<sup>15</sup> *Ibid.*

<sup>16</sup> See <http://CIIIRC.china.cn/>. China Internet Illegal Information Reporting Centre (CIIIRC) receives public complaints on Internet content. The Centre is a quasi-governmental monitoring body set up by the Internet Society of China with blessing of the Chinese authorities.

<sup>17</sup> See *supra* note 3.

<sup>18</sup> See 我国已依法关闭 1250 家传播淫秽色情和低俗网站 [*China Shuts Down, in Accordance with the Law, 1,250 Obscene, Pornographic, Vulgar Websites*], XINHUA, Jan. 21, 2009, available at <http://news.sohu.com/20090121/n261890817.shtml>.

<sup>19</sup> See above note 2.

content were posted online by Internet users and commercial websites simply could not monitor the situation 24 hours a day.<sup>20</sup>

Initially planned for a one-month duration, the SCIO spokesman soon stressed that the 2009 Campaign would in fact be a long-lasting one.<sup>21</sup> For the first four months of 2009, the campaign organizers issued ten lists of websites which had been exposed, punished or even shut down for carrying “vulgar” content.<sup>22</sup> There was no clear indication of exactly how long the campaign lasted. But, apparently, the campaign closed before mid-2009, when it was announced that the CIIIRC had during the campaign handled 150,000 complaints and took stock of over 80,000 websites.<sup>23</sup> But soon after that, Google.cn was again singled out for strong condemnation for not conducting the oversight required by China’s laws and regulations, and a large amount of foreign pornographic information was said to have come into China via the Google website.<sup>24</sup> The Chinese press reported that parents were angry about Google.<sup>25</sup> Though its headquarters were in the United States, the director of the CIIIRC noted, Google.cn was a company operating in China and should therefore be bound by Chinese laws and regulations.<sup>26</sup> Indeed, by mid-2009,

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<sup>20</sup> See 19 家網站被曝有低俗內容 Google、百度等網站均遭曝光 [*Nineteen Websites Named for Vulgar Content, Google and Baidu Included*], YOUTH DAILY (BEIJING), Jan. 6, 2009.

<sup>21</sup> See 整治互联网低俗之风依法进行 不是“一阵风” [*Crackdown on Vulgar Online Content: Acting In Accordance with the Law, Not Sporadic*], Jan. 23, 2009, CHINA DAILY, available at <http://news.sohu.com/20090123/n261926555.shtml>.

<sup>22</sup> For the lists of websites, see a special feature on the campaign on China.com.cn, available at [http://www.china.com.cn/law/node\\_7059297.htm](http://www.china.com.cn/law/node_7059297.htm). See also CIIIRC at [http://net.china.com.cn/qz1/txt/2009-04/24/content\\_2870095.htm](http://net.china.com.cn/qz1/txt/2009-04/24/content_2870095.htm).

<sup>23</sup> See 全国整治互联网低俗之风行动共核查 8 万多家网站 [*Nationwide Crackdown on Online Vulgar Content, More than 80,000 Websites Inspected*], China.com.cn, June. 11, 2009, available at [http://www.china.com.cn/policy/txt/2009-06/11/content\\_17926488.htm](http://www.china.com.cn/policy/txt/2009-06/11/content_17926488.htm).

<sup>24</sup> Chan, M. *Beijing Singles Out Google in Attack on Pornography; Internet Giant’s Links “Severely Harmed” China’s Youth*, SOUTH CHINA MORNING POST (HONG KONG), June 19, 2009, 6. See also 用法律利剑斩断谷歌中国“色情之结” [*Use Laws to Cut Off Google.cn’s “Pornographic Knot”*], XINHUA, June 19, 2009, available at <http://news.sohu.com/20090619/n264639196.shtml>.

<sup>25</sup> See 热议“谷歌中国”含低俗内容 家长建议屏蔽色情网站 [*Google.cn’s Vulgar Content Draws Much Discussions, Parents Suggest to Block Pornographic Websites*], PEOPLEDAILY.COM, June 22, 2009, available at [http://www.china.com.cn/txt/2009-06/22/content\\_17990095.htm](http://www.china.com.cn/txt/2009-06/22/content_17990095.htm).

<sup>26</sup> *Ibid.*

most ISPs and Internet Content Providers (ICPs) in China including Google.cn have already felt the impact of the 2009 Campaign. As such, all websites in China should be suitable for minors. They are not only prohibited from carrying anything obscene but also content considered as “vulgar”.

### **B) Mid-2009 – Green Dam Blunder**

In a related but separate development, the MIIT issued a directive in May 2009 requiring that every computer sold in the country from July 1, 2009, onward should have pre-installed filtering software known as “Green Dam – Youth Escort.” The stated aim was to provide a healthy environment for adolescents and to protect them from “undesirable” online information, and, in particular, to consolidate the accomplishments made by the 2009 Campaign. No detail was given by MIIT on what is meant by “undesirable”. It is far from clear whether “undesirable” content is a wider concept than “vulgar” content. The Green Dam performs several functions including blocking of pornographic content, filtering of “undesirable” websites and limiting online hours.<sup>27</sup> Moreover, the device can blacken the screen every three minutes if it detects that illicit websites are being visited and can record which websites the computer user has accessed.<sup>28</sup> The Green Dam Initiative met severe opposition both inside and outside China.<sup>29</sup> In China, worries were expressed that the software would spy on activities of Internet users.<sup>30</sup> Just hours before the pre-installing rule was to take effect, the MIIT announced over *Xinhua News*

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<sup>27</sup>See 下月起新售个人电脑将预装上网过滤软件 工信部通知要求，7月1日后销售的计算机都必须安装“绿坝” [All Computers Sold After July 1 Must be Installed With Green Dam], SOUTHERN METROPOLIS DAILY (GUANGZHOU), June 9, 2009, A32, available in WISENEWS.

<sup>28</sup> *Ibid.*

<sup>29</sup> Office of the U.S. Trade Representative, *Press Release: Secretary Locke and USTR Ronald Kirk Call on China To Revoke Mandatory Internet Filtering Software*, June 24, 2009, available at <http://www.ustr.gov/about-us/press-office/press-releases/2009/june/secretary-gary-locke-and-ustr-ron-kirk-call-china-rev>.

<sup>30</sup> C. Choi, *Scrap Compulsory Filters for Internet, Academics Say*, SOUTH CHINA MORNING POST (HONG KONG), June 15, 2009, at 8, available in LEXIS NEXIS.

Agency that it would postpone the plan.<sup>31</sup> The MIIT official explanation was that personal computer manufacturers were having difficulty meeting the deadline.<sup>32</sup>

### C) An Intensified Campaign Staged between Late 2009 and Mid-2010

Soon after the launching of the 2009 Campaign, lewd messages spread by mobile phones were also targeted.<sup>33</sup> Toward late 2009, the focus of the campaign shifted to mobile phones. In December, two more government departments joined in, raising to nine the number of ministries and government departments launching a new round of the campaign to target “obscene, pornographic and vulgar content transmitted online and via mobile phones” (2009-2010 Campaign).<sup>34</sup> The emphasis was still on the protection of minors.<sup>35</sup> But telecommunications operators were required to suspend text message services if customers, even if they were adults, were found to transmit pornographic content.<sup>36</sup> In charge of the 2009-2010 Campaign, the MIIT issued a lengthy directive detailing a 14-month plan to curb “obscene and pornographic content” on mobile phones, which would last for the whole of 2010.<sup>37</sup> In the directive, Google and Baidu, the latter being China’s largest search engine, were specially required to step up their management of online search services designed for mobile phones. Telecommunications companies had to keep track of wireless application protocol (WAP)

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<sup>31</sup> *China Delays Mandatory Installation of “Green Dam” Web Filter*, BBC MONITORING ASIA PACIFIC – POLITICAL, June 30, 2009, available in LEXIS NEXIS.

<sup>32</sup> See 工信部新闻发言人就绿色上网过滤软件问题答记者问 [*MIIT Spokesman on Green Dam*], XINHUA, June 30, 2009, available at [http://news.xinhuanet.com/politics/2009-06/30/content\\_11628642.htm](http://news.xinhuanet.com/politics/2009-06/30/content_11628642.htm).

<sup>33</sup> *China Extends Anti-Porn Campaign to Mobile Phone Messages*, BBC MONITORING ASIA PACIFIC – POLITICAL, Jan. 21, 2009, available in LEXIS NEXIS.

<sup>34</sup> See *supra* note 4. See also *infra* note 37.

<sup>35</sup> See *supra* note 4.

<sup>36</sup> *Crackdown Launched on Cell Phone Porn*, CHINA DAILY, Nov. 20, 2009, available at [http://www.chinadaily.com.cn/2009-11/20/content\\_9076660.htm](http://www.chinadaily.com.cn/2009-11/20/content_9076660.htm) and *Spell Out Crackdown on Pornographic Texts*, CHINA DAILY, Jan. 26, 2010, available at [http://www.chinadaily.com.cn/opinion/2010-01/26/content\\_9376242.htm](http://www.chinadaily.com.cn/opinion/2010-01/26/content_9376242.htm).

<sup>37</sup> MIIT, 工业和信息化部印发进一步深入整治手机淫秽色情专项行动工作方案 [*Working Plan on The Special Task of Further Combating Obscene and Pornographic Content on Mobile Phones*], Dec. 15, 2009, available at <http://www.miit.gov.cn/n11293472/n11293877/n12945745/12945799.html>.

gateways and to come up with filtering standards for these gateways. The directive also halted the building of new WAP gateways.

Taking stock of the 2009 achievements, the Chinese authorities announced that as many as 15,000 websites, including 11,000 WAP sites, had been shut down or blocked because they contained pornographic content.<sup>38</sup> Moreover, 1.5 million “undesirable” postings were deleted. Meanwhile, the new round of campaign started in December 2009 also made huge efforts to shut down websites which had been operating without licences, and many ICPs were affected. By February 2010, it was announced that the country’s three existing basic telecommunications operators – China Telecom, China Mobile and China Unicom – had all done their good job by having: a) completed thorough inspection of about 1.8 million websites, and shut down over 136,000 unregistered or unlicensed ones; b) inspected all 743 ISPs and closed down 126 for failing to comply with Internet access registration requirements; and c) completed a thorough inspection of all 1,915 billing business partners and suspended 1,630 items of billing services.<sup>39</sup> Of the 136,000 websites shut down, about 16,000 were either obscene or “vulgar”.<sup>40</sup> About 1.3 million obscene or “vulgar” postings were deleted, more than 850,000 obscene or pornographic pictures removed, and over 30 online pornographic novels and 15 mobile phone pornographic games were banned and punished. Meanwhile, a thorough inspection was also carried out on domain names. The Internet Network Information Center (CNNIC), the body managing the domain name .cn, together with 55 companies nationwide providing domain name registration services, inspected domain names totaling 13.5 million and suspended 1.2 million domain names

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<sup>38</sup> *China Says Over 15,000 Porn Websites Blocked in 2009*, BBC MONITORING ASIA PACIFIC – POLITICAL, Jan. 12, 2010, available in LEXIS NEXIS.

<sup>39</sup> 九部门联合依法整治网络环境取得明显成效[*Clean-up of Online Environment by Nine Departments Achieves Obvious Improvements*], Feb. 11, 2010, available at <http://www.scio.gov.cn/ztk/hlwxx/01/03/3/201002/t545852.htm>.

<sup>40</sup> *Ibid.*

which were *prima facie* pornographic.<sup>41</sup> By March 2010, it was widely perceived that a free, booming decade for many small Chinese ICPs had finally come to a close and China had embarked on a tightly controlled Internet era.<sup>42</sup>

#### D) The Combat of Online Pornography – A Year-Round Exercise

Adamant in their fight against online pornography, the Chinese authorities announced in late 2010 that these periodic campaigns had been replaced by a year-round combat.<sup>43</sup> Meanwhile, the nine ministries and departments revealed in April 2011 a list of further accomplishment.<sup>44</sup> Their joint effort since the end of 2009 have resulted in a thorough inspection of 178.5 million websites and the closing down of more than 600,000 pornographic websites.<sup>45</sup>

### III) Legal Provisions Concerning Online Pornography

In the recent campaigns against online pornography, the authorities repeatedly emphasized that they had been acting in accordance with Chinese laws and regulations.<sup>46</sup> But, as seen, different terms – “vulgar” (*di su*), “undesirable” (*but liang*), “obscene” (*yin hui*), “pornographic” (*se qing*) – were used interchangeably, and in a seemingly loose manner, in these campaigns. This can be very confusing. Indeed, the following detailed examination of the Chinese legislations confirms that prohibitions on “vulgar” and “undesirable” content are indeed far from certain. At the same time, this part of the paper also highlights the fact that the

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<sup>41</sup> *Ibid.*

<sup>42</sup> See 中國互聯網進入嚴管時代 [*China's Internet Moving into an Era of Strict Control*], IT TIME WEEKLY (SHANGHAI), Mar. 20, 2010, 43-48 and , 胡泳[*Hu Yong*], 〈中國政府對互聯網的管制〉 [*Chinese Government's Regulation of the Internet*], 103 《新聞學研究》 [XINWENXUE YANJIU (TAIPEI)], 273 (2010).

<sup>43</sup> See *supra* note 5.

<sup>44</sup> See 打击传播淫秽色情低俗网站引发各界强烈反响 [*Crackdown on Obscene, Pornographic and Vulgar Websites: Strong Responses from All Sectors*], XINHUA, Apr. 2, 2011, available at [http://news.xinhuanet.com/politics/2011-04/02/c\\_121263610.htm](http://news.xinhuanet.com/politics/2011-04/02/c_121263610.htm).

<sup>45</sup> *Ibid.*

<sup>46</sup> See *supra* note 18 and MIIT, *supra* note 37.

Chinese authorities, alongside recent campaigns, have devised new legal measures, so to combat online pornography.

In China, the regulation of online pornography involves three major areas of law, namely, a) regulations and directives issued by the State Council and the relevant government departments governing the ownership and operations of websites and also their online security and content; b) the Law on Administrative Punishments for Public Order and Security (LAPPOS), in accordance with which the police impose administrative punishments on unlawful acts of a relatively minor nature not constituting a crime; and c) the Criminal Law (CL) which deals with unlawful acts that are serious enough to attract criminal sanctions.<sup>47</sup>

#### **A) Regulating Websites and Online Content**

In 1997, China for the first time came up with a legislative enactment detailing strict control of online content (the 1997 Regulation).<sup>48</sup> Issued by the Ministry of Public Security, the 1997 Regulation lists nine categories of prohibited online content, including obscene and pornographic content.<sup>49</sup> Also prohibited are violence and horror, which were considered as

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<sup>47</sup> In China, there are three major branches of law: a) criminal law as codified in Criminal Law (CL), or known as Criminal Code; b) civil law, of which a major piece of legislation is the Civil Code; and c) administrative law. Chinese legislative enactments are in a hierarchy. The Laws enacted by the National People's Congress (NPC) or its Standing Committee (NPCSC) are of the highest level, followed by administrative Regulations enacted by the State Council and decrees and orders issued by ministries. NPC is China's legislature. It only meets once a year for about two weeks. While the NPC is in recess, the NPCSC is in charge of legislation making. Meanwhile, care has to be taken in relation to the English translation of legislative provisions relating to online pornography because concepts relating to pornography and obscenity are far from clear in China. The following English translations are those of the author of this paper. Moreover, the standard of English translation of Chinese laws varies, including those translated copies kept in the NPC online database, see [http://www.npc.gov.cn/englishnpc/Law/Integrated\\_index.html](http://www.npc.gov.cn/englishnpc/Law/Integrated_index.html). But the English translations of Chinese legislations available in Beida Fabo (<http://www.lawinfochina.com>), a widely used legal database in the country, are of higher standard and are more reliable.

<sup>48</sup> The full title of the 1997 Regulation is the Management Measures on Security Protection of International Connection of Computer Information Networks, JISUANJI XINXI WANGLUO GUOJI LIANWANG ANQUAN BAOHU GUANLI BANFA, Ministry of Public Security Decree No. 33 (1997).

<sup>49</sup> See 1997 Regulation, Article 5, for the nine categories of content that: 1) incites resistance to or undermines the implementation of the Constitution, laws and administrative regulations; 2) incites subversion of state power and

“vulgar” content in the 2009 campaign.<sup>50</sup> The 1997 Regulation not only forbids production, duplication or dissemination of the prohibited online content but also reading of such items. As such, this piece of legislative enactment disallows individuals from reading any obscene and pornographic online content or from storing any such items in their computers. This ban is very wide-ranging and not in line with other legal provisions described below.

The year 2000 was an important year for Internet regulation in China, with the issuance of several legislative enactments for Internet control. A few more were promulgated in the next few years. These legislative enactments together devised an elaborate control scheme regulating ISPs, ICPs, electronic bulletin board services (BBS), online news, online publishing and Internet cafes. Nearly all of these legislative enactments carry a list of prohibited online content similar to that stipulated in the 1997 Regulation, and the list specifically bans online content that is obscene and pornographic or concerns gambling, violence or horror.

According to these legislative enactments on Internet regulation, actions have to be taken once any prohibited content is detected. The ICPs are under a duty to stop transmitting such content.<sup>51</sup> In the case of BBS, operators should delete such content immediately.<sup>52</sup> ICPs and BBS operators are also required to report these incidents to the authorities. Websites are liable for producing, duplicating, publishing or disseminating any prohibited content and there

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overthrowing of the socialist system; 3) incites secession or undermines the unification of the country; 4) incites hatred or discrimination among ethnic groups or undermines ethnic unity; 5) disrupts social order by fabricating or twisting facts, or by spreading rumors; 6) propagates feudal superstitions, obscene and pornographic content, gambling, violence, murder, horror, and instigates commission of crimes; 7) publicly insults or fabricates facts to defame others; or 8) harms the reputation of government departments; or 9) any other content that violates the Constitution, laws or administrative regulations. Since the mid-1990s, it has been a regular feature for Chinese legislative engagements governing media, whether print, broadcast or online, to include such a long list of prohibited content, which has expanded over the years to more than a dozen categories.

<sup>50</sup> See *supra* note 3.

<sup>51</sup> Measures on the Management of Internet Information Services, HULIANWANG XINXI FUWU GUANLI BANFA, State Council Decree No. 292 (2000), Article 16.

<sup>52</sup> Provisions on the Management of Electronic Bulletin Services, HULIANWANG DIANZI GONGGAO FUWU GUANLI GUIDING, Ministry of Information Industry Decree No. 3 (2000), Article 13.

are two different kinds of consequences for committing any of these unlawful acts.<sup>53</sup> First, the ICP concerned and those staff member/s responsible will be prosecuted under the CL if such an act is serious enough to constitute a crime. Second, if such an act not serious enough to attract the relevant CL provisions, the ICP concerned or its staff member/s responsible will be punished in accordance with the LAPPOS or the 1997 Regulation. Punishments stipulated in the 1997 Regulation include confiscation of unlawful incomes, and a fine of not more than 15,000 yuan for the ICP concerned, or a fine of not more than 5,000 yuan for an individual. In more severe cases, the Internet access will be disconnected and the ICP concerned will be ordered to shut down its business for a period of not more than six months for “rectification”.<sup>54</sup> In extreme cases, profit-making ICPs can have their licences revoked while non-profit-making ICPs can have their websites shut down.

## **B) Administrative Punishments Imposed by the Police**

Enacted in 2005 by the Standing Committee of the NPC (NPCSC), the LAPPOS is a major piece of legislation which allows the police in China to punish, without court trials and convictions, various unlawful acts which disrupt public order or impair public security, or infringe rights of the person and property rights of citizens, etc. but are not serious enough to attract criminal liability or sanctions.<sup>55</sup> Article 68 of the LAPPOS stipulates that anyone who

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<sup>53</sup> *Supra* note 51, Article 20.

<sup>54</sup> *Supra* note 48, Article 20.

<sup>55</sup> Its precedent, Regulations on Administrative Penalties for Public Security, came into being in 1986. The practice of administrative detention existed even before 1986. See ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA (3<sup>rd</sup> Ed. )(2004), 213-5, for a brief explanation of administrative detention. For discussions of this controversial form of punishment, see Sarah Biddulph, *The Production of Legal Norms: A Case Study of Administrative Detention in China*, 20 UCLA PAC. BASIN L. J. 217 (2003) and Randall Peerenboom, *Out of the Pan into the Fire: Well-intentioned but Misguided Recommendations to Eliminate All Forms of Administrative Detention in China*, 99 NW. U. L.AW REV. 991 (2004). These publications were written before the 2005 legislation, which introduced provisions to strengthen the protection of basic rights of the citizens and to prevent abuses of power by the police, see the introductory statement by the head of the Chinese

produces, transports, duplicates, sells or puts up for hire any obscene articles consisting of books, pictures, motion pictures or audiovisuals, or disseminates obscene information via computer networks, telephone or any other telecommunication devices shall be detained for a period of ten to fifteen days and subjected to a fine of up to 3,000 yuan; for less serious cases, he or she shall be detained for a period of up to five days or subjected to a fine of up to 500 yuan.<sup>56</sup> In addition, Article 42(5) provides that anyone who repeatedly sends obscene, insulting, threatening or other information that interrupt others' normal life shall be detained for a period of up to five days and can also be subjected to a fine of up to 500 yuan; for serious cases, the person can be detained for a period of five to ten days and can also be subjected to a fine of up to 500 yuan. But several aspects of the LAPPOS are noteworthy. The legislation does not give any definition of what constitutes obscene articles or information. Moreover, the above-mentioned LAPPOS provisions do not punish mere possession of obscene articles, even, arguably, child pornography and extreme pornography. Nor they ban reading, copying or storing by individuals of online obscene content. Last but not the least, no provisions in LAPPOS deal with "vulgar" or "undesirable" articles or information .

### **C) The Criminal Law and Crimes Concerning Obscene Articles**

Chapter 6 of the CL deals with acts causing harm to social order, and section 9 of this chapter stipulates offences concerning dissemination of obscene articles.<sup>57</sup> Article 363 deals with profit-making activities while Article 364 addresses not-for-profit dissemination. Article

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delegation attending the United Nations Committee Against Torture meeting in late 2008, see <http://www.mfa.gov.cn/eng/wjb/zjg/tyfls/tyfl/2626/2629/t523683.htm>.

<sup>56</sup> Law on Administrative Punishments for Public Order and Security (LAPPOS), ZHIAN GUANLI CHUFA FA, Art. 68. The provision in Chinese: 「制作、运输、复制、出售、出租淫秽的书刊、图片、影片、音像制品等淫秽物品或者利用计算机信息网络、电话以及其他通讯工具传播淫秽信息的, 处十日以上十五日以下拘留, 可以并处三千元以下罚款; 情节较轻的, 处五日以下拘留或者五百元以下罚款。」

<sup>57</sup> The CL was first enacted by the NPC in 1979. The current version of the CL was substantially revised in 1997.

363(1) specifies three levels of punishments for profit-making acts involving obscene articles.<sup>58</sup> The provision stipulates that anyone, with a view of making a profit, produces, duplicates, publishes, sells or disseminates obscene articles, shall be punishable by a fixed-term imprisonment of not more than three years, criminal detention, or control and supervision, and a fine; for serious cases, punishable for a fixed term imprisonment of three to ten years and a fine; and, for especially serious cases, punishable for a fixed term imprisonment of over ten years or life imprisonment, and a fine or confiscation of property.<sup>59</sup>

Article 364 deals with several acts of disseminating obscene articles not for profit-making purposes.<sup>60</sup> Article 364(1) stipulates anyone who disseminates obscene books, periodicals, motion pictures, audiovisuals, pictures or any other obscene articles, given circumstances are serious, will be punishable for a fixed term imprisonment of not more than two years, criminal detention, or control and supervision. Article 364(2) stipulates that anyone who organizes the showing of obscene motion pictures or audiovisuals is punishable for a fixed term imprisonment of not more than three years, criminal detention, or control and supervision, and a fine; for serious cases, punishable for a fixed term imprisonment of three to ten years, and

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<sup>58</sup>Article 363 of the CL in Chinese: 「以牟利为目的，制作、复制、出版、贩卖、传播淫秽物品的，处三年以下有期徒刑、拘役或者管制，并处罚金；情节严重的，处三年以上十年以下有期徒刑，并处罚金；情节特别严重的，处十年以上有期徒刑或者无期徒刑，并处罚金或者没收财产。为他人提供书号，出版淫秽书刊的，处三年以下有期徒刑、拘役或者管制，并处或者单处罚金；明知他人用于出版淫秽书刊而提供书号的，依照前款的规定处罚。」

<sup>59</sup> For a brief explanation of types of punishment, see CHEN, *supra* note 55, , at 239. “Criminal detention” is carried out by the police in the locality of the offender’s residence, not by the prison authorities. Moreover, the offender is allowed periodical home visits. “Control and supervision” is used by Chen in his book while several unofficial translations use “public surveillance” instead. It is not a custodial sentence. The offender reports to the police periodically and is subject to various movement restrictions. His activities are also subject to surveillance by members of his community.

<sup>60</sup>Article 364 of the CL in Chinese: 「传播淫秽的书刊、影片、音像、图片或者其他淫秽物品，情节严重的，处二年以下有期徒刑、拘役或者管制。组织播放淫秽的电影、录像等音像制品的，处三年以下有期徒刑、拘役或者管制，并处罚金；情节严重的，处三年以上十年以下有期徒刑，并处罚金。制作、复制淫秽的电影、录像等音像制品组织播放的，依照第二款的规定从重处罚。向不满十八周岁的未成年人传播淫秽物品的，从重处罚。」

a fine. Article 364(3) stipulates anyone produces or duplicates obscene motion pictures and audiovisuals for the purpose of organizing shows of such items shall be severely punished in accordance with Article 364(2). Article 364(4) stipulates that anyone who disseminates obscene articles to minors under 18 years of age shall also be severely punished.

Article 366 deals with vicarious responsibilities in cases which unlawful acts have been committed by entities.<sup>61</sup> It provides that an entity found liable for offences relating to obscene articles has to pay a fine while the management staff directly responsible for the entity and those staff members committed the acts shall also be personally liable and subjected to the stipulated punishments.

In sum, these CL provisions are similar to the above-mentioned LAPPOS provisions. They do not punish the mere possession of obscene articles, and arguably, the possession of child pornography and extreme pornography. Activities involving “vulgar” or “undesirable” articles or information are not prohibited.

Article 367(1) of CL defines obscene articles as books, motion pictures, video tapes, sound tapes, pictures that appeal to the prurient interest and containing graphic depiction of sexual conduct or explicitly publicizing pornography, and any other obscene articles.<sup>62</sup> Articles 367(2) and (3) expressly provide that two types of works are not to be considered as obscene articles: a) works of science on functioning of human bodies and on medical knowledge; and b)

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<sup>61</sup>Article 366 of the CL in Chinese: 「单位犯本节第三百六十三条、第三百六十四条、第三百六十五条规定之罪的，对单位判处罚金，并对其直接负责的主管人员和其他直接责任人员，依照各该条的规定处罚。」

<sup>62</sup>Article 367 of the CL in Chinese: 「本法所称淫秽物品，是指具体描绘性行为或者露骨宣扬色情的诲淫性的书刊、影片、录像带、录音带、图片及其他淫秽物品。有关人体生理、医学知识的科学著作不是淫秽物品。包含有色情内容的有艺术价值的文学、艺术作品不视为淫秽物品。」 See latter part of this paper for the meaning of “any other obscene articles”.

works of art and literature containing pornographic content but having artistic value. But the CL does not define the terms “pornography” and “pornographic”.

A directive, issued in 1988 by the predecessor of the GAPP and is still in force (1988 Directive), stipulates further details what content would be regarded as obscene: a) graphic depiction in an obscene manner of sexual conduct, sexual intercourse and the related psychological feelings; b) publicly promoting pornographic and obscene perceptions; c) description of sexual skills in an obscene manner; d) graphic depiction of incest, rape or any other sexual offences which gives too many details and may lead to imitation; e) graphic depiction of sexual conduct of minors; f) graphic depiction of gay sex or any other abnormal sexual behavior in an obscene manner, and graphic depiction of abnormal sexual conduct involving violence or SM; and g) other obscene depiction of sexual conduct which average persons do not tolerate.<sup>63</sup> The 1988 Directive also defines “pornography”, stating that pornographic content, generally speaking, is not regarded as obscene but some pornographic content does fall within b) to g) and is harmful for average persons, minors in particular, and lacks any artistic or scientific value.<sup>64</sup>

#### **D) Application of Criminal Law to Online Pornography**

The above-mentioned CL provisions are silent on online obscene articles and pornography. It was only in 2000 that a document entitled “The NPCSC Decision on Protecting

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<sup>63</sup> See Provisional Provisions on Identifying Obscene and Pornographic Publications, GUANYU RENDING YINHUI JI SEQING CHUBANWU DE ZANXING GUIDING (1988), Article 2.

<sup>64</sup> *Ibid.*, Article 3.

Internet Safety” (2000 Decision) was issued, specifying for the first time that the CL is also applicable to unlawful acts committed in an online environment.<sup>65</sup>

### **1) The 2000 Decision**

Article 3 of the 2000 Decision stipulates a lengthy list of acts committed via the Internet and stating that the commission of any such acts, if the particulars are serious enough to constitute a crime, will be dealt with in accordance with the CL. These acts include the construction of obscene websites or web pages, the provision of online linkages to obscene sites or locations, or the dissemination of obscene books, periodicals, motion pictures, audiovisuals or pictures via the Internet.<sup>66</sup> Article 6 further stipulates that the commission of any such acts in an online environment, if found not liable under the CL, but in breach of the LAPPOS or other administrative rules, those responsible will be punished or disciplined accordingly.

### **2) The 2004 Interpretation**

It took a few more years before further detailed guidance was jointly issued, in the form of a judicial interpretation, by the Supreme People’s Court and the Supreme People’s Procuratorate on how to apply the CL provisions on obscene articles to online environment, and mobile and other electronic communications (2004 Interpretation).<sup>67</sup> For the first time, a

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<sup>65</sup>See NPCSC’s Decision on Protecting Internet Safety, QUANGUO RENDA CHANGWEIHUI GUANYU WEIHU WULIANWANG ANQUAN DE JUDING (2000). The NPCSC from time to time issue decisions to interpret legislations and these decisions are considered as having legislative effect.

<sup>66</sup>*Ibid.*, Article 3(5).

<sup>67</sup>See Supreme People’s Court and Supreme People’s Procuratorate ’ Interpretations on Certain Questions Arising From the Application Of Law On Criminal Cases Concerning the Production, Duplication, Publication, Selling And Dissemination of Obscene Electronic Information via the Internet, Mobile Communications Devices and Other Electronic Communications Platforms, ZUIGAORENMINJIANCHAYUAN, GUANYUBANLIHULIANWANG, YIDONGTONGXUNZHONGDUAN, SHENGXUNTAIZHIZUO, FUZHI, CHUBAN, FANMAI, CHUANBO YINHUIDIANZIXINXIXINGSHIANJIAN JUTIYINGYONGFALV RUOGANWENTIDEJIESHI (2004). 最高人民法院、最高人民检察院关于办理利用互联网、移动通讯终端、声讯台制作、复制、出版、贩卖、传播淫秽电子信息刑事案件具体应用法律若干问题的解释 (2004). The Supreme People’s Court and the Supreme

meaning is provided to the phrase “any other obscene articles” as stipulated in Article 367(1) of the CL.<sup>68</sup> According to the 2004 Interpretation, “any other obscene articles” include information sent via the Internet, mobile and other electronic communications such as visual files, audio files, electronic publications, pictures, writings, short messages that appeal to the prurient interest, and that contain graphic depiction of sexual conduct or explicitly publicizing pornography. And again exemptions are expressly made for information sent online or by mobile or other electronic communications about science on functioning of human bodies and on medical knowledge, and works of art and literature that contain pornographic content but are of artistic value. In short, the 2004 Interpretation clearly states that obscene article offences stipulated in the CL are applicable to online situations.

The 2004 Interpretation delineates the types and amount of online obscene articles or activities that would make any individual (or entity) liable for the profit-making offence stipulated in Article 363(1) of the CL.<sup>69</sup> They refer to anyone, with a view to make a profit: a) produces, duplicates, publishes, sells or disseminates twenty or more video files containing obscene motion pictures, shows or cartoons, or one hundred or more obscene audio files, or two hundred or more obscene electronic publications, pictures, writings or short messages; b) receives 10,000 online hits or more for electronic obscene information produced, duplicated, published, sold or disseminated; c) attains a membership of 200 or more for members-only publication, sale or dissemination of obscene electronic information; d) makes money from obscene electronic information by collecting advertising revenues, member registration fees or other payments, and the sum comes up to 10,000 yuan or more; or e) commits any of the two

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People’s Procuratorate various kinds of documents and some of them provide judicial interpretations to existing legislations and are legally binding.

<sup>68</sup> *Ibid.*, Article 9.

<sup>69</sup> *Ibid.*, Articles 1 and 2.

above-mentioned acts, and in each act has attained half of the stated amount. The above-mentioned acts are liable whether they are committed on websites, in online chatrooms and forums or via instant messaging software or emails. Likewise, there are three levels of punishment. First, anyone, who commits any of the acts from a) to e) and caused serious consequences, shall be punishable by the lowest level of punishment stipulated in Article 363(1), meaning a fixed-term imprisonment of not more than three years, criminal detention or control and supervision, and a fine. Second, if the amount is five-fold of that stipulated in a) to d), then it will be treated as a “serious case”, attracting a fixed-term imprisonment of three to ten years and a fine. Third, if the amount reaches twenty-five-fold or more, then the case will be treated as an “especially serious case”, attracting a maximum penalty of life imprisonment and in some cases confiscation of properties.

The 2004 Interpretation also governs not-for-profit scenarios.<sup>70</sup> Anyone shall be liable for Article 364(1) of the CL if he or she has committed, not for profit-making purposes, any acts in a) to e) mentioned above, and the amount is twice or more, and has caused serious consequences.

In addition, the 2004 Interpretation expressly tackles the issue of child pornography.<sup>71</sup> Anyone shall be punished severely in accordance with Articles 363(1) or 364(1) of the CL if he or she commits any of the acts a) to e) and in which also: i) produces, duplicates, publishes, sells or disseminates obscene electronic information graphically depicting sexual conduct of minors below 18 years of age; ii) provides direct links on website/s or web page/s owned, managed, or used by oneself to information knowingly contains electronic information

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<sup>70</sup> *Ibid.*, Article 4.

<sup>71</sup> *Ibid.*, Article 6.

graphically depicting sexual conduct of minors below 18 years of age; or iii) sells or disseminates obscene electronic information to minors below 18 years of age. The parts i) and ii) are highly significant because never before was the dissemination of child pornography specifically dealt with and punished, though one may argue that the prohibitions imposed by Articles 363 and 364 on obscene articles also cover child pornography. Yet several aspects of the 2004 Interpretation concerning the prohibition of child pornography are noteworthy. First, acts involving publishing, selling or disseminating child pornography will only be punished if they reach the stipulated quantities. Second, acts of downloading and storage by individuals of online child pornography are not specifically prohibited, implying that the mere possession of online child pornography is not a crime.

#### **4) The 2010 Decision**

It was six years after the 2004 Decision and one year into the recent campaigns that the Chinese authorities came up with another important legal document on combating online pornography. In early 2010, the Supreme People's Court and the Supreme People's Procuratorate jointly issued a second judicial interpretation on online pornography (2010 Interpretation).<sup>72</sup> Combating child pornography is one of the two emphases. The dissemination of online child pornography depicting minors below 14 years of age will be liable for CL obscene articles offences and subjected to severe punishment if the amount disseminated has

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<sup>72</sup>See Supreme People's Court and Supreme People's Procuratorate ' Interpretations on Certain Questions Arising From the Application Of Law On Criminal Cases Concerning the Production, Duplication, Publication, Selling And Dissemination of Obscene Electronic Information via the Internet, Mobile Communications Devices and Other Electronic Communications Platforms (II) ZUIGAORENMINFAYUAN, ZUIGAORENMINJIANCHAYUAN, GUANYUBANLIHULIANWANG, YIDONGTONGXUNZHONGDUAN, SHENGXUNTAIZHIZUO, FUZHI, CHUBAN, FANMAI, CHUANBO YINHUIDIANZIXINXIXINGSHIANJIAN JUTIYINGYONGFALV RUOGANWENTIDEJIESHI (II) (2010).最高人民法院、最高人民检察院关于办理利用互联网、移动通讯终端、声讯台制作、复制、出版、贩卖、传播淫秽电子信息刑事案件具体应用法律若干问题的解释（二）(2010).

come up to half of that stipulated in the 2004 Interpretation for dissemination of child pornography depicting minors below 18 years of age.<sup>73</sup>

The second emphases of the 2010 Interpretation is to break the chain providing financial support for obscene websites.<sup>74</sup> A telecommunications operator or a ICP shall be liable for Article 363(1) of the CL if it knowingly i) provides Internet access to five or more obscene websites; ii) collects fees amounting to 20,000 yuan for provision to these websites various kinds of services like Internet access, server storage or online information storage; or iii) collects customers payments for these websites amounting to 50,000 yuan; and iv) has caused serious consequences.<sup>75</sup> It will be treated as a serious case if i) to iii) reaches five-fold and an especially serious case if twenty-five-fold.

The 2010 Interpretation also tackles the related issues of placing advertisements and providing billing services for obscene websites. In the past decade, a flourishing industry of website construction and maintenance has emerged in China. The 2010 Interpretation specifically addresses this phenomenon.<sup>76</sup> A person shall be liable for Article 363(1) if he or she, with a view to profit, constructs or maintains websites for others and knowingly allows others to commit any of acts a) to e) listed in the 2004 Interpretation reaching half of the required amount. Again, it will be treated as a serious case if the amount is fivefold and as an especially serious case if the amount is twenty-five-fold.

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<sup>73</sup>*Ibid.*, Articles 1 and 2.

<sup>74</sup>A press briefing given upon the release of the 2010 Interpretation, Feb. 25, 2010, *available at* [http://220.181.27.236/xwzx/jdjd/sjd/201002/t20100225\\_1961.htm](http://220.181.27.236/xwzx/jdjd/sjd/201002/t20100225_1961.htm).

<sup>75</sup>The 2010 Interpretation, *supra* note 67, Article 6.

<sup>76</sup>*Ibid.*, Article 7.

#### **IV) Issues and Trends in China's Regulation of Online Pornography**

To sum up, the Chinese authorities have for the past decade been devising laws and regulations to cope with the problem of online pornography, and actions to combat online pornography have been stepped up since early 2009. But there are major questions concerning these laws and their enforcement, which would have a significant bearing in the achievement of the goal of protecting minors.

##### **A) Uncertainty in Definitions and No Classification Scheme Available**

It is noteworthy that both the CL and the LAPPOS punish only the dissemination of obscene articles/content but not articles/content considered as “vulgar” or “undesirable”. Furthermore, major legislative enactments governing Internet regulation contain a usual list of prohibited online content, but the terms “vulgar” and or “undesirable” cannot be found. But, as mentioned, since early 2009, websites have been named and shamed, punished or even shut down for carrying “vulgar” content and the failed Green Dam plan was designed by the MITT to stop “undesirable” online content from spreading. What exactly are “vulgar” content and “undesirable” content? The CIIIRC has a FAQ section on its website stating that “undesirable” information includes writings, pictures and audiovisuals that violate the requirements in the promotion of socialist good spirit, great Chinese cultural traditions and practices, and social ethics.<sup>77</sup> According to this definition, “undesirable” content falls short of being illegal. But the CIIIRC, as its name reflected deals mainly with public complaints of illegal online content, also handles complaints concerning “undesirable” content. Meanwhile, as mentioned, violence, murder, horror, gambling, which fall within the stipulated list of

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<sup>77</sup> See [http://net.china.com.cn/jbzn/txt/2006-09/27/content\\_215355.htm](http://net.china.com.cn/jbzn/txt/2006-09/27/content_215355.htm).

prohibited online content, were considered as “vulgar” content in the 2009 Campaign.<sup>78</sup> A SCIO official further explained that there are key factors in the definition of the term “vulgar”, namely, causing harm to minors and danger to public morals, and having adverse impact on cultural heritage or national traditions.<sup>79</sup> The official admitted that it is more of a moral obligation for ICPs not to carry online “vulgar” content, but he was quick to add that legal provisions governing the conduct of online cultural activities do ban content that endangers public morals, cultural heritage or national traditions. Apparently, the term “vulgar” is akin to the concept of “indecent” in the West.<sup>80</sup> The terms “indecent” content and “indecent” are not used in Chinese laws. Both the LAPPOS and CL do not contain any provision punishing dissemination of indecent content or speeches.

Also absent are terms/concepts which resemble the Western classification of hard-core pornography and soft-core pornography or a new category of extreme pornography introduced in recent years in the United Kingdom.<sup>81</sup> Neither the CL and its implementations

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<sup>78</sup> See *supra* note 12.

<sup>79</sup> See 国新网网络局刘正荣谈界定淫秽色情低俗内容 [SCIO official Liu Zhengrong Briefs on How to Define Obscene, Pornographic and Vulgar Content], CHINA.COM, Dec. 25, 2009, available at [http://news.china.com/zh\\_cn/mobilesexinfo/11079576/20091225/15752353.html](http://news.china.com/zh_cn/mobilesexinfo/11079576/20091225/15752353.html).

<sup>80</sup> In the US, Title 18 of the United States Code, Section 1464, prohibits the utterance of “any obscene, indecent or profane language by means of radio communication.” According to rules devised by the Federal Communications Commission, the broadcast of indecent material during the period of 6 a.m. and 10 p.m. is prohibited, see <http://www.fcc.gov/eb/oip/FAQ.html>. Material is indecent if, in context, it depicts or describes sexual or excretory organs or activities in terms patently offensive as measured by contemporary community standards for the broadcast medium. Indecent content is only regulated on broadcast media, not in print media or online environment. Provisions stipulated in the Communications Decency Act and the Child Online Protection Act regulating indecent online content were ruled unconstitutional by US courts. In the UK, it would be considered as indecent if the material creates outrage or utter disguise in ordinary Decent-minded people. The prohibition of indecency is to protect members of the general public from the shock or offence when encountering certain material without consent, but the level of shock would have to be fairly high. Indecent material does not confine to sexual matters and the prohibition is only applicable to broadcast media content and public display, whilst the content of print media and online media is subjected to self-regulation. In addition, taking, possessing, and disseminating indecent child photographs are also illegal.

<sup>81</sup> In the West, pornography is traditionally subdivided into soft-core and hard-core. Hard-core pornography is considered as obscene and the dissemination is prohibited in the US but not mere possession. More recently in the European Union, there has been a relaxation of the prohibition of disseminating hard-core pornography, see Helen Fenwick & Phillipson, *supra* note 7, at 471. Meanwhile, new categories of pornography have been devised.

nor the LAPPOS make any distinction between hard-core, soft-core or extreme pornography. Only child pornography is singled for more severe punishments in the 2004 and 2010 Decisions.

Several features in China's regulation of online pornography are therefore distinctive: a) different terms – obscene, pornographic, “vulgar” and “undesirable” – had been used loosely by the Chinese authorities to refer to content that is considered as harmful for minors; b) the vague concept of “vulgar” content appears to resemble Western notion of indecency; c) but no distinction is made in laws and regulations between obscenity and indecency, and no classification scheme is available for adult-only articles; and d) with the exception of child pornography, other types of pornography have not been specified. The cumulative effect of these features would mean that the online content in China has to be very clean and healthy, and must be suitable for both adults and minors. But this begs an important question: have adults' rights to freedom of expression and to privacy been unduly restricted? In the US, the danger of over-regulating of the Internet for the protection of minors has been stressed: “Indeed, perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection.”<sup>82</sup> In China, critics noted that Bullog was among the early casualties of recent campaigns against online pornography and tightened Internet control. The blog-hosting website was popular among intellectuals and had posted discussions on the “08 Charter”, a petition sent by intellectuals and activists to the Chinese government in 2008

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Dissemination and possession of child pornography are now crimes in many jurisdictions. But there have been fierce debates on whether child pornography consisting of computer generated images not actual children should be banned. In the UK, legislation has been enacted in 2008 to ban the possession of the extreme pornography involving extreme violence or abnormal sexual activities with an animal or a human corpse, see Sections 63-67 of the Criminal Justice and Immigration Act 2008.

<sup>82</sup> American Civil Liberties Union v. Reno, 31 F. Supp. 2d 473, 498.

calling for improvements and reforms in the right to freedom of expression, elections and the rule of law.<sup>83</sup> The website was shut down for failing to remove a large amount of harmful information relating to current affairs and politics.

Meanwhile, the SCIO examined in late 2009 a variety of possible new measures of regulating online content, amongst which was the introduction of a classification scheme for online content.<sup>84</sup> But neither details of this study nor any outcomes were announced. Given the fact that the Chinese authorities have for years strongly resisted the idea of content classification including that of film classification, the possibility of seeing online content classification scheme introduced in the near future is indeed very slim.<sup>85</sup> In practice, though major portals in China were named and shamed during recent campaigns for containing “vulgar” or “undesirable” content such as photographs of sexy young women wearing bikinis, these portals and other websites often only delete such content when they are closely monitored.<sup>86</sup> This leads to another major question: how effective are Chinese laws and policies against online pornography. The study in the following part shows that law enforcement against online pornography in China suffers from the commonest problem of law enforcement in the country, namely, an unpredictable and frequent swing between the two extremes— sometimes being too harsh and sometimes being too lax.

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<sup>83</sup>See 嚴打「低俗」知識分子網誌遭封殺[*Strike-Hard Campaign Against “Vulgar Content”, Intellectual Website Closed Down*], MING PAO (HONG KONG), Feb. 10, 2009, B16, available in WISENEWS.

<sup>84</sup>See 网络内容分级管理[*Classification Scheme for Online Content Regulation*], NANHAIWANG(HAIKOU), Dec. 7, 2009, available at <http://news.163.com/09/1207/20/5PV5DI53000120GR.html>.

<sup>85</sup>See Guo Yuandan, 国家广电总局副局长赵实上午表示——目前中国不推进电影分级制 [SARFT Deputy Head Zhao Shi: China Won't Go for Film Classification], FAZHI WANBAO (BEIJING), Aug. 19, 2010, available at <http://www.fawan.com/Article/ShowArticle.asp?ArticleID=281946>.

<sup>86</sup> Observations by the author of this paper over the past two years.

## B) Online Pornography and Disparities in Law Enforcement

It is extremely difficult to obtain a full and accurate picture of law enforcement in China. Systemic information is not available about convictions and penalties concerning online pornography. Two major library legal databases, Beida Fabo and Beida Fayi, contain very few court judgments from this area. In these two databases, as of early May, 2011, there were fewer than 150 court judgments on offences involving profit-making dissemination of obscene articles and about two dozen court judgments on offences involving non-profit-making dissemination of obscene articles. This is a very small number compared to the number of cases dealt with by Chinese courts in a single year. A press conference held in January 2010 was told that a total of 1,414 cases concerning dissemination of obscene articles offences had come before Chinese courts during the first ten months of 2009 involving 1,744 accused.<sup>87</sup> No breakdown was given on cases concerning online content.

But some convictions involving online pornography were highly publicized in 2010 in the Chinese media. In May 2010, an accused was given a jail term of 11 years and six months and a fine of 750,000 yuan for disseminating with a view to profit online obscene and pornographic content.<sup>88</sup> This appears to be the toughest sentence imposed so far. The court heard that the accused, together with his 11 staff members, had constructed 13 websites in 2007-08 using 14 servers from the United States. Obscene photos, videos and writings were uploaded. Subscription fees totaling 710,000 yuan were collected from VIP members of these

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<sup>87</sup>See 最高法公佈手機淫穢色情信息犯罪典型案例 [Supreme People's Court Announced Classic Cases of Obscene and Pornographic Content Transmitted via Mobile Phones], XINHUA, Jan. 12, 2010, available at [http://news.xinhuanet.com/legal/2010-01/12/content\\_12797131.htm](http://news.xinhuanet.com/legal/2010-01/12/content_12797131.htm).

<sup>88</sup>GAPP, *Announcement of Five Court Cases Concerning Online Obscenity and Pornography* [全国全国“扫黄打非”办通报五起网络传播淫秽色情信息案件], Nov. 26, 2010, available at <http://www.gapp.gov.cn/cms/html/21/413/201011/706995.html>.

websites. In another case heard in late 2009, a 24-year-old university student was sentenced to 11 years and a fine of 20,000 yuan for operating an obscene website targeting mobile phone users.<sup>89</sup> The student built the WAP website in early 2009. He had uploaded 570 obscene photos and provided 1389 links to obscene videos by the time he was arrested. The court heard that the student had earned a total of 9268 yuan from his online pornography business venture. To construct his website, the student paid another young man a fee of 463 yuan for helping him to secure a server from outside mainland China. The latter was treated as an accomplice, and sentenced to a jail term of six years and a fine of 5,000 yuan. In another highly publicized case, a man was convicted of Article 363(1) of CL and was given a jail sentence of ten years and three months and a fine of 170,000 yuan.<sup>90</sup> The accused operated three pornographic websites for mobile-phone users, posting more than 5,000 pictures and nearly 500 novels, and had made a profit of some 30,000 yuan. These harsh sentences imposed are typical of China's "strike-hard" campaigns.

In recent campaigns, those who disseminated online obscene articles for profit-making purposes were not the only ones arrested and sentenced. The focus of the effect has apparently shifted to non-profit-making dissemination since early 2011. A search of news clippings has revealed that there was a rise in reported convictions in the first four months of 2011, in comparison to only two dozen cases over the years in the two major legal databases. At least twelve convictions had been handed down over various parts of China on persons who had, not for profit-making purposes, disseminated online obscene articles. Amongst whom was a 25-years-old mother who had made a name for herself by writing online

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<sup>89</sup>See Zhuangjian, 无锡“12•02”手机网站传播淫秽物品牟利案审结 [Court Trial of “Dec. 2” Wuxi Case of Profit-making Dissemination of Obscene Content via a WAP Site Case Ends], GUANGMING DAILY (BEIJING), Feb. 22, 2010, available at [http://www.gmw.cn/content/2010-02/22/content\\_1057729.htm](http://www.gmw.cn/content/2010-02/22/content_1057729.htm).

<sup>90</sup>See *supra* note 87.

pornographic novels.<sup>91</sup> The young woman was sentenced to four months of criminal detention. Most of the other accused were ordinary subscribers to online pornographic sites. They uploaded and shared obscene articles so to become VIP members and enjoy the privilege of free subscriptions to the websites.<sup>92</sup> A few others volunteered to become webmasters of non-profit-making websites which shared obscene articles.<sup>93</sup> Several got a suspended sentence whilst some others were sentenced to a jail term of six months to ten months.

The above account shows that harsh sentences have been handed down to curb profit-making dissemination of online pornography, and the authorities have also apparently been closing in on those non-profit-making netizens having a hobby of downloading and uploading of online pornography. But, in the meanwhile, there are many illustrations showing obvious discrepancies in sentencing and punishments. Two accused in a court case were also convicted under Article 363(1) of profit-making dissemination of obscene articles, both they were only each given a jail sentence of six months and a fine of 3,000 yuan. The two accused had four pornographic WAP websites operating from outside mainland China since mid-2008 and obtained advertising revenues of about 20,000 yuan from the operation. The court said the two accused received lenient treatment because they were first-time offenders and had been cooperative.

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<sup>91</sup>See 女子網上發佈色情小說獲刑 [A Woman Convicted for Publishing Pornographic Novel on the Web], HAINAN DAILY (HAIKOU), Mar. 22, 2011, available in WISENEWS.

<sup>92</sup>See 研究生網傳黃色圖片 點擊 82 萬次被判拘役 [820,000 hits in Online Pornographic Pictures Dissemination, A Graduate Student Sentenced for Criminal Detention] BEIJING YOUTH DAILY (BEIJING), Jan. 10, 2011, available in WISENEWS.

<sup>93</sup>See 管理色情網站男子獲刑一年 [Man Jailed for One Year for his Role in Managing a Porn Website], ZHENGJIANG DAILY (ZHENGJIANG), Feb. 18, 2011, available in WISENEWS.

In addition, the provisions for punishing dissemination of online obscene articles are lax in two major aspects. According to the 2004 and 2010 Interpretations, a person would only be subjected to level one punishment mentioned in Articles 363(1) if he or she has disseminated online with a view to profit a specified quantities of obscene articles AND “has caused serious consequences”. A similar arrangement is also found in Article 364(1) offence for non-profit dissemination of obscene articles online. But neither the CL nor the two interpretations give a definition of what constituting “has caused serious consequences.” Apparently, wide discretion is allowed as to whether to prosecute or to convict a person for Articles 363(1) or 364(1) offences. If a person is not prosecuted under the CL and is only dealt with by the police in accordance with the LAPPOS, he or she may get away with a small fine. Furthermore, both the CL and LAPPOS punish only the dissemination of obscene articles and not the mere possession of such items, and, apparently, this is also applicable to cases involving child pornography or extreme pornography.

### **C) Effective Protection of Minors from Online Pornography?**

In view of such wide discretion allowed by the legal provisions, it is doubtful whether the protection of minors can really be effective. The ordeal of a 17-year-old school girl attracted wide public attention in mid-2010.<sup>94</sup> During the Chinese New Year holiday of 2010, the girl had sex with several young men on several occasions. The sex scenes were taped by one young man involved and the footage was later posted online. The girl and her father made a complaint to the police in March alleging rape.<sup>95</sup> But the complaint had led to the

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<sup>94</sup>See 广东东莞职校门不雅视频女生获聚众淫乱罪被拘 25 天[*Female Student in Guangdong Dongguan Vocational Training College Indecent Video Incident, Detained for 25 Days for Alleged Group Sex Offence* ], NANFANG DAILY (GUANGZHOU), June 4, 2010, available at [http://news.xinhuanet.com/legal/2010-06/04/c\\_12180921.htm](http://news.xinhuanet.com/legal/2010-06/04/c_12180921.htm).

<sup>95</sup>*Ibid.*

detention of the girl for 25 days for questioning before her release, pending trial for the offence of group sex.<sup>96</sup> The trial eventually held was closed to the public on the ground of privacy protection and the outcome of the trial was unknown. The young man taking the pictures was also detained but no further details were available on whether he was eventually prosecuted for dissemination of online obscene content. Instead, public attention was on the girl and opinion has been split on her arrest and trial. Some legal experts openly supported the prosecution of the teenage girl saying she had caused very bad consequences for social order.<sup>97</sup> Views however were also expressed noting that the girl was a minor who should be protected by the laws against child pornography.<sup>98</sup>

Despite the fact that such “strike-hard” campaigns have lasted for more than two years, the Chinese authorities still regularly announced long lists of websites punished for containing obscene and pornographic content.<sup>99</sup> In January 2011, for example, the GAPP announced a list of 53 websites punished for providing online reading of “obscene and pornographic novels”.<sup>100</sup> In May 9, 2011, the GAPP came up with a second list of 99 websites all punished for providing online reading of “obscene and pornographic novels”<sup>101</sup>

These recent lists have led to several questions. First, the exact punishment has not been

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<sup>96</sup> Article 301 of the CL prohibits group sex. Once convicted, the ringleader of such activities or a person repeatedly taking part in such activities shall be punishable by a fixed term of imprisonment for five years.

<sup>97</sup> 东莞少女“聚众淫乱”案近日 2 次开庭 罪与非罪引争议 [*Dongguan Teenage Girl Group Sex Case Trial Soon, Public Debate on Whether Constituting a Crime*], GUANGZHOU DAILY (GUANGZHOU), June 9, 2010, available at <http://unn.people.com.cn/GB/14748/11820962.html>.

<sup>98</sup> *Ibid.*

<sup>99</sup> SCIO, *62 Websites Punished for Disseminating Obscene and Pornographic Content* [国新网办网络局通报 62 家传播淫秽色情网站被查处], April 2, 2011, available at <http://www.scio.gov.cn/zxbd/wz/201104/t885054.htm>.

<sup>100</sup> GAPP, *Websites Disseminating Obscene and Pornographic Content: First Batch, 2011* [2011 年度第一批传播淫秽色情内容的网站名单], Jan. 13, 2011, available at <http://www.gapp.gov.cn/cms/html/21/413/201101/709936.html>.

<sup>101</sup> GAPP, *Websites Disseminating Obscene and Pornographic Content: Second Batch, 2011* [2011 年度第二批传播淫秽色情内容的网站名单], May 9, 2011, available at <http://www.gapp.gov.cn/cms/html/21/367/201105/716413.html>.

announced. Second, the scope of prosecution is relatively wide and novels have been affected. Third, why such websites continue to exist or pop up? Does this imply ineffectiveness of the campaigns?

Indeed, a handful of press reports hinted that the Chinese authorities have been facing enormous difficulties in its fight against online pornography. A news feature published in mid-2010 gave a rare glimpse into the inside operation of the GAPP's Office Against Illegal and Pornographic Publications (OAIPP).<sup>102</sup> The office had only a team of four staff members to handle public complaints against online pornography, but the number of complaints in the first months of 2010 amounted to some 140,000 including many multiple complaints. Upon receiving the complaints, the OAIPP officers forwarded IP addresses of websites containing obscene content to the police for criminal investigations and those containing "vulgar" content to the SCIO for regulation purposes respectively. But OAIPP officers were performing an impossible task. Most of these websites used overseas servers. Many were based in the United States and some others in Canada. The OAIPP staff confessed that the Chinese authorities did not have any jurisdiction over these websites. The police could only arrest persons servicing these websites inside China but was unable to stop such websites from operating. The news feature further revealed that the OAIPP, at the request of the police, had already stopped forwarding IP addresses of the overseas pornographic websites to the police and all that the OAIPP could do was to keep record of public complaints of these websites. It is not sure whether this was a short-term or long-term measure. Meanwhile, China Mobile said it had prevented 84,148 pornographic websites from

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<sup>102</sup>See 全国“扫黄打非”办探营：4个月收到14万条举报 [A Visit to the OAIPP: 140,000 Reports in Four Months], *ORIENTAL OUTLOOK (BEIJING)*, Vol. 22, 2010, June 2, 2010, available at [http://news.xinhuanet.com/politics/2010-06/02/c\\_12169370.htm](http://news.xinhuanet.com/politics/2010-06/02/c_12169370.htm).

reaching its mobile phone subscribers by late 2010.<sup>103</sup> The overall majority of these websites, amounting to 83,370, were from overseas and only 778 websites were based in China. A news feature published in late 2010 also detailed huge problems that caused by overseas pornographic websites.<sup>104</sup> But the article further noted that Web 2.0 applications had also made it much easier for underground pornographic websites to operate within China. Moreover, major portals and numerous blogs within China were eager to test the limits of government regulation and came up with “vulgar” or pornographic content.

Indeed, it is questionable whether the Chinese authorities can achieve the stated goal of protecting minors given the difficulties they face in content regulation of the Internet and in combating online pornography and given their unwillingness of introducing a classification scheme for online content. To find a solution, some recent attempts have been made by telecommunications operators which included the installation of Green Dam on minors’ mobile phones.<sup>105</sup> One major attempt in early 2011 was for the Chinese Communist Youth League Central Committee in Beijing to team up with China Mobile to design a nationwide mobile Internet access platform solely for minors.<sup>106</sup> Under this scheme, tailored mobile phone packages will be provided for minors who will only have mobile Internet

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<sup>103</sup>See 中国移动封堵色情网站 8 万多个, 境外接入居多[*China Mobile Blocked More than 80,000 Pornographic Websites, Most Originated from Overseas*], XINHUA, Dec. 31, 2010, available at [http://www.news365.com.cn/xwzx/gn/201012/t20101231\\_2923146.htm](http://www.news365.com.cn/xwzx/gn/201012/t20101231_2923146.htm).

<sup>104</sup>See 大陆网络色情调查: 利润丰厚屡禁不绝 扫黄面临公私权博弈 [A Survey on Online Pornography on Mainland China: Huge Profits Make Bans Ineffective, Clampdown on Pornography Involves a Balance of Different Rights ], PHOENIX WEEKLY (HONG KONG), Vol. 25, 2010, Sept. 9, 2010, available at [http://news.ifeng.com/mainland/detail\\_2010\\_09/09/2471705\\_0.shtml](http://news.ifeng.com/mainland/detail_2010_09/09/2471705_0.shtml).

<sup>105</sup>See 未成年人手机上网增多移动互联网内容监管缺位 [More Youths having Internet Access via Mobile Phones, Content Regulation Not Keeping Up] CHINA NEWS SERVICE, Mar. 24, 2011, available in WISENEW.

<sup>106</sup>See 團中央與移動合建未成年人手機上網平台[Youth League Central Committee Team up with China Mobile to Build Mobile Phone Internet Access Platform for Minors], CHINA NEWS SERVICE, Jan. 12, 2011, available in WISENEW.

access to a white list of selected and pre-approved websites. This scheme, if it works according to the plan, should be ready for use when children return to school after the summer break in 2011.

#### **D) Protection of Minors – A Major Rationale for Regulating Online Pornography?**

In June 2010, the SCIO issued a policy statement entitled “White Paper on China’s Internet” expounding for the first time the rationales and measures of Internet regulation in the country (White Paper). The document came at a time when China’s Internet regulation was subject to severe criticism because of the authorities’ tightening measures and the refusal by Google.cn to conduct censorship on online content required by the Chinese government, and its subsequent decision to relocate its search-engine operation from mainland China to Hong Kong where there is no Internet censorship. Apparently, the White Paper serves two major purposes. On the one hand, it reiterates China’s sovereignty on Internet regulation and emphasizes that foreign companies must abide by Chinese laws and regulations when conducting their business in China. On the other hand, it reassures the Chinese Internet users that they would enjoy freedom of speech online and that the Chinese authorities will be prudent in introducing laws, so as to allow room for Internet development.

The long list of prohibited online content was repeated in the White Paper but, at the same time, three major considerations for Internet regulation have been highlighted. They are the protection of national security and society’s public interest and the protection of minors. The White Paper devotes one whole paragraph to elaborating on the authorities’ determination to ensure online safety of minors. It notes that minors have become the largest group of Chinese Internet users. As of late 2009, one third of the 384 million Chinese

Internet users are minors. But the problem of obscene, pornographic, illegal or harmful online information has also become prominent. In ensuring Internet safety, the White Paper says, the Chinese government has always treated the protection of minors as a top priority. The Law on the Protection of Minors stipulates that the government is tasked with the duty to protect minors in relation to their online activities.<sup>107</sup> As such, the Chinese government has been actively promoting research into software that would protect minors online. Obviously, campaigns against online pornography and the rationale of protecting minors from harm have both become recent emphases in China's Internet regulation

In March 2010, the U.S. Government indicated that it would determine whether any complaints to the WTO against China's Internet regulation could be made.<sup>108</sup> In view of any likely complaints made under the WTO aegis, China's recent emphases on combating online pornography and on the protection of minor may be of some use. Both the GATT and GATS allow public-morals exceptions to free trade. But in so doing, the Chinese government must overcome hurdles of necessity and proportionality. In the *Internet Gambling* case, the WTO Appellate Body introduced a two-tier test requiring that a country adopting the restrictive measures in trading of a service (a) show the measures are necessary for public morals and order or for national security and (b) pursue a less trade-restrictive measure to obtain its objectives if one is reasonably available, taking into account the interest being pursued and the desired level

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<sup>107</sup> See the Law on the Protection of Minors, WEICHENGNIANREN BAOHUFU (2006), Articles 33 and 34 in Chinese: 「第三十三条 国家采取措施, 预防未成年人沉迷网络。国家鼓励研究开发有利于未成年人健康成长的网络产品, 推广用于阻止未成年人沉迷网络的新技术。第三十四条 禁止任何组织、个人制作或者向未成年人出售、出租或者以其他方式传播淫秽、暴力、凶杀、恐怖、赌博等毒害未成年人的图书、报刊、音像制品、电子出版物以及网络信息等。」

<sup>108</sup> Palmer, D. *U.S. Weighing China Internet Censorship Case*, REUTERS, Mar. 10, 2010. Available at <http://www.reuters.com/article/idUSTRE6284YG20100310>.

of protection.<sup>109</sup> Indeed, the panel established by WTO Dispute Settlement Body found against China in mid-2009, ruling that the monopoly of state-owned enterprises over the content review and importation of books, newspapers, magazines and audiovisual products was not a measure “necessary” to protect public morals under Article XX(a) of the GATT 1994.<sup>110</sup>

## V) Conclusion

Comparatively speaking, websites within China are much cleaner and supposedly healthier for minors in early 2011 because of the campaigns against online pornography for the past two years. Nonetheless, the country’s concept of online pornography remains extremely vague and uncertain, ranging from “undesirable” or “vulgar” to obscene. Moreover, Chinese laws and regulations do not explicitly distinguish indecency from obscenity, and no classification scheme of any kind exists to cover print, broadcast or online content. Two diametrically opposite scenarios have emerged. On one hand, in order to be lawful under Chinese laws, any online content must be found suitable for both adults and minors. If this requirement is strictly implemented, it certainly places severe limits on the scope of online materials that adults are allowed to read and also plants landmines for websites. On the other hand, neither the existing legal provisions nor the actual practice of regulating online pornography provides sufficient protection for minors. Not all kinds of dissemination of obscene articles are punishable by the CL and the possession of child pornography is not prohibited. As such, it is far from certain if the stated goal of protecting minor has been accomplished. But recent campaigns against online pornography and the White Paper may be viewed as apparent signs that the Chinese government

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<sup>109</sup> WTO, *U.S. – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, para. 309-311.

<sup>110</sup> See U.S. Congressional Executive Commission on China, *WTO Rules Against Chinese Trade Restrictions on Books, DVDs, Music, and Films*, Feb. 4, 2010, available at <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingel=129022>.

is increasingly relying on the goal of protecting minors to justify its strict control on the Internet, both domestically and in the international arena. If this observation is correct, it remains to be seen if such a strategy will be successful.