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As Soft as Tofu: Consumer Product Defamation on the Chinese Internet

Elizabeth Spahn

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ABSTRACT

This Article examines the most notorious Chinese internet defamation case, Wang Hong v. Maxstation, which awarded substantial damages against an individual consumer as well as two on line magazines for criticizing a laptop product on the internet. The case created a widespread political controversy on the internet in China, highlighting an underlying tension in the current policies of the Chinese government, which promotes a more open market economy while maintaining tight censorship over public speech. The case developed landmark legal doctrine in China, extending judge made defamation law while ignoring the Chinese consumer protection statute. Extending defamation doctrine to include factual omissions as evidence of falsity substantially departs from prior Chinese law creating serious conflicts with defamation law in other countries. Allowing a corporation to recover for insult and injured feelings, regardless of the truth of the underlying claims, and without recognizing some exception for opinion or fair comment, departs very substantially from defamation law in other WTO jurisdictions, where truth is an absolute defense to defamation, and expression

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of opinion/fair comment derogatory language about products by consumers is more widely tolerated. The case cannot be viewed historically as a successful application of rule "according to" law, given that the decisions ignore the relevant statute. The case may stand for an early example of rule "of" law in which Supreme People's Court Interpretations are given precedence over statutes.

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I. INTRODUCTION

There are 1.3 billion potential Chinese consumers.[1] There is also a vibrant internet combined with infamously expanding efforts by the Chinese Communist Party (Party) and state to control internet speech. The Party and state seek freer economic markets while maintaining strict control over public speech. A legal system is developing as the transition into a freer market economy expands. China is developing rule "according to" law,[2] and the impact may be global.

Thus, when a large group of law students at the politically sensitive Peking University campus gathered in February 2000 for an

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1. Central Intelligence Agency (CIA), World Factbook: Rank Order—Population, http://www.cia.gov/cia/publications/factbook/rankorder/2119rank.html (last visited 3/8/2006).

2. Rule "of" law compared to rule "according to" law, or rule "by" law (rule by man) present very different concepts of the role of law in Chinese culture and society. The Chinese constitution itself now provides that China will be governed by rule "according to" law (*Yifazhigou, jianshe shehuizhiyi fazhi guojia*). XIAN FA art. 5, § 1 (1999) (P.R.C.). This potentially significant change occurred in 1999. *See id.* The notion of rule "of" law, in the U.S. sense in which political leaders in the executive and legislative branches are limited in their powers by fundamental law enforced by the judiciary, is the subject of great debates within China but has not been adopted by any official governmental actions.

There is extensive scholarly literature in English by Chinese and Western legal scholars assessing the development of law in China. A sampling of the English language literature includes: STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO (1999); RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002); PITTMAN B. POTTER, THE CHINESE LEGAL SYSTEM, GLOBALIZATION AND LOCAL LEGAL CULTURE (2001); Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, 2 WASH. U. GLOBAL STUD. L. REV. 97 (2003); Jerome Alan Cohen, *The Chinese Communist Party and "Judicial Independence": 1949–1959*, 82 HARV. L. REV. 967 (1969); Zou Keyuan & Zheng Yongnian, *China's Third Constitutional Amendment: A Leap Forward towards Rule of Law in China*, 4 Y.B. L. & LEGAL PRAC. IN E. ASIA 29, 29–41; M. Ulric Killion, *China's Amended Constitution: Quest for Liberty and Independent Judicial Review*, 4 WASH. U. GLOBAL STUD. L. REV. 43 (2005); Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PAC. L. & POL'Y J. 255 (2003); Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471 (2002); Frank K. Upham, *Who Will Find the Defendant if He Stays with his Sheep: Justice in Rural China*, 114 YALE L.J. 1675 (2005) (book review); Zhang Qi, The Dynamics from the Ideal to the Reality–The Rule of Law in China (on file with Author) (2000).

academic forum[3] on an obscure internet defamation case, my interest was piqued, particularly when a fairly high level Party official barged into the forum, brusquely announced that the plaintiff's case was correct, and left. The appeal in the case[4] had yet to be heard. The internet chat rooms and bulletin boards filled with commentary,[5] some vituperative, criticizing the plaintiff corporation and its products. The case became a true *cause celebre* among the internet intelligentsia.

The *Wang Hong* case, a relatively minor dispute between a consumer and a computer manufacturer over an allegedly faulty screen repair, escalated into a major internet controversy and a test of the Chinese legal system's public acceptance and legitimacy. It developed new law in China regarding product disparagement defamation, which is consumer criticism of a product. It also positioned Chinese law regarding product disparagement, defamation by consumers, and internet media magazines well outside the mainstream of its trading partners in the World Trade Organization (WTO), potentially opening Chinese consumers to exploitation by less than scrupulous multinational businesses. The case highlights the need for product safety and reliable information exchange forums to protect relatively inexperienced Chinese consumers in the newly burgeoning Chinese consumer economy.

The litigation took place during 2000 and 2001 in the highly respected courts of Beijing. The leading judge in the trial court, Chen Jiping, was promoted directly to the People's Supreme Court of China

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3. Speakers at the PKU Law School forum included Professors Wang Liming, He Shan, Guo Huiming, Qiang Shigong, Wei Zhi, Li Wei, Guo Huiming, Qiang Shigong, He Bing, He Haibo and He Weifang.

4. Max Computer Station Inc. v. Wang Hong, Life Times & PC World, Case No. 1438 (Beijing No. 1 Interm. People's Ct., 2000) (on file with Author).

5. Internet commentary from prominent Chinese law professors and legal scholars included comments from the trial court judge himself, who denied any intervention in the case from the Party or state. He stated that it was just a common defamation case. Judge Chen noted that there were some differences because the carrier was not a newspaper but the internet.

> Regardless of whether it is a traditional media or an internet media case, if a person commits defamation he must undertake the legal responsibility . . . . Wang Hong's article was not according to fact. The hyperlinks provided on Wang Hong's web page were Wang Hong's responsibility, thus Wang Hong is responsible for the speech of people his page links to.

Wang Hong's attorney at trial, Chen Zhi Hua commented on the internet as well, noting that the omission of facts does not constitute falsity.

"Prominent law professors also commented, including PKU Law Professor He Weifang, who stated that the words were not all that insulting "junk", "rubbish" and that a reasonable person would understand that such words are opinion, not technical facts . . . . Reasonable people have common sense." Secondly, Professor He commented that the right to reputation of a corporation is limited by an individual's freedom of speech, which is a higher level right, necessary to strengthen the marketplace.

(PSC) shortly after issuing his opinion, while the case was pending on appeal in the Intermediate Appellate Court.[6] Close examination of the technical legal reasoning used in both the trial court and appellate court opinions provides an opportunity to observe the Chinese legal system at work and to test various abstract claims about the independence and professionalism of the Chinese judges.

Much of the Western scholarly discussion about the development of rule "according to" law in contemporary China takes place at a fairly high level of abstraction. Detailed analysis of the legal reasoning used in a specific Chinese case is rarely undertaken. This is in part because Chinese judges do not always articulate their legal reasoning in a formal, written opinion. Further, it is relatively common for law professors in China to comment on cases as urgent current events in the popular media, thus playing the role of advocate and popular media commentator. Detailed legal analysis is also rare in part because many of the legally-trained Westerners who study China have backgrounds in international policy, cultural studies, and political science focusing primarily on the crucial macro-issues. This Article is one modest example of careful and detailed legal analysis of a specific Chinese case, giving the Chinese courts the same detailed attention and scholarly analysis that professors in the United States often give to domestic court decisions.

Close examination of the trial and appellate opinions will also serve as an example of the "case-note" format used in common law legal systems. In the case-note format, legal scholars provide research and feedback to the judiciary, policy makers, and other scholars on the professional aspects of the craft of legal analysis, removed in time from the highly charged political atmosphere after the brouhaha has died down. This Article will be suitable for use in teaching Chinese law students who are steeped in a civil law tradition, which places considerably less emphasis on case law and precedent and which does not currently emphasize the concrete analytical reasoning involved in applying law to specific fact patterns.[7]

Perhaps more significantly, the substantive legal doctrine in this case develops new law regarding the intersection of Chinese defamation law and consumer protection law. The resolution developed in this opinion highlights an underlying tension in the current policies of the Chinese government, which seeks to harmonize

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6. He Sheng, *Pushing the Limits On-Line*, CHINA DAILY, Apr. 11, 2000, at 9 (noting that Chen Jiping was the lead trial judge).

7. I used the *Wang Hong* trial court opinion as the basis for appellate moot court style exercises at Peking University Law School in the Spring 2000 semester. Approximately sixty law students participated, representing the various parties and serving as judges. Full argument of both sides of the case was a novel and exhilarating experience for them, developing their capacity for detailed legal reasoning just as it does for the legions of U.S. law students subject to this type of exercise.

a relatively open market economy with tight censorship and control over public information and speech. While private communications have become increasingly free from governmental interference, public speech remains under tight, and perhaps increasingly severe, government restrictions. From the Western perspective, an increase in economic trade is often believed to be the necessary precursor to a freer and more open civil society. From the Chinese perspective, the correct path of economic development is the current approach of harmonizing increasing free trade with political stability through censorship of public speech.

According to many leading economic theorists, development of a free market ultimately depends on market discipline provided by the choices of rational consumers. Classic free market theories posit that rational consumers will choose products that provide the highest quality at the cheapest prices. Good corporations with good products and services will be rewarded by increased market share, while poor performance will lead to a decreased market share. To choose rationally, of course, consumers must have access to information about products, including information about the experiences, good and bad, of other consumers with that specific product or corporation. Thus, a sharp dichotomy develops where a policy encourages free economic markets while suppressing speech by consumers.

The defamation case analyzed in this Article is relatively simple: a corporation successfully sued an individual consumer and two internet magazines reporting the consumer's comments for product disparagement (defamation) because of the individual consumer's postings on the internet.[8] The lawsuit resulted in massive fines against the individual consumer, who was eventually jailed for nonpayment on Consumer Day. The case serves as a study for testing the assumptions underlying both Western and Chinese government policies regarding the development of law, consumer rights, and corporate protection of reputation in the context of the vibrant Chinese internet. It also provides a specific case study of the development of rule "according to" law in contemporary China.

A number of legal scholars and commentators in the United States and other Western nations have examined the development of government regulations of and crackdowns on the Chinese internet.[9]

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8. *See* Sheng, *supra* note 6, at 9 (describing the case).

9. A sampling of the extensive scholarly literature available in English includes: Paul D. Callister, *The Internet, Regulation and the Market for Loyalties: An Economic Analysis of Trans-border Information Flow*, 2002 J. L. TECH. & POL'Y 59 (2002); S. David Cooper, *The Dot.Com (MUNIST) Revolution: Will the Internet Bring Democracy to China?*, 19 UCLA PAC. BASIN L.J. 98 (2000); Scott E. Feir, *Regulations Restricting Internet Access: Attempted Repair of Rupture in China's Great Wall Restraining the Free Exchange of Ideas*, 6 PAC. RIM L.& POL'Y J. 361 (1997); Timothy L. Fort & Liu Junhai, *Chinese Business and the Internet: The Infrastructure for Trust*, 35 VAND. J. TRANSNAT'L L. 1545 (2002); Tim Gerlach, *Using Internet Content Filters to*

Major scholarly literature in the West has also analyzed the development of the rule "according to" law.[10] A few commentators have addressed the Chinese consumer protection legal regime,[11] and a few have addressed Chinese law regarding defamation.[12] One very significant and thoughtful recent article addressed the intersection between formal and informal regulation of Chinese media and its effects on the development of the Chinese legal system.[13] One article in English has summarized the *Wang Hong* case from a business perspective.[14]

This Article attempts to provide a specific and relatively detailed case study with close analysis of the Chinese legal doctrines available at the time. It examines the specific historical and general cultural contexts and analyzes the technical legal reasoning involved in a particular case. The Article may be of interest to audiences outside of Chinese legal studies, as the case concerns an internet defamation issue involving both an individual consumer speaker and two internet online magazines. The highest court in Australia highlighted the problem of conflicting domestic defamation law in the context of global publications on the internet in its recent decision in *Gutnick v. Dow Jones*.[15]

Create E-Borders to Aid in International Choice of Law and Jurisdiction, 26 WHITTIER L. REV. 899 (2005); Clara Liang, *Red Light, Green Light: Has China Achieved its Goals Through the 2000 Internet Regulations?*, 34 VAND. J. TRANSNAT'L L. 1417 (2001); Jack Linchuan Qiu, *Coming to Terms with Informational Stratification in the People's Republic of China*, 20 CARDOZO ARTS & ENT. L.J. 157 (2002); Kristina M. Reed, Comment, *From the Great Firewall of China to the Berlin Firewall: The Cost of Content Regulation on Internet Commerce*, 13 TRANSNAT'L L. 451 (2000); Joel R. Reidenberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS J. 261 (2002); John H. Taylor, III, *The Internet in China: Embarking on the "Information Superhighway" with One Hand on the Wheel and the Other Hand on the Plug*, 15 DICK. J. INT'L L. 621 (1997); Jiang-yu Wang, *The Internet and E-Commerce in China: Regulations, Judicial Views, and Government Policies*, 18 COMPUTER & INTERNET L. 12 (2001).

10. *See supra* text accompanying note 2.

11. A sampling of the literature includes: Li Han, *The Product Quality Law in China: A Proper Balance between Consumers and Producers?*, 6 J. CHINESE & COMP. L. 1 (2003); Beverley Hooper, *Consumer Voices: Asserting Rights in Post-Mao China*, CHINA INFO., Vol. XIV No.2, at 92 (2000); Jennifer A. Meyer, *Let the Buyer Beware: Economic Modernization, Insurance Reform, and Consumer Protection in China*, 62 FORDHAM L. REV. 2125 (1994); Beverley Hooper, *The Consumer Citizen in Contemporary China* (Centre for East and South-East Asian Studies, Working Paper No. 12, 2005), *available at* http://www.ace.lu.se./publications/workingpapers/Hooper.pdf.

12. H.L. Fu & Richard Cullen, *Defamation Law in the People's Republic of China*, 11 TRANSNAT'L L. 1 (1998); Hilary K. Josephs, *Defamation, Invasion of Privacy, and the Press in the People's Republic of China*, 11 UCLA PAC. BASIN L.J. 191 (1993).

13. Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1 (2005).

14. Fort & Junhai, *supra* note 9, at 1591–98.

15. Gutnick v. Dow Jones (2002) 194 A.L.R. 433 (Austl.). Professor Gary Chan Kok Yew has done a very thorough, scholarly analysis of the case. *See* Gary Chan Kok Yew, *Internet Defamation and Choice of Law in* Dow Jones & Company Inc. v. Gutnick, 2003 SING. J. LEGAL STUD. 483 (2003).

> [*Gutnick*] applied the traditional common law rule for libel that places publication in the forum in which material is read and comprehended. The stakes are high for Web publishers. The Australian High Court's application of the common law rule to the Internet signals to U.S. Web publishers that they ought to beware where they publish, and should not be surprised when a foreign court asserts jurisdiction over them and applies its own law. The Web publisher ought not to be surprised when First Amendment protections are not assertable in Australia, Zimbabwe, or Great Britain.[16]

Or China. As they enter the Chinese market, web publishers and speakers, as well as their lawyers, may therefore have a substantial interest in informing themselves about Chinese domestic law regarding internet defamation liability against individual consumer speakers, website or bulletin board hosts, and bloggers in addition to more formal internet media publishers and distributors.

Part I of this Article addresses the specific facts of the *Wang Hong* case in detail.[17] The purpose of Part I is to demonstrate to Chinese law students the techniques of legal analysis available in applying a legislatively enacted statute to the facts of a particular dispute where there is also a potentially conflicting interpretation of the PSC.

Part II examines specific Chinese legal doctrines which were available at the time of the *Wang Hong* case to the trial and appellate courts in resolving the factual dispute. The objective of Part II is to apply Chinese legal doctrine to the facts of the *Wang Hong* case in a carefully organized and methodical manner, considering the arguments of both parties. Generally, Chinese court opinions do not address the losing arguments, nor do they typically explain why the losing arguments were not as persuasive as the winning arguments. Considering the arguments, facts, and law presented by both parties is the crucial step in formal legal analysis, though it is rarely taught in Chinese legal education. Part II begins with an examination of Chinese defamation law available to the courts. The Article next examines Chinese law regarding consumer protection.

Because no Chinese legislation or prior court pronouncement had discussed the intersection of potentially conflicting defamation law and consumer protection law presented when a consumer criticizes a product publicly, the *Wang Hong* case presents an interesting situation in terms of the development of the rule "of" (or "according to") law itself. Defamation law is primarily judge-made law in China, while the consumer protection provisions are primarily statutory.[18] Because both the trial and appellate courts applied and extended the

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16. Bryan P. Werley, *Aussie Rules: Universal Jurisdiction over Internet Defamation*, 18 TEMP. INT'L & COMP. L.J. 199, 199–200 (2004).

17. *Wong Hong*, Beijing Interm. People's Ct.

18. *See* JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK 519–62 (2d ed. 2005) (discussing China's consumer protection law); Fort & Junhai, *supra* note 9, at 1588–90 (describing Chinese defamation law).

judge made defamation law while virtually ignoring the statutory consumer protection law, a U.S. observer might conclude that the case presented a *Marbury* moment (rule "of" rather than "according to" law) or its corollary, the dreaded specter of judicial activism. The legal analysis Part concludes by examining various interpretations of the Chinese legal system's approaches to conflicts between judge-made law and statutory law, discussing differences between civil and common law systems, whether interpretations of the Supreme People's Court (SPC) trump statutes enacted by the National People's Congress (NPC).

The Article next examines whether extra-legal factors such as *guanxi*, the business decision to sue, protection of corporations generally from calls for boycotts on the internet, or the internet control campaigns of that era by the Party and state may have affected the case. The final Part addresses the problems shared by all legal systems in developing and maintaining judicial legitimacy and independence in times of popular political panic or pressure and suggests some concrete strategies for judges faced with such problems.

Analyzing this case has been a significant learning experience for me. As a legal scholar, I have accepted a number of different interpretations and conclusions about the case, ranging from a simplistic view that the case was strictly politics dressed up as law, to a more nuanced and, I hope, balanced view about the uses of "law" in the context of contemporary Chinese society. As a relative newcomer to the study of law in China, having only worked on this vast, complex, and rapidly changing system for the past ten years, beginning with a simple case-note seemed appropriate. The case-note format is traditionally used in U.S. law schools as the initial training exercise for legal scholarship. I have tried to approach the case with a beginner's mind. I have benefited greatly from criticism and comments from leading Chinese legal scholars, as well as from U.S., British, and European China-law experts. Because my command of written Chinese language is inadequate, I have relied on translations of the Chinese materials.[19]

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19. Where available, I have used the official translations provided by the People's Republic of China. Where no official translation is available, I have relied on translations by my graduate students in China. They are native Chinese speakers with excellent command of legal English. My methodology was to have at least three different graduate students (two in law, one trained in English translation) who did not know each other to each separately translate the material. I then reconciled any discrepancies in translation with a fourth and, if necessary, fifth bilingual native Chinese speaker. Any mistranslations are entirely my responsibility. Serious scholars should verify for themselves the accuracy of critical translations. Chinese text versions of the materials are on file with the Vanderbilt Journal of Transnational Law or available from me directly.

II. FACTUAL SETTING OF THE CASE

The case involves an ordinary consumer, Wang Hong, who had no particular money or influence but was nevertheless sued for defamation by a Chinese computer manufacturer, Maxstation, which is a fairly large Chinese joint venture corporation involving some foreign investment, apparently from Taiwan, Japan, or both. (Obtaining reliable information about the corporation has proved difficult.) Wang Hong purchased a computer from Maxstation, had difficulties with the screen, took it for repair, and had numerous difficulties during the repair process.[20] Wang Hong posted a lively criticism of the computer and its service providers on an internet bulletin board. His most controversial statement that ultimately led to liability was that the Maxstation computer was "as soft as tofu" (roughly meaning it was a piece of junk). Many other disgruntled consumers added postings calling for a boycott of Maxstation products.[21] Two magazines, which have both online and hard copy circulations reported, on the postings. Maxstation alleged that sales of computers dropped dramatically and successfully sued Wang Hong and the two magazines for defamation. The trial court awarded damages for Maxstation against Wang Hong in the amount of 500,000 yuan ($60,240), while the two magazines were each ordered to pay 240,356 yuan ($28,960).[22] On appeal, the decision against Wang Hong and the magazines was affirmed; however, the damage award against Wang Hong was reduced to 90,000 yuan ($11,000), while damage awards against the two magazines were eliminated.[23] Three months after the appellate decision, Wang Hong was ordered by the enforcement court to pay the fine. He was unable to do so and was briefly jailed. His lawyer, a Peking University Law School junior faculty member, paid the fine personally and freed Wang Hong from jail.

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20. Sheng, *supra* note 6, at 9.
21. Fort & Junhai, *supra* note 9, at 1593–94.
22. *Id.* at 1593.
23. *Id.*

Wang Hong[24] purchased a Maxstation[25] SLIM-I laptop[26] from Beijing Zhaonguancum Anteming Technology, Inc. (Anteming), a computer retailer, on August 5, 1997, for 14,200 yuan ($1,710). Maxstation provided a three year guarantee, including a one year guarantee for parts and labor.[27] The following June, Wang Hong took the laptop to the dealer, Anteming, to repair the screen, which was allegedly shaking.[28] Anteming sent the laptop to Maxstation for repair without a copy of the certificate of guarantee. Maxstation informed Anteming that repair would cost 7,300 yuan, writing "no repair without certificate" on the work order.[29] When Anteming in turn informed Wang Hong that the repair would cost 7,300 yuan, Wang Hong was, in the words of the No. 1 Intermediate People's Court of Beijing, "not satisfied with the result."[30] Wang Hong maintained that repair within the first year should have been covered under the warranty.[31] Anteming maintained that the warranty was issued by Maxstation, and the dealer had no duty to repair. Anteming retained the laptop.

On June 9, 1998, Wang Hong posted an article on the Sitong Lifang internet bulletin board entitled "How I was Cheated when I bought a Maxstation Product."[32] Two days later, Wang Hong filed a complaint with the Haidian Consumers' Association. By July 2, 1998, Maxstation offered to repair Wang Hong's laptop for free through the Haidian Consumer's Association, but the company wanted Wang

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24. Wang Hong was a resident of the Beijing suburb of Hebei. *See* Sheng, *supra* note 6, at 9. He is an individual consumer with no particular power, wealth, connections, or fame until the dispute in question arose. *See id.*

25. Despite the remarkable similarity of names, Maxstation has, to the best of my knowledge, no business relationship with the better known MacStation manufactured by Apple Computer. *See* Hooper, *Consumer Voices*, *supra* note 11, at 101. Maxstation is a mainland Chinese computer manufacturer. *Id.* To my knowledge, Apple Computer has not challenged the Chinese company for deceptive brand labeling, in which the imitating of brand names, such as "Panonsic" or "Panasoic" for the prestigious Japanese brand "Panasonic," has laid a ready trap for more gullible newcomers to global consumerism.

26. Sheng, *supra* note 6, at 9. The laptop had 16M EMS memory and a 1.3G hard drive. Wang Hong purchased the laptop with the assistance of Wang Licheng, manager of the Kehua Computer Company, which initially caused some legal confusion regarding exactly to whom the guarantee applied. It was later clarified that Wang Hong was the actual buyer and thus the beneficiary of the guarantee.

27. The guarantee required the buyer to complete a registration form, which Wang Hong did, mailing it back to Maxstation.

28. Sheng, *supra* note 6, at 9.

29. *Id.* It is not clear to me whether Anteming then asked Wang Hong for a copy of the guarantee. It is also not clear to me why Anteming could not verify the date of purchase through its own business records, or why Maxstation had no copy of the registration of the warranty Wang Hong mailed in August 1997.

30. Max Computer Station Inc. v. Wang Hong, Life Times & PC World, Case No. 1438 (Beijing No. 1 Interm. People's Ct., 2000) (on file with Author).

31. *Id.*

32. Fort & Junhai, *supra* note 9, at 1591.

Hong to make an apology.[33] Wang Hong agreed, faxing an apology to Maxstation stating,

> [B]ecause I had only got in touch with the agency, but not connected with Maxstation in time, I wrote the above article without knowing clearly about some of the factors mentioned above. The article infringed Maxstation's right to reputation, and the writer apologizes to Maxstation faithfully.[34]

Maxstation rejected the apology on the grounds that it should have been longer and asked Wang Hong to post it on the internet. Wang Hong refused.

On July 3, 1998, Wang Hong posted another internet article, "Never Give In."[35] This article stated: "Your laptop breaks frequently, the speed is extremely slow, the temperature is too high to touch, and the laptop is weak and as soft as tofu. This kind of product, compared to other brands, is nothing but rubbish."[36]

On July 24, Wang Hong retrieved his unrepaired laptop from Anteming, discovering that sixteen megabytes of extra memory had been removed. The same day, he received an email from a lawyer named "Lei Ming" allegedly from the Beijing Tiandi Law Firm, claiming to represent Maxstation and threatening Wang Hong with legal action.[37] Wang Hong posted an internet article answering the lawyer on July 26. He then opened a personal web page named "Condemning Maxstation and Protecting Consumer Rights" on which he reprinted his earlier articles and encouraged readers to sign their names to condemn Maxstation.[38]

Two online consumer magazines, *Life Times* and *Computer World Weekly*, picked up the controversy. On July 28, *Life Times*' reporter ZhengZhi wrote about the dispute, stating at the end of the article "[a]ccording to the internet, most consumers thought that Maxstation products had problems and that Maxstation took an irresponsible

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33. *Id.* at 1591–92.

34. Max Computer Station Inc. v. Wang Hong, Life Times & PC World, Case No. 1438 (Beijing No. 1 Interm. People's Ct., 2000) (on file with Author).

35. Sheng, *supra* note 6, at 9.

36. I have been assured by numerous native Chinese speakers, who claim extensive knowledge of all current and archaic Chinese curses, that comparing something to tofu is very common, mildly insulting, involves no swearing, and has no particular double meaning. Most agree it is approximately the English language equivalent of saying something is a "piece of junk." Perhaps some native Chinese speakers believe a closer translation is a "piece of shit." The latter translation has generated some dispute among my Chinese linguists. My best estimate it that the phrase is somewhere between "junk" and "shit," but certainly no stronger language than the latter.

37. The Beijing Tiandi Law Firm said during discovery that it knew of no such lawyer. The appellate court noted that the sender of the so-called letter from lawyer Leiming is unclear. *Wang Hong*, Beijing Interm. People's Ct.

38 LAWINFOCHINA, Wei Nanzhi, *Maxstation Notebook Case*, http://www.lawinfochina.com/ dispecontent.asp?ID=37&DB=4.

attitude to the consumer, which constituted a violation of consumer rights."[39] The article also noted that Wang Hong's web page was full of support for Wang Hong and condemnation of Maxstation from consumers all over China.[40] *Computer World Weekly*'s article, published August 10, merely quoted from Wang Hong's articles (including the soon to be infamous tofu comparison) but contained no additional reporting or editorializing of its own.

On August 12, Wang Hong contacted Maxstation about the missing sixteen megabytes of memory. Maxstation wrote to Wang Hong stating that it had never refused to repair the laptop and that the dispute between individuals had nothing to do with the repair. Maxstation asked Wang Hong to bring the computer in for repair, which Maxstation completed without charge, returning it to Wang Hong on August 26, 1998.[41] Eight months passed, apparently without further incidents.

In April 1999, Maxstation sued Wang Hong and the two online magazines, *Life Times* and *Computer World Weekly*, for defamation in the Grassroots People's Court of Haidian District, Beijing.[42] The presiding judge at trial was one of China's best known and most respected jurists, Chen Jiping, who was promoted from the Grassroots People's Court directly to the SPC shortly after the Wang Hong trial decision, while the case was still pending in the Intermediate Appellate Court.

The trial court found all three defendants liable for infringing Maxstation's right of reputation.[43] Wang Hong was ordered to pay Maxstation 500,000 yuan ($60,240) in damages. *Life Times* was ordered to pay 240,356 yuan ($28,960) and *Computer World Weekly* was ordered to pay 240,356 yuan ($28,960).[44] All three defendants were ordered to apologize to Maxstation. The apology was subject to prior court approval, to be published on the internet. *Wang Hong* was ordered to refrain from future infringement of Maxstation's right of reputation and to delete all the content of his web page.[45]

The Chinese internet erupted in a firestorm of protest. Wang Hong supporters filled the bulletin boards and chat rooms with criticism of Maxstation and the trial court's award of outrageously high damages. Popular perception was that a large and powerful corporation was using the legal system to bully a small individual

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39. Zheng Zhi, *The Consumers Claimed the Dispute through the Internet and the Businessman Issued the Lawyer's Letter by Email*, TIMES OF LIFE, July 28, 1998.

40. *Id.*

41. Fort & Junhai, *supra* note 9, at 1593.

42. Sheng, *supra* note 6, at 9.

43. Max Computer Station Inc. v. Wang Hong, Life Times & PC World, Case No. 3538 (Haidan Dist. People's Ct., Beijing 2000) (on file with Author).

44. Total damages awarded to Maxstation by the trial court were 980,712 yuan ($118,160). *Id.*; Sheng, *supra* note 6, at 9.

45. *Wang Hong*, Haidan Dist. People's Ct.

consumer. Another common theme was that Maxstation had "won the battle but lost the war." The amount of negative publicity regarding Maxstation's difficulty with customer relations was thought to far outweigh any possible recovery of damages. Someone even hacked into Maxstation's website, filling the site temporarily with a black screen and the words "won the battle but lost the war" in red. During this period, the meeting at Peking University which first called the case to my attention occurred.

Peking University Law School doctoral student and Party member Sun Hailong undertook representation of Wang Hong pro bono on appeal. The No. 1 Intermediate People's Court of Beijing[46] affirmed the Grassroots People's Court finding that the defendants had infringed Maxstation's right of reputation. The court required public apologies from all three, but it reduced the damage award against Wang Hong from 500,000 yuan to 90,000 yuan ($11,000) and eliminated altogether the damages awarded against the two online magazines.[47] The appellate court found that Maxstation had failed to provide sufficient evidence of damages on the grounds that purchase returns to its agents, relied on by the trial court, were not necessarily caused by Wang Hong's defamatory comments.[48]

Wang Hong was unable to promptly pay the 90,000 yuan. Three months later, in a remarkably efficient[49] enforcement proceeding on March 15, 2001, Consumer's Day, Wang Hong was sent to jail for contempt of court because of his failure to pay the damages. His lawyer, Sun Hailong, concerned about Wang Hong's well-being in jail, managed to personally pay the 90,000 yuan on Wang Hong's behalf, persuading the enforcement judge to stay late to accept the paperwork. Wang Hong's jail time was thus limited to one night. Wang Hong, understandably, refuses any comment or contact regarding his case. Maxstation's lawyers have also declined to comment. With the trial court judge promoted to the SPC, there were no further appeals filed.

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46. *Wang Hong*, Beijing Interm. People's Ct.

47. Fort & Junhai, *supra* note 9, at 1593. Costs of litigation were apportioned as follows: audit fee, 8,000 yuan to Maxstation; first trial fee of 100 yuan, 50% to Wang Hong, 25% to each magazine; second trial fees were the same. *Wang Hong*, Beijing Interm. People's Ct.

48. *Wang Hong*, Beijing Interm. People's Ct.

49. "Enforcement of civil judgments and arbitral awards is notoriously difficult in China, with as many as 50 percent of judgments and awards going unenforced." PEERENBOOM, CHINA'S LONG MARCH, *supra* note 2, at 287.

III. DEFAMATION LAW

Defamation lawsuits are designed to protect reputation through awards of civil damages which presumably deter false speech.[50] Defamation lawsuits are also a traditional mode of asserting political and social control. Massive damage awards, even the specter of potential awards, are an effective device in restraining media worldwide. China is no exception.[51]

Current Chinese defamation law dates to 1993, when the SPC issued an extensive commentary on the "right to reputation," which delineates civil defamation standards in the People's Republic of China (PRC).[52] Prior to 1993, the 1982 constitution protected an individual's right to be free from insult, libel, false charge, or frame-up in Article 38.[53] However, because Chinese law does not permit direct enforcement of constitutional rights, it was not until the enactment of Articles 99-101 of the civil code that defamation suits became more common.[54] In the 1993 "Reply on Several Problems in Trying Cases relating to the Right to Reputation," the court established detailed guidelines for the lower courts in deciding civil defamation cases:

> The 1993 Reply specifies that if derogatory words are used in a statement, it is defamatory even if the statement is true. There is no

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50. *See, e.g.*, Arlen Langvardt, *A Principled Approach to Compensatory Damages in Corporate Defamation Cases*, 27 AM. BUS. L.J. 491, 494 (1990) (discussing U.S. law).

51. Josephs, *supra* note 12, at 191. Even before the democracy movement, new constraints on the media had already emerged in the form of defamation suits (both civil and criminal defamation) against reporters and the newspapers or journals that employed them. *Id.* at 193. As with its economic reform policy generally, the Chinese government communicates a mixed message to the public. *See id.* On the one hand, it placates the lower classes by allowing journalism to flourish. *See id.* This stance is consistent with the government's tolerance (even encouragement) of consumerism, which is intended to serve as a substitute for greater political participation. *See id.* On the other hand, the government tries to maintain a high moral tone and ideological purity, at least in official publications. *See id.* In this manner, as in other sectors of the economy, the government permits a market fringe to expand around a core of activity that remains under state control. *See id.*

> Critical media coverage has also spawned a significant volume of defamation litigation, much of it apparently intended to silence the media. Editors and journalists comment that economic risks arising from critical reporting, in the form of potential defamation lawsuits, are now as significant as the risk of sanction by propaganda departments, and potential defamation litigation is a significant concern of journalists. The vagueness of existing law on defamation is one reason.

Liebman, *supra* note 13, at 53.

52. Fu & Cullen, *supra* note 12, at 8–22. Defamation can be a crime, as well as a civil wrong. *Id.* at 1. Criminal defamation has often been used as an instrument of political control, and civil defamation can also be put to such uses. *Id.* However, criminal defamation actions are much less frequently pursued than civil actions. *Id.*

53. XIAN FA art. 38 (1982) (P.R.C).

54. Josephs, *supra* note 12, at 196; *see supra* text accompanying notes 21–23.

> defense when an individual is called a "bastard," "shameless," or "presumptuous," a "mad dog," a "monster," or a "hooligan," "Mickey Mouse," or when police officials are called "rotten," or "human scum."[55]

Both natural and corporate legal persons are protected from infringement of the right to reputation; companies whose products have been disparaged have received substantial awards where false claims of low quality or high price products have resulted in serious economic loss.[56]

Chinese defamation law prior to the Wang Hong case involved issues of whether the statement was insulting (derogatory or injurious to feelings) and whether the statement was false. In the limited number of prior cases available in English, these were arguably two different aspects of defamation law. Natural persons, under the prior cases, could recover for insults which injured their feelings and involved derogatory language ("monster," "hooligan"), while the two reported product disparagement cases involving corporate legal persons[57] required that the allegedly defamatory statements be false. Section 8 of the Court's 1993 guidelines also seems to support the proposition that the allegedly defamatory statements must be materially false, and comments which are mostly true will not support a defamation case, even where they are not precisely, literally true.[58] Exaggeration, where there is some factual basis for the statements, has also been accorded considerable leeway in the Chinese case law.[59]

In the *Wang Hong* case, therefore, two distinct issues arise regarding whether his statements constitute actionable defamation under prior PRC law. The first issues is whether the language disparaging Maxstation's product was essentially false. The second issue is whether the language used was derogatory, insulting, or injurious to feelings. Both the trial and the appellate court found sufficient evidence of both falsity and insult to warrant liability for Wang Hong and the online magazines.

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55. Fu & Cullen, *supra* note 12, at 9 & n.40.

56. *Id.* at 11 & n.48 (citing Case of Shanghai Xingya Medical Rubber Factory and Case of Zhonghua Renmin Gongheguo Falu Fenlei Zonglan).

57. Fu & Cullen, *supra* note 12, at 9.

58. *Id.* at 16. Fu & Cullen discuss a case in which no defamation was found after a report was issued claiming that three cadres feasted on public money, spending 117 yuan when in fact, the actual amount spent was 112 yuan. *Id.* at 16–17. Essentially, this policy means that all facts do not have to be exactly true. *Id.* at 16.

59. *Id.* at 17. For example, a Hong Kong businessman's defamation suit failed despite the fact that his activities had been identified as *Azhapian* (fraud) when in reality, he had engaged in *Aqipian* (misrepresentation), which is not a criminal offense. *Id.* Another case failed where the reporter stated that a factory was full of flies when in fact, only a few flies had been found. *Id.*

A. *Omission of Facts as False Speech*

The false information identified in the courts' opinions emphasizes that Wang Hong only told half the story. There is no indication that the courts found any statement made by Wang Hong to be untrue; rather, the falsity arose from his omissions. The court found the failure to include additional facts, rather than the falsity of the facts contained in the statements, to constitute sufficient falsity to warrant liability. I have found no prior case in Chinese law where falsehood due to omission of facts constituted defamation by either a media defendant or an individual.

The trial court found that Wang Hong's internet postings did not set out the entire procedure "objectively and comprehensively" and that the article "used insulting words, the purpose of which was not to resolve the dispute in good faith."[60] The appellate court agreed with the trial court's analysis of the evidence and found that "Wang Hong only told part of the story . . . but he didn't describe thoroughly the other part of the story. . . . On the contrary he summarized this process as a big cheat. So this article is partially untrue in the basic content."[61] The appellate court also emphasized that Wang Hong called on other consumers to boycott Maxstation's products and that he did not take timely steps to clarify the relevant facts.[62] The evidence of falsity relied on by both courts focuses on the fact that Wang Hong's internet posting did not include Maxstation's side of the story, which would include the fact that no certificate of guaranty was presented at the time the repair was requested and that there was no direct contact with Maxstation as opposed to the retail seller's repair facilities.

1. Consumer Versus Media Omissions of Facts

The courts' insistence on objectivity and presenting both sides of the story seems odd in the context of speech by an individual. While these are certainly aspects of good, professional journalism, the courts' requirement appears to demand a level of professionalism in reporting that one would not ordinarily expect from an individual consumer who may not even understand the fine print of a warranty in the first place. The courts do not even mention the basic components of Wang Hong's complaint, that the laptop was defective (shaking screen) and that he got the run around when he tried to have it repaired; both claims were apparently accepted by the courts as basically true. Nor did the courts appear to give any weight whatsoever to the fact that

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60. *Wang Hong*, Beijing Interm. People's Ct.
61. *Id.*
62. *Id.*

Wang Hong tendered an apology to Maxstation, which the company rejected.

Placed in the context of other Chinese defamation cases involving professional journalists (who might be held to a higher standard of objectivity) and in which fairly serious factual matters were reported erroneously, it seems Wang Hong was held to an unusually high standard of objectivity. One earlier case, for example, erroneously reported that a newly recruited serviceman had been convicted of gang rape and theft, when in fact he had been arrested for, but not convicted of, the lesser crimes of theft and hooliganism.[63] That court found that the defamation suit failed because there was "no substantial difference" between a bad police record and a criminal record.[64]

> In these cases, the courts allowed the press to exaggerate the facts provided that the statement has some factual basis. Where the plaintiff had committed a wrong which was of the same nature as the wrong described in the statement, the statement would not be defamatory. The courts according to the Chief Justice of the Supreme People's Court, were balancing the right to protection of reputation and the right of free expression and especially the right to criticize unlawful and immoral activities.[65]

It might be possible to distinguish the earlier cases on the theory that the press has greater latitude to publish exaggerated or partially erroneous statements than does an individual. As a policy matter, one could argue that the chilling effect of damage awards for minor falsity would undermine the economic and journalistic vitality of the press, while individuals need to be held strictly accountable for their statements if damage to another's reputation occurs.

Media in China have historically played a special role as an arm of the Party and state, with special duties to disseminate the official Party positions on issues. More recently, Chinese media have increasingly developed investigative journalism, enhanced by their "supervision" role, including uncovering wrongdoing by Party and state officials at the local level. Professor Liebman's thorough analysis of the special role of Chinese media explores these issues and their impact on the Chinese judicial system.[66]

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63. Fu & Cullen, *supra* note 12, at 17.
64. *Id.*; Liebman, *supra* note 13, at 154–55.
65. Fu & Cullen, *supra* note 12, at 18.
66. Liebman, *supra* note 13, at 1.

> Party-state attempts to curb official corruption and malfeasance, the interests and ideals of individual journalists, and the weak institutional position of China's courts have combined to position the media as influential actors. The media have benefited from a system that provides significant incentives to explore new territory even as they continue to face extensive constraints.

Thus, while a legal policy which provides greater protection for false media speech than false speech by an individual consumer seems odd to the Western eye, from the Chinese perspective it might make sense. Certainly media are easier to control through the web of statutes, licenses, regulations, and Propaganda Department oversight than vast numbers of individual consumers. However, in the context of consumer disparagement of allegedly defective products and services, the public interest served by unfettered expression by consumers clearly serves important social goals of providing market discipline.

A good indication that the *Wang Hong* case did not involve the creation of a two-tier standard, with individuals held to a higher standard of objectivity than the press, is that both the trial and the appellate court found the two online magazines liable for defamation under essentially the same standard as applied to Wang Hong himself.[67] While the *Life Times* report added some observations regarding the general response on the internet to Wang Hong's complaints,[68] *Computer World* merely quoted excerpts of Wang Hong's postings. Both were treated as equally culpable by the courts.[69] The trial court awarded the same amount of damages against each, and the appellate court found both liable for defamation but overturned the trial court's award of damages.[70]

The appellate court opinion states:

> As the press media, Life Time and Computer World should obey the principles of objectiveness, justness and fairness, and have a deep and delicate collection of the news that they reported. But in reporting this matter, Life Time and Computer World took the message from the Internet as the main source of the news, and they did not have deep collection and strict review. In their report, they did not tell the reader some important facts, such as that Wang Hong failed to carry out certain procedures when he bought the computer, which is essential for post-purchase service claims, and Wang Hong did not get in touch with Maxstation directly before he published this article. So objectively, Life Time and Computer World also caused bad influence to the commercial reputation of Maxstation and they should be liable for the above results. The trial court did not err in assessing liability against Wang Hong, Life Time and Computer World.[71]

There is no indication in the reported opinion whether the court took evidence on whether the two media defendants had contacted

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Id. at 154. "The role of the media reflects the Party's twin goals of maintaining control and legitimacy by appearing to be responsive to popular views and grievances." *Id.* at 155.

67. *See Wang Hong*, Haidan Dist. People's Ct.

68. Zheng Zhi, *supra* note 39.

69. *Wang Hong*, Haidan Dist. People's Ct.; *Wang Hong*, Bejing Interm. People's Ct.

70. *Wang Hong*, Haidan Dist. People's Ct.; *Wang Hong*, Bejing Interm. People's Ct.

71. *Wang Hong*, Haidan Dist. People's Ct.

Maxstation prior to publication, or whether the media defendants offered Maxstation an opportunity to respond to Wang Hong's charges. If, in fact, Maxstation was offered an opportunity to comment and declined, that evidence would normally insulate a media defendant which merely recounted that a consumer was complaining publicly. If, on the other hand, the media defendants neglected to contact Maxstation for comment prior to publication, there is certainly support for a claim of negligence in reporting. The courts' emphasis, however, seems to be not on the question of whether the media contacted Maxstation prior to publication to offer an opportunity for rebuttal, but whether Wang Hong did.[72] Thus it appears that the courts are requiring an individual consumer's speech to conform to journalistic best practices.

Why is truth not a defense in Chinese defamation law? To my knowledge, neither court ever actually took evidence on whether the laptop screen was "shaking" as Wang Hong initially alleged. Nor did either court attempt to distinguish between statements of fact (defective screen) and statements of opinion (poor product, poor customer service). The 1993 interpretation of the PSC indicates that truth may not be a defense for that portion of defamation law which involves injury to feelings and derogatory language.[73] But for defamation based on falsity, it seems that the truth of the statements should be relevant.

2. Fact Versus Opinion: Comparison with Other Nations' Legal Standards

The statements made by Wang Hong were arguably not statements of fact at all but rather expressions of his opinion: the product was "a piece of junk."[74] For a Western observer, it is difficult to understand why an expression of opinion would be treated as if it were a statement of fact. Merely expressing one's opinion, even in vivid language, would not give rise to formal legal liability in the U.S. legal system.[75] U.S. culture and law both recognize wide latitude for opinion and tend to dismiss it as relatively unimportant. "That's just your opinion," or "just my opinion" are common phrases in U.S.

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72. *Id.*; *Wang Hong*, Bejing Interm. People's Ct.

73. Fu & Cullen, *supra* note 12, at 9.

74. Sheng, *supra* note 6, at 9.

75. Although U.S. courts traditionally distinguished between statements of fact and statements of opinion, this sharp dichotomy has been subject to much criticism. *See* David G. Post, Jefferson's Moose, Remarks at the Stanford Law School Conference on Privacy in Cyberspace (Feb. 7, 2000).

culture. Similarly, U.S. law does not recognize mere expressions of opinion as grounds for a legal action of defamation.[76]

The U.S. legal tolerance for expressions of opinion has had considerable influence in non-Western jurisdictions. "Numerous countries have, in varying degrees, embraced New York Times's actual malice doctrine, including Argentina, Bosnia, Hungary, India, Pakistan, the Philippines, and Taiwan." [77] Other jurisdictions, including some common law regimes which are normally very similar to the United States' legal standards, have rejected this approach. "Several jurisdictions, including Australia, Canada, South Korea, and the United Kingdom, have expressly rejected the New York Times actual malice standard, choosing instead a different tack to accord protection . . ."[78] Japan has taken a middle-of-the-road approach to the question.[79]

Tolerance of differences in opinion may be quite different in some East Asian cultures, aside from the special problems of the unified Party and state of China. Traditional Asian cultures often place very high value on harmony. Thus, expressions of negative opinions are potentially more difficult to tolerate in Asian cultures than in many Western cultures, where individualism is tolerated and even encouraged.[80]

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76. *See, e.g.*, James E. Stewart & Laurie Michelson, *Pure Opinion: Is Ollman v. Evans Making a Comeback?*, 21-WTR COMM. LAW 9 (2004).

> Courts have long agreed that "pure opinion"—statements that cannot be proven to be either true or false–cannot be actionable in a defamation case. They have not agreed, however, on the analysis to be used in determining whether the challenged speech constitutes protected opinion or potentially actionable statements of fact . . . . Just a few years later, however, in *Milkovich v. Lorraine Journal*, the U.S. Supreme Court reworked the law of opinion and declined to focus on a list of factors. Instead, the Court condensed the analysis into requiring a determination of whether the challenged statements stated actual facts about the plaintiff that could be proven true or false, without providing specific guidance to the lower courts on how that crucial determination should be made. In *Milkovich*'s wake, courts have been grappling with this essential distinction ever since.

77. Kyu Ho Youm, New York Times v. Sullivan*: Impact on Freedom of the Press Abroad*, 22-FALL COMM. LAW. 12 (2004).

78. *Id.* at 14.

79. *Id.* at 16.

80. Gross generalizations about East Asian Confucian influences are ill-advised, as there are significant differences over time, and between various East Asian cultures. *See, e.g.*, Chaihark Hahm, *Law, Culture, and the Politics of Confucianism*, 16 COLUM. J. ASIAN L. 253, 268 (2003).

> Given the enormous diversity–intellectual, geographical, and historical–found within the Confucian tradition itself, we must start with smaller agendas. At a minimum, discussions of Confucianism should be country-specific, for we cannot expect Confucianism to have the same (or even similar) status, function, or value among the people of China, Korea, Japan, and Vietnam . . . . Even within one country, we must be mindful of the fact that Confucianism . . . is stronger or

While recognizing the potential for cultural differences, several East Asian jurisdictions nevertheless protect some vivid expressions of individual opinions from legal liability under defamation law. Hong Kong law, drawing from the British tradition, focuses on whether the comment was fair. Defamation litigation in Hong Kong was relatively rare (primarily involving film personalities) until the return of sovereignty to mainland China, and even since the return, Hong Kong's leaders have been restrained in their use of defamation lawsuits.[81] Japan and South Korea recognize truth as a defense to defamation lawsuits.[82] Taiwan's standards require proof of actual malice.[83] Even Singapore's infamously repressive speech regime focuses on protection of security and order by limiting criticism of government officials or protecting important cultural values through the suppression of pornographic speech.[84] Consumer speech critical of a corporation's products or services does not appear to be a subject for defamation liability under any of the other East Asian legal systems.[85]

With the special restrictions of the Party and state in China, diversity of opinion becomes even more problematic. Chinese Party

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> more respected in some regions than others. Also, discussions of Confucianism must be issue-specific . . . . It is therefore unhelpful to speak in general terms about Confucian political culture or legal culture.

But see Kyu Ho Youm, *Libel Laws and Freedom of the Press: South Korea and Japan Reexamined*, 8 B.U. INT'L L.J. 53, 55–56 (1990).

> Koreans and Japanese perceive their reputational interests "in relation to the groups to which they belong." In other words, instead of viewing a defamatory statement as a harm to the "general social relations" of an individual, Koreans and Japanese consider the statement a "loss of face" to the individual's "familial" group on the basis of their Confucian tradition. The Confucian concept of defamation is reflected in the administration of the libel laws in both Korea and Japan.

81. *See* Jill Cottrell, *Fair Comment, Judges and Politics in Hong Kong*, 27 MELB. U. L. REV. 33, 43 (2003).

82. Youm, *supra* note 80, at 57, 62 (noting that under Japanese libel law, truth is recognized as a defense to defamation related to the public interest, but not ordinary defamation).

83. *See, e.g.*, Youm, *supra* note 77, at 13–14 ("The actual malice rule was recognized in Taiwan's criminal libel law which shows judicial attention to the growing international standard for the "state of mind" and "good faith" belief in the truth of libelous statements.").

84. Scott L. Goodroad, *The Challenge of Free Speech: Asian Values v. Unfettered Free Speech: An Analysis of Singapore and Malaysia in the New Global Order*, 9 IND. INT'L & COMP. L. REV. 259, 287–90 (1998).

85. Indeed Singapore's model, much admired by many Chinese Party and state officials, provides strict control over speech threatening public or political stability, while providing a more open forum for economic or commercial activity. *See* Kanishka Jayasuriya, *The Exception Becomes the Norm: Law and Regimes of Exception in East Asia*, 2 ASIAN-PAC. L. & POL'Y J. 108, 121 (2001). "The rule of law, the Singaporean leaders argue, is one of the defining features of the Singapore state, but it is a legalism that applies selectively to the economic or commercial sphere. The political arena, however, is regulated by executive prerogative power." *Id.*

and state officials "remain suspicious of the value of public debate or the existence of alternative voices. . . . [A]lthough public opinion is increasingly finding voice, it is carefully managed. . . . As one scholar commented, "In China, we fear disagreement, and we do not trust common people to use their own judgment."[86]

3. Remedies for False Statements of Fact

a. Injunctive Relief

If, in fact, the central problem with Wang Hong's actions was the omission of additional facts favorable to Maxstation, the appropriate remedy would be to allow Maxstation to post a rebuttal telling its side of the story and providing the missing facts. Perhaps an injunctive remedy could require Wang Hong to permit a hyperlink on his webpage so that viewers could obtain both sides of the story rather than just his version. This type of remedy, while infringing on Wang Hong's ability to speak, is a much less drastic remedy than heavy damage awards, which will chill his speech entirely, or injunctive relief requiring him to close his webpage altogether. The old saying, that the cure for bad speech is more speech, seems particularly appropriate where the speech is "bad" because of omissions.

A conclusion that omitting facts constitutes false speech for defamation purposes is particularly dangerous in its impact on future speakers. It will be difficult for ordinary consumers to anticipate the various factors, not to mention excuses, offered by corporations being criticized for providing allegedly substandard products or services. Technical knowledge, understanding of customary business, and legal practices are often outside the realm of ordinary consumers. Those in the best position to offer missing facts are the ones in the corporation itself; they have a deeper understanding of the product and services offered.

The courts should place the burden of telling the corporation's side of the story on the corporation itself, who is in the best position to tell it. Placing that burden on individual consumers is inefficient. On the other hand, for the courts to require a disgruntled consumer to include a "right of reply" on his webpage, either through dedicated space or a hyperlink to the corporation's site, is a fair and efficient mechanism to ensure that future consumers have access to the full range of information about a particular product or service prior to purchase. It would allow the corporation to defend its reputation against disgruntled consumers who might unfairly represent the facts of a particular situation.

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86. Liebman, *supra* note 13, at 145–46.

b. Damages

Measuring a corporation's monetary damages for false statements of fact presents many difficulties. In the *Wang Hong* case, neither the trial court nor the appellate court opinion discusses in detail how the damage awards were actually calculated. The appellate court did, however, reject Maxstation's claim that all losses due to laptops being returned by customers should be compensated by Wang Hong on the ground that the alleged defamation did not necessarily cause all customer returns. The amount of the damages ordered by the trial court was substantial for an ordinary consumer to bear: 500,000 yuan ($60,532.69), while the two magazines were each ordered to pay 240,356.8 yuan ($29,098.89).[87] The appellate court reduced the damages awarded against Wang Hong to 90,000 yuan ($10,895.88) and eliminated the damage awards against the media defendants.[88]

The corporation's actual injury (compensatory damages) might be calculated as the total decline in sales (gross or net) or perhaps decline in profits (gross or net) during the period in which the false speech occurred. Whether measured by declining sales or profits, there is a substantial likelihood of a windfall for the corporation because of the difficulties of proving causation, as the appellate court recognized.[89] To what extent were corporate declines due to the false speech of the defendant, and to what extent were declines attributable to other market forces unrelated to the speech? Declining market share may be due to the entry of new products or competitors, changing consumer tastes, or other factors totally unrelated to the speech. Complex economic models presented by each side could perhaps assist the judge in determining which portions of the corporate decline could fairly be attributable to the false speech.[90]

In the alternative, the court may wish to use "presumed" damages. A corporate plaintiff falsely alleged to be in bankruptcy by a credit reporting agency, for example, was awarded $50,000 in presumed damages under U.S. law.[91] The doctrine of presumed or general damages as applied to a corporate plaintiff (rather than a

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87. *Wang Hong*, Bejing Interm. People's Ct.

88. *Id.*

89. *Id.*

90. Economic modeling by each party to the case to demonstrate evidence of causation in declining market share is widely used by U.S. courts in antitrust and shareholder derivative suits. *See e.g.*, Verizon Communications, Inc. v. FCC, 535 U.S. 467, 471 (2002) (noting that conflicting economic models were presented by the parties) I do not know whether such expensive technical evidentiary proof regarding causation in declining market share is typically used in defamation cases in the United States.

91. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985) (plurality opinion). The plurality Court also upheld a $300,000 award of punitive damages for a false statement of fact by the credit reporting agency. *Id.*

natural person) has been criticized under U.S. law.[92] A comparative analysis of the availability and measurement of damages for defamation against a corporation by a consumer or online media within the legal regimes of China's trading partners would also be very helpful.

B. *Insulting Words*

While the courts' opinions emphasize the falsity of Wang Hong's speech, the opinions also mention that Wang Hong used "insulting words;"[93] thus, it is necessary to analyze the derogatory language strand of Chinese defamation law. Under the 1993 standards issued by the SPC, where derogatory language is used truth is not a defense.[94] In the Wang Hong case, the statement included the comparison of Maxstation's product to tofu ("as soft as tofu") and to garbage.[95] Two issues are worth exploring: First, the underlying question is whether a corporation has the legal capacity to feel injured in a manner legally comparable to the hurt feelings of a natural person. Second, there is a question of whether a reasonable corporation would feel insulted by being compared to tofu and garbage. Underlying both aspects of the derogatory language law is the profound cultural differences in sensitivity to criticism (loss of face) between many Asian cultures and those of the West.

1. Injury to Feelings of a Corporation Versus a Natural Person

I was unable to discover any specific guidance from the PSC or from prior case law directly addressing the question of whether a corporation has the legal capacity to have its feeling hurt by insults. Thus, the *Wang Hong* case may be one of first impression on this issue. The admirable analysis of defamation cases performed by Professors Fu and Cullen indicates that prior cases alleging derogatory language all had natural, not corporate plaintiffs.[96] Comparative analysis of the legal standards used in other Asian jurisdictions with similar sensibilities regarding corporate loss-of-face and corporate reaction to criticism may also be of assistance. The cultural differences between Asian and Western concepts of "face" and sensitivity to criticism are significant, and this issue deserves serious scholarly exploration.

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92. Langvardt, *supra* note 50, at 492.
93. *Wang Hong*, Bejing Interm. People's Ct.
94. *Id.*
95. *Id.*
96. Fu & Cullen, *supra* note 12, at 9–10.

2. Damages for a Corporation's Injured Feelings

Assuming *arguendo* that a corporation could have injured feelings, it is difficult to hypothesize how to measure potential damages. False statements resulting in a loss of business can be more or less objectively ascertained through evidence at trial, although the causation of the lost business will be very difficult to measure because business can be lost due to false statements or to market downturns, new competitors, and general shifts in consumer preferences not related to the false statements.

Measuring damages caused by injured feelings to a corporation will prove even more difficult than measuring lost business. An individual whose feelings have been injured can testify about loss of sleep or appetite, physical and mental effects, and medical expenses resulting from the injured feelings. In theory, a loss of corporate morale could constitute the equivalent to injured feelings. The law has some experience measuring corporate goodwill, which might serve as a benchmark even though it is exactly the same as feelings. The task, however, will not be easy.

V. CONSUMER PROTECTION LAW

A. *Omission of Consumer Protection Statute from Courts' Opinions*

The importance of protecting a corporation's right to reputation must be weighed against the value of protecting robust consumer expression, which is often intemperate. However earnestly current Chinese policy seeks to separate the free marketplace from the free marketplace of ideas, where insults are directed at a corporate entity, the value of unfettered exchange of consumer opinion regarding products and services should be accorded significant weight under traditional market theories. What is most remarkable to the foreign eye about the *Wang Hong* case is that the courts proceeded as if the right to reputation of the corporation was the sole public policy to be considered.

As Professor Hooper has extensively analyzed, China has a vigorous and deep commitment to consumer rights, both legally and as a matter of public policy.[97]

> On consumer rights, the state has seen its own interests coinciding with those of individuals. The state has actively encouraged consumers to "stand up for their rights" as part of its efforts to improve the quality and reputation of Chinese products and to attack widespread economic

97. See Hooper, *Consumer Voices*, *supra* note 11, at 92.

> corruption emanating from both the private and state sectors. The consumer rights issue has also provided the government with an opportunity to gain a degree of endorsement, if not popular support, in an area where people feel particularly affected by which does not appear to challenge official authority.[98]

Neither court opinion mentions any of the various consumer protection laws, although counsel for Wang Hong assured me that these issues were in fact raised and vigorously litigated. The 1993 consumer protection statute explicitly states that its purpose is to protect the legitimate rights and interests of consumers.[99] The Consumer Protection Act provides very detailed and explicit statutory guidance for the resolution of consumer disputes, including the establishment of consumer associations to assist in dispute resolutions.[100]

In the Wang Hong case, the consumer protection system seemed to be operating at a very high level of efficiency. Wang Hong filed his complaint against Maxstation on June 11, 1998, with Haidian Consumer's Association in the district where the product had been purchased.[101] The Haidian Consumer's Association negotiated a settlement of the dispute within three weeks. By July 2, 1998, Maxstation offered to repair the laptop as required under the warranty if Wang Hong agreed to apologize for the first internet posting.[102] On July 3, 1998, Wang Hong agreed to apologize to Maxstation and faxed a written apology that same day. Maxstation rejected the apology on the grounds that it was too short.[103] It was at this point that the dispute escalated, with the mysterious "lawyer" Leiming writing to Wang Hong in an aggressive manner and Wang Hong responding by posting the now infamous tofu article.[104]

B. *Overview of Chinese Consumer Protection Statutes*

When the issue reached the formal judicial system, one option for the court was to treat the case as involving a consumer dispute that had unfortunately escalated, despite the best efforts of the Consumer Association. In considering the right to reputation issues raised by the plaintiff, the court might well have taken the specific statutory provisions of the Consumer Protection Act into consideration. There

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98. *Id.* at 96.

99. Law on the Protection of Consumer Rights and Interests ch. I, art. 1 (promulgated by Order No. 11 of the President of the People's Republic of China, Oct. 31, 1993, effective Jan. 1, 1994) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.).

100. *Id.* chs.V–VI.

101. *Wang Hong*, Beijing Interm. People's Ct.,

102. *Id.*

103. *Id.*

104. *Id.*

are several provisions of the statute which explicitly protect the consumer's right to information and expression.

Article 6 of the Consumer Protection Act, for example, appears to provide an affirmative defense to product disparagement, at least for the two online magazines: "Mass media shall conduct propaganda defending the legitimate rights and interests of consumers and, through public opinion, exercise supervision over acts infringing upon the legitimate rights and interests of consumers."[105] Although Wang Hong himself may or may not qualify as "mass media" in his role as webmaster of the controversial web page, the two online magazines would arguably fall within this statutory protection.

Three additional sections of the Consumer Protection Act provide protection for individual consumers acquiring and expressing knowledge or opinion about products. Article 9 protects the consumer's right to make comparisons, differentiations, and selections when making a free choice of commodities or services.[106] Article 13 explicitly protects the consumer's right to acquire knowledge concerning consumption and consumer rights. [107] Article 15 protects the consumer's right to criticize or make proposals to the work of protection of consumer rights and interests.[108] Article 15 might be interpreted to protect only consumer criticism of the Consumer Associations' work, and may not extend to protection of criticism of the business itself.

Businesses, however, are obligated under the Consumer Protection Act to endure criticism. Article 17 specifically provides: "Business operators shall listen to the consumers" opinions on the commodities and services they supply and accept consumers' supervision."[109] Thus, while the individual consumer may not have an express statutory right to criticize products and services, businesses have an explicit statutory mandate to listen to consumer criticism, which is relevant to the legal disposition of the Wang Hong case. When combined with Article 13's protection of the rights of consumers to acquire knowledge (audience right to know), [110] the Consumer Protection Act arguably protects Wang Hong's website, even if it were treated as individual rather than media speech.

Professor Hooper, in her thorough analysis of contemporary Chinese consumer movements, observed that widespread publicity of consumer grievances has become commonplace in general

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105. Law on the Protection of Consumer Rights and Interests, *supra* note 99, ch. I, art. 6.
106. *Id.* ch. II, art. 9.
107. *Id.* ch. II, art. 13.
108. *Id.* ch. II, art. 15.
109. *Id.* ch. III, art. 17.
110. *Id.* ch. II, art. 13.

newspapers, magazines, television, radio, and the internet.[111] "More significantly, the Internet has given individuals with consumer grievances or interests the opportunity to become their own "publicists" setting up individual websites and linking them to other consumer complaints and information sites."[112] In the absence of explicit discussion of the Consumer Protection Act in the Wang Hong case, it is difficult to surmise precisely why the courts felt the consumer protection statute was irrelevant to the disposition of the case.

It is possible that the case contained some unarticulated procedural barriers. Perhaps Wang Hong's lawyer at trial should have formally filed cross-claims under the Consumer Protection Act to provide the court with jurisdiction, although none of the lawyers with whom I discussed the case indicated that any procedural objections had been raised regarding the Consumer Protection Act issues. Wang Hong certainly exhausted his administrative remedies by filing a complaint with the Haidian Consumer Association.[113] Even if formal procedural requirements are not fulfilled, the judiciary normally considers the possibility of a conflicting statutory provision in right to reputation cases. Consideration of legislative policy guidance is particularly important where application of prior defamation law involves substantial extension of the prior legal standards to holding that omissions constitute falsity and that a corporate legal person has the capacity to be insulted by derogatory language.

VI. CONFLICTS BETWEEN JUDGE-MADE AND STATUTORY LAW

The *Wang Hong* case presents several very interesting legal issues. In terms of domestic Chinese law, the case involves unresolved conflicts between China's strict statutory protections of consumer rights and its strict judicial protection of the right to reputation. Consumer rights are protected at the statutory level, which normally affords a higher level of protection, while defamation rights are primarily judicially developed through the interpretations issued by the PSC. In a legal system which to date has avoided elevating judicial

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111. Hooper, *Consumer Voices*, *supra* note 11, at 103–07. "The consumer grievances . . . have been publicized in general newspapers and magazines, as well as in publications more closely associated with business and economic matters." *Id.* at 103–04. "Consumer grievances have been widely covered on television . . . . [T]he consumer affairs program "Focus" reportedly had an audience of over 200 million by 1996." *Id.* at 104.

112. *Id.* at 106.

113. Exhaustion of administrative remedies does not seem to be required under the Consumer Protection Act. Article 34(5) provides that the consumer may settle disputes with businesses by instituting proceedings in the people's court. Law on the Protection of Consumer Rights and Interests, *supra* note 99, ch. VI, art. 34(5).

review above legislative powers, [114] the case presents a very interesting conundrum. It is possible to read the case as preferring judicially developed law over and above legislatively defined rights; thus, the case may represent a notion of the rule "of" rather than "according to" law. While such an interpretation appeals to my foreign eye, it is probably overly ambitious.

The fact that both the trial and appellate courts applied the guidelines established by the SPC on right to reputation and avoided even the mention of the legislatively enacted Consumer Protection Act (both promulgated in 1993)[115] raises separation of powers issues. Civil law jurisdictions, such as China, nominally adhere to the principle that only legislatures establish law.[116] The role of courts is to merely apply the law to a particular set of facts; the application has little, if any, precedential effect.[117] This approach, in theory, contrasts with the tradition of common law jurisdictions in which judge-made law in specific cases may limit or even, in the extreme example of the United States, overturn legislative enactments.

A. *Civil Law vs. Common Law Systems*

Many contemporary legal theorists support the notion that civil and common law systems do not differ as significantly as some claim.[118] For example, developments in the European Community, which encompasses both civil and common law jurisdictions, are

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114. *See* Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 N.W. J. INT'L L. & B. 383 (2000).

115. *Wang Hong*, Beijing Interm. People's Ct.

116. Peter G. Stein, *Roman Law, Common Law, and Civil Law*, 66 TUL. L. REV. 1591 (1992).

117. Kristen Marie Hansen, Note, *The U.S. Legal System: Common Values, Uncommon Procedures*, 69 BROOK. L. REV. 689, 690 (2004); *see also* ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, THE CIVIL SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 1135 (2d. ed. 1997).

118. *See* COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS (Norman Dorsen et al. eds., 2003); JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE (1985); Antonin Scalia, *Common Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997); Michel Rosenfeld, *Constitutional Adjudication in the United States and Europe: Paradoxes and Contrasts*, 2 INT'L J. CONST. L. 633 (2004); *see also* Mary Garvey Algero, *The Sources of Law and the Value of Precedent*, 65 LA. L. REV. 775 (2005) (noting that Louisiana is the only U.S. state to follow a civil law legal system); Wayne R. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 LA. L. REV. 677 (2005) (also noting that Louisiana is the only U.S. state to follow a civil law legal system); Akihiro Hironaka, *Jurisdictional Theory "Made in Japan": Convergence of U.S. and Continental European Approaches*, 37 VAND. J. TRANSN'L L. 1317 (2004); Ewoud Hondius, *Precedent in East and West*, 23 PENN ST. INT'L L. REV. 521 (2005); Catherina A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53 (2005).

showing rapidly that the gulf between civil and common law judicial review is not as serious as previously thought.[119] Civil law judges must, of necessity, fill in the gaps within statutory enactments, as well as resolve conflicts between two or more statutory systems. Judicial precedent, while not binding, is efficient and predictable and enhances collegial respect among judges. Common law judges, on the other hand, hesitate to limit or overturn legislative enactments for fear of engaging in judicial activism, undermining democratically chosen value choices by unelected, unaccountable judges.

Thus, under either a civil or common law system, a specific statutory enactment would normally be given considerable, if not dispositive, weight, even in the face of prior judicial determinations. In China, the legal system has undergone a rapid and very colorful development on the issue of judicial review over legislative and administrative acts and, conversely, suggestions of legislative supervision over the judiciary.[120] The limited scope of this Article does not concern that particular debate. Nevertheless, it is noteworthy that judges in the Chinese legal system would normally be expected to give greater weight to a legislative enactment such as the Consumer Protection Act than to judicially promulgated guidelines such as the SPC 1993 Reply on Right to Reputation, on the ground that legislation trumps judge made law.[121]

The emphasis on the right to reputation and complete disregard of the Consumer Protection Act in the *Wang Hong* case indicates that factors other than those discussed in the opinions were involved in the courts' decisions. Three possibilities occur to me: one is that the PSC interpretations are in fact weightier than statutes enacted by the NPC, and that perhaps the role of the judiciary is more prominent than some commentators have suggested. A second possibility is that the interpretations by the PSC do not normally override legislatively enacted statutes such as the Consumer Protection law, and that an extra-legal factor such as *guanxi* might be at work in the *Wang Hong* case. The third possibility is that some larger social or political agenda was involved.

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119. *See* Rosenfeld, *supra* note 118, at 654.

120. *See* Karmen Kam, Note, *Right of Abode Cases: The Judicial Independence of the Hong Kong Special Administrative Region v. The Sovereign Interests of China*, 27 BROOK. J. INT'L L. 611 (2002).

121. Normally, the more recently enacted or created rule might also be given greater weight where two provisions arguably conflict. For the Wang Hong analysis, this possibility is irrelevant since both the Consumer Protection Act and the SPC guidelines on right to reputation were issued in 1993.

B. *Do Interpretations of the SPC Trump National People's Congress Statutes?*

Both the trial and appellate courts applied the SPC interpretation on right to reputation (defamation) while ignoring the NPC legislation on consumer protection.[122] This raises a structural question about the weight currently given to SPC Interpretations in comparison to legislatively enacted statutes.

Many Western analysts have viewed the power of the SPC with respect to the NPC as relatively weak[123] compared to the U.S. legal system in which the Supreme Court has authority to interpret and even hold unconstitutional congressional statutes (the *Marbury* power of judicial review).[124] Several Western scholars have noted, however, that the SPC has begun to use its powers to issue interpretations more independently.[125] The expanding role of SPC interpretations raises serious questions of legitimacy under current Chinese legal and political regimes,[126] but for the purposes of analyzing the *Wang Hong*

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122. *Wang Hong*, Beijing Interm. People's Ct.

123. Perhaps most surprising to Westerners, particularly from common law countries, is the severely circumscribed interpretative authority of the PRC courts . . . . Despite this delegation [from the NPC Standing Committee to the SPC and other state organs], numerous restrictions remain on the SPC's interpretative powers. Significantly, the NPC did not delegate to the SPC the right to interpret the Constitution . . . . Further, the Court was only given the right to interpret laws where necessary for judicial work. That is, the Court is supposed to limit its interpretation to that necessary to decide issues that have arisen, or arguably are likely to arise, in specific cases. Moreover, the interpretative powers of the Court in theory are limited to clarifying laws without altering their original meaning or adding to their content. *In practice, however, the SPC has pushed the limits of its delegated authority, issuing a number of general interpretations of key laws . . . [S]ome of the interpretations have stretched the boundary of "interpretation," at times even creating legal rules that contradict the original legislation.*

PEERENBOOM, CHINA'S LONG MARCH, *supra* note 2, at 17 (emphasis added).

124. Marbury v. Madison, 5 U.S. 137 (1803).

125. [I]n practice the Supreme People's Court has begun to interpret laws and regulations independently . . . . The range of these interpretations demonstrates the extensive interpretative power the Court has gained since 1979. The broadest and most wide-ranging are official opinions (*yijian*) or interpretations (*jieda* or *jieshi*) which are general statements of normative rules not made in connection with pending litigation. They may be opinions either on an entire law, or on specific sections, and in practice they may sometimes establish new rules or even contradict NPC legislation. *Opinions and interpretations published in the Court's official gazette become authoritative sources of rules for decision in cases*

LUBMAN, *supra* note 2, at 283 (emphasis added).

126. *See, e.g.*, *id.* at 284 (suggesting that the practice exceeds the scope of the SPC's legal authority, and that "its justification lies in the supremacy of the CCP

case, it is important to note that the emphasis given to the SPC interpretation as compared to an NPC statute is not without precedent. Indeed, regardless of the controversy concerning the legal underpinnings of the SPC's interpretative powers, the trial and appellate court judges facing a particular decision such as the *Wang Hong* case may have believed themselves to be bound by the SPC interpretation.[127]

Of course, the SPC interpretations on right to reputation did not specifically address any potential conflicts with the consumer protection law. In fact, the SPC interpretations did not mention the word "consumer," much less attempt to reconcile the potentially competing interests between right to reputation and protecting the consumers' right to information. Therefore, assuming that lower courts are bound by the SPC interpretations on right to reputation still does not absolve those courts of a duty to attempt to reconcile the binding interpretations on right to reputation with the binding consumer protection law.

What is a responsible lower court judge to do when faced with a specific case involving two binding legal authorities? In the *Wang Hong* case, both the trial and appellate courts simply picked one (SPC interpretations) and ignored the other (consumer protection statute). This choice to apply one legal doctrine and ignore the other reflects the inadequacy of technical legal training in the very recently reconstituted Chinese legal system. Chinese legal education does not currently train even the best and the brightest on concrete legal analysis techniques of binding authorities or techniques for resolving

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[Chinese Communist Party] within the Party-state and the consequent use of the Court to issue interpretations that will keep the application of law consistent with policy."). Other problems according to Professor Lubman are that the practice is not standardized, and not all interpretations are published. *See id.*

Professor Peerenboom, on the other hand, views the practice of SPC interpretations as less problematic, explaining that "[t]he SPC may be excused for overstepping its authority in order to fill the vacuum left by the NPCSC [National People's Congress Standing Committee]." PEERENBOOM, CHINA'S LONG MARCH, *supra* note 2, at 177.

Professor Chow points out that there is "no mechanism to review the legislative interpretations issued by the SPC even where there is an apparent conflict between the SPC interpretation and the laws that are being interpreted." DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL 177 (2003).

127. In 1997, the SPC issued the Several Provisions on Judicial Interpretation, which provided that judicial interpretation is to be made by the SPC only and that lower courts are without power to issue interpretations . . . . *Article 4 of the Provisions declares that judicial interpretations of legislation by the SPC have the force of law and must be followed by lower courts.* This assertion of what amounts to legislative power seems to be in violation of China's Constitution.

CHOW, *supra* note 126, at 177 (emphasis added).

potential conflicts between competing legal doctrines.[128] An ability to reconcile the SPC interpretations with the consumer protection statute, find the common areas of agreement between these two legal authorities, and attempt to give effect to each of them as far as possible under the facts of the case would have been particularly helpful to the lower courts.

Without a developed and legitimate methodology for resolving conflicts between binding legal authorities, the lower courts probably followed the legal precedent established by their immediate superiors (the SPC), ignored the competing statute, and hoped for the best. The problem with this approach is that the absence of legal reasoning and explanation of why the SPC interpretation and not the NPC consumer protection law governed *Wang Hong*'s case leaves open the possibility that extra-legal factors (*guanxi* or political pressure) were at work. The suspicion that extra-legal factors influenced a particular case decreases the appearance of independent resolution according to law upon which all judicial systems ultimately rely for their legitimacy.

VII. EXTRA-LEGAL FACTORS: CULTURAL AND HISTORICAL CONTEXT OF THE DECISION

A. Guanxi

The absence of concrete legal analysis explaining why the SPC interpretations could not be reconciled with the consumer protection law leaves the judicial system vulnerable to a conclusion that extra-legal factors were at work in deciding the fate of Wang Hong and

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128. My own experience teaching in China at Peking University Law School taught me that the basic technique of hearing two sides of an argument *before* arriving at a conclusion was initially difficult. The students first wanted to know what I, the teacher, thought was the "right" answer. When I refused to take a position, their next effort was to determine among themselves a consensus regarding the right answer. When I prevented that by dividing them into two groups and assigning them a side to represent, forcing them to argue against the other group, the class became bitterly divided. Only after repeated exercises, most helpfully when I forced each side to argue for the plaintiff and then switch sides and argue for the defendant, did we finally arrive at a basic comfort level with the idea that there might be helpful and legitimate points in favor of each side in a case. Of course, I have this same difficulty with my law students in the United States. Although the exercises are painful, most of my Chinese and U.S. law students eventually report that the technique of arguing two sides prior to actually making a decision has great value. It was interesting to me was that by 2005, when I taught in Chongqing at Southwest University of Political Science and Law, this two sided argument technique was much more comfortable for the students. I am unsure if this reflects the development of Chinese legal education between 2000 and 2005, or whether the students in Sichuan are happier debating.

Maxstation. Two extra-legal factors are often suspected in hotly contested cases in China: *guanxi* and direct interference by the Party.

Guanxi, loosely translated as "connections" or "relationships"[129] is an important aspect of most Asian cultures, and the legal system in China is no exception. Although serious reform efforts are underway in China to limit the effect of *guanxi* on judicial decisions, even the most optimistic observers agree that it occasionally affects the outcome of specific cases.[130]

In the *Wang Hong* case, a *guanxi* analysis would pursue the question of whether those with a controlling interest in Maxstation or their lawyers had any connections to the judges or to Party leaders who might be able to influence the judges. My efforts on the ground in Beijing to explore that aspect of the case have, to date, been unsuccessful. Apparently my own *guanxi* is insufficient, and frankly I did not pursue this vigorously, because the judges in both the trial and appellate cases have very high reputations for integrity and professional skill. Indeed, the trial judge was promoted to the SPC shortly after his decision in the *Wang Hong* case and currently serves on the highest Court. In addition, given the amount of publicity and internet unrest generated by the *Wang Hong* case, I suspect that ordinary *guanxi* would not be a sufficient incentive for such highly regarded jurists unless Maxstation's *guanxi* rose to very high levels in society.

I cannot rule out this possibility based on my current research. Perhaps others with better skills in researching ownership interests in Chinese corporations such as Maxstation could succeed where I have failed. In the absence of specific evidence, however, I would not be comfortable with a presumption of guilt based on generalized stereotypes about the Chinese legal system.

Leaving the possibility of *guanxi* aside, there is one other possible extra-legal explanation for why the courts followed the interpretation of the SPC rather than the consumer protection statute: some larger social or political agenda may have been involved, and there may have been direct influence by the Party. The lack of concrete legal reasoning regarding the conflicts between the SPC interpretations and the NPC consumer protection law and the very odd decision by Maxstation to bring a lawsuit eight months after the underlying dispute was resolved against an individual consumer from whom only small

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129. Wikipedia, "Guanxi", http://en.wikipedia.org/wiki/guanxi.

130. *See* Pittman B. Potter, *Guanxi and the PRC Legal System: From Contradiction to Complementarity*, *in* SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS, CULTURE AND THE CHANGING NATURE OF GUANXI 179, 188 (Thomas Gold et al. eds., 2002); Pamela N. Phan, *Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 8 YALE HUM. RTS. & DEV. L.J. 117, 145, n.153 (2005).

damages could be obtained support the conclusion that social or political influences were involved.

B. *The Business Decision to Sue*

In the *Wang Hong* case, the consumer protection system seemed to be operating at a very high level of efficiency. The Haidian Consumer Association was able to process the dispute within a few weeks.[131] Wang Hong agreed to apologize to Maxstation and faxed a written apology the same day. Maxstation rejected the apology on the grounds that it was too short. It was at this point that the dispute escalated, with the mysterious "lawyer" Leiming writing to Wang Hong in an aggressive manner, and Wang Hong responding by posting the now infamous tofu article.[132] The laptop was nevertheless repaired by Maxstation at no cost and returned to Wang Hong. One would think the dispute resolved. Eight months later, Maxstation sued Wang Hong for defamation.

Why would being called "soft as tofu" prompt major litigation *after an apology had been tendered* and eight months after the underlying dispute had been resolved? Even in the obsessively litigious U.S. culture, this seems a bit of overkill. Apparently it is not overkill in terms of Chinese business culture, however, since two respected courts found the statement sufficiently defamatory to award substantial damages. The case has given me new respect for the profound cultural differences regarding sensitivity to criticism.

Why would a rational business reject an apology offered by a customer, and then sue him for a better apology? As a business decision, it seems suicidal.[133] Savvy corporate lawyers in the United States with whom I have discussed the case have wondered about the wisdom of the underlying business decision to pursue a defamation

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131. *Wang Hong*, Beijing Interm. People's Ct.

132. Zhiwu Chen, *Media Defendants in the Chinese Courts*, http://chinalaw.law.yale.edu/MediaJeopardy%20-%20Translation11.pdf.

133. *See* Fort & Junhai, *supra* note 9, at 1596–97.

> The fourth issue is . . . whether it is wise strategy for a manufacturer to sue its consumers . . . when the consumer criticizes the product and service of the manufacturer . . . it is more important that consumers and businesses build solid trust to avoid defamation . . . . When there is trust between consumers and corporations, including E-businesses, there will be no reason for defamation litigation. To avoid defamation conflicts, business has a more important role to play than consumers. For instance, the defamation litigation of Max Computer Station, Inc., could have been avoided if Wang's laptop had been repaired without refusal . . . this case also demonstrates the importance of cultivating non-judicial mechanisms of resolving cases, as a Confucian ethic would advice. In Max Computer Station Inc., nearly everyone lost.

Id.

case against a consumer, particularly one who has offered a public apology.

Those in the United States would engage in a simple cost-benefit analysis. The danger of refusing the apology and proceeding to litigation is that the unfortunate statements will receive even wider publicity and lead to a larger consumer backlash against the corporation, a risk which likely outweighs whatever monetary damages a corporation could reasonably expect to recover from an individual consumer. Thus, the U.S. business lawyers are flabbergasted at the decision of Maxstation to sue a consumer for defamation.

Again, I suspect that there may be deeply rooted cultural differences at work here. The sting of criticism and the role of apologies, particularly the rejection of publicly offered apologies as insufficient, play a role in Chinese culture far beyond this simple case.[134] Both the U.S. bombing of the Chinese Embassy in Belgrade[135] (still a very sore topic in China although mostly forgotten in the United States) as well as the spy plane incident[136] demonstrate that the setting and wording of apologies matters a great deal more in Chinese than in U.S. culture. Any understanding of Maxstation's decision to reject Wang Hong's apology and proceed to litigation should be considered in light of profound cultural differences.

As I discussed this case with many Chinese colleagues and friends, many, perhaps most of them, were not as shocked by the lawsuit and its outcome as were my Western colleagues and friends. Many, although not all, of my legally-trained Chinese friends who are extraordinarily reform-minded, trained in the United States or Europe, and generally open-minded, highly educated people felt that Wang Hong's statements went too far. Although they mostly agreed that the phrase "soft as tofu" was not terrible and that the rational business decision is to accept a proffered apology, many Chinese friends believed that the central problem was not the postings on the internet bulletin board publicly called for a boycott of Maxstation. Although Wang Hong himself had not called for a boycott, his role in hosting a bulletin board where such boycott calls were posted rendered him culpable in this view. Private Chinese criticisms of the Wang Hong decision tended to revolve around the very high damage

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134. Hilary K. Josephs, *The Remedy of Apology in Comparative and International Law: Self-Healing and Reconciliation*, 18 EMORY INT'L L. REV. 53 (2004) (primarily discussing the role of apology in U.S.-Japanese relations). For Professor Josephs's discussion of the U.S. bombing of the Chinese Embassy in Kosovo (1999) and the Spy Plane Incident (2001), see *id.* at 81–83. *See also* Peter Hays Gries & Kaiping Peng, *Culture Clash? Apologies East and West*, 11 J. CONTEMP. CHINA 173 (2002).

135. *See, e.g.*, PETER HAYS GRIES, CHINA'S NEW NATIONALISM: PRIDE, POLITICS, AND DIPLOMACY 98–108 (2004).

136. *Id.* at 108–13.

awards,[137] which were seen as a big corporation bullying an individual, rather than the question of underlying liability.

Controlling internet speech calling for mass actions, such as a boycott, was not really a business decision at all in this view. Wang Hong, by hosting a bulletin board where a boycott call was posted, had crossed the imaginary but fiercely defended line between the economic and the political realms.

C. *Protecting Corporations from Boycott Calls on the Internet*

The internet, all my Chinese friends agree, is "public" speech and not given the leeway normally accorded today to purely "private" speech criticizing the government. When pressed on the question of whether a private corporation like Maxstation should be accorded the same level of protection from criticism on the internet as the Chinese government itself, my Chinese sources paused. The association of large corporations with the government remains a large factor in modern Chinese culture. Corporations, in this view, stand in the shoes of government because they provide jobs for people and therefore should receive great deference. Any calls for boycotts would jeopardize those jobs.

When I suggested that protecting the reputations of corporations allegedly delivering sub-standard products or services would artificially protect them from the market discipline of informed consumers, ultimately undermining any hope of a truly free and efficient market, my Chinese friends paused. However educated and reform-minded my friends are, they had not yet fully explored this idea.

The instinct to protect corporations from losses still runs deep, at least if the corporation is Chinese. A very common source, perhaps even the most significant source, of all interference with judicial independence by Party officials arises in the context of local Party and state officials instructing local judges to decide cases in order to protect local businesses and the jobs they provide.[138] Reducing local protectionism is a highly significant factor in the reforms of the Chinese legal system, and many if not most situations of Central Party intervention in judicial proceedings are done to counteract tendencies toward local protectionism. The instinct to protect local businesses and jobs is, of course, not unique to China. The United States has developed a large body of law under the dormant commerce clause attempting to curtail similar problems with local legislatures' enacting protectionist measures. Nevertheless, in an economic and

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137. *See infra* Part III.A.3.b.

138. LUBMAN, *supra* note 2, at 268; PEERENBOOM, CHINA'S LONG MARCH, *supra* note 2, at 310–12.

political system like China's, which is making a transition from Party and state control of all business to a freer market economy, the tendency toward local protectionism is a significant factor.

The instinct to protect local businesses must be considered in light of China's burgeoning pride in its national development. Thus, there is often little discomfort with a double standard, in which Chinese businesses are protected from criticism while foreign companies are criticized freely. One example of this is the infamous Toshiba case,[139] in which Chinese consumers were not compensated or even informed by Toshiba of potential glitches in a laptop, while U.S. consumers received notice and substantial compensation. The Toshiba case occurred just before and during approximately the same time period as the *Wang Hong* case. When the corporation was Toshiba, Chinese people were incensed at substandard products and services. However, they remained very protective of the Chinese corporation Maxstation. The mainstream Chinese media was instrumental in uncovering Toshiba's treatment of Chinese consumers, yet the mainstream Chinese media never mentioned the *Wang Hong* case, to the best of my knowledge, before, during, or after the trial and appeal.

This presents a potential double standard: where public internet criticism and calls for boycotts are tolerated (and perhaps even encouraged) when the targeted corporation is foreign, criticism and internet calls for consumer boycotts against a Chinese corporation are quickly and thoroughly disciplined via the defamation lawsuit mechanism. Nationalism is, many China observers believe, perhaps the most significant shared value in contemporary China.[140]

D. *Internet Control Campaigns by the Party and State*

It seems possible that the extraordinary result in the *Wang Hong* case was influenced not so much due to direct Party influence to protect a specific corporation from market losses but by the context of a larger political decision to crackdown on the internet in China. Between April 1999, when Maxstation filed its suit, and March 2001, when Wang Hong was released from jail after his lawyer paid the 90,000 yuan damages, the government engaged in a variety of methods to control and contain the perceived excesses of the internet

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139. *See* Gary Zhao, *Chinese Product Liability Law: Can China Build Another Great Wall to Protect Its Consumers?*, 1 WASH. U. GLOBAL STUD. L. REV. 581, 590–92 (2002) (discussing the *Toshiba* case in great detail). Toshiba refused to compensate Chinese consumers for laptop defects, while it agreed to pay up to $1.05 billion to U.S. consumers. Toshiba also failed to publish any notice in Chinese concerning the potential glitches. *Id* at 590. Toshiba defended its treatment of Chinese consumers by referring to differences in the (weaker) Chinese consumer protection laws. *Id.* The *Toshiba* case entered mainstream Chinese media during March 1999, about a year before the Wang Hong case became a *cause celebre*. *Id.* at 590–91.

140. GRIES, *supra* note 135.

inside of China.[141] The use of a defamation lawsuit to control speech provides merely one technique for internet control.

The Chinese internet regulations of 1996 were in effect at the time of Wang Hong's postings.[142] On September 25, 2000, then Premier Zhu Rongji issued new regulations for the administration of the internet in China.[143] Article 9 provides: "All those engaging in Internet information services and intending to operate electronic bulletin services shall make a special project application . . . " Article 15 of these regulations provides:

> Internet information service providers may not produce, duplicate, publish or disseminate any of the following information that:
>
> (1) is contrary to the basic principles laid down in the Constitution;
>
> . . .
>
> (6) spreads rumors, disrupts the social order and breaks down social stability;
>
> . . .
>
> (8) insults or defames others or infringes upon the lawful rights and interests of others. . . .[144]

From a legal point of view, it is interesting that the general tenor of the times, possibly in the absence of direct instructions from the Party, could influence the outcome of a particular case. This phenomenon is not, by any means, unknown in the West. The U.S. Supreme Court, for example, simply folded under the specter of the Pearl Harbor attacks, permitting the detention of Japanese-U.S. citizens in a manner which has been later recognized by the courts as well as the U.S. Congress as unwarranted.[145] Courts are not immune from the political tenor of their times. Nevertheless, it is the job of an independent legal professoriate to honestly analyze cases, and to encourage judges to follow the written law rather than succumb to the

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141. *See infra* note 156 and accompanying text.

142. The 1996 regulations of the internet issued by the State Council were in effect at the time of Wang Hong's postings. For analysis of those regulations, see Feir, *supra* note 9, at 368–82; Taylor, III, *supra* note 9, at 633–40.

143. Administrative Measures on Internet Information Services (Order No. 292 promulgated by the St. Council, effective Sept. 25, 2000) (P.R.C.). Article 4 states: "The State administers business-oriented Internet information services under a license system, and administers non-business oriented Internet information services under a filing system. No one may engage in Internet information services without obtaining a license or completing filing procedures." *Id.* art. 4.

144. Violation of Article 15 carries both civil and criminal penalties. *See id.* art. 20. For analyses of the 2000 Internet regulations see Clara Liang, *supra* note 9, at 1435–39; Jiang-yu Wang, *The Internet and E-Commerce in China: Regulations, Judicial Views, and Government Policies*, 18 COMPUTER & INTERNET L. 12, 14–16 (2001).

145. *See* Korematsu v. United States, 323 U.S. 214 (1944); *see generally* PETER IRONS, JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (1989).

politics *du jour* by holding the judges themselves accountable in the court of legal history.

Generally, when facing cases in a time of popular panic, the conservative approach for judges who feel unable to withstand the political temper is to avoid adding the legitimizing imprimatur of law to politically motivated campaigns. In the case of detaining U.S. citizens of Japanese ancestry after Pearl Harbor, the Court might well have declined to exercise jurisdiction under the well-developed political question doctrine. It would not have prevented their detention, but it would have prevented the undermining of public confidence in judicial independence and the continuing embarrassment of a Court opinion justifying it. In the *Wang Hong* case, prior to accepting jurisdiction, it would have been relatively easy for the court to remand the case to the Haidian Consumer Association for further proceedings. Although justice delayed is sometimes justice denied, in these types of situations, delay is often preferable to staking the legitimacy of the legal system on ever shifting political grounds. Delay also often serves the additional purpose of allowing the initial panic to subside, enhancing the judges' ability to decide cases according to prior established legal principles.[146] This, in turns, enhances the legitimacy of the legal system and provides an important component in maintaining a stable society. The value of complex procedural delays to avoid controversial hot potato cases is a well established art in Western judicial systems.

Even in a well established judicial system such as that of the United States, maintaining the legitimacy of the judicial branch is a constant concern. If the public were to lose confidence in judges' ability to decide cases according to law under established legal principles, an important component of social stability would be threatened.[147] For a recently reconstituted legal system trying in the first instance to earn public confidence in deciding cases "according to" law such as China, the appearance of not following legal rules in deciding a case can reinforce popular notions that the judges are merely implementing

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146. Benjamin L. Liebman's very thoughtful article about the influence of the media on Chinese courts provides a number of important examples of this phenomenon. *See* Liebman, *supra* note 13, at 131.

> Populist appeals [by the Chinese media] may be further amplified in a system in which laws are often vague, but in which views of law are often formalistic. Laws and regulations often fail to provide judges with clear guidelines for adjudicating disputes. At the same time, the continuation of state-centered formalistic conceptions of law and discomfort with legal indeterminacy mean that a correct answer to cases is presumed to exist. Judges may look to the views of the media for guidance as to whether their decisions will be perceived as correct.

Id.

147. *See, e.g.*, the firestorm of public and academic criticism following the U.S. Supreme Court decision in *Bush v. Gore*.

individual political decisions dressed up as law. In the Chinese context, this is referred to as rule "by" law.[148]

Yet in the context of Chinese culture there may be another perspective to consider: the fame, notoriety, and outright criticism of the judicial system in the *Wang Hong* decisions may have other implications. Criticism of the judicial decisions in the *Wang Hong* case may have provided a relatively safe, sideways avenue for protesting the general crackdown on the internet, which would be substantially more risky if the then newly issued State Council regulations were mentioned directly.

VIII. CONCLUSION

Who "won" the case? Maxstation got some money (90,000 yuan) and the Wang Hong website was shut down.[149] But Maxstation suffered enormous backlash on the internet by its targeted consumers of laptops and other computer products. Did Maxstation win the battle and loose the war? Wang Hong clearly was the big loser. But I would suggest that another loser in this case was the judiciary itself, which was popularly perceived as an instrument of the big corporation, using rule "by" law to crush a hapless, if intemperate, consumer.

Among legally sophisticated audiences, the landmark extension of judge made defamation law while ignoring the consumer protection statute appears unwarranted. The decisions cannot be viewed historically as a successful application of rule "according to" law, given that the decisions ignore the relevant statute. They might stand for an early example of rule "of" law in which SPC interpretations are given precedence over statutes. However, even in the U.S. rule "of" law system in which judges exercise much greater power to interpret and even hold unconstitutional legislative acts, simply ignoring a relevant statute would not be a legitimate legal approach.

A. *Subsequent Developments*

There do not appear to have been any defamation suits by corporations against Chinese consumers for product disparagement

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148. "Shoot the monkey to scare the tiger" is a fairly common folk saying in Chinese. It may be that Wang Hong was a bad example, and his punishment was designed to convey to the feisty internet users that the government meant business (although his punishment was relatively gentle; after all, he only spent one night in jail). For a more thorough collection of internet control cases of that era, see, e.g., Amnesty International, State Control of the Internet in China: Appeal Cases (AI Index: ASA 17/046/2002, Nov. 2002), *available at* http://web.amnesty.org/library/pdf/ASA170462002ENGLISH/$File/ASA1704602.pdf.

149. *Wang Hong*, Beijing Interm. People's Ct.

since the *Wang Hong* decision. Perhaps cooler heads have prevailed on the business side regarding the wisdom of launching defamation suits to curb intemperate consumer complaints. At least one government sponsored organization has since developed a website where consumers can exchange information, and even complaints, about products and services.[150] Perhaps more regulated websites have reassured nervous Party members that they have not yet lost control. However, the general internet crackdown has not abated; many observers believe it is actually increasing since the new leadership took control.[151] But, the use of defamation lawsuits against consumers appears to have declined since the *Wang Hong* case, and perhaps, one could say that the winner is the ordinary consumer who wants to obtain information from other consumers regarding specific products and services. At least within the confines of government sponsored consumer websites, a small gap in the bright line separating the economic freedoms from the political restrictions on speech appears to have developed. I cannot help wondering if consumer complaints against state-owned corporations' products and services or consumer complaints regarding Chinese corporations with high level connections will be safely aired in these forums. The NPC may wish to reexamine its consumer protection statute to clarify the ambiguity regarding protections for consumer speech disparaging a product or service, thereby reclaiming its primacy over the judicial interpretations. Or the NPC may wish to codify defamation law generally.[152]

Maxstation Corporation entered the U.S. market in 1997 in Portland, Oregon, selling laptops through its subsidiary, MAX Computer Station, Inc. "You Sell, We Support" is the company motto.[153] Its market extends throughout North America and worldwide.

B. *Legal Consequences*

The question of an independent judiciary is the subject of considerable debate in contemporary China as well as by foreign observers. Close analysis of the Wang Hong case reveals much to

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150. Consumer websites and a hotline have been established by the Beijing Industrial and Commercial Bureau. Zhao, *supra* note 139, at 598–99.

151. *See, e.g.*, Tina Rosenberg, *Building the Great Firewall of China, With Foreign Help*, N.Y. TIMES, Sept. 18, 2005. China currently has the most extensive internet filtering systems in the world. *See* OpenNet Initiative, Internet Filtering in China in 2004–2005: A Country Study, http://www.opennetinitiative.net/studies/china/ONI_China_Country_Study.pdf.

152. *See, e.g.*, internet commentary by PKU Law School Dean Zhu Suli, asking for revisions of the rape law interpretations from the procurator, the SPC itself, and the Standing Committee of the NPC.

153. Maxstation.com: About Us, http://www.maxstation.com/aboutus.asp.

reassure those concerned: the legal system, including the consumer association and the courts, the lawyers, and the professors functioned at a high level of sophistication, applying legally established doctrines to a particular and very controversial dispute. It operated with admirable efficiency. The consumer association negotiated a settlement within three weeks, and the court system finalized the case in less than two years. Both parties were ably represented in court. The very important tradition of high level lawyers representing impoverished clients on a pro bono basis continued in the case. The judges issued extensive written opinions, ensuring transparency and accountability in legal decision making. The appellate review system operated independently, affirming the trial court on some issues, while overturning it on others, even though the trial judge had been promoted to a superior position of the appellate judge while the appeal was still pending. Enforcement of the appellate judgment was both quick (less than three months elapsed between the final judgment and the finding that Wang Hong was in contempt) and compassionate, as the enforcement judge stayed after hours to permit the filing of papers which would release Wang Hong from jail.

The legal doctrine developed in the Wang Hong case is more problematic. Extending defamation doctrine to include factual omissions as evidence of falsity substantially departs from prior Chinese law and will create serious conflicts with defamation law applicable in some of the WTO jurisdictions of China's new trading partners. Allowing a corporation to recover for insult and injured feelings, regardless of the truth of the underlying claims and without recognizing some exception for opinions or fair comment, departs very substantially from defamation law in other WTO jurisdictions, where truth is an absolute defense to defamation and expression of opinion and fair comment via derogatory language is more widely tolerated. This problem warrants further examination in light of the practices of other Asian jurisdictions, where losing face is more highly sensitive than in Western legal cultures.

The issue of protection of consumer expressions of opinion (as opposed to consumer statements or omissions of fact) is, in my opinion, the most serious problem raised by the *Wang Hong* case. Particularly in the context of internet communications, both media and non-media individual consumer opinions need some measure of predictability regarding acceptable levels of product disparagement opinions by consumers among WTO trading nations.

The case is also quite interesting from the perspectives of foreign lawyers and foreign companies. *U.S. Consumer Reports* online magazine should be careful when reviewing products made in mainland China. Internet consumer feedback sites, such as eBay or Amazon.com, that evaluate products and services could (jurisdictional

problems aside[154]) create serious liability for their participants who might criticize a Chinese seller as well as for any website hosting such criticism of Chinese sellers.

Conversely, multinational corporations that would like to dump substandard products will, naturally, find the protections of Chinese law most attractive, since any smattering of consumer criticism from Chinese consumers can be quenched with a good, stiff lawsuit or two alleging infringement of right to reputation. Jurisdiction will not be a problem in the latter group since Chinese courts would be applying Chinese law to Chinese consumers.

Finally, from the perspective of foreign lawyers, the case presents an interesting opportunity to examine current legal standards regarding product disparagement by consumers. As the products themselves are increasingly global, it is to be expected that the consumers, both those satisfied and those disgruntled, will comment. The internet will naturally play a major role in the international exchange of product information by consumers. The range of current legal protection from defamation varies widely among WTO countries, from the "everything goes" U.S. approach, to the more cautious positions taken by the British, Germans, and French. Of particular importance are the legal standards for defamation involving product disparagement by consumers in the manufacturing and exporting countries of China (including Hong Kong), Mexico, Singapore, Korea, India, etc. It is my hope that this Article will stimulate description, analysis, and debate regarding the various legal standards governing consumer speech in all these jurisdictions.

I do not wish to be alarmist about the current situation, either in China or globally. The fame of the *Wang Hong* case has generated considerable concern inside China, as well as heightened sensitivity to the business pitfalls of making an example out of a disgruntled consumer. In general, the business communities (aided if necessary by their lawyers) will see the economic wisdom in following a softer approach to customer relations, even with difficult customers. Further, the very considerable jurisdictional hurdles for attacking foreign consumer speech should provide some significant measure of security for global consumers, which is small comfort to Chinese consumers who are currently vulnerable under Chinese law.

I would, however, suggest to judges and legislators around the world that they carve out an exception to strict liability defamation laws for product disparagement opinions by consumers. Such an exception would not unduly hamper strict liability for product disparagement by competitors who might have an economic incentive

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154. Jurisdictional issues regarding internet speech have been extensively analyzed elsewhere. *See, e.g.*, Denis T. Rice & Julia Gladstone, *An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyberspace*, 58 BUS. L. 601 (2003).

to defame or misrepresent a competitor's offerings. It would also not necessarily treat injury to reputation for an individual, or even a government official, as the equivalent of reputational injury to a corporation. (In transition economies, where the distinction between government and corporation is currently somewhat blurred, this could present some challenges.)

Nevertheless, because of the foundational importance of consumer access to a broad range of information and opinion to make rational choices in the marketplace, I advocate a liberalization of protection, even for highly volatile consumer opinion. Cultures in which there is great sensitivity to criticism and cultures in which scathing criticism is tolerated must work out some methods to harmonize their perspectives, at least with respect to economic issues and trade, including consumer opinion on the internet.