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Chinese Business and the Internet: The Infrastructure for Trust*

Timothy L. Fort**
Liu Junhai***

ABSTRACT

Although the Internet and E-commerce revolutions have clearly taken hold in the United States and Europe, the Chinese culture has been slow to adopt the Internet as a marketplace. The Authors cite a lack of trust on the part of both potential consumers and potential merchants as the primary obstacle to a robust Chinese E-commerce community. To remedy this lack of trust, the Article proposes the nation seek a middle way between reforms guided by Western rule of law and Eastern rule of ethics, thus incorporating effective regulatory strategies and the philosophical resources already within the Chinese cultural consciousness. The Authors propose a framework based on three distinct varieties of trust, and apply that framework across the specific policy problems that impede vibrant E-commerce in China—namely, the development of a workable regulatory regime, and the particular problems of privacy and defamation that seem to be related to the growth of E-commerce. Ultimately, the Authors suggest that to successfully navigate this dramatic shift to an Internet-enabled economy, China should embrace its past but recognize that the new E-commerce context also may demand new solutions.

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I. INTRODUCTION: THE STATE OF E-COMMERCE IN CHINA

Although the fervor of Internet communications has diminished over the past two years, there is little doubt that electronically modulated communications are here to stay, including those that involve business transactions.¹ This may be more true of emerging markets, where Internet technology was in its infancy at the time of the dotcom bust.² This Article looks specifically at some of the issues necessary for the development of the Internet and E-Commerce in

1. See John Naughton, *Why Web is Here to Stay—Forever*, OBSERVER, Mar. 31, 2002, at B1.

2. See Peter Drucker, *The Next Society*, ECONOMIST, Sept. 15, 2001, at C2.

China where, in the last decade, they have gained a foothold and grown rapidly.³

In 1997, there were only 670,000 Internet users in China.⁴ In 1999, that figure jumped to 2.1 million.⁵ A survey report released by the China Internet Network Information Center (CNNIC) showed that in 2000 there were 8.92 million computers with access to Internet; 22.5 million Internet users in China; and 265,405 "www" sites with suffixes such as .cn, .com, .net, and .org.⁶ The Chinese Academy of Electronic Information Industry Development estimated that the number of Internet users in China would grow to 27 million by the end of 2001.⁷ Some sources are even more optimistic. One publication predicts China will have 374 million users by the end of 2005, making it the largest Internet market in the world.⁸ The growth of Internet culture has been so rapid and influential that a very popular greeting—"have you hooked up to Internet?"—has replaced the traditional greeting of thousands of years—"Chi le ma?" (have you eaten?).⁹ In 2000, Chinese E-commerce revenue reached 77.16 billion yuan (U.S. \$9.32 billion), of which business to business (B2B) trade accounted for 76.77 billion yuan (U.S. \$9.27 billion), and business to consumer (B2C) trade accounted for 390 million yuan (U.S. \$47.1 million).¹⁰ In short, there is great potential for E-commerce development in China.

Chinese consumers, however, are not as active as their American counterparts in online shopping, despite the fact that the number of Internet users is doubling every six months. The Reports and Statistics of China's Internet Development in 1999 indicated that "85 percent of interviewees said they would purchase goods online when the conditions were ripe. Nevertheless, they would only buy small commodities such as books, tapes, or videos. The quality of goods, safety and convenience of payment are major worries for potential online purchasers."¹¹

3. See *Hot Property Goes Unsold*, ASIaweek, June 20, 1997, at <http://www.asiaweek.com>.

4. Zhao Huanxin, *Internet Hook-up Cost Reduction to Enhance Extension of Access*, CHINA DAILY, Mar. 2, 1999, available at LEXIS, World Library, Txtlne File.

5. *Id.*

6. China Internet Network Information Center, *Semiannual Survey Report on the Development of China's Internet*, at <http://www.cnnic.net.cn/developst/e-cnnic200101.shtml> [hereinafter CNNIC Survey].

7. Hou Mingjuan, *National Internet Fever Cools Down*, CHINA DAILY, Feb. 27, 2001, available at LEXIS, World Library, Txtlne File.

8. Kai-Alexander Schlevogt, *Policy Needed to Make Web a Power for Life*, CHINA DAILY, Sept. 22, 1999, available at LEXIS, World Library, Txtlne File.

9. Huan Xin, *Web Surfers Profiled in Survey*, CHINA DAILY, Jan. 18, 1999, available at LEXIS, WORLD World Library, Txtlne File.

10. Mingjuan, *supra* note 7.

11. Jiang Jingen, *Internet Users Hit 4 Million Mark*, CHINA DAILY, July 15, 1999, available at LEXIS, World Library, Txtlne File.

This tepid attitude toward online shopping on the part of consumers does not change even when the group of Internet users expands further. According to the semi-annual survey report on the development of China's Internet released by the CNNIC in January 2001, security is one of Internet users' concerns. In 2000, only 31.67% of interviewees had purchased commodities or services via the Internet, and only 8.64% of interviewees had purchased commodities via auction websites.¹² The motivations for online shopping varied from timesaving to curiosity.¹³ The most frequently purchased products and services were books, magazines, and computer equipment.¹⁴

According to another source, the percentage of online shoppers is even smaller than CNNIC's estimate. A 2000 survey conducted by Beijing-based Analysis Consulting Limited in Beijing, Shanghai, and Guangzhou—China's most wired cities—shows no more than ten percent of Internet users purchased products on the web during August, September, and October of 2000.¹⁵ Not surprisingly, the B2C market only accounts for 0.5% of the whole E-commerce revenue in 2000. Consequently, although there were 667 B2C dotcoms in early 2000, only 205 survived after mergers, acquisitions, and bankruptcies depleted their numbers by the end of 2000.¹⁶

There are many barriers to Internet growth in China, including slow access speed, high prices, insufficient Chinese language information on the web, inability to protect personal privacy, and poor Internet Service Providers (ISPs).¹⁷ Additionally, China lacks a standard credit system and an effective express delivery network, the two critical elements for the operation of E-commerce.¹⁸ It appears, however, that the major reason for consumer unease is simply that many Chinese Internet users do not trust E-commerce modulated ways of doing business and are dissatisfied with the current service available in the E-commerce world. As the CNNIC survey indicated, 15.7% had experienced delays in receiving purchases after their order and payment.¹⁹ Less than 2.0% of the interviewees were very

12. CNNIC Survey, *supra* note 6.

13. *Id.*

14. *Id.*

15. Hou Mingjuan, *Survey Scrutinizes State of Internet Users*, CHINA DAILY, Nov. 14, 2000, available at LEXIS, World Library, Txtlne File.

16. Mingjuan, *supra* note 7.

17. Huanxin, *supra* note 4 (noting that users of the Internet in some cities had to pay about one-third of their salaries to get internet service in 1999, and indicating that many respondents think that telecommunication monopoly has made surfing the net unreasonably expensive, and is retarding expansion of the network). See also Xin, *supra* note 9.

18. Wang Chuandong, *IT Players Yearn to be Listed Abroad*, CHINA DAILY, July 12, 2000, available at LEXIS, World Library, Txtlne File.

19. CNNIC Survey, *supra* note 6.

satisfied with online shopping, 26.0% of the interviewees were satisfied with online shopping, 51.2% of the interviewees felt ambivalent toward it, 17.2% of the interviewees were unsatisfied with it, and 3.9% of the interviewees were very unsatisfied.²⁰

For more expensive goods, the level of confidence was even lower. Slightly more than 55.0% of the interviewees prefer cash payment for goods of over RMB 1000 yuan (U.S. \$120), and only 8.0% of the interviewees prefer online payment.²¹ More than 31% of the interviewees said that "security can not be guaranteed"; 32.0% of the interviewees said that "the quality of products, service after the delivery, and credit of the producer can not be guaranteed"; 12.6% of the interviewees complained about inconvenient payment procedures; 9.9% of the interviewees complained that delivery is slow; 7.4% of the interviewees complained about unattractive prices; and 5.9% of the interviewees complained about unreliable information.²²

The small percentage of Internet users shopping online, the majority of online shoppers' dissatisfaction with E-business, the overall concerns about the security and reliability of online shopping, and E-business' credibility simply reflect the basic fact that consumers do not have sufficient trust in E-commerce corporations and the Internet. Businesses do not trust consumers either. For instance, a senior executive from an E-business admitted that "we can deliver goods only when we make sure the payments have been transferred to our account. Unfortunately, this process is not under our control and could last weeks."²³ As a result, E-business's distrust of consumers reinforces the latter's distrust of E-business, because consumers have no good reason to extend trust to an E-business when it insists on delivering goods only after obtaining hard currency. It is not surprising that "doubtful of the safety of payment online through credit cards, many online buyers in China tend to choose slower, inefficient, yet safer methods of remittance."²⁴ Buyers and sellers perceive the threats to safety not only from third parties, or hackers, but also from the contracting parties. Accordingly, for electronically modulated business to flourish in China, there must be greater consumer and seller confidence.

In Part II of this Article, the authors coin a tri-partite distinction for assessing elements of trust. By breaking trust into component elements of "Hard Trust," "Real Trust," and "Good Trust," one can differentiate the kinds of infrastructure necessary to build the foundation for Chinese Internet confidence. Some of those

20. *Id.*

21. *Id.*

22. *Id.*

23. He Sheng, *On-line Disillusionment Growing*, CHINA DAILY, July 27, 1999, available at LEXIS, World Library, Txtlne File.

24. *Id.*

foundations are legal; as a result, the Article considers the dimensions of three issues—security, privacy, and defamation—in sketching the parameters of a larger project regarding the necessary legal considerations for a sound infrastructure. Another part of this infrastructure is moral—the ethical underpinnings available to ground a sense of duty online. For this, the Article briefly explores Confucian sources in Part II.D, illustrating some of the resources available in traditional Chinese culture to approach the development of the Internet. This Article does not claim to be comprehensive. It would take at least a book, perhaps a multivolume tome, to fully describe the moral and legal infrastructure for something as encompassing as the Internet in a place as rich and complex as China. The treatment here is impressionistic—utilizing certain examples as illustrations of the task ahead of the development of the infrastructure for Chinese E-Commerce.

The Chinese government has responded to the pressures of the Internet. As elaborated in Part III, the government has enacted multiple laws related to access and registration of Internet users, and regulation of telecommunications generally. The government has also extended coverage of basic civil, consumer protection, products liability, advertising, and contract law to the Internet. In particular, Parts III and IV discuss the importance of privacy and defamation laws as they relate to the Internet. The accumulation of information can threaten individual privacy, and the ease of dissemination of information can worsen defamation concerns. As one might expect, the attention the legal system addresses to E-commerce issues relates to the efficacy of laws applicable to them. Accordingly, later portions of this Article address the efficacy of Chinese legal regulation of E-commerce, particularly as that regulation relates to issues of privacy and defamation. It is also important, however, not to assume that such legal regulation is the only mechanism by which trust in E-commerce can be enhanced. Thus, although legal regulation is critically important and merits the majority of attention in this Article, the role law plays in enhancing market trust must be contextualized in conjunction with two other forces: morality and technology.

II. THE ROLE OF ETHICS AND LAW IN TRUST-BUILDING

A. *Hard Trust, Good Trust, and Real Trust*

Use of the word “trust” in this Article is not accidental. Trust has become an Internet buzzword. Companies such as Microsoft talk

about establishing trust.²⁵ The Napster-Bertlesmen deal traded on a notion of trust, dealing with the protection of artists and their works so they could trust putting their intellectual property on the market.²⁶ Management strategists write about placing trust at the center of a company's Internet strategy so as to encourage repeat business from customers.²⁷ The focus on trust also drives governmental action.²⁸ How governments and businesses can devise ways to encourage people to trust E-commerce thus seems to be at the heart of Internet thinking.

But what is trust and how does a company achieve it? If companies are not careful about how they go about reaching a goal of trust, they may well create a kind of trust that is different from what company stakeholders seek; or, if they avoid this mismatch, they may underinclude the issues that comprise trust. Trust always entails at least one party being vulnerable to the actions of another, and that party therefore depends upon, relies on, or trusts the other party not to exploit that vulnerability.²⁹ A more formal way of defining trust is "one's willingness to rely on another's actions in a situation involving the risk of opportunism."³⁰ An important way in which one gains trust is through "the confidence associated with professional certification, ethics and training."³¹ Yet trust is not only about respecting standards of behavior, it is also about specific bordering and marketing strategies that are necessary to establish who is to be trusted, when, and how.³² It is also about repeated interactions with potential partners, experiences which build trust,³³ and the affective emotions that nurture trustworthy expectations of others.³⁴

Trust is, therefore, not a term with a single meaning, nor does use of the term correlate precisely with any one experience. With respect to the Internet and globalization—two relatively new

25. See Richard Purcell, *Chief Privacy Officer: Microsoft's Richard Purcell Spends His Days Wrestling With Some of the Toughest Questions Raised by E-Commerce*, HARV. BUS. REV., Nov.-Dec. 2000, at 20.

26. See Don Clark, *Napster Alliance Boosts Prospects for Encryption*, WALL ST. J., Nov. 2, 2000, at B1.

27. Glen L. Urban et al., *Placing Trust at the Center of Your Internet Strategy*, SLOAN MGMT REV., Fall 2000, at 39.

28. See, e.g., *Hague Conference Will Examine ADR's Role in Consumer Protection, Privacy Rights Areas*, [Nov.-Dec.] Elec. Commerce & Law Rep. (BNA) No. 1831, at 1123 (Nov. 15, 2000).

29. See LaRue Tone Hosmer, *Trust: The Connecting Link Between Organizational Theory and Philosophical Business Ethics*, 20 ACAD. MGMT. REV. 379, 381-82 (1995).

30. Michele Williams, *In Whom We Trust: Group Membership as an Affective Context for Trust Development*, 26 ACAD. MGMT. REV. 377, 378 (2001).

31. *Id.* at 378.

32. *Id.*

33. *Id.* at 379.

34. *Id.*

phenomena that challenge traditional notions of trust—separating the different kinds of trust may be a fruitful exercise. Accordingly, this Article proposes, perhaps idiosyncratically, three kinds of trust: Hard Trust, Real Trust, and Good Trust.

Hard Trust is concerned with bordering: Who are the parties to a particular transaction? Hard Trust can be a legislative action where a sovereign establishes borders or enacts rules that require compliance.³⁵ When government has not acted, however, the key to Hard Trust is technology, particularly encryption. Encryption allows parties to a transaction to keep others out of the transaction.³⁶ Thus, encryption used for privacy keeps personal information away from those the transactors do not want to have it.³⁷ Encryption used for contractual purposes, such as digital signatures, verifies the identity of business parties.³⁸ Digital signatures keep out those who want to impersonate a contractual partner.³⁹ Encryption used for the protection of intellectual property prevents illicit duplication of protected material.⁴⁰ Hard Trust, therefore, creates confidence that the business is dealing *only* with intended parties to the transaction. In short, Hard Trust results when a sovereign clearly defines, patrols, and enforces borders; or, in the absence of sovereign action, when parties define, patrol, and enforce borders for themselves.⁴¹

The second kind of trust is Real Trust. Real Trust is concerned with creating reliable relationships. It is the kind of trust that business literature most frequently addresses.⁴² The idea underlying Real Trust is that customers, in particular, have reason to rely on the businesses that conduct commerce over the Internet.⁴³ In this regard, companies that state a privacy policy and abide by it, that provide and assure security for credit card transactions, that ship reliably, and that provide a place for customers to call with questions all lead

35. In this sense, Hard Trust is akin to positive law as well as Stage One of Lawrence Kohlberg's schema of moral development. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* (1994) (for a classic presentation of positive law theory). See also LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* (1981) (for a description of moral development in which pre-conventional moral development is the result of avoiding punishment).

36. American Bar Association, *Digital Signature Guidelines Tutorial*, at <http://www.abanet.org/scitech/ec/isc/dsg.pdf>.

37. See Manny Frishberg, *Web Privacy, Security Weighed*, WIRED NEWS, at <http://wired.com/news/technology/0,1282,40591,00.html>.

38. See Elinor Abreu, *Savings Seen in E-Sign Law*, STANDARD, at <http://www.thestandard.com>.

39. *Id.*

40. *Id.*

41. An analogy for this idea comes from the western settlements of the United States where absent effective government regulation, ranchers and farmers relied on inexpensive technology such as barbed wire in order to set borders for their property.

42. See, e.g., Urban et al., *supra* note 27.

43. *Id.*

to customers becoming comfortable with doing business over the Internet.⁴⁴ These tactics, which are certainly not exhaustive, build Real Trust in the market.⁴⁵ Companies that do these things are more likely to attract repeat business from satisfied contractual partners.⁴⁶ If they do not, market forces will punish them.⁴⁷

Real Trust depends upon the ability of some parties to hold a company accountable for its promises and practices. While the market is one mechanism for doing so, the law has always been a second mechanism. Thus, laws regarding warranties, product defects, and even criminal regulations make companies more accountable, and in doing so, provide customers with assurance that they have resources to make the company accountable.

The final type of trust is Good Trust. Good Trust goes beyond Real Trust to provide almost an intimate kind of assurance that the person B on the other side or other computer screen is benefited by person A's well-being.⁴⁸ This is a kind of trust that trades on a self-interest in which the understanding of the *self* is far more complex than that of an economic transacting partner.⁴⁹ In a non-economic setting, families or members of a religious organization find joy in the well-being of others.⁵⁰ Human beings still have this disposition when they walk through the door at work or log onto the Internet. The heart of ethical knowledge comes from these interactions with other people when we can understand the consequences of our actions and learn that our well-being is tied up with the well-being of others.⁵¹ The places where these interactions occur are known as "mediating institutions," and they are indispensable for the development of moral knowledge and the orientation of ethical business behavior.⁵² Before considering the role that trust may play in the development of Chinese E-commerce, it is worth comparing these distinctions with the notions of trust developed in other scholarly areas of inquiry.

In the literature of organizational theory, for instance, L.G. Zucker has differentiated among process trust, person-based trust, and institution-based trust.⁵³ Process trust is tied to a record of past expectations: by seeing a record of success after going through a process, one has confidence that an additional engagement will lead

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. See TIMOTHY L. FORT, *ETHICS AND GOVERNANCE: BUSINESS AS MEDIATING INSTITUTION* 62-86 (2001).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. L.G. ZUCKER, *INSTITUTIONAL PATTERNS AND ORGANIZATIONS: CULTURE AND ENVIRONMENT* (1988).

to satisfactory results.⁵⁴ Person-based trust is tied to similarities between people; one trusts because one has an expectation that the other party has some degree of affinity or affiliation.⁵⁵ Finally, institution-based trust is tied to formal mechanisms such as professionalism and insurance. This kind of affiliation blends process and person trust, because one establishes an affinity with others on the basis of a set of process standards to which members of an organization commit themselves.⁵⁶

LaRue Hosmer, on the other hand, attempts to synthesize normative and descriptive understandings of trust through the following definition: "Trust is the expectation by one person, group, or firm of ethically justifiable behavior—that is morally correct decisions and actions based upon ethical principles of analysis—on the part of the other person, group, or firm in a joint endeavor or economic exchange."⁵⁷ Hosmer thus suggests that one trusts because those with whom one is engaging will make morally correct decisions—decisions that conform to ethical standards of behavior.⁵⁸

The purpose of this Article is not to dispute or choose between these characterizations of trust. In fact, these definitions can work usefully together. The Zucker definition is trust fostered through group membership, whether existing *ex ante* or developed through processes and institutions. It is, therefore, to apply a philosophical designation, at least somewhat Aristotelian.⁵⁹ The Hosmer definition is more Kantian in that it articulates principles that can be applied as moral duties to any particular situation. Zucker's description of trust largely avoids normative concerns, relying instead on descriptive ways that people do, in fact, trust, rather than arguing for the reasons according to which a person *should* trust.

The Zucker definition begs the question, however, of what standards of process and institution building are required in order to build trust. As Daryl Koehn has argued in other contexts, people could choose to trust on the basis of joint commitments to racism or hatred.⁶⁰ The task for Chinese E-Commerce, at least for purposes of this Article, is to consider how to encourage Hosmer-like trust that *leads to Aristotelian communities*. In such communities, "good" behavior is reinforced and "bad" behavior is punished because individuals experience the consequences of their actions.⁶¹

54. See *id.*

55. See *id.*

56. See *id.*

57. Hosmer, *supra* note 29, at 399.

58. *Id.*

59. See generally ARISTOTLE, *Nicomachean Ethics*, in THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed., 1991).

60. Daryl Koehn, *Should We Trust in Trust?* 34 AM. BUS. L.J. 183, 210 (1996).

61. See FORT, *supra* note 48. A personal example may illustrate the ways in which Hosmerian and Zuckerian trust can work together. One of the Authors of this

The Internet is a double-edged sword in achieving this knowledge and orienting this behavior: it both connects and separates individuals from the consequences of their actions.⁶² Yet, if one is to build a corporate environment in which values such as promise-keeping and truth-telling are important, and they are important in creating Real Trust, then corporations must also look to how those working for them inculcate these virtues on a regular basis. As a result, the ethical notions of Good Trust, in which one's personal dignity is valued at work, become important to the company as well.⁶³ One can obtain a sense of the importance businesses attach to trust by reading management literature. For instance, some scholars propose that trust in Internet transactions is built in a three-stage process that: (1) establishes trust in the Internet and the specific website, (2) builds trust in the information provided, and (3) creates trust in the delivery fulfillment and service.⁶⁴ Glen Urban also proposes three steps to building trust in a website: (1) protecting customer privacy by not using cookies unless specifically allowed by the individual customer, using third party seals of approval; (2) building or utilizing brand equity; and (3) providing an opportunity for customer feedback.⁶⁵ To create trust in the information provided, Urban argues that the information should be accurate and complete,⁶⁶ providing ways for customers to compare products in an unbiased way. In doing so, the expectations of customers will be met, and customer confidence and trust will grow.⁶⁷

The kind of trust Urban proposes is one that combines Hosmer and Zucker notions. It creates a process in which one establishes a

Article recently adopted a baby from China. One of the first tasks was for the Author to demonstrate to the Chinese government that he and his wife were worthy of adopting a child or, in other words, were trustworthy according to the definition provided by Williams. Because the government of China could not be in a position to make such an evaluation, a series of procedural steps were undertaken in order to assess the emotional, psychological, physical, and financial capabilities of the Author. In order to prevent fraud, each statement had to be notarized. Then each notarized statement had to be authenticated by the Secretary of State of those states which had vested notarial authority in the notary public. After this step, the Chinese Consulate was required to authenticate that the Secretary of States were, in fact, authorized certifiers of this information that could be relied upon by the government of China. It was only after this institutional process that the approval of an adoption—perhaps the ultimate building of a person-based relationship—began.

62. See generally CASS SUNSTEIN, *REPUBLIC.COM* (2001).

63. See KOHLBERG, *supra* note 35 (noting advanced stages of moral development, primary in terms of individual quests for more excellence); cf. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982) (for a more relational perspective of moral virtue in terms of caring relationships, a position more akin to the kind of trust for which we advocate).

64. Urban et al., *supra* note 27, at 40.

65. *Id.* at 41.

66. *Id.*

67. *Id.* at 41-42.

relationship with a company.⁶⁸ The ethical principles followed are those of truth-telling, promise-keeping, and respect for persons. Urban concludes that trust will soon be the currency of the Internet.⁶⁹

There are two important examples of Urban's argument: privacy policies and the presence of intermediaries. For instance, Amazon and Microsoft have privacy policies that incorporate notice, choice, access, security, and enforcement.⁷⁰ In its privacy policy, Amazon provided that it would not disclose consumer information. In a revised policy, however, it outlined a series of times when such information would be disclosed.⁷¹ This kind of modification is exactly what can raise concerns in the minds of consumers as to whether the company they are dealing with is, in fact, trustworthy.

Management attention to the importance of trust also attends to the issue of intermediation. One of the advantages of doing business over the Internet for consumers is that it cuts out the "middleman" by providing direct access to producers. Disintermediation, however, also has costs. Traditional intermediaries evaluate and credibly communicate product information to consumers.⁷² By becoming experts in a particular field, they save consumers transactions costs.⁷³ In addition, intermediaries can enhance delivery and quality; for instance, banks screen out risky borrowers who might jeopardize other depositors' savings.⁷⁴ Eliminating those intermediaries creates costs and uncertainty in the market, because they reduce the processes and institutions by which consumers can trust another party to a transaction. Randall Morck concludes that the characteristics of the Internet, where producers can change identity overnight, may undermine the reliability of the commitment to honest dealing such that "solving this transactional integrity 'gap' represents both a challenge and an opportunity for E-commerce companies."⁷⁵

Over time, companies will learn that if they are to obtain repeat customers, they will need to replicate the relationship-building required to run a neighborhood shop. That is, they must keep promises, respond to consumer questions, and provide quality performance. The market itself acts as a disciplining mechanism to reach this kind of trust over a longer haul, but law plays an important role as well. Warranty laws and liability laws, for

68. *Id.* at 40.

69. *See id.* at 42-43.

70. Purcell, *supra* note 25, at 22.

71. Patricia Jacobus, *Privacy Groups Call Amazon Policy "Deceptive"*, CNET NEWS, Dec. 4, 2000, at <http://news.com.com>.

72. *See* RANDALL MORCK ET AL., EMERGING INSTITUTIONS: TRANSACTIONAL INTEGRITY IN E-COMMERCE 7 (U. Mich. Bus. Sch., Working Paper No. 99-030, 1999).

73. *Id.* at 8.

74. *Id.* at 9.

75. *Id.* at 29.

instance, provide consumers with a course of action against companies and individuals who might not otherwise live up to integrity standards. Aristotle believed a community needs to have laws to teach its members how to be virtuous.⁷⁶ In the context of E-commerce, a community needs to create laws that clarify the duty of companies to act in a virtuous way so that strangers become partners in a relationship rather than exploited transactors. In this way, market and legal mechanisms can translate a Hosmer notion of trust into a Zucker notion of trust.

The task in this Article is to examine the ways in which Chinese E-commerce law can create the processes that help lead to trust and, in particular, Real Trust. No law can create trust *ex nihilo*, but it can provide an infrastructure that encourages individuals and companies to practice basic integrity that deepens into an interpersonal and institutional kind of trust. Building that process has the components of Hard Trust, Real Trust, and Good Trust. Hard Trust provides a procedural infrastructure of an institutional basis for trusting behavior. Real Trust results from the efficacious enactment of the processes so that individuals dealing either with institutions or process have confidence that they can rely on either with minimal risk for opportunism. The alignment between Good Trust and interpersonal trust is more straightforward and, although the Article mentions its importance, is more the domain of ethics and organizational behavior. The interest of this Article is, instead, on process and institutions, or, Hard Trust and Real Trust, with a particular emphasis on the latter.

B. *Toshiba in China: A Case Study of Trust*

In 1999, Toshiba agreed to pay 500,000 Toshiba laptop users in the United States a total of U.S. \$1.05 billion in compensation because of a possible defect.⁷⁷ Toshiba did not take a similar action, however, in China.⁷⁸ This inaction undermined the confidence of Chinese Toshiba customers.⁷⁹ Some Chinese Toshiba laptop users' anger was sparked by news released on May 8, 1999 on a Beijing-based news website, 21DNN, reporting "Toshiba had refused to compensate Chinese consumers for a disk drive flaw in their laptop computers that could cause a loss of data."⁸⁰ Toshiba Vice President Masaichi Koga did not recall the products; instead, he only rhetorically offered to do "everything" to help its Chinese laptop

76. See ARISTOTLE, *supra* note 59.

77. Jin Zeqing, *Toshiba Knows Little of China's Laws*, CHINA DAILY, June 1, 2000, available at LEXIS, World Library, Txtlne File.

78. *Id.*

79. *See id.*

80. *Id.*

purchasers, except provide compensation.⁸¹ “Toshiba asserted that it took a strong stand against Chinese consumers because China does not have concrete laws—or Hard Trust—concerning this kind of compensation as does the United States.”⁸² Consumers thought Toshiba’s apathetic attitude towards Chinese customers was in stark contrast to what it did for its American customers.⁸³ By compensating its U.S. customers Toshiba implicitly confirmed the defect, or at least its concern that consumers would think there was a defect.⁸⁴ Moreover, while the firm did agree to offer Chinese customers a software patch to fix the disk, it appears to have been done only after the domestic media held Toshiba accountable.⁸⁵

Three Toshiba laptop users have since filed a lawsuit with Beijing’s Number 1 Intermediate People’s Court demanding compensation of 80,000 yuan (U.S. \$9,600).⁸⁶ Also, more than one hundred Toshiba laptop consumers from Northeast China have organized a class-action lawsuit to seek compensation from the Japanese company.⁸⁷ On May 30, 2000, a special group of attorneys from Long An Law Firm, Feng Lian Law Firm, and Gao Peng Law Firm, representing a group of Toshiba laptop users, filed suit in Beijing’s Number 1 Intermediate People’s Court demanding compensation from Toshiba.⁸⁸ This group of attorneys also notified all Chinese Toshiba laptop users residing in Mainland China who purchased flawed Toshiba laptops that they could hire the attorneys without charge.⁸⁹ The stakes are high: Toshiba has sold more than 200,000 laptops in China.⁹⁰ If all consumers join this litigation, it could become the largest class-action suit since the enactment of the 1991 Civil Procedure Law in China.

The Hard Trust dimension of the Toshiba case appears to relate to the borderless nature of cyberspace. Because it is unclear what jurisdiction would control the alleged product defect, Toshiba placed a choice of law clause in its contracts indicating that disputes would be resolved in a jurisdiction of Toshiba’s choosing.⁹¹ In short, Toshiba created a border mandating how issues on its “territory” will be resolved. This has two important implications. First, it is open to

81. Guo Aibing, *No Compensation Angers Chinese*, CHINA DAILY, May 23, 2000, available at LEXIS, World Library, Txtlne File.

82. Jin, *supra* note 77.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Wang Xuefeng, *Attorney Syndicates Assist Class Actions Against Toshiba*, BEIJING EVENING NEWS, June 1, 2000, available at <http://www.ben.com.cn>.

89. *Id.*

90. Aibing, *supra* note 81.

91. *Id.*

question whether other determiners of sovereign borders should intervene to make clear what jurisdiction controls. This could be accomplished through unilateral, bilateral, multilateral, or even global treaties. As of yet, however, these treaties are only embryonic.

Second, many constituents, such as consumers in China, may justifiably believe that submitting a dispute to a court overseas imposes an unfair burden on them. As a result, a moral question arises concerning the extent to which Toshiba's bordering strategy is fair to its customers. Thus, Hard Trust provides degrees of certainty as to what rules apply, but by itself is not sufficient to create Real Trust.

The Real Trust dimension of the Toshiba case concerns the economic and civil liability mechanisms to make Toshiba accountable regardless of the borders it wishes to build. Is there an ability to enforce a warranty against a product defect? If the answer is yes, then a consumer in China will know that they can depend on the product, or at least have claims concerning defects heard. The Toshiba case illustrates the struggle of legal systems, in this case China's, to impose accountability on a company whose physical presence is somewhat elusive. If this is a company that cannot be held accountable, one would not expect consumers to place significant trust in the product or the company. Similarly, if there are viable options for consumers, then economic accountability will encourage Toshiba to stand behind its products or risk losing market share to a competitor. If, however, there is no viable substitute, then consumers have little recourse, assuming they need or desire a computer, to assure that the computer they purchase is reliable. Without that dependability, trust suffers, as it appears to have suffered in the Toshiba case.⁹²

Good Trust may not be present at all in the Toshiba case. As already noted, Good Trust results when individuals view their identity as bound up with the well-being of others. Typically, this

92. We do not wish to suggest that warranties are superfluous if there is a degree of ethical trust present so that a company like Toshiba would guarantee the product regardless of the law. Without engaging in a complex, tangential argument about the relationship of law and morality, we simply suggest that laws often reflect a moral disposition of a jurisdiction so that a law reinforces ethical understandings of appropriate behavior. (For an example of this argument, see TIMOTHY L. FORT, *LAW AND RELIGION* 3 (1984) (demonstrating historically that many of the early laws of Connecticut were based on moral, even religious understandings of appropriate conduct)). Rather than viewing warranties as superfluous, we would argue that warranties are a vital reinforcement of a Real Trust notion that companies should stand behind their products. The application of warranty theory to a product, of course, does assume that products have been purchased in a legal course of business. We do not wish to suggest that a counterfeited copy of a software program, copied without permission of the manufacturer, is entitled to the warranty protection as would be the case if a person legally purchased a product in a legal stream of commerce.

will occur with ongoing relationships that are particularly difficult in the context of mass-market distribution to international consumers. The work of mediating institutions is typically opposed to the supposition that personal relationships can be developed in a bureaucratic, mass-marketed manner.⁹³ Good Trust is a more subtle, although no less critical, set of practices whereby Toshiba, as a corporate community, commits to honest, trustworthy behavior as a matter of its identity, and as a matter of empathy and solidarity to those who are members of the community.⁹⁴ If this is learned by habit, then it is more likely that these traits can be extended to external stakeholders as well.⁹⁵ Although this Article proposes that this is a valid, separate analytical category, there is not enough evidence of Toshiba's practices to know the extent to which they practice building Good Trust.

Because of the complexities of these issues, it makes sense to subcategorize trust into these three, somewhat analytically distinct layers: Hard Trust, Real Trust and Good Trust. Hard Trust requires eliminating the dangers from parties other than the direct E-commerce contracting parties, including hackers, who intrude on a relationship. Real Trust requires holding the parties accountable for their actions. Good Trust requires building higher levels of trust among the whole E-commerce community at either a national or international level. This Article explores some dimensions of the interaction between Hard Trust and Real Trust in terms of how China can establish the infrastructure so that parties are inclined to view the Internet as a reliable means of doing business. The focus, to repeat an earlier comment, is not meant to be comprehensive. Assessing the full dimensions of China and its relationship to the Internet would be an enormous task, far beyond the purview of this Article. One can look at extant law and Chinese historical resources, however, to demonstrate issues confronting Chinese E-Commerce.

C. *The Fundamental Role of the Rule of Law in Trust-Building*

E-Commerce parties may have a limited network of friends, relatives, neighbors, country folks, or business partners to guarantee the credibility of their contracting parties sitting on computers thousands of miles away. Indeed, one of the things the Internet does is connect people who did not previously have a relationship. In this context, custom, friendship, kinship, and other traditional bonding mechanisms may not provide a sufficient moral backstop. In these

93. See, e.g., PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 7 (1977).

94. See FORT, *supra* note 92, at 37-66 (discussing the influence of religion and morals on economic development of law).

95. *Id.*

situations, the rule of law at national, international, and even interpersonal levels may be the most effective guarantor of the integrity of an E-commerce transaction.

While the rule of law has been established in the United States for more than two centuries, it was not written into the Chinese Constitution until March 1999, even though the notion of a "legal system," which generally implies *rule by law*, has been used for decades.⁹⁶ Considering thousands of years of tradition utilizing *rule of person* in China, using the rule of law as a governance mechanism is a new approach. But if China is to connect to a world of different cultures, it is necessary to reform the current legal system for the following reasons: (1) to support E-commerce development; (2) to encourage fair, free, and sufficient E-Commerce competition; and (3) to protect consumers and other E-commerce stakeholders, especially vulnerable groups.⁹⁷ As China enters the World Trade Organization (WTO) and increases Internet use, the nation will be expected to incorporate western business law standards, although this transplanting process may be rather gradual.⁹⁸

D. *The Role of the Rule of Ethics in the Trust-Building Process: Confucianism*

Technology may provide bordering mechanisms to clarify what rules apply in a given transaction, but contracting cannot govern every aspect of business affairs. Legal rules must be somewhat general and broad given the substantial governmental weight behind a sanction, and given the myriad variable situations that arise in human affairs. Even the most intelligent legislators and judges are unlikely to be able to create legal rules sufficiently detailed to

96. See Ninth National People's Congress, Zhonghua Renmin Gongheguo Xianfa Xiuzheng'an (The Amendments to the Constitution of the People's Republic of China), 2d. Sess., March 15, 1999 [hereinafter *The Amendments*]. The Amendments incorporated a new sentence into Article 5 of the Constitution of People's Republic of China in 1999, which reads, "The People's Republic of China should implement the principle of governing this country by law, and making it a socialist country with rule of law." *Id.* art. 5. This is the first time for "rule of law" to be written into the Constitution. *Id.*

97. See Zeng Min, *Internet Laws Urged in China*, CHINA DAILY, June 15, 2000, available at LEXIS, World Library, Txtlne File. Chinese authorities are ready to phase in a series of internet-related regulations, including regulations on internet crime, intellectual property rights protection in cyberspace, online payment, online taxation, and how to identify e-dealers and electronic trade certification. However, E-commerce legislation will be a difficult to draft because the range of fields to be governed is both broad and ever-changing. *Id.*

98. See Liang Yu, *Laws Move in WTO's Direction*, CHINA DAILY, Nov. 22, 2000, available at LEXIS, World Library, Txtlne File (noting the mainstream argument that China needs to reshape its laws and regulations so that they conform to standards demanded by the WTO).

guarantee trust of E-Commerce in a new virtual world. This is not to say, however, that China's culture is without important resources for detailing a Rule of Ethics applicable to the Internet. Chinese history, particularly through the moral precepts of Confucianism, also provides a lens through which E-Commerce may be analyzed. In particular, Confucianism provides an understanding for procedures and attitudes necessary to resolve disputes by non-judicial, yet fair and principled means.

This Article should be clear as to its contentions by first making clear what it does not contend. The Article does not predict whether or not there exists a sufficient, critical mass of Confucian belief to mandate Confucianism as the operating ethical governing principle of the Internet. Neither an assessment of the level of allegiance Confucianism possesses in China, nor a suggestion that, even if allegiance was ubiquitous, its ethical principles would be the pragmatic decision-making framework for Chinese E-commerce is made. Instead, the Article strives to be provocative by suggesting that deep within Chinese culture, Confucianism provides a wisdom which, if articulated, captures a sense of the ethical duties that any person—Chinese or non-Chinese—possesses, and which provides insight as to how this very modern technology might be utilized for the good of individuals as well as the community.

In China, there are rich traditional, cultural, and historical resources to use to build sound cyber-ethics, and Confucianism is one example. Confucius (551 B.C.-479 B.C.) was originally a scholar and philosopher.⁹⁹ His philosophy is comprehensive and has influenced Chinese society for more than two thousand years. Despite an uneven history of its development, Confucianism has been a predominant philosophy since the era of Han Wu, Emperor of the Xi Han Dynasty.¹⁰⁰ This emperor decided to abolish all other schools of thought and considered Confucianism the only respectable philosophy.¹⁰¹ He also paved the road to Confucianization of law.¹⁰² As Professor Zhang Jinfan indicated, so called "Confucianization of law" refers to the penetration of ethics, "LI," into the domain of law; "FA," and the final integration of ethics and law.¹⁰³ It took about eight hundred years from the Xi Han Dynasty to the Tang Dynasty for the Confucianization of law to unfold, namely by being fully

99. Confucius Publishing Co. Ltd., *Confucius: A Biography*, at <http://www.confucius.org/intro/edbio.htm>.

100. Zhang Jinfan, *Several Issues on the World Position of Chinese Legal Culture and its Modernization*, at <http://www.cin.hebnet.gov.cn/Others/Rendafazhi/d6j2.html>.

101. *Id.*

102. *Id.*

103. *Id.*

institutionalized into written law, especially the Tang Code in the Tang Dynasty.¹⁰⁴

Although Confucius himself was once a judge, he did not encourage resort to court for dispute resolution. Confucius himself expressed this argument very clearly: "In hearing litigation, I am just like other judges. What is necessary, however, is to cause the people to have no litigation."¹⁰⁵ Fan, a learned subsequent commentator, interpreted the no-litigation admonition as, "the purpose of hearing a case is to resolve the dispute itself, and block the sources giving rise to disputes."¹⁰⁶ Yang also noted that "Confucius did not consider hearing cases as a difficult job, rather considered no-litigation among and between the people as the most fundamental issue."¹⁰⁷

Confucius' no-litigation attitude has greatly influenced Chinese mainstream legal philosophy at both official and grass-roots levels.¹⁰⁸ Not only does the general populace try to avoid litigation, but the ruling class also considered diminishing litigation to be one of their governing goals.¹⁰⁹ Thus, the number of cases served as an important yardstick to evaluate the political performance of the local officials. For example, Han Yanshou, a governor of Dongjun in Xi Han Dynasty, attributed the increase in private litigation to inadequate building of morality.¹¹⁰ For this reason, he confined himself to his home, re-examining his own faults for giving rise to the disputes.¹¹¹ Consequently, the litigants also blamed themselves, and eventually 24 counties within his jurisdiction witnessed no further litigation within his term.¹¹²

Why does Confucianism so enthusiastically pursue an environment with no litigation? In his relationship-oriented theoretical framework, Confucius put special emphasis on the significance of "ethics, DE, building"¹¹³ for the people who want to become superior men, or "JUN ZI."¹¹⁴ To justify his priority of ethical or moral discipline over legal discipline or punishment, Confucius compared these two categories: "If the people are led by laws, and

104. *Id.*

105. THE ANALECTS OF CONFUCIUS (Simon Leys trans. & notes, 1997) [hereinafter THE ANALECTS].

106. ZHU XI, ZHUXI JIZHU 11.6 (1997).

107. *Id.*

108. Jinfan, *supra* note 100.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. Confucius concept "De" could also be translated into "virtue" or "morality." See THE ANALECTS, *supra* note 105, at 2.1, 2.3.

114. Confucius concept "Jun Zi" could be translated into various English counterparts, including but not confined to, "gentleman," "a man of complete virtues," or "superior man". Of course, it is difficult to choose a most appropriate word for the translation purpose. *But see id.* at 1.1, 1.8, 1.14, 2.12.

uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame."¹¹⁵ However, "If they be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good."¹¹⁶ Therefore, it makes sense for people to pay more attention to virtue building than to legal discipline.

Additionally, virtue building is the most intelligent choice for the governing class. As Confucius put it vividly, "he who governs by means of his virtue may be compared to the north polar star, which keeps its place and all the stars turn towards it."¹¹⁷ To guide the people to become morally superior, Confucius and his followers gave many guidelines, such as, "The superior man thinks of virtue; the small man thinks of comfort. The superior man thinks of the sanctions of law; the small man thinks of favors which he may receive."¹¹⁸ Furthermore, "He who acts with a constant view to his own advantage will be much murmured against."¹¹⁹ "The mind of the superior man is conversant with righteousness; the mind of the mean man is conversant with gain."¹²⁰ "The superior man wishes to be slow in his speech and earnest in his conduct."¹²¹ "I daily examine myself on three issues: whether I have been faithful in transacting business for other people; whether I have been honest in dealing with friends; whether I have understood and practiced the instructions of my teacher."¹²²

Through Confucius' elaboration, it is clear that ethical requirements are broader, more aspirational, and more comprehensive than legal requirements; no qualified superior man would be satisfied with only complying with the less rigorous legal requirements. Such a characteristic thus remains the fundamental difference between superior man and mean man, small man, or "XIAO REN." Once people transform themselves into superior men, the whole society will be in harmony and peace, and disputes in society will become fewer and fewer.

It is obvious, in Confucius' time, that virtue or morality should play the dominant and leading role in society, while law should play a supportive and supplementary role in assisting the process of ethics building. Although Confucius would not have imagined the Internet, he likely would argue that ethics should also play a fundamental role in ensuring a peaceful, secure, and harmonious E-commerce world.

115. *Id.* at 2.3.

116. *Id.* at 1.2.

117. *Id.* at 3.2.

118. *Id.* at 11.4.

119. *Id.* at 12.4.

120. *Id.* at 16.4.

121. *Id.* at 24.4.

122. *Id.* at 4.1.

As Confucius said, "Virtue is not left to stand alone. He who practices it will have neighbors."¹²³

In a linkage with Good Trust and Real Trust, E-businesses that honor promises made to contracting E-commerce partners and stakeholders may ultimately benefit from their ethical performance. Virtuous E-businesses will realize optimal and long-term profits, as well as good reputation, because E-commerce partners and stakeholders may offer business opportunities to the E-businesses they trust.¹²⁴ Beyond this aspect of Real Trust, however, one would expect that a Confucian approach would emphasize laws that encourage parties to settle disputes without going to court, or that at least minimize court redress. In short, Confucian emphasis on the resolution of disputes outside of court is not only a helpful directive for E-commerce, but also may be the only pragmatic mechanism by which the Internet can operate. Legal systems of any country tend to be slow, while the Internet trades on speed. A manifestation of this duality in the United States is the phenomena that many disputes brought to court are never decided. Instead, once in court, the parties realize that to wait for the entire judicial process will take too long, and consent decrees are entered where the parties resolve the case prior to adjudication. Descriptively, this is a manifestation of a form of Confucianism insofar as Internet businesses find that non-judicial resolution is preferable to a final court decree. Normatively speaking, the wisdom of Confucian dispute resolution would suggest that parties devise ways to settle disputes prior to filing suits.

Dispute resolution is one practical application of Confucianism. The other, the quest for the virtuous or superior person, is one of inspiration. No law can mandate a person to be virtuous or inspire one to be superior. Yet Aristotle, whose moral system has been compared to Confucius's, argued that a well-formed community would produce certain kinds of human beings—virtuous ones—who would undertake the quest for excellence. A well-formed community, in both Confucian and Aristotelian thought, required good rulers and good laws in order to provide the basis for such inspirational behavior. As a result, one cannot simply hope that distrust on the Internet will be solved via superior human beings who inspire others. Yet one can devote energy, as Confucius would certainly endorse, to

123. *Id.* at 25.4.

124. According to a Chinese E-business manager, "one of the major reasons for the failure of other online shops is that they concentrated too much on their online work, while ignoring the off-line work." See Sheng, *supra* note 23. It seems that the customers are very particular about E-business's performance off-line. If they have good reason to believe that an E-business is trustworthy with the online service, but untrustworthy with off-line service, they will probably switch to another E-business deserving trust. To some extent, winning trust from E-commerce partners and customers is a critical part of competition strategies for E-business.

the establishment of a legal regime in which virtuous behavior is rewarded and unscrupulous behavior is punished. That leads, naturally enough, to the element of trust that heretofore has been largely absent in our analysis.

Real Trust is the one element that needs to be added to this mixture. It should be added in two ways. First, there need to be mechanisms for accountability so that Hard Trust agreements, like in the Toshiba case, are not unfair. Second, there need to be structures that actually encourage people, while at work, to develop virtue. In the field of business ethics, the model of Business as Mediating Institution is a model that proposes to develop this organizational structure.¹²⁵ This model has been described in detail elsewhere,¹²⁶ and will not be treated in detail here. It is important, however, to recognize that Confucius' model of developing organizational structures to encourage individual moral development can be blended with contemporary business ethics frameworks to produce a more comprehensive way to create a wide-ranging trust. A full rendering of the connection between Good Trust and Confucianism would steer the Article away from the moral and practical realities of Chinese E-commerce legal development. The remainder of this Article, then, sketches the specific Chinese E-commerce legislative scheme and relates it to two important elements of Real Trust: protection of privacy and defamation. In making this argument, it is important to remember that there is a strong Confucian goal of avoiding litigation. Having companies that encourage virtues is one way to do this. Another way, the primary focus of the remainder of this Article, is the enactment of clear legal accountability so that companies like Toshiba know that they are subject to stringent laws that make alternate dispute resolution more attractive than going to court.

III. LEGAL FRAMEWORK OF E-COMMERCE IN CHINA

This Section elaborates on the E-Commerce regulatory framework applicable to all Chinese Internet companies in Part A. Part B will then discuss the application of traditional legal rules to E-Commerce. Part C will apply these notions to a fundamental issue of online security: the topic of encryption.

A. Access and Registration

On February 1, 1996, the State Council promulgated the Preliminary Regulations on Computer Information Network and

125. See FORT, *supra* note 92.

126. *Id.*

Internet Management, which was amended on May 20, 1997.¹²⁷ This statute established the State Information Leading Group (SILG), which has the responsibility to coordinate and to resolve critical Internet issues.¹²⁸ Under the authorization from Article 5 of this Regulation, the SILG promulgated the Implementing Rules of the Preliminary Regulations on Computer Information Network and Internet Management on December 30, 1997.¹²⁹ Under these two legal documents, all computer information networks must use the international information port of entry and exit provided by the State Public Telecommunication Network, and no entities or individuals may have access to Internet by other means.¹³⁰ Any Internet users, whether individuals, corporations, or other entities, can have access to the Internet via this access network.¹³¹ If a corporation wants to provide Internet access service, it must satisfy statutory conditions¹³² and obtain approval from government agencies.¹³³ Internet users must file a user registration form together with identification documents when they apply for Internet access service.¹³⁴ The China Internet Network Information Center (CNNIC) was authorized to provide IP addresses and domain names, and to manage the index of Internet resources.¹³⁵

A second statute, The Regulation on Telecommunication, was promulgated by the State Council on September 20, 2000.¹³⁶ It regulates basic and value-added telecommunication business.¹³⁷ The Annex of this Regulation classifies value-added telecommunication services such as E-mail, voicemail, online information storage and indexing, electronic data exchange, online data processing and transaction processing, value-added fax, Internet access service, Internet content service, and video conferencing service.¹³⁸ In

127. Computer Information Network and Internet Security, Protection and Management Regulations (approved by the State Council on Dec. 1, 1997 and promulgated by the Ministry of Public Security on Dec. 30, 1997) (P.R.C.), *English translation available at* <http://www.qis.net/chinalaw/lawtranl.htm> [hereinafter CIN Regulations].

128. *Id.* § 5.

129. *Id.*

130. *Id.* §§ 6, 7.

131. *Id.* §§ 10, 12.

132. *Id.* § 9.

133. *Id.* § 8.

134. *Id.* §§ 10, 13.

135. *Id.* § 7.

136. The Regulation on Telecommunication (promulgated by the State Council Sept. 20, 2000) (P.R.C.).

137. According to the regulations, "basic telecommunication business" should "offer public network infrastructure, public data transferring and basic voice communication," and "value-added telecommunication business" should "offer the telecommunication and information service with the aid of public network infrastructure." *Id.* § 8.

138. *Id.* § 2.

addition to paying attention to telecommunication security—including Internet security—this Regulation sets forth the prerequisites necessary to engage in and be approved for value-added telecommunication service.¹³⁹

Given the significance of information content control over the Internet, government agencies promulgated several administrative instruments to apply the statutory scheme. Those who wish to provide news coverage over the Internet must comply with several complex regulations. For instance, the State Council promulgated the Internet Information Service Regulation on September 25, 2000.¹⁴⁰ Later, the Ministry of Information Industry (MII) promulgated the Regulations on Internet Bulletin Board Service Administration on October 8, 2000, and the State Office of News and the MII together promulgated the Preliminary Administrative Regulations on Publication of News on Internet Web Sites on November 6, 2000.¹⁴¹

Under the Internet Information Service Regulation, approval from the MII or local telecommunication authorities at the provisional level is required for the Internet information service providers operating for a profit,¹⁴² while registration at the above-mentioned agencies is required for the Internet information service providers for non-profit purpose.¹⁴³ No person is allowed to use the Internet information service without approval or registration.¹⁴⁴ Prior to the approval or registration procedure, the Internet information service providers must also receive approval from competent government agencies, including news and publication, education, health and medication, depending on the categories of the information to be provided.¹⁴⁵ Additionally, Internet information service providers of news, publications, and bulletin board services are required to record the content of the information provided, the time that the information is disclosed, and the website or domain name. Internet access service providers are required to record the length of time users spend online, user name, IP address or domain name, and the telephone number connected to the Internet.¹⁴⁶ Such

139. *Id.* § 13

140. Internet Information Service Regulation (promulgated by the State Council on September 25, 2000) (P.R.C.) [hereinafter IIS Regulation].

141. Regulations on Internet Bulletin Board Service Administration (promulgated by the Ministry of Information Industry on Oct. 8, 2000) (P.R.C.); Preliminary Administrative Regulations on Publication of News on Internet Web Sites (promulgated by the State Office of News and the Ministry of Information Industry) (P.R.C.).

142. IIS Regulation, *supra* note 140, § 8.

143. *Id.* § 4.

144. *Id.* § 5.

145. *Id.* § 14.

146. *Id.*

records should be kept for at least sixty days and should be provided to government agencies as requested.¹⁴⁷

On December 28, 2000, the Standing Committee of the National People's Congress passed the Decision on Ensuring Internet Security.¹⁴⁸ This Decision confirmed the applicability of traditional criminal law, administrative law, and civil law to cyberspace, and indicated that unlawful activities would give rise to criminal penalties, civil liabilities, and administrative law liabilities.¹⁴⁹

One of the themes of these above-mentioned legislative efforts is that they grant substantial monitoring powers to the government in pursuing the goal of information security, and look more like public or administrative law than private or business law.¹⁵⁰ This approach provides security for information; the disadvantage is that although there is strong government involvement from the Ministry of Public Security, the Ministry of Information Industry, and other industry government agencies, E-business-related self-regulation is still rather weak.

B. *Application of Traditional Legal Principles to E-Commerce*

There is also a substantial body of traditional business law designed for traditional business transactions applicable to E-commerce, including the General Principles of Civil Law of 1986,¹⁵¹ Consumer Protection Law of 1993,¹⁵² Products Quality Law of 1993,¹⁵³ Anti-unfair Competition Law of 1993,¹⁵⁴ Advertisement Law

147. *Id.*

148. Decision on Ensuring the Security of the Internet (issued by the Standing Committee of the National People's Congress Dec. 28, 2000) (P.R.C.).

149. Articles 1 through 5 of this Decision deal with criminal penalties, Article 6 deals with administrative law liabilities and civil liabilities. *Id.*

150. See generally LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

151. General Principles of Civil Law of the People's Republic of China (adopted at the 4th session of the 6th Nat'l People's Cong., promulgated by Order No. 37 of the President of the People's Republic of China on Apr. 12, 1986) (P.R.C.), translated in STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA (UEA Press Ltd. & Institute of Chinese Law Ltd. 1999), available at <http://www.gist.net/chinalaw/prclaw54.htm> [hereinafter Civil Law].

152. Law of the People's Republic of China on Protecting Consumers' Rights and Interests (adopted by the 4th meeting of the 8th Nat'l People's Cong. Standing Comm. on Oct. 31, 1993) (P.R.C.), translated in STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA (UEA Press Ltd. & Institute of Chinese Law Ltd. 1999) [hereinafter Consumers' Rights Law].

153. Product Quality Law of the People's Republic of China (promulgated by the Nat'l People's Cong. on Feb. 22, 1993) (P.R.C.), translation available at <http://www.gis.net/chinalaw/prclaw26.htm> [hereinafter Product Quality Law].

154. Law Against Unfair Competition of the People's Republic of China (promulgated by the Nat'l People's Cong. on September 2, 1993) (P.R.C.), translation available at <http://www.gis.net/chinalaw/prclaw9.htm> [hereinafter Unfair Competition Law].

of 1994,¹⁵⁵ and the Contract Law of 1999.¹⁵⁶ For instance, online consumers still enjoy their ten central rights: (1) the right to personal safety in buying or using commodities or in receiving services; (2) the right to correct information on the commodities they buy or use or on the services they receive; (3) the right to choose their own commodities or services; (4) the right to fair trade; (5) the right to receive compensation for personal and property damages incurred as a result of the purchase and use of commodities or receipt of service; (6) the right to form social groups to safeguard their legitimate rights and interests; (7) the right to obtain knowledge related to consumption and to the protection of their rights and interests; (8) the right to demand respect of their personal dignity, including the right to privacy, and ethnic customs and habits; (9) the right to exercise supervision over commodities, service and the process of consumer protection; and (10) the right to punitive compensation from fraudulent dealers who refused to inform consumers.¹⁵⁷ For instance, under Article 49 of Consumer Protection Law of 1993, if a consumer shops online and has had some doubts about, or even has been aware of, fake products before shopping, he is entitled to punitive compensation from a dealer who refuses to inform the consumer of this fact on the Internet.¹⁵⁸

Of course, some traditional business law rules may need interpretation when applied to E-commerce. Therefore, the Chinese legislature tends to refer E-commerce transactions to the jurisdiction of the traditional legal framework, and only introduces new special rules for E-commerce if the traditional legal framework is unable to govern.¹⁵⁹ Sometimes, the legislation incorporates special rules for E-commerce parties—who otherwise would not be covered by traditional

155. Advertisements Law of the People's Republic of China (adopted at the 10th session of the Standing Comm. of the 8th Nat'l People's Cong. on Oct. 27, 1994, promulgated by Order No. 34 of the President of the People's Republic of China on Oct. 27, 1994) (P.R.C.), *translation available at* <http://www.gis.net/chinalaw/prclaw117.htm> [hereinafter Advertisements Law].

156. Contract Law of the People's Republic of China (adopted by the 2nd session of the 9th Nat'l People's Cong. on Mar. 15, 1999) (P.R.C.), *translation available at* http://www.cclaw.net/lawsandregulations/chinese_contract_law.htm [hereinafter Contract Law].

157. See Consumers' Rights Law, *supra* note 152, arts. 7-15.

158. In China, a number of consumers engage in buying fake products to make profits by claiming double punitive compensation from the fake product dealers. Although it is still controversial in China whether it is ethical or not for a knowing consumer to buy the fake products and claim punitive compensation, such consumers are legally protected. A typical case in this regard is *Heshan v. Wanleda* (Xicheng Dist. Ct. of Justice, Beijing 1996). See *Law Helps Chinese Consumers in Rights Protection*, PEOPLE'S DAILY, Mar. 16, 2002, *available at* <http://english.peopledaily.com>.

159. In other words, Chinese legislature has been reluctant to create E-commerce law separate from traditional business law. Rather, the legislature tries to apply traditional legal rules to E-commerce. That is why China has not, and probably will not enact a comprehensive code on E-commerce law.

legal norms—in the traditional context of traditional business law, such as the Contract Law of 1999.¹⁶⁰ Sometimes new rules are set forth in the special statutes. For instance, the Beijing Authority on Industrial and Commercial Administration issued a Notice on Protecting Consumers in E-commerce Transactions on June 28, 2000.¹⁶¹ Under this notice, consumers still enjoy the statutory rights recognized by Consumer Protection Law of 1993, and business corporations owe statutory obligations to consumers.¹⁶²

Additionally, new legal obligations are imposed on corporations. For instance, E-business: (1) should keep copies of electronic contracts for at least two years;¹⁶³ (2) should not mislead consumers through unfair competition;¹⁶⁴ (3) should inform consumers of their real registered office, contact person and communication address, or place of transactions;¹⁶⁵ (4) should not make misleading advertisements on the Internet;¹⁶⁶ (5) should warrant that their products or services sold on the Internet should satisfy personal and property security requirements, and warn consumers of the potential hazards associated with the products or services and proper instructions for consumers to follow;¹⁶⁷ (6) should issue receipts to consumers;¹⁶⁸ and (7) should register at the Beijing Authority on Industrial and Commercial Administration and post the registration mark on the organization's home page.¹⁶⁹

160. Article 11 of the Contract Law regards electronic contracts as written contracts. See Contract Law, *supra* note 156, art. 11. Articles 16 and 26 of the Contract Law stipulate the times of arrivals of offers and acceptances. See *id.* arts. 16, 26. When a contract is concluded is determined by the exchange of electronic messages. Thus, if the recipient of an electronic message has designated a specific system to receive it, the time when the electronic message enters into such specific system is deemed its time of arrival; if no specific system has been designated, the time when the electronic message first enters into any of the recipient's systems is deemed its time of arrival. Article 34 of the Contract Law deals with the place of formation of E-contracts,

Where a contract is concluded by the exchange of electronic messages, the recipient's main place of business is the place of formation of the contract; if the recipient does not have a main place of business, its habitual residence is the place of formation of the contract. If the parties have agreed otherwise, such agreement shall prevail.

Id. art. 34.

161. See *id.* § 3.

162. *Id.*

163. *Id.* § 7.

164. *Id.* § 8.

165. *Id.* § 9.

166. *Id.* § 11.

167. *Id.* § 13.

168. *Id.* § 14.

169. *Id.* § 15.

C. *Hard Trust, Security, and the Regulation of Encryption*

Although there is no comprehensive E-commerce legislation in China yet, there are substantial sources of law to support the trust-building cause on the Internet. To the extent that Hard Trust results from the specification of contractual duties by private parties, a series of legislative initiatives have rapidly taken place to ensure the information security and reliability of Internet transmissions. On February 18, 1994, the State Council promulgated the Regulations on Computer Information System Security Protection.¹⁷⁰ These regulations authorize the Ministry of Public Security to be responsible for protecting the security of the national computer information system. Furthermore, these regulations delegate responsibility for protecting the security of computer information systems within their jurisdiction to the Ministry of State Security, the State Office for the Protection of State Secrets, and other ministries.¹⁷¹ These regulations prohibit entities or individuals from endangering the interest of the state, collectives, and citizens by using a computer information system.¹⁷² The regulations also stipulate the security protection rules, security supervision, and legal liabilities against computer virus making and other offenses or unlawful actions.¹⁷³ Pursuant to the authority conferred by this statute, the Ministry of Public Security promulgated the Computer Information Network and Internet Security Protection and Management Regulation on December 16, 1997.¹⁷⁴ This Regulation lists the types of information prohibited to produce, copy, view and disseminate, and lists the activities against computer information network security.¹⁷⁵ It further defines security safeguarding responsibilities of networked entities, Internet access providers, and users.¹⁷⁶ To ensure control over encryption technologies, the State Council promulgated the Regulation of Commercial Encryption Codes on October 9, 1999.

As previously mentioned, many Internet users are uneasy about security and privacy issues of online shopping.¹⁷⁷ According to the

170. See The Regulations on Computer Information System Security Protection (issued by the State Council as Regulation No. 147 and enacted on Feb. 18, 1994) (P.R.C.).

171. *Id.* § 6.

172. *Id.* § 7.

173. Security protection rules are stipulated in Chapter 2, security supervision rules are stipulated in Chapter 3, and legal liabilities are stipulated in Chapter 4 of the Regulations. *Id.* §§ 2-4.

174. See CIN Regulations, *supra* note 127.

175. *Id.*

176. *Id.* §§ 8-15.

177. See CNNIC Survey, *supra* note 6.

CNNIC survey in early 2001, 44.7% of the interviewees reported that their computers have been invaded or infringed.¹⁷⁸ According to another survey on the security of China's E-business in early 2000, 44% of the 300 firms polled had their online information tampered with, and 40% reported having been maliciously attacked.¹⁷⁹ In response to these security challenges, many Internet users have adopted new technologies to ensure their security. As the CNNIC survey reveals, 38.1% of the interviewees are using passwords; 71.6% of them are using anti-virus software; 64.7% of them are using firewall technology; 7.8% of them are using electronic signatures; and only 4.6% of them have not adopted any security measures.¹⁸⁰ As far as E-businesses are concerned, slightly over 70% reported that they had used firewalls as security precautions, and another 20% said they installed security gateways.¹⁸¹

A core component of trust for E-commerce is security. There will be no trust if consumers or customers are doubtful about the confidentiality, authenticity, and integrity of their communications with their transactional partners thousands of miles away. Because the Internet is driven by openness and high speed, however, its vulnerability is insecurity. Without proper security measures to protect the computers, including hardware, software, networks, and documents, it will be easy for some people to intercept, tamper, hack, or forge transmission. The relationship between security and efficiency is an old topic for traditional commercial law, including contract law and negotiable instruments law.¹⁸² Both Chinese law and U.S. law have complex rules for secured transactions.¹⁸³

There are two reasons why the attainment and controllability of desirable security technologies does not necessarily mean the problems puzzling E-commerce security could be solved. First, security technology, which could ensure E-commerce security today, will probably be unable to ensure E-commerce security tomorrow.¹⁸⁴ E-commerce parties are ill-advised to passively rely on out-of-date

178. *Id.*

179. Zhao Huanxin, *Rules, Ethics Needed for Cybersecurity*, CHINA DAILY, Apr. 4, 2000, available at LEXIS, World Library, Txtlne File.

180. See CNNIC Survey, *supra* note 6.

181. Huanxin, *supra* note 4.

182. Thus, business transactions should be made as rapidly as possible, in order to achieve efficiency; on the other hand, business transactions should be made as secure as possible. Traditional commercial law, especially contract law and negotiable instruments law, must strike a balance between the value of security and efficiency.

183. China's Guarantee Law is very similar in purpose to the United States' U.C.C. Article 9. Compare Guarantee Law of the People's Republic of China (adopted by the 8th Nat'l People's Cong. June 30, 1995) (P.R.C.), with U.C.C. § 9 (2001).

184. This is determined by the very nature of the ever-changing technological advances. Once certain security technology is surpassed, it cannot be regarded "secure" or "safe" anymore. To some extent, we can say that there is no permanent security technology or product.

security technologies, which may still be sold as brand new security software or services. Second, like any technology, E-commerce security technology is a double-edged sword. On the one hand, security technology produces and reinforces E-commerce security; on the other, security technology may create another kind of insecurity. For instance, criminals could use security technologies to protect and expand their fraudulent or criminal activities, like money laundering, copyright piracies, or gambling.¹⁸⁵ Thus, the acquisition, utilization, and control of security technologies could damage both business and governmental interests in safeguarding justice, law, and order.

Bearing in mind the potential risks and threats represented by the Internet, the Chinese government has played an active role in ensuring computer and Internet information security, especially in regulating security technologies. As in the United States, commercial encryption technologies and software play a significant role in safeguarding the transmission and reception of E-commerce information over the Internet. These devices also combat online theft, fraud, vandalism, and invasion of privacy in China.¹⁸⁶ In reality, the encryption technologies and software developed and manufactured both overseas and in China have already been used by some Internet users in China.¹⁸⁷

The Chinese government is very strict in regulating the commercial encryption code (CEC) technology with two major concerns in mind. The first concern is the reliability of encryption technology from the perspective of business because fake or defective encryption technology may worsen E-commerce security. The second concern is the controllability of encryption technology from the perspective of the government interest.¹⁸⁸ As a senior official from the State Commission on Encryption Code Regulations (SCECR) argued,

the security of the CEC products developed and used by entities or individuals without SCECR approval can not be guaranteed, furthermore, such CEC products may mess the State code administration order. It also posed insecurity issues to use CEC

185. According to the survey coordinated by the St. Paul group of U.S. insurance companies, while many are aware of Microsoft Corp's problems with hackers, or of the havoc wreaked by the "Melissa" and "lovebug" viruses, most companies have no safety net to protect them from the hazards of doing business on the internet. See Xinhua News Agency, *Protecting Your E-frontier*, CHINA DAILY, Feb. 5, 2001, available at LEXIS, World Library, Txtlne File.

186. As the CNNIC survey reveals, 71.59% of the interviewees are using anti-virus software, 64.67% are using firewall technology, 7.83% are using electricity signatures, and only 4.58% do not adopt any method. See CNNIC Survey, *supra* note 6.

187. Xinhua News Agency, *Promote the Healthy and Orderly Development of Chinese Commercial Encryption Codes*, PEOPLE'S DAILY, Oct. 18, 1999, available at LEXIS, World Library, Txtlne File.

188. *Id.*

products made overseas, which will not only harm the interest of the users, but also harm the national interest and security.¹⁸⁹

Because neither CEC products manufactured by Chinese corporations or individuals without government approval, nor CEC products made by overseas manufacturers are trustworthy, the only trustworthy and reliable CEC products are made by Chinese manufactures appointed by the Chinese government.

To justify the government control of CEC products, commercial encryption technologies, which refer to "the encryption products and technologies used in the encoding protection or security certification of information that is not part of State confidential information," are defined as "State confidential information"¹⁹⁰ by Article 2 of the Regulation of Commercial Encryption Codes.¹⁹¹ Thus, the state has exclusive regulatory power over the research and development, manufacturing, sales, and actual use of commercial encryption products.¹⁹² The Regulation of Commercial Encryption Codes authorizes the SCECR and its offices as the national regulators of CECs.¹⁹³ The U.S. Court of Appeals for the Ninth Circuit held in May of 1999 that encryption source code is expression and is therefore classified as speech deserving of First Amendment protections.¹⁹⁴ Unlike this position, it appears that CEC technologies have nothing to do with the freedom of speech or expression from a Chinese law perspective.

Overcoming the first layer of Chinese regulation of research, development, and manufacturing is difficult. Only the entities appointed by the SCECR may take CEC research and development responsibility.¹⁹⁵ CEC research and development achievements are subject to inspection and certification by the experts selected by the SCECR based on CEC technological standards and norms.¹⁹⁶ When CEC technologies are transformed into products, only the entities appointed by the SCECR may manufacture the CEC products.¹⁹⁷

189. *Id.*

190. "State confidential information" refers to the information of great significance to national security and interest, which is only available to certain group of people within certain period ascertained by following statutory procedur . See Law of the People's Republic of China on Guarding State Secrets, § 2 (P.R.C.), in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (Foreign Language Press, ed. 1997).

191. Regulation of Commercial Encryption Codes (promulgated by the State Council Oct. 9, 1999) (P.R.C.), in STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA (UEA Press Ltd. & Institute of Chinese Law Ltd. 1999) [hereinafter CEC].

192. *Id.* § 3.

193. *Id.* § 3.

194. *Bernstein v. U.S. Dept. of Justice*, 176 F.3d 1132, 1141 (9th Cir. 1999), *vacated by Bernstein v. U.S. Dept. of Justice*, 192 F.3d 1308, 1309 (9th Cir. 1999).

195. CEC, *supra* note 191, § 2.

196. *Id.*

197. *Id.*

Before manufacturing, the categories and models of CEC products to be manufactured must be approved by the SCECR, and no manufacturing entity may manufacture CEC products exceeding the approved scope.¹⁹⁸ After CEC products are produced, they must pass the quality inspections conducted by agencies appointed by the SCECR.¹⁹⁹

The second layer of regulation targets the distribution of CEC products. Only the entities appointed by the SCECR may distribute CEC products.²⁰⁰ The distributors must truthfully record the actual CEC product user's name, address, organization ID number or resident ID number, and the use to which each CEC product is put. The distributors must also file the above information with the SCECR.²⁰¹ Faced with the flood of foreign CEC products, the Regulation of Commercial Encryption Codes prohibits any entities or individuals from selling foreign CEC products or importing CEC products and equipment containing CEC technologies, and requires that export of CEC products be approved by the SCECR.²⁰² Ironically, the United States agreed to export U.S. encryption software, formerly classified as military technology, to non-government users without obtaining a license in 1999,²⁰³ while China tightened the control of foreign encryption software import by enforcing the Regulation of Commercial Encryption Codes.

The third layer of regulation targets the use of CEC products. Only SCECR-approved CEC products may be used by entities or individuals, and no entities or individuals may use self-made CEC products or CEC products made overseas.²⁰⁴ With the exception of foreign consular and representative organizations, foreign organizations or individuals seeking to use CEC products or equipment containing CEC technologies within China must obtain approval from the SCECR.²⁰⁵ Additionally, no entities or individuals may attack CECs, nor are they allowed to use CECs to endanger national security interests, to jeopardize public safety, or to participate in other criminal activities.²⁰⁶ To enforce the three layers of regulation mentioned above, penalties are imposed for any breach of the Regulation of Commercial Encryption Codes.²⁰⁷

The Regulation of Commercial Encryption Codes undoubtedly represents a typical model for government to secure both government

198. *Id.*

199. *Id.*

200. *Id.* § 3.

201. *Id.*

202. *Id.*

203. 15 C.F.R. § 740.17 (2002).

204. CEC, *supra* note 191, § 4.

205. *Id.*

206. *Id.* § 5.

207. *Id.* § 6.

and business E-commerce interests in security. In contrast to the U.S. model that stresses decentralized self-regulation, the Chinese model pays great attention to centralized governmental regulation. Behind these two different models are two different regulatory philosophies. The U.S. model relies on the E-commerce community more than government agencies because it believes the E-commerce community has stronger technological competence and business credibility than the government. The Chinese model, on the other hand, trusts the government, believing the government has stronger regulatory competence and political credibility. Of course, these two conflicting philosophies are not necessarily in opposition. The U.S. agencies are also eager "to obtain decryption keys, or to implant recovery devices that ensure any encrypted message can be read by the government."²⁰⁸ If this becomes the reality, the U.S. encryption policy will be very close to the position of the Chinese government. At the same time, the Chinese business community is also gaining some self-regulatory powers in the transition process from planned economy to market economy. This implies that some regulatory power regarding encryption will be transferred to the E-commerce community.

In fact, both government regulation and business self-regulation are necessary to build the trust of consumers and users in the security and reliability of encryption technology. The U.S. government may assume more power to monitor encryption technology in the future, while the Chinese government may instead give up some of those powers to the E-commerce community. A very good indication in this regard is that, shortly after the enforcement of the Regulation of Commercial Encryption Codes, the Chinese government made a narrative interpretation of the scope of the application of this Regulation in order to ease undue anxiety among American and other foreign investors and manufacturers of encryption technology.²⁰⁹ As Zhang Xiang, the Vice Minister of Foreign Trade and Economic Co-operation, promised, "the regulations cover only specialized hardware and software that use encryption as a core function, wireless telephones. Windows software and browser software are not subject to the regulations."²¹⁰ Consequently, Microsoft received approval from China's Ministry of Information

208. See Dan Pacheco et al., *Digital Security: Who Holds the Keys?*, TECH. POST, Sept. 25, 1997, at <http://www.washingtonpost.com/wp-srv/tech/analysis/encrypt.htm>. FBI Director Louis Freeh said in a speech to the International Cryptography Institute, "We are simply looking to continue . . . electronic surveillance under very stringent conditions. If we are foreclosed from those areas . . . the safety of this country will be impaired." *Id.*

209. Zhang Yan, *Computer Code Rule Decoded*, CHINA DAILY, Mar. 17, 2000, available at LEXIS, World Library, Txtlne File.

210. *Id.*

Industry (MI) and the SEMC to sell the simplified-character Chinese version of the Windows 2000 operating system, which includes 128-bit encryption capability.²¹¹

In addition to encryption technology, China is experimenting with certificate authorities (CA) and digital certificates. Although the validity of electronic signatures was first recognized by the Provisional Regulations on Electronic Data Interchange in the Field of Foreign Trade, which was promulgated by the Guang Dong province in October 1996,²¹² there is no detailed legislation at the national level yet. The first Chinese CA, China Telecom Certificate Authority (CTCA), was formed on August 3, 1999. CTCA could issue a CATA certificate for every E-commerce party. A certificate works like an Internet identification card and enables unknown E-commerce parties to be sure of the authenticity and reliability of their transactional partners. The CATA system also supports the issue of public keys of 512-bit and 1024-bit.²¹³ At present, CTCA has established a national network covering all the E-commerce parties in China.²¹⁴ In July 2000, the China Financial Certificate Authority (CFCA) was formed by the Chinese central bank and 12 commercial banks.²¹⁵ Its main mission is to act as a reliable third party to issue digital certificates, so as to facilitate online payment.²¹⁶ The emergence of CAs in China, however, has grown too rapidly for the legislature to develop governing legislation. To ensure the accountability of CAs, it will, of course, be necessary to enact regulations concerning all of the following: (1) the legal status of CAs, (2) the mandatory standards for issuing certificate, (3) the legal

211. See Stephen Lawson, *Microsoft gets OK to Sell Windows 2000 in China*, COMPUTER WORLD-HONG KONG, Mar. 14, 2001, available at <http://www.cw.com>. It is foreseeable that Chinese encryption regulation will become more compatible with international standards after China enters the WTO. Currently, it is controversial whether it is appropriate to classify commercial encryption technology as state confidential information. One could argue that such technology would be wise in order to ensure E-commerce security by defining commercial encryption technology as state confidential information and thereby allow commercial encryption technology to receive protection like other state confidential information, including military, political information. However, one of the problems associated with this position is that the E-commerce business interest and users' privacy could be infringed by government agencies, for the government agencies may be well equipped by regulatory advantages, including back-doors or decryption keys, to decode any encrypted business information transmitted over the Internet. The second problem is that a great number of entities or individuals will be deprived of the opportunity to explore, develop, manufacture, distribute, and use valuable commercial encryption technology of great interest to E-commerce security.

212. See *E-commerce in China: A Very Long Way to Go*, ECON. DAILY, Aug. 13, 1998, available at <http://www.chinaonline.com>.

213. See The Greater China Advisor, at <http://www.cata.ca/china>.

214. *Id.*

215. *Id.*

216. *Id.*

validity of the digital certificate that CAs issue for the E-commerce parties, and (4) the professional responsibility of CAs.

IV. PROTECTION OF E-COMMERCE CONSUMER PRIVACY IN CHINA

Beyond the bordering question posed by encryption, there are other dimensions of the Internet that can raise questions in the eyes of those affected by its growth. One of these dimensions is privacy. This Section explores some of the dimensions of privacy protection, particularly from the perspective of the expectation of the Chinese people.

In Chinese, privacy, "Yin Si," generally refers to all the personal information, personal activities, and personal space which people are unwilling to share. Such privacy includes, but is not confined to, one's resume; name; age or date of birth; gender; height; weight; health condition; medical records; body features, such as fingerprints; genetic information; body organs, especially handicapped or dysfunctional organs; picture; address; residence or other private space, including an office cubicle; telephone and fax numbers; race; religion; political affiliation and belief; income and savings; educational background; occupation; hobbies; marital status; sex life and orientation; personal history, especially regarding sexually transmitted disease; correspondence; diaries; passport or other ID numbers; personal documents or deeds; family background; social networks; and private articles, including bags and luggage.²¹⁷ Of course, public figures enjoy less privacy than the general population.²¹⁸ Furthermore, the scope of privacy varies depending on the community, which may have different cultural values and traditions.²¹⁹

217. See Huang Zhong, *Is Score a Piece of Privacy?* CHINA ECON. TIMES, Aug. 5, 2000, at 1. There is no list of privacy rights articulated by the Chinese legislature. The above-mentioned items of privacy summarized by these Authors do not necessarily fit into Chinese legislation. It is often very controversial to list certain personal information into the category of privacy. For instance, the high school students' scores in the National College Entrance Examination are regarded as private by some students, while considered public information by some. Yet, there are neither statutes nor court cases on this point.

218. The media and general population may have strong curiosity or fundamental interest in knowing about the private life of the public figures. Public figures are more frequently covered by media either because they are performing their legal obligation, or fulfilling their desire to be famous. All of these factors could make public figures' private lives more transparent than ordinary peoples'. *Id.*

219. For instance, one of the Authors of this Article readily received an answer from an elderly Chinese man when inquiring about his age. Americans, however, are more reluctant to state their age. However, while some Americans are reluctant to disclose their salary, many Chinese are very comfortable to disclose it. *Id.*

Generally speaking, the privacy that consumers enjoy in the E-commerce world is not fundamentally different from traditional privacy consumers enjoy in the physical world. Excluding the sinister use that may be made by individuals, such as theft or pornography, the most vulnerable personal data will be used for commercial value for different sectors and trades of E-business. This is because consumer privacy serves as a valuable asset.²²⁰ The exploitation of the privacy of on the Internet consumers is facilitated by easy data collection, instantaneous disclosure, wide dissemination, and national or even global consequences.²²¹ For instance, if a customer shops at a brick-and-mortar store, she does not need to inform the cashier of her home address, family telephone number, or shopping preference. The same person, however, may be expected to disclose more personal information on a website. Thus, doing business online poses greater risks to privacy, which also makes misuse of private information more likely.

Privacy concerns are augmented in China because privacy protection has traditionally been limited in Chinese legal history as a result of the country's feudalistic tradition. As evidence of the long Chinese feudal tradition of ignoring privacy, W.J.F. Jenner wrote that

Chinese states by the fourth century BC at latest were often remarkably successful in keeping records of their whole populations so that they could be taxed and conscripted. The state had the surname, personal name, age and home place of every subject and was also able to ensure that nobody could move far from home without proper authorization.²²²

During the Cultural Revolution between 1966 and 1976, individual privacy was condemned as capitalist privilege.²²³ Even

220. In the United States, E-commerce businesses are willing to pay for valuable personal information, especially those regarding shopping habits and preferences. Thus, the gathering of such data has evolved into big business for many companies specializing in the sale of such information in the form of a list. See GERALD R. FERRARA ET AL., *CYBERLAW: TEXT AND CASES* 211 (2000). Such a profitable business may occur in China in not so distant future.

221. In discussing defamation cases, some writers believe that "the likelihood of an increase of such cases in the future is inevitable, given the personal nature of electronic communications, publications, e-mail messages, and so on, and the relative ease with which it is possible to virtually instantaneously publish and transmit to millions of other users worldwide." See *id.* at 249.

222. W.J.F. Jenner, *China and Freedom*, in *ASIAN FREEDOMS* 65, 75 (David Kelly & Anthony Reid eds., 1998).

223. For instance, everything was considered "public" during the Cultural Revolution, and the "red guards" could break into private houses and take whatever they liked, including diaries. Some groups' only responsibility at that time was to explore and disclose the other people's privacy. See He Jiahong, *The Right We All Have*, *PEOPLE'S DAILY*, Sept. 8, 1999, at K1, available at <http://english.peopledaily.com>.

today, many people consider privacy to be a negative word.²²⁴ The awareness of privacy has been stronger since the late 1970s, however, when China opened up to the outside world and engaged in economic reforms. In recent years, privacy and the right to privacy have become hot topics discussed by both the media and the general population.²²⁵

The constitutional basis for privacy protection can be traced back to four clauses in the Constitution of 1982. The first provision is about the general concept of "personal freedom," meaning that "the personal freedom of the Chinese citizens is inviolable."²²⁶ The second provision is about the general concept of "human dignity," meaning that "the human dignity of the Chinese citizens is inviolable."²²⁷ Both "personal freedom" and "human dignity" can be interpreted to cover the right to privacy.²²⁸ The third provision aims at protecting the privacy of one's home so that "the residence of the Chinese citizens is inviolable. It is prohibited to illegally search and intrude into the residence of the citizens."²²⁹ The fourth provision aims at protecting communication:

The freedom and privacy of correspondence of the Chinese citizens are protected by law. No organization or individual may, on any ground, infringe on the freedom and privacy of correspondence, except in cases where to meet the needs of state security or criminal investigation, public security or prosecutorial organs are permitted to censor correspondence following statutory procedures.²³⁰

The Criminal Law of 1997 criminalizes illegally searching another's body or house, intruding into another's house, and opening or destroying and concealing another's mail and letters.²³¹

Although not addressed specifically, the significance of privacy protection is stressed in many laws, either in the form of general legislation or in the form of special legislation. Such language is

224. *Id.* (noting that even today some people still interpret the word "privacy" as something akin to immoral romantic affairs between men and women).

225. Yang Lixin, *The Right to Privacy Should Not Be Violated*, PEOPLE'S DAILY, Sept. 8, 1999, at K2, available at <http://english.peopledaily.com>.

226. XIANFA art. 37 (P.R.C. 1982), translated in THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (1982).

227. *Id.* art. 38.

228. Some Chinese scholars interpret the notation "human dignity" as an abstract and general concept, which takes several concrete forms, such as the right to privacy and the right to reputation. See Yang Lixin, *Please Respect My Human Dignity*, PEOPLE'S DAILY, July 19, 2000, at K1, available at <http://english.peopledaily.com>.

229. XIANFA art. 39.

230. *Id.* art. 40.

231. Criminal Law of the People's Republic of China, arts. 245, 252, 253 (P.R.C.) (1997), reprinted in RALPH H. FOLSOM & JOHN H. MINAN, LAW IN THE PEOPLE'S REPUBLIC OF CHINA (1999) [hereinafter Criminal Law].

found in Article 14 of the Consumer Protection Law of 1993;²³² Article 30 of the Infants Protection Law of 1991;²³³ Article 39 of the Women Protection Law of 1992;²³⁴ Article 22 of the Practicing Physician Law of 1999;²³⁵ Article 4 of the Postal Law of 1986;²³⁶ Article 29 of the Commercial Bank Law of 1995;²³⁷ Article 33 of the Attorney Law of 1996;²³⁸ Article 22 of the People's Police Law;²³⁹ Articles 66 and 120 of the Civil Procedure Law of 1991;²⁴⁰ Articles 105, 112, 152 of the Criminal Procedure Law of 1996;²⁴¹ and Article 42 of the Administrative Punishment Law of 1996.²⁴²

Privacy protection is also recognized by the codes of conduct of some professional associations, including Article 3 of the Ethical Code of Professional Conduct of Chinese Journalists of 1997²⁴³ and Article 9 of the Code of Attorneys' Professional Morality and Practicing Disciplines of 1996.²⁴⁴ Article 7 of the Computer Information Network and Internet Security Protection and Management Regulations also declares that "correspondence freedom and

232. Consumers' Rights Law, *supra* note 152, art. 14.

233. Law on the Protection of Minors, art. 30 (P.R.C.), in STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 191, available at http://www.unescap.org/pop/database/law_china/ch_record009.htm.

234. Law on the Protection of Rights and Interests of Women, art. 39 (P.R.C.), in STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 191, available at http://www.unescap.org/pop/database/law_china/ch_record002.htm.

235. Practicing Physicians' Law, art. 22 (P.R.C.), in STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 191, available at <http://www.people.com>.

236. Postal Law of the People's Republic of China, art. 4 (P.R.C.), in STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 191, available at <http://www.sunyou.com/C/law/part16/g1601e.htm>.

237. Commercial Bank Law of the People's Republic of China, art. 29 (P.R.C.), available at <http://www.spp.gov.cn>.

238. Attorney Law of the People's Republic of China, art. 33 (P.R.C.), in STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 191, available at <http://product.chinawe.com>.

239. People's Police Law of the People's Republic of China, art. 22 (P.R.C.), in STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 191, available at <http://product.chinawe.com>.

240. Civil Procedure Law of the People's Republic of China, arts. 66, 120 (P.R.C.), in STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 191, available at <http://product.chinawe.com>.

241. Criminal Procedure Law of the People's Republic of China, arts. 105, 112, 152 (P.R.C.), in STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 191, available at <http://qis.net/chinalaw>.

242. Administrative Punishment Law of the People's Republic of China, art. 42 (P.R.C.), in STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 191, available at <http://qis.net/chinalaw>.

243. Ethical Code of Professional Conduct of Chinese Journalists, art. 3 (P.R.C.), in STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 191, available at <http://qis.net/chinalaw>.

244. Code of Attorney's Professional Morality and Practical Disciplines, art. 9 (P.R.C.), in STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 191, available at <http://qis.net/chinalaw>.

correspondence privacy enjoyed by network users are protected by law. No unit or individual may, in violation of the legal requirements, use the Internet to violate the correspondence freedom and correspondence privacy enjoyed by network users."²⁴⁵ Although this administrative regulation adds nothing substantially new, it confirms the applicability of traditional privacy protection to the virtual E-commerce world. These statutes serve as the basic statutory guideline when business corporations or professionals are virtualized on the Internet highway.

The right to privacy was not incorporated into the General Principles of Civil Law of 1986.²⁴⁶ Human dignity, however, was mentioned again in Article 101 of this Law: "citizens and corporations enjoy the right to reputation, and *the human dignity of citizens is protected by law*. It is prohibited to damage the reputation of citizens or legal persons by insults, defamation or other means."²⁴⁷ Keeping in mind this legislation, the Chinese Supreme Court treated the breach of privacy as a case of defamation.²⁴⁸

In reality, privacy infringement happens frequently. In 1996, privacy cases accounted for 12% of all the civil law cases in China.²⁴⁹ In 1997, these kinds of cases shot up to 25%.²⁵⁰ Breach of privacy happens to many different social groups. For instance, the privacy of infants is very easily breached by their parents or teachers. In Guangxi, a fourteen-year-old female high school student sued her teacher for reading her diary and disclosing it to the whole class.²⁵¹ The court held that the defendant breached the plaintiff's privacy and ordered the defendant to pay non-pecuniary compensation to the plaintiff.²⁵² Ironically, even the privacy of judges is at risk. It is reported that the courts of justice in Beijing City will monitor the performance of their judges and clerks, not only covering their eight

245. CIN Regulations, *supra* note 127, art. 7.

246. Civil Law, *supra* note 151.

247. *Id.* art. 101.

248. See The Opinions on Certain Issues Regarding Implementing the General Principles of Civil Law, § 140 (1988), available at http://www.fl365.com/nhlaw/lawshelf/civil_2.htm [hereinafter Opinions]. See also The Reply on Certain Issues Regarding Hearing the Cases of Reputation Breach (1993) [hereinafter Reply]. This approach is very problematic. Privacy cases accepted by the court are restricted to cases where privacy information is disclosed or spread either orally, or in writing, and the reputation of the victim is hurt. However, not every privacy case is suitable to be classified as reputation breach. Although the reputation of an individual is hurt in some cases of privacy breach, the reputation of the individual is not hurt in many cases of privacy breach. In the latter cases, the plaintiff will be unable to seek judicial remedies under this approach.

249. Zhang Lingguo, *Please Respect My "Personal Space,"* PEOPLE'S DAILY, Sept. 8, 1999, available at <http://english.peopledaily.com>.

250. *Id.*

251. Su Ning & Wu Jing, *Walking Toward the Country With Rule of Law,* PEOPLE'S DAILY, Sept. 24, 1999, at 1, available at <http://english.peopledaily.com>.

252. *Id.*

hours of work, but also covering their circle of life and socialization.²⁵³ Some commentators argue that such a policy amounts to a breach of the privacy of the judges and clerks.²⁵⁴ In China, the emergence of new organizations, technologies, and products, like private detective agencies,²⁵⁵ credit reporting agencies,²⁵⁶ and wiretapping devices,²⁵⁷ also creates the possibility of privacy intrusion.²⁵⁸

The development of E-business in China has placed Chinese consumers in a vulnerable position in terms of privacy protection. Simply put, regardless of the history of Chinese privacy, the Internet opens new avenues for abuse. For people to trust the Internet, particularly when it exposes Chinese consumers to the options for privacy protection in the United States and European Union, companies must provide assurances that personal information will not be exploited. Otherwise, companies may discourage the confidence and willingness of consumers to do business with them.

When users enter into contracts with ISPs for Internet access, they are generally required to disclose their true first and last name, ID number equivalent to a U.S. social security number, date of birth, and address.²⁵⁹ When consumers shop online, they are also required to furnish their general personal data, together with the information necessary for the purpose of the specific transaction.²⁶⁰ When

253. Wei Wenbiao, *Motivation and the Effect*, CHINA ECON. TIMES, May 6, 2000, at 2.

254. *Id.*

255. Private detective agencies have come into being in many cities, including Shanghai, Beiing, Shenyang, Haerbin, and Chengdu. Most of the investigation businesses focus on unfaithful marriages, which implies a great deal of privacy issues. *Could Chinese Private Detective Agencies Make Money*, CHINESE ASSETS NEWS, Mar. 31, 2000.

256. The first Chinese consumer credit report agency was born in Shanghai in July 2000. Beginning July 1, 2000, 15 Chinese-invested banks in Shanghai, after paying RMB 10 yuan (U.S. \$1.25), could have access to the personal credit data stored in the data center of this report agency. There are critical privacy issues associated with the collection, storing, and dissemination of the consumers' personal credit information. See Xie Jun, *Do You Know the Credit ID Card?* GUANGMING DAILY, July 14, 2000 at B2; Wang Lu & Quan Wuying, *Unified Personal Credit Report: How to Ensure the Financial Consumer's Interest?*, ECON. DAILY, Aug. 25, 2000.

257. Although it is illegal to sell wiretapping devices in China, bugs are available in the market of some cities. Even some elementary students can buy them to eavesdrop the other people. See *Technical Surveillance Counter Measures*, at <http://www.tscm.com>.

258. Chen Gang & Tang Min, *Be Careful With the Expansion of Bugs*, PEOPLE'S DAILY, Feb. 16, 2000, available at <http://english.peopledaily.com>.

259. This also serves to satisfy the current legal requirements. See CIN Regulations, *supra* note 127.

260. For instance, to apply for online shopping membership at <http://mall.sina.com.cn>, one must submit his or her true name, gender, birth date, educational background, industry the applicant is working with, employment position, monthly income (optional), marriage status (optional), hobbies (optional), address, post code, telephone number, and type and number of ID documents. See <http://members.sina.com.cn>.

consumers apply for an E-mail address, they are usually required to offer certain information regarding their occupation, educational level, income level, personal hobbies, and shopping preferences.²⁶¹ Therefore, at least in theory, it is possible for an E-business to use or sell consumers' personal data for profits or other purposes without consumers' consent. Entrusting this information to a stranger creates significant vulnerability. To alleviate that vulnerability, it is in the self-interest of companies to assure consumers that there will be no misuse of such personal information.

Additionally, a threat to consumer privacy can also come from defective computer software, which could transmit users' personal data to the websites of software manufactures or other parties without authorization of the users. For instance, since May 1999, many Chinese newspapers have challenged the reliability of Windows 98 software and the Pentium III chip.²⁶² More than one month later, MII suggested that the government agencies should be careful in using Pentium III chips. They recommended that domestic PC computers disable the "Processor Serial Number" function and warned that government agencies using Pentium III chips may not have direct access to Internet.²⁶³ Pentium III chips used by many Chinese consumers have the Processor Serial Number function, which makes it possible to identify and track Internet users as they conduct E-commerce transactions. Ultimately, Intel had to disable this function under orders from MII in August 1999.²⁶⁴

On May 15, 2000, the Beijing Authority on Industrial and Commercial Administration issued the Notice on Standardizing Sending Commercial Advertisements by E-mails.²⁶⁵ Under this Notice, sending commercial emails to E-mail users without their consent is prohibited.²⁶⁶ Although this Notice is intended to curb E-

261. To apply for a free E-mail address at www.yahoo.com, one is asked to submit information including date of birth, family name, first name, residence, post code, gender, occupation and industry for which the applicant is working. See <http://mail.yahoo.com>. To apply for a free E-mail address at www.china.com, one is requested to submit more information, including the ID number, the highest educational level, marital status, employment status, monthly income, method used to have access to internet, time spent on the internet per month, expense spent on the internet, and the first time having access to internet. See <http://freemail.china.com/extend/gb/UserName.htm>. To apply for a free E-mail address at www.wowchina.com, one is also requested to submit the information regarding one's street address. See <http://china.mail.everyone.net/email>.

262. Li Lin, *Explore the Road to Information Security*, PEOPLES' DAILY, Aug. 28, 1999, at 7, available at <http://english.peopledaily.com>.

263. *Id.*

264. *China Security Blitz Bugs Intel PCs*, AUSTRALIAN BUS. ABSTRACTS, July 8, 1999.

265. *Notice on Standardizing Sending Commercial Advertisements by E-mails*, available at <http://www.news.enet.com.cn>.

266. *Id.*

mail spamming and to protect the Internet users' privacy, some questions still remain unresolved. For instance, such an administrative regulation is only valid in the jurisdiction of the Beijing Municipality.²⁶⁷ If a corporation sends E-mails from other cities or foreign countries, it will be difficult to impose any legal liabilities on the sender. In reality, if a corporation based in Beijing sends spam E-mails from a foreign IP address, it will be very difficult, if not impossible, for the government agency to investigate the real identity of the sender in Beijing. Nevertheless, the actions of the legislature are a step in the direction of enhancing privacy protection.

National legislation enhancing the protection of privacy is possible. Of course, the determination of an optimal compliance scheme is the subject of much debate both in the United States and the European Union.²⁶⁸ Regardless of the parameters of future legislation, the following elements of a privacy policy may very well inspire the kind of Real Trust that consumers desire from Internet companies. A company could adopt a policy that respects the consumers' right to information and the right to control their own personal data.²⁶⁹ A company adopting such an approach could effectuate Real Trust by providing a notice to consumers before the company gathers consumers' personal data either by surveys, cookies, or other new technologies.²⁷⁰ After the consumers provide their personal data, they should be informed as to the storing, process, editing, utilization, dissemination, transferring, and disposal, including sale, by E-business on a regular and timely basis.²⁷¹ E-businesses should limit the scope of personal data to the reasonable minimum and necessary extent when they collect information. That is, only the closely related personal data regarding transactions

267. Since the Beijing Authority on Industrial and Commercial Administration is only a local government agency, only its administrative measures within its jurisdiction can be recognized by law.

268. Council Directive 2002/58/EC, 2002 J.O. (L 201). This is an important effort of legislative harmonization in safeguarding the right to privacy within 15 EU Member States. The Directive is so rigid that some U.S. writers admitted that "currently, U.S. laws on privacy do not comply with the Directives' mandates." See FERRERA ET AL., *supra* note 220, at 217.

269. These two rights will enable consumers to have some idea about the E-business's practice regarding their personal data, and enable them to stop an E-business from using and selling their personal data. In other words, consumers' personal data should be treated like consumers' other private property.

270. Surveys and cookies are not the only two means to gather consumer personal data. Other technologies could also be developed for gathering consumer personal data in a more efficient and challenging way.

271. It seems that such subsequent reporting has not been endorsed by all E-businesses. Without the subsequent reporting, consumers will probably have no idea where their "private property" has been placed.

should be collected.²⁷² For instance, in normal circumstances, questions about income, employer, or educational background should not be asked when consumers shop online.²⁷³

E-businesses should guarantee the integrity of consumers' personal data and should permit consumers to update, edit, delete, or withdraw their personal data from E-business databases at the consumers' sole discretion.²⁷⁴ As a function of data control by the consumers, they should be able to decide whether their personal data should be sold and who should be the buyer.²⁷⁵ In addition, consumers should also receive a reasonable portion of proceeds from selling their personal data.

To ensure respect of the privacy of consumers on the part of E-business themselves, E-businesses should also use their best care, knowledge, skill, experience, and diligence in adopting any necessary managerial or technological measures to make sure that no third parties, including hackers, could steal or unlawfully have access to the private information. Of course, a privacy policy will be worth nothing if the E-business fails in properly enforcing it. Thus, monitoring the implementation of the privacy policy by non-governmental organizations (NGOs), associations of E-businesses, mass media, or consumer organizations may be necessary.

Self-help may also enhance Real Trust. Consumers should also learn how to protect themselves in a new E-commerce environment with the aid of technology and the use of legal remedies. Consumers should be aware that E-commerce on the Internet is not as secure as may be suggested by online firms. Consumer confederations and pro-consumer interest groups may make helpful contributions to consumers in the forms of public education, litigation representation, and dissemination of technological and legal information.

272. It seems that personal data gathering is justified only when it serves certain transactional purposes. If personal data gathering serves other purposes, consumers should have the right to abstain from cooperation with the E-business.

273. In addition to consumers' motivation to be left alone, additional, but unnecessary, information may put consumers at a disadvantage later in terms of possible unequal treatment based on the personal data consumers provided.

274. Of course, a consumer could sell his or her personal data to the E-business outright and give up all the rights to control or update the personal data. Otherwise, consumers should be offered the opportunity to retain ultimate control over their personal data.

275. Some consumers may be very concerned about the second-hand, or even the third-hand, buyers of their personal data. The opportunity for them to participate in the decision to sell their personal data will make consumers feel comfortable when they are asked to offer detailed personal data.

V. REGULATION OF DEFAMATION ON THE INTERNET

This Article attempted to impressionistically demonstrate the challenges faced by Chinese E-Commerce. Security technology is a double-edged sword in creating safe transactions that also risk governmental intrusion or the criminal misuse of the technology. Privacy is a relatively new concept in Chinese law, but it does have foundations. Those foundations, along with the twin realities that the Internet opens new potential vulnerability and exposes Chinese consumers to privacy protection options, place a strong incentive on companies to be reliable partners safeguarding information. Some legislation may assist in this work, but economic incentives also seem to be potentially important reasons for protecting privacy. In this section, the Article discusses defamation. As previously noted, in Chinese law, defamation cases often include privacy issues. Like privacy, the Internet opens up new potential for abuse that may make people hesitant to use it unless certain assurances are provided.

A. Statutory and Judicial Framework

While greatly expanding freedom of speech, the advance of the Internet puts individual reputations in a more vulnerable position than ever due to the high speed and ease of dissemination of defamatory information. Not surprisingly, the emergence of the Internet has resulted in an increased number of defamation cases in China. For instance, in *Hu Ming v. Jiang Guobei*,²⁷⁶ the plaintiff argued that the defendant published defamatory remarks on the website of sina.com about the plaintiff. The plaintiff was described on the site as barring the defendant from adopting a baby girl from an orphanage.²⁷⁷ In addition to the increase of defamation cases, business or product disparagement on the Internet often causes huge economic loss suffered by corporate victims. For instance, three Internet users, Wen Baocheng, Wang Fei, and Zha Yiliang, posted a message on a website in April 1999 saying that “the Director of the Zhengzhou branch of the Communication Bank has absconded with the embezzled money.”²⁷⁸ As a result, many misled depositors withdrew their deposits in advance or even canceled their bank accounts.²⁷⁹ The Communication Bank suffered over RMB 33.02

276. *Hu Ming v. Jiang Guobei* (Xuanwu People's Court, Nanjing City 2000).

277. Yang Jian & Da Ying, *Nanjing: Defamation on the Internet is on Trial*, YANGZI EVENING NEWS, May 25, 2000.

278. *Xinmin Evening News Report*, July 1, 2000 (where a rumor caused RMB 30 million yuan of loss to a bank).

279. *Id.*

million yuan (U.S. \$4 million) of loss. Accused of defamation, the three individuals were arrested and put on trial.²⁸⁰

Defamation is prohibited by both private and public law in China. Article 101 of the General Principles of Civil Law of 1986 reads that "citizens and corporations enjoy the right to reputation, and *the human dignity of citizens is protected by law*."²⁸¹ It is prohibited to damage the reputation of citizens or legal persons by insults, defamation or other means."²⁸² Article 120 of the General Principles of Civil Law reads:

If a citizen's right of personal name, portrait, reputation or honor is infringed upon, he shall have the right to demand that the infringement be stopped, his reputation be rehabilitated, the ill effects be eliminated and an apology be made; he may also demand compensation for losses. The above paragraph shall also apply to infringements upon a legal person's right of name, reputation or honor.²⁸³

Article 221 of the Criminal Law of 1997 criminalizes serious business and product disparagement,²⁸⁴ and Article 246 criminalizes serious defamation against non-business individuals.²⁸⁵ Article 4 of the Decision on Ensuring Internet Security, passed by the Standing Committee of the National People's Congress on December 28, 2000, brings the crimes of defamation on the Internet within the purview of the Criminal Law of 1997.²⁸⁶ Article 57 of the Regulations on Telecommunication, promulgated by the State Council on September 20, 2000, also prohibits any entities or individuals from producing, copying, publishing, or distributing defamatory information using telecommunication networks.²⁸⁷ Article 7 of the Computer Information Network and Internet Security Protection and Management Regulations, promulgated by the Ministry of Public Security on December 16, 1997, prohibits viewing defamatory information.²⁸⁸ Article 9 of the Regulations on Internet Bulletin Board Service Administration, promulgated by the MII on October 8, 2000, prohibits publication of defamatory information on bulletin boards services, including bulletin boards, electronic forums, and chat

280. *Id.*

281. Civil Law, *supra* note 151, § 101.

282. *Id.*

283. *Id.* § 120.

284. Criminal Law, *supra* note 231, § 221.

285. *Id.* § 246.

286. The Decision on Ensuring Internet Security, § 4.

287. The Regulations on Telecommunications (promulgated by the State Council Oct. 6, 2000), § 57 (P.R.C.), *translation available at* http://www.trp.hku.hk/infofile/china/china_tel_regs_2000.pdf.

288. CIN Regulations, *supra* note 127, § 7.

rooms.²⁸⁹ Article 13 of the Preliminary Administrative Regulations on Publication of News on Internet Websites, promulgated by the State Office of News and the MII on November 6, 2000, also prohibits defamatory information in the news published on websites.²⁹⁰

The Chinese Supreme Court provided a judicial interpretation for defamation litigation in 1993, called "the Reply on Certain Issues Regarding Hearing the Cases of Reputation Breach."²⁹¹ In 1998, the Court made another interpretation, titled "the Interpretations on Certain Issues Regarding Hearing the Cases of Reputation Breach."²⁹² These two judicial interpretations answer substantial questions regarding defamation cases, including but not confined to, the elements of proof required for defamation, the jurisdiction of the courts over defamation cases, the relationship between defamation tort procedure and defamation criminal procedure, the power of plaintiffs in cases of defamation against deceased individuals, defamatory liabilities for writing literal works and criticism articles with defamatory elements, liabilities of media and consumer for defamation, the identification of the place of the result of defamation torts, kinds of civil liabilities for defamation, and the evaluation of amount of pecuniary compensation in defamation cases.²⁹³ For instance, the courts are required to take a number of factors into account when imposing defamation liabilities against the defendant, including the fact that the victim's reputation has been damaged, the illegality of the defendant's statement, the causation between the illegal statement and consequential damage, and the fault on the part of the defendant.²⁹⁴ Either oral or written false statements, or news coverage inconsistent with the facts, could amount to defamation if such false statements or news coverage have led to wrongful harm to the plaintiff's reputation.²⁹⁵

Although Chinese legal norms on defamation are basically the same as U.S. law, Chinese law has many of its own features. For instance, even if a deceased individual is defamed his close family members may still file a defamation case.²⁹⁶

289. The Regulations on Internet Bulletin Board Service Administration, *supra* note 141, § 9.

290. The Preliminary Administrative Regulations on Publication of News on Internet Web Sites, *supra* note 141, § 13.

291. Reply, *supra* note 248.

292. The Interpretations on Certain Issues Regarding Hearing the Cases of Reputation Breach, *available at* <http://www.gzlawyer.com/laws/minyujx.htm> [hereinafter Interpretations].

293. Reply, *supra* note 248, §§ 4, 5, 7, 10; Interpretations, *supra* note 292, §§ 7, 9, 10.

294. Reply, *supra* note 248, § 7.

295. *Id.*

296. *Id.* § 5.

B. *Max Computer Station Inc.: The First Internet Defamation Case in China*

Perhaps the most famous Internet defamation case originated from a 1998 dispute. *Max Computer Station Inc. v. Wang Hong, Life Times & PC World*²⁹⁷ was the first defamation case between a computer user and a computer manufacturer. It was also the biggest defamation case in terms of alleged compensation, and the most controversial case in China. Wang Hong, a computer engineer, bought a Maxstation SLIM-I laptop produced by Max Computer Station Inc. (Maxstation), from a laptop retailer, Anteming Corporation (Anteming), for 14,200 yuan (U.S. \$1,710) on August 5, 1997.²⁹⁸ He was promised by Anteming that he would have a full, one-year warranty.²⁹⁹ After he completed the warranty card, he left it at Anteming Corporation.³⁰⁰ When his computer screen began to malfunction, Wang took the laptop to Anteming for repair on June 2, 1998.³⁰¹ However, Maxstation refused to repair the product because Anteming did not present the warranty card and told Anteming that it would cost 7,300 yuan (U.S. \$880) for repairs without it.³⁰² After several conversations between Wang and Anteming, Anteming asked Wang to contact Maxstation directly.³⁰³

Angered by the refusal, Wang wrote and posted his article, *Please See How I Was Swindled in the Process of Purchasing the Maxstation Laptop*, on a bulletin board of the website of Sitong Lifang on June 9, 1998. He also filed a complaint with the consumer association of Haidian District of Beijing city.³⁰⁴ In his article, he described his experience in a relatively straightforward way and asked readers to help post the story on other bulletin boards, "So as to let those manufacturers know that Chinese consumers are not just defenseless and to prevent trash like Maxstation from spreading."³⁰⁵ After reading this article, Maxstation contacted Wang on June 11, 1998 and agreed to repair Wang's computer, but it also demanded

297. *Max Computer Station Inc. v. Wang Hong, Life Times & PC World* (No. 1 Intermediate People's Court, Beijing 2000).

298. For the facts of this case, see the first instance verdict at http://www.angelaw.com/weblaw/wang_court03.htm [hereinafter First Verdict] and the second instance verdict at http://www.angelaw.com/weblaw/wang_22.htm [hereinafter Second Verdict]. See also He Sheng, *Pushing the Limits On-Line*, CHINA DAILY, Apr. 11, 2000, available at LEXIS, World Library, Txtlne File; Shao Zongwei, *Shopper Loses Libel Case*, CHINA DAILY, Dec. 20, 2000, available at LEXIS, World Library, Txtlne File.

299. Sheng, *supra* note 298.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

that Wang apologize for his words.³⁰⁶ Wang faxed his apology to Maxstation on July 2, 1998.³⁰⁷ However, Maxstation asked Wang to publish this apology on the Internet.³⁰⁸ Wang disagreed and canceled his request to repair.³⁰⁹ On July 3, 1998, Wang wrote his second article, *Never Ever Give In*, and posted it on the Internet.³¹⁰ His article called the Maxstation laptop as weak as tofu and called the machine "trash" compared with the laptops manufactured by other corporations.³¹¹

On July 24, 1998, he took back his defective laptop.³¹² The next day he received an E-mail from a sender who claimed to be a lawyer of Maxstation warning Wang that he would work for the remainder of his life to win damages for Maxstation.³¹³ In response to this E-mail, Wang wrote a public letter to Maxstation on the Internet on July 26, 1998.³¹⁴ Then he set up a home page on a website named "IT315," in which he encouraged surfers to vent their discontent with the quality of Maxstation products.³¹⁵ This home page not only collected his articles, but also included a column to sign to send a condemnatory message to Maxstation.³¹⁶ Some bulletin boards in other websites were hyperlinked to this condemnation column.³¹⁷

On July 28, 1998, Life Times reported Wang's dispute with Maxstation.³¹⁸ The report said that "Maxstation was considered, by a majority of consumers on the Internet, to be irresponsible to the consumers after the problems with the products were identified." This report also described Wang's special home page as "full of the supports for Wang and condemnations against Maxstation by the consumers across the country."³¹⁹ On August 10, 1998, PC World, a computer magazine, also cited Wang's notation about the Maxstation laptop, including the words "tofu" and "trash" in its report.³²⁰ On August 12, 1998, Maxstation offered to repair Wang's computer

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. See Zheng Zhi, *Consumer Complains on the Internet, and Manufacturer's Attorney Sends E-mail to Consumer*, LIFE TIMES, July 28, 1998.

319. *Id.*

320. See Zhang Yan, *Whose fault: A Controversial Case About Maxstation Laptop*, PC WORLD, Aug. 10, 1998.

unconditionally.³²¹ Wang took back his repaired laptop from Maxstation on August 26, 1998.³²²

In April 1999, Maxstation filed suit against Wang, as well as the publishers of the newspaper and the magazine, for defamation in the Haidian District People's Court and demanded that the three defendants pay 2.4 million yuan (U.S. \$289,150) in compensation.³²³ The Haidian court delivered the "first instance judgment" in favor of Maxstation on December 15, 1999.³²⁴ Wang was found to have libeled Maxstation in his articles, and the other two defendants were held responsible for damaging Maxstation's reputation.³²⁵ Wang was also held liable for the defamatory remarks posted by other readers on the BBS linked to Wang's home page.³²⁶ The court ordered Wang pay Maxstation 500,000 yuan (U.S. \$60,240) in compensation and ordered the publishers of PC World and the Life Times to pay 240,356 yuan (U.S. \$28,960) each. Written public apologies were also demanded from the three defendants.³²⁷

All three defendants appealed to Beijing's No 1 Intermediate People's Court, which upheld the "first instance verdict" on December 19, 2000, with the exceptions of reducing Wang's compensation amount to 90,000 yuan (U.S. \$11,000) and eliminating the other two defendants' duty to compensate.³²⁸ The "second instance verdict" held that "Wang's articles omitted the part about the guarantee card and focused on the fact that he did not receive post-sale service, and caused the public to have a bad estimation of the company."³²⁹ "In particular, Wang did not take measures to stop the spread of the negative impact even after Maxstation provided free maintenance service for his laptop."³³⁰ Nevertheless, unlike the first instance judgment, the second instance judgment did not recognize Wang's liability for the defamatory remarks posted by other readers on the BBS linked to Wang's home page.³³¹

C. Assessment of Max Computer Station Inc.

Four important principles arise from this case. The first concerns how to judge whether certain consumer comments about

321. First Verdict, *supra* note 298; Second Verdict, *supra* note 298; Sheng, *supra* note 298.

322. Second Verdict, *supra* note 298.

323. Sheng, *supra* note 298.

324. First Verdict, *supra* note 298.

325. Sheng, *supra* note 298.

326. First Verdict, *supra* note 298.

327. Sheng, *supra* note 298.

328. Second Verdict, *supra* note 298.

329. *Id.*

330. *Id.*

331. *Id.*

products or service are defamatory statements. The Supreme Court held in its judicial interpretation that "consumer criticisms or comments over the quality of product or service provided by the manufacturers, dealers or shops, should not be considered defamation. However, defamation should be identified when consumers use the criticism or comment opportunity to libel or attack the business reputation."³³²

Differentiating between lawful criticism or comment and defamatory statement is not easy. The appellate court listed two defamatory points in Wang's articles: first, that Wang's articles omitted some facts about his difficult process of repairing his laptop, which makes the statement at least partially false; and second, that Wang used language calling for a boycott of Maxstation laptops. The court found a link between the lowering of Maxstation's business credibility, and the wide distribution and dissemination of Wang's articles on the Internet, and in newspapers and magazines.³³³ Compared with the first instance judgment, the second instance judgment did not clearly classify the "tofu" and "trash" comments as insulting or defamatory words. It seems that the second instance judgment realized that "tofu" or "trash" was associated with a statement of opinion, instead of a statement of fact, and those words should not be considered defamatory statements. If this is true, the second instance judgment departs from the judicial interpretation of the Supreme Court in 1998, which did not treat statements of opinion and those of fact differently. The second instance judgment does not explain why and how omission of certain facts in the statement of fact will amount to defamation and has failed in explaining why boycotting language will amount to defamation. If an omission of certain facts is minor or insignificant, there will be no reason to find defamation. If the statement of opinion and of fact are different, however, it would seem necessary to classify boycott language as statement of opinion, instead of statement of fact, and thereby not give rise to defamation.

The second issue is, even assuming the words posted by other readers on the BBS linked to Wang's home page are defamatory statements, whether Wang should be liable for them. The first instance judgment found liability.³³⁴ However, Wang only offered hyperlinks to the BBS on other websites, which means that Wang is not the web master or editor of the BBS. Since Wang had no opportunity to control the content of the speech of other readers on the BBS, it is not clear why he should be held liable for offering hyperlinks to another BBS. By analogy, a symposium organizer

332. Interpretations, *supra* note 292, at 9.

333. Second Verdict, *supra* note 298.

334. First Verdict, *supra* note 298.

should not be liable for the defamatory statements made by every participant, because he has no right to restrict or deprive the participants' freedom of speech, despite the fact that the organizer offered the opportunity for the people to gather together and speak on certain issues.³³⁵ For the same reason, Wang should not be responsible for the defamatory remarks posted by other readers. The second instance court may have resolved this reasoning problem in line with the first instance court and ignored Wang's responsibility for other people's remarks that were hyperlinked to Wang's home page, but were out of his control or management. This Article contends that the second instance judgment is correct on this point, and such position should be upheld in other similar cases.

The third issue is how to define the media's defamation liability in covering consumer criticism and comments. The Supreme Court held in its judicial interpretation that

if the media criticisms or comments over certain products or services of certain manufacturers, dealers or shops are true with the basic fact, and contain no insulting words, there shall be no defamation. However, defamation should be identified when there are substantial false statements, and such statements have caused harm to business or product credibility.³³⁶

In *Max Computer Station Inc.*, the second instance judgment held that the two media outlets committed defamation, because

the source of coverage mainly depended on the information on the Internet, and the media did not go through detailed and deep interviews and strict censorship, and failed in informing the readers of the significant fact that Wang did not process the warranty application, and had not directly contacted Maxstation before he published his articles. In this way, the media also have caused negative impacts on Maxstation's business reputation.³³⁷

In a sense, it would be logical for the media to join Wang in compensating Maxstation for defamation following this reasoning. However, the second instance judgment did not draw that conclusion. Instead, it only ordered the two media outlets to apologize to Maxstation and exempted their duty to provide compensation. The rationale was that the two media outlets "misled the readers due to receiving incomplete information."³³⁸ Thus, the second instance judgment tends to differentiate the media's liability based on the cause of defamatory coverage. That is, if the defamatory media report or coverage is caused by active statements by the media itself, the media should have full civil liability, including apology and

335. See, e.g., *Howard Stern v. Delphi Services Corporation*, 626 N.Y.S.2d 694 (N.Y. Sup. Ct. 1995).

336. Interpretations, *supra* note 292.

337. Second Verdict, *supra* note 298.

338. *Id.*

compensation; if caused by inactive reception and citing of incomplete information, only an apology is required. If this reasoning is adopted by other courts, the Chinese media will be encouraged to limit their liability by arguing that their misleading coverage, despite containing defamatory statements, is caused by receiving incomplete information. It is doubtful whether an apology would be sufficient to motivate the media to promote more rigid censorship and deeper investigation when compensation for defamation is exempted.

More fundamentally, it is still an open question as to whether merely citing or reporting incomplete information or defamatory statements amounts to defamation. While the second instance judgment found that it did, the relevant legislation is silent on this point. Considering the significance of media supervision in political and business life, it seems that other more productive and positive remedies could be offered, instead of imposing defamatory liability on the media. For instance, if a party covered by the media reports is dissatisfied with allegedly defamatory statements made by another party, he could ask the media to cover his comments or responses, to counteract the negative defamatory statement, in addition to suing the defaming party. Since there is no comprehensive legislation on mass media, it would be a wise choice to keep media as a free speech and communication forum for all consumers and business corporations. In this way, the two media defendants in this case should not be held liable for defamation at all; nevertheless, Maxstation would be entitled to ask these two media to devote the same space to cover its response to Wang's statements.

The fourth issue is, assuming the second instance judgment is correct, whether it is wise strategy for a manufacturer to sue its consumers for defamatory statements when the consumer criticizes the product and service of the manufacturer. This is not purely a legal question. Reputation is so sensitive and complex that it is still possible for the people to doubt the corporation, whether it prevails in court or not. As one commentator put it, "Whether Maxstation wins or loses the case, the suit brings negative effects to the company's image."³³⁹

Max Computer Station Inc., as the first Chinese Internet defamation case, not only triggered reflections on defamation legislation by legislators and judges, but also proposed a question for consumers, E-business, and high-tech business corporations: how to avoid the defamation conflicts and how to resolve the defamation conflicts already in existence. Although detailed and sophisticated legislation and decided cases are indispensable to striking the proper balance between consumers' freedom of speech and business reputation, it is more important that consumers and businesses build

339. *Id.*

solid trust to avoid defamation. For the healthy growth of business prosperity and social integrity, trust is more valuable than the mere legal freedom of speech or legal right to reputation. 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. If businesses satisfy their consumers, most consumers would refrain from expressing their anger through potentially-defamatory words. In addition, to prevent business or product disparagement between the business and consumers, it is also necessary to avoid defamation between business competitors and to build a spirit of honest, open, and free competition.

Beyond these specific ideas, this case also demonstrates the importance of cultivating non-judicial mechanisms of resolving cases, as a Confucian ethic would advise. In *Max Computer Station Inc.*, nearly everyone lost. What could have been resolved productively turned into an unproductive fight. Often a company violating privacy rights and individuals whose privacy rights have been violated will find their interests more protected by resolving disputes short of the kind of public airing litigation entails.

The same is true of encryption. While the threat of transparency may make people more honest, the resolution of disputes prior to their disclosure is likely to protect the psychological vulnerabilities of participants. And so this Article comes full circle back to the moral advice of Confucius that, if willing, China is poised to draw upon in forming the infrastructure for the Internet.

VI. CONCLUSION

Compared with its American counterpart, the Chinese E-commerce market is still in its infancy. How effectively U.S. law promotes all three elements of trust is a separate question. Comparatively speaking, consumers and businesses have a greater range of protection in the United States than in China. Given the longer history of free markets and the rule of law, this is not surprising.³⁴⁰ The kind of legal infrastructure that allows U.S. and

340. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITAL TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000) (arguing that a key reason why the West fosters capitalism is because of a long legal history of refining concepts of property rights. De Soto argues that in advising emerging countries how to adapt their legal systems, Western advisors are sometimes unaware of the complexity of their own legal history and how to graft 21st century rules onto a socioeconomic

European economies to adapt to technological changes does not develop overnight.³⁴¹ Yet this infrastructure is vital for E-commerce.

Trust-building among E-commerce constituents is critical to foster the development of E-commerce in order for E-businesses to take reasonable risks, risks based on economic assessment more than on legal ambiguity. Although Chinese institutional arrangements supporting traditional commercial transactions are able to create and enforce Hard Trust, Real Trust, and Good Trust to some extent, further legal reforms and improvements will be necessary. For instance, while the current Contract Law of 1999 has five articles dealing with E-contracts,³⁴² it is silent on the legal validity of digital signatures and authentication by certificate authorities. Therefore, further legislative reforms related to digital signatures and authentication at a national level is important for regulating current E-contracts and certificate authorities. In addition to contracting rules, identification of consumer rights including the right to privacy, clarification of the laws of defamation, protection from credit card fraud, and rules on fair trade and competition will also be needed. Of course, a fair, effective, and strong judicial enforcement system and international legal cooperation are tremendously important in pursuit of the goal of trust building in a borderless, transnational cyberspace. All of these legal supports ensure that those involved in E-commerce, whether businesses or consumers, are accountable for their actions and thus generate Real Trust.

The rule of law should also join hand in hand with the rule of ethics in the process of trust building in the E-commerce community. Although rule of law in a modern sense is relatively young, the rule of ethics is rooted in Chinese traditional culture, especially Confucianism. Once applied to E-commerce, traditional Chinese ethics has much to offer in building a harmonious and trustworthy E-commerce world. To make cyberethics workable, E-businesses should take initiatives in self-regulation, such as enacting consumer and customer friendly policies and codes, and substantially raising their cyberethics standards beyond legal thresholds. Unfortunately, one cannot solely rely on the practices of Good Trust. Thus, the supervision by government agencies; NGOs, including the media; consumer organizations; and industry organizations is essential to the meaningful enforcement of cyberethics. Given the borderless nature of E-commerce, corporate codes of E-businesses should be developed at the international level rather than a national or industry level. Thus, a comparative study on cyberethics and

polity without the decades of learning that made incremental advances in property development sensible).

341. *Id.*

342. Contract Law, *supra* note 156, §§ 11, 16, 26, 33, 34.

traditional business ethics in different nations, including the United States and China, will be an important part of developing international cyberethics standards of trust building.

Anytime significant change occurs, questions arise as to what rules should apply. Globalization of markets, the Internet, and other scientific advances test old assumptions. There are always risks associated with falling back on traditional laws and thereby limiting the potential of the new technologies. This is the temptation of Ludditism and is seen more recently in the reactions of fundamentalist groups of nearly all major religions.³⁴³ On occasion, however, new laws need to be fashioned, whether to keep up with the Industrial Revolution or the Internet Revolution. A globalized, technologically-driven economy needs new legal forms.

There is also a temptation to assume that none of the old rules apply to a new economy. The dotcoms, for example, believed that traditional methods of stock valuation or accounting procedures did not apply to them. The stock market has also been littered with tales of their demise during the initial years of this century. It is rarely prudent to ignore the lessons of time, and a significant advantage of traditional normative rules, whether legal or ethical, is that there is wisdom within them that may not always seem to make rational sense but is valuable nonetheless.³⁴⁴

Global E-commerce world cannot work if it attempts to create everything from scratch, or if it relies solely on traditional legal principles. Instead, this Article proposes a middle path that steers between these shores. One might think of this in the East as a Buddhist Middle Way or in the West as an Aristotelian form of moderation. Either way, a middle road in which E-commerce learns from the wisdom of the West's rule of law and the East's rule of ethics may hold promise for a model of trust in this technologically vibrant, globalized economy.

343. See R. SCOTT APPELBY, *THE AMBIVALENCE OF THE SACRED: RELIGION, VIOLENCE, AND RECONCILIATION* (1999) (arguing that a major reason that fundamentalist sects develop is that new ways of thinking, such as free market capitalism, can undermine traditional identity as well as economic ways of life. Thus, a reaction to this new threat is to "dig in" with the blessings of a fundamentalist interpretation of sacred scriptures).

344. See F. A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* (W. Bartley III ed., 1988) (arguing that between instinct and reason lies a dimension of knowledge that is inherent in tradition that human beings are wise to attend to).

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