

Wednesday, June 18, 2008
Room 418, Russell Senate Office Building

Gilbert Kaplan
Partner, King & Spalding LLP

Testimony before the U.S.-China Economic and Security Review Commission

“Access to Information and Media Control in the People’s Republic of China”

Good afternoon, my name is Gilbert Kaplan, and I am a Partner in the Washington, DC office of King & Spalding LLP. I am here today on behalf of the California First Amendment Coalition (“CFAC”). CFAC is a nonprofit public interest organization dedicated to advancing free speech and open-government rights. CFAC recently petitioned the U.S. Trade Representative to bring a case against China under the General Agreement on Tariffs and Trade (the “GATT”) and the General Agreement on Trade in Services (the “GATS”). I will be talking about that later, but first I would like to address some of the questions posed by the Commission.

I. China - Measures Affecting Financial Information Services and Foreign Financial Information Suppliers (WT/DS373)

I was asked whether certain restrictions imposed by the Chinese Government on the dissemination of financial information to Chinese customers are consistent with China’s commitments under the World Trade Organization (the “WTO”) agreements.

On September 10, 2006, Xinhua, the Government of China’s (the “GOC”) official news agency, released the “Measures for Administering the Release of News and Information in China by Foreign News Agencies” (the “Measures”). These Measures regulate the transfer of financial information from foreign firms like Dow Jones, Reuters, and Bloomberg to Chinese customers. Specifically, the Measures prohibit foreign news organizations from distributing financial information directly to Chinese customers. In addition, the Measures require the submission of any financial information to Xinhua or its affiliates for review prior to its release. Xinhua and its

affiliates have the authority under the Measures to alter or delete any material they deemed offensive.

It is important to understand that these Measures are fully consistent with the GOC's monopoly on the dissemination of information in China. Although Article 35 of the Chinese Constitution guarantees freedom of speech and press, the reality is far different. The Chinese Government maintains strict control of the media, and heavily censors the content of newspapers and other publications, radio and television broadcasts, and Internet websites.

The GOC views foreign firms like Dow Jones, Reuters, and Bloomberg as a threat. These companies operate independently of the Government. They deliver financial information that is not censored. And they have a direct relationship with some of the most wealthy and powerful individuals in China.

Moreover, these companies have become powerful in their own right. Dow Jones, Reuters, and Bloomberg dominate the market for financial information in China. Each of them have developed highly profitable networks by selling up-to-the-minute stock quotes and news to thousands of Chinese customers.

Through the Measures, China is seeking to extend its monopoly over the dissemination of information, and make Dow Jones, Reuters, and Bloomberg dependent on its goodwill for their operations in China. Unfortunately for China, the Measures are plainly inconsistent with their commitments under the WTO agreements.

As a member of the WTO, China is generally barred from restricting trade in financial information. Moreover, China undertook specific commitments during its accession negotiations to provide non-discriminatory treatment to foreign individuals and enterprises, irrespective of whether or not they had invested or registered in China. The Measures seem to discriminate

against foreign firms like Dow Jones, Reuters, and Bloomberg in favor of domestic enterprises, in particular Xinhua.

China also agreed to separate the regulatory authorities for financial information services from the service suppliers they regulated. But China never established an independent regulator. Instead, Xinhua serves as both a major market competitor and a regulator of foreign financial information suppliers.

Finally, China's accession agreement also contained certain “horizontal” commitments, which apply to all sectors listed as services, including those that involve acquired rights. Under the acquired rights commitment, China agreed that the conditions upon a foreign company's activities would not be made more restrictive than they were on the date of China's accession to the WTO. In other words, a foreign company could expect the continuation or expansion of its rights, but not the contraction or elimination of its rights. The Measures breached this commitment by imposing new restrictions on the dissemination of financial information by foreign firms.

II. Barriers to Trade in Internet Goods and Services with China

Now I would like to address the GOC's barriers to trade in Internet goods and services. The GOC is actively preventing U.S. Internet companies from doing business in China while at the same time promoting Chinese Internet companies engaged in the same or similar activities. It is thereby denying market access to U.S. Internet companies, discriminating against U.S. Internet companies in favor of their Chinese competitors, preventing growth in a critical economic sector and region for the U.S. technology and services industries, and violating its WTO commitments.

The GOC uses a combination of sophisticated hardware and advanced software to prevent U.S. Internet companies and websites from doing business in China. The GOC

maintains exclusive control of the information technology (“IT”) infrastructure that connects different computer networks within China and connects China’s computer networks to the outside world. The GOC has configured this hardware to block thousands of U.S. websites and to restrict the delivery of Internet goods and services into China. The GOC also employs advanced software at the router level to prevent persons within China from accessing certain U.S. websites or receiving certain Internet goods and services.

The GOC requires Internet Services Providers (“ISPs”) and other companies operating in China to support this effort. For example, ISPs and Internet cafes are required to use software filtering programs to deny access to certain U.S. websites and to prevent the delivery of certain electronic goods and services. Similarly, U.S. Internet companies providing Internet search services within China are required to distort their search results so as to block certain U.S. websites and to restrict access to certain electronic goods and services.

As a result of the GOC’s measures, the following U.S. and foreign websites, among others, have been blocked by the GOC in the past few months: YouTube (www.youtube.com), BBC News (news.bbc.co.uk), Wikipedia (www.wikipedia.com), LiveJournal (www.livejournal.com), Tripod (www.tripod.lycos.com), Technorati (www.technorati.com), WordPress (www.wordpress.com), Xanga (www.xanga.com), and Blogeasy (www.blogeasy.com).

The GOC has enacted a wide range of laws and regulations that result in *de jure* or *de facto* prohibition on the delivery of certain electronic goods and services into China and/or result in discriminatory treatment of U.S. Internet companies. Many of these measures require U.S. Internet companies to register at the provincial or local level, or to submit their content to various

government agencies for approval. Obviously, it is impossible for persons based in the United States to comply with these regulations.

Many of the measures that prevent U.S. Internet companies from doing business in China are not publicly available. For example, the GOC maintains a list of Internet Protocol (“IP”), Domain Name Service (“DNS”), and Universal Resource Locator (“URL”) addresses that it blocks on a regular basis or during special events. Separately, the GOC maintains a list of prohibited terms and phrases that are used by advanced software at the router level to determine whether U.S. websites may be accessed by persons within China and whether electronic goods and services may be delivered into China. The GOC has not published either of these lists. As a result, U.S. Internet companies remain subject to an invisible web of measures that prevent them from doing business in China.

Through these measures, China is violating its WTO obligations under numerous provisions of the General Agreement on Tariffs and Trade 1994 (“GATT”), the General Agreement on Trade in Services (“GATS”), and China’s Protocol of Accession. For example, China is violating the following provisions of the GATT:

- GATT Article III:4 -- Certain measures treat the products supplied from outside China less favorably than like products originating from domestic suppliers. In many cases, the measures only apply to non-Chinese products or to their suppliers and thus give like products originating in China a competitive advantage.
- GATT Article XI:1 -- Certain measures are applied exclusively to foreign origin products and amount to a *de jure* or *de facto* import prohibition.
- GATT Article X:1 -- The blocking and filtering measures constitute “administrative rulings of general application” that operate as a *de facto* ruling on

which products are permissible to import and distribute to Chinese customers.

They operate as an import prohibition or restriction or otherwise affect the sale, distribution, or other use of the products, and the GOC has failed to publish these measures.

- GATT Articles X:3(a) and (b) -- The GOC does not administer the blocking and filtering measures in a uniform, impartial, and reasonable manner, because they are unpublished and are applied in different ways to different suppliers and to different products. In addition, the GOC does not maintain any judicial or arbitral system to review the administration of these measures.

China is also violating the following provisions of the GATS:

- GATS Article I:1 -- The relevant measures affect trade in services in sectors for which the GOC has made specific commitments, including value-added telecommunications services. Such services are being provided in the cross-border, commercial presence, and arguably consumption abroad modes of supply.
- GATS Article III:1 -- The blocking and filtering measures are of general application and have not been published.
- GATS Article VI -- Certain measures are not administered in a reasonable, objective, and impartial manner, and tribunals and/or procedures are not available for the prompt review and remedy of administrative decisions.
- GATS Article XVI -- Certain measures impose significant limitations or prohibitions (*i.e.*, *de facto* zero quotas) on the number of U.S. service suppliers and service operations.

- GATS Article XVII -- Certain measures explicitly or implicitly treat U.S. suppliers differently and modify the conditions of competition in favor of Chinese suppliers.

Finally, China is violating the following provisions of its Protocol of Accession.

- Paragraph 1.2 (incorporating the commitments in paragraphs 19 and 22 of the Working Party Report) -- Certain measures discriminate against foreign suppliers of products over the Internet by blocking foreign goods and services at the border, particularly where like products offered domestically via the Internet are not blocked.
- Paragraph 1.2 (incorporating the commitments in paragraph 122 of the Working Party Report) -- China agreed not to introduce or apply any non-tariff measures not identified in Annex 3 to the Protocol. The GOC, however, has blocked a number of imported products without explanation or justification.
- Paragraph 2.C.1 and paragraph 1.2 (incorporating the commitments in paragraphs 331, 332, and 334 of the Working Party Report) -- The GOC has failed to publish or make readily available any measures that identify the keywords and IP, DNS, and URL addresses that are blocked at the border. The GOC is also enforcing these measures to block the delivery of goods and services.
- Paragraph 2.D and paragraph 1.2 (incorporating the commitments in paragraphs 78 and 79 of the Working Party Report) -- The GOC has failed to establish tribunals, contact points, and procedures by which Internet-based suppliers can appeal the blocking of imported publications and content.

I would be happy to answer any questions you might have about these issues. Thank you very much for giving me the opportunity to speak here today.