
Tightening Internet Regulation in China

MARCH 10, 2016

The longstanding tension in China between expansion of service to the Internet and regulation of content on the Internet has entered a new phase. While the so-called Great Firewall remains in place to block unwanted overseas content and postings by ordinary citizens remain subject to censorship, now the restrictions on publishing and programming familiar to radio, film and television are being extended in full to the Internet.

Specifically, the 2002 Interim Regulations on the Administration of Internet Publishing (the Old Regulations) have been replaced by the Regulations on the Administration of Internet Publishing Services (the New Regulations) issued February 4 and effective March 10 (separate regulations apply to news). The New Regulations, jointly issued by the State Administration of Press, Publication, Radio, Film and Television (SAPPRFT) as publishing regulator and the Ministry of Industry and Information Technology (MIIT) as Internet regulator, are twice as long and go beyond the Old Regulations in several respects while also leaving several important issues unclear:

- Unlike the press, film and television, for which publishing, broadcast or film production and exhibition licenses are a prerequisite for transmission of content, the Internet is open to any individual or organization with access to the Internet through a computer or mobile device. Although the definition of “Internet publishing services” (Article 2) is more detailed than its predecessor (Old Article 5) by specifically including both original and reproduced works, online databases, and the catchall other types of digital works recognized by SAPPRFT, it potentially brings any content that is “informational or ideological” in nature within the scope of Internet publishing. It is therefore unclear whether companies and individuals who do not consider themselves to be publishers but which transmit product information, commentary or other content on the Internet or through social media, typically without charge, are engaged in the provision of Internet publishing services.
- Foreign investment in Internet publishing services in the form of a foreign-invested enterprise (FIE), i.e., a Chinese-foreign equity or cooperative joint venture or wholly foreign-owned enterprise, is expressly prohibited (Article 10 para. 1). It is unclear how much of a change this constitutes as foreign investment in publishing and the distribution of printing publications and film has already been restricted, even to the extent of China’s failure to

implement a 2010 WTO appellate body ruling with respect to trading rights and distribution services for publications, although an agreement with the United States was reached with respect to films for theatrical release (Dispute Settlement 363).

It would, however, appear that foreign investment in the form of a shareholding of less than 25 percent, the threshold for constitution as an FIE, may be permitted in, for example, shareholdings of Chinese companies limited by shares. The status of variable interest entity (VIE) companies, i.e., companies organized outside China that exercise control through Chinese national holders of the relevant licenses, is unclear:

- The New Regulations go beyond the restriction on foreign investment to require SAPPRFT approval for any cooperation project with an overseas organization, an individual, or an FIE even though FIEs are themselves Chinese companies (Article 10 para. 2). This will at minimum delay any such cooperation project and may thereby foster piracy even though copyright protection is expressly provided (Article 32).
- Providers of Internet publishing services are required to locate their servers and storage devices in China (Articles 8(3) and 12(7)), which establishes an additional basis for regulatory control beyond the prohibition on foreign ownership. It may also encourage providers of Internet publishing services to procure equipment from Chinese vendors to protect themselves against suspicion that they are utilizing equipment with foreign “back doors.”
- The New Regulations encourage establishment of an industry self-disciplinary association (Article 6 para. 2) which will likely function more as an auxiliary of the regulatory bodies than as an autonomous advocate for industry interests.

In addition to these changes, the significance of the New Regulations lies in their retention of fundamental provisions that constrain freedom of expression. For example, Internet publishing service providers must establish an editorial responsibility, i.e., censorship, system (Article 23). Meanwhile, civil liability applies to publications that are unfair even if they are not false (Article 28), and the standard prohibitions on content that harms the reputation or interests of the state or is otherwise unlawful remain in place (Article 24).

Companies which produce and transmit content over the Internet and through social media should determine whether they require publishing licenses. They should also urge the Chinese government to exclude their industries and/or content from the license equipment when implementing regulations or clarifications are issued.

Authors



Lester Ross

PARTNER

Partner-in-Charge, Beijing
Office

✉ lester.ross@wilmerhale.com

☎ +86 10 5901 6588