
China Imposes Broad New Restrictions on Publication of Internet Content

By Thomas M. Shoesmith and Julian Zou

New rules just published by the PRC impose new licensing and censorship requirements on almost all internet content providers, including publishers and aggregators of news, advertisements, social media content and mobile games. There are new prohibitions on joint ventures, and the existing restrictions on VIE arrangements are tightened.

In February 2016, the PRC State Administration of Press, Publication, Radio, Film and Television (SAPPRFT) and the Ministry of Industry and Information Technology (MIIT) jointly released broad-reaching new rules regulating the publication of virtually all types of internet content in China. *The Online Publishing Service Management Rules* go into effect on March 10, 2016. Although the practical effect of the new Rules remains to be seen, they mark another step away from the “opening” many have hoped for in China, and toward more complete control over the information available to Chinese internet users.

Background

The internet has always been tightly regulated by the government in Beijing. Any person or entity using the internet for any commercial purpose is required to hold an “internet content provider,” or ICP, license issued by MIIT. License holders must engage in comprehensive self-censorship, maintain records and provide information on content and in some cases users to the authorities, and refrain from publishing over the internet any content which would be detrimental to national security, social stability or the moral well-being of the Chinese public. Certain sectors, such as news, chat applications, video- and file-sharing and the like are subject to additional regulation as they are seen to pose special risks to domestic harmony in China.

Foreign participation in the Chinese internet industry is even more restricted. For many years, ICP licenses could only be issued to 100 percent Chinese-owned enterprises, which meant that even a PRC subsidiary of a foreign company could not hold an ICP license. A few years ago, the law was relaxed to permit 49 percent foreign-owned joint ventures to hold ICP licenses, but only a handful of such licenses have ever been granted and only to major internet players.

Foreign companies using the internet for commercial purposes in China therefore were forced either to keep their servers outside of the PRC, which led to customer-experience issues; or enter into contractual tie-ups with 100 percent Chinese-owned ICP license-holders (so-called variable interest entities, or VIEs). These VIE structures are neither clearly legal nor clearly illegal in China but have been widely tolerated by the government for almost two decades. Even “Chinese” companies such as Alibaba and Sina must use these structures, since they are domiciled outside of the PRC.

As a political matter, Beijing is not blind to the power of the internet to contribute to popular discussion and even dissent. As the PRC economy contracts and pressure is put on the central government to maintain a rising standard of living, Beijing has become increasingly willing to exert its muscle to closely monitor, and where it deems it necessary, restrict the free flow of information over the internet. The new Rules can be seen as an expression of this trend.

The 2016 Online Publishing Rules

The 2016 *Online Publishing Service Management Rules* overtake and abolish provisional regulations promulgated jointly in 2002 by the General Administration of Press and Publications and the Ministry of Information Industry relating to online publications. The new Rules are much more restrictive.

Summary for foreign investors

Foreign companies publishing content over the internet in China must work through VIE structures, and the new Rules do not change this. VIE entities will have to obtain new permits and submit to additional registration and examination procedures, including approval of their relationships with their related foreign parties. Publishers of information and news should continue to be aware of official sensitivity to certain types of content. Publishers of games and apps may want to consider pre-approval of their content to reduce enforcement uncertainty in the future.

Jurisdictional scope

The 2016 Rules apply broadly to any “online publishing services provided within the borders of the PRC.” (Art. 2.) Presumably this continues the approach to jurisdictional nexus of existing internet regulation in China: if active content resides on or is provided through servers located within the PRC, the jurisdictional nexus is satisfied and the law applies. If the provider maintains its servers outside of China, the law does not apply. Hong Kong and Taiwan are technically outside the borders of China. As a practical matter many companies do not find this solution satisfactory, as latency problems and the Great Firewall can degrade the user experience. And, China can and often does cut off access to foreign websites.

Definition of online publishing services

“Online publishing services” are broadly defined to cover original works, including online and mobile games, as well as re-publication or aggregation of works created by others, collections of information, databases and the like. Article 2 of the Rules contains the following examples of “online publishing services:”

- written, pictorial, game, cartoon, audiovisual reading materials and other such originally created digitized works in the literary, artistic and scientific area, which are characterized by knowledge and ideas;
- digitized works whose content is identical to already published books, newspapers, periodicals, audiovisual works, electronic publications, etc.;

- online documentary databases composed by selecting, arranging or compiling the abovementioned works and other such digitized works;
- other categories of digitized works identified by the State Administration of Press, Publications, Radio, Film and Television.

New permitting and registration requirements

An online publisher must now obtain an “Online Publishing Services Permit” before engaging in online publishing services. This permit is in addition to the ICP license required for anyone using the internet for commercial purposes. The permitting and registration requirements apply equally to Chinese companies unrelated to foreign investors, joint ventures and VIEs.

Online publishing permits will be valid for five years and can be extended upon application. Once the permit is issued, the operator must register with the authorities and commence operation within 180 days. After registration, other formalities must be followed, and any changes to the organizational structure and scope of operations of the permit holder must be reported. Suspension or termination of online publishing activities must also be reported and registered with the authorities. (Arts. 7-18.)

Prohibition on foreign investment; reporting requirements for VIEs and other collaborators

Foreign-owned and foreign-controlled enterprises are flatly prohibited from engaging in online publication activities in the PRC (Art. 10). This includes Sino-foreign joint ventures, a potential problem for the few foreign companies that have obtained joint venture ICP licenses. These companies may be forced into VIE structures like the rest of the industry.

Foreign companies and foreign-invested Chinese companies are already prohibited from using the internet for commercial purposes (except for the few joint venture ICP license-holders), so the prohibition of Article 10 is not entirely new. The Rules clearly acknowledge that foreign enterprises operate in the internet through VIEs in China.

What is new in the 2016 Rules is the ominous-sounding reporting requirement in Article 11: “Online publishing enterprises which engage in collaboration [cooperation?] with Sino-foreign contractual or cooperative joint ventures, foreign-operated enterprises or organizations and individuals from outside the borders of the People’s Republic of China who conduct online publishing services activities shall report to the SAPPRFT for examination and approval in advance.” This new requirement gives the SAPPRFT and the MIIT an opportunity to examine and pass on foreign internet companies which they did not have under the existing regulatory structure. It remains to be seen what these Ministries do with their new authority.

Chinese enterprises that publish foreign content in China may well be subject to the reach of Article 11 as well, even where there is no VIE relationship. The broad language of Article 11 would appear to sweep in Chinese distributors, re-publishers, and business partners who facilitate the distribution or publication of foreign content online in China. This would include games, apps and cloud computing services as well as other more static content.

Article 21 adds that online publishing enterprises, such as VIEs, may not “transfer, rent out, or sell” their online publishing permits. This is probably not designed to prohibit the hundreds of VIE structures which exist in China. But there is no doubt the Rules mark a significant increase in the government’s oversight and potential regulation of VIE entities.

Qualifications for online publishers

The Rules contain new requirements applicable to any enterprise applying for an online publishing services permit. Article 8 provides that applicants must maintain a unique domain name and meet other requirements. Article 9 mandates that, outside of the online equivalent of traditional publications (books, periodicals, etc.), operators must also meet certain other requirements, including:

- Having a statutory representative [who is] a Chinese citizen with fixed abode within the borders of the PRC, who has complete capability of action;
- Having at least one person among the statutory representative and the main responsible persons who has mid-level or higher specialist publishing technology qualifications; and
- Employing at least eight specialist editing and publishing personnel with qualifications “accredited by the SAPPRFT.”

In the case of foreign companies operating through a VIE, these requirements would apply to the VIE entity and its management. It is not clear whether the requirement that the permit-holder’s statutory representative “has complete capability of action” will be used to interfere with the contractual control that foreign companies typically exercise over their VIEs.

Requirement for domestic servers

Article 8 requires all online publishers of “books, audiovisual, electronic, newspaper and periodical” content to locate their servers within China. Article 12 provides that the application for an online publishing permit must include “a commitment that relevant servers will be located within the borders of the PRC.”

Logically, this requirement is circular. If the Rules do not apply extraterritorially, publishers maintaining their servers outside of China are not subject to the requirement that they locate their servers inside of China. However, this provision is at least a signal that SAPPRFT and MIIT will look carefully at online content published into China from offshore, and may use other means to interrupt what they deem as unsuitable content.

Content management and censorship

The 2016 Rules increase the censorship and oversight provisions of the superseded 2002 provisional regulations. There is the customary list of prohibited content in Art. 24 (information which touches on national security, propagates heresy, upsets the social order, and the like), as well as a list of encouraged content in Art. 46 (including disseminating the principles of the PRC Constitution, targeting youth with “healthful” content, and “advancing the Socialist core value system, domestic morals and individual virtue”). For foreign-related content providers these provisions will be familiar as well as unpredictable.

Article 23 requires online publishers to implement a “content management system” and exercise “editorial responsibility” over any content published online. This should be of concern to re-publishers, content aggregators, websites allowing file-sharing or peer-to-peer communications and similar functionality. Internet content providers are already subject to self-censorship requirements, but the Rules reinforce the government’s interest in this area.

Article 26 requires pre-approval from SAPPRFT for “any content implicating national security, social stability and “other such major themes.” The pre-clearance requirement is new. It is difficult to imagine many foreign publishers of news or other similar information submitting their content for pre-approval, but publishers of technical and other information with a long shelf-life, as well as distributors of games, apps

and other similar content may find that pre-approval adds an element of predictability which was not previously available.

Article 34 requires online publishers to retain records of online content, URLs and other information for at least 60 days and make that information available to the authorities on request.

Articles 38-44 charge the local authorities with responsibility for carrying out annual examinations of online publishers and issuing appropriate “rectification” orders. The Rules also give the authorities permission make public the results of their examinations.

Penalties

Articles 50-59 contain provisions relating to the liability of online publishers for breaches of the Rules. Penalties can include warning notifications, rectification orders, a requirement for “open self-criticism,” and an order to remove offending content. Websites can be shut down, criminal penalties are available, and of course permits can be revoked.

Implementing regulations

Rules promulgated by national-level authorities in China often are followed by implementing regulations. The Rules are too new for there to have been any indication yet if, or when, implementing regulations will be released. In any event, the Rules as well as any future implementing regulations are sure to leave the PRC authorities with substantial latitude with regard to permit applications as well as enforcement. The outlook for foreign internet content in China therefore remains uncertain, even as the demand for that content continues to grow.

For additional information on this topic and any other topics relating to investment in or by China, please contact any member of our China Practice Group.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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