



Are foreigners banned from publishing on the Internet in China? An examination of what exactly China's new online publishing rules are ruling out

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China's media and publishing regulator, the State Administration of Press, Publication, Radio, Film and Television ("**SAPPRFT**"), and its telecoms and Internet regulator, the Ministry of Industry and Information Technology ("**MIIT**"), have jointly issued new rules governing online publications in the People's Republic of China ("**China**" or the "**PRC**"): the *Online Publication Services Administrative Provisions* (网络出版服务管理规定) (the "**Online Publication Provisions**"). The Online Publication Provisions were issued on 4 February 2016 and came into effect from 10 March 2016.

Foreign Investor Concerns

The Online Publication Provisions have raised a number of concerns among foreign investors in China, largely due to the expansive scope of what SAPPRFT and MIIT have defined as constituting "online publishing services", coupled with a complete ban on foreign invested enterprises such as Sino-foreign joint ventures ("**JVs**") and wholly foreign-owned enterprises ("**WFOEs**") (collectively "**FIEs**")¹ from engaging in such activities. Not only are FIEs not allowed to directly participate in online publishing activities, but also all "cooperation projects in relation to online publishing business" (not further defined) between overseas entities, individuals and/or FIEs on the one hand and (domestic capital licensed) online publishers on the other are subject to prior approval by SAPPRFT. This may be an issue for cross-border content licensing transactions, particularly as the approval requirement is somewhat counter-intuitive to foreign investors even if you are familiar with the current direction in which China is heading in this area.

If foreign providers of content or FIEs which provide significant online content were in any doubt that they were not exactly being shown the red carpet by China's regulators, the Online Publication Provisions make things abundantly clear that China is seeking to tighten up the rules on who can publish online. The text hints at the issue that China sees new forms of online publication platforms as a target for stricter regulation, whereas existing conventional publishing platforms get a slightly lighter touch from the regulators. It is important, however, to see the Online Publication Provisions in their historical context: as will be analysed below, restricting foreign investment in this area is by no means a new phenomenon.

The Online Publication Provisions also remind foreign and domestic investors alike that the license required for online publishing, the "Online Publishing Permit", is consistent with the rules on other Chinese permits, non-assignable and may not be loaned, leased out, sold or transferred. Similarly, it is prohibited for a licensed online publishing entity to allow any other entity, even another online information service provider, to publish in its name.

Domestic Investor Concerns

Domestic capital entities ("**Domestic Entities**") in China have raised a different set of concerns centring around the potential expansion of the scope of entities and/or individuals needing the Online Publishing Permit, a permit that comes with a number of strings attached.

Even if a Domestic Entity manages to obtain an Online Publishing Permit, it will only be able to publish within an approved limited scope. For example, an Online Publishing Permit may be issued for a specific type of publication, say "publication of the contents of already formally published periodicals", or "online games" in which case it would be limited to that activity, and would not be permitted to publish anything else. This means online publishers are pigeonholed into only publishing one or more category(ies) of publications, implying tight state control and monitoring.

¹ The Online Publication Provisions specifically reference Sino-foreign equity joint ventures, Sino-foreign cooperative joint ventures and wholly foreign-owned enterprises.

There is also a dual qualification standard. A lower threshold is imposed upon existing book, audio-visual, electronic, newspaper and periodical publishers who presumably have already met gating requirements for traditional media publishers. Such publishers only need to satisfy three requirements in order to apply for an Online Publishing Permit to engage in online publishing, which are possession of:

- A specific website domain name, and an intelligent terminal application or other such like online publication platform;
- A specific scope of online publishing services; and
- The necessary equipment for the provision of online publication services, with its servers and storage equipment obligatorily placed within the PRC.

By contrast, a much longer list of qualification criteria applies to other entities engaging in online publishing e.g. blogging or information distribution platforms. For them, in addition to the above, they must also satisfy the following requirements:

- The company's legal representative and key person in charge must each be a Chinese citizen permanently resident in China;
- The Domestic Entity must employ a minimum of 8 full-time editing and publishing staff who have SAPPRFT-recognized qualifications, of which at least 3 have mid-level or higher professional qualifications; this is presumably primarily directed at censorship, but has the effect of increasing costs;
- The company must have a content proof reading system meeting the requirements for online publishing services; and
- Other requirements under laws, regulations or as specified by SAPPRFT.

In a country where censorship is taken for granted and part of the landscape, such a reaction from Domestic Capital Entities is, to say the least, unusual, giving rise to a strange community of interest with the foreign community, albeit for very different reasons.

Ongoing Obligations

In terms of ongoing obligations, an entity with an Online Publishing Permit must, among other things, adopt a content responsibility system including an editor and proofreader responsibility system and other management systems to ensure the "quality" of its online publications (and reading between the lines, to allow blame to be apportioned when something inappropriate gets published).

The entity must avoid publishing prohibited content, including among other things pornography; ethnic discrimination; slander; and anything that would endanger the unity, sovereignty or territorial integrity of the State or jeopardize the honour and interest of the State². These categories are broadly defined and open to interpretation. Publications that incite minors to engage in acts that go against social morality or involve illegal acts or crimes or any content that is harmful to the physical and mental health of minor's or any content that discloses personal information of minors are also prohibited. Content relating to state security, social stability and harmony or other "major topics" may potentially be published, but are subject to a separate record-filing with SAPPRFT prior to publication.

² These provisions are essentially a carbon copy of Article 57 of the *People's Republic of China Telecommunications Regulations* (the "**Telecoms Regulations**") and Article 15 of the *Internet Information Services Administrative Procedures* (the "**Internet Information Procedures**"). The *Internet Email Services Administrative Provisions* simply refers back to the same list in Article 57 of the *Telecoms Regulations*. Here China is covering the media bases.

Penalties for non-compliance

Entities who engage in online publishing services in China without an Online Publishing Permit or in violation of the Online Publication Provisions are subject to administrative penalties (such as taking down of the website, removal of the online publications, confiscation of illegal proceeds and fines of 5 to 10 times the amount of any illegal turnover), and where a crime has been committed, criminal sanctions. This is fairly harsh compared with other similar legislation in China.

New ban on foreign investment?

The ban on foreign participation in online publishing services is not new. It was already stated in the current *Guidance Catalogue of Foreign Investment Industries* (2015 version and previous iterations such as the 2004 version), which listed online publishing services as a prohibited sector for foreign investment, and earlier in the 2005 *Several Opinions on the Introduction of Foreign Capital to the Cultural Sector*.

Online publishing prior to 10 March 2016: the law

In order to understand the scope of what is considered "online publishing" under the Online Publication Provisions in context, it is necessary to look at where the law stood previously under the previous rules which were expressly repealed by the Online Publication Provisions, the *Internet Publications Interim Administrative Provisions* (the "**Interim Administrative Provisions**").

Under the Interim Administrative Provisions, online publishing services had essentially four elements, as follows:

- (a) works;
- (b) published by Internet information service providers after selecting and editing;
- (c) on the Internet, or distributed via the Internet to user terminals;
- (d) for public browsing, reading, using or downloading.

The picture that can be gleaned from these elements was that not all posting of information online was deemed to constitute online publishing.

First, "works" are a limited subset of information. Works are defined as:

- Books, newspapers, periodicals, audio and video products, electronic publications, and other publication content that have been officially published, as well as other works that have been publicly released in other media; and
- Edited works on literature, art, natural science, social science, engineering technology, and so forth.

Thus, works are official publications, analogous to the official publications of the print/hard copy world. Or, they are selected and edited original works in the fields of certain disciplines. Works are, then, apparently not just any and all information.

Second, who is publishing the works is framed in terms of internet information service providers ("**IISPs**"). By way of background, in China, the fact of operating a website makes an entity an IISP, and all website operators hosted on a server in China, being "internet content providers" must have an Internet Content Provider ("**ICP**") business operating permit serial number ("**ICP Permit**") or ICP record filing serial number ("**ICP Record Filing**") issued by MIIT prominently displayed on their

websites. (The distinction under the Internet Information Procedures is supposed to be based on whether or not the operator charges a fee or not, but in reality it is much more complex than that.) In turn, it was clear – at least prior to 10 March 2016 – that among IISPs only a sub-set of websites, those that publish "works", would besides their ICP Permit or ICP Record Filing also additionally need an Online Publishing Permit.

Weaving these two points together, the conclusion is that online publishing refers to a sub-set of activity involving publishing "works", and not just any posting of information generally. That said, the exact contours of what counts as online publishing are not entirely clear from the face of the law. It is relatively clear at the extreme ends: turning printed books into e-books for example, clearly would be; by contrast a person posting on a blog that he ate a bowl of porridge in the morning for breakfast should not be. However, where the line in the sand is drawn between those two albeit extreme examples is not so clear. Where do things like articles, product descriptions and reports (or this publication), for example, fall?

Another open and somewhat related question is where information platforms fall into the online publishing equation. When do user posts start to form "works"? Does the fact that user posts are not reviewed or edited by the platform change the equation? Do users need Online Publishing Permits? Does the platform? The Interim Administrative Provisions (and now similarly the Online Publication Provisions) do not provide any clear answers to these questions.

Online publishing prior to 10 March 2016: in practice

Turning to practice, our observations tend to confirm the following: (1) only a small fraction of websites have an Online Publishing Permit, and (2) websites that have an Online Publishing Permit apparently tend to engage in publication of e-works of a formal kind, analogous to publications in the hard copy world.

For example, www.qikan.com.cn, which apparently publishes and sells online magazines, has an Online Publishing Permit for a scope of "online dissemination of periodical contents that have already been formally published". www.360.cn has an Online Publishing Permit for "publishing online games".

The lines become somewhat murky when comparing publishing versus distribution or otherwise offering online publications for sale. Distribution or sale of online publications does not necessarily require an Online Publishing Permit, but apparently may need to be supported by an "online culture business license", provided that the online publishing part of the process for bringing the work online was handled by a licensed publisher of record. We observe, for example, that the entity operator that sells e-books for Kindle in China under the Amazon banner has an online culture business license, enabling it to sell e-books, but appears to stop short of publishing them, instead retaining a publisher of record for each work.

Turning to the question of "articles", we observe that Baidu Library, which distributes a wide variety of user-posted articles and other documents online, some for free and some for a fee, apparently does not have an Online Publishing Permit. Some documents are posted by publishers, which Baidu Library lists as cooperative institutional partners, whose licenses presumably cover the online publishing of the works/articles uploaded by them. However, some documents are uploaded by individual users, and it is not apparent whether either the authors or Baidu Library needs an Online Publishing Permit to cover these documents.

As for other platforms, such as We-Chat, which allows users to post articles and/or other content in "public accounts" and www.Qingting.fm, which allows users to post audio files, we observe that they have online culture business licenses, but not Online Publishing Permits, at least not for these functions (Tencent, which operates We-Chat, has an Online Publishing Permit, a copy of which is posted on

www.qq.com, but only for online games which is another story entirely³). Presumably, then, the stance under the Interim Administrative Provisions was that an Online Publishing Permit was not needed for these types of activities, or at the very least that such requirement was not rigorously enforced.

Online publishing after 10 March 2016

The Online Publication Provisions definition of online publications is much more expansive than that under the Interim Administrative Provisions.

First, is in the realm of "works". While these must still have the "features of publishing", such as editing, producing, or processing, the list of what constitutes a work is now expanded from the two prior bullet points (which leaned towards formal works), to four bullet points that seem to cover just about everything and anything. Those points are:

- Written works, pictures, maps, games, cartoons, audio/video reading materials and other original digital works containing knowledge or ideas in the field of literature, the arts, science or other fields;
- Digitized work products whose content is identical to that of any published book, newspaper, periodical, audio/video product electronic publication or the like;
- Network document databases and other digitized works derived from any of the aforementioned work products by extraction, editing, collection or other means; and
- Any other forms of digitized works as determined by the SAPPRFT.

With such a broad list (and an open-ended sweep-up that leaves the list to be expanded in SAPPRFT's discretion), it is hard to imagine what is not covered. Presumably "features of publishing" is supposed to define and constrain the universe of works and set some apart from others, but it is even more difficult now to ascertain just what that means. Some clarity may come with specific classifications of web publishing services which are to follow, but it is still hard to say how helpful this will be given the wide definition in the Online Publication Provisions. On the other hand, we may get little or no further clarity at all, as this is an area that has historically been notoriously nebulous and opaque, and based on our experience, vagueness is often a useful tool for regulators wishing to claim a given case falls within its regulatory purview.

Take for example, the new inclusion of "pictures". Does this mean "picture books", or any pictures? If the picture has been carefully framed, cropped, or even photo-shopped at all, would that mean it has the "features of publishing"? Is this meant to cover illustrations integrated in works or simply all pictures, and is SAPPRFT really claiming it has authority (or the interest or capability) to control the publication of any picture on the internet and if so how does that cut across the rights of people to their image under the *General Principles of Civil Law*?

Impact on Self-Publishing Platforms

Furthermore, the Online Publication Provisions, on their face, may re-open the question of the legal status of self-publishing platforms. By deleting the Interim Administrative Provisions reference to online publishing as being done by IISPs, in other words websites, are the Online Publication Provisions aiming to more aggressively seek to capture individual blogs or columns such that no one, not even individuals, may post content unless a licensed online publisher is involved, thus implying that self-publishing platforms must have an Online Publishing Permit?

The statute does not provide a clear answer on this. However, an interview with an unnamed SAPPRFT official posted on the SAPPRFT website (<http://www.gapp.gov.cn/news/1656/277357.shtml>), indicates

³ Please refer to our client note on the merger of SARFT and GAPP and the turf war between them [here](#) on page 28.

that popular Chinese platforms like Weibo and We-Chat will be required to get an Online Publishing Permit, as they are the public providers of user content. At present, neither platform has such permit. Considering, then, what a big change this is in practice, however, it is surprising that the rules do not address this type of scenario in a more straight-forward and direct (or clear) way. Query where blogs run by individuals fit into this new world – could this be a way of pushing them to publish on a platform licensed by SAPPRFT where the regulator has leverage to make the platform play ball by threatening to cancel the Online Publication Permit?

Implications for foreign invested entities or foreign entities who post works online

Given this background, the issue is less whether foreign investment is banned (which is clear), but more to the point, what are the set of actions and activities that foreigners and FIEs are banned from engaging in?

FIEs who post content online need to know whether the content constitutes an "online publication" which is required to be formally published online on a platform with an Online Publication Permit, or whether they can go online without being seen as engaging in "online publishing".

As noted above, much content appears to fall within a grey area, in particular, pieces that are not formal works but may have involved considerable thought, production, formatting, or relative significance to them, for example this client note or articles and market reports. Our inquiries suggest it will take time before the policy positions and practice of SAPPRFT under the new Online Publication Provisions take shape for those types of "works".

Meanwhile, preliminary inquiries with SAPPRFT suggest that product descriptions or content related to a company's business posted by the business on its website are unlikely to fall within the Online Publication Provisions, provided that such posting is incidental to the company's main business, and the company's main business is not online publishing. By way of example, a company that markets and sells mobile telephones would be unlikely to need an Online Publishing Permit (or need the services of a licensed online publisher) to post an article on its website describing the difference between 3G and 4G technologies. By the same token, these inquiries would suggest that this client note is not an "online publication".

In addition, apparently posting content on self-publication media platforms, such as We-Chat, will similarly likely not require the user posting to have an Online Publishing Permit. However, it is more unclear now whether the platform itself will need a license, and if it does, what level of editing the platform will need to engage in for the content to have the "features of editing" and hence constitute "online publishing", and whether and how this would impact the timing for delivery of content.

Given the general lack of clarity in the Online Publication Provisions, however, it would be prudent for concerned companies (whether FIEs or Domestic Entities) to make inquiries on a case-by-case basis with SAPPRFT in order to further understand how and whether the Online Publication Provisions may apply to their specific online activities.

Implications for cross-border providers of online publications

It is worth noting here that the Online Publication Provisions apply to online publishing services within the mainland of the PRC. Companies who publish works outside of China technically fall outside the ambit of the Online Publication Provisions, even if web users in China may be able to access such overseas websites on a cross-border basis. This does not mean, however, that cross-border provision is an easy work around for the Chinese market. For one thing, a politically unacceptable cross-border offering may be still blocked to Chinese internet users by China via the Great Firewall of China, and overseas websites may suffer from slow access speeds deterring the target readership from purchasing subscriptions.

Conclusion

The Online Publication Provisions make it clear that SAPPRFT wishes to tighten up control over publications on the internet and online publishing services in general. To what extent is not yet fully clear, and although there is past history of restricting foreign investment in this area, it is difficult to be optimistic given the direction of travel suggested by the Online Publication Provisions. Few pieces of Chinese legislation have raised concerns across the investing community to this extent, possibly with the exception of the draft *Foreign Investment Law*⁴. On the one hand, fears that all content online may become subject to the Online Publication Provisions and restricted from foreign participation are probably unfounded and amount to something of a "scare story". On the other, the lack of clear direction about what is now regulated and when you cross the line into territory requiring an Online Publishing Permit is more of an issue for business. Far from demonstrating hope of an eventual opening up of China's tightly controlled media sector, the Online Publication Provisions make even collaborations between overseas entities, individuals and/or FIEs with Chinese publishers subject to discretionary approval, which is likely to become something of an "elephant in the room" when discussing such business transactions.

Perhaps of most concern is that the Online Publication Provisions appear to be pushing those who have published online to date on less formal unlicensed platforms to relocate to licensed platforms with an Online Publishing Permit: there is no doubt that the bigger non-conventional publishing platforms will obtain Online Publishing Permits in due course: the underlying concern is that expanding the coverage of the online publishing licensing system gives SAPPRFT and MIIT additional leverage to have unpalatable content removed by threatening the platform with withdrawal of its Online Publishing Permit in the event it does not "play ball" with the censorship requirements.

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⁴ Please refer to our client note on the draft Foreign Investment Law [here](#).

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