



PRC Telecoms, Media & Technology Law Newsletter 10 April 2009

This TMT Newsletter contains the following articles:

- SARFT's Notice on Strengthening the Administration of Online Audio-Visual Content
- The End of the Road for Sino-Foreign Joint Venture TV Productions

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SARFT's Notice on Strengthening the Administration of Online Audio-Video Content

Introduction

On 30 March 2009, the State Administration of Radio, Film and Television (**SARFT**) released its *Notice on Strengthening the Administration of Online Audiovisual Content (Notice)*. The Notice was accompanied by a press release announcing that SARFT had, to date, shut down 341 obscene audio-video websites in its 2009 campaign against "vulgar" online content.

The Notice has 2 purposes: firstly it is intended to guide websites providing audiovisual services on compliance with Article 16 of the *Rules for the Administration of Internet Audiovisual Program Services* (issued by the SARFT on 20 December 2007 and effective as of 31 January 2008) (**Rules**) and its companion regulation, the SARFT's *Notice on Increased Monitoring of Online Audiovisual Services* (issued on 28 December 2007). Article 16 of the Rules lists types of content that must not be included in online audiovisual programs.

Secondly and more importantly, the Notice states that all audiovisual content must be approved by the SARFT prior to being published online.

Key Provisions

1. **Forbidden Content**

The Rules list 10 categories of content that are prohibited in online audiovisual programs. These are very broadly defined and provide little real guidance for those trying to comply with the law. The Notice elaborates upon these broad categories and

provides a much clearer, and more specific list of 21 types of content that must not be distributed via audiovisual websites and that, where found, must be deleted.

The types of prohibited content will be unsurprising to those familiar with China's general censorship policies. They include sensitive historical and political content, such as the disparagement of historical figures, the security services and the judiciary, content promoting feudalism, religious extremism, and "negative" or "decadent" lifestyles, content that is violent or pornographic and extreme horror.

2. Self-scrutiny by Websites

Audiovisual website operators are required by the Notice to enhance their scrutiny over the videos they host, in order to ensure that they are legally compliant. Material described as "self-photography", "hot dance", "beauty", "amusement", "original content" and "audiovisual citizen reporting" requires particularly close attention. Users' complaints must also be dealt with swiftly.

3. SARFT Permit Requirements

All films or TV programs transmitted via audiovisual websites must have obtained from the SARFT a Film Public Screening Permit, TV Drama Distribution Permit, TV Animation Distribution Permit, or TV Documentary Film Screening Permit, as appropriate. These permits are already mandatory for all films and programs shown on TV and in cinemas in China.

4. Copyright Protection

Audiovisual websites are obligated to enhance their copyright protection systems, and to take appropriate measures to protect the legitimate rights and interests of copyright holders. Operators of such sites must hold, or be licensed with, the copyright to all content they transmit.

TAL Commentary

Overlapping Jurisdictions

The online audiovisual industry in the PRC is currently administered and regulated by a number of agencies. The online streaming of audiovisual content, being analogous to TV and cinema distribution, is clearly within the SARFT's jurisdiction. As the key regulator and censor for other media, such as CDs and DVDs, the General Administration of Press and Publications (**GAPP**) has also been asserting to regulate downloadable online audiovisual content which it views as

akin to CD and DVD publication and distribution (previously the responsibility of the Ministry of Culture, or **MOC**).

To date, it has been unclear whether audiovisual content that has been approved by the MOC/GAPP for release in other formats, but not specifically by the SARFT, may be distributed online. Currently, numerous websites providing audiovisual content are transmitting TV shows and films that have not obtained the requisite permits from the SARFT. The SARFT has been remarkably relaxed about this.

The Notice could be viewed as an indication that the SARFT is hardening its stance, and that it wishes to assert its sole or primary jurisdiction over all audiovisual material on the internet. It also exhibits a desire to extend the traditional censorship requirements applied to film and TV programs to online content.

Likely Impact on Industry

The process for obtaining the necessary SARFT permits is protracted. The Notice thus further obstructs content owners and licensees from getting their content into the public domain.

It is yet possible that these will ultimately prove insurmountable, at least in the short- to medium-term. This Notice, and the flurry of adverse and pessimistic Western media attention that it has generated, may yet prove to be a storm in a teacup.

However, it is too early to assess whether the Notice will be implemented strictly and what its real impact will be. The Internet has repeatedly proved extremely difficult for the Chinese authorities to regulate. One of the main reasons that audiovisual websites are so popular is that users are able to watch content that is not available in the cinemas or on TV. This will make strict implementation of the Notice a delicate and sensitive process.

A further issue is that, despite the requirement that operators of audiovisual websites take steps to protect copyright, the Notice conspicuously fails to indicate what types of measure should be taken to achieve this aim.

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The End of the Road for Sino-Foreign Joint Venture TV Productions?

Introduction

More than 4 years ago, on 28 October 2004, the State Administration of Radio, Film and Television (**SARFT**) and the Ministry of Commerce (**MOFCOM**) jointly issued the *Provisional Rules for the Administration of the Production of Radio and Television Programs by Sino-foreign Equity and Cooperative Joint-Ventures* (**TV JV Rules**). This was a groundbreaking piece of

legislation: for the first time, foreign investors were offered the tantalizing prospect of a future in China's vast television sector by being permitted to enter into a joint venture with one of the multitude of domestic TV production companies.

However, it soon became clear that any real opening up of the TV production sector was still a long way off. On 25 February 2005, just 4 months after the TV JV Rules were issued, the SARFT released its *Notice on Matters Concerning the Implementation of the Provisional Rules for the Administration of the Production of Radio and Television Programs by Sino-foreign Equity and Cooperative Joint-Ventures*. This notice made it clear that the sector would not be opening up to foreign investment any time soon. Effectively, it thwarted the ambitions and aspirations of foreign investors. Surprisingly, one JV was actually approved, but this was only granted a 1-year term, which was never extended. Nor was the experiment repeated.

New Rules

On 6 February 2009, all hope was extinguished when the SARFT and MOFCOM jointly issued the *Decision to Repeal the Provisional Rules for the Administration of the Production of Radio and Television Programs by Sino-Foreign Equity and Cooperative Joint Ventures (Decision)*. The Decision removed the legal basis under the TV JV Rules for Sino-foreign TV production joint ventures that had existed. There is no indication that any replacement regime will be introduced.

TAL Analysis

As is known to all industry observers, the Chinese government continues to exercise tight control over all forms of media, particularly radio and TV. It is therefore not surprising that the TV JV Rules were ultimately abolished. Indeed, it is perhaps more surprising that they were ever promulgated in the first place.

Deregulation of the TV Sector

2004 was a momentous year for the Chinese TV industry, as it was the year in which it was deregulated for domestic participants. Traditionally, the industry had been dominated by CCTV and a limited number of local stations. Deregulation spawned hundreds of new channels. However, this new landscape made it challenging for the authorities to keep control over the content being broadcast across China. While the TV JV Rules appeared to reflect an enthusiasm for deregulation, it was therefore not surprising that a temporary moratorium on overseas investment in the sector was imposed in 2005.

Public Order and the Media

The (perceived) need for the government to retain editorial control over the nation's media was made starkly apparent a year ago, when parts of Western China were rocked by violent social unrest. This not only brought about a rapid reassessment of the degree of censorship and supervision necessary across all strands of the media, but also resulted in a significant amount of hostile coverage from foreign media outlets. This caused outrage among the general public in

China and generated an atmosphere of increased hostility towards foreign media and, by extension, foreign media ownership.

China is now, arguably, undergoing the most politically sensitive and significant year in its history. It lacks last year's rallying effect of the Olympics to buoy public opinion. At the same time, the country is facing a series of landmark, deeply symbolic political anniversaries, coupled with the fallout from the global economic cataclysm. In this connection, the Internet has already felt the force of the government's desire to reassert control over an industry that was becoming increasingly and dangerously heterodox in terms of the content and opinions that it was producing.

In such a climate, the idea of allowing any Western company influence, however minimal, over the content of domestically-produced TV, would be anathema to the authorities. It was thus most politically expedient to repeal the TV JV Rules altogether, rather than allowing this opaque and illusory system to linger on under the ongoing policy ban on foreign investment.

Conclusion

It is highly unlikely that any alternative framework for foreign investors to participate in TV production joint ventures will be introduced in the short- to medium-term. Industry players wishing to enter the Chinese market will therefore need to continue to adopt more creative strategies. While the repeal of the TV JV Rules has removed the legal basis for establishing permanent JV structures as corporate entities, *ad hoc* collaboration in TV production, without the creation of an independent legal entity remains possible and, indeed, popular. Ultimately therefore, in terms of real effect, the Decision does no more than formalize the longstanding *status quo*.

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