



## **PRC Telecoms, Media & Technology Law Newsletter 11 March 2009**

This TMT Newsletter contains the following articles:

- New Administrative Framework for Online Games and Audiovisual Products - the First 6 Months
- New Regulations Covering the Registration of Contracts for Technology Imports and Exports

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### **NEW ADMINISTRATIVE FRAMEWORK FOR ONLINE GAMES AND AUDIOVISUAL PRODUCTS - THE FIRST 6 MONTHS**

#### **Introduction**

In July 2008, the State Council issued 2 notices, the first of which relates to the Ministry of Culture (**MOC**), (*Notice on the Main Functions, Internal Institutions and Staffing of the Ministry Of Culture*) and the second to the General Administration of Press and Publication (**GAPP**), (*Notice on the Main Functions, Internal Institutions and Staffing of the General Administration of Press and Publication*). As suggested by their description, the notices are similar, and were intended to precipitate a significant restructuring of both ministries and a realignment of their respective jurisdictions. However, they were somewhat ambiguous on how the restructuring should be achieved.

As a result of the changes triggered by the notices, the MOC and GAPP have been undergoing an uncertain and confusing period of adjustment. The situation has gradually improved over the past few months, with new policies and measures being introduced and jurisdictional arrangements over some matters being reached between the 2 authorities. However, the precise scope of their respective powers remains unclear in certain areas. As the MOC and the GAPP are the 2 regulators in charge of creative industries in China, the notices are having a significant effect on many sectors - not least with regard to importing and publishing audiovisual products and online games.

#### **Administration of Audiovisual Products**

The administration of the audiovisual products market has now been substantially determined, unlike the online games sector. Specifically, the 2 State Council notices name the GAPP as the regulator for audiovisual product sales (wholesale and retail), leases, imports, and screenings.

1. Establishment of the Committee for the Examination of Imported Audiovisual Products

On 29 August 2008, the GAPP issued the *Notice Concerning the Adjustment of Administrative Functions for the Import of Audiovisual Products and the Censorship of the Content of Imported Audiovisual Products*. This notice confirms that the GAPP has assumed from the MOC authority for supervising the import of audiovisual products from outside Mainland China, including from Hong Kong, Macao and Taiwan.

Shortly thereafter, on 5 December 2008, the GAPP established a Committee for the Examination of Imported Audiovisual Products. It exercises its power to grant or refuse import approvals based on the committee's observations and opinions.

## 2. Interim Measures for the Import and Market Management of Audiovisual Products

Prior to the changes introduced by the notices, the MOC was primarily responsible for overseeing the audiovisual products sector. This role included approving imports, and overall market supervision. As such, most of the fundamental rules and regulations on this area to date were formulated by the MOC. Until it has issued its own regulations under its new remit, the GAPP is retaining some of the MOC's policies.

In an initial attempt to clarify which MOC policies and regulations will remain in place during the transition period, and to ensure that the transition itself is handled smoothly, the GAPP, Ministry of Commerce (**MOFCOM**) and General Administration of Customs (**Customs**) jointly issued on 9 December 2008 the *Notice Concerning Issues Relevant to the Import and Market Administration of Audiovisual Products*.

This notice states that the 2002 *Measures for the Administration of the Import of Audiovisual Products* jointly issued by the MOC, MOFCOM and Customs and the 2006 *Measures for the Administration of Wholesale, Retail and Leasing of Audiovisual Products* issued by the MOC will be among the rules remaining in place for the time being. The role of the GAPP is simply being substituted for that of the MOC under them. In addition, the 2008 notice stipulates that audiovisual products approved for import by the MOC under the old regime must have completed import formalities with the Customs before 31 December 2008. Similarly, products imported for publication must be published in China within 1 year of the date on which the MOC granted them import approval. Otherwise, a new approval application must be submitted to the GAPP.

## **Administration of Online Games**

The 2 State Council notices designate the MOC as the principal regulator for the online games market. However, in practice the GAPP has overlapping authority in some areas.

### 1. Approval Authority

Certainly, the MOC has very broad jurisdiction over the supervision of online games and the administration of audiovisual game products in general. The MOC's Committee for the Censorship of the Content of Imported Game Products also continues to be responsible for censoring the content of imported online games.

However, the GAPP retains authority over granting Internet Publishing Permits to

companies intending to publish online games, and for the "publication" of online games.

It is notable that 2 different interpretations of the term "publication" are used by different GAPP officials. The more plausible interpretation encompasses only the publication of read-only CDs containing client-end software for an approved game. Notwithstanding, some officials use the term to cover all activities relating to the distribution and operation of a game via the Internet.

## 2. Market Supervision

For several years, the MOC has been actively involved in supervisory and enforcement activities relating to online gaming. For example, in 2004, it set up a system of investigations into illegal activities. These have been carried out at fairly regular intervals ever since. The latest investigation was launched in late December 2008, when the MOC announced its sixth batch of investigation targets, dealing with 16 cases of illegal online gaming activities.

The MOC's investigations have concentrated on 3 main issues:

- the qualifications of the game operator: does it hold an Online Culture Operation Permit?
- the content of the online game: does it contain violence, gambling or obscenities? and
- the illegal activities in question: do they involve unlicensed, private servers or networks?

Pursuant to its 2003 *Tentative Provisions on the Administration of Internet Culture*, the MOC will take punitive action against Internet companies or operators which violate the law. Indeed, it has exercised this power against infringers discovered during the above investigations by ordering them to cease their illegal operation of online games, confiscating the unlawful proceeds, and fining them and/or revoking their Online Culture Operation Permits.

Notwithstanding the designation by the State Council of the MOC's role in the online games sector, the GAPP has implemented anti-fatigue programs and plans to introduce player identification and authentication systems. From speeches made by GAPP officials during the China Game Industry Annual Conference held in January 2009, the GAPP intends to remain active in this residual role. Indeed, according to a report published on its website in mid-February 2009, the GAPP has already assessed anti-fatigue programs covering 95 online games, 5 of which were ultimately forced to cease operations because their software failed to meet the required standard. This would seem to suggest that the GAPP intends to stay relevant, regardless of any direct stipulation in the State Council notices.

## **TAL Commentary**

### *Administration of Audiovisual Products*

The situation in the audiovisual products sector is relatively clear, with the GAPP assuming exclusive jurisdiction. To date, it has implemented a series of administrative measures, although some of these are only provisional. More important developments in this area will no doubt be forthcoming in the months ahead, which should further clarify its role and function.

### *Administration of Online Games*

Pursuant to the State Council notices, the MOC is described as the principal regulator for the online games sector. However, the GAPP continues to play a visible role. As such, the overlapping authority of the 2 ministries in this industry, which has persisted for several years and has caused significant confusion, remains to be resolved conclusively. Perhaps the State Council will hopefully issue another notice in the near future, and which will be clear and definitive regarding the MOC's role and function.

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## **NEW REGULATIONS COVERING THE REGISTRATION OF CONTRACTS FOR TECHNOLOGY IMPORTS AND EXPORTS**

### **Introduction**

Early last month, the Ministry of Commerce (**MOFCOM**) promulgated 2 regulations – the *Measures for the Administration of the Registration of Contracts for Importing and Exporting Technology (2009 Measures)* and the *Measures for the Administration of Prohibitions and Restrictions on Technology Imports (Import Restrictions)*. Both pieces of legislation became effective on 3 March 2009 and are intended to update and clarify earlier rules on the import and export of technology.

Since China's economic reforms in the early 1980s, the Chinese government has introduced many ad hoc pieces of legislation aimed at administering the import and export of technology. This process culminated in 2001 with the *Regulations on the Administration of Technology Imports and Exports (2001 Regulations)*. The purpose of the 2001 Regulations was to foster trade in technology and to support China's commitment to comply with the rules and objectives of the WTO.

Under the 2001 Regulations, technology imported to or exported from China was divided into 3 categories:

- "Prohibited", pursuant to which no import or export permitted;
- "Restricted", pursuant to which import or export only permitted with the approval of the Ministry of Foreign Trade and Economic Cooperation (**MOFTEC**, now part of MOFCOM); and
- "Permitted", pursuant to which import or export permitted provided that the underlying contracts were duly registered.

The 2009 Measures and the Import Restrictions have been introduced with the following stated goals:

- integrating and clarifying the functions of the authorities responsible for registering technology import and export contracts; and
- increasing the efficiency and strengthening the management of the registration system, thereby ensuring that the illegal flow of technology is prevented and that the economy benefits from trade in technology.

### **Key Amendments Introduced by the 2009 Measures**

#### 1. Registration Authority

The 2009 Measures clarify that MOFCOM in Beijing is the agency authorized to handle the registration of technology import and export contracts for those government investment projects listed in the *Government Approved Investment Project Catalogue*, or those projects approved by the State Council or those of its departments responsible for overseeing investments. All other registrations may be handled by the MOFCOM's local branch.

#### 2. Deadline for Registration

A contract must now be registered by the exporter or importer of the technology (as the case may be) within 60 days after its effective date, unless payment under the contract is in the form of royalties. In that case, the applicant must simply register the contract within 60 days of the date on which the calculation basis for the royalty payment was determined. No penalty is stipulated for failure to comply with these deadlines.

#### 3. Content of Registrations

The 2009 Measures contain a revised list of the details that need to be included in a contract registration. For example, the "method of foreign exchange settlement" and "form of credit" must no longer be reported, but the term of the contract in question has been added. The measures also contain new provisions on how to register a change in these details or the loss of a registration certificate.

### **New Import Restrictions**

With only a few minor adjustments, the Import Restrictions maintain the earlier 2-pronged approach to examining applications for restricted technology imports. Specifically, they confirm that the MOFCOM will examine:

- their impact on foreign trade; and
- their technology content.

### **TAL Commentary**

#### *Criteria for MOFCOM Approval or Registration Unclear*

Despite the MOFCOM's efforts to strengthen its supervision over technology imports and exports, a precise definition of what constitutes an "import or export of technology" has still

not been provided. Thus, it could be unclear when MOFCOM approval of a contract (in the case of restricted technology) ought to be sought or when it would suffice to simply register it (in the case of permitted technology).

### *Ambiguous Definition*

The 2001 Regulations define the import and export of technology as the "transfer of technology from China to a foreign jurisdiction", or vice versa, through "trade, investment or economic and technological cooperation". This definition includes the transfers of a patent, right to apply for a patent, or patent implementation permit; transfers of trade secrets; transfers during the provision of technical services; and other forms of technology transfers.

However, it is unclear whether the definition applies to certain related transactions, such as sublicensing software from a foreign party to a Chinese party. Some of the Bureaus of Commerce deem such related transactions as imports of technology, and therefore subject to the registration requirement under the 2009 Measures. However, many contracts are not registered, due to lack of clarity or awareness on the part of importers.

### *Impact of Registration*

The registration of an import or export contract is not a condition precedent to its effectiveness or validity. Rather, the registration certificate serves as a supporting document that allows the importer or exporter to carry out foreign exchange, banking, tax, customs and other procedures relevant to the technology transfer. Indeed, the State Administration of Foreign Exchange has issued foreign exchange settlement guidelines to banks, under which those transactions involving import of patent or technology must be supported by the relevant technology import registration or approval certificate.

However, some banks would allow on the one hand the settlement of foreign exchange for royalty payments on the strength of other documents, such as a Certificate of Approval for Registration of Copyright Contracts issued by the National Copyright Administration. On the other hand, other banks would not check whether the contract has been registered and would allow the settlement of foreign exchange under technology transfer contracts based solely on their sight of the relevant contract (along with an application form and valid tax receipt).

As a result, some importers and exporters neglect, or do not think it necessary, to register their technology transfers with the MOFCOM. Curiously, none of the 2001 Regulations, Import Restrictions and Registration Measures penalize such an omission. Thus, it remains to be seen whether the 2009 Measures will actually achieve their stated aim of strengthening the government's administration of technology imports and exports.

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