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What has been “Changed” and “Unchanged” for the foreign investments in online publishing? -- A capsule review on the online publishing service rules

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Foreign Investment Changes in China’s Online Publishing

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The newly released Online Publishing Service Rules, due to its multiple amendments to the previous Internet Publishing Interim Rules which has been implemented for almost 14 years, has caused widespread concern of China’s regulation on the online publishing. This article, by comparing and analyzing the differences and similarities between these two Rules mainly in regulating foreign investment models and defining certain core concepts, aims to reveal what has been “changed” and “unchanged” for the regulatory environment following the entry into force of the Online Publishing Service Rules, especially in terms of those FIEs or foreign entities who intend to provide online publishing services to Chinese domestic customers.

What has been “changed” and “unchanged” for the regulation on foreign investment models?

1. The regulation on the “FDI Model” and the “Offshore Model” has not been changed.

On February 4, 2016, the Online Publishing Service Administration Rules (**OPS Rules**) was co-released by the State Administration of Press, Publication, Radio, Film and Television (**SAPPRFT**) and the Ministry of Industry and Information Technology. The OPS Rules will take effect as of March 10, 2016, and officially replace the Internet Publishing Administration Interim Rules (**Interim Rules**), which was promulgated back in 2002 and has been in effect for nearly 14 years.

Upon its release, the OPS Rules instantly received much attention both at home and abroad because of its expressly prohibition on foreign investments in online publishing sector.[1] The OPS Rules makes it clear that, “Sino-foreign equity joint ventures, Sino-foreign cooperative ventures and foreign-invested entities” within China are all banned from providing online publishing services. [2] In another word, the law disallows the model under which foreign enterprises directly invest in the Chinese online publishing sector (**FDI Model**). But in fact, what the OPS Rules has done in this respect is merely reiterating and confirming such a prohibition that has been provided under Chinese law for quite a time[3], rather than newly setting forth a prohibition on the foreign investments in online publishing. Because such a prohibition was not explicitly provided by the Interim Rules, there is misunderstanding that China is publishing a “new rule” to prohibit foreign enterprises from investing in the online publishing sector.

Meanwhile, the OPS Rules uses the same language with the Interim Rules[4] to provide its applicable scope, namely, the OPS Rules applies to “online publishing services provided within the territory of the People’s Republic of China” [5]. As we understand, no matter it is to engage in the “Internet publishing” under the Interim Rules or the “online publishing service” under the OPS Rules, one must rely on certain physical infrastructures, such as servers or content storage devices. If an entity provides online publishing services entirely based on such infrastructures located outside of China (**Offshore Model**), and customers located within China can enjoy such services on a “cross-border” basis, then the entity should have a good reason to argue that it is not providing such services “within the territory of the People’s Republic of China”, and thus it should not be subject to the OPS Rules. We believe it is rational for the OPS Rules to limit its applicable scope within the PRC territory, since there are numerous websites outside of China through which online publishing services are provided, and it is impossible for Chinese competent authorities either to require that all such websites should come to China and apply for a Chinese license, or to completely ban Chinese customers from visiting such websites.

Therefore, when compared with the Interim Rules, the regulatory effects of the OPS Rules have no substantive changes for those foreign enterprises who intend to invest in the Chinese online publishing sector under the “FDI Model”, as well as those foreign entities who want to provide cross-border online publishing services to Chinese domestic customers under the “Offshore Model”.

2. Clear changes have been seen for the regulation on the “VIE Model” and the “Contracting Partner Model”

As for online publishing services, the OPS Rules has maintained the licensing system established by the Interim Rules for the Internet publishing[6], and has stipulated the Online Publishing Service Permit (**OPSP**) which will replace the current Internet Publishing Permit once it officially takes effect.[7] Prior to the promulgation of the OPS Rules, since foreign investments were forbidden in online publishing sector, it has been seen that foreign enterprises manage to control a purely domestic entity holding OPSP in China through VIE structure (**VIE Model**), or find such a domestic entity and cooperate with it (**Contracting**

Partner Model), so that they could provide online publishing services to Chinese customers through a commercial presence within China (rather than by adopting the Offshore Model).

Under the VIE Model, a foreign enterprise needs to either set up a new domestic-invested VIE company (**VIE Co.**) and have the VIE Co. apply for the OPSP and provide online publishing services in its name, or control a domestic VIE Co. who has obtained the OPSP. As for the scenario under which a VIE Co. needs to be established, we note the OPS Rules sets forth a series of conditions for the application of the OPSP, including that the applicant must have “definite publishing platforms for engaging in online publishing services such as website domain names, smart terminal applications, etc.”, as well as “technical devices necessary for engaging in online publishing services”. [8] Under strict interpretation on such conditions, as the applicant, the VIE Co. must meet such conditions by itself, i.e. it must “own” such publishing platforms or technical devices. However, in practice, it is highly possible that the foreign enterprise, who ultimately controls the VIE Co., is the real owner of such publishing platforms or technical devices, and at the same time, the foreign enterprise is unwilling or unable to actually transfer such publishing platforms or technical devices to the VIE Co., due to intellectual property, technical needs or other reasons. In that case, the VIE Co. will have no chance to satisfy the foregoing conditions provided by the OPS Rules for the application of the OPSP. Thus, basically such conditions will make the VIE structure under this scenario unworkable.

Where there is an existing VIE Co. that holds the OPSP, in order to provide online publishing services, the foreign enterprise may, under the VIE structure, control such a VIE Co. through its wholly foreign-owned enterprise (WFOE) in China by entering into a series of VIE agreements. Additionally, the foreign enterprise will, through the WFOE, provide the VIE Co. with technology or consulting services related to the online publishing. However, the OPS Rules clearly provides that, if an online publishing service provider intends to engage in “any cooperation project regarding online publishing services” with joint ventures or WFOEs within China or organizations or individuals overseas, then it must report to SAPPRFT and obtain an approval in advance. [9] Such a provision subjects the foregoing contractual relationship between the WFOE and the VIE Co. to SAPPRFT’s prior review and approval. Considering that the VIE structure under this scenario is directly aimed to circumvent the aforesaid prohibition on foreign investments in online publishing sector, the prospect for such an arrangement to pass SAPPRFT’s review is rather gloomy.

In the meanwhile, the Contracting Partner Model, under which a domestic enterprise holding the OPSP provides platform or technical support to a foreign enterprise and provides online publishing services in the name of the foreign enterprise, is also clearly banned by the OPS Rules. An online publishing service provider is prohibited by the OPS Rules from “lending, leasing or selling” or “otherwise transferring” the OPSP, and one scenario clearly covered under such a prohibition is that an online publishing service provider “allows any other online information service provider to provide online publishing services in its name”.

Thus, once the OPS Rules takes effect, the Contracting Partner Model will be deemed illegitimate.

In light of the above, the real impact of the OPS Rules on foreign enterprises or entities does not lie with the “FDI Model” or the “Offshore Model”. Rather, the striking changes caused by the OPS Rules towards the regulation on the “VIE Model” and the “Contracting Partner Model” are the real issues here – on one hand, the OPS Rules sets material obstacles for the VIE Model in terms of OPSP application conditions and SAPPRFT’s prior review and approval; on the other, it makes it clear that the Contracting Partner Model is illegal. With such changes plus the consistent prohibition on the FDI Model, arguably the OPS Rules has foreclosed all the options for foreign enterprises to provide online publishing services through any commercial presence within China.

What has been “changed” and “unchanged” for defining certain core concepts?

After being released, in addition to its regulation on foreign investments, the OPS Rules also aroused wide concern for the definition of two core concepts, i.e. “online publishing services” and “online publications”, especially the expansion of the coverage of the term “Internet publishing works” under the Interim Rules. In the following table, we show the definitions of these two sets of concepts in contrast:

The Interim Rules (2002)		The OPS Rules (2016)	
Internet publishing	An act of online dissemination whereby Internet information service providers <u>select, edit and process</u> works created <u>by themselves or others</u> and subsequently post the same on the <u>Internet</u> or transmit the same to the users’ end via the Internet for browsing, reading, use or downloading by <u>the public</u> .	online publishing services	The <u>provision</u> of online publications to <u>the public</u> through <u>information networks</u> .
Internet publishing works	1. Content of such types of publications as books, newspapers, periodicals, audio-visual products, electronic publications, etc. that <u>have already been formally published</u> or works that <u>have been made public</u> in other media; and	online publications	<u>Digital works</u> with characteristics of publishing such as <u>editing, production or processing</u> provided to <u>the public</u> through <u>information networks</u> , and mainly includes:

2. Edited and processed works of literature, art, natural science, social science, engineering technology, etc.

1. Original digital works such as texts, pictures, maps, games, cartoons and audio-visual reading materials in the fields of literature, art, science, etc., which are of knowledge or ideology;

2. Digital works the content of which is the same with that of books, newspapers, periodicals, audio-visual products, electronic publications, etc., which have already been published;

3. Digital works such as online document databases formed by way of selecting, compiling or collecting the above works; and

4. Other types of digital works determined by SAPPRT.

We can see from the table above that, there are multiple similarities between the definitions of “Internet publishing” / “Internet publishing works” under the Interim Rules and that of “online publishing services” / “online publications” under the OPS Rules. For example, “online publishing services” continue to have the “public-facing” characteristic, and “online publications” still cover both of original works and works of others.

That being said, since the promulgation of the Interim Rules, almost 14 years have elapsed until the release of the OPS Rules. In that period, the online publishing has experienced rapid and profound changes. In particular, great changes have been witnessed for the technical means on which the online publishing is based and the works provided as products by the online publishing. For such reasons, it is a natural thing for the OPS Rules to adapt to the reality and make necessary adjustments and updates to the definitions of “online publishing services” and “online publications”.

To be more specific, compared with the definition of “Internet publishing” under the Interim

Rules, the definition given by the OPS Rules to “online publishing services” is more vague, which on its face covers any act of “providing” online publications. However, we do not believe such a definition would make “online publishing services” cover any and all acts of “providing” digital works online, that is because what can be provided by such services is a specific item, i.e. “online publications”, which must have “characteristics of publishing such as editing, production or processing”. In other words, if it is merely an individual who provides original or reposted digital works such as texts and pictures or audio and video to the public via networks (e.g. on a blog or BBS), although this is an act of “provision”, such an act does not have a “characteristic of publishing” such as “editing, producing or processing” such works, thus it should not constitute an “online publishing service”.

Nevertheless, according to the definition of “online publications” under the OPS Rules, it may subject certain acts to the OPSP that previously were not well captured by the Interim Rules. For example, “online document databases” formed by selecting, compiling or collecting original or already published digital works are explicitly listed out by the OPS Rules as a specific type of “online publications”. In that sense, it is very likely that those online literature databases which can be commonly seen in China today for many professional areas will be deemed as “online publications”, and thereby their providers will be subject to the requirements under OPS Rules, especially the OPSP. In addition, the OPS Rules includes a “catch-all clause”, namely, additional to those clearly listed out, “online publications” also cover any other type of digital works “determined by SAPPRFT”. We understand regulators’ intention behind this provision for leaving enough flexibility for the OPS Rules to adapt to quick technical development in the online publishing sector, but undoubtedly, such a provision will cause more uncertainty to the OPS Rules in its future implementation.

Conclusions and prospects

Based on the above analysis, we believe the significant impact of the OPS Rules is not its clear prohibition on the foreign investments in online publishing sector, since such a prohibition has been in place for quite a time. Instead, in light of the fact that the VIE Model or the Contracting Partner Model is currently adopted by foreign enterprises to achieve their goal of providing online publishing services in China, the OPS Rules obviously focuses on regulating such models by setting additional obstacles or stipulating more comprehensive and definite prohibitions. Therefore, for foreign enterprises in the online publishing sector, the most important issue at hand is to further ascertain, through the subsequent implementation of the OPS Rules, that whether competent authorities indeed, in accordance with the OPS Rules, impose general prohibitions on the VIE Model or the Contracting Partner Model in online publishing. In addition, what has not been fully provided by the OPS Rules is also worth attention, especially the classification to be formulated for online publishing services, because it will be useful for the assessment that in what a specific range the activities of foreign enterprises in relation to online publishing may be regulated by the OPS Rules.

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[1] See e.g. relevant reports on the websites of foreign media such as “Forbes” and “Fortune” (<http://www.forbes.com/sites#/sites/emmawoollacott/2016/02/19/china-bans-foreign-firms-from-publishing-directly-online/#517b53a564f8> / <http://fortune.com/2016/02/20/china-foreign-media-rules/>).

[2] See Article 10(1) of the OPS Rules.

[3] For example, foreign investments were forbidden to enter into the “Internet publishing service” as early as in 2005 by the Several Opinions of the Ministry of Culture, the State Administration on Radio, Film and Television, the State General Administration of Press and Publication, the National Development and Reform Commission and the Ministry of Commerce on Introducing Foreign Investments in Cultural Field; “online publishing services” were also listed out, by the 2015 Revision of the Catalogue for the Guidance of Foreign Investment Industries, as Sub-item 31 under Item XI “Cultural, Sports, and Entertainment Industries” of the “Catalogue of Prohibited Foreign Investment Industries”.

[4] See Article 3 of the Interim Rules.

[5] See Article 2(1) of the OPS Rules.

[6] See Article 6(1) of the Interim Rules.

[7] See Article 7 of the OPS Rules.

[8] See Article 8 of the OPS Rules.

[9] See Article 10(2) of the OPS Rules

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