
CHAPTER SEVEN

INTERNET CONTENT PROVIDER LICENCES IN THE PEOPLE'S REPUBLIC OF CHINA'S INTERNET INDUSTRY: A PRACTICAL PERSPECTIVE

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The provision of internet services in China is governed by a detailed regulatory regime. This chapter will outline the basic legal framework for such regulation and highlight current issues created by the existing model.

BACKGROUND

As reported by the AFX News,¹ and other mainstream media, China's authorities have scrutinised Google for operating under a partner's Internet Content Provider Licence (ICP Licence). The AFX reporter believed such scrutiny suggested policymakers were making a political statement, rather than punishing a company that had breached the law.

According to Deutsche Bank sector analyst William Bao Bean, each foreign multinational 'borrows licences or uses someone else's licence, but generally they own those companies'. Most overseas-listed internet companies acquire licences through local companies owned by Chinese nationals who then work for the listed company; these locally-owned companies are not directly owned by the listed entity.² However, Google does not own its partner Ganji.com.

¹ See <<http://www.forbes.com/work/feeds/afx/2006/02/23/afx2547661.html>> at 25 January 2008.

² For instance, Internet giant eBay acquired its license through Chinese partner EachNet, while Yahoo and Amazon respectively cooperate with their local partners, 3721 and Joyo. Practically speaking, such cooperation will be based on a trustee structure via domain

The primary legal issue for industry players in conducting relevant businesses under the Chinese Administration is value-added telecom services (VAS). People are pleased that Google will soon be obtaining an ICP Licence,³ however this may raise questions such as: will the ICP Licence cover all the businesses conducted by Google? How can Google meet all the People's Republic of China's (PRC) legal requirements regarding ICP Licence, especially the requirements for service in restricted areas (for example the news sector)? And, will China's provision on ICP Licence be changed due to the growth in the Internet service industry?

ICP-RELATED LEGAL FRAMEWORK FOR THE INTERNET INDUSTRY

PRC's Legal Environment

The PRC Internet industry is jointly regulated by several government authorities, including: the Ministry of Information Industry (MII, formerly the Ministry of Post and Telecommunications), the Ministry of Commerce (MOFCOM), the State Administration for Industry and Commerce (SAIC), the Ministry of Public Security (MPS), and the General Administration of Press and Publication (GAPP). MII and MOFCOM which are the most relevant and important Ministries to the industry players, are responsible for assessment of the qualification of market entrances, regulating market entry and the daily operation of Internet-related enterprises; while SAIC, MPS and GAPP regulate Internet content. There are certain areas in the PRC relating to the Internet that are protected by existing laws and regulations, these

name and trademark license arrangements, which will legally guarantee foreign multinationals' control over relevant local partners.

³ This was reported in the *Caijing Magazine*, 13 April 2007, volume 184. For the electronic version of this article see <<http://www.caijing.com.cn/newcn/coverstory/2007-04-28/18646.shtml>> at 25 January 2008. According to the most recent report in this regard, we now know that Google has obtained the ICP licence through a joint venture named Beijing Gu Xiang Information Technology Co., Ltd., the shareholding of which is half-half held by Google and Ganji.com respectively.

include: telecom, PRC and international computer network connections, information security and censorship.

The *Telecommunications Regulations of the People's Republic of China (Telecom Regulations)* is fundamental to regulating China's telecom industry. These regulations provide the general legal framework under which domestic Chinese entities may engage in various types of telecom services.⁴ Article 80 of the *Telecom Regulations* provides that the State Council will separately enact measures under which foreign companies may invest in, and operate telecom services in the PRC.⁵ These regulations reiterate the long-standing principle that telecom service providers must acquire an operating licence, before commencing business.

Furthermore, the *Telecom Regulations* draws a distinction between 'basic telecommunications services' and 'value-added telecommunications services'.⁶ Attached to the *Telecom Regulations* is the *Catalogue of Telecommunications Business (Catalogue)*. This lists which types of telecom and telecom-related activities are deemed basic or value-added services.⁷

The *Administrative Measures for Permits for the Operation of Telecommunications Business* requires operating licences to be divided into two categories: Permit for Operation of Basic Telecom Business and Permit for Operation of Value-added Telecom Business. The Permit for Operation of Value-added Telecom Business is valid for five years, and includes the Permit for Trans-regional Operation of Value-added Telecom Business

⁴ The *Telecom Regulations* were circulated by the PRC State Council on 25 September 2000, and came into effect at the date of circulation. The Chinese version is available at <http://www.mii.gov.cn/art/2005/12/15/art_523_1322.html> at 25 January 2008.

⁵ Such measures refer to *FITE Rules* as stated in the last paragraph of this section.

⁶ See Article 8 of the *Telecom Regulations*.

⁷ The 2003 *Catalogue* lists the following services as being of 'value-added' nature: online data and transaction processing services (including transaction processing services, electronic data interchange services, network/electronic equipment data processing services), domestic multi-point communication services (including domestic multi-point communication telephone services, domestic video conferencing services, and domestic Internet conferencing video and image services), domestic Internet virtual private network services, Internet data center services, voice mailbox, x.400 e-mail services, fax storage and forwarding services, call center services, Internet access services and information services. To clarify, information services refer to the value-added service provided by the industry player *via* a fixed network, mobile network and Internet. This chapter will focus on the regulation on the Internet information service.

and the Permit for Operation of Value-added Telecom Business at a provincial level.⁸

Specific Regulations on ICPs

The Internet information services are the mainstream VAS in the information services sector. The principal guidelines for the Internet information services is the *Administrative Measures for Internet Information Services 2000 (ICP Measures)*, which require all commercial 'Internet information providers' (or ICPs) in China to obtain an operating licence (ICP Licence), and all non-commercial ICPs to file with the MII or its local provincial branch in accordance with the *Telecom Regulations*.⁹ For instance, MII considers e-commerce to be a commercial Internet information service, so it can only be managed by an enterprise after an ICP Licence has been granted.

In addition to this, the *ICP Measures* require ICPs involved in news, publishing, education, medicine, health, pharmaceuticals, and medical equipment industries to be consented to by the relevant national authority, before applying for an ICP Licence.¹⁰

ICPs are also required to display their operating licence numbers in a conspicuous location on their homepage,¹¹ and remove content the law deems 'inappropriate'. This obligation reiterates the Internet content restrictions issued by other government departments during the past few years.

⁸ Specifically, in applying to operate a value-added telecom business, the applicant shall comply with Article 13 of the *Telecom Regulation* and the following requirements: (1) its registered capital shall be no less than RMB 1 million if it operates the business at a provincial level or no less than RMB 10 million if it operates the business throughout China or by covering different provinces, autonomous regions, or municipalities directly under the Central Government; (2) it has the feasibility study report and relevant technical schemes; (3) it has a necessary place and facilities; and (4) it has committed no material illegal acts within the last 3 years of the application. See Article 6 of the *Administrative Measures for Permits for the Operation of Telecommunications Business*, the Chinese version is available at <http://www.mii.gov.cn/art/2005/12/17/art_524_1621.html> at 25 January 2008.

⁹ Article 3 of the *ICP Measures*, the Chinese version is available at <http://www.mii.gov.cn/art/2005/12/15/art_523_1323.html> at 25 January 2008.

¹⁰ See Article 5 of the *ICP Measures*.

¹¹ See Article 12 of the *ICP Measures*.

Furthermore, according to the *Administrative Rules for Foreign-invested Telecommunications Enterprises (FITE Rules)*,¹² a joint venture (JV), with foreign investments of up to 50% in equity interests is allowed to conduct a VAS business (for example Internet information services), if the JV has obtained an ICP Licence.¹³ This regulation is in accordance with the *Protocol on the Accession of PRC* as agreed with by the World Trade Organisation (WTO). For instance, Microsoft's MSN service has been operating as a JV in China since 2005.

PRACTICAL CHALLENGES AND NEW DEVELOPMENTS

Internet Information Services: ICP Licence or ICP Filing?

As previously specified, the criteria for an ICP obtaining an ICP Licence, or ICP filing depends on whether the ICP is commercial or non-commercial in nature. According to the *ICP Measures*, commercial Internet information services refers to information, the creation of web pages, and other services provided to Internet users for consideration. Non-commercial Internet information services refers to those services that provide publicly available information that is accessible and free for Internet users. Because the provision is so general, in practice it is difficult for MII's local branches and industry players to identify commercial and non-commercial ICPs.

On the provincial level, the Beijing Communication Administration (BCA) issued the *Rules of ICP Licence and ICP Filing Application for Internet Information Services* on 3 November 2000. This specifies that commercial ICPs refers mainly to ICPs which derive income from: providing online advertising, creating web pages, leasing server memory space, web hosting, providing specific information services for consideration, e-commerce and other online applications. Non-commercial ICPs refers mainly to websites sponsored by the government at each level, news

¹² The *FITE Rules* were circulated by the PRC State Council on 11 December 2001 and came into effect on 1 January 2002. The Chinese version is available at <<http://www.edu.cn/20031105/3093883.shtml>> at 25 January 2008.

¹³ See Article 6 of the *FITE Rules*.

agencies (by providing electronic news letters), various public benefit websites sponsored by enterprises or public institutions and the self-promoting websites of various entities. However, while these rules remain valid, the BCA has treated them as out-dated since 2006.

Online Advertising

SAIC, which is the government department responsible for the advertising industry, issued no regulations governing online advertising before 2004. However, during the interim period, SAIC's Beijing branch (Beijing AIC) released several regulations in this area in 2000, including: *Qualification Standards for the Registration of Online Advertising Business and Mandatory Conditions for Enterprise Administrative Systems for Advertising*.

In April 2001, the Beijing AIC issued the *Provisional Measures of Administration of Online Advertising Businesses of Beijing Municipality*¹⁴ which states that, only those entities that have already obtained an advertising operating licence can engage in the advertising publication business through their websites, and undertake design, production and agency work in relation to online advertising. The Internet information service providers, who have been granted an advertising operating licence, are required to record the licence number on the HD 315 website, the official website of Beijing AIC. Enterprises conducting online advertising businesses in Beijing when the *Provisional Measures of Administration of Online Advertising Businesses* was issued were treated as commercial Internet information service providers, and were required to obtain an ICP Licence by MII.¹⁵

However, according to the *Administrative Measures for Advertising Operating Permits* issued by SAIC on 30 November 2004, only 3 types of entities are required to obtain an advertising operation permit before engaging in advertising activities:

1. Radio or television stations, newspaper or magazine publishers;
2. Non-profit institutions; and

¹⁴ Effective as of 1 May 2001. The Chinese version is available at <<http://www.baic.gov.cn/gcs/fagui/select.asp?id=1293>> at 25 January 2008.

¹⁵ In practice, this is the same with Shanghai and Guangdong.

3. Other entities as required by PRC laws and regulations.¹⁶

As such, enterprises engaging in online advertising, with a business scope that includes publishing advertisements, are required to file with MII's publicly accessible, file management system.¹⁷

The afore-mentioned conflicts reflect the development of the authorities' understanding of commercial and non-commercial ICPs, and the Internet service industry. The uncertainty of the regulations sometimes requires the industry players to proceed with different ICP procedures for the same business. This was the case with sina.com.cn, which was required to obtain an advertising operation permit for its online advertising business.¹⁸ Sina's permit was rendered meaningless in 2005, due to the *Administrative Measures for Advertising Operating Permits*.

E-commerce

As previously mentioned, e-commerce businesses (such as online retail in the B2C model) are traditionally treated as commercial Internet information services, because they derive profit from transactions through the Internet. However, since more traditional enterprises have started to promote their offline businesses through the Internet, several local branches of MII have rethought the scope of their regulations regarding commercial Internet information services.

With the development of the Internet service industry, e-commerce businesses have fallen into the category of 'non-commercial Internet information services'. In the Beijing province, the current practice since 2006 requires non-commercial Internet information service providers to make an ICP filing at MII's file management system, prior to establishing their websites.

Similarly, the Shanghai Communication Administration (SCA) has established administrative rules to clarify the details of service methods

¹⁶ Effective as of 1 January 2005. The Chinese version is available at <http://www.saic.gov.cn/flfg/flfg_detail.asp?flfgid=1320&keyword=undefined> at 25 January 2008.

¹⁷ See <http://www.miibeian.gov.cn/share/cx_dwfl_daimabiao.jsp?id=3> at 25 January 2008.

¹⁸ A Chinese copy of Sina's advertising operation permit is available at <<http://www.sina.com.cn/licence/ad1000007000001.html>> at 25 January 2008.

for providing non-commercial Internet information services. The SCA has been treating e-commerce businesses as 'non-commercial Internet information services' since early 2006. This category was changed because e-commerce businesses derive profit from the products bought by end users, not from Internet information services. Only Internet information services that charge Internet users for accessing provided information need a permit from the SCA (specifically ICP Licence).

These rules only apply in Beijing and Shanghai, and they have not been issued in writing by these two local branches. Officials in other cities and provinces (such as Guangdong) still consider e-commerce businesses to fall within the category of commercial Internet information services, thus requiring commercial businesses to have ICP Licences. This type of uncertainty in the regulatory environment may result in confusion amongst industry players, especially foreign investors.

MII's New Policy on the Qualification of ICPs for Foreign Investors

In addition to the *FITE Rules*, there is a new notice which dramatically affects the entry model of the foreign investor in the area of Internet information services. This notice further specifies MII's requirements on the qualification of foreign-invested ICPs.¹⁹

On 28 July 2006, MII issued a public notice in the name of its Telecommunications Administrative Bureau. This notice was designed to strengthen the administration of foreign investment in the PRC telecom businesses, particularly those involving VAS.²⁰ The notice states that some foreign investors working with domestic VAS companies have been evading the approval requirements under the *FITE Rules*, through domain names and trademark licensing arrangements.

The notice requires foreign investors in the PRC telecom businesses to establish a foreign-invested telecom enterprise, and apply for the relevant

¹⁹ See

<<http://www.transasialawyers.com/publications/index.php?action=viewpub&id=&pub=10>> at 25 January 2008.

²⁰ The Chinese version is available at <http://news.xinhuanet.com/tech/2006-07/28/content_4886944.htm> at 25 January 2008.

licence (for example a VAS licence) in accordance with the *FITE Rules*. Domestic telecom companies (including VAS companies) may not directly, or indirectly lease, transfer or sell their permits, or provide facilities or resources, to foreign investors engaging in telecom businesses in the PRC, without the required approvals. In addition to this, telecom companies must have their business premises and facilities (including servers) located within the region covered by their VAS permit, and corresponding to the VAS they are authorised to provide.

The provincial telecom administrative bureaus, in issuing and renewing VAS licences, are required to be more stringent when reviewing materials regarding VAS companies' domain names, trademark registrations,²¹ and facility locations (including servers). The provincial level telecom administrative bureaus are also required to investigate existing VAS licence holders, especially those most visible in the consumer market, with investigation results to be submitted to MII by 1 November 2006. Companies that do not comply with their VAS permit have a set time to rectify their non-compliance, after this their VAS permit may be revoked.

According to industry experts, this notice reflects MII's efforts to encourage all foreign investors providing VAS in China, to do so under a JV structure. Many foreign investors have adopted other structures as a result of assessing their business's needs for a local partner, and the difficulty faced in securing approvals for JVs. Less than 10 telecom JVs have been approved by the MII so far, much to the frustration of the Internet players.

For trusteeship purposes, foreign investors are not allowed to licence a domain name, or trademark to a domestic VAS company. Under the prevailing investment model, this restriction makes it difficult for a foreign investor to incorporate its brands into its PRC operations. However, the intended degree of regulation over the prevailing investment structure remains undetermined.

²¹ According to such rules, telecom companies (or their shareholders) must hold all domain names and trademarks that they use in their provision of VAS.

Regulation: Both Overlapping and Vacant

As stipulated by the *FITE Rules*, a JV may engage in Internet information services. However, MOFCOM has recently raised this threshold for foreign investors, through strict scrutiny of their JV's business scope with regard to VAS. To some extent, this regulation illustrates why there are so few telecom JVs established in China since the *FITE Rules* were issued.

For instance, foreign investors who are planning to conduct retail businesses through the Internet have met with admittance restrictions from MOFCOM. In accordance with the *Administrative Measures for Foreign Investment in Commercial Fields*, the business scope of a foreign-invested enterprise (FIE), which includes JVs and foreign-owned enterprises is subject to the scrutiny of MOFCOM, or its local branch. As a result, an FIE conducting a retail business through the Internet has to gain prior approval from MOFCOM. Even so, officials in charge of scrutinising FIEs believe that at this stage, in order to standardise industrial practice, and restrict foreign investment in the PRC e-commerce market, no FIE will be permitted to conduct retail businesses through the Internet. In this regard, if a JV is granted an ICP Licence, it will not cover Internet information services, or online retail in its business scope.

Even though an enterprise may have been granted an ICP Licence, the enterprise may be subjected to regulations from other authorities, before being allowed to conduct its VAS. For instance, China's leading portal sina.com.cn conducts its business with eleven relevant permits and licences.²² Most foreign investors will be frustrated by the application of such permits or licences, especially when their validity is subject to annual inspections from the relevant authorities.

²² Those permits and licenses include: Internet Culture Operation (Ministry of Culture); Internet Publishing Services (GAPP); Transmission of AV Programs *via* Information Networks (State Administration of Radio Film & Television); Online News Information Services (State Council Information Office); Certificate for Online Drug Information Services (Beijing Drug Administration); Approval for Online Drug Information Services (for example, for advertisements) (State Food & Drug Administration); Approval for Online Education Information Services (Beijing Education Committee); Approval for BBS Services (BCA); ICP licence (MII); Telecom and Information Services (BCA); and Approval Notice for Online Health Information Services (Ministry of Health).

CONCLUSION

Under the current ICP-related legal framework for the Internet industry, which is based on the *Telecom Regulations*, an enterprise conducting a commercial Internet information service will be required to obtain an ICP Licence at MII or its local bureau.

There are still practical challenges to how the ICP Licences are currently regulated; this is caused by the temporary uncertainty of different authorities' regulations at both provincial and national levels. However, China's framework for regulating the Internet information industry is becoming clearer, and the provision of ICP Licences is becoming more sophisticated.

Due to the growth of the Internet service industry, the various agencies have adjusted their regulation of this area; this will allow the Internet service industry to become free and open. As a result of the regulations, China's regulation of the Internet industry has become more reasonable, with very few foreign websites blocked for providing 'inappropriate' Internet content.²³

Some local branches of MII have tried adopting new administrative rules to regulate their ICPs. These administrative rules reflect the regulation momentum directed by MII: to create a healthy legal environment, in order to develop China's telecom industry through a balanced regulation method. It is predicted that after drafting the *Telecommunications Law*, China's Government will take more substantial measures in regulating the Internet industry to promote a more unified approach to regulation that is consistent with the mainstream practice of other WTO members.

²³ On 20 December 2007, the State Administration of Radio, Film and Television (SARFT) and the Ministry of Information Industry (MI) jointly promulgated a new regulation, *Rules for the Administration of Internet Audiovisual Program Services*, which took effect as of 31 January 2008. This new regulation specifies that an entity seeking to provide online audio and video services, which cover the production, aggregation, integration and/or steaming of audiovisual content over the Internet, both fixed-line and mobile, must now obtain a permit from the administration for radio, film and television at the provincial level or above before it applies for an ICP Licence. Further, all online audio and video service providers are required to be either state-owned or state-controlled, except for the providers in operation prior to the issuance of such rules.

