

Will the Merger of SARFT and GAPP End The Turf War Over Control over the Internet?

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On 18 March 2013, several famous China Central Television news presenters were seen taking souvenir pictures of the "State Administration of Radio Film and Television" plaque on the gate of the government agency's office building located at Fuxingmenwai Street, in central Beijing. Soon after, on 24 March 2013, the plaque was replaced with one bearing the new, longer and even more difficult to pronounce (or abbreviate in English) moniker "The State Administration of Press, Publication, Radio, Film and Television".

Pursuant to the 2013 State Council Organizational Reform and Functional Changes Plan adopted at the 12th session of the National People's Congress, the General Administration of Press and Publication of the People's Republic of China ("**GAPP**") and the State Administration of Radio, Film and Television ("**SARFT**") will be merged into a single body, to be known as the State Administration of Press, Publication, Radio, Film and Television ("**SAPPRFT**").

1. Background

GAPP historically has overseen and regulated print media, such as books, newspapers and magazines, along with published audio and video products. Broadcast media, i.e. radio, television, film and online video programs have historically been regulated by SARFT. GAPP was founded in 2001, while SARFT was formed as a result of the 1998 institutional reform. Both predated the explosion in the use of the Internet as a tool for disseminating information and entertainment-related content to the public. With the emergence of the Internet as a form of new media, the relevant government agencies including GAPP and SARFT grappled with each other when it came to regulating internet publication and broadcasts.

The merger seems to be an attempt to resolve the 'turf wars' between GAPP and SARFT. However, resolving the conflicts between the two government agencies represents only part of the overall picture. The reality is that China's Internet industry is heavily over-regulated and there is a pressing need to redefine roles and www.hoganlovells.com

demarcation lines between the plethora of regulatory bodies with oversight over cyberspace in China. In addition to GAPP and SARFT, another key regulator is the Ministry of Culture ("**MOC**"). The tentacles of other agencies, such as the Ministry of Industry and Information Technology ("**MIIT**") and even the Press Office of the State Council ("**POSC**") also reach into this area. This note gives a brief overview of the role of the key players in the past as well as the impact of the merger on China's Internet industry.

2. The Key Players

2.1 MOC - Internet Cultural Activities

MOC is responsible for the administration of Internet cultural activities¹, which is defined as providing "Internet cultural products" (defined below) and related services, including producing, reproducing, importing, publishing or broadcasting Internet cultural products; sending cultural products through information networks such as the Internet or mobile networks to computers, telephones, mobile phones, TV sets, game players, or Internet cafes for browsing, reading, using or downloading.

Internet cultural products are defined as cultural works produced, disseminated or circulated via the Internet, including: online music, online games, online shows and plays (programs), online performances, online works of art, online cartoons produced solely for the Internet as well as works of art, cartoons and so forth reproduced or disseminated through the Internet.²

Internet cultural activities are categorized into profit-

¹ Interestingly, China considers the Internet as a form of culture, and has referred to activities involving entertainment and cultural works performed on the Internet (publishing, producing or broadcasting such material on the Internet) as Internet cultural activities. Similarly, these materials are termed "Internet cultural products".

² The *Interim Provisions on the Administration of Internet Culture* (《互联网文化管理暂行规定》), promulgated by MOC, effective from 1 April 2011.

making and non-profit-making activities. The operation of profit-making Internet cultural activities in China means the operator needs to obtain an Internet Cultural Operation Permit which is issued by MOC, while non-profit-making activities only require record filing with MOC. Profit-making Internet cultural activities not only include charging Internet users for providing Internet cultural products or related services, but also publishing on-line commercials (in return for a fee paid by advertisers) while allowing users to access the content without charge.

2.2 SARFT – Online Audio-Visual Programs

SARFT, on the other hand, is responsible for the administration of the publication of audio-visual programming delivered through the information network (i.e. the Internet). Audio-visual programs consist of moving pictures or continuous sounds, which are shot and recorded by movie cameras, video cameras, recorders and other audio-visual equipment.³ An Internet audio-visual programming service refers to making, redacting and integrating audio-visual programs, providing them to the general public via the Internet, as well as providing services allowing users to upload and disseminate the audio-visual programming online.

Hitherto, a Publication of Audio-Visual Programs through an Information Network Permit ("**AVSP**") needed to be obtained in order to screen audio-visual programs on the Internet⁴, such as the services provided by video-on-demand operators. In addition, other licenses may be required depending on the specific category of audio-visual programs.⁵ For instance, given the sensitivities involved, an Internet News Information Service License issued by POSC is

required⁶ in order to screen audio-visual programs about current events and political affairs on the Internet.

2.3 GAPP - Internet Publication

Publication of materials on the Internet is also subject to approval by GAPP.⁷ Publication historically has meant the publication, printing/reproduction, importation and distribution of books, newspapers, periodicals, audio and video products, electronic publications, and so forth.⁸

Internet publication refers to the online publication of works ("作品" in Chinese) by Internet information service providers (also known as Internet Content Providers ("**ICP**")) which are self-authored or written by others, or to the uploading of such works onto the Internet for public viewing, browsing, reading, using or downloading. Pursuant to Article 5 of the *Interim Provisions on the Administration of Internet Publication ("**Interim Provisions**")*⁹ 'works' mainly includes (i) the contents of published books, newspapers, periodicals, audio and video products, electronic publications or works published on other media; and (ii) reedited or redacted works of literature, art and natural science, social sciences, and so forth. Hitherto, engaging in Internet publication activities required an Internet Publication Permit issued by GAPP.

3. Overlapping Authority of the Three Regulators

3.1 Theoretical analysis

It is fairly clear from the above description that in the Internet context, the concepts of "Internet cultural

³ The *Publication of Audio-Visual Programs through the Internet or Other Information Networks Administrative Procedures* (《互联网等信息网络传播视听节目管理办法》), promulgated by SARFT, effective from 11 October 2004; *Administrative Provisions on Internet Audio-Visual Program Services* (《互联网视听节目服务管理规定》), promulgated jointly by SARFT and MIIT, effective from 31 January 2008.

⁴ Radio or TV stations at the municipal level and news agencies at the central level do not need to apply for this license and only need to file with SARFT to provide audio-visual broadcasting programming.

⁵ For details of each category of audio-visual program services, see the *Catalogue of Classification of Internet Audio-Video Program Services (Trial)* (《互联网视听节目服务业务分类目录(试行)》), promulgated by SARFT, effective from 1 April 2010.

⁶ *Internet News Information Services Administrative Provisions* (《互联网新闻信息服务管理规定》), promulgated jointly by POSC and MIIT, effective from 25 September 2005.

⁷ *Internet Information Services Administrative Procedures* (《互联网信息服务管理办法》), promulgated by the State Council, effective from 25 September 2000; *Regulation on the Administration of Publications* (《出版管理条例》), promulgated by the State Council, effective from 1 February 2001, amended on 19 March 2011 ("**Publications Regulations**"); *The Administration of Internet Publications Interim Provisions* (《互联网出版管理暂行规定》), promulgated jointly by GAPP and MIIT, effective from 1 August 2002.

⁸ Publications Regulations, Article 2.

⁹ Issued by GAPP on June 27, 2002 and which took effect on August 1, 2002.

products", "online audio-visual programs" and "works" overlap with each other.

It is difficult to determine in practice whether an Internet publication should be treated as a form of Internet cultural activity. By definition, online audio-visual programs such as online music videos and online performances / videos of plays would fall within the scope of Internet cultural products. Therefore, the publication of such materials would require relevant permits from both SARFT (AVSP) and MOC (Internet Cultural Operating Permit).

In addition, Internet cultural products and online audio-visual programs which meet the originality test may be recognized as "works" under the Copyright Law.¹⁰ However, as indicated above, under the Interim Provisions, the scope of works requiring an Internet Publication Permit is narrowed down to certain intellectual works. In addition, it is hard to determine whether Internet cultural products or online audio-visual programs fall within the scope of 'works' regulated under the Interim Provisions, the publication of which requires a GAPP Internet Publication Permit; based on the *Draft Provisions on the Administration of Online Publications* issued by GAPP on December 18, 2012 ("**Draft Provisions**") for public comment¹¹ it can be anticipated that the scope of works will be expanded to include more products, such as games, cartoons and audio visual products.

In the Draft Provisions, online works were categorized into the following three types: (i) original digital works such as words, pictures, maps, games, cartoons or

audio-visual literary products in the literature, arts or scientific areas (ii) digital works containing the same contents as their printed version, and (iii) digital works produced by way of editing, compilation and collection.

This new categorization of "works" reflects GAPP's intention to assert its authority over the administration of online publications of games, cartoons, and audio-visual products. This would potentially have led to further overlap and tensions between MOC and SARFT. The likelihood of an ugly three way tug-of-war between GAPP, MOC and SARFT in a very public forum may well have been the catalyst for the merger. As explained below, there have been various clashes between MOC and GAPP in the online gaming space, which came to a head in the case of the hugely popular online game, World of Warcraft.

3.2 Practical Examples

(a) Online game administration

As noted above, the administration of the online gaming industry has been the battleground for the various authorities seeking to exert regulatory control over Chinese cyberspace. The battle between MOC and GAPP over the rights to regulate the online gaming industry has itself become something of a drama. GAPP regulates online games as internet publications, but MOC also imposes administrative licenses in this space, deeming online games to be internet cultural products. Before the World of Warcraft dispute (described below), in addition to holding an Internet Cultural Operation Permit and an Internet Publication Permit, an online gaming operator was also required to apply for a product-specific license from MOC and GAPP respectively for the release of any online game.

The World of Warcraft dispute in 2009 brought the dispute in the online gaming administration between MOC and GAPP into sharp focus. World of Warcraft is an online game created by Blizzard Entertainment which NetEase imported into China. NetEase submitted product license applications to both MOC and GAPP. After obtaining MOC's product license but before GAPP issued its license, NetEase released the game for online commercial publication. GAPP then announced that World of Warcraft was being operated unlawfully and ordered a shut-down of NetEase's operations. MOC and GAPP then argued back and forth over the

¹⁰ The term "works" is defined in the *People's Republic of China Copyright Law* promulgated by the Standing Committee of the National People's Congress on 7 September 1990 and further amended on 27 October 2001 and on 26 February 2010 ("**Copyright Law**") as "original intellectual achievements in the literary, artistic, and scientific domains that can be reproduced in a tangible form." It is worth noting that although "works" refers to an original intellectual achievement under the copyright law regime, originality does not seem to be a necessary element for a product to be deemed a "work" in relation to Internet publication activities, as re-edited or redacted works are also covered. This may serve to further expand the scope of works under GAPP's administration.

¹¹ It is uncertain how the issuance of the Draft Provisions will be impacted by the merger. We presume SAPPRT will not be willing to give up its rights to regulate Internet publications and thus the Draft Provisions will still be issued after all. Ideally, SAPPRT should remove the overlapping provisions from the Draft Provisions such as those on the administration of audio-visual products.

issue, each declaring that it had ultimate authority over the matter.

A cease-fire was called after the State Commission Office for Public Sector Reform ("**SCOPSR**") issued an Interpretation¹² splitting the administrative powers between MOC and GAPP over online games as follows:

Taking the view that online games are Internet cultural products, the Interpretations provide that MOC shall be responsible for overall administration of the online gaming industry with a particular focus on the content of online games to ensure compliance with the PRC government's ideological policies (i.e. meaning that MOC is responsible for the overall administration, industry planning, industrial base planning, project construction, exhibition, trading and market supervision of the online gaming industry). GAPP's product license will be required with respect to the publication/release of online games, but MOC's licensing requirements will vary depending on whether the game is domestically produced or imported. The operator of a domestically-produced online game is, as a result, required to obtain a product license from GAPP and file the product information with MOC after its publication/release. For imported online games, the operator will still need to apply for product licenses separately from both MOC and GAPP before the release. This sets the bar higher for bringing imported online games into China.

Despite SCOPSR's efforts to split the administrative powers between MOC and GAPP, the online gaming industry remains subject to unnecessary joint administration and oversight from both MOC and GAPP. This increases the compliance costs for market players and delays the introduction of new products into the market. In reality, despite the merger, we have not noticed any actual integration of the approval processes of both SARFT and GAPP in this area. Even the websites of the two authorities remain separate from each other. It has been reported in the media that

the overall integration plan is expected to be released by the end of June 2013.

(b) Online animation administration

Before the merger of SARFT and GAPP, the animation industry was under the joint administration of three market regulators.

MOC was responsible for the administration of the animation industry, overseeing industry planning, industrial base planning, project construction, exhibition and trading activities and market supervision.¹³ In addition, animation enterprises which met MOC's requirements were able to enjoy preferential tax treatment.¹⁴ SARFT oversees the administration of film and television animation, online animated films and television programs, and online audio-visual animation programs.¹⁵ On the other hand, GAPP is responsible for the approval of the publication of animation books, newspapers, periodicals and video products.¹⁶

Henceforth, in the post-merger environment, online animation products will be regarded as Internet cultural products, and online audio-visual programs as well as Internet publication operators will need to obtain an Internet Cultural Operating Permit from MOC, an AVSP from SARFT, and an Internet Publication Permit from GAPP. As mentioned above, the extent of future integration between SARFT and GAPP remains uncertain. Until the authorities sort this out, the licensing requirements are likely to continue to be a source of confusion and frustration for businesses in this area.

4. Impact of the Merger

If it was hoped that the merger of SARFT and GAPP would lead to a rationalisation of the overlapping

¹² The Circular on Printing and Distributing the Interpretations of Certain Provisions Regarding Animations, Online Gaming and Comprehensive Law Enforcement of the Culture Market issued by the Ministry of Culture, the State Administration of Radio Film and Television and the General Administration of Press and Publications by the State Commission Office for Public Sector Reform, (《中央编办对文化部、广电总局、新闻出版总署《“三定”规定》中有关动漫、网络游戏和文化市场综合执法的部分条文的解释》), promulgated by SCOPSR, effective from 16 September 2009 (the "**Interpretations**").

¹³ Please refer to the Interpretations.

¹⁴ The Measures for the Administration of Animation Enterprises (For Trial Implementation) (《动漫企业认定管理办法(试行)》), promulgated jointly by MOC, the Ministry of Finance ("**MOF**") and the State Administration of Taxation ("**SAT**"), effective from 1 January 2009; Tentative Measures on Exempting Animation and Comic Development and Production Materials Imported by Animation Enterprises from Import Taxes (《动漫企业进口动漫开发生产用品免征进口税收的暂行规定》), promulgated by MOF, the General Administration of Customs and SAT, effective from 1 January 2011.

¹⁵ Please refer to the Interpretations.

¹⁶ Please refer to the Publications Regulations and the Interpretations.

jurisdictions of the various authorities involved in the licensing of, and exercising regulatory supervision over, certain areas of China's Internet industry. For example, in theory, online video websites should benefit from the merger of SARFT and GAPP, since the AVSP and the Internet Publication Permit may be combined into one permit after the merger.¹⁷ However, as mentioned above, to date there seems to be little evidence of any genuine integration between the two regulators.

It is therefore anybody's guess as to whether the merger has made any real impact on the rationalisation of regulation within China's Internet media and entertainment content industry. Perhaps the key issue is whether we should read anything into the fact that MOC has been excluded from this round of institutional reform, and whether, as a ministerial level authority, this should be taken to mean that a question mark is being raised over its role going forward. It seems that despite the merger, there remains a lot more work to be done in order to bring some semblance of order to this hugely over-regulated space and provide some respite for businesses both foreign and domestic struggling to make sense of it all and comply with the requirements of each of the regulators.

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¹⁷ Though private internet service providers intending to tap the online video market will be disappointed if SAPPFT continues SARFT's discriminatory policies - the market is only open to wholly stated owned state controlled enterprises after AVSPs were initially granted to a few private forerunners as exceptions.