

互联网法律热点问题

《网络出版服务管理规定》解读

2016年2月4日，国家新闻出版广电总局与工业和信息化部联合发布了《网络出版服务管理规定》，对网络出版服务的定义、许可、管理及监督等事项作出了规定。该管理规定将于2016年3月10日起施行。

《网络出版服务管理规定》系根据国务院发布的行政法规《出版管理条例》、《互联网信息服务管理办法》、以及相关法律法规制定，并将于施行之日起取代原新闻出版总署以及信息产业部于2002年颁布的《互联网出版管理暂行规定》。

《网络出版服务管理规定》共计七章 61 条，与之前的《互联网出版管理暂行规定》的五章 31 条相比，其内容得以大幅度的扩充。《网络出版服务管理规定》的主要内容如下：

1、网络出版服务与网络出版物

在中国境内从事网络出版服务，均应适用《网络出版服务管理规定》。《网络出版服务管理规定》首先对“网络出版服务”以及“网络出版物”这两个重要概念进行了定义。

根据《网络出版服务管理规定》，网络出版服务，是指通过信息网络向公众提供网络出版物。网络出版物，是指通过信息网络向公众提供的，具有编辑、制作、加工等出版特征的数字化作品，范围主要包括：（1）文学、艺术、科学等领域内具有知识性、思想性的文字、图片、地图、游戏、动漫、

音视频读物等原创数字化作品；（2）与已出版的图书、报纸、期刊、音像制品、电子出版物等内容相一致的数字化作品；（3）将上述作品通过选择、编排、汇集等方式形成的网络文献数据库等数字化作品；（4）国家新闻出版广电总局认定的其他类型的数字化作品。

此外，国家新闻出版广电总局将另行制定网络出版服务的具体业务分类。

2、政府主管部门及管理模式

国家新闻出版广电总局作为网络出版服务的行业主管部门，负责全国网络出版服务的前置审批和监督管理工作。工业和信息化部作为互联网行业主管部门，依据职责对全国网络出版服务实施相应的监督管理。

关于日常的监管工作，则实行分级管理制度。地方人民政府各级出版行政主管部门和各级电信主管部门依据各自职责，对本行政区域内网络出版服务及接入服务实施相应的监督管理工作并做好配合工作。

3、行政许可申请条件

从事网络出版服务的单位，应当具备以下条件：

- （1）有确定的从事网络出版业务的网站域名、智能终端应用程序等出版平台；

- (2) 有确定的网络出版服务范围；
- (3) 有从事网络出版服务所需的必要的技术设备，相关服务器和存储设备必须存放在中华人民共和国境内；
- (4) 有确定的、不与其他出版单位相重复的，从事网络出版服务主体的名称及章程；
- (5) 有符合国家规定的法定代表人和主要负责人。法定代表人必须是在境内长久居住的具有完全行为能力的中国公民，法定代表人和主要负责人至少 1 人应当具有中级以上出版专业技术人员职业资格；
- (6) 除法定代表人和主要负责人外，有适应网络出版服务范围需要的 8 名以上具有国家新闻出版广电总局认可的出版及相关专业技术职业资格的专职编辑出版人员，其中具有中级以上职业资格的人员不得少于 3 名；
- (7) 有从事网络出版服务所需的内容审校制度；
- (8) 有固定的工作场所；
- (9) 法律、行政法规和国家新闻出版广电总局规定的其他条件。

如果是图书、音像、电子、报纸、期刊出版单位从事网络出版服务的，则只需满足上述(1)~(3)项条件。

从事网络出版服务的单位，应当提交申请表以及其他证明其符合申请条件的材料，向所在地省级出版行政主管部门提出申请，经其审核同意，报国家新闻出版广电总局批准后，取得有效期为 5 年的《网络出版服务许可证》。

网络出版服务单位变更《网络出版服务许可证》许可登记事项、资本结构，合并或者分立，设立分支机构的，则应依据《网络出版服务管理规定》办理审批手续。

4、外资准入限制

关于网络出版服务的外资准入，《网络出版服务管理规定》与《外商投资产业指导目录》的规定

是一脉相承的。根据《外商投资产业指导目录》（2015 年修订）的规定，网络出版服务属于禁止类，禁止外资进入。而《网络出版服务管理规定》也明确规定中外合资经营、中外合作经营和外资经营的单位不得从事网络出版服务。

并且，《网络出版服务管理规定》进一步将下列两方面的涉外业务合作纳入行政审批范围，以加强管理和监督：

- (1) 网络出版服务单位与境内中外合资经营、中外合作经营、外资经营企业或境外组织及个人进行网络出版服务业务的项目合作，应当事前报国家新闻出版广电总局审批；
- (2) 网络游戏上网出版（包括出版境外著作权人授权的网络游戏）前，必须向所在地省级出版行政主管部门提出申请，经审核同意后，报国家新闻出版广电总局审批。

5、网络出版服务单位的义务和责任

网络出版服务单位实行编辑责任制度，保障网络出版物内容合法。

网络出版物不得含有以下内容：

- (1) 反对宪法确定的基本原则的；
- (2) 危害国家统一、主权和领土完整的；
- (3) 泄露国家秘密、危害国家安全或者损害国家荣誉和利益的；
- (4) 煽动民族仇恨、民族歧视，破坏民族团结，或者侵害民族风俗、习惯的；
- (5) 宣扬邪教、迷信的；
- (6) 散布谣言，扰乱社会秩序，破坏社会稳定的；
- (7) 宣扬淫秽、色情、赌博、暴力或者教唆犯罪的；
- (8) 侮辱或者诽谤他人，侵害他人合法权益的；
- (9) 危害社会公德或者民族优秀传统文化的；

(10) 诱发未成年人模仿违反社会公德和违法犯罪行为的，恐怖、残酷等妨害未成年人身心健康的，披露未成年人个人隐私的。

在网上出版其他出版单位已在境内合法出版的作品且不改变原出版物内容的，须在网络出版物的相应页面显著标明原出版单位名称以及书号、刊号、网络出版物号或者网址信息。

网络出版服务单位出版涉及国家安全、社会安定等方面重大选题的内容，应当按照国家新闻出版广电总局有关重大选题备案管理的规定办理备案手续。未经备案的重大选题内容，不得出版。

网络出版服务单位应记录所出版作品的内容及其时间、网址或者域名，记录应当保存 60 日，并在国家有关部门依法查询时，予以提供。

6、罚则

未经批准，擅自从事网络出版服务，或者擅自上网出版网络游戏（含境外著作权人授权的网络游戏）的，由出版行政主管部门、工商部门依法予以取缔，并由所在地省级电信主管部门依法给予责令关闭网站等处罚；已经触犯刑法的，按照非法经营罪等规定依法追究刑事责任；尚不够刑事处罚的，删除全部相关网络出版物，没收违法所得和从事违法出版活动的主要设备、专用工具，违法经营额 1 万元以上的，并处违法经营额 5 倍以上 10 倍以下的罚款；违法经营额不足 1 万元的，可以处 5 万元以下的罚款；侵犯他人合法权益的，依法承担民事责任。

出版、传播含有禁止内容的网络出版物的，由出版行政主管部门依法责令删除相关内容并限期改正，没收违法所得，违法经营额 1 万元以上的，并处违法经营额 5 倍以上 10 倍以下罚款；违法经营额不足 1 万元的，可以处 5 万元以下罚款；情节严重的，责令限期停业整顿或者由国家新闻出版广电总局吊销《网络出版服务许可证》，由电信主管部门依据出版行政主管部门的通知吊销其电信业务经营许可或者责令关闭网站；构成犯罪的，依法

追究刑事责任。

简评

《网络出版服务管理规定》明确了网络出版服务行政许可的条件和程序，并进一步强化了出版行政主管部门对网络出版服务的监管权限。其规定内容具有以下特点：

(1) 适用范围广。

《网络出版服务管理规定》所定义的网络出版物的范围十分宽泛。《网络出版服务管理规定》在对网络出版物进行概括性定义的同时，又采取列举的方式对网络出版物的范围进行了举例，并且设置兜底性条款“国家新闻出版广电总局认定的其他类型的数字化作品”。

由于适用范围过宽，在实践中，部分情形下可能难以判断是否构成适用对象。并且，其内容与电信主管部门、文化部门、工商部门等相关主管部门颁布的规定可能产生重叠适用或衔接的问题。鉴于国家新闻出版广电总局将另行制定网络出版服务的具体业务分类，我们有待于其进一步细化判断标准。

(2) 申请条件严，审批级别高，审批时间长。

《网络出版服务管理规定》设置的准入门槛相对较高，对拟从事网络出版服务单位，特别是图书、音像、电子、报纸、期刊出版单位以外的单位，从域名、经营范围、设备设施、人员资质、内容审校制度等方面设置了严格的许可条件。

《网络出版服务管理规定》规定：申请《网络出版服务许可证》时，必须经所在地省级出版行政主管部门审核同意后，报国家新闻出版广电总局审批。并且，《网络出版服务管理规定》规定的国家新闻出版广电总局审批时限为 60 日，加上省级出版行政主管部门的审核时间，合计审批时间预计不会少于 3 个月。

由于申请条件严格、审批级别较高、审批时限较长，不可避免地增加了申请取得《网络出版服务许可证》的难度。

(3) “涉外”限制严。

根据《网络出版服务管理规定》的规定，禁止外资从事网络出版服务，并且网络出版服务单位与境内外商投资企业或境外组织及个人进行网络出版服务业务的项目合作，或者出版境外著作权人授权的网络游戏的，应当事前报国家新闻出版广电总局审批。

《网络出版服务管理规定》还要求相关服务器和存储设备不得存放在中国境外，申请人在申请《网络出版服务许可证》时，必须做出相关服务器存放在中国境内的书面承诺。

此外，网络出版服务单位的法定代表人必须是在中国境内长久居住的具有完全行为能力的中国公民，外籍人员不得担任网络出版服务单位的法定代表人。

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Internet Law

Analysis of Provisions on the Administration of Network Publishing Services

On 4 February 2016, the State Administration of Press, Publications, Radio, Film and Television (SAPPRFT) and the Ministry of Industry and Information Technology (MIIT) jointly issued the *Provisions on the Administration of Network Publishing Services* (hereinafter, "Provisions"). The Provisions, with effect from 10 March 2016, specify the definition of, licensing requirements for, management of, supervision of and other relevant issues pertaining to the online publishing service.

The Provisions are based on the *Regulations on Publication Administration* and the *Administrative Measures on Internet Information Services* published by the State Council and other related legislation and will replace the *Interim Provisions on Internet Publication Administration 2002*.

The Provisions contain seven articles and 61 clauses and expand on the *Interim Provisions on Internet Publication Administration*, which contain five articles and 31 clauses. This article provides a detailed discussion of the Provisions.

Online Publishing Service and Online Publication

Any online publishing service conducted within China shall fall within the jurisdiction of the

Provisions. The Provisions provide definitions for "online publishing service" and "online publication".

According to the Provisions, the online publishing service refers to the public dissemination of online publications through an information network. "Online publications" refers to digital works with editing, production, processing and other publishing features, including the following: (1) text, images, maps, games, animation, audio-visual books and other original digital works that contain knowledge and thoughts, in the fields of literature, art, science, etc.; (2) contents of digital works consistent with published books, newspapers, periodicals, audio-visual products and electronic publications; (3) network document databases and other digital works derived from new selections, compilations and collections of the above-mentioned works; and (4) other digital works as identified by the SAPPRFT.

SAPPRFT will separately publish a detailed business classification for the online publishing service.

Competent Government Authority and Management Mode

SAPPRFT, as the competent authority for the

online publishing service industry, is in charge of the pre-approval, management and supervision of the nationwide online publishing service. MITT, as the competent authority for the internet industry, is in charge of the management and supervision of the enforcement of the nationwide online publishing service, pursuant to its jurisdiction and authority.

With respect to daily supervision and management, a multi-level management system has been put in place. Different levels of publishing administration departments within the local government and different provincial telecommunication departments shall perform their duties of supervising and managing online publishing services and assess services within their respective administrative regions, in accordance with their respective jurisdictions and powers.

Licensing Qualifications

Entities that intend to engage in the online publishing service shall have the following qualifications:

- (1) A platform for engaging in the online publishing service with a dedicated website domain, intelligent terminal applications, etc.;
- (2) A definite online publishing service scope;
- (3) Technical equipment required for engaging in the online publishing service with relevant servers and data storage devices located within China;
- (4) Distinct and non-repeating names and articles of association for online publishers;
- (5) Qualified legal representative and principal person-in-charge. The legal representative shall be a Chinese citizen permanently residing in China with full legal capacity; at least one professional with an intermediate professional title or above shall serve as the legal representative and/or principal person-in-charge;

(6) Apart from the legal representative and principal person-in-charge, eight or more professional editor and publishing persons with publishing qualifications or relevant professional qualifications approved by the SAPPRFT; among whom at least three personnel shall hold intermediate professional titles or above;

(7) Content review and editing systems required for engaging in online publishing services;

(8) A fixed place of business; and

(9) Other requirements prescribed under the laws and regulations and required by the SAPPRFT.

In the event that publishers of books, audio-visual products, electronic publications, newspapers and periodicals intend to engage in the online publishing service, such publishers need only satisfy requirements (1) to (3).

When applying for a Network Publishing Services License, the online publisher shall first apply to the relevant provincial publishing administration authority by submitting the application form and other materials proving its licensing qualifications. After obtaining the approval of the local authority, the publisher shall apply to the SAPPRFT for its approval and obtain the License, with a validity period of five years.

In the event that the online publisher changes its registration information, capital structure, undergoes a merger or divestment, or establishes a branch, the approval procedure shall be carried out in accordance with the Provisions.

Limitation on Foreign Investment

In terms of foreign investment in online publishing services, the Provisions adopt the same practices as in the *Catalogue of Industries for Guiding Foreign Investment 2015*, under which the online publishing service falls within the category of prohibited foreign investment. It is expressly

provided under the Provisions that, equity joint ventures, cooperative joint ventures and foreign-funded enterprises are prohibited from engaging in online publishing services.

In addition, the Provisions further broaden the administrative approval and examination scope to capture the following foreign-related issues, in order to strengthen the management and supervision of such entities:

(1) For project cooperation of online publishing service business between an online publisher and an equity joint venture, cooperative joint venture, foreign-funded enterprise or overseas organization or individual, the prior approval from the SAPPRFT shall be obtained.

(2) For the online publication of online games (including those authorized by overseas copyright holders), prior approval from the local provincial publishing authority shall be obtained, after which, approval from the SAPPRFT shall be sought.

Responsibilities and Liabilities of Online Publishers

An editor responsibility policy has been applied to online publishers to ensure the legitimacy of the content of online publications.

The online publication shall not contain content that:

- (1) opposes the cardinal principles determined in the Constitution;
- (2) endangers the unity, sovereignty or territorial integrity of the nation;
- (3) divulges state secrets, endangers national security, or damages the honor and interests of the nation;
- (4) incites ethnic hatred or ethnic discrimination or undermines national solidarity, or is aggressive towards national customs and habits;
- (5) propagates heresies or superstition;
- (6) disseminates rumors, disrupts social order or undermines social stability;
- (7) disseminates obscenity, pornography,

gambling, violence or instigates others to commit crimes;

(8) infringes others' legitimate rights and interests by insulting or slandering others;

(9) endangers social morality or national splendid cultural traditions; or

(10) induces juveniles to imitate misconduct that violates the social morality or constitutes crimes; includes content categorized as horror, cruelty, etc., which content is hazardous to the mental and physical wellbeing of juveniles; discloses the private information of juveniles.

When publishing works have been legally published by other publishers online and the original content is re-published, the name of the original publisher, book number, issue number, online publication number and/or website information shall be indicated on the online publication in a notable manner.

If the online publisher intends to publish contents that are related to national security, social stability and other major subjects, it shall do so by filing according to the relevant regulations on primary subject selection set forth by the SAPPRFT. Any unrecorded primary subject shall not be published

The online publisher shall record the contents, time, website and/or domain name of its publication, and such record shall be kept for 60 days and shall be provided when duly requested by the relevant authority of the nation.

Penalties

In the event of unauthorized online publication activities or online publication of online games (including those authorized by overseas copyright holders), such publication shall be banned by the Publication Administration Department, Administration of Industry and Commerce, and the publisher shall be ordered to close down the website and/or be subject to other punishment by the relevant provincial telecommunication department. Where such activity constitutes a

crime, criminal responsibility shall be investigated in accordance with the regulations on illegal business operations. Where such activity does not constitute a crime, all relevant online publications shall be deleted, and the main facilities and special tools used in the illegal publication activities, as well as all illegal income, shall be confiscated. Where the illegal business income is more than RMB10,000, a fine not less than five times but below ten times the illegal income shall be imposed; where the illegal business income is less than RMB10,000, a fine not more than RMB50,000 shall be imposed thereon.

In the event of publishing and disseminating any online publications with prohibited content, the publisher shall be ordered to delete the relevant contents and take corrective actions within a given period by the Publishing Administration Department and all illegal income shall be confiscated. Where the illegal business income is more than RMB10,000, a fine not less than five times but below ten times the illegal income shall be imposed; where the illegal business income is less than RMB10,000, a fine not more than RMB50,000 shall be imposed thereon. In the event of a serious case, the publisher shall be ordered to suspend its business or may have its Network Publishing Services License canceled by the SAPPRFT; and the publisher's website shall be closed down by the relevant telecommunication department according to the notice of the Publishing Administration Department. Where such conduct constitutes a crime, criminal responsibility shall be investigated in accordance with the law.

Comments

The Provisions specify the requirements and procedures for the acquisition of a Network Publishing Services License; the Provisions also further strengthen the supervision power of the relevant publishing administration authorities pertaining to the online publishing service. The

primary aspects of the Provisions are as follows:

(1) Extensive Applicability

The online publications prescribed under the Provisions can be widely interpreted. Apart from this general definition, the Provisions also list the scope of online publications by enumeration. In addition, a general provision involving "other types of digital works identified by the SAPPRFT" has also been inserted.

Due to this extensive applicability, it may be difficult to determine whether a publication will fall within the scope of an online publication. Further, the contents of the Provisions may overlap with those published by the competent telecommunications department, culture department, Administration of Industry and Commerce and other relevant authorities or may raise issues concerning the linkage and application between different rules and regulations. Given the fact that the SAPPRFT will separately set forth a detailed classification of the online publishing service business, we will be expecting further detailed judgment standards regarding such business.

(2) High Threshold for Licensing Qualifications, High Approval Level, Lengthy Approval Period

The Provisions have set forth high qualification thresholds for entities that intend to engage in the online publishing service. In particular, for entities not publishing books, audio-visual products, electronic publications, newspapers and/or periodicals, stricter licensing requirements will be applied to domain names, business scopes, facilities, employee qualifications, and publication content examination policies.

According to the Provisions, when applying for a Network Publishing Services License, pre-approval from the local provincial publishing administration department shall be obtained, after which approval from the SAPPRFT shall be acquired. As the approval period for SAPPRFT is

60 days and considering the extra time required for provincial approval, the total approval period is estimated to be no less than three months.

The abovementioned high thresholds for licensing qualifications, high approval level and relatively long approval period will inevitably increase the difficulty in obtaining a Network Publishing Services License.

(3) Strict Limit on Foreign-Related Issues

Pursuant to the Provisions, foreign-funded entities are prohibited from engaging in the online publishing service. With respect to project cooperation of online publishing service business between an online publisher and a foreign-funded enterprise or overseas organization or individual,

or publishing an online game authorized by overseas copyright holder, prior-approval from the SAPPRFT shall be sought.

The Provisions also provide that the related server and storage devices cannot be located outside of China. The applicant shall make a written warranty guaranteeing to store its relevant server in China when applying for a Network Publishing Services License.

Moreover, the legal representative of an online publisher shall be a Chinese citizen permanently residing in China with full legal capacity, i.e., a foreigner cannot be the legal representative of an online publisher.

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