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Viola Bensinger

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Institut für Rundfunkökonomie
an der Universität zu Köln

Hohenstaufenring 57a
50674 Cologne, Germany
Phone: +49 - (0)221 - 23 35 36
Fax: +49 - (0)221 - 24 11 34

Viola Bensinger

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* Dr. Viola Bensinger is Rechtsanwältin and Solicitor (England and Wales) and a managing associate in the Media & Entertainment Group of Linklaters, Berlin. Her article is based on a presentation she gave at the International Conference “TV-Programme Exchange between Germany and China” in Cologne/Germany on April 28th-29th, 2005, organised by the Institute for Broadcasting Economics in cooperation with the German Chinese Business Association.

Co-Operation with China in the TV Sector

1. Existing Legislation

In the course of late 2003 and 2004, an impressive number of regulations in the area of film and tv have entered into force in China. The most important of these are the following:

1. SARFT: Interim Provisions on the Access Qualification for Engaging in Film Production Distribution and Screening (effective date: 1 December 2003),
2. SARFT: Measures Governing Broadcasting of Overseas Satellite TV Channels (effective date: 10 January 2004),
3. SARFT: Regulations on the Management of the Opening of Offices in China by Radio and TV Organizations Overseas (effective date: August 1, 2004),
4. SARFT: Provisions on Administration of Sino-foreign Cooperation in the Production of Films (effective date: 6 July 2004),
5. SARFT / MOFCOM: Interim Provisions on Qualifications for Entry into the Business of Film Enterprises (effective date: 10 October 2004),
6. SARFT: Provisions on the Administration of Sino-foreign Cooperation in the Production of TV Programmes (effective date: October 21, 2004),
7. SARFT: Provisions on the Administration of the Import and Broadcasting of Foreign Television Programmes (effective date: October 23, 2004),
8. SARFT / MOFCOM: Interim Provisions on Administration of Sino-foreign Equity and Cooperative Joint Ventures on Radio and Television Programme Production (effective date: 28 October 2004),
9. SARFT: Notice on Relevant Matters Concerning Implementing 'Interim Provisions on Administration of Sino-foreign Equity and Cooperative Joint Ventures on Radio and Television Programme Production' (announced on 25 February 2005).

The regulations cover some of the most important subjects in this area: The production of films, the production of tv and radio programmes, the distribution and license of films and tv programmes, and the operation of tv stations.

In summary, not much development can be seen in the area of importing and distributing foreign programmes in China. Although meanwhile a number of companies have been permitted to buy and distribute foreign product in China, this remains a highly restricted industry. Unlike the sectors production and provision of technical equipment, the distribution of films is reserved for Chinese



companies or joint ventures. The import of films for theatrical release is still exclusively handled by China Film Group. It currently imports 50 films every year; however, only 20 of these are on a revenue share basis¹ which is what is required under China's commitments under GATS. Broadcasting quotas only allow for currently 25% of foreign programmes to be broadcast each day, though this is intended to be raised to 30% for pay tv channels. In addition, the maximum time allowed for overseas programme during prime time is 40 minutes. Foreign programmes need to be approved before they can be imported and screened in China; however, this of course applies generally also to programmes produced in China.

There is some development in the area of film production. Not so much in the regulation of various forms of joint production of movies as this was always possible, and now merely has been made subject to a more structured set of rules, including the approval by SARFT. What is new is the possibility to establish movie production joint ventures between Chinese and foreign companies.

The same possibility has been created for tv production joint ventures, though these follow somewhat different rules than those for movie production. Furthermore, Chinese and foreign tv programme producers are now allowed to jointly produce tv and radio programmes. It is these two regulations which I would like to tell you more about.

2. Background and Development

In the area of tv programme production, there basically was no framework for cooperation until the new regulations entered into force at the end of 2004. This was different with regard to film production where obviously co-operation took place, though of course on a different level than is possible now under the new regulations (some of which are still interim) on co-operation in the area of film production. The Chinese authorities themselves have stressed that they do distinguish between film production and tv production, and producers will have to register their projects under either of the sets of rules. This presentation is limited to the legal framework created for joint tv productions.

The reasons for China to open up their media to foreign and private involvement (usually in the form of financial investment) can partly be found in obligations China has to meet since it became a member of WTO in December 2001.² Here, China committed to allow for foreign investment of up to 49% in the construction and operation of cinemas, and China also committed to yearly import 20 foreign films for distribution on a revenue-share basis. It should be noted that with regard to the operation of cinemas, China actually currently exceeds its

¹ For example, in 2005 17 of these 20 films had been licensed by July 2005.

² Cf. William Brent, China's Film Industry Steps Out of the Shadows, China Business Review Nov./ Dec. 2003, p. 42 et seq.



commitments, allowing now in seven cities up to 75% of foreign ownership. However, other parts of the audiovisual sector such as film and tv programme production and distribution as such were exempt from China's commitments under GATS.³

Another reason may simply be seen in the need for "innovative co-operation" and for content.⁴ This may be illustrated by some recent examples: In April 2005, a musical based on the 1943 motion picture "Casablanca" had its world premiere in Beijing and ever since is a huge success. The musical is produced by a subsidiary of Warner Bros. Studios, and the decision to have the premiere in China was largely based on the enormous popularity of the film "Casablanca" in China. As of September, the popular soap opera "Desperate Housewives" will screen on CCTV – which has caused much excitement in China because it is very rare for US tv programmes under the current regime on licensing of foreign programmes to find their way onto Chinese screens. Chinese audiences appreciate and want high-quality and diversified entertainment products, and the Chinese industries are regarded as producing not enough of these. Realising that the Chinese market will open more and more to foreign product, be it legal or illegal imports, the Chinese industries face challenges from overseas competitors. Also, the Chinese market is of course a very big market simply by absolute numbers, and this means a huge potential for Chinese producers in terms of market share. SARFT has been quoted to expect to create one or more Chinese industry champions, beginning with China Radio, Film and TV Group, that can compete with the largest multinational media groups.⁵ Also, SARFT has committed to the State Council to migrate 100 million urban households to digital television by 2005, and the remainder by 2015. In order to ensure that this rollout is successful, China needs good Chinese-language content. Consequently, China expects to benefit from the know-how and financial means that the sino-foreign joint ventures will bring to the industry. In other sectors it could be seen that while foreign input became generally possible and encouraged, there were clear limits to prevent foreigners from taking over, and to give Chinese players the opportunity to build experience in order to become competitive. Similarly, the possibility of forming joint ventures for the production of feature films or television programme soon became restricted to generally only one such joint venture per foreign media company. Also, the government clearly wants to maintain as much control as possible. In particular television content is of course a sensitive product as television in China reaches a far bigger audience than, for example, theatrical films.

³ Cf. to the 2004 Report to Congress on China's WTO Compliance, United States Trade Representative, December 11, 2004, p. 80.

⁴ Cf. Jeanette K. Chan and Marcia Ellis, Foreign Media, Chinese TV and Market Access: The New Rules from SARFT, China Law & Practice December 2004, p. 16.

⁵ Neal Stender, Dong Wang and Ying Zhu, China Law & Practice March 2004, p. 17 et seq.



Of the many regulations that have been issued during the past twelve months, it was probably the TV Joint Venture Regulation that caused most excitement. It had been announced by an opinion in December 2003, and many multinational media companies started negotiating with Chinese media companies on the joint ventures even before the regulation was actually adopted. The potential advertising market in China has been estimated to value 25 billion US\$, and many media conglomerates wished to secure a share in this. However, though not in the TV Joint Venture Regulation itself, but in a note on its implementation, SARFT has drawn a strict line to these dreams: In general, each foreign media company will only be allowed one film or tv joint venture in China. This belated information of course also undermines strategic decisions, as many of the multinationals already filed joint ventures for film production but now might want to establish a tv joint venture instead.

The following paragraphs shall present an overview on the regulations that deal with the production of tv programmes.

3. The Players

It appears convenient to start with a concise explanation of the abbreviations and the use of terms in the Chinese regulations: As we will see, the various regulations deal with one or more Chinese parties and a foreign party. A foreign party, obviously, is any non-Chinese party, and it should be noted in this context that companies or persons from Hong Kong SAR or Macao SAR or the Taiwan Region are also considered “foreign”. On a side note: In context of the rules on the importation of films into China, films from Hong Kong SAR or Macao SAR or the Taiwan Region are actually not considered foreign, but Chinese.

Furthermore, the regulations refer to SARFT, MOFCOM and sometimes to MII. SARFT stands for “State Administration of Radio, Film and Television” and is directly subordinated to the Chinese State Council. MOFCOM is the Ministry of Commerce (which was formerly known as Ministry of Foreign Trade and Economic Co-Operation (MOFTEC)), and it is as well subordinated to the State Council. MII is the Ministry of Information Industries. It is also directly subordinated to the State Council and combines former ministries dealing with these industries.

4. The “TV Production Regulation”

The “Provisions on the Administration of Sino-foreign Cooperation in the Production of TV Programmes” entered into force on October 21, 2004. It covers both tv plays and tv cartoons, and now exclusively governs any form of Chinese-foreign joint production of tv programmes. It clearly states that any such co-operation, or the licensing or screening of any programmes so jointly produced is prohibited unless a license was obtained. The TV Production Regulation offers three different forms of sino-foreign co-operation in this area:



- “Joint Production”, i.e., the Chinese party and the foreign party jointly share the financial and creative burden of the production, and also share the profits and risks from the production and exploitation of the tv programmes;
- “Collaborated Production”, i.e., the foreign party invests, provides leading writers and artists, and shoots all or part of the production in China, and the Chinese party provides assistance in the form of labour or equipment, facilities and sites for the production of the TV programme; or
- “Entrusted Production”, i.e., the foreign party invests in the production of the TV programme and entrusts the Chinese party to make the programme in China.

Despite these three different types of co-operation, the provisions of the TV Production Regulation largely apply equally to all three of them, and largely remind of what we would call a “co-production”: The investments by both parties can be made either in cash contribution, or by contributing the monetary value of labour, equipment or advertising time. Creative and other elements shall be determined by both parties, and the copyright, and Chinese as well as overseas exploitation rights in the produced programme shall be jointly owned by the parties. Among the key personnel the persons assigned by the Chinese party shall not be less than 1/3 - which supposedly shall mean that they should be Chinese.

There are no strict rules on the content or subject of programmes to be jointly produced. Rather, the regulations “encourage” such contents that reflect the excellent traditions of the Chinese people and similar subjects. Also, programmes may not infringe on the Chinese constitution or other laws, or otherwise disturb the public order. All programmes need to be produced in a Mandarin language version, and possible additional Chinese or other language versions.

On the formal side, the Chinese party has to have a tv production license and has to apply for the joint production to be approved by SARFT, and has to submit certain materials, among others the complete screenplay, or an abstract for each episode, in Chinese characters, and a registration certificate and certificate of credit standing of the foreign party. The decision by SARFT can be appealed against, in which case SARFT will reconsider the facts, taking into consideration an “expert’s view”.

Once the programme is produced, it again needs to be approved in order to be exploited and screened. This decision by SARFT is again subject to a right of appeal by the Chinese party. Also, substantial changes to the script during the production process need to be approved. Once approved, the programmes qualify as domestic productions.



5. The “TV Joint Venture Regulation”

The “Provisions on the Administration of Sino-foreign Equity and Cooperative Joint Ventures on Broadcasting and Television Programme Production” entered into force on November 28, 2004. Other than the TV Production Regulation, it covers the formation of joint venture companies by Chinese and foreign parties for the purpose of joint production of tv programmes. This possibility is unique under Chinese law, as previously co-operation in the production of individual tv or film projects was possible, but not the formation of joint ventures or other forms of corporations. Earlier in 2004, joint ventures could be formed for the joint production of feature films, and the lack of a definition of “feature films” has actually had the effect that these joint ventures also started producing tv programmes. The TV Joint Venture Regulation now is exclusively applicable to such joint ventures producing tv programmes. As early as February 2005, however, the Chinese government felt the need to clarify some of the provisions and the interplay of both regimes, and published a Notice on the implementation of the TV Joint Venture Regulation (the “February 2005 Notice”).

Under the TV Joint Venture Regulation, one or more Chinese party can form a jv with foreign professional radio and tv enterprises. This excludes other foreign investors (such as private equity investors), and reflects the purpose of the tv regulations to include foreign experienced producers in improving the standards of production in China, as opposed to opening this sector for speculative investment. At least one of the Chinese parties needs to be a licensed radio and tv programme producer (but need not be state-owned)⁶, and the February 2005 Notice also clarified that a Chinese party may not be a broadcaster.

The joint venture shall be a limited liability company, and shall hold a minimum share capital of at least US\$ 2 million (or the equivalent in Yuan), or US\$ 1 million if the jv intends to produce cartoons. The joint venture shall have a name that is different from the name of the foreign party. This provision contributes to the formation of independent brands in China, rather than building a Chinese market for existing foreign brands.⁷

One of the Chinese parties must hold not less than 51% of the shares. While the Chinese parties may contribute either cash or equipment, labour and the like, the foreign party can only contribute cash in foreign currencies. However, even for the Chinese parties it appears not to be possible to contribute certain intangibles such as copyrights, production rights, advertising time, etc. Though the provisions do not explicitly rule out profit-split agreements that would award the foreign party more than 49% of the profits, and though the reference in the title of the TV Joint Venture Regulation to “co-operative joint ventures” suggests a variety of structures, it is generally assumed that SARFT will not permit such

⁶ Cf. Jeanette K. Chan and Marcia Ellis, *op.cit.*, p. 16.

⁷ Cf. Jeanette K. Chan and Marcia Ellis, *ibid.*, p. 16.



joint ventures to operate. Similar experiences have been made with sino-foreign joint ventures in other restricted industries.

The provisions are drafted in a way to grant the Chinese party control over the joint venture, and to also hold the Chinese party liable for any actions of the joint venture⁸. For example, the Chinese parties shall appoint the legal representative and their consent shall be required for the selection of programming topics and the contents of programmes. In order to prevent circumvention of the majority-provisions, any powers granted to the Chinese party may not be delegated to, or performed by, the foreign party.

The application process with both SARFT and MOFCOM is led by the Chinese parties, and there is no appeal to the decisions by SARFT or MOFCOM. A permit is valid for 10 years, and may be renewed. Changes to the structure etc. of the joint ventures require again approval. As the February 2005 Notice clarifies, the approval procedure not only takes into consideration the joint venture and its members as such, but also the state's overall strategic development plan, and can deny to grant approvals also for this reason.

Once approved, a joint venture can apply for a license to produce tv programmes under the general rules. Though not explicitly, it appears that a joint venture can obtain both, a license class B (which is limited to the production of the specific approved programme), and later a license class A (which is not limited to any specific programme and is valid for two years). The joint venture may produce special feature, column, entertainment, cartoon and other radio and tv programmes. It may not produce news and similar types of programmes. Also, and again this is clarified by the February 2005 Notice, the joint venture is strictly prohibited from carrying out broadcasting activities of any kind.

During any one year, 2/3 of the programmes a joint venture produces shall have Chinese subjects. It is encouraged, but not obliged, to employ Chinese professionals in the production of the programmes. A joint venture enjoys the same rights and obligations as domestic tv and radio programme producers, and programmes produced by them are considered domestic programmes. It is also possible for a joint venture to jointly produce a programme with a foreign producer, in which case the TV Production Regulation applies. However, this is not possible in the form of "entrusted production" where the joint venture would produce the programme for the foreign party.

The joint venture is encouraged to export the produced programmes, but the February 2005 Notice clarified that it may not be used to import foreign produced programmes into China. The import of programmes, and the distribution and exploitation of foreign programmes, is still the monopoly of very few governmental organisations.

⁸ Cf. Jeanette K. Chan and Marcia Ellis, *ibid.*, p. 16.



6. Now – What is Different?

Most notably, China has now created the possibility of equity investment in film or tv programme producing companies - even though this may not be a majority stake. It has also recently allowed the first of such a joint venture to broadcast a children's tv programme via a cable tv network (that is a jv between Viacom / Nickelodeon and Shanghai Film Group), though this appears to contravene the February 2005 Notice. However, China clearly encourages big scale investment in China's media industry, though it also ensures this investment is not too big scale to constrain a genuine Chinese industry in their development.

What is new as well is that procedures that beforehand were subject to internal and unpublished administrative rules or guidelines have now been regulated in a far more transparent and comprehensible way.⁹ True, the drafting of the regulations leave scope for many question marks and doubts, and also for criticism, but clearly they mean a huge step forward towards opening up the media industry to private and non-Chinese interests.

On the other hand, the more recent developments in this area seem to shatter a slightly different light on China's endeavours to open its media market. Firstly, and as already mentioned, the February 2005 Notice, which clearly limited the scope of the TV Joint Venture Regulation and the possibilities for foreign media companies to form joint ventures thereunder. Later, Chinese authorities blocked the release of most foreign (and in particular, US) films during the summer of 2005. Though this is surprising in light of the developments of 2004, it is probably less surprising seen the overall development of the "opening" of China and its markets to the rest of the world.

⁹ Cf. Connie Carnabuci, *The Opening of China's Media Sector*, Hong Kong Lawyer 06/2004, p. 57 et seq.

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