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IP & TMT QUARTERLY REVIEW

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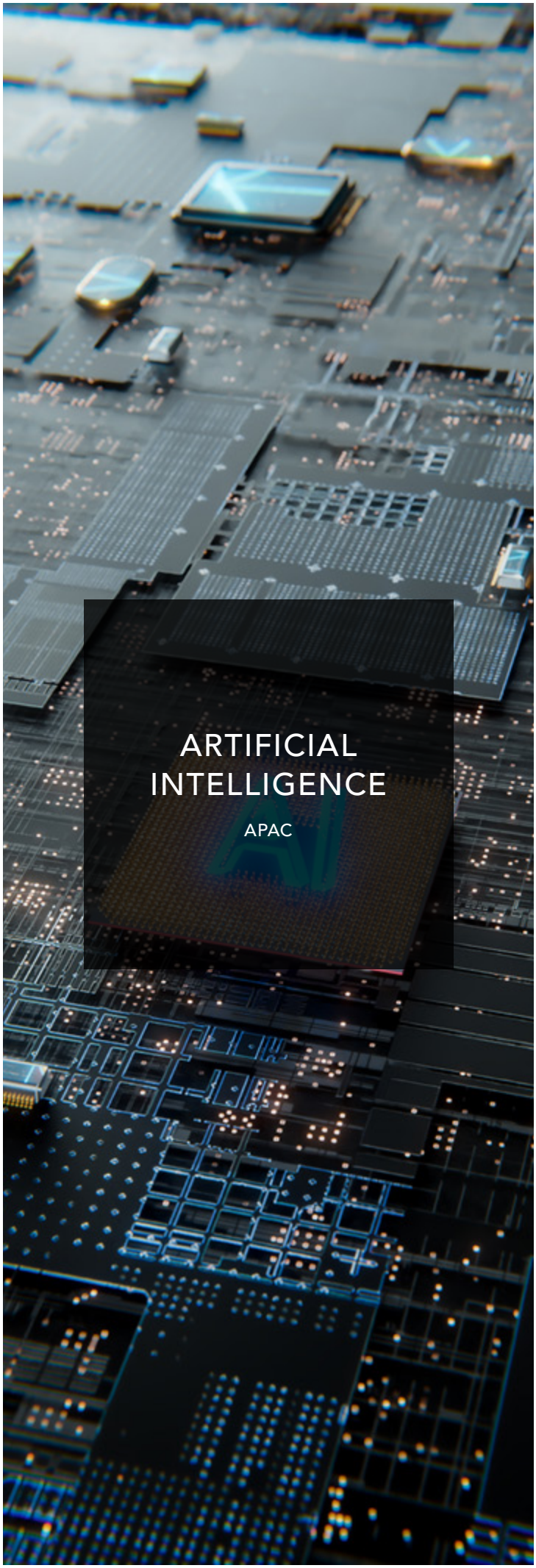

ARTIFICIAL INTELLIGENCE-RELATED LEGAL DEVELOPMENTS IN ASIA-PACIFIC ("APAC")

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The rapid development of artificial intelligence ("**AI**"), together with the increased number of commercial use cases made possible by generative AI ("**Gen AI**"), have brought about a wave of new opportunities for businesses as well as new legal challenges, particularly as governments have struggled to apply pre-existing legal frameworks to these new technological developments.

APAC countries have witnessed their fair share of rapid AI advancement and in this column we flag some of the region's most notable recent AI-related legal developments.

REGULATORY / LEGISLATIVE DEVELOPMENTS

HONG KONG

- **Potential amendments to the Copyright Ordinance to address Gen AI concerns.** On 15 February 2024, Hong Kong's Intellectual Property Department announced that it was preparing a proposal to address copyright in AI-generated content, machine-learning responses and models, as well as parameters on the rights of AI content creators— issues that are not addressed in the current Copyright Ordinance.

INDIA

- **Indian government considers amending IT rules to account for AI and Gen AI.** On 4 January 2024, it was reported that the Indian government is mulling amendments to the Information Technology Rules of 2021 to introduce regulation for AI companies and the use of generative AI. One potential amendment will require platforms to undergo stress testing to ensure that the intelligent algorithms or language models used for machine learning are free from bias such as those based on caste and religion. The reports come amidst the ongoing consultation on the Digital India Bill, which will replace the existing Information Technology Act, passed in 2000.

INDONESIA

- **The Indonesian technology and interim data privacy regulator issues circular on AI.** On 19 December 2023, the Ministry of Communication and Information issued Circular No. 9 of 2023 on the Ethics of AI. The circular applies to both public and private businesses operating AI-based programming activities, and provides that the use of AI should promote inclusivity, humanity, security, accessibility, transparency, credibility, accountability, personal data protection, sustainability and intellectual property. It also suggests that public and private AI users carry out responsibilities relating to risk management and crisis management. The circular is non-binding and indicates that Indonesia is opting for a more delicate, flexible approach to AI regulation in contrast to some other countries.

JAPAN

- **AI Strategy Council issues draft AI Operator Guidelines ("AIOG").** The AIOG was published on 21 December 2023 as part of the 7th AI Strategy Conference. The AIOG set out requirements such as clear service terms for AI providers, while also including areas that AI users should be mindful of, such as bias and potential privacy violations.
- **The Ministry of Economy, Trade and Industry ("METI") and the Ministry of Internal Affairs and Communications conduct a public consultation together on the Draft AI Guidelines for Business.** These Guidelines were published for consultation on 19 January 2024 and encourage businesses to implement measures throughout the AI lifecycle, from development to usage, on a voluntary basis.
- **METI establishes AI Safety Institute.** On 14 February 2024, METI announced the establishment of the AI Safety Institute ("**ASI**"). The ASI will be responsible for evaluating the safety of AI, reviewing AI safety assessment methods, and participate in collaborative efforts with AI Safety Institutes in other countries.
- **Announcement on Interim AI rules.** On 15 February 2024, Japan's ruling party, the Liberal Democratic Party ("**LDP**"), announced that it will be formulating interim rules, including penalties, to regulate AI. The LDP hopes to introduce a law to regulate Gen AI in Japan by the end of 2024. This is somewhat incongruous with an earlier announcement by the Japanese government in late 2023, which suggested that there will not be penalties imposed for non-compliance with Gen AI guidelines, while considering a certification system for AI developers, and industry-specific regulations for industries it considers to be high risk.

PEOPLE'S REPUBLIC OF CHINA ("PRC")

- **Ministry of Industry and Information Technology of China ("MIIT") issues proposal on the standardisation of AI in the PRC.** The MIIT's Draft Guidelines on Standardisation of Artificial Intelligence (AI) Industry,[1] published on 18 January 2024, propose the formulation of a comprehensive standard for the AI industry, with China ambitiously aiming to publish over 50 national and industry standards for AI and have over 1,000 companies adopt these new standards by 2026.
- **The Security Requirements for Generative AI ("Gen AI Security Requirements") are finalised.** Published on 29 February 2024, the finalised Gen AI Security Requirements serve as supporting guidelines for the Gen AI measures that came into effect on 15 August

1 Original text can be found here (Chinese only): https://www.miit.gov.cn/cms_files/filemanager/1226211233/attach/202311/7240bd43f3fc4b-598351f9b135e68e4a.pdf

2023 ("**Gen AI Measures**"). The Gen AI Security Requirements set out obligations on training data, model security, security measures and security assessment for Gen AI service providers in China ("**Service Providers**").

Service Providers are required to conduct an assessment to ensure that content containing "*more than 5% of illegal and harmful information*" (e.g., infringing intellectual property ("**IP**"), etc) is not used to train Gen AI models. Notably, the Gen-AI Security Requirements provide for measures to be taken by Service Providers to ensure the training data and the foundation models are legal and free from IP infringement, and set out specific measures to be taken by Service Providers, such as appointing an IP officer to manage IP risks in training data and generated content.

PHILIPPINES

- **Philippines plans to propose unified Association of Southeast Asian Nations ("ASEAN") AI framework.** On 17 January 2024, the Philippines' speaker of congress was reported to have announced the Philippines' intention to create a unified Southeast Asian regulatory framework for AI. This sentiment was expressed at the World Economic Forum in Davos, where the Philippines' representative emphasised the need for support in areas such as digitalisation, cybersecurity, and the related concerns and issues surrounding Gen AI. The framework is anticipated to be presented to the ASEAN when Philippines chairs the bloc in 2026, though the proposed move contrasts with the business-friendly, flexible approach to AI taken by other ASEAN member states such as Singapore and Indonesia.

SINGAPORE

- **Singapore and the US collaborate on AI governance.** On 10 October 2023, the Infocomm Media Development Authority ("**IMDA**") and the US National Institute for Standards and Technology ("**NIST**") issued a joint statement announcing the completion of a joint mapping exercise involving IMDA's AI Verify and NIST's AI Risk Management Framework ("**AI RMF**"). The AI RMF provides resources for managing and mitigating risks associated with AI systems, while AI Verify is a governance testing framework that promotes transparency. The mapping exercise confirmed that both frameworks promote trustworthy and responsible AI, and the exercise offers clarity to the industry and lowers compliance costs. A bilateral AI Governance Group has also been established to further enhance future collaborations on AI.
- **IMDA and AI Verify Foundation ("AIVF") launch public consultation on proposed draft AI framework.** On 16 Jan 2024, the IMDA and AIVF published the draft Model Governance Framework for Generative AI ("**Draft Gen AI Framework**") for public comment, with a view to finalising it by mid-2024. The Draft Gen AI Framework builds upon and expands the issues identified in the Model AI Governance framework last updated in 2020. It aims to strike a systematic and balanced approach in addressing concerns related to generative AI while promoting innovation. The Draft outlines nine dimensions that support the development of a trusted AI ecosystem. These dimensions include accountability, data, trusted development and deployment, incident reporting, testing and assurance, security, content provenance, safety and alignment research and development, and AI for public good.
- **Singapore data regulator publishes Guidelines on use of Personal Data in AI Recommendation and Decision Systems.** On 1 March 2024, the Personal Data Protection Commission published the "Advisory Guidelines on use of Personal Data in AI Recommendation and Decision Systems",[2] which provide directions to organisations seeking to use AI in a manner compliant with Singapore's Personal Data Protection Act 2012. The guidelines include clarifications on the use of personal data to train AI systems, examples on the information to be provided to consumers when seeking their consent, and guidance to AI-service providers who may act as data processors on behalf of their customers.

2 Original text can be found here: https://www.pdpc.gov.sg/-/media/files/pdpc/pdf-files/advisory-guidelines/advisory-guidelines-on-use-of-personal-data-in-ai-recommendation-and-decision-systems_1mar2024.pdf

SOUTH KOREA

- **Specialised AI council launched.** On 1 November 2023, the Korean Personal Information Protection Commission announced the launch of the Public-Private Policy Council for Artificial Intelligence and Privacy. The Council consists of 32 experts and professionals who are divided into sub-groups focusing on data processing standards, risk assessment, and transparency. Together, the Council will assist with developing a regulatory framework to govern domestic AI development. In addition to setting local standards and guidelines on AI and data privacy, the Council also plans to make proposals to the United Nations and other international institutions to cement Korea's status as a thought leader in AI.
- **South Korea will not allow copyright registration for AI-generated content without direct creative intervention by a human being.** On 27 December 2023, the Ministry of Culture, Sports, and Tourism ("**MCST**") stated that only works that involve a "human touch" will qualify for copyright protection.[3] This policy is expected to be further expounded on in an upcoming AI Copyright Guidebook to be published by the MCST, which will offer more guidance to copyright owners, businesses, and AI users on related copyright issues.

CASE LAW AND OTHER DEVELOPMENTS

HONG KONG

- **PCPD carries out compliance checks on companies' use of AI.** On 21 February 2024, the Office of the Privacy Commissioner for Personal Data ("**PCPD**") announced the completion of compliance checks carried on 28 Hong Kong organisations in relation to their collection, use and processing of personal data in the training or use of AI, as well as the organisations' respective frameworks for AI governance. The PCPD found that 21 of the 28 organisations used AI for day-to-day tasks, of which 19 of the 21 organisations had formulated an AI governance framework.

PRC

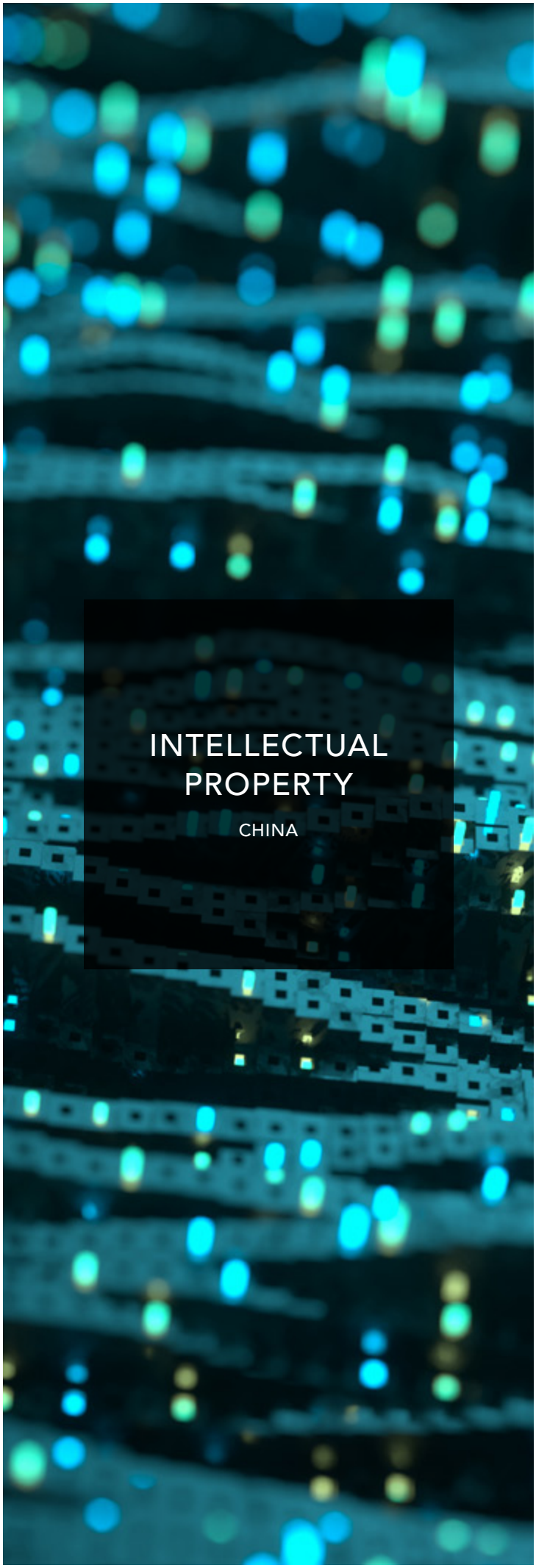
- **PRC Court recognises copyright in AI-generated work.** On 27 November 2023, the Beijing Internet Court recognised copyright in an AI-generated image – the first such ruling in the PRC. The court held that the human creator's intellectual input in producing the AI-generated image, such as drafting and adding the prompt texts, setting up parameters and designing the presentation of the image, had satisfied the requirements of an "artwork" based on originality. With this judgement, China appears to have taken a different stance on AI-generated copyright from the US, which has ruled that AI-generated images are not copyright protected due to the absence of human authorship (*see Beijing Internet Court (2023) 京0491民初11279号*).
- **First application of the PRC Gen AI Measures.** On 8 February 2024, the Guangzhou Internet Court issued the first PRC decision applying the PRC Gen AI Measures, which took effect on 15 August 2023. The Court found the defendant operator of an AI text-to-image service liable for producing images that infringed on the "Ultraman" series of works on the basis of its failure to adhere to a reasonable standard of care as required by the Gen AI Measures. Interestingly, the Court, aided by the expansive definition of Gen AI Service Providers in the Gen AI Measures,[4] found the Defendant liable despite the underlying Gen AI application being provided by a third party (see *Guangzhou Internet Court (2024)粤0192民初113号*).

3 For example, human editing through selection and arrangement of AI-generated elements in an AI-generated film.

4 The definition of "Generative AI service providers" includes organisations and individuals that provide Gen AI services through programmable interfaces and other means.

CLOSING OBSERVATIONS

As AI continues to advance at breakneck speed, we expect that more legal developments and cross-border collaboration will follow. Businesses with a presence in more than one APAC country should keep a lookout for the latest regulatory and legal trends, and adopt best practices and ethical principles to ensure the responsible and sustainable use of AI.



LOOK WHO JOINED THE PARTY: CHINA ACCEDES TO THE CONVENTION ABOLISHING THE REQUIREMENT OF LEGALISATION FOR FOREIGN PUBLIC DOCUMENTS

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INTRODUCTION

On 7 November 2023, China implemented the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (the "**Convention**"),[5] also known as the Apostille Convention. As of March 2024, there are 126 contracting states to the Convention.[6]

SCOPE AND APPLICABILITY

When a public document issued in a contracting state undergoes authentication under the Convention, a certificate ("**Apostille**") is issued such that the document is exempt from legalisation in other contracting states where it is to be used.

Under the Convention, a public document includes but is not limited to any of the following:

a. **documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server**:

5 Original text can be found here: https://assets.hcch.net/docs/b12ad529-5f75-411b-b523-8eebe86613c0.pdf.

6 A list of contracting states can be found here: https://www.hcch.net/en/instruments/conventions/status-table/?cid=41

whether a person or body is an authority or an official connected with the courts or tribunals of the State will be determined by the laws of the state from which the document originates;

b. **administrative documents**: this often encompasses civil status documents, extracts from official registers, grants of licences and patents, and certificates from administrative authorities;

c. **notarial acts**: this means authenticated instruments or certificates made by a notary that may perfect, record, or verify an obligation, fact, or agreement, but excludes acts such as certifying authenticity of signatures; or

d. **official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures**: an official certificate may be apostilled despite relating to documents foreign to its originating state.

The Convention does not govern documents executed by diplomatic or consular agents or administrative documents dealing directly with commercial or customs operations.

While Hong Kong and Macao have long been contracting states to the Convention and will continue to be so bound, the Convention does not apply to documents going between either region to China, and *vice versa*. This is instead governed by specific agreements between the regions, for example, the Mainland and Hong Kong Closer Economic Partnership Arrangement and its annexes.

The Convention does not apply between China and India.

APOSTILLISATION

EFFECT

The effect of an Apostille is that it certifies the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears. It does not verify the format, content, time limit or the translation of a document, and does not warrant the acceptance of the document by the receiving party.

FORMALITIES

When seeking to apostille documents originating from China for business purposes, one should produce the following:

1. original notarial certificate (or certificates issued by the China Council for the Promotion of International Trade or commercial bills);
2. original authorisation letter issued by the enterprise concerned;
3. copy of valid passport of the authorised person; and
4. any other materials as may be required on a case-by-case basis.

RELEVANT AUTHORITIES

The Department of Consular Affairs of the Ministry of Foreign Affairs of China ("**Department of Consular Affairs**") and their local governments' authorised Foreign Affairs Offices ("**FAO**") are responsible for apostillisation in China.

The Ministry of Foreign Affairs has designated 31 local FAOs who can directly issue Apostilles. Moreover, it has designated 6 local FAOs who can transfer documents directly to the Department of Consular Affairs to issue Apostilles; 9 local FAOs for the transfer of the documents to provincial FAOs to issue Apostilles; and 8 agencies in Beijing for the transfer of the documents to the Department of Consular Affairs to issue Apostilles.

Following the issuance of an Apostille, applicants can also verify the Apostille on the Department of Consular Affairs' website.[7]

TIME AND COSTS

The processing time needed for Apostille by the Department of Consular Affairs is generally 4 working

7 Applicants may verify Apostilles at https://consular.mfa.gov.cn/VERIFY/.

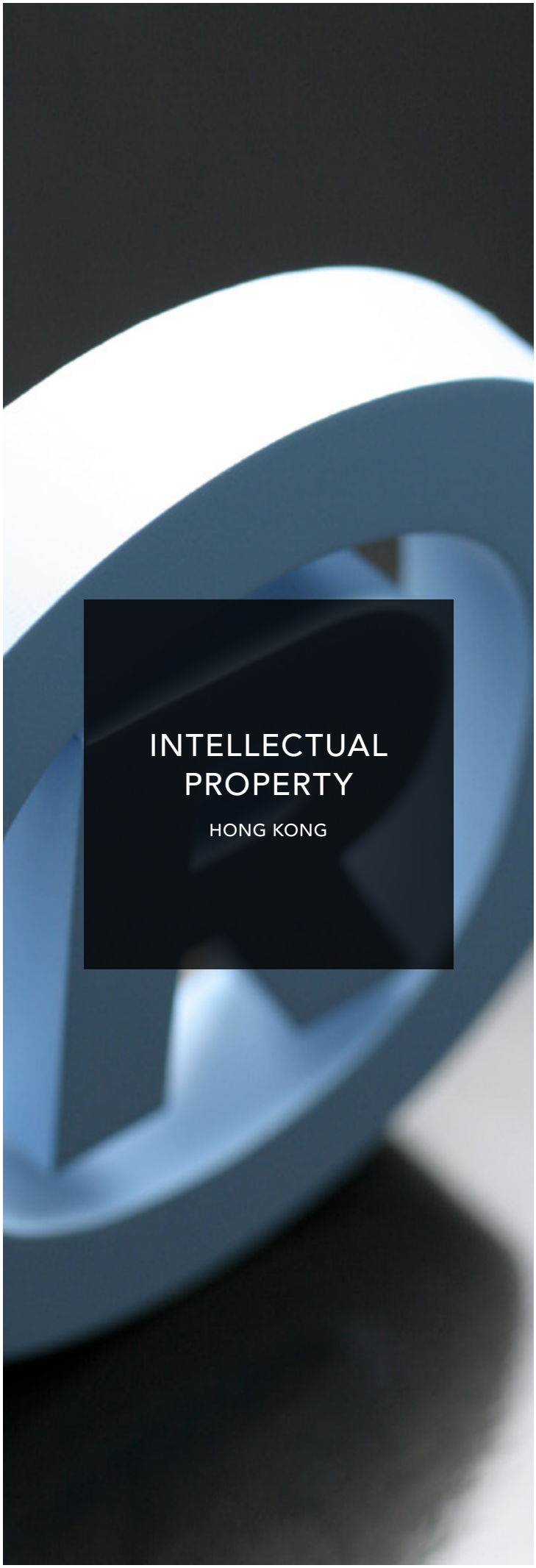
days, or 2 working days if the applicant requests an expedited process.

Costs will also differ depending on the above and whether the documents in question relate to civil or commercial affairs. The fee for civil affairs is RMB50, while that for commercial affairs is RMB100. An additional RMB50 express fee is required for expedited processes.

TAKEAWAYS

Prior to China's joining of the Convention, the process of sending a public document to China involved a double certification process including domestic notarisation, consular certification, and certification by the Chinese Embassy. With these requirements now rendered obsolete, completion of an official document for use abroad will generally only take a few working days, a significant reduction from former timeframe of around 20 working days. This is certainly a welcome change to the field of intellectual property, given the large volume of power of attorneys, authorisation and identification documents required for foreign parties to engage in intellectual property court cases in China.

THE AUTHOR WOULD LIKE TO THANK **MELISSA LAM**, TRAINEE SOLICITOR AT MAYER BROWN, FOR HER ASSISTANCE WITH THIS ARTICLE.



IDENTIFYING INTELLECTUAL PROPERTY RIGHTS IN A BUSINESS ACQUISITION

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On 12 January 2024, the Hong Kong District Court ruled in *Data World Solutions Ltd and Another v. Chan Wing Cheong and Others* that the sale of an IT business solution products company did not include transfer to the purchaser of third-party intellectual property ("**IP**") rights which the company had been using.[8] As can be seen from our discussion below, where the IP rights are not expressly identified in the sale and purchase agreement, it would be very difficult for the purchaser to convince the courts that the IP rights are part of the sale, whether by relying on purported misrepresentations or breach of warranties by the seller or an expansive interpretation of the agreement.

BACKGROUND

Under a sale and purchase agreement entered in January 2018 ("**SPA**"), the 1st Plaintiff purchased the entire shareholding of Poly-Asia (China) Company Limited (the "**Company**", being the 2nd Plaintiff) from the 1st and 2nd Defendants (respectively the majority and nominee shareholders of the Company) for HKD 1.54 million. One of the Company's businesses was the provision of enterprise resource planning ("**ERP**") solutions as a Microsoft ERP "gold partner" – the highest level of partnership status conferred by Microsoft. The Company's Microsoft ERP business was also enhanced by the long history of its "Poly Asia" brand and two domain names <polyasia.com> and <polyasia.net> ("**Disputed Domain Names**").

8 Original text can be found here: https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=157477&currpage=T

Since the 1990s, the 1st Defendant had operated a wider IT business via a number of companies under the "Poly Asia" brand, including the 3rd and 4th Defendants (the "**Group Companies**"). Following the SPA, the Company entered into a management agreement with the 3rd Defendant in February 2018 for advisory services to be provided by the 1st Defendant to the Company ("**Management Agreement**").

Disagreements arose in June 2018 when the 1st Plaintiff asked the 1st Defendant to change the name of the Group Companies and provide the administrator's passwords for the Disputed Domain Names. The 1st Defendant refused; and it transpired that the Disputed Domain Names were actually not registered in the Company's name but held by the 1st Defendant. The Microsoft domain name <polyasia.onmicrosoft.com>, which was necessary for the Company to identify itself in Microsoft's online environment, was however transferred to the 1st Plaintiff.

The Plaintiffs also discovered that the 4th Defendant registered a trademark for a "Poly Asia E-Technology" logo in Hong Kong and planned to prohibit the Company from using this mark. The Disputed Domain Names and the trademark are collectively referred to as the "**IP Rights**".

NO MISREPRESENTATIONS UNDER THE SPA

The Plaintiffs' primary claim is based on misrepresentation, which would entitle them to rescind the SPA with a refund of the purchase price, damages, and an indemnity for their use of the IP Rights. The alleged misrepresentations were the 1st Defendant's express statements that (i) he would retire and the sale would cover all businesses under the "Poly Asia" brand; and (ii) the sale would cover all assets and businesses of the Company, including the IP Rights.[9]

Upon considering the testimony of the 1st Defendant and the 1st Plaintiff's directors, as well as various contemporaneous documents, the Court was not convinced that the 1st Defendant had made the two misrepresentations.

Regarding the first misrepresentation, the Court agreed with the Defendants that this was an unnatural construction and contrary to the negotiations and wording of the SPA. The fact that the 1st Defendant planned on retiring could not have reasonably led the 1st Plaintiff to believe that sale of the Company would come with all other businesses under the "Poly Asia" brand. In fact, the 1st Plaintiff's director also admitted that the 1st Defendant's retirement did not play a role in his decision of whether to acquire the Company – which is a necessary element to proving an actionable misrepresentation. Further, none of the Group Companies were included in the SPA. Rather, it was clear that the subject matter of the sale was the Company's Microsoft ERP business.

The Court also found no evidence that the IP Rights were part of the acquisition. The SPA was silent on the IP Rights; had they been the 1st Plaintiff's primary concern, there was no reason why the parties – all managed by experienced businessmen – would not have expressly listed them out in the SPA. Importantly, one of the 1st Plaintiff's directors admitted during cross-examination that he merely assumed the sale would include the IP Rights, thus going directly against the 1st Plaintiff's own case that it relied on the 1st Defendant's *express* misrepresentation.

Interestingly, the Plaintiffs sought to use the Defendants' case that the parties never discussed the IP Rights to argue that this constituted breaches of various warranties under the SPA. Examples of the warranties included: there being no material facts or circumstances that had not been fully and fairly disclosed to the 1st Plaintiff; and that all information relating to the Company which might affect the willingness of a prudent purchaser had been disclosed.

The Court rejected this argument as it was not included in the Statement of Claim, and it would have been unfair to allow the Plaintiffs to "*freely run unpleaded case based on some incomplete facts alleged by the*

9 Except for the software licensing of the Pervasive database management system business.

opponent." The Court also noted there was no evidence that the IP Rights fell within the scope of the warranties that required disclosure, particularly given the finding that the subject matter of the sale was the Microsoft ERP business rather than the IP Rights.

OTHER MATTERS

In light of the Court's findings of fact and lack of misrepresentations, the Plaintiffs' alternative arguments and other claims were also dismissed. There was no misrepresentation that would allow the Company to rescind the Management Agreement and recover the management fees or damages. The Court also rejected the Plaintiffs' argument that on a proper construction of the agreements, the IP Rights were part of the sale and the Defendants' failure to transfer them to the Company was a breach of the agreements. There was nothing in the agreements that suggested the IP Rights were included.

Despite rejecting all of the Plaintiffs' claims, the Court clarified that this did not mean the Company was not entitled to use the mark "Poly Asia" or the Microsoft domain name in the course of its business.

CONCLUSION

The risk of being embroiled in this type of dispute can be effectively managed by having a holistic understanding of the business to be acquired, identifying the IP rights which are crucial for its operations, and undertaking a robust due diligence process. This is particularly important where, as in this case, the target had a long historical presence and reputation which the purchaser had intended to exploit and where the purchaser is only buying part of a larger business that shares the same brand name. If the omission of valuable IP rights is only discovered post-acquisition, like in this case, then negotiating a licence for the use of the IP may have been a better alternative to litigation.

THE INTERNET IS A DANGEROUS PLACE: CHINA'S NEW REGULATIONS ON THE PROTECTION OF MINORS ON THE INTERNET

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INTRODUCTION

On 24 October 2023, the Cyberspace Administration of China ("**CAC**") published the Regulations on the Online Protection of Minors (the "**Regulations**"), which came into force on 1 January 2024.[10]

The Regulations are the first to address the issue of internet risks for minors specifically, nearly two years after such regulation was first proposed in draft.[11] The Regulations are issued pursuant to the PRC Law on Protection of Minors,[12] PRC Cybersecurity Law and PRC Personal Information Protection Law ("**PIPL**").

SCOPE OF THE REGULATIONS

The Regulations apply to online product and service providers ("**Online Providers**"), personal data controllers and manufacturers and sellers of smart terminals,[13] as well as organisations and individual Internet users. They also apply to guardians of minors, educational institutions and media institutions.

10 Original text can be found here (Chinese only): https://www.cac.gov.cn/2023-10/24/c_1699806932316206.htm

11 For our perspective, please see our previous article on Minor(s) Regulation, Major Consequences? Cyberspace Administration of China's New Draft Regulations for Online Protection of Minors.

12 The Law on Protection of Minors defines "minors" as individuals under the age of 18

13 Article 6.

Significantly, the provision targeting "*important* Internet service providers" in the 2022 draft has now been expanded in scope to refer to "online service providers".[14]

ONLINE SERVICE PROVIDERS

Online service providers with a "*large base of minor users or with material influence on minors as a group*" are to comply with the following obligations,[15] largely following those laid out in the 2022 draft:

- Periodically carry out impact assessments on the protection of minors online;
- Provide "Minor Modes" and special areas for minor users;
- Establish an independent body to conduct oversight of the online protection for minors;
- Draft special rules and alert minor users in a conspicuous manner of the rights they enjoy for protection online in accordance with the law and of remedies for harms suffered online;
- Stop providing services to providers of products or services on the platform who violate laws and administrative regulations and seriously harm minors' rights and interests; and
- Publish on an annual basis, a special report on their online protection of minor users.[16]

In addition to the 2022 draft, the Regulations provide that the CAC offices will work with relevant departments to clarify the definition of "*online service providers that have a large base of minor users or with material influence on minors as a group*".[17] Hopefully, this means that a clarification for "*a large base of minor users*" or "*material influence on minors as a group*" will be forthcoming soon.

CONTENT PROHIBITION

While the Regulations now benefit from more detail on the types of prohibited content, their application has simultaneously been widened to cover more scenarios involving minors:

- Content that is harmful to the physical or psychological health of minors has been particularised to include content "*promoting obscenity, pornography, violence, cults, superstitions, gambling, inducements to self-harm and suicide, terrorism, separatism, or extremism*"[18] ("**Sensitive Content**"); and
- Organisations and individuals are now not only prohibited from sending or forwarding online content that is harmful to or that might impact minors' physical or psychological health, but also prohibited from *enticing* or *compelling* minors to have contact with such content.[19] This is likely applicable to the placement of advertisements for products and services that might "*impact minors' physical or psychological health*".

In addition to the requirements to take down Sensitive Content upon discovery, store relevant records and make a report to relevant departments that were addressed in the 2022 draft, the Regulations include specific requirements for Online Providers to actively take action against users that produce, reproduce, publish or transmit any Sensitive Content, including measures such as warnings, restricting functions, suspending services and closing accounts.

Along with the cyberbullying controls in the 2022 draft, the Regulations have been expanded and also require Online Providers to go a step further to establish alert and prevention, identification and monitoring, and take

14 Article 20.
15 Ibid.
16 The requirement to publish this special report "periodically" has now been clarified to be published on an annual basis.
17 Article 20.
18 Article 22.
19 Article 25.

down mechanisms for cyberbullying. This is quite different to the provisions in the 2022 draft that merely required Online Providers to establish convenient functions and channels for minors and their guardians to notify them. This change effectively **increases the compliance burden of Online Providers** to provide a safe online environment for minors.

The Regulations also take into account the impact of new technology on online content, and include slightly contradictory provisions regarding the use of artificial intelligence ("**AI**"). On the one hand, Online Providers are prohibited from using automated decision-making to carry out commercial marketing towards minors,[20] but on the other hand, they are required to use technological means such as AI and big data, combined with manual processing, to build algorithms for a cyberbullying information database, which may enhance the supervision and identification of cyberbullying incidents.[21]

REAL NAME REGISTRATION REQUIREMENT

Minors or their guardians are required to provide real name information to Online Providers that offer information publishing, instant messaging or gaming services,[22] failing which Online Providers are prohibited from offering these services to them. This requirement is in line with a broader push by the CAC to require users to provide real name information when signing up for internet-based services, including deep synthesis (i.e. deepfake) services,[23] and information publication and instant messaging services,[24] which enable an even greater degree of oversight over online activities in the PRC.

PERSONAL INFORMATION PROTECTION LAW

As discussed in our previous article,[25] data controllers are required to strictly control access to minors' personal information and to conduct an annual compliance audit of their processing of minors' personal data. However, under the Regulations, these annual compliance audit reports must now be promptly reported to the CAC.[26]

Upon the discovery of any possibility of risk of harm to minors deriving from the use or potential misuse of their private information, online service providers have the additional obligation to preserve relevant records and report the incident to the relevant public security bureaus.[27] It is unclear what circumstances would trigger this assessment, though setting the threshold at a "possibility of harm" imposes on online service providers an overly onerous duty that may be difficult to discharge. Note that private information – "私密信息" is not defined in the Regulations, nor in the PRC Civil Code or the PIPL. It is also not the same term used for sensitive personal data in the PIPL – "敏感个人信息", so this is one area that online service providers will have to keep an eye out for.

INDUSTRY-SPECIFIC OBLIGATIONS

Restrictions against providers of online education products and services aimed at minors have also been ostensibly relaxed to reduce the number of specific requirements prescribed. Under the Regulations, such providers are now only required to provide products and services corresponding to age-based development

20 Article 24.

21 Article 26.

22 Articles 31 and 46.

23 See Article 9 of the Provisions on the Administration of Deep Synthesis Internet Information Services requiring deep synthesis service providers to verify the real identity information of users.

24 See Article 6 of the Provisions on the Management of Mobile Internet Applications' Information Services.

25 For our perspective, please see our previous article on Minor(s) Regulation, Major Consequences? Cyberspace Administration of China's New Draft Regulations for Online Protection of Minors.

26 Article 37.

27 Article 38.

characteristics and cognitive abilities of minors *according to PRC laws and regulations*,[28] whereas under the 2022 draft they were also required to comply with the standards and systems formulated by the education departments on the setup of their educational institution, qualification of personnel, oversight of fee collection, and restrictions on permissible advertisements.

The Regulations also provide more flexibility to measures limiting the expenditure of minors on online services such as games, livestreams, video and social media. Providers of these online services may now take into account the age-based characteristics of minors in setting up "Minor Modes" and corresponding payment options for such services.[29] The Regulations also remove the specific prohibition against the registration for online livestreaming services for minors under 16.

ENHANCED PENALTIES

Penalties under the Regulations mirror those under PIPL and include a fine of up to RMB 50 million or 5 percent of the preceding year's annual turnover, rectification orders, warnings, confiscation of illegal gains, suspension or cessation of services, cessation of operations or revocation of business licences or permits. In egregious cases, directly responsible personnel may be held personally liable for up to RMB 1,000,000.[30] However, the applicability of the highest fines appear to have been narrowed – now only applying to serious breaches of Articles 20(1) and 20(5) and hence only relevant to online service providers that have "*a large base of minor users*" or "*material influence on minors as a group*" that fail to either (a) consider the physical and psychological developmental traits of minors in designing, developing, and operating the online platform services, and periodically carry out impact assessments of the protection of minors online; or (b) stop providing services to providers of products or services on the platform who violate laws and administrative regulations to seriously harm minors' health, rights and/or interests.

TAKEAWAYS

Given the obligations imposed on online businesses to protect minors and increased accountability requirements to the PRC authorities, companies with websites or mobile applications accessible in the PRC by minors should carefully consider the impact of the Regulations on their online operations, and devise a compliance strategy, particularly when processing the personal data of minors.

In particular, businesses with an online presence in the PRC that cater to individuals under the age of 18 and collect and process their personal data should ensure that they have processes that can meet the requirements set out in the Regulations, and that they carry out periodic impact assessments to ensure the continuous adequacy of their processes and services given the restrictions of the law.

Lastly while explicit reference to this requirement was removed from the Regulations, businesses should nonetheless bear in mind Article 31 of the PIPL, which requires data controllers to obtain the consent of a minor's parent or guardian if the minor is under the age of 14.

THE AUTHORS WOULD LIKE TO THANK **MELISSA LAM**, TRAINEE SOLICITOR AT MAYER BROWN, FOR HER ASSISTANCE WITH THIS ARTICLE.

28 Article 28.
29 Articles 43 and 44.
30 Articles 53-56.

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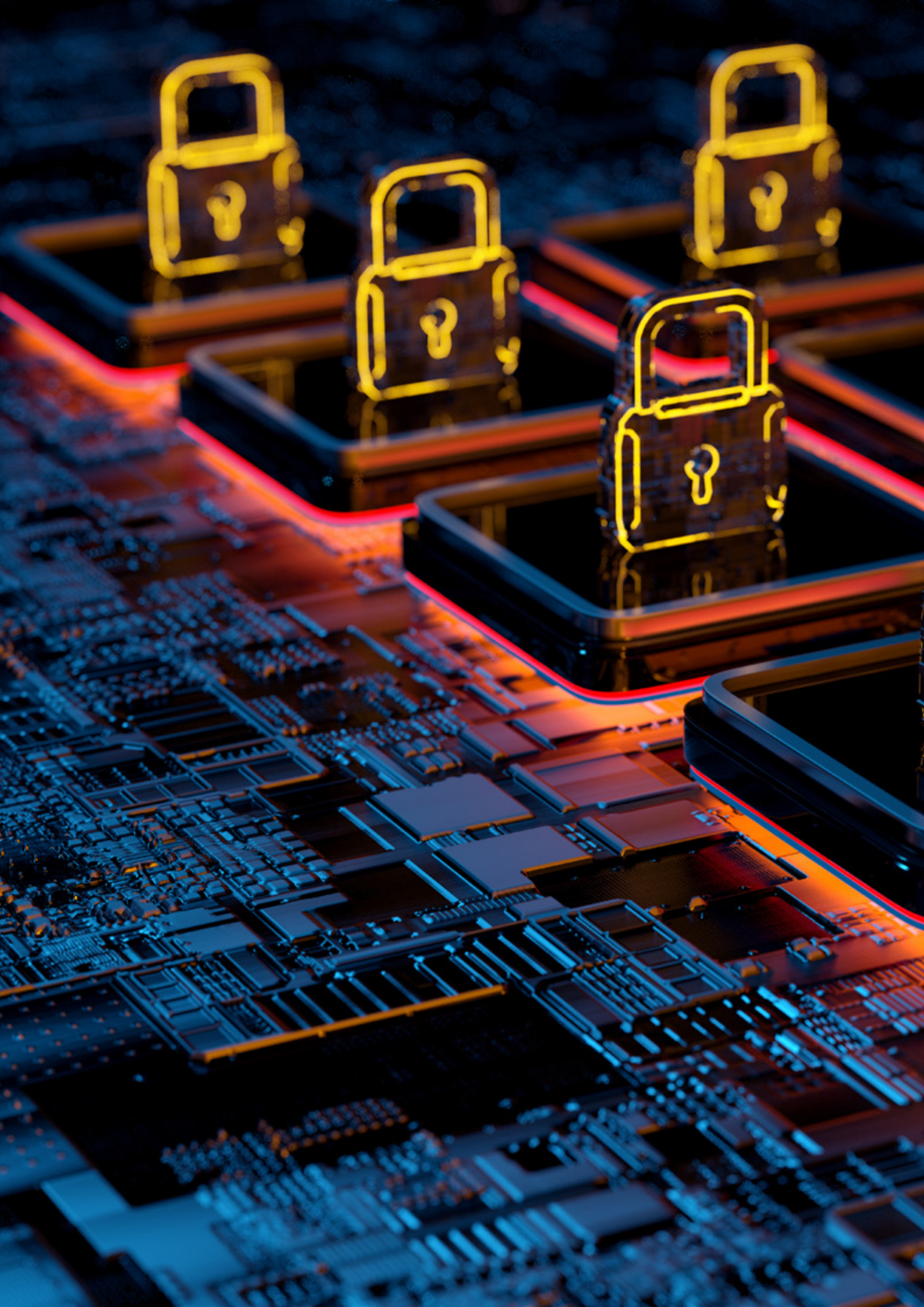

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