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Well-known Marks under the new Chinese Trade Mark Law

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The new Trade Mark Law of China came into force on 1 May 2014. One of the key changes is the provision of clearer guidance on recognition and protection of well-known trade marks in China.

CLEARER GUIDANCE ON WELL-KNOWN TRADE MARKS UNDER THE NEW TRADE MARK LAW

The concept of a well-known trade mark is not new. Under the old Trade Mark Law, a well-known trade mark would be assessed and determined based on the following criteria:

- The extent of the fame and reputation of the trade mark among the relevant public;
- The duration of use of the trade mark;
- The duration, extent and geographical reach of any advertisements for the trade mark;
- Any prior records of well-known status recognition; and
- Any other factors contributing to the well-known status of the trade mark.

According to statistics from the Chinese Trade Mark Office, out of 1,300 trade marks being endorsed as well-known trade marks between 2012 and 2013, only about 20 marks were foreign brands. This suggests that in practice a strong local presence of the trade mark in China was required in order to earn the well-known mark status in China.

The new Trade Mark Law does not relax the requirements on recognition of a well-known trade mark as such. However, the new law clarifies the recognition procedure for well-known trade marks and how well-known trade marks should be used in practice. We set out below the clarifications offered under the new law:

- i. Circumstances in which the well-known trade mark status may be recognised:
 - » During the examination of a trade mark application, and at the request of the trade mark applicant, the Chinese Trade Mark Office (CTMO) may determine and conclude the well-known status of a trade mark in accordance with the facts of the case;
 - » In the course of investigating a trade mark infringement case conducted by the administration departments for industry and commerce, and at the request of the trade mark owner, the CTMO may determine and conclude the well-known status of a trade mark in accordance with the facts of the case;
 - » In the course of handling a trade mark dispute matter (such as an opposition or cancellation), and at the request of the trade mark owner, the Trademark Review and Adjudication Board (TRAB) may determine and conclude the well-known status of a trade mark in accordance with the facts of the case;
 - » In the course of adjudicating a trade mark case or an administrative appeal, and at the request of the trade mark owner, the Chinese court may determine and conclude the well-known status of a trade mark in accordance with the facts of the case.

In essence, the new law has provided clearer guidance as to the avenues through which a well-known trade mark can be applied for. The new law aims to curb abuse of the well-known trade mark regime by stemming out the unhealthy practice of recognition of well-known trade marks which is unnecessary for the dispute in question or by unqualified authorities.

ii. Restrictions on the commercial use of “Well-known Trade Mark”:

Under the new Trade Mark Law, the phrase “Well-known Trade Mark” (“驰名商标”) can no longer be used on products or their packaging. Again, this amendment aims to avoid the abusive practice of using the recognition as an advertising gimmick.

DRAFT PROVISIONS ON THE RECOGNITION AND PROTECTION OF WELL-KNOWN TRADE MARKS (驰名商标认定和保护规定—修订征求意见稿)

In April 2014, the State Administration for Industry and Commerce (SAIC) put forward draft provisions on the recognition and protection of well-known trade marks (for consultation) to bring the 2003 provisions in line with the new Trade Mark Law. The provisions are intended to supplement the new law in the definition and recognition of well-known trade marks. The major changes include:

- Rise in threshold in definition of well-known trade mark, as shown below:

Existing/old provisions from 2003	Draft provisions in 2014
Generally known by relevant public in China and enjoys a relatively higher reputation (在中国为相关公众广为知晓并享有较高声誉的商标)	Thoroughly recognised by relevant public in China (在中国为相关公众所熟知的商标)

- Evidence to be adduced for marks with or without registration in China

If a trade mark owner is seeking well-known trade mark status recognition for a trade mark that is not registered in China, the owner must prove that the mark has been used in China continuously for a minimum of five years.

If a trade mark is registered in China, the owner must adduce evidence that it was registered for three years or more prior to seeking such recognition, or that it has been in continuous use in China for a minimum of five years.

- Reinforcing the principle that well-known trade mark recognition should be granted on a case-by-case basis and in the form of passive protection.

The new provisions are expected to be finalised and implemented soon by the SAIC.

CONCLUSION

The new Trade Mark Law tightens up the procedure and raises the threshold for obtaining a well-known trade mark recognition in China. This probably presents a mixed bag for foreign trade mark owners. On the one hand, the new law is to be applauded for trying to deter abusive and indiscriminate recognition and use of the “well-known trade mark” badge especially by local Chinese entities. On the other, the more restrictive procedures and threshold will make it even more difficult for foreign trade mark owners to obtain a well-known trade mark status in China. ☺



The Copyright (Amendment) Bill 2014

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Subsequent to our article “Consultation on Treatment of Parody under the Copyright Ordinance – still ongoing” in our previous newsletter, there has been a significant development in the Hong Kong government’s attempt to re-introduce the long-awaited Copyright (Amendment) Bill. On 11 June 2014, the government introduced the Copyright (Amendment) Bill 2014 (“Copyright Bill 2014”). In brief, the Copyright Bill aims to (i) re-introduce the package of legislative amendments already scrutinised and supported during the previous (and lapsed) discussion of the Copyright (Amendment) Bill 2011 (“Copyright Bill 2011”); (ii) introduce new fair dealing exceptions for the purposes of parody, satire, caricature and pastiche, commenting on current events, and quotation; (iii) provide further clarification of the criminal liability for copyright infringement generally.

We set out below the major proposals under the Copyright Bill 2014.

INTRODUCING A NEW EXCLUSIVE RIGHT FOR THE COMMUNICATION OF WORKS TO THE PUBLIC

The Copyright Bill 2014 re-introduces a technology-neutral communication right for copyright owners to communicate their works. Unlike the existing copyright regime which confers rights specific to certain methods of communication, e.g., “broadcasting” or including the copyright work in a “cable programme service” (both of which will be replaced by this new communication right), the new communication right is expressed in broad terms and is capable of catching existing and future modes of electronic transmission of copyright works. This new right will enhance copyright protection in the digital environment and assist rights owners in combating emerging forms of infringement, e.g., streaming.

NEW FAIR DEALING EXCEPTIONS FOR PARODY

The legislative process of the Copyright Bill 2011 was derailed by debates on the treatment of parody when it was tabled before the Legislative Council in 2011-2012. End-user groups expressed concern over the proposals in that Bill, in particular that the new offences under the Bill would create a threat to parody and other user-generated content (UGC) on the Internet. A lot of pressure was exerted to create a special exemption for parody use of copyright works from civil and/or criminal liabilities under the Copyright Ordinance.

Following extensive debates and consultation on the parody issue since July 2013, the Copyright Bill 2014 introduces the following new fair dealing exceptions for parody and other uses that have been the subject of concern to end-user groups:

- Fair dealing use for the purposes of parody, satire, caricature and pastiche – the precise meaning of parody, etc. is not defined in the Copyright Bill 2014 and will be left to the court to decide;
- Fair dealing use for the purpose of commenting on current events, provided the copyright work has already been released or communicated to the public and the user sufficiently acknowledges the copyright work;

- Fair dealing use of a quotation, on the condition that the quotation is no more than is required for the specific purpose for which it is used, and that the copyright work has already been released or communicated to the public and the user sufficiently acknowledges the copyright work;
- Consistent with the current copyright regime, in determining whether the act constitutes fair dealing, the court will take into account all relevant circumstances, including (i) the purpose and nature of the use (non profit or commercial); (ii) the nature of the copyright work; (iii) the amount and substantiality of the portion used in relation to the copyright work as a whole; and (iv) the effect of the use on the potential market for or value of the copyright work.

The Copyright Bill 2014 does not introduce an exception for UGC despite heavy lobbying by some end-user groups. The government considers that the concept of UGC is too “vague and undefined” and although Canada has adopted a UGC exception, there are doubts as to whether the Canadian regime complies with the TRIPS Agreement. The government is of the view that Hong Kong is not ready for a UGC exception and will adopt a ‘wait-and-see’ approach.

CRIMINAL SANCTIONS

The Copyright Bill 2014 re-introduces criminal sanctions against the unauthorised communication of the work to the public where the infringing act is conducted either (i) in the course of trade or for profit; or (ii) to an extent that prejudicially affects the copyright owner.

As compared to the Copyright Bill 2011, the Copyright Bill 2014 proposes a different threshold for determining when an act of unauthorised communication “prejudicially affects the copyright owner”. Under the Copyright Bill 2011, the proposed test for the court was whether “more than trivial economic prejudice was caused” to the copyright owner, taking into account a non-exhaustive list of relevant factors (e.g., nature of the copyright work, mode and scale of distribution). This test has been revised in the Copyright Bill 2014 such that in addition to the non-exhaustive list of relevant factors, the court may in particular assess whether economic prejudice has been caused to the copyright owner by asking whether the infringing act amounts to a “substitution for the work”.

This revised test is in response to concerns from certain end-user groups that the meaning of “more than trivial economic prejudice” under the Copyright Bill 2011 was imprecise and too wide, creating a chilling effect on freedom of expression. However, the new threshold of “substitution for the work” is unduly high and is out of synch with the international approach (e.g., the Berne Convention three-step test requires members to confine exceptions to use of the copyright work which does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the rights holder). This issue could be an area of contention during the discussion of the passage of the Copyright Bill 2014.

ESTABLISHING A SAFE HARBOUR FOR ONLINE SERVICE PROVIDERS (OSP)

The Copyright Bill 2014 retains the safe harbour provisions for OSPs introduced in the Copyright Bill 2011. In brief, to benefit from the safe harbour, OSPs must, after receiving a notice of alleged infringement, notify the service subscriber of the alleged infringement, and remove the allegedly infringing content. In response, the service subscriber may file a counter notice to deny the infringement and request the reinstatement of the content which was

removed. OSPs must then reinstate the removed content unless the complainant has informed the OSP in writing that court proceedings have been commenced in Hong Kong. The statutory safe harbour regime will be underpinned by a voluntary Code of Practice which sets out practical guidelines and procedures for OSPs to follow after receiving a notification of alleged infringement.

CONCLUSION

The government is keen to pass the Copyright Bill 2014 as soon as possible as there is an urgent need to update Hong Kong's copyright regime to catch up with international trends and developments. The proposals in the Copyright Bill 2014 appear to have addressed many of the concerns raised in the previous rounds of consultations and the government should expect less resistance to its passage. The government will certainly hope to avoid a repeat of what happened to Copyright Bill 2011 where the legislative proposal was derailed by last-minute debates on the treatment of parody. ☺



Proposed Changes to the Pharmacy and Poisons Ordinance

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The Pharmacy and Poisons (Amendment) Bill 2014 (“Bill”) was introduced in March 2014. The Bill proposes substantial changes aimed at improving and updating the regulatory framework of the Pharmacy and Poisons Ordinance. If implemented, the new statutory provisions will impose several additional requirements on manufacturers and sellers of pharmaceutical products.

We set out below the major changes proposed in the Bill.

NEW REQUIREMENTS PROPOSED IN THE BILL

i. Manufacturing pharmaceutical products

- » Principles and guidelines for manufacturing in compliance with the Good Manufacturing Practice Guide (GMP Guide) issued by the Pharmacy and Poisons Board will be introduced. Non-compliance with the GMP Guide may result in disciplinary action under the subsidiary regulations of the Pharmacy and Poisons Ordinance.
- » Licensed manufacturers of pharmaceutical products will be required to employ at least one authorised person (AP) to ensure and certify that pharmaceutical products are manufactured and checked in accordance with the GMP Guide. Qualifications requirements and procedures for registration as an AP will be formulated and will include registered pharmacists and persons completing recognised courses by the Pharmacy and Poisons Board – both of which shall have a minimum of three years of experience relevant to the manufacturing or quality control of pharmaceutical products. A register of APs will be established.
- » Licensed manufacturers will be required to ensure that the particulars of each completed batch of pharmaceutical products corresponds exactly with the products’ registered particulars.

ii. Packaging and labelling

- » Labelling requirements for pharmaceutical products will be expanded to include the product’s batch number and expiry date in addition to the current requirements to include active constituents of the product, the name and address of the manufacturer, and the drug registration certificate number.
- » Secondary packaging will only be allowed to be undertaken by licensed manufacturers who comply with GMP Guide requirements. Secondary packaging refers to packaging activities which do not expose the pharmaceuticals to air, for example, putting bottles of pharmaceutical products or strip-packed tablets into cartons, and labelling those bottles and cartons. This change will be effected by expanding the definition of “manufacture” to explicitly include secondary packaging.
- » Pharmaceutical products will no longer be required to be labelled with the word “Poison” in red lettering. Instead, they will be required to be labelled “Prescription Drug” or “Drug under Supervised Sales” depending on the category of sale restriction they fall under. The purpose of this change in terminology is to avoid giving the impression that the labelled products are unsuitable for general consumption or use.

iii. Selling, importing and exporting

- » A person who wishes to import or export pharmaceutical products must first obtain a wholesale dealer licence or a manufacturing licence. The wholesale dealer licence will replace the existing wholesale poisons licence.
- » Authorised sellers of poisons will also be required to obtain a manufacturing licence.
- » All products listed in Part I of the Poisons List kept at retail shops will be required to be stored in locked receptacles in areas inaccessible to customers. The keys to the locked receptacles must be kept by a registered pharmacist.
- » Wholesale dealers and licensed manufacturers will be required to keep transaction records for all pharmaceutical product transactions, and not just transactions in respect of poisons listed in Part I of the Poisons List. They will be required to record additional particulars, such as the batch number and pack size.

iv. Clinical trials

- » Clinical trials may only be conducted after obtaining a clinical trial certificate or medicinal test certificate. Contravention of this licensing requirement will constitute an offence.
- » Conditions may be imposed on issuing a clinical trial certificate or medicinal test certificate. These certificates may be cancelled or suspended on the contravention of any of the imposed conditions, or on the ground of public interest.
- » The maximum term of validity of these certificates will be extended from two to five years.

CURRENT STATUS OF THE BILL

Legislative Council members have generally been supportive of the new proposals. The First Reading of the Bill and commencement of the Second Reading Debate took place at the Legislative Council meeting on 26 March 2014. The Debate was adjourned and the Bill was referred to the Bills Committee for further discussion. The pharmacist sector expressed concerns that the qualification of non-pharmacists as APs under the Bill might weaken the quality control over the manufacturing process. It remains to be seen whether the Bill will be passed in the current legislative session. 📶



The URS System – Recent Cases and What They Reveal

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In 2013, the Uniform Rapid Suspension (URS) system was introduced as an alternative to the Uniform Domain Name Resolution Policy (UDRP) system, with the intent of providing faster relief to trade mark owners in clear cut domain name disputes¹. The URS system applies to new gTLDs or ccTLDs that have adopted the URS (i.e., Palau <.pw> domain names). So far, only the Asian Domain Name Dispute Resolution Centre (ADNDRC) and the National Arbitration Forum (NAF) have been appointed by ICANN as URS service providers.

The first URS action to test the waters was in September 2013, and was related to the country code top level domain name <facebok.pw>. Since then, there have been over 60 URS cases filed with the NAF and only three filed with the ADNDRC as at 13 June 2014.

This article will provide an overview of what some of the URS decisions reveal regarding the Examiners' approach to URS cases, and when a UDRP action may be preferred.

URS – THE THREE ELEMENTS

In summary, the URS requires the complainant to prove the following three elements:

1. The domain name is identical or confusingly similar to a word mark in which the complainant holds national or regional registration rights and which is in current use (or which has been validated by court proceedings or is specifically protected by statute or treaty);
2. The respondent has no legitimate rights or interest in the domain name; and
3. The domain name was registered and is being used in bad faith.

If the Examiner finds that the above elements have been established then the disputed domain name will be suspended. Note that under URS proceedings, the Examiner cannot order the transfer or cancellation of the domain name as with UDRP proceedings – the only remedy available is the suspension of the domain name for the remainder of its registration period.

UNSUCCESSFUL URS CASES

The URS is intended to be used only in clear cut cases of trade mark abuse, where there are no open questions of fact. Looking at some of the URS cases where the complainant has been unsuccessful will help us analyse what the Examiners may consider to be “clear cut”. As at 13 June 2014, there were only seven URS complaints, all filed with the NAF, which were denied (however one of these decisions was overturned on appeal, and the domain name was suspended). Interestingly, all seven of these URS complaints were originally determined by the same two Examiners.

In two of these URS cases², the complainants stumbled at the first hurdle. Although the complainants had presented evidence of trade mark registrations corresponding to the relevant

¹ See “The URS – A Strong Alternative to UDRP Actions for New gTLDs?” by Gabriela Kennedy and Karen H.F. Lee of Mayer Brown JSM: <http://www.mayerbrown.com/The-URS--A-Strong-Alternative-to-UDRP-Actions-for-New-gTLDs-11-29-2013/>

² Wolfram Research, Inc. v. Andrew Davies et al, NAF Case No. FA1404001553139; and Aeropostale Procurement Company, Inc. v. Michael Kinsey, NAF Case No. FA1403001550933.

disputed domain names, these trade mark registrations were not held in the name of the complainants, and no evidence was provided regarding the relationship between the complainants and the trade mark holders. As a result, the Examiner denied these cases on the basis that the complainants had failed to establish the first element. Note that one of these cases was overturned on appeal, as the complainant was able to establish that it held relevant trade mark registrations, and was also able to satisfy the second and third element³.

In the other five of these URS cases, the Examiner found that while the complainants were able to satisfy the first element, they had failed to establish the second and third elements by clear and convincing evidence, for one of the following reasons:

- The complainant had failed to establish that its registered trade mark was well-known, and the disputed domain name only resolved to a generic parking page that did not include any references to the complainant or its registered trade mark⁴.
- The disputed domain name reflected an abbreviation of the names of four towns to which the respondent provided services, and even though the disputed domain name resolved to a parking page that contained links related to the complainant's trade mark, the Examiner accepted the respondent's explanation that it was unaware of the parking page and had tried to cancel it, but the disputed domain name was blocked due to the URS action. This explanation regarding the parking page was found by the Examiner to be plausible since the URS proceedings were commenced only nine days after the disputed domain name was registered.
- For three of the URS cases, the Examiner found that despite the complainant holding registered trade mark rights that corresponded to the disputed domain names, as the mark was a generic word, the complainant had failed to establish that the generic word had acquired secondary meaning, i.e., that the trade mark was exclusively and most commonly associated with the complainant. Further, the disputed domain names resolved to parking pages that were not exclusively or strongly associated with the complainant or its trade mark, and there was no evidence to show that the respondent registered the domain name with the intent of taking advantage of the complainant's trade mark⁵.

WHAT DO THESE CASES REVEAL?

What seems clear from these decisions is that a URS action may not be suitable in every circumstance. If a complaint requires more explanation than the 500 word limit will allow, or there is a genuinely contestable issue, then a URS complaint will likely be denied.

What was repeatedly emphasised in the majority of these unsuccessful URS cases was that URS complaints involve a higher burden of proof than UDRP actions, and are not intended for cases involving any arguable issues. For example, if the trade mark being relied upon is also a generic or dictionary term, then this raises a number of ancillary issues that the complainant needs to overcome in order to satisfy all three elements. In such circumstances, a UDRP action may be more appropriate. Unlike a URS complaint, a UDRP complaint has a 3,000 word limit, and complainants can request to file further supplemental submissions (although the granting

³ Aeropostale Procurement Company, Inc. v. Michael Kinsey, NAF Case No. FA1403001550933.

⁴ Virgin Enterprises Limited v. Lawrence Fain, NAF Case No. FA1402001545807.

⁵ Heartland Payment Systems, Inc. v. Whois Privacy Protection Service, Inc., and Kyle Ramsey, NAF Case No. FA1403001546294; Heartland Payment Systems, Inc. v. Redwood Capital, NAF Case No. FA1403001547419; and Finn.co AS. North Sound Names et al, NAF Case No. FA1405001558494.

of such a request is up to the discretion of the Panel); complainants would therefore be better able to fully develop and set out their factual and legal arguments in a UDRP complaint.

The URS cases decided so far show that the Examiners are still applying the same well-established principles formulated by Panellists under the UDRP proceedings – none of the reasons provided by the Examiners for denying the URS complaints are novel or unusual. However, if the complainants in the above URS cases had filed a UDRP action instead of a URS complaint, there is a possibility that they may have been able to succeed.

SUMMARY OF THE ADNDRC CASES

Only three cases have so far been filed with the ADNDRC as at 13 June 2014⁶ – two of which were handled by this firm. So far these cases have been uncontroversial.

All three cases were based on similar facts, i.e., the disputed domain names were identical to the complainants' registered trade marks (save for the domain extension) and also resolved to parking pages.

The Examiners in each of the cases found that the complainant had provided “clear and convincing evidence” to establish all the required elements. In particular, the Examiners relied on the following facts in reaching their decision:

- The complainants all had numerous registered trade mark rights that were well-known, and which were incorporated in their entirety in the disputed domain names;
- In two of the cases, the Examiners specifically noted that the complainants had also registered their trade marks with the Trademark Clearing House, and so the respondents must have received notice of the relevant complainant's trade mark rights prior to their registration of the disputed domain names; and
- The respondents must have been aware of the complainants and their trade mark rights prior to registration of the disputed domain names, based on one or more of the above reasons. For one of the cases, the Examiner also noted that the complainants trade mark was a made up word having no common meaning in any language.

The Examiners found in two of the cases that due to the well-known nature of the complainants' trade marks, and the fact that the respondents would have been alerted to such rights since the complainant had registered its trade marks with the Trademark Clearing House, any “good faith use by the [respondent] is inconceivable”⁷ and there is “no other plausible explanation for taking a prominent name, incorporating it in a domain name...and using it in the manner described”⁸. As such, the Examiners held that the respondents had registered and were using the domain names in bad faith to take advantage of the complainants goodwill and creating a likelihood of confusion, for commercial gain.

In the other URS case, the Examiner found that the fact that the respondent registered three domain names on the same date, each incorporating a different registered trade mark of the

6 Alibaba Group Holding Limited v. Andreas Perschk, ADNDRC Case No. HKS-1400003; Alibaba Group Holding Limited v. Tian Shuping, ADNDRC Case No. HKS-1400002; and Michael Page Recruitment Group Limited v. Tassanee Atsawasakundee, KTI Recruitment Consultants Co. Ltd, ADNDRC Case No. HKS-1400001.

7 Alibaba Group Holding Limited v. Andreas Perschk, ADNDRC Case No. HKS-1400003.

8 Michael Page Recruitment Group Limited v. Tassanee Atsawasakundee, KTI Recruitment Consultants Co. Ltd, ADNDRC Case No. HKS-1400001.


complainant, showed a pattern of conduct aimed at preventing the complaint from reflecting its marks in corresponding domain names⁹.

URS or UDRP proceedings?

When deciding whether or not to bring URS or UDRP proceedings, the following questions should be considered:

1. Is the complainant seeking a quick and cheap resolution, wishing simply to stop the infringing activities as soon as possible?
2. Is the domain name an unimportant one, which the complainant does not want to use themselves?
3. Does the complainant hold a registered word mark?
4. Is the word mark relatively well-known?
5. Is there a low risk of repeat infringement, i.e., is it unlikely that the domain name will be re-registered by an infringer?
6. Does the domain name relate to a mark that the complainant only intends to use for a short-term or temporary campaign, and which is not an essential trade mark for the complainant in the long term?
7. Is the respondent obviously infringing the complainant's rights, e.g., is the respondent using the disputed domain name to sell competing products or counterfeit goods, etc?
8. Does the respondent have no viable defence, e.g., it is not a reseller of the complainant, the complainant's mark is not a generic term, etc?

If any of the answers to the above questions are no, then UDRP proceedings may be preferred, in light of the higher burden of proof and the limited remedy (i.e., suspension of the domain name) involved in URS proceedings, and the 500 word limit for URS complainants.

For more details regarding the URS procedure, please refer to our article entitled "The URS – A Strong Alternative to UDRP Actions for New gTLDs?"¹⁰. 

⁹ Alibaba Group Holding Limited v. Tian Shuping, ADNDRC Case No. HKS-1400002.

¹⁰ www.mayerbrown.com/The-URS--A-Strong-Alternative-to-UDRP-Actions-for-New-gTLDs-11-29-2013



Chinese Postal Bureau Issues Personal Data Protection Rules

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In March 2014, the Chinese State Postal Bureau (SPB) issued three sets of provisions (the “Three Provisions”) which now constitute a regulatory framework for data privacy in relation to postal and express delivery (PED) services in China. The new legislation represents the most recent addition to China’s growing collection of sector-specific statute on the treatment of personal data.

The Three Provisions are:

1. Provisions on the Management of the Security of Personal Data of Postal and Delivery Service Users (the “Security Provisions”);
2. Provisions on the Management of Undeliverable and Unreturnable Express Items (the “Undeliverable Items Provisions”); and
3. Provisions on the Reporting and Handling of Security-related Operational Information in the Postal Industry (the “Reporting Provisions”).

1. THE SECURITY PROVISIONS

The Security Provisions were enacted on 26 March 2014. Their aim is to prevent the leakage and loss of personal data. Personal data is defined to include any of the names, addresses, ID numbers, telephone numbers and company names of the sender and recipient, as well as the order number, delivery time and details of the posted item. The Security Provisions apply to all PED service activities that involve personal data safety, and the supervision and management of these activities.

Under the Security Provisions, PED enterprises are required to enter into written confidentiality agreements with their employees. They are also expected to train and educate their staff on their ethical responsibilities. Without clear legal authorisation or written agreement, PED enterprises may not disclose any personal data to anyone, with the exception of the police and national security bureaus who are conducting investigations in accordance with the law.

The Security Provisions contain chapters on the safe management of (i) physical delivery records and (ii) electronic delivery records. PED enterprises are required to maintain a physical set of traceable records in a centralised, secure area. They are encouraged to increase the use of technology in order to reduce the likelihood of data leakage, and to reduce the number of staff involved in the handling process.

PED enterprises are also required to increase the security of their electronic record storage by using data encryption methods and ensuring the safe use and protection of devices on which personal data is stored. Any copying, destruction or large-scale extraction of personal data should be reviewed and examined. PED enterprises are required to appoint a network manager to protect and improve the operation of their data systems, database and network. PEDs are also required to conduct regular internal audits and risk assessments.

The SPB has power to investigate any contravention of the Security Provisions by PED enterprises that may impair personal data security; PED enterprises who refuse to comply with the Security Regulations are liable to having their express delivery business permits revoked. Any unauthorised provision of personal data that constitutes an offence will be directed to legal authorities which may pursue a criminal investigation. PED enterprises are also liable to compensate any loss suffered as a result of leakage of personal data.

2. THE UNDELIVERABLE ITEMS PROVISIONS

The Undeliverable Items Provisions came into effect on 10 March 2014. They set out the steps that express delivery enterprises should take in relation to items that cannot be delivered or returned to the sender (“UUIs”). Under the Undeliverable Items Provisions, express delivery enterprises are required to establish a management procedure for UUIs. They should maintain a special UUI storage area, in which UUIs will be preserved for a minimum of one year from registration.

Where UUIs are not claimed by the end of the preservation period, express delivery enterprises may open the packages and take photographs and notes of their contents. Express delivery enterprises are required to set up a claim platform on which details of these opened packages will be publicly advertised for a period of at least 30 days.

During the preservation and handling period, express delivery enterprises must not unlawfully disclose the data of the service users.

3. THE REPORTING PROVISIONS

The Reporting Provisions, enacted on 26 March 2014, create a framework for the efficient and comprehensive reporting of operational information that may have an impact on security. Operational information that may have an impact on security is categorised either as (i) information on unexpected situations; or (ii) information on day-to-day operations.

Information on unexpected situations includes information on natural disasters, chemical leakage, epidemics and terrorist attacks that have led to staff deaths, staff injury or the large-scale destruction, loss or backlog of postal items. Information on day-to-day operations includes the discovery of illegal substances such as explosives and drugs, theft of postal items, change of staff and the hijacking of delivery vehicles.

The Reporting Provisions identify the authorities to which PEDs should report different types of information, and set out the appropriate responses. For example, when notified of certain information on unexpected situations, PEDs should implement a 24-hour duty system to receive, verify and track information on the situation.

At half-yearly intervals, PEDs are required to submit a report to the authority below the Provincial Postal Bureau in the form provided, containing information such as number of staff deaths, number of lost postal items, and number of cases of data leakage. The authorities below the Provincial Postal Bureau must collate the figures and report to the Provincial Postal Bureau, which must in turn report to the SPB. ☺



Risks of Crowd Funding – Notice Issued by the SFC

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Due to the growing popularity of crowd funding in Hong Kong, on 7 May 2014, the Hong Kong Securities and Futures Commission (SFC) issued a notice to remind all operators of crowd funds that crowd funding may involve the application of securities laws and regulations, and to warn investors of the risks involved in crowd funding (“Notice”).

WHAT IS CROWD FUNDING?

“Crowd funding” involves the investment of a small amount of money by a large number of different people via an online platform, which is used to fund a project, business or loan. Typical examples of crowd funding include where a number of people invest in a start-up business and gain an interest in the shares of the start-up company, or they donate money towards a charitable cause, or make a loan to a third party, etc.

The key players in a crowd-funding activity are (i) the operator of the crowd-funding online platform; (ii) the organisation, business or borrower (i.e., the organisation or individual that is receiving and using the investment); and (iii) the investor (i.e., the person making the investment).

WHAT IS THE CURRENT REGULATORY REGIME?

Currently crowd funding is not specifically regulated by a single overarching law in Hong Kong. However, this does not mean that crowd funding is unregulated; a variety of different laws may kick in, depending on the nature of the crowd funding. In particular, crowd-funding activities may be subject to the requirements of the Securities and Futures Ordinance (Cap. 571) (SFO) or the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32).

In summary, those engaged in crowd-funding activities may find themselves subject to the following restrictions or requirements (unless an exemption applies):

- Restrictions on the issuance of an advertisement, invitation or document that knowingly invites the public to acquire securities or participate in collective investment schemes;
- Prospectus registration requirements in relation to the public offering of shares or debentures of a company;
- The crowd-funding operator may need to be licensed under the SFO if it carries out any regulated activities, e.g., dealing in securities, advising on securities, providing automated trading services, etc., which will also give rise to other SFC requirements set out in applicable codes or guidelines; and
- Requirements in relation to automated trading services and recognised exchange companies, depending on the nature of the crowd-funding platform.

Breach of any legal or regulatory requirements, including those set out above, may result in criminal and civil liability.

WHAT ARE THE RISKS POSED TO INVESTORS?

Due to the anonymous nature of crowd funding, and the fact that it is done via an online platform, investors are exposed to a number of risks. Investors should consider all possible risks before deciding whether or not to participate in crowd funding. These risks include the following:

- The investor may lose their investment, e.g., the project or business it has invested in may fail, the borrower may default on the unsecured loan, or the crowd-funding platform may be shutdown or the operator may become insolvent;
- There is a higher risk of fraud or other illegal activities, i.e., money laundering or illegal commerce, due to the anonymous nature of crowd-funding platforms;
- There is greater difficulty in liquidating their investments in crowd funding as there is limited or no secondary market for the investments;
- There is a significant risk of loss or theft of information (including personal data), as the crowd-funding platform may be hacked or have weak security measures in place;
- If the crowd-funding platform is operated or hosted outside of Hong Kong, then the investor may not be able to benefit from the same level of legal protection provided in Hong Kong; and
- There may be a lack of full and accurate information on, or vetting by the crowd-funding operator of, the investment or loan being made, including the project, business or person that is receiving the investment or loan.

CONCLUSION

The Notice draws attention to the risks posed by crowd funding, from criminal liability for operators to the risks for investors of loss of money or even identity theft. As such, crowd funding should not be taken lightly. We advise all persons engaged in crowd-funding activities to follow the clear message set out in the Notice – seek legal advice before investing or engaging in crowd funding. 📶

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