



Stevenson, Wong & Co.

史蒂文生黃律師事務所

Solicitors and Notaries, Agents for Trade Marks & Patents

CB(1)168/06-07(02)

Partners:

Angus Forsyth *	霍 雷
Willy Y.P. Cheng ***	鄭炎潘
Hank H.F. Lo *	勞恒晃
Neville J.J. Watkins **	韋健士
Anita L. F. Chan	陳麗芬
Catherine K. G. Por **	傅景元
Wendy W. S. Lam *	林穎詩
Yvonne T. Y. Chia	謝天懿
Lai S. Lam *	林麗嫻
Cornelia W. C. Chu	朱志瀅

* Notary Public of Hong Kong

香港公証律師

** China - Appointed Attesting Officer

中國委託公証人

** Civil Celebrant of Marriages

婚姻監禮人

Head Office:

4/F & 5/F, Central Tower, No. 28 Queen's Road Central, Hong Kong

總行:

香港皇后大道中28號中匯大廈四樓及五樓

Email 電郵: general@sw-hk.com

Telephone 電話: (852) 2526 6311

Website 網址: http://www.sw-hk.com

Facsimile 傳真: (852) 2845 0638

Interchange DX No: 009220 Central 1

(852) 2845 9184

China Office:

Suite 1704, Citic Plaza, 233 Tian He N. Road, Guangzhou 510613, China

中國辦事處:

中國廣州天河北路233號中信廣場辦公大樓1704室

郵編: 510613

Telephone 電話: (8620) 8752 1228

Facsimile 傳真: (8620) 8752 1268

Our Ref: FKF/64830/06

Date: 24 October 2006

Your Ref:

Reply Fax:

By Fax (2537-1851) & By Post

Bills Committee on
Unsolicited Electronic Messages Bill
Legislative Council
Legislative Council Building
8 Jackson Road
Central, Hong Kong

Attn.: The Hon. Howard Young, SBS, JP / The Chairman

Dear Sirs,

Re.: Unsolicited Electronic Messages Bill ("Bill")

We refer to the above matter.

Our firm shares the general concern in the community regarding the development of the anti-spam legislation in Hong Kong and we have been looking at the matter from time to time, in particular the "Consultation Paper on the Legislative Proposals to Contain the Problem of Unsolicited Electronic Messages" issued by the Commerce, Industry and Technology Bureau in January 2006 and the Bill published in the Government of the Hong Kong Special Administration Region Gazette on 7 July 2006.

As common case, the consultation period is too short and not easy to follow with a reasoned contribution. So, we have been looking at this until now and would like to make the following observations that may be of any assistance to your Committee:-

1. Clause 2: Definition of "commercial electronic message"

It is observed that the definition of "commercial electronic message" is focused on the subject matters of "goods", "services", "facilities", "land", "an interest in land", "a business opportunity", "an investment opportunity" in the course of or in the furtherance of any business.

We find that there may be situations that the sender of commercial electronic

Asia Pacific

Auckland • Bangkok • Brisbane • Canberra
Jakarta • Hanoi • Ho Chi Minh • Kuala Lumpur
Manila • Melbourne • Shanghai • Singapore
Seoul • Sydney • Tokyo

Europe/Africa/Middle East

Amsterdam • Athens • Barcelona • Berlin • Brussels • Budapest
Copenhagen • Dublin • Edinburgh • Frankfurt • Geneva • Helsinki
Istanbul • Johannesburg • Lagos • Lisbon • London • Madrid • Moscow
Munich • Oslo • Paris • Prague • Stockholm • Tel Aviv • Vienna • Zurich

North and South America

Atlanta • Boston • Buenos Aires • Chicago • Dallas • Denver
Houston • Los Angeles • Mexico City • Miami • Milwaukee • Montreal
New York • Orlando • Rio de Janeiro • Santiago • Seattle • Toronto
Vancouver • Washington, DC

message may not directly offer to supply; offer to provide; advertise or promote; advertise or promote a supplier or a prospective supplier of; or advertise or promote a provider or a prospective provider of the said "goods", "services", facilities", "land", "an interest in land", "a business opportunity", "an investment opportunity".

For example, we may sometimes receive emails from spammers informing us that we win a lucky draw and ask us to contact the spammers for the redemption of the lucky draw prize. In this case, the actual advertising or promoting activities will only start when we make any reply to the spammers. However, we note that such person-to-person interactive communications between a caller and a recipient without any pre-recorded or synthesized (machine-generated or simulated) element will be excluded from the application of the ordinance (once the Bill becomes effective) under Schedule 1 of the Bill, unless the said Schedule 1 is amended by the Secretary for Commerce, Industry and Technology by notice published in the government gazette.

Therefore, we would recommend widening the definition of "commercial electronic message" by adding a new category as "to obtain, assist to obtain, or attempt to obtain any gain, benefit, or advantage in the course of or in the furtherance of any business". In our view this will assist in removing one possible platform for the spammers to play tricks by presenting the commercial electronic message in a way that it does not fall into one of the presently exclusive five categories of the commercial electronic message under the Bill.

2. **Clause 3: Meaning of "Hong Kong link"**

The meaning of "Hong Kong link" concerns the extent of the extra-territorial effect of the Bill. From the meaning of "Hong Kong link" in the Bill, it is interesting to note that the Bill will regulate commercial electronic messages originating from Hong Kong as well as those sent from overseas to a Hong Kong electronic address.

However, spamming may somehow be an international phenomenon/ problem that international co-operation is needed to combat against spamming. There may be situations that some international spammers may use the open relays located in Hong Kong to spam any recipients in any places or countries outside Hong Kong. If it is the case, the commercial electronic messages that transmitted through the open replays in Hong Kong may fall outside the meaning of "Hong Kong link".

Therefore, subject to the legislative intent regarding the extra-territorial application of

the Bill, the Committee may consider whether to extend the meaning of "Hong Kong link" to commercial electronic message that pass through Hong Kong during the transmission of any such commercial electronic message.

3. **Clause 8: Unsubscribe facility**

We would recommend the unsubscribe facility should be provided in both Chinese and English languages to avoid any doubts regarding the use of language of the unsubscribe facility provided by the senders of commercial electronic messages.

4. **Clause 12 and Clause 23(3): Calling line identification**

It is observed that Clause 12 and Clause 23(3) of the Bill may create a certain degree of uncertainty or inconsistency.

Clause 12 is one of the rules about sending commercial electronic messages under Part 2 of the Bill, which prohibits a person who sends a commercial electronic message that has a Hong Kong link from an electronic address that is a telephone number or facsimile number ("the sending number") from concealing or withholding from the called party the calling line identification information of the sending number. It also prohibits the person from performing any operating or issuing any instruction for that purpose.

Contravention of Clause 12 will not directly attract an immediate criminal liability. Clause 35 of the Bill empowers the Telecommunications Authority to issue an enforcement notice to a person if he is of the opinion that that person is contravening any provision of Part 2 or has contravened one of those provisions in circumstances that make it likely that the contravention will continue or to be repeated. Clause 36 of the Bill then makes it an offence for any person to contravene an enforcement notice. In other words, the contravention of Clause 12 will only be "criminalized" if and when a person does not comply with the enforcement notice issued by the Telecommunications Authority.

On the contrary, Clause 23 makes it an offence for any person to materially falsify header information in multiple commercial electronic messages that have a Hong Kong link and to knowingly or recklessly initiate the transmission of such messages from a telecommunication device, service or network. However, Clause 23(3) provides an exclusion that in relation to the sending of a commercial electronic message from an electronic address that is a telephone number or facsimile number

("the sending number"), the person initiating the transmission of such a message shall not be treated as having materially falsified header information by reason only that he has performed any operation or issued any instruction in connection with the sending of the message for the purpose of, or that has the effect of, concealing or withholding from the called party the calling line identification information of the sending number.

We duly note the differences between Clause 12 and Clause 23 as follows:-

- (1) Clause 12 governs "commercial electronic messages" irrespective of the numbers of commercial electronic messages being sent; whereas Clause 23 governs "multiple commercial electronic messages" being sent in bulk quantities.
- (2) Clause 12 is a rule under Part 2 of the Bill and will only be "criminalized" until a person fails to comply with the enforcement notice issued by the Telecommunications Authority; whereas Clause 23 is an offence relating to fraud and other illicit activities related to transmission of commercial electronic messages under Part 4 of the Bill and the commission of which is an offence and is liable on conviction on indictment to a fine and to imprisonment for 10 years.

Despite the aforesaid differences, there may be a degree of uncertainty or inconsistency because Clause 12 is a prohibition; but Clause 23(3) is an exclusion, but it seems that they cover the same situation. Furthermore, there does appear to be a genuine question how Clause 12 and Clause 23(3) will be reconciled when this question arises in a real life situation.

5. Clause 20(2): Definition of "multiple commercial electronic messages"

It is fully aware that the definition of "multiple commercial electronic messages" is made by reference to Section 4 of the "CAN-SPAM Act of 2003" in USA and Section 6 of the "Spam Control Bill" in Singapore, save and except that the meaning in USA and Singapore is also extended to cover more than 10,000 electronic messages during a one-year period.

However, we have concerns that the strict numeral definition under the Bill (i.e. more than 100 commercial electronic messages during a 24-hour period, or more than 1,000 commercial electronic messages during a 30-day period) may create a

loophole for the spammers to exploit because if a spammer only sends 99 commercial electronic messages during a 24-hour period, or 999 commercial electronic messages during a 30-day period by means of fraud or other illicit activities prohibited in Part 4 of the Bill, the spammers will not be caught under Part 4 because of the non-fulfillment of the definition of "multiple commercial electronic messages".

"Fraud/ illicit activities" itself is "fraud/illicit activities"; and we are of the view that commission of the fraudulent/ illicit offence should not be subject to an artificial threshold of the number of commercial electronic messages being initiated however superficially convenient that may be to administer. The number of commercial electronic messages being initiated is only relevant to the seriousness of the offence and severity of the penalty imposed by the courts, instead of relating to the actual commission of the offence per se.

6. **Clause 22(1): Initiating transmission of multiple commercial electronic messages with intent to deceive or mislead recipients as to the source of messages**

Clause 22(1) makes it an offence for any person to knowingly initiate the transmission of multiple commercial electronic messages that have a Hong Kong link from a telecommunications device, service or network without authorization, with the intent to deceive or mislead recipients as to the source of such messages.

We would suggest adding the mens rea of "recklessly" i.e. with gross or active negligence relating to actus reus element of "initiates the transmission of multiple commercial electronic messages that have a Hong Kong link from a telecommunications device, service or network without authorization", which may assist the prosecution division to prove the limb of the said actus reus under the Clause 22 offence.

7. **Clause 25(1)(a): False representations regarding registrant or successor in interest to registrant of electronic address or domain name**

It is interesting to note that there is no mens rea requirement relating to the actus reus element of "falsely represents himself to be the registrant or the legitimate successor in the interest to the registrant of 5 or more electronic addresses or 2 or more domain names". We believe that it is the legislative intention to do so.

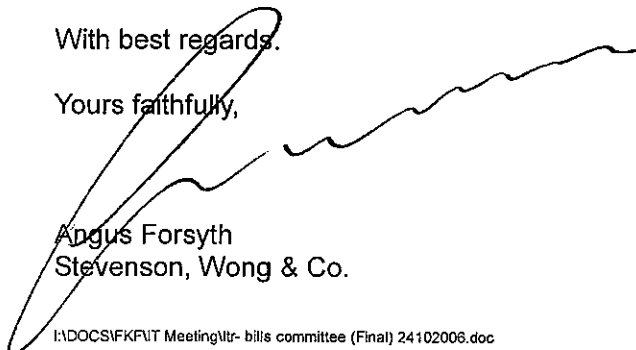
We believe that there is no right or wrong answer for the aforesaid observations and we

hope the above may provide enlightenment for the discussion of the Bills Committee and we are looking forward for the enactment of the first piece of anti-spam legislation in Hong Kong.

Thank you for your attention.

With best regards.

Yours faithfully,



Angus Forsyth
Stevenson, Wong & Co.