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CASE NOTE – TRADE MARK INFRINGEMENT & PASSING OFF

Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide, Inc and Anor [2012] SGHC 204

The Appellant, Staywell Hospitality Group Pty Ltd, applied to register the sign 'Park Regis' on 3 March 2008 in a series of two marks in Class 35, for advertising, marketing, promotion and publicity services; business management, business administration, office functions and provision of office facilities, etc., and also in Class 43, for provision of hotel services and other services related to or connected with the hospitality industry.

The Respondents, Starwood Hotels and Sheraton took a joint stand and filed a notice of opposition to oppose the application on the grounds that the sign was similar to their ST REGIS trade mark and would result in public confusion as to the source of Staywell's services, that the application was made in bad faith, and that the ST REGIS was well known to the public.

The Principal Assistant Registrar of Trade Marks found that the marks and services were indeed similar, and would likely result in public confusion as the ST REGIS mark was well known in Singapore as of March 2008.

On appeal to the High Court, the court found that the PARK REGIS sign was similar to the ST REGIS trade mark both aurally and conceptually, as well as in the services provided thereunder, but went on to find that nonetheless, it was not likely that confusion will arise. The judge found that while the services provided by both parties were not qualitatively different, Staywell had taken steps to differentiate its services from those of Starwood and Sheraton through the prominent display of its signs on its website and differentiated marketing of its services.

The court also found that a reasonable and discerning customer would be able to establish that both parties were entities that were not economically-linked, and while it was not possible to state categorically distinguish the kind of customer for the goods of both parties, in the context of the trading circumstances, a simple internet search or clarification from travel agents or hotels would suffice to dispel any confusion. The court also reversed the registrar's findings that the ST REGIS brand was likely to be damaged since there was unlikely to be any confusion.

CONTACT US

Jo-Ann See
Director
Direct: +65 6303 6211
joann.see@amicalaw.com

Wilson Wong
Director
Direct: +65 6303 6213
wilson.wong@amicalaw.com

Jason Chan
Director
Direct: +65 6303 6215
jason.chan@amicalaw.com

Winnie Tham
Director
Direct: +65 6303 6217
winnie.tham@amicalaw.com

Elaine Tan
Director
Direct: +65 6303 6229
elaine.tan@amicalaw.com

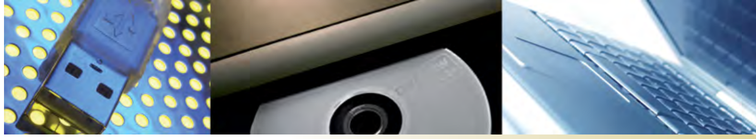
Geraldine Tan
Associate Director
Direct: +65 6303 6221
geraldine.tan@amicalaw.com

Zhang Weilin
Principal,
Patent Prosecution Group
Direct: +65 6372 5488
zhang.weilin@amicalaw.com

ADDRESS

30 Raffles Place
#18-03/04 Chevron House
Singapore 048622
Tel: +65 6303 6210
Fax: +65 6303 6222
+65 6536 9332

www.amicalaw.com



Sarika Connoisseur Café Pte Ltd v Ferrero SpA [2012] SGCA 56

The Appellant, Sarika Connoisseur Café Pte Ltd, introduced a new gourmet hot coffee beverage called "Nutello" in its "tcc - the connoisseur concerto" cafes. The drink, listed under "The Espresso Specialties" section of its menu, included the famous "Nutella" hazelnut spread as one of its ingredients. The drink was described in the menu as "Espresso with lashings of nutella – perfect for cocoa lovers!".

The Respondent, Ferrero SpA, issued a cease-and-desist letter to the Appellant in December 2009 to object to the use of the "NUTELLO" sign. In January 2010, Ferrero SpA instituted proceedings in the High Court. In July 2011, the "Nutello" item was discontinued by the Appellants, ostensibly due to a menu overhaul.

The decision in the court below found that the Appellant had infringed the Respondents' NUTELLA trade mark under section 27(2)(b) of the Trade Marks Act ("TMA"), given the similarity of the NUTELLO sign to the NUTELLA trade mark. The court also found dilution under the well-known trade marks regime (sections 52 and 55(3)(a) of the TMA) as well as passing off.

On appeal, the Court of Appeal upheld the decision below that there was trade mark infringement under section 27(2)(b) of the TMA. It was held that the trial judge had erred in finding that there was conceptual similarity between the two marks. While similar in the visual and aural sense, the meaningless nature of the words did not evoke any ideas and did not necessarily suggest a conceptual similarity.

The court also dismissed the Appellants' argument that evidence of the rising sales of the Respondents' NUTELLA spread suggests indirectly that there was in fact no confusion, since it did not follow as a general proposition that evidence of confusion will lead to a fall in sales.

Also, whilst the "Nutello" coffee beverage could not be considered a "chocolate product" under Class 30 of the International Classification Of Goods & Services (since there were separate categories of goods for different types of chocolate, milk and cocoa-based beverages and that Ferrero had not registered the NUTELLA trade mark under this class) the Court of Appeal nevertheless found that extraneous factors had to be considered in taking a holistic view of all the circumstances. In its view, there existed a real likelihood that a substantial portion of the general public would be mistaken in assuming that both parties were related or had a business relationship, noting that the question of confusion was ultimately a matter of perception.

Doctor's Associates Inc v Lim Eng Wah (trading as SUBWAY NICHE) [2012] 3 SLR 193

The Plaintiff owns the popular international sandwich chain named SUBWAY, a name they adopted in 1967. Its first outlet in Singapore was opened in 1996 and they registered the SUBWAY trade mark in Singapore in Classes 29, 30, 32, 42 and 43 between 1989 and 2004. The Defendant has been operating a chain of snack outlets under the name SUBWAY NICHE which sold local cakes, bubble tea and snacks since 1987.

The Plaintiff sued the Defendant for infringement of a registered mark, infringement of a well-known mark and passing off.

The High Court found SUBWAY and SUBWAY NICHE to be visually, aurally and conceptually similar. The goods and services on which SUBWAY NICHE were similar to those registered for SUBWAY. However, the Defendant had several distinguishing traits from the Plaintiff's SUBWAY business, including manner of display and retail as well as in pricing and décor.

The court held that there was insufficient evidence of likelihood of confusion and finding it was "hypothetical and speculative". As such, infringement was not established. Therefore, the claim for infringement of a registered trade mark failed under section 27(2)(b) of the Trade Marks Act. The court went further to consider the defence of prior user and held that there was evidence to support the defence in relation to sale of sandwiches and local cake but not in relation to restaurant services.

The court accepted that whilst SUBWAY is a well-known trade mark in Singapore in view of its 92 outlets and extensive marketing and advertising, there was no likelihood of confusion and there was insufficient evidence that there was damage to the Plaintiff's interests. Accordingly, the claim for infringement of a well-known trade mark also failed. The claim for passing off was also dismissed because it could not be established that there was goodwill in the SUBWAY trade mark in 1987, the year when the Defendant started its operations.

Hai Tong Co (Pte) Ltd v Ventree Singapore Pte Ltd and Anor [2012] SGHC 104

The Plaintiff was the registered proprietor of the mark

Lady Rose

in respect of "*Perfumery, essential oils, hair lotions, hair creams and cosmetics*" (the "Registered Mark"). The Plaintiff had used this mark since 1960 in Singapore, on products including a two-way cake and a foundation with sunscreen. The Plaintiff's products were sold in a blue packaging.

The First Defendant was the sole importer and distributor of a range of South Korean cosmetics products under the name ROSE LADY and which contained essence of dog rose as an ingredient. These products included a two-way cake and foundation, and were sold in a peach-coloured packaging bearing sketches of five-petalled flowers (the "Infringing Products"). The Second Defendant was a retailer who sold ROSE LADY foundation.

In 2010, the Plaintiff received complaints regarding the quality of certain LADY ROSE cosmetic products packaged in a peach-coloured case. The Plaintiff thus became concerned about the possibility of counterfeit LADY ROSE products on the market, and undertook investigations that revealed the import and sale of ROSE LADY products by the Defendants.

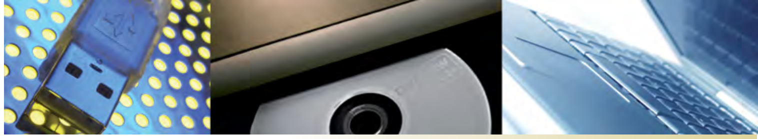
The Plaintiff brought an action against the Defendants for infringement of the Registered Mark and for passing off. The Plaintiff alleged that the Defendants had infringed the Registered Mark under section 27(2)(b) of the Trade Marks Act ("TMA"), which states that "a person infringes a registered trade mark if, without the consent of the proprietor of the trade mark, he uses in the course of trade a sign where because … the sign is similar to the trade mark and is used in relation to goods or services identical with or similar to those for which the trade mark is registered, there exists a likelihood of confusion on the part of the public."

Infringement of the Registered Mark

The High Court held that the Defendants had infringed the Registered Mark by importing and offering for sale the Infringing Products, and ordered, *inter alia*, an injunction to restrain both Defendants from infringing the Registered Mark and an inquiry as to damages. Chan Seng Onn J ("Chan J") identified the four elements in TMA s. 27(2)(b), and found that the Plaintiff had established all the elements.

First, the ROSE LADY sign was used "in the course of trade" as it was used to identify the trade source of the products to which it was applied. Although the words "Rose" and "Lady" were common words individually, their combination was distinctive and served to identify the trade source of the cosmetic products rather than to describe the products. In addition, although the ROSE LADY sign was used together with a house mark, it was clearly used as a secondary mark to indicate the trade source of the product. Chan J held that the presence of a house mark does not preclude the possibility that another sign on the packaging is a secondary mark, especially if the latter sign is not descriptive of the product to which it is applied. Further, the ROSE LADY sign was displayed prominently on the product packaging while the house mark was in a much smaller font and less prominent position. This led to the conclusion that the ROSE LADY sign was intended to and did function as a secondary trade mark.

Second, the ROSE LADY sign was visually, aurally and conceptually similar to the Registered Mark. Citing examples of marks that the courts have considered visually similar (HEDGE INVEST/InvestHedge, FORWARD THINKING/THINKING FORWARD, Fresh & Blue/blue & fresh, Adelaide Le Mans/Le Mans Adelaide), Chan J observed that the mere inversion of two identical words would not prevent the marks from being considered visually or aurally similar. Further, although the font and overall design of the marks differed to some extent, it was the words in each mark that would stand out to a consumer. Emphasising the principle of imperfect recollection, the court held that the marks were visually and aurally similar. Also, the marks shared a "floral and feminine" concept.



Third, the ROSE LADY sign was used in relation to goods identical or at least similar to those for which the Registered Mark was registered, as the Defendants' products were ladies' skin cover and foundation cosmetic products.

Finally, the above similarities were likely to lead to confusion among the relevant public. Chan J reiterated the principle that where there is greater similarity between the marks and between the goods in question, it is easier to find a likelihood of confusion. As the marks and goods were highly similar, and the goods were marketed in similar locations and targeted at the same customer group, there was a likelihood that a substantial portion of consumers would be confused.

Passing Off

Applying the classic trinity of goodwill, misrepresentation and damage, the High Court held that the Plaintiff had failed to establish sufficient goodwill in the LADY ROSE mark, or that it would suffer damage from the Defendants' alleged misrepresentation.

The Plaintiff's case was undermined by its failure to indicate its market share in the cosmetics industry, and the fact that it had not identified the proportion of its sales figures that related to cosmetics, as opposed to non-cosmetic products. The court also focused on the fact that the Plaintiff had not advertised its products since 1979, stating that "*without adequate and sustained promotion and advertisement, especially in the crowded and competitive cosmetics market place in Singapore*", the Plaintiff's mark could have remained unknown to the relevant sector. As a result, the Plaintiff had not proved that it had more than trivial goodwill in the LADY ROSE mark.

In addition, Chan J held that the Plaintiff had failed to adduce evidence of damage or a likelihood of damage, besides a mere assertion that the Infringing Products were in direct competition with the Plaintiff's goods. Consequently, the claim in passing off failed.

CASENOTE - PATENTS

Main-Line Corporate Holdings Ltd v. DBS Bank Ltd [2012] SGHC 147

The High Court recently weighed in on the latest installment of the Main-Line saga – a.k.a. the gamut of litigation surrounding the patent known as the "Dynamic Currency Conversion for Card Payment Systems". Owned by an Irish company, Main-Line Corporate Holdings Ltd (**"Main-Line"**), the patent has spawned at least 6 written decisions (including 2 from the Court of Appeal) on issues ranging from its validity to Main-Line's election of remedies.

The patent involves a method for automatically determining the currency to process a credit card transaction in at the point of sale, without the need for any manual selection by the merchant and/or the cardholder to identify the card's currency. With this patent, cardholders purchasing goods and services overseas are given the option of making payment in the local currency of the merchant, or in their own card billing currency. Main-Line had previously commenced proceedings against United Overseas Bank (**"UOB"**) and First Currency Choice (**"FCC"**), for alleged infringement of their patent. In its seminal decision, the Court of Appeal eventually held that the patent was valid (in particular, it was both novel and involved an inventive step), and that UOB and FCC had infringed the patent by making use of a payment system which comprised the very method disclosed in the former (**"the UOB CA Decision"**).

In the present case, Main-Line brought similar proceedings against the Development Bank of Singapore (**"DBS"**) over their use of an automatic currency detection service known as the "Monex System". The Monex System was provided to DBS by E-Clearing Singapore (**"ECS"**), which did so via terminals located at the premises of merchants acquired by DBS. Under their agreement, ECS also trained the merchant's employees in the use of the terminals.

Main-Line was first alerted to DBS's potential infringement in December 2008, when one of its directors, Declan Barry, was having tea at the Fullerton while in Singapore. At the time of payment, he noticed that dynamic currency conversion for foreign cards was being offered in the name of DBS. Main-Line promptly brought the present proceedings, alleging infringement of their patent and relying heavily on the UOB CA Decision. In response, DBS a) counter-claimed that the patent was invalid, arguing that Main-Line's European patent had recently been revoked by the European Patent Office (**"EPO"**) on the grounds of added subject matter and lack of an inventive step; or b) in the alternative, that Main-Line's case for patent infringement was not made out.

Validity of the Patent

Main-Line claimed that the High Court was bound by the UOB CA Decision that the patent was valid and subsisting, even in the face of the EPO's decision to revoke the European patent. The High Court agreed, emphasizing that Singapore was not a party to the European Patent Convention and was thus not bound to give consideration to its decisions. These would be of persuasive value at best:

> *"…the statutory matrices and prevailing administrative practices in Singapore clearly differ from those in Europe…the mere fact that the EPO has come to a different conclusion from our Court of Appeal, certainly does not mean that this court should regard itself to be free to depart from the UOB Court of Appeal decision."*

On that basis, Main-Line's patent was novel (DBS having failed to discharge its burden of showing that the Monex System had been in use before the patent's priority date), involved an inventive step (following the Court of Appeal's endorsement of the continued applicability of the *Windsurfing* test, and rejecting the EPO's "problem-solution" approach), and did not contain additional subject matter (which would have made it liable to revocation under section 80(1)(d) of the Patents Act). The third finding was considered in detail, as it was not raised during the UOB CA Decision. Rejecting DBS's submissions, the court found that amendments made by Main-Line to the patent only occurred in one part of the specification and were merely to correct an obvious error, rather than to add subject matter. Further, the

question of whether subject matter had been added had to be addressed from the viewpoint of a notionally skilled person. As Main-Line's expert witness successfully convinced the court that she would not have viewed the amendments as having changed the substance of the patent's disclosure, the patent was, yet again, held to be valid.

Infringement

The High Court held that Main-Line's patent had been infringed. The Monex System had incorporated each and every one of the "essential integers" of the Main-Line patent, such as deriving an "identifier code" from the cardholder's card number alone. The court's finding was based on Declan Barry's experience and observations of the patent at work while at the Fullerton Hotel, as well as witnesses' evidence that the Monex System could only work in a manner which would infringe the patent.

In response, DBS argued that it was ECS which had used or offered the Monex System for use. The High Court disagreed:

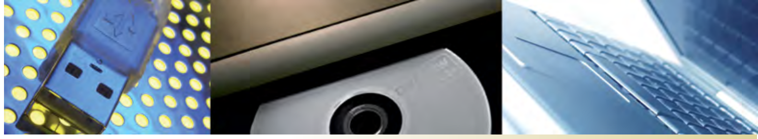
> *"…this amounted to little more than a futile attempt by the defendant to pass the buck, so to speak, to ECS and evade liability…as acquiring bank, the defendant stood directly to benefit from all transactions which undergo automatic currency detection and conversion."*

As DBS's name appeared prominently on the Fullerton transaction receipt, this suggested that the automatic currency detection and conversion was being performed on behalf of DBS. In this regard, ECS was little more than a "*service provider*". As DBS's role in the transaction was "*central*", they should be separately and individually liable for infringement of the patent.

Finally, the court rejected DBS's claim that they did not have knowledge, or that it would not have been obvious to a reasonable person in DBS's circumstances, that the use of the Monex System without Main-Line's consent would amount to infringement. Cross-examination of DBS's witness indicated that he knew about the patent prior to using the Monex System. However, he did not ask to see the patent document or raise the issue with DBS's legal department. The court held that "alarm bells" should have been raised when DBS's witness was aware that the UOB case was being litigated in the High Court:

> *"…even after the UOB Court of Appeal decision was released around October 2007, and it had become evident that there was a real possibility that the defendant could be infringing the Patent, the defendant was content to rely merely on representations and assurances from ECS and Monex instead of making independent inquiries of its own."*

DBS's conduct amounted to "*willful blindness*", which satisfied the knowledge requirement for a finding of patent infringement. A reasonable person in their position would have taken positive steps to independently ascertain whether the Monex System offered by ECS infringed the patent. As such, Main-Line's claim was allowed and DBS's counter-claim dismissed, with damages or an account of profits to be determined before a Registrar.



CASENOTE- COPYRIGHT/CONFIDENTIAL INFORMATION & RESTRICTIVE COVENANT

PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd and Anor [2012] SGHC 133

The Plaintiffs in this action were PH Hydraulics & Engineering Pte Ltd, who commenced proceedings against two defendants – their former employee, a Rinov Herawan, and his new employer, Intrepid Offshore Construction Pte Ltd. Intrepid had published certain drawings of marine winches in their catalogues and on their website, which the Plaintiffs claimed were substantially similar to drawings made by Herawan in the course of his employment with themselves. They brought the following claims: against both Defendants, for copyright infringement and breach of confidential information; and against Herawan only, for breach of a non-compete clause located in his employment contract with the Plaintiff.

Copyright Infringement

The court found that the First and Second Defendants had infringed the copyright in the Plaintiffs’ drawings. Despite being simple, preliminary drawings, they were original artistic works nonetheless and qualified for copyright protection. The court rejected the Defendants’ claim that copyright in the drawings belonged to Herawan, as they had been made in the course of his employment with the Plaintiff.

A *prima facie* inference of copying arose on the basis that Herawan had access to the Plaintiffs’ drawings, and there was a close similarity between the works published by the Defendants and those of the Plaintiffs. The Defendants’ works contained numerous “fingerprints” such as identical erroneous features, which the Defendants were unable to provide any credible explanation for. During cross-examination, the Defendants further made several admissions that they had effectively copied the Dlaintiffs’ drawings. As such, the court found that the Defendants had infringed the copyright present in the Plaintiffs’ drawings, and granted the latter an injunction restraining the Defendants from further infringement. The court further ordered statutory damages (under section 119(2)(d) of the Copyright Act) in lieu of a Registrar’s inquiry, as the Plaintiffs had difficulty proving any real commercial loss resulting the unauthorized use of the drawings.

Breach of Confidence

The Plaintiffs claimed that the drawings were confidential information. A confidentiality statement had been marked at the top of each drawing, and with regard to Herawan, there was an express clause governing confidentiality in his employment agreement with the Plaintiffs. While the Plaintiffs had made the drawings available to a number of customers, these disclosures were for the limited purpose of customers’ use and consideration, and did not destroy the drawings’ status as protectable confidential information.

However, the court disagreed that the drawings were so highly confidential as to amount to trade secrets. The Plaintiffs pointed to the fact that they were password-protected and kept in restricted cabinets. However, the court noted that the Plaintiffs did not have in place a system to record the number

of copies taken or made by its employees. As such, they did not treat the drawings with such a degree of confidence for them to qualify as trade secrets. Nonetheless, the drawings as confidential information were entitled to be protected against unauthorized disclosure. The first Defendants, being indirect recipients of the drawings and knowing of their confidential nature, had breached their equitable obligation of confidence by publishing the drawings on their website and in their catalogues.

As against Herawan, the Plaintiff relied on an express confidentiality clause set out in his employment agreement. The clause was to last for 2 years after the termination of Herawan's employment with the Plaintiff. The court found that Herawan had breached this contractual duty of confidence at the time he took the drawings and passed them on to the first Defendant. However, as this 2-year period had lapsed by the date of hearing, no injunction could be granted to further restrain both Defendants from making use of the drawings.

Restraint of Trade (and the Non-Compete Clause)

The non-compete clause in Herawan's employment agreement sought to prevent him from working with other businesses in competition with the Plaintiffs and its associated companies. The clause applied to Singapore and Malaysia, and was to last for 2 years after Herawan's resignation from the Plaintiff company.

The court held that restraint of trade clauses were prima facie void, unless the Plaintiffs could show that they had a legitimate proprietary interest to be protected by the covenant and that the covenant was reasonable as between the parties and the public. In the immediate case, the Plaintiffs did have a protectable, legitimate proprietary interest – to maintain a pool of employees well-versed and skilled in the Plaintiffs' system of work, such that the Plaintiffs could pursue their commercial activities successfully. The marine winch industry in which the Plaintiff operated was relatively small and specialised. As such, the Plaintiff invested substantial time and resources in training Herawan to build up his expertise in this specialised area. The court gave weight to the difficulties encountered by the Plaintiffs where its employees, after receiving substantial training, left soon thereafter to join their competitors.

Further, the duration and geographical limitations placed on Herawan under the non-compete clause were reasonable. As the Plaintiffs' business was highly specialized, i.e. mainly that of designing and manufacturing marine hydraulic and electrical installations, there was no blanket restriction on Herawan working in the marine industry. The geographical delimitation of the restraint was permissible, as it was confined to the countries where the Plaintiffs had operations – Singapore and Malaysia. The court also pointed out that there were marine industries of substantial size in Thailand and Indonesia, and it was not impossible for Herawan to seek employment there. In particular, Herawan had shown himself to have transferable skill sets, and was likely to be able to secure employment in other related and non-related industries. It was clear that the non-compete clause would not have a serious adverse impact on his livelihood. Overall, the non-compete clause was valid, and there was no need to sever any part of it to preserve the validity of non-offending parts.

However, notwithstanding that the non-compete clause was valid, Herawan could not be held liable for breach of the same. The plaintiffs were found to have acquiesced in Herawan's conduct, in that they stood by for 16 months without taking action despite being aware of the breach. Accordingly, the Plaintiff had induced Herawan to believe that it consented to breach of the non-compete clause, and could not now be permitted to enforce its rights. The Plaintiffs' application for an injunction in this regard was denied.

LEGISLATION UPDATE - New Personal Data Protection Act

The new Personal Data Protection Act 2012 (No. 26 of 2012) ("Act") was passed by the Singapore Parliament on 15 October 2012. The Act will take effect in 3 phases:

1. provisions relating to the formation, administration and powers of the Personal Data Protection Commission (the "Commission") and Data Protection Advisory Committee (the "Advisory Committee") came into force on 2 January 2013;
2. provisions relating to the National Do-Not-Call Registry ("DNC Registry") will come into force in early 2014; and
3. the main data protection provisions will come into force in mid-2014.

The phased implementation of the Act serves as a transition period for organisations to review and adopt internal personal data protection policies and practices, so that they may comply with the Act. The exact dates on which the DNC Registry provisions and other data protection provisions will come into force will be announced at a later date.

Some of the key aspects of the Act are summarily set out below:

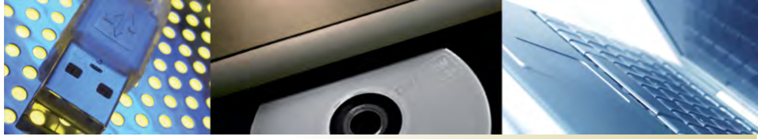
Definition of "Personal Data"

"Personal data" is defined broadly to mean "data, whether true or not, about an individual who can be identified from that data, or from that data and other information to which the organisation has or is likely to have access". This definition covers both electronic and non-electronic forms of data.

Scope of Application

The Act will apply to the collection, use and disclosure of personal data by all organisations with certain exceptions. Public agencies, individuals acting in a personal or domestic capacity or as an employee acting in the course of his employment with an organisation, and other prescribed organisations or prescribed personal data are exempted from the data protection requirements under the Act. Data intermediaries are also exempted from certain data protection obligations under the Act.

Certain types of information are also exempted from the data protection requirements of the Act. For example, unless otherwise stated in the Act, the data protection requirements of the Act do not apply to "business contact information", which is defined as "an individual's name, position name or title, business telephone number, business address, business electronic mail address or business fax number and any other similar information about the individual, not provided by the individual solely for his personal purposes".



Other specific areas covered include the following aspects:
General compliance obligations
Consent
Reasonable Purpose
Access and correction requirements
Care & Security
Retention Period
Transfer outside Singapore
Enforcement
Do Not Call Registry

A fuller explanation of the various aspects of the Act can be found online at www.amicalaw.com .

Implications of Act

The new Act will affect all organisations which collect and process personal data. Some steps that may need to be taken by an organisation include:

1. conducting an internal data compliance audit;
2. appointing one or more personal data manager(s);
3. formulating, publishing and implementing proper corporate policies and procedures to ensure compliance with the Act; and
4. communicating and educating staff of the new corporate policies and procedures implemented to ensure compliance with the Act.

July / December 2012