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# Collaborating with KOLs: Safeguarding Your Business Interests and Rights (Cantonese Session)

Loke-Khoon Tan, Ruby Chan, James Lau, Helen Pang | 27 January 2022



# Speakers



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# Agenda

1 Trending types of KOL engagement

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2 Laws on KOL marketing

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3 Emerging legal risks

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# Trending types of KOL engagement



# Trending types of KOL engagement

## Polling Question 1

Let's say you wake up one day and suddenly decide to switch career to become a KOL to advertise products in livestream shows. If you were to match present-day KOLs in China, how many lipsticks would you need to sell in 5 minutes to match their record?



a. 150

b. 1,500

c. 15,000

# Trending types of KOL engagement

## Video 1

[insert video]



- Plans to launch a new skincare product
- Wishes to collaborate with a KOL

原美達人



2

# Laws on KOL marketing

# Laws on KOL marketing

## Hong Kong - Trade Descriptions Ordinance



### Posting on Social Media



### Livestreaming



### Trade Descriptions Ordinance

- False Trade Description

### Max. penalty:

Fine of HKD 500,000 and 5 years of imprisonment





# Laws on KOL marketing

## China - Advertising Law



### Advertising Law

- Advertisement shall not contain any false or misleading information.



Brands



Publisher



KOL



Advertisement  
Company



# Laws on KOL marketing

## China - Advertising Law



KOLs must have used the products themselves

Advertisement must be marked accordingly



Considered an advertisement

Cannot contain false or deceiving description

Proper management of interactive contents

Cannot delete unfavourable comments



# Laws on KOL marketing

## Polling Question 2

The PRC Advertising Law requires that an advertising endorser must:



**a.** be fluent in both Chinese and English

**b.** have used the product or service being advertised

**c.** have obtained a bachelor's degree in marketing

**d.** have been involved in the design of the product or service being advertised



3

# Emerging legal risks



# Emerging legal risks

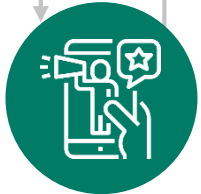
## Hong Kong - Importance of written contract



Brands

### Communicate through

- Email
- WhatsApp messages
- Instagram DM



KOL

### Agree on

- Fee quote
- Content of marketing materials



**Pros:** cost-efficient

**Cons:** in the event of dispute, very limited protection



# Emerging legal risks

## Hong Kong - Importance of written contract



### Brand Services Agreement

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- Details of the parties involved
- Designated period
- Content and materials to be delivered
- Date of publishing
- Payment schedule
- Exclusivity obligation
- Dispute resolution clause
- Necessary licensing, etc.



# Emerging legal risks

## China - Importance of written contract



### Written Contract

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- A legal requirement
- Be aware of
  - Management and control over KOL
  - Compensation structure
  - Content of the agreement



Careful not to establish an employment relationship



# Emerging legal risks

## Other notable points



**Morality  
clause**



**Background  
checks**



# Emerging legal risks

## Polling Question 3

When engaging KOL, what can brand owners consider doing to better protect their own interests?



**a.**

Research and consider background of the KOL candidates

**b.**

Restrict the KOL from advertising competitor's products during the cooperation period

**c.**

Prior review and clear content before publication by the KOL

**d.**

All of the above

1

# Emerging legal risks

## Video 2

[insert video]



Three scenarios

1. Working with a KOL in a livestream
2. Launch its own virtual KOL using the visual appearance of an employee
3. Working with an existing virtual KOL

原美達人

# 1 Emerging legal risks

## Hong Kong - Risks associated with livestreaming



### Trade Descriptions Ordinance

- False trade descriptions
- Statutory defence if the brand charged took all **reasonable precautions** and exercised all **due diligence** to avoid commission of offence



### Misrepresentation Ordinance



Both civil and criminal liability.



1

# Emerging legal risks

## China - Risks associated with livestreaming



### Advertising Law

- Endorsers must have used the products
- Minors under the age of 10 cannot be an endorser
- Advertisements for medical treatment, pharmaceuticals, medical devices and healthcare food cannot have an endorser
- Advertisement shall not contain any false or misleading information





# ① Emerging legal risks

## Other notable points



### Background music

Risk of copyright infringement



### Mention of competing brand

Negative PR



**Important to preview and approval marketing materials!**

2

# Emerging legal risks

[insert video 3]



Three scenarios

1. Working with a KOL in a livestream
2. Launch its own virtual KOL using the visual appearance of an employee
3. Working with an existing virtual KOL

原美達人

# 2 Emerging legal risks

Virtual KOL



## Common types of marketing

- Posting on social media
- Commercial livestreaming

2

# Emerging legal risks

## Hong Kong - Privacy law



### Personal Data (Privacy) Ordinance

- DPP1: Purpose and manner of collection
- DPP3: Use of data

### Possible consequences:



**Enforcement notice**  
**Civil claim for damages**





2

# Emerging legal risks

## China - Personality rights



### Civil Code

- Shall not deface, defile or falsify a person's right to likeness
- The likeness of an owner may not be made, used or made publicly available without prior consent
- Shall not publish, reproduce, distribute, lease, exhibit or otherwise use or make publicly available the likeness of the right owner without prior consent

### Possible consequences:



### Civil claim for damages



3

# Emerging legal risks

[insert video 4]



Three scenarios

1. Working with a KOL in a livestream
2. Launch its own virtual KOL using the visual appearance of an employee
3. Working with an existing virtual KOL

原美達人

3

# Emerging legal risks

## Virtual KOL in livestreaming



**Issue:** Can virtual KOL share his / her "product reviews"?



Hong Kong

There seems to be no express prohibition.

But be aware of the TDO.



China

Endorsers must have used the product – a grey area.

But brands can still be liable for false advertising.

3

# Emerging legal risks

## Hong Kong - Copyright



**Who owns the copyright of the virtual KOL?**

Brands? Virtual KOL? Production Company?



Copyright Ordinance

- Employee works
- Commissioned works



Consider use of license



Important to agree on the ownership of copyright or license in writing!



3

# Emerging legal risks

## China - Copyright



To protect

1) visual appearance of virtual KOL and 2) literary background story



Copyright Law

- Employee works
- Commissioned works



To protect

1) name of KOL and 2) other distinctive features



Trademark Law





# Emerging legal risks

## Polling Question 4

Where a brand requires the KOL to create and provide original content for an advertising campaign, what are some IP considerations?



**a.**

Ownership, e.g., who owns the copyright in the content created by KOL

**b.**

Licensing, e.g., what is scope of license granted to the KOL in relation to use of the content

**c.**

Infringement, e.g., who is liable for any infringement of third party's IP rights by the content

**d.**

All of the above



**Questions**

# Speaker Bios



**Loke-Khoo Tan**  
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Loke-Khoo Tan is a senior partner of the award-winning IP & Technology Group in Hong Kong and China. He is currently on the Global Firm's Steering Committee for the Consumer Goods & Retail (including Luxury and Fashion) Industry Practice and leads the Industry Practice in the AP region. He led the IP & Technology Group as Practice Group leader from 2005 to 2020. He is also the author of various IP publications including the trilogy of "Pirates in the Middle Kingdom: the Art of Trademark War" books. The 4th edition will be published in 2021.

Loke-Khoo supports the Firm's Global Diversity & Inclusion Committee, focusing on LGBT+ in Asia. As an integral part of the Firm's Corporate Social Responsibility Program, the Committee has broad oversight for the strategic development and implementation of the Firm's diversity and inclusion activities.



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Ruby Chan is a partner in Baker McKenzie's Hong Kong office and a member of the Firm's Intellectual Property Practice Group.

Ruby's practice focuses on brand protection, trademark application, prosecutions and registration, name clearance and IP acquisitions. She has solid experience in commercial IP matters and has been involved in a number of contentious IP matters. Ruby has advised clients on names selection, brand clearance before product launch or market entry, as well as overall protection strategies across multiple jurisdictions. She has successfully assisted clients in numerous administrative proceedings and other contentious matters.

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James Lau is a special counsel in Baker McKenzie's Hong Kong office and a member of the Firm's Intellectual Property and Technology Practice Group.

James has extensive experience in advising on intellectual property law in China. His practice covers trademark prosecution and enforcement, and he also regularly advises on a wide range of intellectual property matters including copyright, unfair competition, trade names, domain names, designs, licensing, advertising and product labelling laws, Chinese branding, parallel imports and OEM issues.



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Helen Pang is an associate in Baker McKenzie's Hong Kong office and a member of the Firm's Intellectual Property and Technology Practice Group.

Her practice focuses on the enforcement of brand-related intellectual property rights in Hong Kong and China, especially on civil litigation and enforcement work involving trademarks, counterfeiting, patents and copyrights. She also advises commercial intellectual property and domain name issues, and general intellectual property legal advice. She has experience advising healthcare and pharmaceutical companies on regulatory and compliance issues.

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