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LEGAL WISE BY MDME | TRUMP ESCORT SERVICE WHEN DEFENSE TRUMPS OFFENSE

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Recent developments in Mainland China regarding the preliminary granting to Donald Trump of the rights to the word mark TRUMP raised eyebrows worldwide. Not only did such approvals come shortly after Mr. Trump stepped into the presidential office, but also the nature of some of the services covered by the filings was, to put it mildly, ambiguous. The list includes "escort services", "spas" and "massage parlours", terms that have historically been used as euphemisms for a different line of activities.

The uproar focused mainly on the ethical, political and economic implications of a potential conflict of interest between Mr. Trump, the President and Mr. Trump, the Businessman. After all, the Trademark registrations about to be granted by China represent valuable private assets.

Another point made by some was that those filings imply that Mr. Trump's organization engages or intends to engage in unethical or illegal activities. However, Mr. Trump may have no intention of entering into such areas of business himself but simply be aiming at keeping his name-brand from being used in connection with such activities by third parties acting in bad faith.

Mr. Trump is a master-brand and his legal team is specialized in using all means available to protect his Intellectual Property rights. The filing of defensive trademarks as described above is one of them.

The Chinese economy has, in the last couple of decades, developed at an impressive rate. Part of that growth was, allegedly, based on the abusive use and registration, by Chinese entrepreneurs, of ideas - including technology, services and brands - developed by foreign public and private companies. When it comes to trademarks, misappropriation is more visible and consequential, and can be very difficult to stop. This is because, as with Macau S.A.R., Mainland China is a first-to-file jurisdiction. In other words, and in general, the first one to the IP Office gets the right, even if the applicant is not the developer/first user of the mark.

In 2010, a Chinese state-owned enterprise, the GAC Group, branded its cars TRUMPCHI. This brand is now a common sight in the streets of Mainland China and it is very unlikely that Mr. Trump will be able to reverse this. But an earlier defensive filing of this mark for automobiles would most probably have barred the use and registration by GAC.

The Chinese government is now sending a clear message that Intellectual Property is to be upheld and international brand owners are more confident that action will be taken against infringers. Trials related to crimes against Intellectual Property increased to 147,000 in 2016, and Michael Jordan scored a big win recently against a Chinese company. However, the first-to-file rule remains in place and, more than ever, defensive filings should be part of a company's IP strategy.

In Macau, large corporations have been taking steps to protect their effective use of trademarks by way of registration, but also filing defensive marks. The catch is that a merely defensive filing is potentially vulnerable to cancellation for non-use three years after registration. But the low cost of re-filing, with a creative rewording of the list of items, is an incentive to keep using this preventive strategy.

Small and medium enterprises in Macau have been slower in taking advantage of the formal protection system available in the law. The consequences can entail serious legal costs for recovery of brands, and business-threatening repercussions if such recovery fails.

Ironically, Mr. Trump seems to consider that the risk of someone offering Trump Escort Services in Macau is lower than in Mainland China. None of the 26 applications he filed in Macau include a reference to massage or escort services. Maybe it's time for a business visit to Macau - with a Secret Service escort.



João Encarnação*

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