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# IP & TMT Quarterly Review

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## New PRC Trade Mark Law: What Brand Owners Need to Know

By Alan Chiu, Partner, Mayer Brown JSM, China

After many revisions and much public consultation, the amended PRC Trade Mark Law was passed by the PRC government in August 2013. The new law will come into effect on 1 May 2014. This article summarises the key changes and their implications for brand owners.

### 1. Modernising trademark application process

- **Electronic filings** are officially recognised.
- **Multi-class applications** are allowed.
- **Registration of sound marks** is allowed.
- **Office actions** may be issued by the China Trade Marks Office (CTMO) to address formality or substantive issues during the examination process, thereby allowing applicants to present additional arguments or amend or clarify their applications if the CTMO so requires.

### 2. Streamlining trademark opposition procedures

- **Who can oppose a mark?** To curb “unmeritorious” oppositions, only prior right owners or interested parties can oppose a mark on relative grounds, whilst oppositions on absolute grounds may be filed by anyone.
- **Opposition procedures** are shortened. If an opposition fails, the mark will proceed to registration. The losing opponent no longer has a right to appeal to the Trademark Review and Adjudication Board (TRAB) and can only challenge the registration by filing an invalidation petition with the TRAB. It is therefore very important for brand owners to submit full arguments and adduce adequate evidence at the opposition stage.

### 3. Speeding up examination time

- **Statutory time limits** are introduced for the first time. For instance, the CTMO is required to process a trade mark application within nine months, with no time extension available.

### 4. Tackling trade mark squatting

- **Bad faith applications** - The new law expressly requires all trade marks to be applied and used in accordance with the principles of honesty and integrity. More importantly, it specifically prohibits dealers, distributors, partners, agents and those who have a prior contractual or business relationship with the brand owner from registering the same/similar trademark in respect of the same/similar goods or services.
- **Trade mark agencies’ involvement in squatting** is strictly banned.
- **Remedies for brand owners against bad faith registrants** - If a registered trade mark is declared invalid for reasons of fraud or bad faith or on other grounds, the registration is deemed void *ab initio*. Whilst this does not retrospectively affect court or administrative decisions or assignments or licences concluded, if the non-return of trademark infringement damages, licence fees or assignment fees is obviously against the notion of fairness, the whole or part of it should be returned. Further, if the registrant causes any damage to others in bad faith, he or she should compensate for such damage.

#### 5. Clarifying well-known mark protection

- **Use of the phrase “well-known trade mark”** on goods, their packaging or containers, or in advertisements, exhibitions or other commercial activities is prohibited under the new law.

#### 6. Strengthening trademark enforcement

- **Knowingly facilitating or assisting infringement** by itself constitutes infringement.
- **Applicable fines** for trade mark infringement in administrative raids have been increased. In particular, a heavier fine may be imposed if the infringer is found to have infringed more than two times within five years.
- **Infringer’s disclosure obligation in damages assessment** - An infringer may be ordered by the court to disclose its account books for the purpose of assessing damages; failing which, the court would determine the amount of damages solely based on the amount proposed by the mark owner.
- **Damages assessment** –
  - » For serious infringement cases, the court is empowered to order punitive damages of up to three times the normal damages.
  - » Where the trade mark owner’s loss is difficult to assess, the court may award damages up to the statutory cap of US\$480,000 (six times higher than the current ceiling).
  - » No damages will be awarded if the brand owner fails to prove use of its mark in the PRC in the past three years.

At the moment, the PRC government is consulting different stakeholders about a set of draft Implementing Regulations for the new PRC Trade Mark Law detailing the procedures and logistics of different trade mark procedures, clarifying the uncertainties and ambiguities under the new law and regulating the practices of trade mark agents in the PRC. 📶



## The Impact of the New Trade Descriptions Ordinance

*By Eugene Low, Senior Associate, Mayer Brown JSM, Hong Kong*

Since the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 (New TDO) came into force on 19 July 2013, there has been one case of acceptance of a written undertaking in lieu of prosecution, as well as at least three arrests for suspected offences.

### FIRST CASE OF ACCEPTANCE OF A WRITTEN UNDERTAKING

The New TDO introduces a civil compliance-based mechanism under which the enforcement authorities (i.e., the Customs and Excise Department (Customs) and the Communications Authority) may, with the consent of the Secretary for Justice, accept a trader's written undertaking in lieu of prosecution. The written undertaking is a commitment by the trader (usually for a period of no shorter than two years) not to continue or repeat the commercial practice in question. The undertaking may be published, e.g., the Customs may post the undertaking on its website and refer to it in media statements.

The Customs announced on 9 December 2013 the first case of acceptance of such an undertaking. The undertaking was given by a local education institution, The Wedding Management Academy (Hong Kong) Limited. The case originated from a complaint that this institution falsely claimed on its website that its diploma course graduates would be eligible for direct entry to the final year of a degree programme in local universities.

Not all cases are suitable to be dealt with by way of a written undertaking (for instance, for serious offenders, the enforcement authorities may prefer to prosecute). In the above case, there were a few factors which supported the use of a written undertaking:

- The institution was co-operative in the investigation;
- The false claim was taken down from the website promptly;
- The institution had yet to receive any enrolment for the course, i.e., no real victims;
- The Customs considered that the written undertaking would encourage the institution to comply with the law and that the matter could be resolved more expeditiously by way of an undertaking.

### ARRESTS

According to the Customs' press release, there have been three arrests made with reference to the New TDO:

Case #1: The Customs arrested several operators and "pretend customers" of stalls selling dried abalone and ginseng in Mong Kok and Yau Ma Tei. The stall operators were found to be misleading consumers into believing that the price of the goods was calculated in catties instead of taels, thereby contravening the new unfair trade practice of "misleading omissions".

Case #2: The director of J.M. Soft, a furniture chain store, was arrested for the suspected offence of wrongly accepting payment. The Customs received complaints from the public as well as referrals from the Police and the Consumer Council that the furniture store repeatedly failed to deliver furniture after accepting payment. The

furniture store ceased business subsequently without offering refunds or taking remedial steps for affected customers.

Case #3: A sales person at a local dispensary was arrested for verbally making false representations as to a brand of Chinese proprietary medicine originated from Beijing. When the undercover Customs officers asked for the Beijing-originated medicine, the sales person offered a Nanjing-originated product with a similar medicine name on the box but the place of origin was concealed by a label. The sales person verbally claimed that the product was the Beijing-originated proprietary medicine.

According to the Customs, for the first two months after the New TDO came into effect, it received over 3,000 enquiries and 670 complaints (exceeding the total number of complaints for the whole year of 2012, which was below 600). In light of this increased customer awareness of their rights and the above actual cases of arrests and investigation, it is high time for traders to familiarise themselves with the legislative change and review their trading practices. 📶



## Amendments to the PRC Consumer Rights Protection Law: Strengthening Consumer Rights in Personal Data

*By Gabriela Kennedy, Partner, Mayer Brown JSM, Hong Kong  
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The Standing Committee of the National People's Congress of China recently passed a resolution to amend the country's Consumer Rights Protection Law (the New Consumer Law). The New Consumer Law will become effective on 15 March 2014.

One of the highlights of the New Consumer Law is the explicit recognition of consumers' rights to their personal data. The New Consumer Law introduces the following changes to directly address consumer personal data:

- Consumer personal data are protected under the law as well as their right of personal integrity.
- Collection of consumer personal data must be lawful, fair and necessary. Consumers must be informed of and consent to the purpose, method and scope of data collection and data use.
- Policies of data collection and data use must be made known to consumers.
- Consumer personal data must be kept strictly confidential and must not be disclosed, tampered with or illegally transferred. This duty applies to both business operators and their staff.
- There must be technical and other necessary measures to ensure the security of consumer personal data. In case of actual or threatened data breach, remedial measures must be taken immediately.
- Commercial materials (e.g., advertisements) must not be sent to consumers who have not given their consent or have opted out.

In addition, the New Consumer Law specifies remedies for infringement of consumer personal data, which include cessation of infringement, apology, fine and compensation. Serious infringement may also lead to criminal prosecution. The New Consumer Law also provides that where the defendant is financially unable to meet both the fine and compensation ordered, the defendant will be required to pay the compensation first.

The New Consumer Law has symbolic significance in reflecting the trend of increasing awareness of personal data in China. While the country has yet to implement a piece of legislation on personal data or privacy as such, there have been a number of legislative and regulatory developments all introduced in a fairly short time span.

Before the passing of the New Consumer Law, the Standing Committee issued in December 2012 a "Decision to Strengthen the Protection of Data on the Internet". The Decision governs the collection and use of electronic data that can identify citizens and relate to their privacy. The Decision, with the exception of a few provisions which concern only Internet service providers, apply to all kinds of entities. The Decision captures a number of principles concerning the protection of electronic personal data, for instance, all electronic personal data collected must be kept strictly confidential and must not be leaked, tampered with, destroyed, sold or illegally provided to other persons.

Subsequent to the Decision, the Ministry of Industry and Information Technology published its “Information Security Technology – Guide of Personal Information Protection” in February 2013. The guide aims to set a national standard on the management of personal data by information technology. It sets out an individual’s rights to personal data and the requirements (recommendations) on collection, processing, transfer, use, anonymisation and erasure.

The Ministry further published its “Regulations on Protection for Telecommunications and Internet Users Personal Data” on 1 September 2013. The Regulations apply to providers of telecommunications and Internet services in relation to their collection and use of personal data of users. Personal data of users is defined to include user name, date of birth, identity number, address, telephone number, account number and password, and any other information that can (by itself or in combination with other sources) identify the user or details of his use, such as time and location. Again, the Regulations set out general principles that the collection and use of personal data must be legal, proper and necessary, and that the purpose of collection must be clearly explained, etc. Interestingly, the Regulations also impose specific requirements that a complaint channel should be made available and service providers should respond within 15 days. ☺



## Aligning the Law with Innovative Payments in Hong Kong

*By Gabriela Kennedy, Partner, Mayer Brown JSM, Hong Kong*

In light of recent developments in innovative payment methods, a new proposed regulatory regime has emerged in Hong Kong. The Financial Services and Treasury Bureau (FSTB) and the Hong Kong Monetary Authority (HKMA) plan to align the legal framework in Hong Kong with emerging payments systems. The article provides an outline of the proposals made by the FSTB and HKMA.

### EMERGENCE OF NEW PAYMENT METHODS

New ways of paying for goods and services, such as mobile payments and mobile network-based accounts, are becoming increasingly popular due to technological developments such as Near Field Communication and the increasing popularity of smartphones and tablets, which enable e-commerce transactions on the go. These payment methods are generally known as stored value facility (SVF) and retail payment system (RPS).

An SVF essentially involves the pre-payment to or storage of the value of money (or money's worth) on a payment facility, such as a gift card or a top-up card. SVFs can generally be categorised as: (i) single-purpose SVFs or multi-purpose SVFs; and (ii) device based (where the stored value is on a physical device, e.g., a card) or non-device based (where the stored value is on non-physical devices, e.g., mobile network accounts). A single-purpose SVF can only be used to obtain goods or services from the sole merchant who issued the SVF, e.g., a prepaid card issued by a supermarket to purchase goods from its supermarkets. In contrast, a multi-purpose SVF (such as an Octopus card in Hong Kong) can be used to obtain goods or services from multiple merchants (convenience stores, supermarkets, cinemas, transport companies).

An RPS is essentially a system for the transfer, clearing or settlement of low-value payments in relation to retail purchases, e.g., mobile payments.

### THE NEW LEGAL FRAMEWORK

Whilst device-based multi-purpose SVFs are currently regulated in Hong Kong under the Banking Ordinance (BO), non-device based SVFs and RPSs are not subject to any mandatory regulations under Hong Kong law (though a self-regulatory regime is in place for payment cards under a voluntary code of practice). Concerns have therefore been raised that the current laws do not provide the public with adequate protection for the secure and safe operation of such payment transactions. In other countries, e.g., the UK and Australia, regulations have already been enacted that generally impose licensing requirements on entities offering SVFs and grant the right to local authorities to designate and oversee important RPSs.

On 22 May 2013, the Financial Services and Treasury Bureau (FSTB) and the Hong Kong Monetary Authority (HKMA) issued a public consultation paper to invite comments on their proposed introduction of a regulatory regime for SVFs and RPSs. The consultation period expired on 22 August 2013. Based on the public's feedback, a new amendment bill will be introduced to the Legislative Council to amend the existing Clearing and Settlement Systems Ordinance (CSSO).



The main proposals are as follows:

- A licence must first be obtained from the HKMA before a person can issue or facilitate the issuance of an SVF;
- The HKMA will designate the RPSs that will be subject to the HKMA's oversight;
- The HKMA will have the power to conduct on-going supervision of SVF licensees and designated RPSs;
- The HKMA will have the power to perform investigations and enforcement functions;
- Offences, sanctions and appeal processes will be introduced; and
- A 12 month transition period for existing SVFs to move to the new regulatory regime.

#### SVF LICENSING REGIME

The definition of an SVF under the proposed amendments has been broadly drafted to capture any new SVF developed in the future, and applies to both device and non-device based SVFs.

However, the proposed definition expressly excludes single-purpose SVFs. As such, only issuers (or those who facilitate the issuance) of multi-purpose SVFs, and not single-purpose SVFs, will need to obtain a licence. The HKMA will also have the discretion to exempt certain SVFs from the licensing requirements if, for example, there is minimal risk to users or it would have an insignificant impact on Hong Kong's financial stability.

Licensed banks will be deemed to have an SVF licence and will therefore not have to go through the process of obtaining an SVF licence.

In order to obtain a licence, a licensee must satisfy (and continue to satisfy) certain criteria, including the following:

- It must be incorporated in Hong Kong with a local registered office, i.e., a foreign company with a Hong Kong branch cannot apply;
- It must maintain a paid-up share capital of HK\$25,000,000 or over;
- It must put in place policies and procedures to safeguard and manage the "float" (the total amount received by the licensee for storage on the SVF);
- It must redeem the full value stored on the SVF at the user's request, and must clearly state the terms and conditions for redemption in the user contract;
- Its main business must be the issuance of (or facilitating the issuance of) multi-purpose SVFs;
- Its managers must have the appropriate knowledge and experience in providing SVFs and related-services;
- Its officers responsible for implementing or day-to-day management of the SVF must have the necessary knowledge and experience to discharge those responsibilities effectively;
- Its shareholders who meet the specified threshold must be fit and proper persons; and
- Other conditions, such as anti-money laundering requirements, ask management requirements and operating rules.

In addition, the HKMA may also impose other on-going conditions on the licensee, e.g., a maximum amount that may be stored on the SVF and a daily transaction limit.

Lastly, the proposed legislation aims to offer better protection of the “float” of SVFs. SVF licensees who are not licensed banks will be required to keep the float separate from their other funds and must subject the float to safeguard measures, e.g., a guarantee from or a trust account with a Hong Kong bank. The HKMA will determine via discussions with each licensee what those measures will be. In contrast, licensed banks will simply need to ensure that they have in place sufficient controls to protect the float, which the HKMA will review continuously to ensure adequacy.

The HKMA will also have the discretion to exempt certain stored value facilities from the licensing requirements if, for example, there is minimal risk to users or it would have an insignificant impact on Hong Kong’s financial stability.

### RPS DESIGNATION

The proposed amendments will give the HKMA the power to designate RPSs that are to be monitored by the HKMA. An RPS would only be designated if:

- It is operated in Hong Kong, or processes Hong Kong dollars or any other currencies prescribed by the HKMA; and
- The disruption of the RPS would have an impact on the financial stability of Hong Kong; public confidence in the payment or financial systems of Hong Kong; or day-to-day commercial activities in Hong Kong.

Any RPS designated by the HKMA will have to comply with certain safety requirements. For example, designated RPSs must:

- Have proper operating rules in place to ensure the soundness of the systems operations, default arrangements, etc.;
- Have measures to ensure data integrity, a contingency plan and risk management controls; and
- Comply with the Hong Kong Anti-Money Laundering Ordinance.

Certain designated RPSs may be exempted from some of these obligations if the RPS is established outside of Hong Kong and is already subject to sufficient supervision by its local regulator.

### Investigation, enforcement, offences and sanctions

The HKMA will have the general power to issue guidelines or new regulations; request documents or information; conduct on-site inspections; direct that operating rules be amended; and issue directions.

Where the HKMA believes that an offence has been committed, the HKMA will also have the power to direct an investigator to conduct an investigation; to compel the provision of any evidence from the alleged offender; and to also apply for search warrants and seizures. A person will commit an offence if they operate an SVF without a licence; contravene an SVF licensing condition or other conditions imposed on a licensed SVF or designated RPS; give false information to the HKMA; fail to produce documents requested or make false entries into the documents. It is proposed that the criminal sanctions currently in place under the BO and CSSO be used as the basis for determining the sanctions to apply to the new regime.



In addition, the HKMA will have the right to impose certain sanctions, including the suspension or revocation of a licence; the issuance of a warning, or a pecuniary penalty of up to HK\$10,000,000 or three times the profits gained or loss avoided. Aggrieved persons will be able to appeal some of the HKMA's decisions (e.g., refusal to grant an SVF licence) by applying to the new Payment Systems and Stored Value Facilities Appeals Tribunal (currently the Clearing and Settlement Systems Appeal Tribunal). 📶



## How Smart is a Smartphone and How About its User?

*By Gabriela Kennedy, Partner, Mayer Brown JSM, Hong Kong*

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In the recent case of *Secretary for Justice v. Wong Ka Yip Ken* (HCMA 77/2013), the Court of First Instance determined on appeal that a smartphone was a “computer” for the purposes of Section 161(1) of the Crimes Ordinance (Cap. 200). As such, the defendant was found guilty of obtaining access to a computer with a view to obtaining dishonest gain for himself.

### BACKGROUND

The defendant had set his smartphone to secretly film the ladies bathroom located in his office. The smartphone was discovered and the matter reported to the police. The defendant was charged with obtaining access to a computer with a view to dishonest gain for himself or another, in breach of Section 161(1)(c) of the Crimes Ordinance (CO).

In order to convict the defendant of the offence, the Magistrate required the prosecution to prove that:

1. The defendant’s smartphone was a computer;
2. The defendant’s act constituted “obtaining access” to a computer; and
3. The defendant had done so with a view to obtaining a dishonest gain for himself or another.

Although the defendant pleaded guilty, the Magistrate held that while the prosecution had satisfied the second and third elements, it had failed to prove the first element, i.e., that the defendant’s smartphone was a computer. The defendant was acquitted.

The Secretary for Justice filed an appeal with the Court of First Instance (CFI).

### IS A SMARTPHONE A COMPUTER?

In the Magistrate’s court, the prosecution argued that the term “computer” was intentionally not defined by the Legislative Council in the CO or the Interpretation and General Clauses Ordinance, so as to avoid the definition becoming outdated in light of rapid developments in technology.

The prosecution submitted that the defendant’s smartphone satisfied the dictionary meaning of “computer” and the definitions provided under various other statutes, i.e., because the smartphone was an electronic device that could receive and store information, perform mathematical calculations and produce data to be stored on the device, which could be searched and retrieved when needed.

Under the Hong Kong Evidence Ordinance, Inland Revenue Ordinance and Business Registration Ordinance, “computer” is defined as “any device for storing, processing or retrieving information”. By contrast, the Online Oxford Dictionary defines a “computer” as an “electronic device, which is capable of receiving information (data) in a particular form and of performing a sequence of operations in accordance with a predetermined but variable set of procedural instructions (programme) to produce a result in the form of information or signals.”

### MAGISTRATE'S FINDINGS

Despite the arguments put forward by the prosecution, the Magistrate was of the view that the Legislative Council must have deliberately decided not to adopt the same definition of “computer” as found in the Evidence Ordinance into the CO, in order to give the court the discretion to judge each case based on its facts. His view was that “computer” was broadly defined in the Evidence Ordinance, Inland Revenue Ordinance and Business Registration Ordinance, as the purpose of the relevant provisions of those statutes was to enable the access and use of information under certain circumstances. This was highly different to Section 161 of the CO, which is meant to criminalise certain behaviour. The Magistrate held that it would be inappropriate to simply adopt the definition of “computer” as found in the Evidence Ordinance for the purposes of Section 161 of the CO, as this definition would be excessively wide and would lead to absurd results.

While he agreed that the defendant’s smartphone fell within the dictionary meaning of a “computer”, he believed that the definition still needed to be narrowed for the purposes of the CO in light of the legislative intent of the statute. The Magistrate did not believe it was the intent of the Legislative Council to criminalise certain acts under the CO, which were not previously regarded as an offence, merely because of the means with which they were done (i.e., use of a “computer”). The Magistrate stated that the video recording by the defendant in itself was not a criminal offence – if he had used any other tool, e.g., a normal video camera, then the prosecution would have been hard pressed to find an offence with which to charge him. In narrowing down the definition of “computer” the Magistrate noted exclusions from the definition of “computer” in statutory provisions elsewhere (i.e., in the U.S. Code Title 18 § 1030, the Singapore Computer Misuse and Cybersecurity Act). Even though he admitted he did not have the legislative power to narrow down the definition of “computer” he would not apply the definition of computer in the Evidence Ordinance to the interpretation of Section 161(1)(c) of the CO.

The Magistrate held that the defendant’s smartphone was not a computer, and the defendant was acquitted.

### JUDGMENT ON APPEAL

On appeal, the court found that in interpreting Section 161 of the CO it must first look at its language and take into account the technological changes that have occurred after the enactment of the statute – *“a broad interpretation should be given according to its language, applying to it the changing situation subsequent to the enactment, unless it goes beyond the natural meaning of the statutory language, or the result is absurd or manifestly unjust”*.<sup>1</sup> The CFI was not required to form a retrospective view as to whether or not an act previously constituted an offence.

The court noted that in case law elsewhere a smartphone had been held to fall within the definition of “computer” (i.e., the U.S. case of *USA v. Kramer USCA* (8<sup>th</sup> Circuit) No. 10-1983; the Canadian case of *R v. Rocha* 2012 ABPC 24), as a well as in appeal cases in Hong Kong which post date the Magistrate’s decision (i.e., the *Secretary for Justice v. Chong Yao Long Kevin* [2013] 1 HKLRD 794, where the defendant was convicted under Section 161 of the CO for taking up-skirt photos with his mobile phone).

<sup>1</sup> SECRETARY FOR JUSTICE V. WONG KA YIP KAN [2013] 4 HKLRD 604

The CFI agreed with the Magistrate that it would not be appropriate to adopt the definition of “computer” as found in the Evidence Ordinance. It held that the dictionary meaning of “computer” was the correct definition to be adopted for the purposes of Section 161 of the CO. However, unlike the Magistrate, the CFI saw no reason to narrow the definition of “computer”.

The CFI therefore held that the defendant’s smartphone fell within the definition of a “computer” and overturned the Magistrate’s decision. The defendant was found guilty of an offence under Section 161(1) of the CO.

#### TAKEAWAY POINTS

This case shows that the Hong Kong courts are trying to interpret statutes in a manner that keeps them current and up-to-date with the latest changes in technology, and possibly even the changing attitudes of the public. A smartphone is more than a phone and using it to commit wrongful acts may now mean that a person can be found guilty of a computer related offence. The moral is: be smart when using your smartphone! 📶

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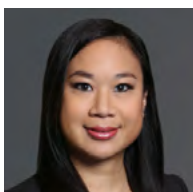


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