

## 《2005年吸煙(公眾衛生)(修訂)條例草案》委員會 答覆助理法律顧問二零零六年六月六日的來函

本文件就立法會助理法律顧問二零零六年六月六日給衛生福利及食物局局長的來函作出以下回應。

### 摘要

2. 本文件的結論撮述如下：

- (a) 雖然《2005年吸煙(公眾衛生)(修訂)條例草案》(《條例草案》)第11條本身未必構成《基本法》第105條所指的事實徵用財產而沒有補償的情況，但《條例草案》第11條及其他條文(特別是有關煙草廣告的條文)以及《吸煙(公眾衛生)條例》(《條例》)所載的現行法例的整體效力，就包含第11條所述字眼的註冊商標而言，實有構成上述徵用情況的重大風險。
- (b) 這個觀點亦某程度上適用於在《條例草案》於憲報刊登後及獲得通過和實施之前已妥為註冊的商標。
- (c) 我們亦應考慮香港在國際知識產權方面的法律義務，詳見附件。
- (d) 鑑於上文所述的重大風險，我們決定引入“不溯既往”的條文(連同註釋)，涵蓋以上所指的已註冊及未經註冊的商標。

### 徵用財產

3. 來函(第7頁)指出，《條例草案》“並不影響擁有人對其商標的專有權。他就侵犯其商標的行為採取法律行動的權利維持不變。儘管法例擴大對使用其商標所作的禁制，沒有人能夠在未經其同意下使用其商標”。不過，須注意的是，《條例草案》第11條對使用有關商標所施加的限制，同樣適用於商標擁有人及任何未經授權的使用者。假如《條例草案》以目前形式通過，可能有理據證明將會大大減低侵犯擁有人權利的機會(一如擁有人自行使用其商標的情況)，以致“就侵犯商標的行為採取法律行動的權利”變得微不足道和毫無意義。

4. 來函(第8頁)亦指出，(即使《條例草案》獲得通過，)“擁有人仍有權在其他方面使用其商標，包括[《商標註冊條例》(第559章)]第18(5)條所載的用途。他仍可在其貨品上(包裝除外)使

用其商標；在該商標下要約售賣貨品或為售賣而展示貨品(例如該商標下的零售店舖)；在該商標下輸入或輸出其貨品；在其商業紙張或宣傳中使用該商標，惟須受《條例》內的限制條文所規範。”(斜體為後加)。顧及《條例》及《條例草案》內涉及煙草宣傳廣告的條文(正如下文第 8 段所論，有關條文對“煙草廣告”所訂的涵義極廣。)，以及考慮到下文第 5 至 9 段分析的情況，究竟該兩項以斜體表述的商標用途(見本段以上引文中的斜體字)是否仍可用於所有實際用途，令人存疑。至於該段引文中提述的其他方面的用途，可能有理據證明它是非常微不足道，以致有關商標已無法作具意義及有利可圖的經濟用途。

5. 《條例草案》第 11 條的效力是，香煙封包及零售盛器上不得再使用有關的商標。為確定是否會構成(事實)徵用的情況，我們有需要考慮這項禁制會否引致有關商標再無任何有意義的替代用途或任何有利可圖的經濟用途(應用立法會 CB(2)1897/05-06(01)號文件撮述的歐洲及美國法理學)。

6. 首先，有關商標仍可印在每支香煙的紙身上。不過，《條例》第 8 條規定所有香煙均須以最少 20 支裝的封包出售，而每個封包都必須印有訂明的健康忠告。因此，在香港將香煙按支裝售賣是違法的。

7. 換言之，即使香煙本身印有有關商標，顧客也看不到，因為在購買的當時當地都只可看到香煙封包而不是香煙本身。

8. 假如香煙廣告不受任何限制和禁制，便仍可能在封包或零售盛器以外的情況使用有關商標，作為香煙產品的標記，以便與其他香煙產品區分，並吸引顧客注意。不過，《條例》第 14 條對香煙廣告所訂的涵義極廣，包括進行任何業務過程中向公眾展示的任何載示香煙產品的商標或品牌的物體，而《條例》規定可以展示香煙廣告的情況本已極為有限，但《條例草案》更進一步建議除去《條例》容許的餘下極少數展示香煙廣告的情況。(即持牌小販的攤檔和僱用兩人或以下的零售商處所。詳情見《條例草案》第 14 條。)

9. 因此，可能有理據證明《條例草案》和《條例》的整體效力，是使有關商標擁有人和特許持有人無法再用其商標作具意義或有利可圖的經濟用途。此舉的重大風險，是會對包含第 11 條所述字眼的註冊商標構成(事實)徵用的情況。

10. 在作出上述結論前，我們已考慮到《商標條例》(第 559 章)第 42(1)條就註冊商標的規定，即所有商標的註冊申請均須經商標註冊處處長(處長)審查是否符合該條例所訂的註冊規定。只要申請符合有關規定，處長無權拒絕有關申請，而拒絕申請的絕

對和相對理由分別載於第 559 章第 11 和 12 條<sup>1</sup>。商標在註冊後會賦予其持有人多項權利，“註冊商標屬一項藉將有關商標根據本條例註冊而取得的財產權利。”(第 559 章第 10(1)條)在註冊後，商標擁有人或可期望在訂明期間 (按第 559 章規定為 10 年) 有權使用該商標。

11. 由於現行《條例》第 10(3)條和《條例草案》擬議第 11 條採用的字眼不同，因此這樣的期望尤為恰切。根據現行法例，在“香煙已根據第 16 條及規例被鑑定為含有 9 毫克或少於 9 毫克的焦油量”的情況下 (條例第 10(3)條)，即使商標包含《條例草案》第 11 條所列的受禁制字眼，亦可註冊及使用。因此，如商標擁有人基於有關香煙的焦油含量符合《條例》第 10(3)條的原來規定而成功申請註冊，或可期望至少能在註冊生效期間合法使用有關商標。

#### 在條例草案於憲報刊登後及獲得通過和實施前妥為註冊的商標

12. 至於上文所述《條例草案》和《條例》造成的徵用財產效力，上述觀點某程度也適用於《條例草案》刊憲後但尚未通過時註冊的商標。不過，在《條例草案》刊憲後的某個時間，商標註冊處處長應否接納包含《條例草案》第 11 條所列受禁制字眼的商標註冊，則屬另一個問題。當《條例草案》獲通過後，當局可根據《商標條例》第 11(5)條禁止這類商標註冊，因為它們是“根據或憑藉任何法律遭禁止在香港使用”的商標。

#### 結論

13. 鑑於上文重點論述的重大風險，我們決定加入“不溯既往”條文(連同註釋)，以涵蓋第 9 段和第 12 段所指的註冊商標。

律政司  
衛生福利及食物局  
知識產權署

二零零六年六月

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<sup>1</sup> 《商標條例》第 11(4)條規定，任何商標違反廣為接受的道德原則或相當可能會欺騙公眾，該商標便不得註冊。

Smoking (Public Health) (Amendment) Bill 2005  
Hong Kong SAR's  
International Intellectual Property Legal Obligations

*Introduction*

This brief note highlights the object and purpose of the *Smoking (Public Health) (Amendment) Bill 2005* (Bill) from the international intellectual property treaty law perspective.

*Public health and intellectual property*

2 In formulating the contents of the Bill, the Hong Kong SAR has to ensure its provisions are also consistent with its international intellectual property legal obligations, namely, those under the *Paris Convention for the Protection of Industrial Property* (Paris Convention), and the *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS). Article 1 (Nature and Scope of Obligations) of TRIPS provides that “*Members shall give effect to the provisions of this Agreement...*”

*Trade marks as intellectual property*

3 Trade marks, including unregistered well-known marks, are categories of intellectual property. Article 1(2) (Scope of intellectual property) of the Paris Convention provides that: “*The protection of industrial property has as its object ... trade marks,... and the repression of unfair competition.*” Article 1 of TRIPS provides that “*...the term “intellectual property” refers to all categories of intellectual property that are subject to Sections 1 (Section 2: Trademarks) through 7 of Part II.*”

### *Protectable trade marks*

4 Section 2: Article 15 (1) (Protectable Subject Matter) provides that: *“Any sign, or any combination of signs, capable of distinguishing the goods and services of one undertaking from those of other undertakings, shall be capable of constituting a trade mark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combination of colours as well as any combination of such signs, shall be eligible for registration of trademarks.”*

5 Article 15(2) (Protectable Subject Matter) of TRIPS provides that *“Paragraph 1 shall not be understood to prevent a Member from denying registration of a trade mark on other grounds, provided that they do not derogate from the provision of the Paris Convention (1967).”*

### *Unregistered well-known marks*

6 Article 6bis (Well-Known Marks) of the Paris Convention provides that: *“The countries of the Union undertake ... to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods.”*

### *Unregistered trade names*

7 In addition, Article 8 of the Paris Convention provides that “A

*trade name shall be protected ... without the obligation of filing or registration, whether or not it forms part of a trademark.”*

### *Denial of registration*

8 The Hong Kong SAR has the permissible power to provide for the denial or invalidation of trade marks when they are of such a nature as to deceive the public. Article 6quinquies B (Protection of Marks Registered) of the Paris Convention provides that: *“Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases:*

...

*3. when they are ... of such a nature as to deceive the public...”*

### *No unjustifiable encumbrance*

9 Article 20 (Other Requirements) of TRIPS provides that: *“The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements ... use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.”*

### *Protection of Existing Subject Matter*

10 Article 70 (2) (Protection of Existing Subject Matter) of TRIPS provides that: *“... this Agreement gives rise to obligations in respect of all subject matter existing at the date of application of this Agreement for the Member in question, and which is protected in that Member on the said date, or which meets or comes subsequently to meet the criteria for protection under the terms of this Agreement...”*

### *WTO Dispute Settlement*

11 Disputes between WTO Members are concerning their rights and obligations under TRIPS are settled through the rules and procedures under the *WTO Understanding on Rules and Procedures Governing the Settlement of Disputes* (Understanding).

### *Compensation*

12 Where a WTO Dispute Settlement Panel or the Appellate Body concludes that e.g. a regional/domestic measure under TRIPS is inconsistent with TRIPS, that Member has to bring the measure into conformity with TRIPS. Article 22 (Compensation and the Suspension of Concessions) of the Understanding provides that: “*Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time...*”

### *Conclusion*

13 In pre-empting the risk of litigation through this legislative exercise, it is therefore necessary to anticipate not just the domestic ones, but the possibility of those at the international level.

**INTELLECTUAL PROPERTY DEPARTMENT**

June 2006