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4 March 2008

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Ms. Debbie Yau
for Clerk to Bills Committee
Legislative Council
Legislative Council Building
8 Jackson Road, Central, Hong Kong

Dear Ms. Yau,

**Re: Bills Committee on Trade Descriptions (Amendment) Bill 2007
Invitation for submissions**

I refer to your letter dated 25 January 2008 and attach the Law Society's submissions on the Bill.

As this matter is still under consideration, the Law Society may make additional representations later.

Yours sincerely,

Joyce Wong
Director of Practitioners Affairs
e-mail: dpa@hklawsoc.org.hk

Encl.



Submissions on the Trade Descriptions (Amendment) Bill 2007

Section 13C of the Trade Descriptions (Amendment) Bill 2007

Upon reviewing the section its intended scope appears to go further than passing off. The proposed legislation will introduce two offences: one for making a false representation under s.13C(1) and the other a misleading representation under s13C(2).

It will be an offence to make a false representation about a connection with or endorsement by any individual or body. Although the Commerce & Economic Development Bureau (CEDB) describes this as a strict liability offence which means proof of intention, knowledge, recklessness or negligence is not required, s13C(4) actually provides a defence if the person had reasonable cause to believe the representation was true. CEDB now agrees with a submission to change the defence to "*did not know and had no reason to believe that the statement was false*".

As for a misleading representation, the connection or endorsement should relate to an individual or body of "*good standing and reputation*", [currently?] [lately] referred to as the "*reputable*" individual or body. There is no statutory defence as the prosecution needs to prove the person who made the misleading representation "*ought reasonably to expect*" the information recipient would be misled and the person did not take reasonable steps to prevent that to happen.

In passing off, many cases consider a "misleading" representation to be a "false" representation. In *John Brinsmead & Sons Ltd v Edward George Stanley Brinsmead* (30 RPC 493, Buckley LJ said (p 506):

"The law, as I understand it, is this: if a man makes a statement which is true, but which carries with it a false representation and induces the belief that his goods are the plaintiff's goods, he will be restrained by injunction. He cannot rely on the fact that his statement is literally and accurately true, if notwithstanding its truth, it carries with it a false representation."

The situation described by Buckley LJ appears to be the same situation contemplated in section 13C(2).

We submit the proposed distinction between false and misleading representation in the proposed section is actually unclear.

In addition, in the case of a false representation, there is no requirement that the relevant individual or body has a reputation when in reality, there is no point making a false representation if the individual or body is unknown or does not enjoy some level of recognition or fame.

Under the misleading representation offence, we also have reservations on the use of the terms "*good standing and reputation*" and later "*reputable*".

These terms suggest an additional moral and social evaluation when the term "reputation/goodwill" in passing off is relatively neutral although impliedly there must be something good to attract or bring in customers/business.

S13C(2)(b) refers to use of a name identical with an individual or body with good standing and reputation. This reference suggests that the misrepresentation is used with an identical or very similar name. This is unsatisfactory because the use of a name, photograph, autograph or even nickname, provided it is sufficiently distinctive of the entity which enjoys the reputation, could lead to confusion.

We submit that:-

- (a) **there is no need for the distinction between "false" and "misleading" representation;**
- (b) **revision of s13C is needed by using familiar terms in passing off cases such as "misrepresentation" and "reputation" so that the dicta in passing off cases can be used to assist with the interpretation of this section;**
- (c) **revision of s13C is needed to expand the scope to cover not only names but any misrepresentation that can lead to confusion; and**
- (d) **extend the scope of the Trade Descriptions Ordinance generally to cover services (although it appears CEDB still wishes to introduce legislation to cover goods only).**

Does the Government realise that the proposed changes effectively introduce statutory protection to personality and publicity rights which have hitherto not been protected in Hong Kong by statute or case law?

General Comments

The Law Society queries what, if any, process will be undertaken in educating retailers affected by the new proposals:

- on the implications for them?
- the necessary practical adjustments they will need to make to comply with the intended legislation?

How will the legislation be enforced when it comes into effect i.e. with full force from day 1 or will there be any form of "grace" period?

The Law Society of Hong Kong

4 March 2008

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