

28 February 2003

The Honourable Margaret Ng
Chairman of the Subcommittee on
Trade Marks Rules and Trade Marks Ordinance (Cap. 559)

Dear Sirs,

**SUBCOMMITTEE ON TRADE MARKS RULES AND TRADE MARKS ORDINANCE (CAP. 559)
(COMMENCEMENT) NOTICE 2003**

Thank you for your letter of 25 February 2003 informing us of the opportunity to make our views and concerns known to the Subcommittee on Trade Marks Rules and Trade Marks Ordinance.

We draw your attention to our letter of 20 January 2003 addressed to the Legislative Council Panel on Commerce and Industry. A copy of our letter is attached for your easy reference. As you will see, we support the need to implement the new ordinance and its rules as soon as possible. Therefore, we are limiting our comments regarding the new ordinance and rules to only those issues we consider unworkable in practice.

1. Application for extension of time Rules 13 and 14

We believe the rules establishing the time limits for registering trade marks to be uncertain, inflexible and impractical and may prejudice the rights of a trade mark owner.

We understand that under Rules 13 and 14, the registry will issue an examination report initially allowing the applicant 6 months from the date of the report to respond. An applicant may request a 3-month extension of the 6-month time limit. If the

applicant has not responded within 9 months, the application will lapse. If it has responded to the registry within the 9-month period, the registry will either accept the application or issue a further report. The applicant has 3 months from the date of the further report to call for a hearing.

We understand that the applicant may make only one submission to the registry within the 9-month period. It is not clear from the rules whether further submissions may be made should time allow.

It is often the case that one submission is not sufficient and further discussion with the registry is required. For example, if the registry refuses the mark as being devoid of distinctiveness, an initial response may be to file argument to the contrary. If the registry maintains its position, then the applicant may wish to gather evidence of use of the mark in Hong Kong over the relevant period of time. This often takes time. Another example is if the registry raised a query regarding the classification of goods or description of the goods. An initial response may provide an explanation to the registry but further explanation or consideration of options may be necessary. Therefore, it is essential that more than one response to the registry is permitted.

Even if more than one response to the registry is permitted, then there is a concern that the registry will not respond in sufficient time to allow the applicant time to make a further response if the inflexible 9-month period is retained. Turn around time at the registry currently averages several months. This may or may not improve under the new ordinance. Where the local agent takes instructions from an overseas applicant, the overseas applicant often needs to consult its local business division on the options available before it can provide the local agent with instructions on how to proceed. This could take several months. In many cases, where the local agent does not take instructions directly from the overseas applicant, but is instructed by overseas lawyers or agents, this would cause further delay in obtaining instructions.

Another concern is that the 3-month time limit to call for hearing is tied to the registry's further response. This may or may not disadvantage the applicant. One possible scenario is that the applicant files a response after 5 months and the registry takes 5 months to issue its further response. However, where an applicant responds to

an official action within one month and receives a response from the registry within 4 months, the applicant must call for a hearing within 3 months of the registry's further reply. This would mean the time period for examination of the application has been reduced from 9 months to 7 months.

A further concern is that in many instances, the action to overcome objections will require a substantial amount of time to complete. For example, if there is objection based on an earlier conflicting application, the applicant may file an opposition against that earlier application in order to resolve the conflict. Even under the new, speedier proceedings, it will take approximately two years for a decision in the opposition to issue. The same would apply if the applicant wishes to take revocation action or seek a declaration of invalidity against a prior registered mark which is blocking its path. Another situation is where the applicant seeks a letter of consent or negotiate for an assignment from the owner of the conflicting prior application or registration, the time within which it is able to successfully obtain the consent or assignment is beyond the applicant's control. In our experience, such actions usually take many months to conclude and complete.

The loss of an application for failure to meet the strict time requirement could have severe consequences for the trade mark owner. While it is possible to file a new application, priority will be lost and the new application may be blocked by an intervening conflicting application.

It is the Institute's preferred position, that extensions of time be available in all genuine cases where the applicant is pursuing its application and requires time in order to clear objections or obstacles. Failing this, we believe at minimum, the rules should be amended to allow:

- a. a further response by the applicant to the second report from the registry whether within the 9-month time period or not;
- b. time to call for a hearing to be 3 months from either the last registry response or 3 months from the 9-month examination period whichever date is the latest;

- c. the application proceedings to be stayed until the outcome of the action is known, in the circumstances where the applicant has or is considering commencing opposition proceedings, revocation proceedings or seeking a declaration of invalidity against a mark raised in objection;
- d. to permit further extensions of time where the applicant can genuinely provide evidence that it is seeking a letter of consent or negotiating an assignment from the owner of the earlier conflicting application or registration.

2. Opposition extension of time Rules 16 and 17

Under the new rules, no extension of time will be allowed to file a notice of opposition. The notice of opposition must be filed within 3 months of the publication of acceptance of the application. There are cases where it is preferable to obtain an extension of time rather than file the notice of opposition. There are two main situations:

- a. Quite often instructions concerning potential oppositions are received several days before the first deadline, most likely because the owner has just learnt of the conflicting mark. It is often difficult to advise and clarify the situation with a client before the deadline;
- b. In many instances, oppositions are avoided by prior negotiations between the parties reaching an amicable solution. It is the current practice that an intended opponent, usually with the consent of the applicant, obtains an extension of time to file the notice of opposition until discussions between the parties are finalised. Under the proposed system, an intended opponent will be forced to take adversary action without the opportunity to reach an amicable solution. Quite often, an opposition or intended opposition in Hong Kong is part of a larger worldwide conflict which is being discussed between the trade mark owners. In that case, it is useful for the trade mark owners to agree to extend the time period to file an opposition without incurring unnecessary time and expense in preparing the notice of opposition.

Likewise, no extension of time will be allowed to file a counter-statement to the notice of opposition. For reasons stated in (b) above, we believe that extensions should be available.

The Institute's preferred position is that one 3-month extension should be available to the intended opponent and that further extensions should be available with the agreement of both parties.

3. Non-extendible time limits Rule 95

The Trade Marks Ordinance allows the Registrar to make rules under s.91(2) and (4) to prescribe time limits and provide for extension of time limits, and alteration of such prescribed time limits.

We believe that Rule 95 is ultra vires the Ordinance on the basis that there is no provision in the Ordinance allowing the Registrar to make Rules providing for non-extendible time limits.

We would be grateful for your consideration of our views and concerns.

Yours faithfully

Peggy Cheung
President for and on behalf of
The Hong Kong Institute of Trade Mark Practitioners

Encl.

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20 January 2003

The Chairman
The Legislative Council Panel on Commerce and Industry
The Legislative Council
HONG KONG

Dear Sir,

Trade Marks Rules - LC Paper No. CB(1) 646/02-03 (03)

We, the Hong Kong Institute of Trade Mark Practitioners ("the Institute"), represent a group of trade mark practitioners in Hong Kong. We are writing to express our concern at the current draft of the Trade Marks Rules ("the Rules") to the new Trade Marks Ordinance, Cap. 559 ("Cap 599"), which was enacted in June 2000 but has as yet not come into operation.

For your information, the Institute was formed in 1988 with the aims of protecting the interests of those who are engaged in the trade mark profession in Hong Kong, to protect the interests of trade mark owners, and to enable the legislature and other bodies in Hong Kong to obtain the views of trade mark practitioners.

The Institute has approximately 120 members who represent nearly every firm in Hong Kong engaged in trade mark and other intellectual property work. The Institute has meetings with the Intellectual Property Department ("IPD") to exchange views and ideas on everyday practice, and to receive advance information about the plans of the IPD, and which has included occasional consultation on new laws.

We were one of the bodies that the IPD consulted with regard to the Rules and we did provide the IPD with our comments on each occasion. In the last round of consultation, we and two other professional bodies had a dedicated meeting with the IPD when our comments to the Rules were discussed and the IPD's position was made known. It was the result of this meeting that has prompted this letter.

The implementation of Cap 559 was tentatively set for January 2003 because the IPD considered that all logistics, primarily the new computer system, as well as the Work Manual and the Rules, would have been ready by then. As a matter of fact, this "tentative" implementation date has time and again been pushed back ever since the enactment of Cap 559, not to mention the lapse of time between the first gazette date of the Bill in February 1997 and its eventual enactment 40 months later.

In the meantime, trade mark proprietors who wish to seek protection of their trade marks in Hong Kong are obliged to have their applications processed under the current system, a system which is at least 6 to 8 years outdated according to International practice. For example, the UK Trade Marks Act 1938 was amended in 1994 and Australia has had its new law since January 1996. As a result, many multinational proprietors who have had their trade marks registered worldwide are astonished to find their trade marks being refused in Hong Kong. Their temporary comfort with which we as their agents can only provide is the advice to re-attempt under the new regime and the anticipation that the new regime is due to be effective very soon. Indeed, we understand many clients of our members have actually planned to launch or re-launch their filings around the "January 2003" date.

The firm belief in, and reliance on, this "January 2003" commencement date was rooted upon the public announcement by the IPD of their launch time-table which was posted on the IPD web-site under their News "Tentative Events for the Launch of the New Trade Marks Ordinance" in September / October last year. That was about the time when the 4th draft of the Rules was published for final consultation. The announcement was widely reported in the international media and subsequently following the public briefings in November 2002. Unfortunately, we are given to understand that this tentative due date had to be postponed yet again to "not before March 2003" and at the time of writing to "April 2003".

The further delay of the tentative commencement date of Cap 559 is undesirable. It has already raised anxiety in the business community both locally and overseas. A lot of time and effort would be written off when the plans for the launch or re-launch of filings have to be re-scheduled, not to mention the difficulty in securing time extensions from the IPD with regard to pending applications so as to survive the wait.

Other consequential impact includes the inability to adopt the 8th Edition of the Nice International Classification of Goods and Services, which expanded 42 classes of goods and services in respect of which trade marks may be registrable into 45 classes. The 8th Edition was effective as of 1 January 2002 and has been in force worldwide including Singapore and the PRC. The IPD made a decision in December 2001 to defer the adoption of the 8th Edition with a view to awaiting the enactment of the Rules which would take into account changes in the International Classification system and which would save the interim amendment of the current rules. As a result, multinational applicants have to tailor their international filing strategy to cater for the "old" classification that perhaps only Hong Kong in the Asia-Pacific region adheres to.

More importantly, international confidence in Hong Kong is being eroded when a public announcement by the Government of Hong Kong, albeit captioned "tentative", is not taken seriously. We urge the Chairman and members of the Panel not to allow the erosion to carry on, or all the good intent and objectives which the new system is meant to achieve towards encouraging business concerns to register their trade marks and do business in Hong Kong would be defeated.

We now summarize our comments on the Rules as follows:

1. Before focusing upon our concerns, we first wish to comment upon a statement made by the Commerce and Industry Branch, Commerce, Industry and Technology Bureau in its paper to you dated January 2003 attaching the Rules, and most

particularly the statements made in paragraphs 5 and 9 to the effect that "*We have conducted thorough consultations with practitioners in the course of preparing these Rules. The proposed Rules, ... have taken into account the views received during the consultations*" (para 5) and "*We have ... changed some of the proposed time limits in order to strike a better balance between the interests of the different parties ... They have noted our feedback without expressing any significant reservations.*" (para 9).

2. We do not believe that there has been a thorough consultation process, the Rules do not strike a good balance and we do have significant reservations, largely because our views (which are based on our intimate knowledge of trade mark practice, and the requirements and expectations of our local and overseas clients) have not been taken into account at all, **including in some of the most fundamental issues which arise on a day to day basis.**
3. Whilst we have been given the chance to make comments at various stages, the Rules have been drastically different in each draft and we were given very little time to comment on the final and most important draft. As things currently stand, there are numerous issues that have not been properly addressed, and which we consider will be to the detriment of trade mark practice in Hong Kong if the Rules are adopted in their current form.
4. The Rules of concern and our reasons for concern are set out below at paragraph 5 and in the attached Schedule. As we are also concerned that the new Trade Marks Ordinance ("new TMO") which was enacted almost three years ago should be brought into force without delay, and recognise that to attempt to continue re-drafting of the Rules in so many areas of concern will merely delay operation of the new TMO even further, we have highlighted immediately below those aspects of the Rules that are of the utmost concern.

Points of utmost concern

5. Those issues that the Institute has very serious concerns over and which we believe really must be addressed at this stage before it is too late, are set out below. They relate to two main issues, namely :-
 - (1) Time limits for taking certain steps in proceedings before the Registrar
 - (2) Documents available for Public Inspection

<u>Rule</u>	<u>Rule title and what it does</u>	<u>Comments</u>
13	<p>Failure to meet requirements for registration</p> <p>Allows a 6-month period and a final extension for one further period of 3 months within which to respond to the official action failing which the Registrar will issue a notice saying the TM does not satisfy registration requirements; and thereafter the Applicant must apply for a hearing.</p>	<p>This is too onerous on the part of the Applicant and a major change to existing HK practice, and inconsistent with international practice.</p> <p>Further, we believe to set a non-extendible time limit is not practicable.</p> <p>In cases where the Applicant is required to submit evidence of use to establish the factual distinctiveness of the mark or honest concurrent use, it is doubtful whether the non-extendible time limit is sufficient for the Applicant to collate the necessary evidence. This is especially the case if the Applicant is an overseas or international entity who needs to collect the evidence through local distributors or agents in Hong Kong.</p> <p>Further, in some cases, if not in all cases, the Registrar has delayed in his response to our submissions on the official action. The delay should be discounted from the 6-month time period.</p> <p>In any event, we are strongly in favour of the availability for multiple responses. As evidenced from recent official actions, it is not uncommon on the part of the Registrar to raise belated objections when an application is expected to be ready for acceptance. As we believe this practice will still prevail under the new law, it will be unfair to restrict the Applicant to filing only one round of submissions or to resort to a formal hearing to argue against the Registrar's refusal.</p>

<u>Rule</u>	<u>Rule title and what it does</u>	<u>Comments</u>
16.	Notice of opposition	<p>Basically, having a rigid requirement for a trade mark application process to be completed within 9 months is not only unrealistic, but unnecessarily restrictive. It would inevitably result in thousands of applications failing. The Government has proposed to substantially reduce the trade mark registration fees to such a level that it may be more attractive to trade mark owners to file applications in Hong Kong, but the 9-month registration requirement is most likely to be a deterrent for applicants to file.</p>
	<p>Sets a non-extendible deadline of 3 months to file Notice of Opposition to a TM once it has been advertised</p>	<p>Despite our previous submissions on the 2nd Draft of the Trade Marks Rules, no extension of time is allowed for the filing of the notice of opposition. We reiterate that this is too onerous.</p> <p>In current practice, an intended opponent is able to apply for a 3-month extension of time (by giving reasons) for filing of notice of opposition. The Registrar will either agree to this or refuse the extension of its own accord, or the trade mark Applicant can choose to consent to the extension of time.</p>

<u>Rule</u>	<u>Rule title and what it does</u>	<u>Comments</u>
		<p>In many cases, oppositions are not pursued after one extension is granted, or the parties then engage in correspondence with a view to settling any concerns there may be of potential confusion between their respective trade marks and goods/services. The extension of time facility under the current law has been a very useful and effective (including cost effective) means of processing and setting potential oppositions. Having the extension of time facility is also far more cost effective than the parties being forced into an opposition proceeding before the Registry, and where costs liability issues also arise, and can become excessive.</p> <p>Importantly, it is also a commercial reality that the 3-month opposition period will in many cases be insufficient time for an intended opponent to be given notice of the potential opposition and to gather all information/documentation in order to assess its ability to successfully oppose a trade mark application.</p> <p>Many intended opponents are overseas companies, and the chain of instructions often involve law firms not only in Hong Kong, but those overseas who the ultimate intended opponent has first instructed. Hong Kong holds itself out as an international city, and to have a rigid opposition process that does not recognise international time constraints by the simple method of allowing an extension of time, is not reflective of such an international image.</p>
17	Counter-statement	
	Sets a non-extendible deadline of 3 months to file a counter-statement to a Notice of	The same points apply here as to Rule 16 above.

<u>Rule</u>	<u>Rule title and what it does</u>	<u>Comments</u>
	Opposition that is filed under Rule 16	We also understand that a stay of opposition proceedings will be available as a medium to facilitate settlement. For clarity sake, we believe this Rule or Rule 16 should lay down the procedures for application for stay of proceedings.

70 **Inspection of documents**

Allows public inspection of specified documents held at the Registry

As we have previously raised in the comments on the 3rd Draft of the Trade Marks Rules, we believe that documentary evidence should definitely not be made available for public inspection as these documents may contain highly confidential and sensitive information. In the circumstances, we believe paragraphs (q) (any documentary evidence filed under rule 63(2), (3), (4) or (5)) and (s) (any documentary evidence filed under rule 65(2) or (3)) should be deleted.

We also note that a notice of opposition to the proposal for amendment of a trade mark filed under Rule 62 is not included as an item available for public inspection. We believe this is an unintended omission.

6. The above represents those most fundamental concerns that the Institute has on the latest draft of the Rules. However, we would urge the Panel to review the attached Schedule, which gives details of all of our other concerns (including suitable wording that could be used), and which we do consider very important.
7. If the Panel wishes the Institute to assist further, we will be very pleased to do so.

Yours faithfully,



Peggy Cheung
 President for and on behalf of
 The Hong Kong Institute of Trade Marks Practitioner Limited
 Enc.

Schedule

Additional areas of concern

<u>Rule</u>	<u>Rule title and what it does</u>	<u>Comments</u>
23	Additional purposes for which application may be amended Sets the criteria for amending a trade mark application [after it is published]	<p>We note that the time when a request for amendment of an application to registration of a trade mark can be made is not clear.</p> <p>We suggest adding a proviso “and such request may be filed at any time before particulars of that application have been published under <u>rule 15</u>” for clarity and in line with the wordings under rule 27.</p>
26	Notice of objection (Amendment) Allows a third party to oppose the amendment of a trade mark application after it has been published	<p>We note that this rule does not provide the trade mark applicant with the right to file a counter-statement or filing of evidence.</p> <p>Rules 17 to 21 should apply to the conduct of proceedings here. We suggest adding a subrule (5) to read : “Rules 17, 18, 19, 20 and 21 apply to proceedings relating to the opposition to the amendment of the application as they apply to proceedings relating to opposition to the registration of a trade mark.”</p>
29	Registration Specifies the trade mark particulars to appear on the Register	<p>We note that this rule does not provide for entry of particulars where the trade mark is registered pursuant to section 13 of the Ordinance (Honest concurrent use, etc.)</p> <p>We suggest adding a subrule (1)(o) to read : “where the trade mark is registered pursuant to section 13(1) of the Ordinance that there has been an honest concurrent use of the trade mark and the earlier trade mark or other earlier right, or by reason of other special circumstances it is proper for the trade mark to be registered, that fact.”</p>

<u>Rule</u>	<u>Rule title and what it does</u>	<u>Comments</u>
37	Counter-statement (Procedure for revocation on grounds of non-use)	Subrule (4) only says that the owner shall not be permitted to take part in the proceedings in the event he does not file a counter-statement under this rule. It does not clearly lay down the conduct of the proceedings. For the avoidance of doubt, we suggest that this rule should clarify the conduct of the proceedings to cater for these cases and that in any case of doubt arising under this rule, the parties to the proceedings can apply to the Registrar for directions.
42	Counter-statement (Procedure for revocation on grounds other than non-use)	Same as for rule 37(4), we note that subrule (3) only says that the owner shall not be permitted to take part in the proceedings in the event he does not file a counter-statement under this rule. It does not clearly lay down the conduct of the proceedings. For the avoidance of doubt, we suggest that this rule should clarify the conduct of the proceedings to cater for these cases and that in any case of doubt arising under this rule, the parties to the proceedings can apply to the Registrar for directions.
51	Procedure where application is made by a person other than the owner	Same as for rule 37(4) and 42(3), we note that subrule (6) only says that the owner shall not be permitted to take part in the proceedings in the event he does not file a counter-statement under this rule. It does not clearly lay down the conduct of the proceedings. For the avoidance of doubt, we suggest that this rule should clarify the conduct of the proceedings to cater for these cases and that in any case of doubt arising under this rule, the parties to the proceedings can apply to the Registrar for directions.

<u>Rule</u>	<u>Rule title and what it does</u>	<u>Comments</u>
56	<p>Notice of objection (Alteration)</p> <p>Allows a third party affected by amendment to a registered trade mark, to object</p>	<p>We note that this rule does not provide the applicant with the right to file a counter-statement or filing of evidence.</p> <p>We suggest adding a subrule (4) to read : “Rules 17, 18, 19, 20 and 21 apply to proceedings relating to the opposition to the alteration of the registered trade mark as they apply to proceedings relating to opposition to the registration of a trade mark.”</p>
67	<p>Correction of errors or omissions in the register</p>	<p>To adopt the same wordings as appear in other provisions in Part 8, we suggest adding a subrule (5) to read : “In such case, there shall be entered in the register the date on which the entry relating to the correction is made”.</p>
68	<p>Removal of matter from the register</p> <p>Gives the Registrar power to remove any matters from the Register</p>	<p>Subrule (3) does not set out the manner and conduct of the hearing under paragraph (b).</p> <p>For the avoidance of doubt, we suggest adding a proviso at the end of subrule (3) to read : “and where such opposition or objections are made, <u>rule 75</u> (Hearings before the Registrar) shall apply”.</p>
91	<p>Notice of decision</p>	<p>With a view to maintaining consistency in the language used throughout, we suggest amending “within 1 month after the date on which the notice was sent to him” to “within 1 month after the date of the notice” in subrule (2).</p>
99	<p>Application for registration of defensive trade mark</p>	<p>We note that this rule does not lay down the procedures upon filing of the Statutory Declaration, including any subsequent time limits, etc. This rule should further clarify the procedures. We believe that the 9-month period provided for under rule 13 will not be sufficient to enable the applicant to gather the necessary information and materials for filing of the Statutory Declaration. Extensions of time and multiple responses should therefore be allowed.</p>

<u>Rule</u>	<u>Rule title and what it does</u>	<u>Comments</u>
100	<p>Regulations governing use of collective mark or certification mark</p> <p>Requires applicant to file regulations</p>	<p>We note that this rule does not lay down the procedures upon filing of the draft regulations, including any subsequent time limits, etc. This rule should further clarify the procedures. Furthermore, where regulations have to be submitted and approved, these will usually take longer than the 9-month period provided under rule 13. It is most likely to involve multiple rounds of submissions. We therefore believe that extensions of time and multiple responses should be allowed.</p>
101	<p>Amendment of regulations</p>	<p>We note that this rule does not allow the owner of the registered collective mark or certification mark to file a Counter-Statement to the Notice of Opposition filed against the owner's application for amendment of the regulations governing the use of the mark. We believe the owner should be given an opportunity to reply to the Notice of Opposition before the Registrar determines whether the opposition is with or without merit.</p>
104	<p>Filing of address for service</p>	<p>As we have previously raised in our comments on the 3rd Draft of the Trade Marks Rules, subrule (6) should allow filing of separate addresses for services in relation to any application, notice, request or other document that is filed in the name of 2 or more persons jointly. We reiterate this will cater for situations where the party which has been nominated as the address for service loses interest in the mark and does not pass on such documents to the other joint applicants or owners.</p>

<u>Rule</u>	<u>Rule title and what it does</u>	<u>Comments</u>
110	Service of documents on parties to proceedings	We believe sub-rule (2) should be amended so that the effective date of service of the documents should be the date of receipt of the documents. The Registrar will appreciate that mis-delivery is not uncommon in Hong Kong. It is therefore unfair if the time limit commences from the date of the document. Besides, a party should be given an opportunity to provide evidence in support of non-receipt or late receipt of a document.
113	Publication of business hours and business days of the Registry	We note that the Registrar will post in the Registry and publish in the official journal the hours of business or business days of the Registry. We hope that the Registrar will continue the current practice of making Saturday an excluded day.
120	Pending applications for registration Sets the time for filing Notice of Opposition and Counter Statement where an application filed under the old law is advertised after enactment of the new law.	We do not see any reason why the time limit for filing of the counter-statement specified in <u>subrule (b)</u> (within 3 months from <u>filing</u> of Notice of Opposition) is different from that under rule 17 (within 3 months of <u>receipt</u> by Applicant of Notice of Opposition). Besides, the time limit specified under the current law is not the same as specified in subrule (b). We suggest amending subrule (b) to “the period within which a counter-statement may be filed is the 3-month period after the date of receipt of the copy of the notice of opposition”.
	Additional Caveat provision	We believe any interested parties to the proceedings, be it a licensee or a joint proprietor, should be entitled to know the state of the proceedings. In the circumstances, provisions should be made in this regard, either at the initiative of the Registrar, or the owner is required to certify that he has informed the interested parties accordingly.